

COMMENT

ALL DOGS GO TO COURT: THE IMPACT OF COURT FACILITY DOGS AS COMFORT FOR CHILD WITNESSES ON A DEFENDANT’S RIGHT TO A FAIR TRIAL*

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I. INTRODUCTION

The fifteen-year-old sexual-abuse victim could not speak about her experience.¹ Despite ongoing visits with a therapist, the victim could not verbalize the trauma she experienced.² When asked about the alleged sexual abuse during therapy sessions, the girl visibly shut down, became extremely anxious, and was unable to articulate complete sentences.³ When she was with Rose, however, her demeanor changed.⁴

Rose is a golden retriever and companion animal that works with trauma victims and with children in particular.⁵ Rose can sense when a person is feeling anxious or stressed, and she is trained to attempt to reduce those feelings by nuzzling the person.⁶ The girl worked with Rose during her therapy sessions, and when Rose was present, the girl opened up and discussed her experiences.⁷ The prosecutor requested that Rose accompany the child on the witness stand to reduce her anxiety and allow her to testify in court.⁸ The child's therapist echoed the prosecutor's sentiment and explained that the child would suffer ongoing stress by testifying without the dog.⁹

1. *People v. Tohom*, SCI No. 338/2010, at 1–3, 10 (N.Y. Dutchess Cnty. Ct. June 1, 2011), available at http://www.courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf (order granting use of a companion dog on the witness stand).

2. *Id.* at 2–3.

3. *Id.* at 3.

4. *Id.*

5. *Id.*; William Glaberson, *By Helping a Girl Testify at a Rape Trial, a Dog Ignites a Legal Debate*, N.Y. TIMES, Aug. 9, 2011, at A15.

6. *Tohom*, SCI No. 338/2010, at 3.

7. *Id.*

8. *Id.* at 1.

9. *Id.* at 3–4.

The defense opposed the use of the dog in the courtroom, asserting that the animal would evoke empathy in the minds of the jurors and would distract from opposing evidence.¹⁰ However, the judge relied on a New York statute that protects child witnesses by allowing special accommodations for children during testimony.¹¹ The judge analogized the case to a previous case in which a child was permitted to hold a teddy bear in court, noting that a judge must be “sensitive to psychological and emotional stress” that a child feels on the witness stand.¹² Despite the defendant’s objections, the judge concluded that the “severe emotional and psychological stress” the girl would endure on the witness stand “permits, if not compels, the use of ‘Rose,’ a companion dog, during the victim’s testimony.”¹³ The judge explained that any potential prejudice could be overcome by an appropriate jury instruction.¹⁴

The jury found the defendant guilty,¹⁵ and the appellate court granted the defendant’s motion to appeal the decision,¹⁶ although no appeal has been filed.¹⁷ Defense counsel informally alleged that the dog’s presence in the courtroom violated the defendant’s constitutional right to a fair trial by generally prejudicing the defendant.¹⁸ He claimed that the dog influenced jurors to believe that the witness was telling the truth.¹⁹ Defense counsel further asserted that the witness’s interaction with the dog “sent an unconscious message to the jury that she was under stress because she was telling the truth.”²⁰

This Comment analyzes the benefits and challenges of incorporating dogs in traditional legal settings, like the courtroom. Part II discusses the impact of trial and testimony on

10. *Id.* at 2.

11. *Id.* at 7–8; see N.Y. EXEC. LAW § 642–a (McKinney 2005 & Supp. 2012).

12. *Tohom*, SCI No. 338/2010, at 9 (quoting *People v. Gutkaiss*, 206 A.D.2d 628, 631 (N.Y.S.2d 1994)) (internal quotation marks omitted).

13. *Id.* at 10.

14. *Id.*

15. See Glaberson, *supra* note 5 (reporting Mr. Tohom’s conviction and sentencing of twenty-five years to life).

16. *People v. Tohom*, Ind. No. 149/10, 2011 WL 4537123 (N.Y. App. Div. Oct. 3, 2011) (order granting motion to appeal)

17. Defendant’s Motion for Poor Person Status and Assignment of Counsel in a Criminal Appeal was granted, but as of the time of this writing, no briefs have been filed with the court. *Id.* The appellate court later extended the defendant’s filing deadline to August 6, 2012. *People v. Tohom*, Ind. No. 149/10, 2012 WL 2847708 (N.Y. App. Div. July 11, 2012). However, there is not yet any record of an appeal. *Dutchess County Clerk Document Search*, DUTCHESS NY, <http://www.dutchessny.gov/countyclerkdocumentsearch/search.aspx> (search “Tohom” in “Starts With” search box) (last visited Mar. 3, 2013).

18. Glaberson, *supra* note 5.

19. *Id.*

20. *Id.* (internal quotation marks omitted).

child witnesses, the special measures courts have employed to reduce stress and anxiety on child witnesses, and the current uses of court facility dogs across the country. Part III notes the potential impact on a defendant's right to a fair trial, including the possibility of perceived witness credibility, sympathy, and distraction.

Part IV concludes that, despite the potential prejudices discussed in Part III, the use of court facility dogs is a logical step forward for several reasons. First, such prejudice against a criminal defendant can be mitigated. Second, dogs can benefit certain child witnesses in ways traditional accommodations cannot. Finally, the benefits to child testimony and criminal justice are substantial. Dogs reduce the likelihood that children will be retraumatized during trial, allow children to more comfortably testify in the courtroom, and alleviate Confrontation Clause issues the defendant might have with alternative methods of child testimony.

II. BACKGROUND: CHILDREN AS WITNESSES

The number of cases involving child witnesses has increased dramatically in the past two decades.²¹ The testimony of victims and witnesses is often crucial to the successful prosecution of a criminal case.²² This is especially true in cases where a child has been sexually abused or assaulted.²³ If a child witness is also an abuse victim, the "testimony becomes imperative in proving the guilt of the defendant."²⁴ These cases present even greater challenges to the prosecution because the child is likely the only witness, and the child's testimony is central to the successful prosecution of the case.²⁵ Children experience unique challenges on the witness stand, and in response, they receive special accommodations.²⁶

21. SHERRIE BOURG CARTER, *CHILDREN IN THE COURTROOM* 121 (2d ed. 2009). This increase can be attributed to a number of reasons, including stricter laws regarding the reporting of suspected child abuse, awareness of child abuse, and education of children on potential crimes. *Id.*

22. See *Swan v. Peterson*, 6 F.3d 1373, 1377 (9th Cir. 1993) ("When the crime is child sexual abuse, one of the more difficult to detect and prosecute, a conviction hinges often on the words of children."); *State v. Bruce*, 577 So. 2d 209, 216 (La. Ct. App. 1991) ("Therefore, the prosecution's case hinges on the testimony of the child.").

23. Jessica Liebergott Hamblen & Murray Levine, *The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses*, 21 *LAW & PSYCHOL. REV.* 139, 141 (1997).

24. *Id.*

25. *State v. Pollard*, 719 S.W.2d 38, 42 (Mo. Ct. App. 1986); Tanya Asim Cooper, *Sacrificing the Child to Convict the Defendant: Secondary Traumatization of Child Witnesses by Prosecutors, Their Inherent Conflict of Interest, and the Need for Child Witness Counsel*, 9 *CARDOZO PUB. L. POL'Y & ETHICS J.* 239, 266 (2011).

26. See 18 U.S.C. § 3509 (2006 & Supp. 2012) (providing various statutory rights to

A. *Impact of Testifying on Child Witnesses*

Child victims often feel guilty and ashamed about their experiences, and prosecutors can retraumatize children when questioning them in a courtroom.²⁷ Before a child ever gets to court, he or she has already endured a number of potentially traumatic experiences in the legal system.²⁸ The child likely has been interviewed by police or by a forensic investigator and may have met with a therapist or psychologist.²⁹ Even when children want to testify against their abusers, the courtroom and the trial process can intimidate them and make them feel anxious.³⁰ Judges have recognized that a child is likely to suffer compounded fear and anxiety when participating in a trial, effectively being retraumatized.³¹

A child's fear of the defendant and apprehension in an unfamiliar setting can inhibit the child's ability to testify, preventing all facts in the case from being included in the trial.³² In some cases, a child may be completely unable to speak due to fear.³³ Additionally, the judge, lawyers, and jury can overwhelm child witnesses, making them feel nervous or anxious.³⁴ A child

child victims and child witnesses); Cooper, *supra* note 25, at 249–50 (describing how testifying can aggravate a child victim's trauma).

27. Natalie R. Troxel et al., *Child Witnesses in Criminal Court*, in CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS: PSYCHOLOGICAL SCIENCE AND THE LAW 152–54 (Bette L. Bottoms et al. eds., 2009); Cooper, *supra* note 25, at 247, 249–50.

28. See STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY 37 (6th prt. 2002) (describing ways in which child victims can be involved with the legal system other than testifying at trial).

29. *Id.*; see David Faust, Ana J. Bridges & David C. Ahern, *Methods for the Identification of Sexually Abused Children*, in THE EVALUATION OF CHILD SEXUAL ABUSE ALLEGATIONS 3, 3–4 (Kathryn Kuehnle & Mary Connell eds., 2009) (noting the role of psychologists and other professionals in interacting with children suspected of having been sexually abused).

30. Troxel, *supra* note 27, at 152–54; Cooper, *supra* note 25, at 251.

31. See *United States v. Carrier*, 9 F.3d 867, 869–70 (10th Cir. 1993) (discussing law that allows closed-circuit trial testimony by child abuse victims if live testimony would elicit fear or emotional distress); *People v. Stechly*, 870 N.E.2d 333, 373 (Ill. 2007) (discussing a statute that excuses a child from testifying on account of fear).

32. See *State v. Conklin*, 444 N.W.2d 268, 273 (Minn. 1989) (explaining that child witnesses experience many obstacles in the courtroom, including “[t]he unfamiliar courtroom setting”); L. Christine Brannon, Comment, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v. The Accused's Right to Confrontation*, 18 LAW & PSYCHOL. REV. 439, 444 (1994) (explaining social and motivational factors that affect children's disclosure of abuse); Hamblen & Levine, *supra* note 23, at 163 (noting that one study found that 63.7% of testifying children reported that they were “afraid of seeing the defendant in the courtroom”).

33. *E.g.*, *Carrier*, 9 F.3d at 870; *People v. Johnson*, 517 N.E.2d 1070, 1073–74 (Ill. 1987).

34. ALLIE PHILLIPS & DIANA MCQUARRIE, AM. HUMANE ASS'N, THERAPY ANIMALS SUPPORTING KIDS (TASK) PROGRAM MANUAL 15 (2009), available at

“may feel intimidated or embarrassed” when the defense attorney conducts cross-examination and questions his testimony.³⁵ Often, prosecutors have to drop cases when children will not testify against the defendant.³⁶ Thus, the trauma that children feel in the courtroom hampers the successful prosecution of a defendant when the child refuses to testify.³⁷

B. *Special Circumstances for Child Witnesses*

Both federal and state legislation acknowledge the unique position of child witnesses and implement protective measures for children testifying in court.³⁸ For instance, the Victims of Child Abuse Act of 1990 recognizes the traumatic impact a trial can have on a child.³⁹ This law outlines alternative methods of testimony for when a child is unable to testify in court because of fear, likelihood of trauma, incapacity, or conduct of the defendant or defense counsel.⁴⁰ Additional protections for children stipulated in the Act include allowing testimony via closed-circuit television or videotaped deposition, closing the courtroom, use of a guardian *ad litem*, allowing a child witness to be accompanied to the witness stand by an adult attendant for emotional support, and allowing the use of testimonial aids such as puppets or drawings to assist a child’s testimony.⁴¹

Another attempt to relieve the trauma of child testimony is the Uniform Child Witness Testimony by Alternative Methods Act.⁴² This model legislation provides further safeguards for child witnesses by creating procedures for states to adopt that authorize alternative methods of testimony.⁴³ If clear and

<http://www.americanhumane.org/assets/pdfs/interaction/hab-task-manualpdf.pdf>. The American Humane Association’s Therapy Animals Supporting Kids (TASK) Program Manual seeks to encourage legal professionals and child advocates to introduce and to incorporate court facility dogs in their services. *Id.* at 5.

35. Hamblen & Levine, *supra* note 23, at 140.

36. Rebecca Wallick, *Dogs in the Courtroom*, BARK (May/June 2007), <http://thebark.com/content/dogs-courtroom>.

37. CECI & BRUCK, *supra* note 28, at 36.

38. See Cooper, *supra* note 25, at 253, 257–61 (chronicling laws relating to child victim testimony).

39. 18 U.S.C. § 3509 (2006 & Supp. V 2012).

40. 18 U.S.C. § 3509(b)(2006 & Supp. V 2012).

41. 18 U.S.C. § 3509(c)–(m)(2006 & Supp. V 2012).

42. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT (2002), available at http://www.uniformlaws.org/shared/docs/child_witness_testimony/child_witness_final_02.pdf (outlining model legislation to protect child witnesses). The Act was created after the 1999 Rules of Evidence removed a provision allowing alternative testimony methods for child victims. 81 AM. JUR. 2D *Witnesses* § 188 (2004).

43. UNIF. CHILD WITNESS TESTIMONY BY ALT. METHODS ACT § 3–6.

convincing evidence indicates that a child is particularly vulnerable to emotional harm, the child may testify by an alternative method.⁴⁴

In addition to the legislature, many courts have recognized the unique nature of cases involving child witnesses.⁴⁵ Trial courts have broad discretion within the law to allow nontraditional techniques that help child witnesses clearly communicate sensitive and critical information.⁴⁶ This discretion allows the court to impose a number of protections for child witnesses, including the use of closed-circuit televised testimony, comfort items, and support persons.⁴⁷ Several states enacted laws that permit children to carry toys, blankets, dolls, or other comfort items with them onto the witness stand.⁴⁸ Other states and the federal government have officially recognized that a support person may accompany a child to the witness stand during testimony.⁴⁹

1. *Closed-Circuit Television.* Modification of traditional testimony presentation alleviates a child's anxiety while maintaining the fairness of the trial process.⁵⁰ The use of closed-

44. *Id.* § 5. As of this writing, the following four states have enacted the Act: Idaho, Nevada, New Mexico, and Oklahoma. *Legislative Fact Sheet—Child Witness Testimony by Alternative Methods Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Child%20Witness%20Testimony%20by%20Alternative%20Methods%20Act> (last visited Mar. 3, 2013).

45. See *State v. Cliff*, 782 P.2d 44, 47 (Idaho Ct. App. 1989) (recognizing a child's need to be free from intimidation at trial); *State v. Powell*, 318 S.W.3d 297, 303 (Mo. Ct. App. 2010) (“Courts often allow non-standard procedures in cases involving the examination of minors in sexual abuse cases . . .”).

46. *Powell*, 318 S.W.3d at 302–03.

47. *Maryland v. Craig*, 497 U.S. 836, 842, 857 (1990) (allowing closed-circuit television); *Czech v. State*, 945 A.2d 1088, 1095 (Del. 2008) (finding that a trial court's decision to allow a mother to accompany her child to the witness stand without an adequate jury instruction was harmless error); *Cliff*, 782 P.2d at 47 (allowing child to hold a comfort item).

48. *E.g.*, ARK. CODE ANN. § 16-43-1202(5), (6) (Supp. 2011) (allowing for comfort items and support persons); MO. ANN. STAT. § 491.725 (West 2011); TEX. CODE CRIM. PROC. ANN. art. 38.074 (West Supp. 2012) (allowing a “child to have a toy, blanket, or similar comforting item” or to sit near a support person during testimony).

49. *E.g.*, 18 U.S.C. § 3509(i) (2006) (“A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child.”); HAW. REV. STAT. ANN. § 621-28 (LexisNexis 2007) (allowing a child witness “to be accompanied by a parent, a victim/witness counselor, or other adult designated by the court”); N.D. CENT. CODE § 12.1-35-05.1 (2012) (permitting an adult selected by the court to accompany a child witness); OKLA. STAT. ANN. tit. 12, § 2611.2(F) (West 2009) (allowing a witness to be accompanied by a support person).

50. See *Craig*, 497 U.S. at 842–43, 857 (allowing a child to present testimony via closed-circuit television); *Smith v. State*, 119 P.3d 411, 418–20 (Wyo. 2005) (permitting a child witness to hold a teddy bear on the witness stand and noting that the benefit to the witness outweighed any prejudicial value of the toy).

circuit television preserves the foundation of the Confrontation Clause,⁵¹ namely the “right to observe, cross-examine, and have the jury view the demeanor of the witness.”⁵² In *Maryland v. Craig*, the U.S. Supreme Court determined that presenting a child victim’s testimony via closed-circuit television did not violate the defendant’s right to confrontation.⁵³ In drawing this conclusion, the Court recognized the particular trauma child witnesses experience when faced with the defendant.⁵⁴ The Court further recognized the potential for this trauma to affect the child’s ability to testify.⁵⁵ Following the decision, several states enacted laws allowing for child testimony to be filmed in a separate room and simultaneously played in court, so the child does not have to testify in front of the defendant.⁵⁶

However, a 2004 U.S. Supreme Court decision threatens the use of closed-circuit television for child witnesses.⁵⁷ *Crawford v. Washington* precludes the introduction of testimonial, out-of-court statements unless (1) the witness is unavailable to testify in court; and (2) the defendant previously had an opportunity for cross-examination.⁵⁸ Regardless of whether the court finds the testimonial statement reliable through other means,⁵⁹ the testimony can be excluded as a violation of the Confrontation Clause if actual face-to-face confrontation is not satisfied.⁶⁰

51. U.S. CONST. amend. VI.

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

53. *Id.* at 842–43, 857. The Court also noted that the method of eliciting the child’s testimony was “reliable and subject to rigorous adversarial testing” such that it conformed to the guarantees of the Confrontation Clause. *Id.* at 851.

54. *Id.* at 857.

55. *Id.*

56. *E.g.*, CAL. HEALTH & SAFETY CODE § 1551.1 (West 2008) (allowing a child in an administrative hearing to testify outside the presence of the defendant as long as the testimony is broadcast to the defendant via closed-circuit television); DEL. CODE ANN. tit. 11, § 3514 (2007); MD. CODE ANN., CRIM. PROC. § 11-303 (LexisNexis 2008).

57. *See Crawford v. Washington*, 541 U.S. 36, 59, 68–69 (2004); *see also* Cooper, *supra* note 25, at 268–69 (discussing the impact of *Crawford v. Washington* on child witness testimony in child abuse prosecutions). *But see* State v. Stock, 256 P.3d 899, 904–05 (Mont.), *cert. denied*, 132 S. Ct. 850 (2011) (concluding that *Crawford* did not overrule prior case law allowing children to testify by alternative means, including “via two-way audio-video communication”).

58. *Crawford*, 541 U.S. at 59, 68–69.

59. *See* CARTER, *supra* note 21, at 19–20 (chronicling the progression of decisions regarding the admittance of testimonial evidence); *see also supra* note 53 and accompanying text (discussing the reliability of closed-circuit testimony despite the lack of face-to-face confrontation).

60. *Crawford*, 541 U.S. at 57, 68–69. Some courts have continued to hold that children may testify by alternative methods despite *Crawford*’s prohibitions. *See, e.g.*, People v. Buie, 775 N.W.2d 817, 825–26 (Mich. Ct. App. 2009), *vacated*, 804 N.W.2d 790 (Mich. Ct. App. 2011), *rev’d*, 817 N.W.2d 33 (Mich. 2012); *Stock*, 256 P.3d at 904–05; State v. Henriod, 131 P.3d 232, 237–38 (Utah 2006).

Prior to the *Crawford* decision, most child witnesses were never called to the stand because their testimonial statements could be introduced under exceptions to the hearsay rule.⁶¹ However, post-*Crawford*, statements made to police, therapists, or forensic interviewers may no longer be introduced as evidence of what a child experienced or witnessed.⁶² As a result, more children will be forced to testify face-to-face with the defendant, increasing their apprehension in the courtroom.⁶³ Pre-*Crawford*, one court evaluated child testimony to conclude that a fearful child witness could not be deemed “unavailable” based on hesitancy or unwillingness to testify.⁶⁴

2. *Comfort Items.* Child witnesses need additional protections at trial because the atmosphere of a courtroom differs from a therapy session or a private interview.⁶⁵ Children seek security in the courtroom, which is “an otherwise insecure setting.”⁶⁶ The particularly delicate nature of child testimony has led many courts to allow a child to hold a comfort item on the witness stand.⁶⁷ Courts are given discretion to allow items ranging from teddy bears to dolls to blankets, which serve to calm the child so he or she can testify.⁶⁸

Defendants routinely object to child witnesses carrying items with them to the witness stand, citing undue prejudice, juror empathy, and an appearance of credibility.⁶⁹ Defendants claim

61. CARTER, *supra* note 21, at 20. Prior to *Crawford*, the Court’s decision in *Ohio v. Roberts* provided the governing law for introducing out-of-court statements. Cooper, *supra* note 25, at 267 (chronicling the law of hearsay as evidence before *Crawford*). *Roberts* provided that an unavailable witness’s out-of-court statements may be allowed into evidence if a good faith effort was made to obtain the witness and the judge determined that the statement “[bore] sufficient indicia of reliability.” *Ohio v. Roberts*, 448 U.S. 56, 65–66, 73–77 (1980).

62. CARTER, *supra* note 21, at 20 (explaining that statements to law enforcement or forensic interviewers cannot be admitted under the new *Crawford* standards when the defendant has no opportunity for cross-examination).

63. *See id.* (noting that oftentimes the child’s statements are the only evidence in child sexual abuse cases).

64. *People v. Johnson*, 517 N.E.2d 1070, 1074–75 (Ill. 1987) (noting that confrontation is an important aspect of the trial process and that “mere reluctance to testify cannot be accepted as a good enough reason to permit the use of out-of-court testimony”).

65. *See State v. Hakimi*, 98 P.3d 809, 812 (Wash. Ct. App. 2004).

66. *Id.* at 811.

67. *E.g.*, *State v. McPhee*, 755 A.2d 893, 896–98 (Conn. App. Ct. 2000) (stuffed animal); *Hakimi*, 98 P.3d at 811–12 (doll); *Smith v. State*, 119 P.3d 411, 418–20 (Wyo. 2005) (teddy bear).

68. *State v. Powell*, 318 S.W.3d 297 (Mo. Ct. App. 2010); *Hakimi*, 98 P.3d at 811–12; *Smith*, 119 P.3d at 418–20; *see State v. Cliff*, 782 P.2d 44, 47 (Idaho Ct. App. 1989) (discussing the potential calming effect of a doll on a child witness).

69. *E.g.*, *McPhee*, 755 A.2d at 896; *Cliff*, 782 P.2d at 46–47; *Powell*, 318 S.W.3d at 302.

that comfort items engender a jury's sympathy toward a child witness, but sympathy does not necessarily deprive the defendant of a fair trial.⁷⁰ Courts are careful to balance the defendant's right to a fair trial with the child's interest in being free from fear and intimidation before allowing a comfort item.⁷¹ Most often, the benefit of a calm and articulate witness outweighs any potential prejudicial effects on the defendant.⁷² A judge can further safeguard the defendant's rights by instructing the jury to "not allow any bias, passion, prejudice, sympathy or pity to interfere with [the] verdict" to prevent this sympathy from impacting the jury's decision.⁷³

A Missouri appellate court recognized this benefit in *State v. Powell*.⁷⁴ In *Powell*, an eleven-year-old girl and a sixteen-year-old girl carried teddy bears with them into the courtroom and held the stuffed animals on the witness stand.⁷⁵ The defendant objected, arguing that the bears "unfairly bolstered the witnesses' testimony and made the jury more sympathetic to their allegations."⁷⁶ Despite these assertions, the court concluded that the trial court appropriately balanced the potential prejudice with the benefit of having coherent, articulate witnesses and found no harm in using the bears.⁷⁷

The fear and anxiety children experience in court inhibits their ability to testify, but comfort items alleviate this problem.⁷⁸ Courts consistently conclude that the benefit of clear and coherent testimony outweighs any potential prejudicial effect of a comfort item on the defendant's right to a fair trial.⁷⁹

70. *McPhee*, 755 A.2d at 896–98. The court noted that allowing a divergence from strict rules is acceptable "only where a case-by-case analysis is performed to 'balance the individual defendant's right of confrontation against the interest of the state in obtaining reliable testimony from the particular minor victim in question.'" *Id.* at 898 (quoting *State v. Jarzbek*, 529 A.2d 1245, 1255 (Conn. 1987)).

71. *Cliff*, 782 P.2d at 47; *Powell*, 318 S.W.3d at 303–04.

72. *See Cliff*, 782 P.2d at 47 ("[T]he benefit of having coherent testimony . . . outweighed any possible prejudice to the defendant."); *Hakimi*, 98 P.3d at 811–12 (explaining that the security a doll provided to the child witness outweighed the alleged prejudice to the defendant). *But see State v. Aponte*, 738 A.2d 117, 122, 124 (Conn. 1999) (concluding that the prosecutor's gift of a doll to the child witness prior to eliciting her testimony violated the defendant's due process rights).

73. *See State v. T.E.*, 775 A.2d 686, 694–95 (N.J. Super. Ct. App. Div. 2001).

74. *Powell*, 318 S.W.3d at 303.

75. *Id.* at 300.

76. *Id.* at 302.

77. *Id.* at 300, 303–04 ("When an objection is raised, courts should require some explanation of the need for such items, . . . [and] we conclude that the trial court properly weighed the impact of the teddy bears on the witnesses and the jury . . .").

78. *See State v. Cliff*, 782 P.2d 44, 47 (Idaho Ct. App. 1989) (explaining that the presence of a doll could calm the child, allowing her to testify).

79. *Supra* notes 67–77 and accompanying text (discussing how courts have

3. *Support Persons.* The apprehension child witnesses often experience while testifying also encourages courts to allow “support persons” to accompany children to the witness stand.⁸⁰ A support person can sit near the child or, in certain circumstances, the child may sit in the support person’s lap.⁸¹ Typical support persons are close family members, such as a parent or sibling.⁸² In rare cases, a child’s therapist can act as a support person.⁸³ As with cases involving comfort items, defendants often object to the presence of support persons on grounds of prejudice.⁸⁴ In response, and much like decisions regarding comfort items, courts generally conclude that the benefits to the child witness outweigh any purported prejudicial effect on the defendant.⁸⁵ One court explained the process of evaluating the use of support persons when it stated,

In the case *sub judice*, the trial judge did what he was not only authorized, but required, to do. He made a decision to exercise reasonable control over the mode of interrogating the infant-witness with a view to making the interrogation and presentation effective for the ascertainment of truth while protecting the witness from undue embarrassment. The trial judge claims he struck a balance between the goals of Evid. R. 611(A) and the constitutional right of confrontation. We agree.⁸⁶

addressed the particularly delicate nature of children by allowing them to have comfort items).

80. See, e.g., *People v. Whitman*, 205 P.3d 371, 378 (Colo. App. 2007) (teenage sister of witness); *Czech v. State*, 945 A.2d 1088, 1093, 1095 (Del. 2008) (mother of witness); *State v. Letendre*, 13 A.3d 249, 252, 255 (N.H. 2011) (guardian *ad litem*); *State v. Johnson*, 528 N.E.2d 567, 568–69 (Ohio Ct. App. 1986) (aunt of witness).

81. *People v. Johns*, 56 Cal. App. 4th 550, 553 (1997) (allowing child’s mother to sit next to him while he testified); *State v. Reeves*, 448 S.E.2d 802, 812, 814 (N.C. 1994) (allowing witness to sit in stepmother’s lap).

82. *Whitman*, 205 P.3d at 378; *Czech*, 945 A.2d at 1093, 1095; *Murchison v. State*, 500 S.E.2d 651, 652 (Ga. Ct. App. 1998).

83. See *State v. T.E.*, 775 A.2d 686, 694–96, 698 (N.J. Super. Ct. App. Div. 2001) (surveying all jurisdictions allowing support persons and noting that family members are preferable over therapists).

84. See, e.g., *Baxter v. State*, 522 N.E.2d 362, 365 (Ind. 1988); *T.E.*, 775 A.2d at 697; *Johnson*, 528 N.E.2d at 568.

85. See *T.E.*, 775 A.2d at 694–95 (discussing the child’s previous inability to testify and the trial judge’s evaluation of potential prejudice); *Soap v. State*, 562 P.2d 889, 892 (Okla. Crim. App. 1977) (noting the broad discretion of the trial court and refusing to overrule the decision barring clear abuse, which was not found); see also *supra* text accompanying note 69 (discussing common objections in cases involving comfort items).

86. *Johnson*, 528 N.E.2d at 569. In this case, the trial court permitted the eight-year-old witness to sit on her aunt’s lap during her testimony. *Id.* at 568. In reviewing this decision, the appellate court agreed with the trial court that the “interests of society outweigh the concerns enunciated by the defense.” *Id.*

Thus, to determine when a support person is permitted to join the child, a court balances the child's ability to coherently testify against any prejudice to the defendant.⁸⁷ There is no standard balancing test, but courts often look to a showing of substantial need on the part of the child and safeguards against prejudice to the defendant.⁸⁸ This substantial need exists when the child is unable to testify or would suffer extreme emotional harm by testifying without the presence of the support person.⁸⁹

In instances where an adult support person accompanies the witness to the stand, a number of safeguards protect the defendant from prejudice.⁹⁰ For instance, the support person may not speak to or otherwise communicate with the witness in any way.⁹¹ This quiet presence reduces the possibility that the support person will distract the jury from the child's testimony.⁹² Additionally, a jury instruction informs the jurors of the presence of the support person and of the reason for that person's presence.⁹³ The judge also instructs the jurors that they are not to draw any inferences about the witness's testimony from the presence of the support person.⁹⁴ To further protect the defendant from prejudice, a court can examine the demeanor of the child witness and determine the necessity of a support person in a pretrial hearing rather than during trial.⁹⁵ Because the benefit to

87. *T.E.*, 775 A.2d at 697–98; *Johnson*, 528 N.E.2d at 568.

88. *See T.E.*, 775 A.2d at 695–98 (discussing New Jersey's balancing test for allowing an adult support person to sit with a child witness). The *T.E.* court enumerated a six-step process for allowing a support person: (1) finding a preliminary showing of substantial need for the support person; (2) providing the defendant an opportunity to suggest alternative solutions; (3) choosing a support person to minimize potential prejudice (e.g., a parent over a therapist, if possible); (4) determining logistics to have the support person be minimally intrusive; (5) providing the support with a cautionary instruction to refrain from communicating with the witness; and (6) advising the jury that the support person should not affect the jury's assessment of the child's testimony. *Id.* at 697–98. However, not all courts follow such rigid guidelines. *See State v. Letendre*, 13 A.3d 249, 255–56 (N.H. 2011) (declining to establish specific factors for determining when a support person is allowed).

89. *See People v. Whitman*, 205 P.3d 371, 378 (Colo. App. 2007) (noting that the child witness "seemed withdrawn and unwilling to testify"); *T.E.*, 775 A.2d at 694, 697 (commenting that the witness was initially nonresponsive to questioning).

90. *See Whitman*, 205 P.3d at 378 (recounting the trial court's instruction to the support person to not communicate with the child witness); *T.E.*, 775 A.2d at 694–95 (administering a cautionary instruction to the jury omitting the therapist's occupation); *Johnson*, 528 N.E.2d at 568 (reviewing the trial court's pretrial hearing on the demeanor of the witness).

91. *See Whitman*, 205 P.3d at 378 (noting the trial court's instruction to the support person to refrain from communicating with the witness).

92. *See id.* at 379 (finding no distraction in the witness's sister sitting quietly beside the witness stand).

93. *Czech v. State*, 945 A.2d 1088, 1095 (Del. 2008); *Letendre*, 13 A.3d at 256.

94. *Whitman*, 205 P.3d at 379; *Czech*, 945 A.2d at 1095; *T.E.*, 775 A.2d at 698.

95. *See Johnson*, 528 N.E.2d at 568 (recounting the trial court's evaluation of the

the child witness and to the trial process usually outweighs potential prejudice to the defendant, courts typically allow a support person to accompany a child on the witness stand.⁹⁶

C. Current Court Facility Dog Programs

Much like comfort items and support persons, dogs help children throughout the judicial process.⁹⁷ Court facility dogs work in initial meetings with prosecutors, during preparations for trial, and even during trial.⁹⁸ The first known use of a court facility dog occurred in Mississippi in 1992.⁹⁹ A German shepherd named Vachss worked with an abused seven-year-old girl in therapy.¹⁰⁰ As the trial drew near, the girl asked if Vachss could accompany her to the witness stand.¹⁰¹ The judge conducted a witness voir dire and concluded that allowing Vachss to accompany the child in the witness box would serve the best interest of justice.¹⁰²

After Vachss entered that Mississippi courtroom, attorneys in other states began exploring the benefits of court facility dogs.¹⁰³ In 2003, Ellen O'Neill-Stephens, a prosecutor in King County, Washington, created "Courthouse Dogs," a program that

witness in a pretrial hearing before allowing a support person to accompany the witness during trial).

96. *Czech*, 945 A.2d at 1093–94; *T.E.*, 775 A.2d at 695–96, 698; *Johnson*, 528 N.E.2d at 569.

97. See Arin Gencer, *Court-System Canine Helps Put Kids at Ease*, BALT. SUN (June 2, 2008), available at http://articles.baltimoresun.com/2008-06-02/news/0806020002_1_therapy-dogs-carroll-county-victim-witness-assistance (discussing using a dog during initial meetings, sentencing, the waiting period before trial, and trial); *supra* text accompanying notes 78, 89.

98. See Allie Phillips, *How Animals Can Help Traumatized Children*, PROSECUTOR, Jan./Feb./Mar. 2010, at 12, 12–14 (discussing a program in Palm Beach County, Florida); Don Rogers, *Local Heroes: Belinda Smith: Combining a Passion for Pets in Her Personal and Professional Lives*, HOUS. LAW., May/June 2010, at 13, 14 (describing a program in Harris County, Texas); Pierre Thomas & Jack Date, *Victims Find a 'Buddy' at the Courthouse*, ABC NEWS (June 25, 2008), <http://abcnews.go.com/TheLaw/story?id=5244356&page=1> (reporting on a program in Carroll County, Maryland).

99. Dan Wiessner, *U.S. Courtroom Dogs Spark Legal Debate*, REUTERS (Sept. 12, 2011, 12:21 PM), <http://www.reuters.com/article/2011/09/12/us-usa-courtroom-dogs-idUSTRE78B4KN20110912>.

100. PHILLIPS & MCQUARRIE, *supra* note 34, at 21.

101. *Id.*

102. Transcript of a Portion of the Proceedings, *State v. Tatum*, No. 3610 (Cir. Ct. Rankin Cnty., Miss. Feb. 27, 1992), available at http://www.vachss.com/dogs/vachss_transcript.html; see also PHILLIPS & MCQUARRIE, *supra* note 34, at 21.

103. See Rena Marie Justice, *Animal Assistance Part II Pets in the Courtroom: The New "Comfort Item,"* UPDATE (Nat'l Ctr. for Prosecution of Child Abuse, Alexandria, Va.), Nov. 3, 2007, at 1, 1–2 (chronicling the use of court facility dogs from Vachss onward).

educates and advocates specifically for court facility dogs.¹⁰⁴ The program seeks to teach the legal system about the benefits of court facility dogs when used properly.¹⁰⁵ O'Neill-Stephens discovered the potential benefits of court facility dogs after bringing her disabled son's therapy dog to work and observing the dog interacting with children in her office.¹⁰⁶ She later approached the sexual assault unit about using a dog to comfort children.¹⁰⁷ Court facility dogs are now frequently used to support children in King County from initial interviews to trial.¹⁰⁸

Since the experience in King County, prosecutors across the country are recognizing the benefits of using dogs to calm and support victims and witnesses, especially children.¹⁰⁹ In Carroll County, Maryland, a dog works with prosecutors as they meet with children and prepare for trial.¹¹⁰ The prosecutors hope that in the future the dog will be able to accompany children in the courtroom.¹¹¹ A program in Harris County, Texas called "Paw and Order SDU" works with the Children's Assessment Center (CAC) to connect therapy dogs with victims of abuse.¹¹² Volunteer handlers bring therapy dogs to the CAC to calm and relax young victims of domestic violence.¹¹³ Similar programs exist in Florida and New York, where dogs work with child victims in diverse legal settings.¹¹⁴ Currently, seventeen states allow dogs into the

104. Wallick, *supra* note 36; Ellen O'Neill-Stephens, *Courthouse Dogs: A Case Study*, ANIMAL L. COMMITTEE NEWSL. (A.B.A., Chi., Ill.), Summer 2009, at 9, 21–22.

105. O'Neill-Stephens, *supra* note 104, at 21–22.

106. Wallick, *supra* note 36.

107. *Id.* O'Neill-Stephens's son's dog temporarily acted as the court facility dog. *Id.* After other King County prosecutors observed the dog's impact on child victims, they lobbied for a full-time facility dog. *Id.*

108. *See id.*; *see also* Marianne Dellinger, *Using Dogs for Emotional Support of Testifying Victims of Crime*, 15 ANIMAL L. 171, 175–76 (2009) (chronicling the progression of the court facility dog program in King County, Washington).

109. *See* Debra S. Hart-Cohen, *Canines in the Courtroom*, GPSOLO (A.B.A., Chi., Ill.), July/Aug. 2009, at 55–57 (describing a number of programs across the country that utilize dogs in a legal setting).

110. Thomas & Date, *supra* note 98. Buddy, the support dog, comforted one child who had allegedly been abused by her former babysitter. *Id.* She was initially intimidated by the judicial system, but after talking through her experiences with prosecutors (and Buddy), she agreed to testify in court. *Id.* Upon learning that the child would testify, the former babysitter chose not to go to trial and was convicted of child abuse. *Id.*

111. *Id.*

112. Rogers, *supra* note 98, at 13–14. The "SDU" in the program name stands for "Special Dog Unit." *Id.* at 14.

113. *First Anniversary for Unique DAO "Paw & Order" Program*, PROSECUTION PERSP. (Office of Dist. Attorney, Harris Cnty., Tex.), Spring 2011, at 7, 7 (interviewing Belinda Smith, Chief of the District Attorney's Animal Cruelty Section, about the program). Smith stated that, "[t]hese dogs, and the comfort they bring, can make all the difference during these difficult times for victims." *Id.* (internal quotation marks omitted).

114. Justice, *supra* note 103, at 1–2.

courtroom.¹¹⁵ The benefits that these court facility dogs provide to child witnesses and to the justice system should encourage courts to utilize them in the courtroom, despite opponents' objections to the practice.¹¹⁶

III. POTENTIAL IMPACTS OF DOGS IN THE COURTROOM

Although dogs comfort and support child witnesses, defendants object to a dog's presence during trial for many reasons.¹¹⁷ Much like comfort items and support persons, court facility dogs incite objections based on undue prejudice before the jury, increased perceived credibility of the witness, and distraction in the courtroom.¹¹⁸ Furthermore, because other protections are in place to avoid retraumatizing children on the witness stand, some claim dogs may be an unnecessary addition despite their supposed benefit.¹¹⁹ As discussed below, defendants oppose court facility dogs based on prejudice, disrupted confrontation rights, distraction, and undue sympathy and credibility.¹²⁰

A. *Prejudice Generally*

Defendants oppose court facility dogs based on various alleged prejudicial effects.¹²¹ The actual impact of a certain method of presenting evidence on the jury and the verdict cannot be measured with complete accuracy, and a prejudicial practice may go unnoticed by jurors.¹²² The jury will not always perceive

115. Christine Clarridge, *Courthouse Dogs Calm Victims' Fears About Testifying*, SEATTLE TIMES (Sept. 24, 2012, 4:35 PM), http://seattletimes.com/html/localnews/2019235703_courthousedogs23m.html.

116. *See infra* Part IV.C.

117. Justice, *supra* note 103, at 1.

118. *See* People v. Tohom, SCI No. 338/2010, at 2 (N.Y. Dutchess Cnty. Ct. June 1, 2011), available at http://www.courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf. (summarizing the defendant's arguments against allowing a dog to accompany a child witness to the stand); Glaberson, *supra* note 5 (reporting on defense lawyers' reasons for appealing the use of a dog during a child's testimony).

119. *See* State v. T.E., 775 A.2d 686, 695–98 (N.J. Super. Ct. App. Div. 2001) (recognizing the need to allow “substantial leeway in the use of leading questions” to protect child witnesses); Scott H. Greenfield, *Dog as Witness*, SIMPLE JUST.: N. Y. CRIM. DEF. BLOG (Aug. 10, 2011, 4:38 AM), <http://blog.simplejustice.us/2011/08/10/dog-as-witness.aspx>.

120. *See Tohom*, SCI No. 338/2010, at 2 (discussing the defendant's objections to the use of a dog in the courtroom).

121. *Id.*

122. Scott Kitner, Note, *The Need and Means to Restrict Spectators from Wearing Buttons at Criminal Trials*, 27 REV. LITIG. 733, 738, 740 (2008).

prejudicial practices as such,¹²³ so the trial court must exercise vigilance in observing whether a practice reduces the fairness of the trial.¹²⁴ A defendant is not necessarily guilty, nor is any witness necessarily a victim, at least not until a defendant is convicted of the charged offense.¹²⁵ However, allowing a dog to comfort and support a child on the witness stand could signal to the jury that the child is a victim and needs the dog because of some underlying trauma.¹²⁶ A dog cannot discern if a witness is stressed because she is afraid of the defendant or because she is lying on the stand.¹²⁷ Either way, a dog will react to that stress and comfort the witness, potentially lending to the appearance that the witness is a victim.¹²⁸ Even a proper jury instruction may not completely eliminate a dog's influence on the jury.¹²⁹ A jury might still conclude that the dog was protecting the frightened witness or comforting the vulnerable witness, and both conclusions presuppose that the defendant is guilty.¹³⁰

Furthermore, a defendant cannot easily combat claims that a dog is necessary for a child's testimony. Prosecutors likely have access to the child's therapist or other experts, but the defense is less likely to retain an expert to combat this evidence.¹³¹ The prosecution utilizes the resources of the state, but the defense may not share this privilege.¹³² Even if the public defender's office

123. *Id.* at 740 (“[J]urors ‘will not necessarily be fully conscious of the effect [an inherently prejudicial practice] will have on their attitude toward the accused.’” (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986))). The judge should therefore evaluate whether the practice unacceptably increases the risk of prejudice, not whether the jurors actually perceive a prejudicial effect. *Id.*

124. *Id.* at 738; *Estelle v. Williams*, 425 U.S. 501, 503–04 (1976) (“The actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.” (citations omitted)).

125. *Greenfield*, *supra* note 119.

126. Brief of Appellant at 12–13, *State v. Dye*, 283 P.3d 1130 (Wash. Ct. App. 2012) (No. 66549-9-I) (asserting that a court facility dog “suggests the guilt of the accused” and “presuppose[s] the victimhood” of the witness).

127. Brief of Appellant, *supra* note 126, at 10.

128. Randall Beach, *Branford Therapist's Courtroom Dog Calms Witness in Child Sex Assault Case in Hartford*, NEW HAVEN REG. (Sept. 26, 2011), available at <http://www.nhregister.com/articles/2011/09/26/news/doc4e7fcc1413375219038440.txt?viewmode=fullstory>.

129. See Brief of Appellant, *supra* note 126, at 12 (identifying several ways in which the presence of a dog in the courtroom could prejudice the jury against the defendant).

130. See *id.* at 12–13 (emphasizing that the innocence or guilt of the defendant “is the ultimate issue of fact for the jury to decide”).

131. See Hannah Jacobs Wiseman, *Pro Bono Publico: The Growing Need for Expert Aid*, 60 S.C. L. REV. 493, 501–02 (2008) (discussing the difference in resources available to prosecutors versus criminal defendants).

132. Paul C. Giannelli, *The Right to Defense Experts*, CRIM. JUST., Summer 2003, at

is willing to pay for an expert, the defense may still have trouble finding one to testify against the child witness.¹³³ This lack of counter testimony could limit the defendant's ability to contradict the prosecution's argument that special accommodations are necessary to protect an allegedly anxious child witness.¹³⁴ This disparity in access to experts could place the defendant at a disadvantage.¹³⁵

Defendants are also concerned with how court facility dogs may increase a juror's perceived credibility of or sympathy toward a witness.¹³⁶ Jurors might instinctively believe a child's testimony is true based on the child's interaction with a dog on the witness stand.¹³⁷ In fact, defendants worry that the mere presence of a dog could signal to the jury that the child is apprehensive and vulnerable, evoking empathy toward the child.¹³⁸ A dog might signal to the jury that the child is vulnerable because he or she has been traumatized, which could make the jury sympathetic toward the witness.¹³⁹ This perceived victimization could serve as an additional indicator that the defendant is already guilty, potentially reducing the fairness of the trial.¹⁴⁰

B. Confrontation

The Confrontation Clause in the Sixth Amendment guarantees a defendant the right to physically confront a witness

14, 15 (2003) (remarking that obtaining expert testimony is not as difficult for prosecutors as it is for defense attorneys).

133. See Wiseman, *supra* note 131, at 502, 528–31.

134. *Id.* at 502–03 (noting that lack of an expert opinion severely inhibits the defense's ability to counter the prosecution's assertions).

135. *Id.*

136. See Beach, *supra* note 128 (reporting a public defender's fears in having a dog appear next to a child witness); *cf.* State v. Torres, 761 A.2d. 766, 769 (Conn. App. Ct. 2000) (rejecting a defendant's objection that the presence of a witness's fiancé on the stand "impermissibly bolstered the witness' credibility").

137. Glaberson, *supra* note 5 ("Every time she stroked the dog,' [a public defender] said in an interview, 'it sent an unconscious message to the jury that she was under stress because she was telling the truth.'").

138. People v. Tohom, SCI No. 338/2010, at 2 (N.Y. Dutchess Cnty. Ct. June 1, 2011), available at http://www.courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf.

139. See Beach, *supra* note 128 (examining the potential implications involved with using a dog to comfort a child witness and suggesting that a juror's knowledge that a dog is being used signals to the jury that the child was traumatized by the defendant).

140. See *supra* text accompanying notes 126–130 (discussing the possibility of the child witness being perceived as a victim and the defendant as the abuser before the defendant is convicted).

testifying against him.¹⁴¹ The clause also ensures that the defendant has an opportunity to cross-examine that witness.¹⁴² Defendants invoke the Confrontation Clause to object to a court facility dog based on the impact a dog can have on a witness.¹⁴³ Cross-examination is the time to elucidate the truth, which is accomplished by critically questioning the witness.¹⁴⁴ Confrontation is necessarily a stressful activity and is designed to allow the jury to determine whether the witness is lying.¹⁴⁵ This stress can help defense attorneys reveal any fabrications in a witness's testimony.¹⁴⁶ A dog, however, can distract a person and relieve emotional tension.¹⁴⁷ Opponents to court facility dogs assert that "when the comfort of a dog alleviates the normal stress of giving testimony, a significant part of the system is compromised."¹⁴⁸

A court facility dog can also inhibit the defense counsel's ability to reveal holes in a witness's testimony.¹⁴⁹ One New York public defender opposed having a dog on the witness stand because "[t]here was no way for [him] to cross-examine the dog."¹⁵⁰ Unlike traditional comfort items, a dog can move independently of the witness, and the defense has no means of asking the dog why it chose to move at that particular time.¹⁵¹ A

141. U.S. CONST. amend. VI; *see also* *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (detailing a defendant's rights under the Confrontation Clause).

142. *Ritchie*, 480 U.S. at 51; *State v. Cliff*, 782 P.2d 44, 46 (Idaho Ct. App. 1989) (finding that a child witness holding a doll during cross-examination did not hamper the defendant's right to confrontation because the defendant still had the opportunity to directly cross-examine the witness).

143. *See, e.g.*, Brief of Appellant, *supra* note 126, at 10 & n.9 (alleging that the dog relieves the witness of stress that is otherwise critical to revealing falsehoods during cross-examination).

144. *See* *Maryland v. Craig*, 497 U.S. 836, 856–57 (1990); *see also* *Greenfield*, *supra* note 119. Mr. Greenfield, a criminal defense attorney, argues that "[t]he point of confrontation is to confront, to make the witness uncomfortable, to challenge their finely-honed direct testimony so that the narrative can be tested and, if false or mistaken, shown to be wrong so that an innocent person isn't convicted." *Id.*

145. *Hamblen & Levine*, *supra* note 23, at 174; *see* Brief of Appellant, *supra* note 126, at 10.

146. *See* *Wiessner*, *supra* note 99.

147. Andrew Leaser, *See Spot Mediate: Utilizing the Emotional and Psychological Benefits of "Dog Therapy" in Victim-Offender Mediation*, 20 OHIO ST. J. ON DISP. RESOL. 943, 962 (2005) (observing the ability of dogs to "elicit specific human responses" and relieve stress).

148. *Greenfield*, *supra* note 119; *see also* Brief of Appellant, *supra* note 126, at 10; *Hamblen & Levine*, *supra* note 23, at 174.

149. *See* Brief of Appellant, *supra* note 126, at 10.

150. *Glaberson*, *supra* note 5 (internal quotation marks omitted) (quoting a public defender who objected to the use of a support dog to assist a child witness for a number of reasons, including confrontation issues).

151. *See* Brief of Appellant, *supra* note 126, at 10 (contending that a dog cannot reveal the reasons for its "nudges" or "signals" to the witness).

dog does not know if the witness is stressed because of fear or because he or she is lying.¹⁵² The jury is then free to interpret that the dog is comforting the witness, now perceived as a victim, for revealing the truth.¹⁵³ Face-to-face confrontation may distress a rape victim or an abused child, but it may also “confound and undo the false accuser, or reveal the child coached by a malevolent adult.”¹⁵⁴ Defendants worry that using court facility dogs will inhibit the illumination of the truth.¹⁵⁵

C. *Distraction*

A judge has a judicial duty to maintain decorum in the courtroom.¹⁵⁶ Appropriate courtroom behavior serves two purposes: (1) to prevent disruptions, ensuring the defendant has his day in court; and (2) to preserve the dignity of the courtroom environment.¹⁵⁷ Disturbances in the courtroom affect the jury as well as the trial judge.¹⁵⁸ If the judge is distracted, he or she cannot focus on ensuring the defendant receives a fair trial.¹⁵⁹

Interruptions in the trial process may result from physical disruptions, sounds, or visual distractions.¹⁶⁰ A dog in the courtroom might sidetrack jurors from the trial process in ways that are physical, audible, and visual.¹⁶¹ Potential distractions include the dog entering and exiting the courtroom or making

152. *Id.*

153. *Id.*

154. *Coy v. Iowa*, 487 U.S. 1012, 1020, 1022 (1988) (reversing the decision of the lower court upon determining that separating a child witness from a defendant using a screen violated the Confrontation Clause). The Court in *Coy* also remarked, “It is a truism that constitutional protections have costs.” *Id.* at 1020.

155. See Brief of Appellant, *supra* note 126, at 10.

156. Jona Goldschmidt, “Order in the Court!”: *Constitutional Issues in the Law of Courtroom Decorum*, 31 *HAMLIN L. REV.* 1, 9 (2008).

157. *Id.* The first purpose is “a prerequisite to a rational, reasoned process for dispute resolution,” while the second rationale protects the court system and the law generally. *Id.*

158. See, e.g., *Estes v. Texas*, 381 U.S. 532, 544–45, 548 (1965) (concluding that the presence of television cameras distracted the judge and the jury, depriving the defendant of a fair trial).

159. *Id.* at 548.

160. Goldschmidt, *supra* note 156, at 25. Physical disruptions include “active conduct” such as entry and exit from the courtroom, fighting, or moving about the courtroom. *Id.* Sounds that disrupt a trial include side conversations in the gallery, offensive language, or a baby crying. *Id.* Visual distractions could be clothing, overbearing accessories, or signs. *Id.*

161. See *People v. Tohom*, SCI No. 338/2010, at 2 (N.Y. Dutchess Cnty. Ct. June 1, 2011), available at http://www.courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf (recounting the defendant’s argument that a dog “would distract from otherwise contradictory evidence that negates the truth of the witness’s accounting, as raised by the defense”).

noise during the testimony.¹⁶² Additionally, a dog that is visible on the witness stand could distract the jurors from the witness's testimony.¹⁶³ Jurors may be afraid of or allergic to dogs, which could delay the jury selection process.¹⁶⁴

These varied distractions might prompt defendants to use Rule 403 of the Federal Rules of Evidence to combat the presence of a court facility dog by suggesting a less prejudicial form of presenting sufficient evidence.¹⁶⁵ Rule 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."¹⁶⁶ If the prosecution argues that a child can testify only with a dog's assistance, the defense can latch onto the language regarding "unfair prejudice" and "undue delay" in an attempt to keep the dog out of the courtroom.¹⁶⁷ If sufficient evidence can be admitted through less prejudicial means, a defendant could argue that having a child testify on the stand with a dog is unfairly prejudicial.¹⁶⁸ Regardless, a defendant is entitled to a fair trial that is as free from distractions as possible.¹⁶⁹ Arguably, using a live animal for comfort instead of a toy increases the potential for distraction and, consequently, reduces the fairness of the trial.¹⁷⁰

162. See Casey McNerthney, *Dogs Give Prosecutors a Hand in Difficult Cases*, SEATTLE PI (Sept. 2, 2007, 10:00 PM), <http://www.seattlepi.com/local/article/Dogs-give-prosecutors-a-hand-in-difficult-cases-1248466.php> (discussing potential factors that might prevent courts from adopting a courthouse dog); cf. *People v. Buck*, 116 P.2d 160, 162–63 (Cal. Dist. Ct. App. 1941) (explaining that people entering and exiting the courtroom distracts the jury from the task at hand).

163. *Defense Objections and Outline for Trial Brief*, COURTHOUSE DOGS, http://courthousedogs.com/legal_brief.html (last visited Mar. 3, 2013).

164. Dellinger, *supra* note 108, at 188.

165. See FED. R. EVID. 403 (providing a way to exclude evidence based on prejudice and delay); Dellinger, *supra* note 108, at 181 (opining on the viability of using Rule 403 to exclude court facility dogs from trial).

166. FED. R. EVID. 403. "Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FED. R. EVID. 403 advisory committee's note.

167. FED. R. EVID. 403; see also Dellinger, *supra* note 108, at 181 (speculating that defendants might seek to argue against dogs under Rule 403). However, Dellinger argues that Rule 403 would be a weak standard for defendants because it relates to the substance of the evidence being admitted and not the method of presentation. Dellinger, *supra* note 108, at 181.

168. See *Old Chief v. United States*, 519 U.S. 172, 182–83 (1997) (concluding that if there is evidence available with the same or greater probative value but less potential for prejudice, the original evidence must be excluded in favor of the less prejudicial evidence).

169. *Bricker v. Yonkers R.R. Co.*, 198 N.Y.S. 37, 38 (N.Y. App. Div. 1923).

170. See Goldschmidt, *supra* note 156, at 8 ("Unless order is maintained in the courtroom and disruption prevented, reason cannot prevail and constitutional rights to

D. Legislative Decision

The federal government and many states have adopted legislation that specifically affords children alternative means of testifying.¹⁷¹ However, none of this legislation expressly permits the use of court facility dogs as an alternative method.¹⁷² These laws allow closed-circuit television, comfort items, and support persons,¹⁷³ and they could be amended to incorporate court facility dogs and other new technologies. This legislation “reflect[s] legislative efforts to decrease the psychological harms to child[] [witnesses] . . . and to increase the quality and quantity of such testimony.”¹⁷⁴ One Illinois court noted that cases involving child witnesses present “special difficulties” because the child’s “fear and reticence is probably non-volitional and hence understandable.”¹⁷⁵ However, the court was quick to assert that the legislature, not the court, should take steps to overcome these difficulties.¹⁷⁶

Additionally, some defense attorneys argue that the legislature is the appropriate forum to determine if dogs belong in the courtroom.¹⁷⁷ Arguably, when judges allow dogs in the courtroom, they are making new law, a task reserved for the legislature.¹⁷⁸ Instead, legislators should create this law because they can better evaluate the use of dogs in the courtroom and make a decision that is best for both child witnesses and defendants.¹⁷⁹ The legislature is not confined to considering only the parties of a particular case but, instead, may hear as much

liberty and equality under law cannot be protected.” (quoting AM. COLL. OF TRIAL LAWYERS, ANNOTATED CODE OF TRIAL CONDUCT 32 (2005)) (internal quotation marks omitted)).

171. See *supra* notes 40, 48–49, 56 and accompanying text.

172. See *supra* notes 40, 48–49, 56. *But see* *People v. Tohom*, SCI No. 338/2010, at 2, 9 (N.Y. Dutchess Cnty. Ct. June 1, 2011), available at http://www.courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf (interpreting a statute broadly to allow the use of a dog in the courtroom despite the lack of support for court facility dogs).

173. See *supra* notes 40, 48–49, 54 and accompanying text.

174. Andrea L. Dennis, *Prosecutorial Discretion and the Neglect of Juvenile Shielding Statutes*, 90 NEB. L. REV. 341, 356 (2011).

175. *People v. Johnson*, 517 N.E.2d 1070, 1074–75 (Ill. 1987).

176. *Id.* at 1075.

177. Wiessner, *supra* note 99.

178. *Id.* David Martin, one of the defense attorneys for the defendant in the case discussed in the Introduction of this Comment, argues that the public should “go to [the] legislature, hold public hearings and then determine what’s in the best interest of all the parties concerned.” *Id.*

179. See Lillian R. BeVier, *Judicial Restraint: An Argument from Institutional Design*, 17 HARV. J.L. & PUB. POL’Y 7, 10–11 (1994) (explaining the benefits of the legislature as a policy-making entity).

evidence as necessary about the potential impacts of different options before making a decision.¹⁸⁰ After research revealed how testifying can impact a child, federal and state legislatures enacted laws to protect child witnesses.¹⁸¹ Thus, because the legislature has decided what alternative support measures can be used in the courtroom, some argue that it should decide whether court facility dogs are an appropriate addition to options for protecting child witnesses.¹⁸²

IV. USING DOGS IN THE COURTROOM IS A LOGICAL STEP FORWARD

Despite objections to the use of dogs in the courtroom, the practice is a logical extension of current protections for child witnesses.¹⁸³ Judicial precedent and statutory law support the use of added protections for testifying children, and court facility dogs serve as a form of protection.¹⁸⁴ Court facility dogs can enhance the trial process both for child witnesses and for the justice system by facilitating the delivery of calm and coherent testimony.¹⁸⁵ Additionally, the court can initiate certain safeguards to ensure that the defendant retains the right to a fair trial.¹⁸⁶ By requiring the child to demonstrate a substantial need for the dog, implementing a jury instruction regarding the dog, and specifying the appropriate guidelines for court facility dogs, a court can preserve the integrity of the trial.¹⁸⁷

A. *Legal Foundations*

Legislative and judicial support for using comfort items and support persons lays the foundation for using court facility dogs.¹⁸⁸ Courts are sensitive to the fear and stress children experience on the witness stand and are willing to implement

180. See *id.* (comparing the information-gathering capabilities of legislatures versus courts).

181. Dennis, *supra* note 174, at 347, 349 & n.57.

182. See Wiessner, *supra* note 99; *cf.* Brief of Appellant, *supra* note 126, at 5–6 (arguing against use of a court facility dog for a witness with a mental disability because “[t]here is no right to have a dog or other emotional support animal under either Washington law or under the ADA” (footnote omitted)).

183. See Dellinger, *supra* note 108, at 179.

184. See Gabriela N. Sandoval, *Court Facility Dogs—Easing the Apprehensive Witness*, COLO. LAW., Apr. 2010, at 17, 18–21.

185. *Maryland v. Craig*, 497 U.S. 836, 857–58 (1990); Sandoval, *supra* note 184, at 17.

186. See PHILLIPS & MCQUARRIE, *supra* note 34, at 22–23 (setting forth policies and procedures for the training and selection of court facility dogs).

187. *Infra* Part IV.D.

188. See *supra* Part II.B.2–3 (discussing laws allowing use and court approval of comfort items and support persons for child witnesses).

protections to ease that fear.¹⁸⁹ A court facility dog serves a similar purpose as a comfort item or a support person, namely, to calm and comfort an anxious witness.¹⁹⁰ With an appropriate jury instruction, similar to the instructions given in cases involving comfort items and support persons, the jury's inferences about the dog can be quelled.¹⁹¹

In addition, the Federal Rules of Evidence support using court facility dogs.¹⁹² Rule 611(a) stipulates, "The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment."¹⁹³ The trial court has broad discretion to decide how questioning, cross-examination, and the introduction of evidence are conducted.¹⁹⁴

Each of the three subparts of Rule 611(a) supports a judge's decision to use court facility dogs.¹⁹⁵ First, court facility dogs work with anxious or withdrawn witnesses to help them vocalize and communicate.¹⁹⁶ This increased coherency and efficiency in communication is more "effective for determining the truth."¹⁹⁷ Second, in comforting a witness, the practice also "avoid[s] wasting time."¹⁹⁸ Witnesses would not have to take lengthy breaks to gain composure because a dog works to keep the witness calm.¹⁹⁹ Finally, a court facility dog can reduce the amount of embarrassment a child

189. *Supra* Part II.

190. *See* *People v. Tohom*, SCI No. 338/2010, at 3, 9–10 (N.Y. Dutchess Cnty. Ct. June 1, 2011), *available at* http://www.courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf (concluding that the use of a dog was appropriate to calm the witness and allow her to testify).

191. *Id.* at 10; *see supra* notes 73, 93 and accompanying text.

192. *See* Brief of Respondent at 9–10, *State v. Dye*, 283 P.3d 1130 (Wash. Ct. App. 2012) (No. 66549-9-I) (contending that Rule 611 supports the use of court facility dogs and analogizing the application of the rule in cases involving comfort items).

193. FED. R. EVID. 611(a). "The ultimate responsibility for the effective working of the adversary system rests with the judge." FED. R. EVID. 611(a) advisory committee's note.

194. *People v. Whitman*, 205 P.3d 371, 378 (Colo. App. 2007).

195. *See infra* notes 196–201 and accompanying text.

196. Gencer, *supra* note 97 (remarking on how dogs comfort children and make it easier for them to talk).

197. FED. R. EVID. 611(a)(1); *see, e.g.*, *State v. Cliff*, 782 P.2d 44, 47 (Idaho Ct. App. 1989) (recognizing the trial judge's findings that benefit of coherent testimony of a girl holding a doll outweighed any potential prejudice to the defendant).

198. FED. R. EVID. 611(a)(2); *see also* Dellinger, *supra* note 108, at 180 (remarking on the potential to use FRE 611 to support the use of court facility dogs).

199. Dellinger, *supra* note 108, at 180; *see also* Leaser, *supra* note 147, at 961–63 (describing the ways in which a dog can have a calming, comforting effect on a person).

feels on the witness stand.²⁰⁰ A court facility dog provides support, giving the child witness strength to testify in court.²⁰¹ These judicial and legislative pathways provide generous support for the use of court facility dogs to comfort anxious child witnesses.

B. Lack of Potential Prejudice

Opponents of court facility dogs routinely claim that the dogs will infect the jury with prejudice against the defendant.²⁰² However, proponents of the idea claim that any potential prejudice is outweighed by the benefits to the child witness.²⁰³ In fact, court facility dogs may carry even less potential for prejudice than traditional support persons.²⁰⁴

Unlike support persons, dogs cannot comprehend the substance of the case.²⁰⁵ An adult support person who understands the legal implications of a trial could potentially add credibility to the witness's testimony, but a dog acts only as a neutral source of comfort for the witness.²⁰⁶ The jury could perceive a support person as leading or swaying the witness but would be less likely to draw the same conclusions about a dog.²⁰⁷ As a result, a defendant might prefer a court facility dog to an adult support person to ease an apprehensive witness.²⁰⁸

200. See *State v. T.E.*, 775 A.2d 686, 694–95 (N.J. Super. Ct. App. Div. 2001) (discussing how the trial court allowed a therapist to sit next to a child witness after finding “clear evidence of fear and embarrassment on the part of the witness” (internal quotation marks omitted)).

201. See *Sandoval*, *supra* note 184, at 17 (describing how a child can feel “empowered to testify without fear” by holding a dog’s leash on the witness stand).

202. See, e.g., *People v. Tohom*, SCI No. 338/2010, at 2 (N.Y. Dutchess Cnty. Ct. June 1, 2011), available at http://www.courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf (acknowledging the defendant’s allegations of prejudice before approving the use of a court facility dog); Brief of Appellant, *supra* note 126, at 12–13 (asserting a number of ways in which a dog would prejudice the jury).

203. See, e.g., *Glaberson*, *supra* note 5 (reporting a prosecutor’s contention that the use of a court facility dog “did not affect the substance of the testimony”); Justice, *supra* note 103, at 1 (remarking that any potential prejudice is outweighed by the benefits to child testimony).

204. *Dellinger*, *supra* note 108, at 186 (suggesting that dogs have a lesser prejudicial effect on a jury than a traditional support person because of the neutral character of the animal).

205. *Id.*

206. *Id.* (remarking that a court facility dog “serves the limited function of physically and emotionally standing by the testifying witness”); see also *Tohom*, SCI No. 338/2010, at 4 (noting the defendant’s objection to a therapist accompanying the witness to the stand as prejudicial).

207. Rebecca Wallick, *Dogs in the Courtroom, Follow-Up Part I*, BARK (Aug. 15, 2011), <http://thebark.com/content/dogs-courtroom-follow-part-i>. This is especially true if the dog is inside the witness box and out of the jury’s sight during the child’s testimony. *Id.*

208. See *id.* (commenting that dogs are less visible than support persons and do not have the ability that support persons have to sway the witness).

C. Benefits to Child Witnesses and the Trial Process

Court facility dogs assuage the fears of child witnesses while upholding the integrity of the trial process.²⁰⁹ A dog calms and comforts a child witness, allowing vital testimony to be heard,²¹⁰ and being in an animal's presence lowers a person's blood pressure and heart rate.²¹¹ Further research discloses that animals are particularly encouraging for children suffering from stress or trauma.²¹² A child witness accompanied by a court facility dog can speak more clearly and articulately, allowing the court to hear coherent testimony.²¹³

Allowing a court facility dog to accompany a child to the witness stand in court alleviates defendants' confrontation concerns with alternative methods of testimony.²¹⁴ Unlike closed-circuit television or videotaped testimony, court facility dogs allow a witness to testify in court and face the defendant.²¹⁵ One Washington state prosecutor remarked that court facility dogs do not foster prosecution; rather, they merely make the trial process easier on children.²¹⁶ Dogs comfort child witnesses "without . . . leading or suggesting things to the child[, but by] simply provid[ing] comfort and something to *like* about a situation kids don't like at all."²¹⁷

1. *Increased Coherency and Efficiency During Trial.* Dogs help children become more communicative, clear, and responsive in a variety of legal settings, including on the witness stand.²¹⁸ Court

209. See Dellinger, *supra* note 108, at 189–90 (concluding that the advantages of using court facility dogs outweigh the disadvantages).

210. Gencer, *supra* note 97 (observing how dogs assist previously withdrawn children communicate).

211. PHILLIPS & MCQUARRIE, *supra* note 34, at 6.

212. See *id.* ("Dr. Gail Melson, professor emeritus of developmental studies at Purdue University . . . found that with only five minutes of contact with an unfamiliar dog, 76% of children studied between the ages of 7 and 15 believed that a dog knew how they felt. Another 84% indicated they would confide secrets to a dog.")

213. See *People v. Tohom*, SCI No. 338/2010, at 3–4 (N.Y. Dutchess Cnty. Ct. June 1, 2011), available at http://www.courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf (remarking that a child witness would be better able to testify in the presence of a dog).

214. See Dellinger, *supra* note 108, at 177–78 (opining that dogs may be the "missing link" that protect children while avoiding Confrontation Clause issues).

215. *Id.* at 178.

216. Wallick, *supra* note 207.

217. *Id.* (internal quotation marks omitted).

218. See *Tohom*, SCI No. 338/2010, at 3 (remarking how the previously withdrawn child opened up around the dog, becoming "significantly more verbal" when the dog was present); Beach, *supra* note 128 (quoting a prosecutor as saying that without the assistance of a dog, a child would not have been able to talk about the events of the case); Wallick, *supra* note 36 ("It takes children time to develop trust with a prosecuting

facility dogs ease a child's stress, "resulting in more efficient and accurate testimony" and reducing the potential that a child will be retraumatized while testifying in front of the defendant.²¹⁹ Interaction with a dog can lower a person's blood pressure and reduce stress and anxiety.²²⁰ "Often, children are capable of describing what they saw, experienced, and heard. However, if the child is fearful or anxious about discussing important issues, [the] testimony may be inarticulate, unpersuasive, or incomplete."²²¹ Court facility dogs mitigate this setback.

In cases in which a child is the victim or a key witness, the child's testimony may be critical to the prosecution's case.²²² Forcing a child to testify face-to-face with the defendant "can actually decrease the accuracy of a child's testimony" because he or she is emotionally and psychologically overwhelmed.²²³ A court facility dog enables a child witness to speak without added stress or tension.²²⁴ A dog's presence can reduce a child's heart rate and blood pressure, in turn reducing stress and anxiety.²²⁵ A child might be so overwhelmed by the court process²²⁶ that he or she freezes before being able to testify.²²⁷ This not only delays the trial process, but also can result in traumatizing the child even more.²²⁸ Dogs help reduce this delay by keeping a child witness calm. Research reveals that a dog "significantly lower[s] behavioural, emotional, and verbal distress in children when participating in a mildly stressful activity."²²⁹ Strong evidence indicates that petting or holding a dog can reduce stress and increase relaxation.²³⁰

attorney, so [the dog] is very helpful there. Or when kids have to wait—it's very hard on them, waiting for their turn to testify. [The dog] is calming and reassuring.").

219. PHILLIPS & MCQUARRIE, *supra* note 34, at 15.

220. J.S.J. Odendaal, *Animal-Assisted Therapy—Magic or Medicine?*, 49 J. PSYCHOSOMATIC RES. 275, 278 (2000) (noting that dogs can affect a person's automatic nervous system and decrease "sympathetic nervous system arousal").

221. Sandoval, *supra* note 184, at 18.

222. Cooper, *supra* note 25, at 266.

223. CARTER, *supra* note 21, at 123–24 (describing how the traditional practices of the legal system automatically put child witnesses at an emotional disadvantage).

224. Sandoval, *supra* note 184, at 17.

225. Nancy R. Gee, *Animals in the Classroom*, in ANIMALS IN OUR LIVES 117, 127 (Peggy McCardle et al. eds., 2011).

226. See PHILLIPS & MCQUARRIE, *supra* note 34, at 15 (discussing how a judge, jury, lawyers, and spectators can frighten a child witness).

227. *Id.* at 21.

228. *Id.*

229. Nancy A. Pachana, Bronwyn M. Massavelli & Sofia Robleda-Gomez, *A Developmental Psychological Perspective on the Human-Animal Bond*, in THE PSYCHOLOGY OF THE HUMAN-ANIMAL BOND 151, 155 (Christopher Blazina et al. eds., 2011).

230. *Id.* at 156.

Testimony is most effective when the witness is able to communicate calmly and without stress.²³¹ Although defense attorneys prefer a stressed and uncomfortable witness for truth-seeking purposes, judges prefer clear and articulate testimony.²³² Coherent testimony depends in some part on the nature of the child, but it also depends on the nature of the surroundings in which the child is placed.²³³ Court facility dogs relieve tension and anxiety, allowing a child to speak clearly and articulately.²³⁴ The security a child feels with a court facility dog keeps the trial moving and reduces the possibility of preventable delays.²³⁵

2. *Balancing Confrontation with Comfort.* The post-*Crawford* legal system could prove to be emotionally damaging to child witnesses.²³⁶ Any statement classified as testimonial is prohibited from introduction unless the defendant had an opportunity to cross-examine the witness.²³⁷ Courts may no longer admit the statement based on a determination of reliability if the defendant was not able to confront and question the witness.²³⁸ The increased likelihood that a child will have to speak in front of the defendant in court means that more children will need protection from the fear and anxiety of testifying.²³⁹ Court facility dogs fulfill this need.²⁴⁰

Employing a court facility dog allows a defendant to confront the witness while recognizing the delicate nature of child

231. Sandoval, *supra* note 184, at 18.

232. Compare *State v. Cliff*, 782 P.2d 44, 47 (Idaho Ct. App. 1989) (“[T]he benefit of having coherent testimony from the witness outweigh[s] any possible prejudice to the defendant.”), with Brief of Appellant, *supra* note 126, at 10 (“It is the very physiological responses that testimony produces that a jury utilizes to determine a witness’s credibility . . .”).

233. CARTER, *supra* note 21, at 133 (“[L]egal professionals can accommodate young witnesses to better ensure that they provide the most complete and accurate information possible.”).

234. Anke Prothmann & Aubrey H. Fine, *Animal-Assisted Interventions in Child Psychiatry*, in *ANIMALS IN OUR LIVES*, *supra* note 225, at 149–50; Sandoval, *supra* note 184, at 18.

235. PHILLIPS & MCQUARRIE, *supra* note 34, at 21.

236. See Andrew W. Eichner, Note, *Preserving Innocence: Protecting Child Victims in the Post-Crawford Legal System*, 38 AM. J. CRIM. L. 101, 108–09 (2010) (commenting that the majority of child statements about abuse are testimonial in nature and therefore would be excluded under *Crawford* unless the defendant had an opportunity for cross-examination); see also CARTER, *supra* note 21, at 19–20 (commenting that, although it was not directly concerned with child witnesses, the *Crawford* decision shed light on typical cases involving child witnesses).

237. *Supra* notes 58–60 and accompanying text.

238. CARTER, *supra* note 21, at 19–20.

239. See Cooper, *supra* note 25, at 268–69 (advocating that prosecutors should take special care to prepare child witnesses to testify in court); Eichner, *supra* note 236, at 109–11 (noting the potentially devastating impacts of *Crawford* on child witnesses and suggesting several interpretations of “testimonial” that would reduce further victimizing of child witnesses).

240. See Hart-Cohen, *supra* note 109, at 55 (advancing the idea that prosecutors and judges are increasingly accepting dogs to comfort and support child witnesses).

witnesses.²⁴¹ Defendants might even prefer confronting the witness face-to-face when accompanied by a dog rather than using closed-circuit television or a videotaped deposition.²⁴² Allowing defendants to confront witnesses resolves defendants' central objections to using other alternative methods of testimony.²⁴³ Using court facility dogs comports with *Crawford's* prohibition of nontestimonial statements while protecting the anxious child witness.²⁴⁴

In certain cases, a child may not find comfort in a traditional comfort item or a support person.²⁴⁵ For example, in the New York case described in the Introduction,²⁴⁶ the witness's father had allegedly sexually abused her,²⁴⁷ and she was estranged from the rest of her family.²⁴⁸ Although her therapist could have served as her support person, both the prosecution and the defense "object[ed] to the therapist sitting next to or in close proximity to the [child]."²⁴⁹ The child did not have a person who could have calmed her during her testimony.²⁵⁰ The judge did not indicate whether a traditional comfort item would alleviate the child's stress or suggest that one be used instead of the dog, despite analogizing the situation to a previous case in which a girl held a teddy bear on the witness stand.²⁵¹ A child's age and family

241. Dellinger, *supra* note 108, at 185–86.

242. *Id.* at 190.

243. *See id.* (suggesting that closed-circuit television and videotaped statements are more likely to violate the defendant's Confrontation Clause rights than a court facility dog).

244. Gencer, *supra* note 97 (describing how court facility dogs can ease an anxious child witness); *see supra* text accompanying note 58.

245. *See, e.g.,* *People v. Tohom*, SCI No. 338/2010, at 3–5 (N.Y. Dutchess Cnty. Ct. June 1, 2011), available at http://www.courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf (considering the age of the child witness and her lack of family support in determining whether a dog would be allowed to accompany her to the witness stand); Sandoval, *supra* note 184, at 17 (suggesting that a court facility dog empowers children in ways that an inanimate comfort item may not).

246. *See supra* notes 1–14 and accompanying text (describing a recent case in which a Dutchess County, New York judge allowed a dog to accompany a fifteen-year-old witness during her testimony despite objections from the defense).

247. Glaberson, *supra* note 5 (reporting that the fifteen-year-old was testifying against her father who had allegedly raped and impregnated her).

248. *Tohom*, SCI No. 338/2010, at 3 ("The victim has limited contact with her family and her only support system are her paternal grandparents who reside outside of the United States.").

249. *Id.* at 4. The prosecution thought that the witness would appear untruthful if she looked at the therapist during her testimony, and the defense asserted the presence of the therapist would be prejudicial for the same reasons the defense objected to the use of a dog. *Id.*

250. *Id.* at 3–4.

251. *Id.* at 9 (comparing the instant case to *People v. Gutkaiss*, 614 N.Y.S.2d 599 (N.Y. App. Div. 1994), in which the court upheld the trial court's decision to allow a child to hold a teddy bear while testifying). The court also noted that judges are permitted to be

dynamic might mean that comfort items and support persons would not serve their intended purpose, leaving the child apprehensive about testifying.²⁵² Dogs can fill the void when support persons are unavailable and comfort items are inadequate to allow the defendant to confront the witness.²⁵³

D. Policies to Protect Defendants' Rights During Trial

Certain precautions reduce the potential for prejudice to the defendant and ensure that the use of a court facility dog is beneficial to all parties.²⁵⁴ These protections start when a dog is selected to work with a child and continue through the trial process.²⁵⁵ Requiring that the child witness have a substantial need for emotional support ensures that prosecutors incorporate court facility dogs only as needed.²⁵⁶ Additionally, judges can issue a special jury instruction to mitigate any potential inferences the jury could draw from the dog's presence.²⁵⁷ Furthermore, specific guidelines for court facility dogs reduce the possibility of distraction.²⁵⁸

1. *Requirement of Substantial Need.* A court facility dog should be utilized only when the witness presents a substantial need for emotional support during testimony.²⁵⁹ This determination can be made in several ways.²⁶⁰ The court can conduct a pretrial hearing to evaluate the child's ability to testify

"sensitive to psychological and emotional stress a child witness may undergo when testifying." *Id.* at 9 (quoting *Gutkaiss*, 614 N.Y.S.2d at 602) (internal quotation marks omitted).

252. See *supra* notes 245–246 and accompanying text (discussing problems with traditional comfort items and support persons in a case that ultimately utilized a court facility dog).

253. See Dellinger, *supra* note 108, at 185 (recognizing that dogs could be used instead of traditional comfort items when a compelling need exists).

254. See PHILLIPS & MCQUARRIE, *supra* note 34, at 22–23 (describing a number of practices to successfully implement a court facility dog program).

255. See *infra* text accompanying notes 280–288 (discussing appropriate characteristics for court facility dogs); see also *infra* text accompanying notes 267–271 (suggesting appropriate instructions for the jury when court facility dogs are present).

256. Cf. *State v. T.E.*, 775 A.2d 686, 697 (N.J. Super. Ct. App. Div. 2001) (requiring substantial need before allowing additional accommodations for a child witness).

257. *People v. Tohom*, SCI No. 338/2010, at 10 (N.Y. Dutchess Cnty. Ct. June 1, 2011), available at http://www.courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf.

258. Dellinger, *supra* note 108, at 190–91.

259. See Sandoval, *supra* note 184, at 21.

260. See, e.g., *State v. Powell*, 318 S.W.3d 297, 300 (Mo. Ct. App. 2010) (deciding during a sidebar conference at trial that two child witnesses could carry teddy bears for support); *Tohom*, SCI No. 338/2010, at 2, 10 (determining the child witness's need for a dog during a pretrial hearing).

and then determine if a court facility dog is necessary to calm the child.²⁶¹ This prevents an objection during the trial, which may further upset or stress the witness. A pretrial hearing also gives the judge an opportunity to hear the background on the child's recovery and the potential fears of the defendant, as well as testimony from the child's therapist about the child's ability to communicate without the dog.²⁶²

Only when the witness exhibits a substantial need for emotional support during testimony should a court facility dog be allowed in the courtroom.²⁶³ Ideally, the witness will have worked with the court facility dog leading up to trial so that the benefits on the child's ability to communicate with and without the dog are documented.²⁶⁴ By demonstrating that the child will suffer emotional or psychological harm by testifying without a dog, prosecutors better enable the judge to accurately balance a defendant's due process rights with the child's interests.²⁶⁵

2. *Jury Instruction.* A jury instruction about the presence of a court facility dog can serve multiple purposes in protecting the defendant.²⁶⁶ A basic instruction simply directs the jury not to draw any inferences whatsoever from the dog's presence.²⁶⁷ When the child begins to testify, "[a] specific, contemporaneous instruction" explaining the dog's purpose and that the jury

261. See *Tohom*, SCI No. 338/2010, at 2–4, 9–10 (approving a court facility dog during a pretrial hearing).

262. See *id.* at 2–4 (detailing how the previously withdrawn child opened up around the dog and why the dog would benefit the child's testimony); see also Charles R. Clark, *Professional Roles: Key to Accuracy and Effectiveness*, in *THE EVALUATION OF CHILD SEXUAL ABUSE ALLEGATIONS* 69, 70 (Kathryn Kuehnle & Mary Connell eds., 2009) (discussing the possibility of a mental health professional testifying on a child's reliability and ability to testify in court).

263. See Sandoval, *supra* note 184, at 21 (explaining that most determinations will be made before the witness testifies, but could also be made if the witness exhibits symptoms of stress and begins to withdraw on the witness stand).

264. See *Tohom*, SCI No. 338/2010, at 3–4 (noting that the child witness who was withdrawn and uncommunicative before working with a dog became vocal afterward).

265. Cf. *State v. T.E.*, 775 A.2d 686, 697 (N.J. Super. Ct. App. Div. 2001) (discussing the need to balance the defendant's rights with the needs of the child witness and taking into account substantial emotional need).

266. See *Tohom*, SCI No. 338/2010, at 10 ("With an appropriately fashioned instruction to the jury, any possible prejudice will be minimized, if not eliminated."); *infra* notes 267–272 and accompanying text.

267. Cf. *People v. Whitman*, 205 P.3d 371, 379 (Colo. App. 2007) (noting that the trial court had instructed the jury not to consider a support person); *T.E.*, 775 A.2d at 695 ("All right, ladies and gentlemen of the jury, we have Reshma Patel sitting with [B.E.] here. Please do not consider the fact that Ms. Patel is sitting with [B.E.] in any way, shape, manner or form in your determination determining credibility or any other determination in this matter." (internal quotation marks omitted)).

should not draw any inference from the dog “mitigate[s] concerns over the accommodation’s impact on the jury.”²⁶⁸

The judge could state as a supplementary instruction that the jurors should “not allow any bias, passion, prejudice, sympathy or pity to interfere with [the] verdict.”²⁶⁹ The judge could go one step further to advise the jury of the role of the court facility dog and explain why the dog is in the courtroom.²⁷⁰ This instruction would clarify that the court facility dog is present to calm the child during testimony and specifically instruct the jury that it should not draw any conclusions about the witness’s credibility based on the dog.²⁷¹ The defense may also craft an instruction to reduce what specific prejudices concern it most.²⁷² Instructing the jurors to disregard the dog’s presence focuses their attention on the child’s testimony instead of on the accommodation.²⁷³

3. *Guidelines for Court Facility Dogs.* Although dogs that work with children in legal settings are sometimes called therapy dogs,²⁷⁴ they serve a different purpose from therapy dogs and should instead be called court facility dogs.²⁷⁵ Therapy dogs and their volunteer handlers, although beneficial to child victims, can present some problems in the legal arena because they are less familiar with appropriate behavior in legal settings.²⁷⁶ Designated court facility dogs trained to act appropriately in legal settings create less risk during their interactions with child victims.²⁷⁷ Handlers who are prosecutors, interviewers, or police, as opposed

268. Cf. *Czech v. State*, 945 A.2d 1088, 1095 (Del. 2008).

269. *T.E.*, 775 A.2d at 695 (internal quotation marks omitted).

270. Cf. *State v. Letendre*, 13 A.3d 249, 256 (N.H. 2011) (describing an appropriate jury instruction detailing the purpose of support persons).

271. Cf. *T.E.*, 775 A.2d at 697–98 (setting out a number of safeguards, including a jury instruction describing the role of support persons).

272. See *Tohom*, SCI No. 338/2010, at 10 (requesting that the defendant submit a jury instruction to mitigate potential prejudice).

273. See *supra* notes 267–268 and accompanying text.

274. See, e.g., Justice, *supra* note 103, at 1 (“Like a teddy bear or a silent support person, a certified therapy dog remains quiet and well-trained.”); Glaberson, *supra* note 5 (“Rosie is a golden retriever therapy dog who specializes in comforting people when they are under stress.”).

275. Sandoval, *supra* note 184, at 17, 21 (“[C]ourt facility dogs . . . are specially trained dogs that are present in court to assist witnesses who may be frightened or nervous about testifying.”).

276. See Rebecca Wallick, *Dogs in the Courtroom, Follow-Up Part II*, BARK (Aug. 17, 2011), <http://thebark.com/content/dogs-courtroom-follow-part-ii> (discussing why court facility dogs are more appropriate for legal interaction than traditional therapy dogs).

277. See *id.* (describing a situation in which a therapy dog’s hair tainted evidence when it put its paws on an exam table and licked a child rape victim’s face during the child’s physical exam, requiring a new exam).

to volunteers, also reduce the risk of mistake or trauma.²⁷⁸ It is important to note that the “handler” in the courtroom is the child witness, which reduces the potential distraction associated with an adult handler in addition to a court facility dog.²⁷⁹

An appropriate canine should be one specifically trained for the legal world by an organization that specializes in training court facility dogs.²⁸⁰ A properly trained court facility dog will be prepared to interact with children so that the experience is positive for the animal and for the child.²⁸¹ A qualified court facility dog could be trained to be less conspicuous than even traditional comfort items.²⁸² In cases in which dogs have been used to comfort children, the dogs have been remarkably quiet and unobtrusive.²⁸³ The dog could be brought into the courtroom and placed into the witness box before the jury enters, so that the jury would never see the dog.²⁸⁴

Characteristics of a court facility dog include the ability to remain composed amidst distractions and behave in a way that is calm and relaxed.²⁸⁵ The dog should also be “reliable, controllable, [and] predictable.”²⁸⁶ Once a dog is approved as a court facility

278. See *id.* (relating an incident in which a volunteer handler was traumatized after she and her dog met a child victim in the lobby of a child advocacy center and the child immediately told the volunteer everything that had happened to her). Apart from the volunteer being traumatized, the child had to tell her story again to an interview specialist. *Id.*

279. Sandoval, *supra* note 184, at 21. A trained handler in the courtroom might distract the jury from the child’s testimony, countering the purpose of the dog’s presence. *Id.* Consequently, the jury could spend time examining the handler instead of listening to the child. *Id.* Additionally, taking the leash away from the child and giving it to a trained handler might decrease the child’s sense of empowerment. *Id.*

280. PHILLIPS & MCQUARRIE, *supra* note 34, at 8; Wallick, *supra* note 276. Assistance Dogs International accredits canine training programs for facility use. *Accreditation*, ASSISTANCE DOGS INT’L, <http://www.assistancedogsinternational.org/members/accreditation/> (last visited Mar. 3, 2013). For a list of programs and their accreditation, see *Programs Search*, ASSISTANCE DOGS INT’L, <http://www.assistancedogsinternational.org/members/programs-search/> (last visited Mar. 3, 2013). A nationally registered dog and its handler can be insured by their registration group, providing more security for court facility dog programs. PHILLIPS & MCQUARRIE, *supra* note 34, at 8.

281. See PHILLIPS & MCQUARRIE, *supra* note 34, at 6–7.

282. Wallick, *supra* note 207; *cf.* Dellinger, *supra* note 108, at 186 (noting that a court facility dog is less prejudicial than a support person).

283. See *People v. Tohom*, SCI No. 338/2010, at 5 (N.Y. Dutchess Cnty. Ct. June 1, 2011), available at http://www.courthousedogs.com/pdf/CourthouseDogs-CourtRulingPeople_v_Tohom.pdf (recounting that in the time the court had observed the dog, she was quiet, still, and motionless when people pet her, and did not react to anyone in the courtroom); Brief of Respondent, *supra* note 192, at 7 (commenting on the court’s observation that the dog was “well-trained and unobtrusive”).

284. Dellinger, *supra* note 108, at 191.

285. PHILLIPS & MCQUARRIE, *supra* note 34, at 9.

286. *Id.* Other traits that a well-trained court facility dog possesses include the

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canine, the dog and handler should continue training to maintain the skills necessary for court facility work.²⁸⁷ A screening program would ensure that court facility dogs and their handlers continue to possess the skills necessary for legal environments.²⁸⁸

V. CONCLUSION

The use of court facility dogs to comfort child witnesses during testimony is a logical step toward protecting child witnesses while, at the same time, recognizing a defendant's right to a fair trial. Children are increasingly likely to testify in the courtroom—face-to-face with the defendant.²⁸⁹ These witnesses will undoubtedly feel apprehension about testifying and will likely seek comfort and support in the courtroom. Court facility dogs can fill a gap for witnesses when traditional comfort items and support persons fail to ease their anxiety. Although opponents may raise a variety of objections to a dog being present in the courtroom, an array of precautionary measures effectively combat any prejudice. With a properly trained dog and an appropriately tailored jury instruction, a defendant's right to a fair trial will not be compromised.

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following: the ability to interact with people, the ability to work with a variety of human behavior, and the ability to walk easily on different surfaces from tile, to carpet, to rubber. *Id.*

287. *Id.* at 11.

288. *Id.* The TASK Manual recommends skills evaluations every two years, yearly health screenings by a veterinarian, and vaccinations. *Id.*

289. CARTER, *supra* note 21, at 20.