Note

Confronting Victims: Why the Statements of Young Victims of Heinous Crimes Must Still Be Subject to Cross-Examination

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Orlando Manuel Bobadilla does not make a very sympathetic defendant: he was charged with first-degree sexual assault of a three-year-old boy.[1] At his trial, Bobadilla was identified by statements that the victim gave to a child-protection social worker during a previous interview.[2] However, because of a Minnesota statute that allows out-of-court statements of child-victims to be used in court, Bobadilla never had an opportunity to cross-examine the victim.[3] The well-intentioned statute was designed to protect child-victims of these sorts of offenses from being further traumatized by having to face their abusers in court. But it meant that Bobadilla could not ask the victim questions to establish the certainty of the identification or to pose any questions regarding a motive to lie, improper influence, or confusion.[4] Rather than having the jury assess the victim's credibility, the judge alone decided that the victim's statements bore sufficient "indicia of reliability."[5] While the defendant was unable to challenge the identifying party's assertions, Bobadilla was also not allowed to attempt to prove his

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1. State v. Bobadilla, 709 N.W.2d 243, 246 (Minn. 2006).
2. *Id.* at 247–48.
3. *Id.* at 248.
4. *See id.*
5. *See id.* at 256.

innocence by offering evidence of his own consistent denials because *that* would be impermissible hearsay.[6] The jury subsequently found Bobadilla guilty, and he was sentenced to twelve years in prison for first-degree criminal sexual conduct.[7]

As a general principle, the right of a defendant like Bobadilla to confront the witnesses against him is guaranteed by the Confrontation Clause of the Sixth Amendment to the Constitution. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[8] A number of states have passed statutes carving out exceptions for child-victims of certain violent offenses when a judge determines that the statements meet some standard of reliability.[9] These statutes were consistent with the United States Supreme Court's decision in *Ohio v. Roberts* so long as there was either a showing that the witness was "unavailable" or that the statements bore "adequate indicia of reliability."[10] However, in 2004, the Supreme Court overturned *Roberts* in *Crawford v. Washington*, holding that all so-called "testimonial" statements (in other words, witness statements obtained for the purpose of prosecuting the accused) in criminal cases requires that the defendant not be deprived of his right to cross-examination.[11] Furthermore, the statutes are problematic because the jury, and not the judge, is responsible for assessing the credibility of evidence.[12]

6. *Id.* at 256–57.

7. *Id.* at 246.

8. U.S. CONST. amend. VI.

9. *See, e.g.*, MINN. STAT. § 595.02, subdiv. 3 (2013) (providing that "[a]n out-of-court statement made by a child under the age of ten years . . . alleging, explaining, denying, or describing any act of sexual conduct or penetration performed with or on the child" will be admissible "as substantive evidence" even if otherwise prohibited provided that the child either testifies or "is unavailable as a witness and there is corroborative evidence of the act"); WIS. STAT. § 908.08(3) (2012) (requiring that the "time, content and circumstances of the statement provide indicia of its trustworthiness").

10. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (internal quotation marks omitted).

11. *See* Crawford v. Washington, 541 U.S. 36, 51–52, 68–69 (2004) ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

12. *See* MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE EIGHTH CIRCUIT § 3.04 (Jud. Comm. on Model Jury Instructions for the Eighth Circuit, rev. ed. 2013) [hereinafter EIGHTH CIRCUIT MANUAL] ("In deciding what the facts are, you may have to decide what testimony

This Note will discuss the implications of *Crawford* and its progeny for these so-called victim protection statutes. Part I discusses the current state of Confrontation Clause jurisprudence, as well as policy considerations behind laws shielding children from having to testify in certain types of cases. Part II analyzes how those laws are inconsistent with both the Confrontation Clause as well as the role of the jury as fact-finder. Ultimately, Part III of this Note proposes that the offending statutes should be revised to make them consistent with the Supreme Court's *Crawford* line of decisions either by providing for live, two-way video testimony or by limiting the scope of the statutes.

I. CONFRONTATION CLAUSE JURISPRUDENCE

This Part outlines the *Ohio v. Roberts* decision, which provided the guidelines for admitting hearsay evidence against criminal defendants. It goes on to show how one United States Supreme Court case turned Confrontation Clause jurisprudence on its head. Finally, it demonstrates how courts have dealt with statutes addressing out-of-court testimony of child-victims and discusses the role of the jury as fact-finder in trials.

A. *OHIO V. ROBERTS*

In 1980, in *Roberts*, the United States Supreme Court issued a landmark ruling in Confrontation Clause jurisprudence. The Court considered whether hearsay evidence may be admitted against a criminal defendant.[13] In that case, a man named Herschel Roberts was charged with check forgery.[14] Roberts claimed that Anita Isaacs, an acquaintance of the defendant, allowed him to use her parents' checkbook. Roberts was convicted largely based on transcripts made when defense counsel questioned Isaacs at a preliminary hearing and she contradicted Roberts's claims.[15] The Court held that the Confrontation Clause bears upon hearsay in two ways. First, the framers showed a preference for face-to-face confrontation.[16] Second, in

you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.").

13. *See Roberts*, 448 U.S. at 62–63.

14. *Id.* at 58.

15. *Id.* at 58–60.

16. *See id.* at 65 ("In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use

the event that a witness is unavailable, hearsay evidence can only be used if it bears some indicia of reliability.[17] "Reliability can be inferred . . . where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded . . . absent . . . particularized guarantees of trustworthiness."[18] The *Roberts* Court concluded that judges (and not the jury) would be responsible for determining whether there were sufficient indicia of reliability in order to weigh the evidence.[19]

B. CONFRONTATION CLAUSE: *CRAWFORD* AND AFTER

Roberts did not stand forever, though, as the Supreme Court made a decision that significantly altered the landscape of Confrontation Clause jurisprudence. Tremors caused by that decision were felt almost immediately.

1. *Crawford*

Twenty-four years after *Roberts*, the United States Supreme Court reexamined the Confrontation Clause and its application to out-of-court statements offered at trial for prosecution purposes. In *Crawford v. Washington*, defendant Michael Crawford was charged with stabbing the man who attempted to rape his wife, Sylvia.[20] At trial, the prosecution played a recorded pretrial statement of Sylvia because marital privilege would have precluded her from testifying in court.[21] Crawford was subsequently convicted.[22] The Supreme Court held that using Sylvia Crawford's transcript against her husband violated the Confrontation Clause.[23] Justice Scalia observed that previous rationales applied by the Court had been unfaithful to the his-

against the defendant." (citing Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968))).

17. *Roberts*, 448 U.S. at 65–66 (allowing for certain hearsay evidence to be admitted when the circumstances around the collecting of the evidence establish the truth of the hearsay and therefore do not prejudice the defense when the defense is unable to cross-examine the witness); *see also* Mattox v. United States, 156 U.S. 237, 244 (1895) (holding that evidence resting on such a solid foundation ensures that the defense still receives the "substance of the constitutional protection").

18. *Roberts*, 448 U.S. at 66.

19. *See id.*

20. Crawford v. Washington, 541 U.S. 36, 38 (2004).

21. *Id.* at 38–40.

22. *Id.* at 41.

23. *Id.* at 68.

torical underpinnings of Confrontation rights.[24] While *Roberts* had focused on historically recognized hearsay exceptions and indicia of reliability, the *Crawford* Court asserted that use of "indicia of reliability" is inconsistent with the spirit of the Confrontation Clause.[25] Against this backdrop, the Court held that the Confrontation Clause was not subordinate to rules of evidence and a judge's subjective assessment of whether the evidence bore "indicia of reliability."[26] The Court held that states could develop their own hearsay laws to deal with so-called non-testimonial evidence, but that all testimonial hearsay would be inadmissible as a matter of law when offered against a criminal defendant.[27] Under this ruling, for the Confrontation Clause to be implicated under *Crawford*, there would have to be a showing that the declarant was not testifying and that the statements were testimonial.[28] In a foreshadowing of the confusion that was to ensue as a result of the Supreme Court's distinction between testimonial and non-testimonial hearsay, Justice Scalia stated that "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[29] The court did give some limited guidance as to what constituted "testimonial" hearsay: it included (1) ex parte in-court testimony, (2) formalized extrajudicial statements, and (3) statements made to be a substitute for in-court testimony.[30] The Court also enumerated several types of hearsay which are always testi-

24. *Id.* at 60.

25. *Id.* The Court's objections to the *Roberts* test were twofold. First, the test is too broad because it "applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause." *Id.* Second, the test is too narrow because it "admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability." *Id.*

26. *Id.* at 61–62. Justice Scalia used scathing language to criticize the use of such indicia, stating that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id.* at 62.

27. *Id.* at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

28. *See id.*

29. *Id.*

30. *Id.* at 51–52.

monial: "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[31]

2. *Crawford*'s Progeny[32]

Two years later, in *Davis v. Washington*, the United States Supreme Court had an opportunity to shed further light on what was meant by the word "testimonial." In that case, Adrian Davis was charged with violating a protective order against his ex-girlfriend.[33] Some of the most damaging evidence against him was a recording of his ex-girlfriend's 911 call.[34] The Court articulated a standard for distinguishing between testimonial and non-testimonial hearsay statements: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[35] The Court went on to hold that statements are testimonial when "the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[36] In *Davis*, the Court found that the 911 operator was gathering facts from the witness to deal with the emergency rather than fact-finding about past events in order to prove a charge.[37] By contrast, the Court found that statements identifying a defendant to law enforcement officials in a companion case, *Hammon v. State*,[38] were inadmissible.[39] These statements were testimo-

31. *Id.* at 68.

32. Several cases interpreting *Crawford* were not included in this Note because they were not germane to the arguments made within it. *See, e.g.*, Williams v. Illinois, 132 S. Ct. 2221 (2012); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Giles v. California, 554 U.S. 353 (2008).

33. Davis v. Washington, 547 U.S. 813, 818 (2006).

34. *Id.* at 817–19.

35. *Id.* at 822.

36. *Id.*

37. *Id.* at 827–28.

38. Hammon v. State, 829 N.E.2d 444, 457 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 547 U.S. 813 (2006).

39. *Davis*, 547 U.S. at 832 (finding that it was immaterial that the statements in *Hammon* were in response to initial inquiries made at the crime scene because they were "neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation").

nial because they were made after the emergency was over.[40] The *Davis* Court then remanded *Hammon* for another trial without the inadmissible evidence.[41]

In 2011, in *Michigan v. Bryant*, the Court again had to clarify what made statements testimonial. In that case, a man named Richard Bryant was found guilty of murder after he was identified by a dying declaration that his victim made to police.[42] The Court stated it would use an "objective" standard to assess the purpose of a statement by examining the surrounding circumstances to decide what a reasonable person would understand the purpose of the question to be.[43] In a departure from the *Crawford* discussion, which included in its definition of "testimonial" statements those statements where the intent of the person answering the question is to create a substitute for in-court testimony,[44] this decision seemed to focus on the primary purpose of the police in obtaining the statement.[45] After applying that standard to the case, the Supreme Court found the victim was primarily helping police respond to the ongoing emergency rather than aiding a later prosecution.[46]

In that same year, the Supreme Court again examined the Confrontation Clause in *Bullcoming v. New Mexico*.[47] Donald Bullcoming was charged with driving while intoxicated and

40. *Id.* The Court also approved *Hammon*'s dicta that a 911 interrogation innocently begun can "evolve into testimonial statements." *Id.* at 828 (quoting *Hammon*, 829 N.E.2d at 457) (internal quotation marks omitted).

41. *Id.* at 834.

42. Michigan v. Bryant, 131 S. Ct. 1143, 1150 (2011).

43. *Id.* at 1156. The standard by which the purpose is measured is an objective standard. *Id.* It can be derived from the circumstances including the time, location, and questions asked, but it is based on what a reasonable person would understand the purposes of the questioner to be and not on the actual subjective intent of the questioner. *Id.* One of the most important factors to be considered when assessing the primary purpose is whether or not there is an ongoing emergency that the police are responding to. *Id.* at 1157. An ongoing emergency can expand beyond threats to the witness and extend to other potential victims and responders. *Id.* at 1158. Another important question is the formality of the setting. *Id.* at 1160. A formal setting will almost always suggest the absence of an ongoing emergency, but an informal setting is not enough to suggest the absence of an emergency. *Id.* The content of the discussion can also be probative of the purpose of the questioning. *Id.* at 1160–61. Considering that a severely injured victim may have no purpose in answering the questions is permissible and does not mean that the Court is conducting a subjective inquiry. *Id.* at 1161.

44. Crawford v. Washington, 541 U.S. 36, 52 (2004).

45. *See Bryant*, 131 S. Ct. at 1155.

46. *Id.* at 1166–67.

47. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710 (2011).

convicted largely because of a forensic laboratory report showing his blood-alcohol concentration levels.[48] The test was performed by an analyst named Caylor, but the State called a different analyst to validate the report during trial because Caylor was on unpaid leave.[49] The Court, relying in part on the understanding that the lab report was made in a formal setting, found that admitting the report without the maker testifying violated Bullcoming's Confrontation Clause rights.[50] The Court found that the State had failed to establish that unpaid leave made Caylor truly "unavailable."[51] Justice Sotomayor concurred, finding that the formality of the statement was probative of testimonial hearsay, and that the report therefore should not have been admitted, because it was an attempt to get into evidence hearsay obtained by law enforcement for the purpose of prosecuting the defendant.[52] Any time something is created for that purpose, according to the Court's precedents, it is testimonial by nature.[53]

These cases have left ambiguity as to what it means for hearsay to be testimonial. The *Davis* Court did focus on three factors to consider when deciding whether a statement is testimonial: (1) whether the focus is on past or present events, (2) whether the purpose of the statement was to aid in the investigation of a crime, and (3) the formality of the statements.[54] However, despite these factors, there is still ambiguity as to what kind of hearsay may be constitutionally admitted.

C. STATE STATUTES INTENDED TO PROTECT CHILD-VICTIMS FROM THE TRAUMA OF CONFRONTING THEIR ABUSERS

Many states have laws that allow law enforcement interviews with child-victims of certain crimes to be admitted without subjecting the victims to cross-examination.[55] Many of these laws require that the victim be a child below a certain cutoff

48. *Id.* at 2709.

49. *Id.* at 2710–12.

50. *Id.* at 2717 (pointing out that the certificate Caylor created and signed was part of a formal process that is suggestive of testimonial evidence).

51. *Id.* at 2714.

52. *Id.* at 2720–21 (Sotomayor, J., concurring).

53. *Id.* at 2721 ("I am compelled to conclude that the report has a 'primary purpose of creating an out-of-court substitute for trial testimony,' which renders it testimonial." (citation omitted) (quoting Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011))).

54. *See* Davis v. Washington, 547 U.S. 813, 826–27 (2006).

55. *See supra* note 9.

age, that the crime be a certain category of assault or sexual abuse, and that the circumstances of the statements give some indication of the trustworthiness of the testimony.[56] These laws admitting allegations of criminal behavior have their roots in the common law, when prompt complaints of criminal conduct were admissible as part of the "hue and cry" requirement of violent crimes.[57] The law assumed that if a person really was an unwilling victim of a violent crime, then the victim would promptly report the offense.[58]

This section will describe the state of these statutes in Minnesota, Wisconsin, and California and will also discuss the role of the jury in assessing witness credibility. Minnesota, Wisconsin, and California are used as examples of these laws because they are similar to laws that other states have[59] and also illustrate the different forms that the laws can take.

1. Minnesota's Statute

Minnesota law provides that "[a]n out-of-court statement made by a child under the age of ten years . . . alleging, explaining, denying, or describing any act of sexual conduct or penetration performed with or on the child" will be admissible "as substantive evidence," even if otherwise prohibited, provided that the child either testifies or "is unavailable as a witness and there is corroborative evidence of the act."[60]

Minnesota courts addressed the statute several times after *Roberts* but before *Crawford*.[61] In *State v. Bellotti*, for example, Anthony Bellotti appealed from his conviction of sexually assaulting two girls.[62] The Minnesota Court of Appeals addressed whether a child's out-of-court statements to a doctor in a hospital about Bellotti's conduct were admissible in a second-degree criminal sexual conduct case.[63] This case provides a good exam-

56. *See supra* note 9.

57. Charles W. Ehrhardt & Ryon M. McCabe, *Child Sexual Abuse Prosecutions: Admitting Out-of-Court Statements of Child Victims and Witnesses in Louisiana*, 23 S.U. L. REV. 1, 14 (1995).

58. *See id.*

59. *See, e.g.*, FLA. STAT. § 92.53(1) (2014) (allowing for videotaped statements of victims under age sixteen to be used as a substitute for in-court testimony).

60. MINN. STAT. § 595.02, subdiv. 3 (2013).

61. *See, e.g.*, State v. Cole, 594 N.W.2d 197, 198–99 (Minn. Ct. App. 1999); State v. Hollander, 590 N.W.2d 341, 345–48 (Minn. Ct. App. 1999).

62. State v. Bellotti, 383 N.W.2d 308, 310 (Minn. Ct. App. 1986).

63. *Id.* at 310–11.

ple of how Minnesota courts measure the indicia of reliability. The following factors were considered: opportunity to commit the crime, absence of a motive for the victims to lie, spontaneity of the statements, absence of a long interrogation or leading questions, use of age appropriate terminology by the victim, reluctance to speak with men about the crime, consistency of the statements, spontaneity of the initial disclosure, length of time between the assault and the statement to the police, and if the victim agrees with everything asked of her.[64] The court applied the test articulated in *Roberts* and found that, by virtue of being declared incompetent, the witness was unavailable and there were indicia of reliability.[65] In a very short discussion, the court found the statute facially constitutional.[66] However, the court's finding of facial constitutionality is of little consequence now because this case did not consider the more recent *Crawford* decision prohibiting testimonial hearsay.

In *Bobadilla v. Carlson*, discussed in the Introduction of this Note and decided after *Crawford*, a federal district court in Minnesota assessed whether it was a constitutional violation to admit a videotaped statement given by a child-victim to a social worker working at the behest of a police officer.[67] The court found that statements taken during the course of police interrogations were testimonial by definition and therefore per se inadmissible as hearsay.[68] This holding is in direct conflict with the language of the statute that would leave it to the court to determine the admissibility of such a testimonial statement, even absent the opportunity to cross-examine the witness. Therefore, the statute should be found to be facially unconstitutional.

2. Wisconsin's Statute

Wisconsin has a similar statute that allows for a court to "admit into evidence the audiovisual recording of an oral statement of a child who is available to testify."[69] The statute

64. *Id.* at 312–13.

65. *Id.* at 315.

66. *Id.* at 314–15.

67. Bobadilla v. Carlson, 570 F. Supp. 2d 1098, 1099–100 (D. Minn. 2008).

68. *Id.* at 1104 ("[T]he Supreme Court was absolutely clear that '[s]tatements taken by police officers in the course of interrogations' are 'testimonial' and cannot be admitted unless the declarant is unavailable and the defendant has had an opportunity to cross-examine the declarant." (quoting Crawford v. Washington, 541 U.S. 36, 52 (2004))).

69. WIS. STAT. § 908.08(1) (2012).

uses similar "indicia of reliability" language when it allows for a court to determine whether "the time, content and circumstances of the statement provide indicia of its trustworthiness."[70]

The Wisconsin Court of Appeals examined the statute's constitutionality in the pre-*Crawford* decision *State v. Tarantino*.[71] In that case, Louis Tarantino appealed his conviction for sexually assaulting his three stepdaughters.[72] The evidence against Tarantino included audiovisual recorded testimony of the three victims from a pre-trial hearing.[73] On its face, the case does not implicate *Crawford*, as the defense had the opportunity to cross-examine the victim-witnesses at the pre-trial hearing and at trial under the Wisconsin statute, even though the state did not pursue direct examination at trial.[74] Tarantino appealed both the facial constitutionality of the statute[75] as well as the constitutionality of the trial court's application of that statute.[76]

Nevertheless, Tarantino alleged that his due process rights were violated.[77] He argued that since the state was not required to produce the children for live direct examination, his ability to cross-examine them as guaranteed by the Confrontation clause was conditioned upon compelling the child victim-witnesses to appear in court, something which would hurt him in the eyes of the jury.[78] The court was not persuaded by this argument. It found that the built-in cross-examination procedures "satisfie[d] substantive due process."[79] The court further pointed out that there were other examples of hearsay exceptions when the declarant was available.[80] However, *Tarantino* was decided fourteen years before *Crawford* overturned many of those exceptions.[81]

70. *Id.* § 908.08(2)(d).
71. State v. Tarantino, 458 N.W.2d 582 (Wis. Ct. App. 1990).
72. *Id.* at 584.
73. *Id.*
74. *Id.* at 585.
75. *Id.* at 587–89.
76. *Id.* at 589–90.
77. *Id.* at 588.
78. *Id.* He asserted that the choice between not being able to cross-examine the witnesses and looking unsympathetic to the victims by calling them as witnesses "place[d] him in a Catch-22." *Id.*
79. *Id.* at 589.
80. *Id.*
81. *See* Crawford v. Washington, 541 U.S. 36 (2004).

Tarantino also argued that since the testimony came from a pretrial hearing where the burden of proof was probable cause and the credibility of the witnesses could not be challenged, the court had impermissibly lowered the state's burden of proof from beyond a reasonable doubt to probable cause.[82] The court found the instruction telling the jury that they must find the defendant guilty "beyond a reasonable doubt" in order to convict was sufficient to address any burden of proof issues raised by the defendant.[83]

In the year before *Crawford*, in *State v. Snider*, that same statute again came before the Wisconsin Court of Appeals.[84] Robert Snider appealed his conviction of first-degree sexual assault of a child.[85] In an interview with a social worker recorded by a detective, the child-victim recounted the assault.[86] At trial, the state decided to use the recording after the victim-witness failed to recount the events in the same level of detail while on the stand as in the recording and omitted some important details.[87] Snider argued that the admission of the video was improper.[88] The court upheld the trial court's finding that "the statement possessed 'circumstantial guarantees of trustworthiness.'"[89] The factors considered in determining "trustworthiness" included age-appropriate knowledge of sexuality, a desire to not talk about certain body parts, the lack of indication of deceit in the video, the consistency of the video with the statement given by the victim to the guidance counselor, and the consistency of the video with the statement that Snider himself gave to the detective.[90]

Snider may not seem to raise a *Crawford* issue since the child actually appeared at trial. However, under the Federal Rules of Evidence, a witness is "unavailable" if that witness

82. *Tarantino*, 458 N.W.2d at 589–90.

83. *Id.* at 590 (internal quotation marks omitted). This case makes for another interesting comparison. *Crawford* only requires an opportunity to cross-examine, and does not specify whether it must have been in a setting with the same burden of proof as the criminal trial. 541 U.S. 36, 59 (2004).

84. State v. Snider, 668 N.W.2d 784, 788 (Wis. Ct. App. 2003).

85. *Id.* at 787.

86. *Id.*

87. *Id.* at 788 ("Despite leading questions from the prosecution, the victim left out some of the alleged touching she had described during the taped interview.").

88. *Id.* at 791.

89. *Id.*

90. *Id.* at 792.

"testifies to not remembering the subject matter."[91] Thus, the witness's unavailability was arguably analogous to not being present.

3. California's Statute

California also has a statute providing for the out-of-court statements of victims of child abuse or child neglect to be admitted at trial.[92] For the statement to be admitted, the court must find "in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability."[93] Additionally, the child must either be able to testify or be shown unavailable to testify.[94] In the second instance, there must be some form of corroborating evidence of the crime to indicate the truthfulness of the statement.[95]

The Court of Appeal for the Sixth District in California applied this statute in *People v. Harless*.[96] Robert Harless appealed his conviction for lewd acts on children under fourteen as well as sexual assault on children under fourteen.[97] Included in the evidence against Harless were out-of-court statements made to a social worker by one of the victims in an interview arranged by a detective.[98] Harless argued that those statements were inadmissible under *Crawford* because the witness was unable to remember[99] what she had said or to whom she had said it, so he did not have a meaningful opportunity to cross-examine her.[100] An opportunity to conduct "meaningful" cross-examination is guaranteed by the Confrontation Clause.[101] The court held that use of the prior inconsistent statement was proper because the witness's inability to recall every detail did

91. FED. R. EVID. 804(a)(3).
92. CAL. EVID. CODE § 1360(a) (West Supp. 2014).
93. *Id.* § 1360(a)(2).
94. *Id.* § 1360(a)(3).
95. *Id.*
96. People v. Harless, 22 Cal. Rptr. 3d 625 (Ct. App. 2004).
97. *Id.* at 628.
98. *Id.* at 631.
99. Making the witness "unavailable" under Federal Rule of Evidence 804(a)(3).
100. *Harless*, 22 Cal. Rptr. 3d at 636.
101. *See* United States v. Owens, 484 U.S. 554, 562 (1988) (showing that certain circumstances can "undermine the process" of cross-examination, rendering it not meaningful).

not render the cross-examination ineffective.[102] Further, since the witness was present, there was nothing improper about impeaching her in-court testimony with prior out-of-court inconsistent statements.[103]

D. ROLE OF THE JURY

Another issue that must be considered when assessing the permissibility of statutes allowing for out-of-court testimony is the role of the jury. As has been discussed, the state statutes call for courts to look to the circumstances surrounding out-of-court statements by young victims and assess their reliability.[104] In *Crawford*, Justice Scalia felt that judges were usurping the role of the jury by making their own judgments about "indicia of reliability" when he compared the use of the standard to eliminating jury trials in their entirety.[105]

The role of the jury when assessing witness statements, according to the Eighth Circuit's Model Criminal Jury Instructions, is to determine the credibility of that testimony.[106] The Court of Appeals for the Eighth Circuit examined the application of these jury instructions in a pre-*Crawford* decision in *United States v. Butler*,[107] in which Carl Butler appealed his conviction of aggravated sexual abuse of a minor.[108] The child victim-witness testified against Butler in the jury trial.[109] The trial court issued this jury instruction: "In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it."[110] The appellate court also approved the trial court's use of the following jury instruction:

> [Y]ou are the sole judge of the credibility of a child who testifies. You may consider not only the child's age, but . . . whether the child impresses you as having an accurate memory and recollection,

102. *Harless*, 22 Cal. Rptr. 3d at 636–37.

103. *Id.*

104. *Supra* Part I.C.1–3.

105. *Supra* note 26.

106. EIGHTH CIRCUIT MANUAL, *supra* note 12, § 3.04 ("In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.").

107. United States v. Butler, 56 F.3d 941 (8th Cir. 1995).

108. *Id.* at 942–43.

109. *Id.* at 943.

110. *Id.* at 945 (internal quotation marks omitted).

> whether the child impresses you as a truth-telling individual, and any other facts and circumstances which impress you as significant in determining the credibility of the child.[111]

Butler argued that the special instruction regarding the child-witness lent extra credence to the testimony, thereby unfairly "bolstering the credibility of the child-witness in this case."[112] The appellate court held that the trial court did not give any undue credence to the child's testimony, but simply correctly pointed out that the child's testimony deserved the same consideration as other testimony and that the jury should determine the witness's credibility.[113]

The Minnesota District Judges Association took a similar stance on the role of the jury when it stated in its jury instructions that "[y]ou are the sole judges of whether a witness is to be believed and of the weight to be given to a witness's testimony."[114]

The Supreme Court's interpretation of the Confrontation Clause has evolved with the *Crawford* decision erasing decades of jurisprudence under the *Roberts* standard. Many states allow out-of-court statements into evidence against criminal defendants under statutes that were held constitutional under the *Roberts* standard. However, the *Crawford* decision calls for reexamination of those statutes.

II. THE STATE STATUTES ARE INCONSISTENT WITH EXISTING JURISPRUDENCE

As this Part will show, these statutes are not without controversy. Section A will show that the statements allowed under these statutes are, in fact, testimonial. Section B demonstrates that the statutes fail to provide an opportunity for meaningful cross-examination. Section C will argue that the statutes do not require a showing of unavailability. Section D will show that these statutes rely on the now obsolete *Roberts* standard. Finally, Section E will argue that the statutes allow judges to improperly invade the province of the jury.

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

112. *Id.*

113. *Id.* at 945–46.

114. MINNESOTA JURY INSTRUCTIONS GUIDES, CRIMINAL 3.12 (Minn. Dist. Judges Ass'n, 5th ed. 2006); *see also* JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS No. 105 (Jud. Council of Cal. 2013) ("You are the sole judges of the believability of a witness and the weight to be given to the testimony of each witness.").

A. THE TYPES OF STATEMENTS THAT THESE STATUTES ALLOW ARE TESTIMONIAL

In order to trigger a *Crawford* analysis, the statements at issue must be testimonial.[115] The three categories of "testimonial" that *Crawford* laid out included (1) ex parte in-court testimony, (2) formalized extrajudicial statements, and (3) statements made to be a substitute for in-court testimony.[116] Initially, it would seem child-victim statements do not apply to any of the three categories. They are neither ex parte in-court testimony nor are they formalized extrajudicial statements.

For the third category, *Crawford* looks at the intent of the *witness* to determine whether a statement was given for the purpose of creating a substitute for in-court testimony.[117] Since it is difficult to imagine a child-victim understanding that he is giving statements for such a substitute, it follows that the third category also does not apply. However, in the *Bryant* decision, it appears that the Court shifted the focus of the primary purpose test from the witness to the questioner.[118] In this instance, the purpose for gathering the statements is to create a substitute for in-court testimony because the police are searching for information identifying the attacker with the intention to use it at trial.[119] At least one federal court has determined, without ruling on the facial validity of the statute, that it is "absolutely clear" that such evidence is testimonial.[120] Given the apparent evolution in Confrontation Clause jurisprudence, there likely will be an ongoing conflict as law enforcement and prosecutors continue using statements of young witnesses obtained during investigations as a proxy for live testimony.

B. THE STATUTES FAIL TO REQUIRE A MEANINGFUL OPPORTUNITY FOR CROSS-EXAMINATION

Having established that hearsay is in fact testimonial, *Crawford* and its progeny will not allow admission of the statements unless the state can show both that (1) the witness

115. *See* Crawford v. Washington, 541 U.S. 36, 51 (2004) ("[The Confrontation Clause] applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'").

116. *Id.* at 51–52.

117. *See id.* at 52.

118. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1154–55 (2011).

119. *See supra* Part I.C (detailing state statutes permitting substitutes for in-court testimony).

120. *See* Bobadilla v. Carlson, 570 F. Supp. 2d 1098, 1104 (D. Minn. 2008).

is unavailable and (2) that there was a prior opportunity for cross-examination.[121] The Minnesota and California statutes seem to violate the fundamental right of cross-examination by allowing the admission of testimonial hearsay without requiring the witness to testify, so long as there is corroboration of the act and the witness is unavailable.[122] The Wisconsin statute complies with the requirement for cross-examination facially,[123] but it arguably does not comply with the requirement substantively.

State v. Snider provides an interesting example of how Wisconsin's cross-examination requirement may be entirely cosmetic and not provide a defendant a true opportunity to confront the witness against him.[124] In that case, the prosecutor decided to play the taped victim's taped statement only after she was unable to recall the specific details that she had reported on the tape.[125] The defendant can hardly be said to have had an opportunity to cross-examine the witness when the witness was unable to recall the details admitted as evidence in the taped statement. In such a circumstance, the defendant is unable to make the witness answer for any inconsistencies or flaws in her story because the witness is able to simply assert lack of memory and allow the tape to stand as uncontroverted evidence.

Since these statutes do not provide criminal defendants with a meaningful opportunity to cross-examine the witnesses against them, they fail to comply with the Confrontation Clause.

C. THE STATUTES DON'T REQUIRE A SHOWING OF UNAVAILABILITY

Crawford and its progeny are predicated not only on the notion that the out-of-court statement must be testimonial in nature, but also on the notion that the declarant must be unavailable to testify and must have undergone cross-

121. *See Crawford*, 541 U.S. at 68.

122. *See* CAL. EVID. CODE § 1360(a)(3) (West Supp. 2014); MINN. STAT. § 595.02, subdiv. 3 (2013). But corroboration does nothing to satisfy the fundamental right of cross-examination. *See Crawford*, 541 U.S. at 68–69.

123. *See* WIS. STAT. § 908.08(1) (2012) (stating that a court "may admit into evidence the . . . recording . . . of a child who is available to testify").

124. State v. Snider, 668 N.W.2d 784 (Wis. Ct. App. 2003).

125. *Id.* at 788.

examination.[126] As noted above, the Minnesota and California statutes use the disjunctive, requiring either unavailability *or* cross-examination, so that, in the event that the victim has been cross-examined, unavailability is not required under the statutes.[127] Furthermore, the Wisconsin Court of Appeals ruled that the Wisconsin statute is an example of a hearsay exception that allows for admission of hearsay despite the availability of the declarant.[128] It is self-evident that the defendant was unable to cross-examine the videotape in *Snider*. If the child was unable to recall the details played on tape, then the defendant also did not have a meaningful opportunity to cross-examine the declarant.[129] That issue was raised and defeated in *People v. Harless* since the child was physically present in the courtroom.[130] However, the United States Supreme Court would likely disagree that a child unable to discuss the details being played on tape could be meaningfully cross-examined because the defendant lacks an opportunity to confront the witness with any logical inconsistencies in the testimony.

D. INAPPROPRIATENESS OF THE COURT DETERMINING THE "INDICIA-OF-RELIABILITY": SHADES OF *ROBERTS*

In addition to the Confrontation Clause problems inherent in the state statutes, the statutes also improperly imbue judges with the authority to make credibility determinations that should be made by the jury. This is not necessarily a constitutional concern, but rather a problem that implicates a fundamental component of the jury system.

All three of the statutes examined[131] contain similar criteria for what the judge should consider in order to determine whether out-of-court statements should be admitted. They all empower the judge to look to the "time, content, and circum-

126. *See Crawford*, 541 U.S. at 68.

127. *Supra* Part II.B.

128. *See* State v. Tarantino, 458 N.W.2d 582, 589 (Wis. Ct. App. 1990).

129. Ironically, the child's inability to recall the details of her attack, while dooming the admissibility of the evidence by failing the "cross-examination" prong of the *Crawford* test, potentially simultaneously satisfies the "unavailability" prong of the test because under the Federal Rules of Evidence, a witness unable to recall sufficient details can be deemed to be "unavailable." FED. R. EVID. 804(a)(3) (stating that a witness is unavailable if the witness testifies to "not remembering the subject matter"); *see also* United States v. Owens, 484 U.S. 554, 562 (1988) (showing that certain circumstances can "undermine the process" of cross-examination, rendering it less than meaningful).

130. People v. Harless, 22 Cal. Rptr. 3d 625, 636–37 (Ct. App. 2004).

131. *Supra* Part I.C.

stances" of the statements in order to determine whether the statements bear an "indicia of reliability,"[132] meaning the judge is weighing the credibility of the statements. Some might argue that the Federal Rules of Evidence allow these determinations.[133] However, this type of language seems to be predicated on the rejected *Roberts* framework. In fact, the "indicia of reliability" language found in the statutes is essentially the same language used in *Roberts*[134] yet specifically rejected in the *Crawford* decision.[135]

E. INVADING THE PROVINCE OF THE JURY

Weighing of credibility is the role of the jury.[136] Under *Crawford*, the jury's ability to observe the witness under cross-examination is the only legitimate method of assessing witness credibility.[137] Indeed, the Eighth Circuit upheld the propriety of an instruction telling the jury that it weighs the credibility of witnesses and approved an extra instruction saying that the jury alone was responsible for making that credibility determination, even in the case of child-witnesses.[138] When judges start making these determinations, they improperly invade the province of the jury and undermine a bedrock principle of the criminal justice system.

A brief hypothetical illustrates the problems inherent in allowing judges to substitute their judgment for that of the jury when making credibility determinations of witness statements. Assume a situation where a child reluctantly gave a recorded

132. CAL. EVID. CODE § 1360(a)(3) (West Supp. 2014); MINN. STAT. § 595.02, subdiv. 3(a) (2013); WIS. STAT. § 908.08(1) (2012).

133. *See* FED. R. EVID. 807 (requiring "equivalent circumstantial guarantees of trustworthiness").

134. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

135. Crawford v. Washington, 541 U.S. 36, 68 (2004) ("[W]e decline to mine the record in search of indicia of reliability.").

136. *See, e.g.*, EIGHTH CIRCUIT MANUAL, *supra* note 12, § 3.04 ("In deciding what the facts are, *you may have to decide* what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.") (emphasis added).

137. *See Crawford*, 541 U.S. at 68–69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

138. *See* United States v. Butler, 56 F.3d 941, 945 (8th Cir. 1995) ("[Y]ou are the sole judge of the credibility of a child who testifies. You may consider not only the child's age, but . . . whether the child impresses you as having an accurate memory and recollection, whether the child impresses you as a truth-telling individual, and any other facts and circumstances which impress you as significant in determining the credibility of the child.").

statement regarding an alleged sexual assault. The child might be reluctant because he or she is ashamed and confused about what happened. On the other hand, the child may have fabricated the event for some reason and now does not want to continue lying. When considering the reliability of the statement, the judge would have to weigh both of these possibilities before reaching a decision. However, if the judge decides the statements are reliable, then the possible inference that the child was reluctant because the story was not true, and the circumstances supporting that inference, are not presented to the jury. The jury then has to make a credibility determination about the out-of-court testimony without the benefit of all of the relevant information about the circumstances of the statement itself. Reliability cannot realistically be separated from credibility, but that is exactly the scenario that the exemplar statutes, as currently written, force upon the courts.

This problem can also be seen in *Tarantino*, where the trial court actually found that most of the factors it used to assess reliability did not support admitting the statements.[139] However, the court decided to admit them anyway because of the nature of the crime and the close relationship between the victim and the defendant, and because showing the video would reduce the victim's exposure.[140] Although the statements were admitted, it was the judge rather than the jury that considered the reliability factors.[141] The jury consequently had to make a credibility determination without the benefit of direct live testimony.[142]

The statutes discussed in this Note are problematic for a variety of reasons. They permit testimonial hearsay, fail to require a meaningful opportunity for cross-examination, do not require a showing of unavailability, rely on an overturned Supreme Court doctrine, and improperly invade the province of the jury.

139. State v. Tarantino, 458 N.W.2d 582, 587 (Wis. Ct. App. 1990).
140. *Id.*
141. *Id.*
142. *Id.* at 585.

III. HOW THE STATUTES COULD BE REDRAFTED CONSISTENT WITH CURRENT JUDICIAL PRINCIPLES AND THE CONFRONTATION CLAUSE

Having demonstrated that the statutes at issue are problematic both from a perspective of Confrontation Clause jurisprudence[143] as well as when viewed in terms of the traditional role of the jury,[144] this Note next addresses how to revise the statutes to make them consistent with those principles. Section A describes how the statutes could be revised to allow for the use of live, two-way video testimony. Section B proposes that the statutes could be rewritten to be consistent with the *Crawford* line of decisions. Section C concludes that the former option would better balance the competing interests in this contentious issue.

A. REWRITE THE CHILD-VICTIM PROTECTION STATUTES TO SPECIFICALLY ALLOW FOR THE USE OF LIVE TWO-WAY VIDEO TESTIMONY

The cases and statutes discussed above illustrate constitutional problems inherent in admitting out-of-court statements. Is there a way to protect the child-victims without depriving criminal defendants the right to confront their accusers? Closed-circuit television provides such an alternative. It can allow for cross-examination of a young witness during trial, thus allowing a jury to see the child testifying and assess the child's credibility, while at the same time protecting the child-witness from having to experience a face-to-face encounter with his or her alleged assailant.

Minnesota state courts have had opportunities to assess the statute allowing the use of closed-circuit television[145] as a way to shield child-victims from face-to-face confrontation with their alleged assailants while still protecting the Confrontation rights of the accused. In *State v. Ross*, the Minnesota Court of Appeals considered a situation where a man was charged with sexual abuse against his girlfriend's daughter.[146] There, the child-victim began her testimony in the courtroom but had to resume her testimony via two-way video because she became scared when asked about the defendant while she was in the

143. *Supra* Part II.A–C.
144. *Supra* Part II.D–E.
145. MINN. STAT. § 595.02, subdiv. 4(c)(2) (2013).
146. State v. Ross, 451 N.W.2d 231, 233 (Minn. Ct. App. 1990).

courtroom.[147] The court upheld the use of the video testimony and said that it did not violate the defendant's Confrontation rights because it came with a "particularized finding" that confronting her accuser face to face would cause further trauma to the child.[148]

Other jurisdictions also allow live, two-way video testimony. In 2009, the New York Court of Appeals heard an appeal from a case where the New York Supreme Court allowed an adult complainant to testify in an assault case via two-way video because he lived out of state and his health would have made traveling to New York to testify difficult.[149] In that case, the court upheld the conviction, finding that live, two-way video testimony upheld testimonial reliability required by the Confrontation Clause because there was "an individualized determination that denial of physical, face-to-face confrontation is necessary to further an important public policy."[150]

The statutes could be saved from Confrontation Clause violations if, instead of excusing the child from testifying, they instead allowed the child the protection of live two-way video testimony. While such a scheme would not prevent the child from having to revisit the traumatic experience, it would at least prevent the child from undergoing the trauma of meeting his or her alleged attacker face to face.[151] At the same time, the defendant would have a meaningful opportunity to cross-examine (or "confront") his or her accuser.

The Minnesota Court of Appeals has ruled that live two-way video testimony does not violate a defendant's Confrontation rights.[152] However, there is a question whether the Supreme Court would find two-way video testimony to be an appropriate substitute for face-to-face confrontation. In 1988, the Court overturned a conviction of a man charged with sexually

147. *Id.* at 233–34.

148. *Id.* at 235 (ruling that a finding that the child was scared to be in the presence of the defendant was sufficient to establish that the child would be traumatized if forced to face her assailant).

149. People v. Wrotten, 923 N.E.2d 1099, 1100 (N.Y. 2009).

150. *Id.* at 1102 (internal quotation marks omitted).

151. *See* Julie Oseid, Note, *Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 MINN. L. REV. 1377, 1384–85 (1985) ("[R]etelling the story is like another assault, because the traumatic incident must constantly be relived and remembered.").

152. *See Ross*, 451 N.W.2d at 234–35.

assaulting two thirteen-year-old girls.[153] The trial court committed reversible error when, pursuant to an Iowa statute,[154] it allowed the victim-witnesses to testify through a special screen designed to shield them from their alleged assailant.[155] The Court held that the Confrontation Clause ensured defendants the right to face-to-face confrontation because a witness would find it more difficult to lie when that witness has to testify face to face with his or her alleged assailant.[156] However, the Court did note that one of the factors that weighed against the state was that the statute presumed child-victims would find facing their assailants to be a traumatizing experience. The Court indicated an exception to the Confrontation Clause would require more particularized findings supporting the necessity of the shield.[157] This potentially leaves the door open for courts to allow alternatives to physical face-to-face testimony in the event of a particularized finding of trauma to the child victim-witness.

So long as such findings were provided for in some kind of hearing, courts would likely find two-way video testimony to be an appropriate method of testimony for child victim-witnesses for several reasons. First, in evaluating the need for two-way video, the judge would simply be assessing likelihood of trauma while leaving credibility determinations in the hands of the jury. Additionally, the *Coy* Court declined to ban outright statutes that provided for shielding of crime victims from their accusers.[158] The Supreme Court, however, did articulate the objectives of the Confrontation Clause as allowing the defendant to look at the witnesses, cross-examine the witnesses, and impeach the witnesses.[159] Based on those objectives, courts should be expected to uphold the use of two-way video testimony. Unlike the protective sheet at issue in *Coy*, live video testimony allows for the defendant and the jury to see the witness. The defendant's counsel also has an opportunity to cross-examine the witness, and defense counsel can impeach the wit-

153. Coy v. Iowa, 487 U.S. 1012, 1012 (1988).

154. IOWA CODE ANN. § 910A.14 (West 1987).

155. *Coy*, 487 U.S. at 1020.

156. *Id.* at 1019–20.

157. *Id.* at 1021.

158. *Id*. Indeed, the Supreme Court did distinguish from *Coy* a case involving two-way video testimony and found it permissible because it did have particularized findings supporting the important policy of protecting the child-victim susceptible to trauma. Maryland v. Craig, 497 U.S. 836, 853 (1990).

159. *Coy*, 487 U.S. at 1017.

ness. Therefore, the Supreme Court would likely be more receptive to live, two-way video testimony than it was to protective sheets.

Critics might argue that by putting children in a two-way video setup, they are still being placed in a traumatic setting. To some extent, that cannot be helped. The adversarial system requires confrontation as a protection of defendants' rights. Insulating a witness from having to face his or her assailant in a live setting is as much protection as can be offered without depriving the defendant of one of the Constitution's protections. However, by saving these victims from the live setting, the victims are protected by the knowledge that their assailant is only appearing on a TV screen, and there is no opportunity for direct physical contact between assailant and victim.

There are several benefits to allowing this form of testimony, which successfully balances the interests of both the accused and the victims of crimes. The defendant would have an opportunity to test the veracity of the accuser's claims and be able to expose any motives for dishonesty. The jury would be able to gauge the child-witness's facial expression and tone of voice to determine whether or not it finds the testimony to be credible. And, most importantly, it would be the *jury* making that determination.

B. LIMITING THE SCOPE OF THE STATUTES TO NON-TESTIMONIAL HEARSAY

In addition to providing for a new mechanism for child testimony, legislatures should amend the statutes to apply only to specific types of out-of-court statements. They should begin by including the word "non-testimonial" every time they refer to the statements. Since testimonial hearsay is inadmissible,[160] the statutes would clear one constitutional hurdle if the drafters made it clear that the statutes applied only to non-testimonial hearsay. This would be constitutionally permissible because courts may freely apply various rules of evidence to hearsay that is non-testimonial.[161] The statutes can draw this same line between "testimonial" and "non-testimonial" hearsay, allowing judges to make the more difficult distinction between the two, and allowing the statutes to evolve in accordance with the definitions handed down by the Supreme Court.

160. Crawford v. Washington, 541 U.S. 36, 68 (2004).

161. *See id.* at 61 ("[W]e apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law . . . .").

Critics might label this approach as unduly formalistic, especially given the ill-defined concept of "testimonial hearsay."[162] Saying that the statutes would only apply to "non-testimonial statements" would not be appreciably different from saying that "this statute only applies to situations where it comports with the Constitution." Those critics might argue that statutory language should say that statements made in a formal interview with a police officer, in a police station, or arranged by a police officer are not admissible. However, given the evolving nature of Confrontation Clause jurisprudence, it would be more prudent to simply say "non-testimonial" and allow the statutes to evolve alongside the case law. These changes would be consistent with *Davis*'s primary purpose test[163] by preventing the admission of statements made at the behest of police officers in the course of their investigation for the purpose of creating admissible evidence. Furthermore, these changes would also satisfy *Bullcoming*'s formality test[164] by banning statements at settings that the Supreme Court finds to be too formal of a setting in order for the evidence to be admissible.

Critics might also assert that statements made in order to create evidence to aid in prosecution or statements that were responses to questions asked for the same purpose are in violation of *Bryant*.[165] They would want the statute to explicitly say that no statement shall be admitted if an objectively reasonable person would think it was made for evidentiary use in criminal prosecution or in response to questions asked for such an evidentiary purpose. This would presumably compel judges to apply the reasonable person standard when making admissibility decisions rather than trusting trial judges to correctly apply all of the standards from the convoluted *Crawford* progeny. However, once again, this would preclude courts from being able to adjust to the ever-expanding line of cases dealing with Confrontation Clause jurisprudence.

The distinction between testimonial and non-testimonial statements would be a question of law for the judge to decide, but the jury should be able to analyze and give weight to any evidence regarding the reliability of the statements. In order to preserve the proper role of the jury,[166] the statute should re-

162. *See supra* Part I.B.2 (describing various interpretations).
163. Davis v. Washington, 547 U.S. 813, 822 (2006).
164. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2717 (2011).
165. Michigan v. Bryant, 131 S. Ct. 1143, 1147–48 (2011).
166. *See* EIGHTH CIRCUIT MANUAL, *supra* note 12, § 3.04.

quire that the evidence regarding the "time, content, and circumstances"[167] of the statements be presented to the jury to aid them in making their credibility determinations. This way, the judge would not merely inform the jury that the court has determined the statements are reliable because of the circumstances under which they are given. Instead, the jury would be able to see the same evidence as the judge and use it to either agree with the court or determine that the statements are not inherently reliable. Whatever decision the jury makes, this rule would make the jury the sole judge of how much (if any) weight to give to the out-of-court statements.

In contrast to objections that the proposed revisions do not go far enough to comport the statutes with modern Confrontation Clause jurisprudence, other critics might claim the added restrictions would make it too difficult to admit out-of-court statements and thus fail to protect vulnerable child-victims. While these proposals would make it more difficult to prevent some witnesses from having to take the stand in potentially traumatic situations, if the statutes are not changed in order to make them consistent with *Crawford*, then no victims will be protected because they will all have to testify in person. Therefore, by limiting the scope of these statutes, legislatures can continue to protect vulnerable child-victims while not running afoul of the Confrontation Clause.

C. THE PREFERRED SOLUTION

Considering both live, two-way video testimony and rewriting the statutes to limit their scope, the better solution would be to amend the statutes to allow for live, two-way video testimony. The expansive definitions offered by *Crawford* and its progeny of what makes hearsay evidence "testimonial" would result in only a small amount of hearsay being admitted under the revised statutes. Therefore, prosecutors would frequently be left with the Hobson's choice between putting the child-victim on the stand to face their alleged attacker or trying to prosecute without the evidence. Allowing for live, two-way video testimony would prevent them from having to face that choice.

Advocates of the revisions limiting the scope of the statutes to non-testimonial hearsay might argue that live testimony

167. CAL. EVID. CODE § 1360(a)(3) (West Supp. 2014); MINN. STAT. § 595.02, subdiv. 3(a) (2013); WIS. STAT. § 908.08(1) (2012).

would be preferable to testimony on a video screen. Prosecutors likely would not disagree. This solution, however, does not mean that child-witnesses must testify through two-way video. Rather, it is simply an option if the prosecutor feels the child is not emotionally strong enough to testify in person. If the child is willing and able to testify live, that can be done—and will likely be more powerful testimony. But, if the prosecutor did not feel that was the case, prosecutors would have the added option of using closed-circuit television in order to balance the prosecutorial interests with the protection of vulnerable victims. Giving prosecutors that ability to balance their prosecutorial interests with the need to protect the child-victims would help ensure that both interests are adequately protected.

CONCLUSION

To protect child-victims of heinous crimes, many states have laws allowing those children to have out-of-court statements admitted against their alleged assailants in criminal trials. While the objective of these statutes is a noble one, it also disturbs the Confrontation rights of the defendants and impermissibly inserts judges into a credibility-weighing role ordinarily reserved for juries. It is important for legislatures, in their haste to protect sympathetic victims, not to forget that our criminal justice system also owes an important obligation to unsympathetic defendants.

If states wanted to keep the children from having to testify at all, they could attempt to rewrite the statutes to be consistent with *Crawford* and its progeny. However, the use of two-way video testimony to save children the trauma of face-to-face confrontation would most effectively preserve the Confrontation rights of the accused while still protecting those children.