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Deborah Paruch

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**SILENCING THE VICTIMS
IN CHILD SEXUAL ABUSE PROSECUTIONS:
THE CONFRONTATION CLAUSE AND CHILDREN'S
HEARSAY STATEMENTS BEFORE AND AFTER
*MICHIGAN V. BRYANT***

*Deborah Paruch**

I. INTRODUCTION

Child sexual abuse prosecutions present challenging evidentiary and constitutional issues. Oftentimes, there is no physical evidence of the abuse. Children will frequently recant their allegations, since the vast majority of these crimes are committed by a parent, other relative, or by a friend of the family.¹ The child is often the only witness to the crime because these crimes take place in secret.² Furthermore, the young child witness may be incapable of understanding the nature of the crime, the significance of his or her testimony, or be too frightened or anxious to testify.³ The problem is compounded when courts find young children incompetent to testify on the grounds that they are unable to distinguish the truth from lies⁴

* Deborah Paruch is an associate professor of law at the University of Detroit Mercy School of Law. The author would like to thank her research assistant, Grace Trueman, for all of her help with this article.

¹ See Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 PSYCHOL. PUB. POL'Y & L. 194, 195, 216-17 (2005) (discussing numerous scientific studies showing a wide range of recantation by alleged child sexual abuse victims); Myrna Raeder, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 374-75 (2005).

² Raeder, *supra* note 1.

³ Brian Fox, *Crawford at Its Limits: Hearsay and Forfeiture in Child Abuse Cases*, 46 AM. CRIM. L. REV. 1245, 1245 (2009).

⁴ Victoria Talwar et al., *Children's Conceptual Knowledge of Lying and Its Relation to Their Actual Behaviors: Implications for Court Competence Examinations*, 26 LAW & HUM.

or because they are unable to communicate in a traditional courtroom setting.⁵ As a result of these factors, prosecutors rely heavily on the use of hearsay in child abuse prosecutions, with children's statements primarily presented as excited utterances, statements made in connection with medical diagnosis and treatment, or through the catchall or residual exceptions to the hearsay rule.⁶

It is often difficult to separate emotion from reason in these cases given the nature of the crime. Moreover, because of the highly charged emotions these crimes bring out, it can be easy to overlook the devastating effect that false accusations of this nature have on the accused. Marriages and careers have been destroyed and reputations ruined as the result of false accusations of sexual abuse.⁷ But it is precisely because of the highly emotional nature of these offenses that courts must proceed with caution to assure that the proper balance is maintained between the competing interests at stake: the need

BEHAV. 395, 396 (2002).

⁵ Raeder, *supra* note 1, at 376.

⁶ Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009, 1009 (2007).

⁷ Robert G. Marks, *Should We Believe the People Who Believe the Children?: The Need for a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207, 208-09 & n.7 (1995) (citing RICHARD A. GARDNER, TRUE AND FALSE ACCUSATIONS OF CHILD SEX ABUSE xxvii (1992)). Prosecutors continue to pursue cases even though they have insufficient evidence. *Id.* at 210-11 & nn.15-17 (providing instances of prosecutorial excess). A recent case in Michigan illustrates what can happen in an overzealous quest to prosecute allegations of sexual abuse. Julian and Thal Wendrow were charged in late 2007 with sexual abuse after their 14-year-old autistic and mute daughter alleged through facilitated communication (FC) that her father had sexually abused her. Brian Dickerson, Op-Ed., *How Judicial Cowardice Prolonged a Tragedy*, DETROIT FREE PRESS, June 19, 2011, at A23. The facilitated communication in this case involved a school aide who guided the girl's hand on a keyboard. *Id.* The aide reported the allegations to school authorities, which in turn contacted the police. L.L. Brasier & John Wisely, *A Family's Nightmare*, DETROIT FREE PRESS, June 12, 2011, at A1. The parents were arrested and their daughter and son were placed in foster care. *Id.* Thal Wendrow was ultimately released on house arrest, however, Julian was imprisoned for nearly three months. Dickerson, *supra*. Although there was no evidence to indicate that FC was anything but junk science, the police and prosecutors continued their case against the parents. *Id.* Their attempts to communicate with the young girl without FC were unsuccessful. *Id.* The prosecutors and police also aggressively questioned the Wendrows' son and dismissed a nurse's evaluation that tended to exonerate the Wendrows. Brasier & Wisely, *supra*. They also attempted to communicate with the girl using FC even after a court barred them from doing so. *Id.* Four months after the case began, the prosecution was forced to dismiss the case for lack of evidence. *Id.* All in all, the Wendrow family was separated for 106 days. *Id.* Julian and Thal lost their jobs and believe they will always be viewed with suspicion. *Id.* They ultimately filed a federal lawsuit against police, the prosecutors, and the school district. L.L. Brasier, *Parents Target Prosecutors, School, Police*, DETROIT FREE PRESS, June 17, 2011, at A7. They recently settled their claims against the police department for \$1.8 million. *Id.*

to protect the vulnerable victims of these dreadful crimes and safeguarding a defendant's Sixth Amendment right to confrontation.⁸

Under the standard enunciated in *Ohio v. Roberts*,⁹ courts were free to admit hearsay statements without fear of violating the Confrontation Clause so long as the court found that the statements bore an "adequate indicia of reliability."¹⁰ Additionally, the statements were presumed to be reliable if they fit within a firmly established exception to the hearsay rule.¹¹ The Supreme Court's 2004 decision in *Crawford v. Washington*¹² overruled *Roberts* and shifted the focus from the reliability of the hearsay statements to an examination of the nature of the statements themselves, requiring courts to determine if the statement fit within the Court's loosely defined definition of a "testimonial" statement.¹³ The Court held that a statement would be testimonial if it was made " 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' "¹⁴ The Court further held that if a hearsay statement is found to be testimonial, it cannot be admitted in a criminal trial unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.¹⁵

In the seven years since the *Crawford* decision, the Court has issued two other decisions on this matter. *Davis v. Washington*¹⁶ was decided in 2006. In *Davis*, the Court further developed its definition of testimonial statements, holding that statements made to police during an "ongoing emergency" were not testimonial because the primary purpose of the interrogation was to enable the police to respond to the situation at hand, rather than produce evidence for use at a subsequent trial.¹⁷

In February 2011, the Court handed down its decision in

⁸ See Marks, *supra* note 7, at 214-18 (discussing conflicting issues of need for hearsay in sexual abuse cases and the possible infringements to a defendant's Sixth Amendment right to confrontation).

⁹ 448 U.S. 56 (1980), *overruled by* *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004).

¹⁰ *Crawford*, 541 U.S. at 42 (citing *Roberts*, 448 U.S. at 66).

¹¹ *Id.*

¹² 541 U.S. 36 (2004).

¹³ *Id.* at 68-69.

¹⁴ *Id.* at 52 (quoting Brief for Nat'l Ass'n Criminal Def. Lawyers et al. -as Amici Curiae Supporting Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410) at *3).

¹⁵ *Id.* at 68-69.

¹⁶ 547 U.S. 813 (2006).

¹⁷ *Id.* at 822.

Michigan v. Bryant.¹⁸ In *Bryant*, the Court further developed the “ongoing emergency” rule it established in *Davis*, and in doing so, suggested that the duration of an emergency in domestic violence cases will typically be much shorter than in other types of crimes.¹⁹ Although the Court affirmed the requirement that courts should apply an objective standard in determining “ ‘the primary purpose of the interrogation,’ ” the Court shifted the focus of the inquiry from the declarant to the interrogator, particularly in situations where a declarant is operating under a disability.²⁰ Finally, the Court reintroduced the concept of reliability into its Confrontation Clause jurisprudence, although it provided no guidance as to how this concept should be applied, nor did it explain how the reliability of a hearsay statement could be relevant to the determination of whether a statement is testimonial.²¹

This article examines the changes to Confrontation Clause jurisprudence brought about by the *Bryant* decision, particularly as it relates to children’s hearsay statements in criminal sexual abuse trials, and argues that the effect of this decision will be to further restrict the admission of these statements in cases where the children do not testify. Part II of this article briefly sets forth the history of the Confrontation Clause and includes a discussion of the admissibility of children’s hearsay statements during the seventeenth and eighteenth centuries. Part III reviews the Supreme Court’s decisions in

¹⁸ 131 S. Ct. 1143 (2011).

¹⁹ *Id.* at 1156.

²⁰ *Id.* at 1156, 1161-62 (quoting *Davis*, 547 U.S. at 822).

²¹ *Id.* at 1174-75 (Scalia, J., dissenting). Another line of cases decided by the Supreme Court dealing with Confrontation Clause challenges to the admissibility of hearsay involve reports containing forensic analysis of certain seized substances. In the first case, *Melendez-Diaz v. Massachusetts*, the Court held that an analyst’s sworn affidavit, setting forth the results of a forensic analysis and reporting that the substance tested was found to be cocaine, was a testimonial statement and inadmissible in the absence of a showing that the analyst was unavailable to testify at trial and that the defendant had a prior opportunity for cross-examination. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009). In *Bullcoming v. New Mexico*, the Court held that the admission of a laboratory report containing a forensic analysis of the defendant’s blood sample through the in court testimony of a scientist employed by the laboratory, but who neither observed nor performed the test, violated the Confrontation Clause. *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). At the time of this writing, the Court is deciding *Williams v. Illinois*, which raises the question of whether the Confrontation Clause is violated where a prosecution expert in a criminal case relies on a testimonial lab report in forming his opinion, the report is disclosed to the jury under Fed. R. Evid. 703, and the author of the report fails to appear as a witness at the trial. *People v. Williams*, 939 N.E.2d 268, 274 (Ill. 2010), *cert. granted*, 131 S. Ct. 3090 (2011).

Ohio v. Roberts,²² *Crawford v. Washington*,²³ *Davis v. Washington*,²⁴ and *Michigan v. Bryant*.²⁵ Part IV examines state and federal cases that involved children's hearsay statements in sexual abuse prosecutions. It illustrates how courts resolved questions related to children's hearsay under *Roberts* and how *Crawford* and *Davis* altered the resolution of these issues. Part V analyzes the *Bryant* decision and demonstrates how this decision will likely serve to further restrict the admissibility of children's hearsay statements in sexual abuse prosecutions. The article concludes with recommendations that courts can employ to increase the likelihood that children will testify at trial. It also recommends that prosecutors utilize pre-trial depositions when feasible to do so, as these can preserve a defendant's Confrontation Clause rights by providing the defendant with an opportunity for cross-examination of the child witness before the actual trial, therefore assuring that the child's testimonial statements will be admitted at trial.

II. A BRIEF HISTORY OF THE CONFRONTATION CLAUSE

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"²⁶ The right of confrontation serves two purposes, which have been described as follows:

The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-

²² 448 U.S. 56 (1980), *overruled by Crawford*, 541 U.S. at 68-69.

²³ 541 U.S. 36 (2004).

²⁴ 547 U.S. 813 (2006).

²⁵ 131 S. Ct. 1143 (2011).

²⁶ U.S. CONST. amend VI. The Amendment was proposed to Congress in 1789 and adopted in 1791. H. JOURNAL, 1st Cong., 1st Sess. 85-88 (1789), *available at* [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(hj001139\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(hj001139))) (introducing the Bill of Rights Amendments); *see Ratification of Constitutional Amendments*, U.S. CONST. ONLINE, <http://www.usconstitution.net/constamrat.html> (last modified Nov. 11, 2010) (stating the dates that states ratified the Bill of Rights; Virginia was the eleventh state to ratify on December 15, 1791 providing the required majority of eleven out of fourteen states). The Confrontation Clause is made applicable to the states through the Fourteenth Amendment to the United States Constitution. *See Pointer v. Texas*, 380 U.S. 400, 403 (1965) (holding that the right of confrontation is a fundamental right made applicable to the states through the Fourteenth Amendment to the United States Constitution).

examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by direct and personal putting of questions and obtaining immediate answers.

. . . .

There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the *judge* and the *jury* are enabled to obtain the elusive and incommunicable evidence of a *witness' deportment while testifying*, and a certain subjective moral effect is produced upon the witness.²⁷

The United States Supreme Court has recognized that the right to not be confronted with hearsay is a corollary to the right of cross-examination.²⁸ Hearsay presents two distinct legal issues: whether the out-of-court statements are admissible under the established evidentiary rules and whether the admissibility of the hearsay statements in a criminal proceeding violates the Confrontation Clause of the Sixth Amendment. In *California v. Green*,²⁹ the Court noted:

[W]e have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguable recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.³⁰

The Confrontation Clause has its origins in Roman law and the common law of England.³¹ Many discussions of the history of the

²⁷ 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA § 1395, at 94, 96 (2d ed. 1923).

²⁸ See *California v. Green*, 399 U.S. 149, 155-56 (1970) (explaining that while there is overlap between the Confrontation Clause and hearsay prohibitions, there is no complete congruence).

²⁹ 399 U.S. 149 (1970).

³⁰ *Id.* at 155-56 (internal citations omitted).

³¹ *Crawford*, 541 U.S. at 43.

Confrontation Clause begin by noting that history provides scant guidance in interpreting it.³² Justice Harlan, concurring in *Green*, noted: “As the Court’s opinion suggests, the Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause.”³³

In the common law of England, the development of the hearsay rule, as a “distinct and living idea,” did not begin until the sixteenth century and did not reach full development until the early eighteenth century.³⁴ The process of obtaining information from persons who were not called as witnesses during the trial was a common practice in trials in England during the fifteenth century.³⁵ In fact, it was a standard practice for jurors to confer privately with witnesses outside of court, where the witnesses would “inform” the juror.³⁶ This practice was described by Chief Justice Fortescue in 1450, “‘If the jurors come to a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is justifiable.’”³⁷ In those days, jurors also may have been provided with a “counsel’s report,” which documented what a witness might have said or predicted what the witness would likely say about the matter before the court.³⁸ During this time, there was little to no objection to the use of these types of out-of-court statements at trial.³⁹

During the seventeenth century, juries came to depend, with increased frequency, on in-court testimony as the chief source of their information.⁴⁰ At this time, a sense of impropriety arose surrounding the use of out-of-court statements, based principally on the notion that when these types of statements are used as evidence, they should

³² See, e.g., *White v. Illinois*, 502 U.S. 346, 361-62 (1992) (Thomas, J., concurring) (discussing the history of the development of the Confrontation Clause). “From the scant information available it may tentatively be concluded that the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses.” *Green*, 399 U.S. at 179 (Harlan, J., concurring).

³³ *Green*, 399 U.S. at 173-74.

³⁴ John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 437 (1904).

³⁵ *Id.* at 438-39.

³⁶ *Id.* at 440.

³⁷ *Id.* (quoting Chief Justice Fortescue).

³⁸ *Id.* at 441.

³⁹ Wigmore, *supra* note 34, at 440. Actually, the process of producing fact witnesses at trial was discouraged. *Id.* at 440-41. Compulsory process for witnesses was not provided until 1562-1563. *Id.* at 440.

⁴⁰ *Id.* at 441.

be admitted only if the person affected by them had an opportunity to test their trustworthiness by means of cross-examination.⁴¹ It was also during this period of time that considerable thought was being given to the quantity and the reliability of the evidence that would allow jurors to reach a correct decision. Statutes and other rules were passed that addressed topics such as “good and sufficient” or “good and lawful” proofs.⁴² It was as a result of these transformations that courts began to question “whether a hearsay [sic] thus laid before [a jury] would suffice”⁴³ and courts began to challenge the validity of verdicts where the evidence presented at trial consisted solely of hearsay.⁴⁴

Many accounts of the history of the Confrontation Clause cite the infamous prosecution of Sir Walter Raleigh for treason in 1603.⁴⁵ Raleigh was charged with conspiring against King James by raising money abroad to distribute to rebels with the objective of having Arabella Stuart placed on the throne.⁴⁶ The most damaging evidence presented by the prosecution was statements that Lord Cobham had given during an interrogation conducted in the Tower of London.⁴⁷ Cobham had allegedly stated that Raleigh was the instigator of the plan to overthrow the King. During the trial, records of this interrogation along with a letter written by Cobham were read to the jury.⁴⁸ Raleigh denied the charges, presented evidence that Cobham had recanted his statements, and demanded that the court call Cobham to appear at trial.⁴⁹ Raleigh argued, “ [T]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face.”⁵⁰ However, his request was denied.⁵¹ It is

⁴¹ *Id.* at 448.

⁴² Wigmore, *supra* note 34, at 441-42.

⁴³ *Id.* at 442.

⁴⁴ *Id.* at 442-43. For example, a discussion was raised whether the requirement for a conviction for treason, which required evidence from two accusers, could be satisfied if one was by hearsay. *Id.* “[I]t was there holden for law, that of two accusers, if one be an accuser of his own knowledge, or of his own hearing, and he relate it to another, the other may well be an accuser.” Thomas’s Case, 73 Eng. Rep. 218, 218-19 (1553).

⁴⁵ See, e.g., *Crawford*, 541 U.S. at 44.

⁴⁶ Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 388 (1951).

⁴⁷ *Id.*; Jacqueline Forsgren Cronkhite, *Signed, Sealed, Delivered . . . Unconstitutional: The Effect of Melendez-Diaz on the Use of Notarized Crime Laboratory Reports in Arkansas*, 63 ARK. L. REV. 757, 761 (2010).

⁴⁸ *Crawford*, 541 U.S. at 44.

⁴⁹ *Id.*

⁵⁰ *Id.* (quoting Trial of Sir Walter Raleigh, (1603) 1 James I. 15-16, available in 2 T.B.

reported that one of the judges responding to Raleigh's request stated: "[M]any horse-stealers may escape, if they may not be condemned without witnesses."⁵² Raleigh was convicted and sentenced to death.⁵³

It was during the sixteenth and early seventeenth centuries that courts began to question the practice of freely admitting hearsay.⁵⁴ However, at this time, the law distinguished hearsay statements made under oath from those that were not.⁵⁵ It was common practice to have a sworn statement read aloud to the jury and for the deponent to confirm it by indicating that it was freely and voluntarily made.⁵⁶ By the end of the seventeenth century, this practice of admitting sworn extrajudicial statements was abandoned in favor of one that required the testimony of the witness in court.⁵⁷

In fact, two trials decided in 1696, *The King v. Paine*⁵⁸ and *Fenwick's Trial*,⁵⁹ appear to have solidified the rule that hearsay statements, including those given under oath, should not be admitted if there was no prior opportunity for cross-examination. In *Paine*, the declarant had given a deposition under oath in front of the Mayor of Bristol but died before the trial.⁶⁰ The King's Bench remarked, "[T]hese depositions should not be given in evidence, the defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination."⁶¹

By the beginning of the eighteenth century, the hearsay rule had become settled doctrine and prohibited out-of-court statements from being used as evidence at trial unless the opponent was pro-

HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 15-16 (1816), available at <http://books.google.com/books?id=9AxAAAAAYAAJ&dq=Let%20Cobhan%20be%20here%20let%20him%20speak%20it&pg=PT19#v=onepage&q&f=false> (last visited Oct. 11, 2011)).

⁵¹ *Id.*

⁵² *Miller v. Indiana*, 517 N.E.2d 64, 67 (Ind. 1987) (quoting K. Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 (1972)).

⁵³ *Crawford*, 541 U.S. at 44.

⁵⁴ Wigmore, *supra* note 34, at 441-43.

⁵⁵ *Id.* at 445-46, 448, 451.

⁵⁶ *Id.* at 448, 451.

⁵⁷ *Id.* at 451-56.

⁵⁸ *The King v. Paine*, (1700) 87 Eng. Rep. 584 (K.B.).

⁵⁹ *Fenwick's Trial*, (1696) 13 How. St. Tr. 537, 591-93 (Eng.).

⁶⁰ *Paine*, 87 Eng. Rep. at 584.

⁶¹ *Id.* at 585.

vided with an opportunity for cross-examination.⁶² This prohibition applied to both sworn and unsworn statements.⁶³

Children's hearsay statements were treated differently from those of adults during the seventeenth and early eighteenth centuries. The law generally allowed children's hearsay statements in criminal trials in the absence of their sworn testimony on the grounds of necessity; the statements were the best evidence available in the absence of live testimony.⁶⁴ Furthermore, courts routinely admitted children's statements that were made before magistrates whose function was to determine if an arrest warrant should be issued or whether the defendant should be detained and held over for trial.⁶⁵

It was also during this period of time that judges were beginning to understand the necessity of abolishing the presumption of a child witness' incompetence. The decision in *The King v. Brasier*⁶⁶ is an example of a case involving hearsay statements of a young child in

⁶² 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 27 (Little, Brown and Company rev. ed. 1974).

⁶³ *Id.* (quoting *Lent v. Shear*, 55 N.E. 2, 4 (N.Y. 1899)). One author has summed it up as follows: "Such . . . seems to have been the course of development of that most characteristic rule of the Anglo-American law of evidence – a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure." *Id.* at 28.

⁶⁴ Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 IND. L.J. 1029, 1036 (2007).

⁶⁵ *Id.* at 1045.

⁶⁶ 168 Eng. Rep. 202 (1779). Several different versions of the opinion in this case have been published. Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 923-31 (2007). The various reported opinions differ with respect to whether the child's mother testified at the trial and whether she should have been allowed to testify as to her child's statements. *Id.* at 926, 928. One published version indicates that the mother did testify at the trial. *Id.* at 926. It reported that the "Judges determined, therefore, that the evidence of the information which the infant had given to her mother . . . ought not to have been received." *Id.* at 926 (citing *Brasier*, 168 Eng. Rep. 202). Another version of the case published in 1789 makes no reference to the child's mother or her testimony. *Id.* at 928. This version indicates that the child appeared before the court, was unable to take the oath, but nonetheless was allowed to testify at the trial. Mosteller, *supra* at 928. On appeal, the judges ruled that because she was unable to take the oath, she should not have been allowed to testify. *Id.*

Brasier appears to have had no effect on the admissibility of children's hearsay statements. Lyon and LaMagna, *supra* note 64, at 1052. Prior to *Braiser*, if a child was unavailable to testify, the child's hearsay statements were admitted on the grounds that it was the best evidence available. *Id.* at 1034-35. After *Brasier*, children were not presumed incompetent to testify. *See id.* at 1053. Rather, courts evaluated a child's testimonial competence and if the child was found competent to testify, he or she would be allowed to do so. *See id.* If she was found incompetent, she would not be allowed to testify, but her hearsay statements would be admissible. *See id.*

a sexual abuse trial.⁶⁷ In *Brasier*, a young rape victim, “immediately on her coming home, told all the circumstances of the injury” to her mother.⁶⁸ *Brasier* stands for the proposition that courts should assess a child for testimonial competence; thereby, children’s hearsay statements were admissible only if they were found to be incompetent to testify.⁶⁹

Although children’s hearsay statements regarding sexual abuse appear to have been freely admitted in criminal trials during this period of time, the weight given to these statements was often limited either by juror choice or pursuant to instructions from the judge.⁷⁰ Rape convictions were rare.⁷¹ This was likely due to the difficulty of obtaining physical proof of the crime (rape required proof

⁶⁷ *Brasier*, 168 Eng. Rep. at 203.

⁶⁸ *Id.* *Brasier* is cited in *Davis* as support for the Court’s conclusion that the 911 call was reporting an ongoing emergency and therefore not testimonial under the meaning of the Confrontation Clause. *Davis*, 547 U.S. at 828. In *Davis*, the Court noted that had the statements been the young girl’s screams for help as her assailant was chasing her, the statements would have been made during an ongoing emergency. *Id.* However, by the time she reached home, her statements were nothing more than “an account of past events.” *Id.* The *Davis* Court’s reference to this as instructive of the Framers’ intent with respect to the Confrontation Clause has been criticized on the grounds that the authors of the Sixth Amendment would probably not have been aware of the *Brasier* decision. Mosteller, *supra* note 66, at 924-25. The Sixth Amendment was proposed to Congress in 1789 and ratified in 1791. *Id.* at 924. The *Brasier* decision was handed down in 1779. *Id.* However, it was not published until 1791, and, the English Reporter cited by the *Davis* Court for the *Brasier* decision was not published until 1925. *Id.* at 923-24. In *Bryant*, Justice Scalia mockingly suggested that the majority would use this case as support for their holding that the declarant’s statements were nontestimonial. Justice Scalia stated:

But today’s majority presumably would hold the daughter’s account to her mother a nontestimonial statement made during an ongoing emergency. She could not have known whether her attacker might reappear to attack again or attempt to silence the lone witness against him. Her mother likely listened to the account to assess the threat to her own safety and to decide whether the rapist posed a threat to the community that required the immediate intervention of the local authorities.

Bryant, 131 S. Ct. at 1173 (Scalia, J., dissenting).

⁶⁹ Lyon & LaMagna, *supra* note 64, at 1054-55 (quoting 5 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §1760, at 241 (1904)). It has been suggested that *Brasier* does reflect the contemporary thinking of the judges at that time regarding a child’s competency as a witness and the significance of the oath. *Id.* at 1053. Interestingly, the judges did not appear to be concerned with the issue of whether her statements were testimonial. See Mosteller, *supra* note 66, at 925-26.

⁷⁰ Lyon & LaMagna, *supra* note 64, at 1046. Lyon and LaMagna reviewed all of the cases involving child sexual abuse that were tried between the years 1684 and 1789 from the Old Bailey Session Papers. *Id.* at 1039, 1041. “The Old Bailey was the trial court for felonies committed in London and . . . in the adjoining county of Middlesex.” *Id.* at 1039.

⁷¹ *Id.* at 1047.

of penetration), the fact that delays in reporting were considered evidence that the rape did not occur, and because rape was a capital offense (jurors may have been reluctant to convict the defendant based solely on the statements of a child).⁷² It is against this historical backdrop that the Confrontation Clause became part of the Sixth Amendment to the United States Constitution.⁷³

III. THE U.S. SUPREME COURT'S MODERN CONFRONTATION CLAUSE CASES

Since 1980, the U.S. Supreme Court has issued a series of seminal decisions involving hearsay evidence and the modern day defendant's Sixth Amendment right to confrontation.

A. *Ohio v. Roberts*

In *Ohio v. Roberts*,⁷⁴ the issue before the Court was whether a declarant's preliminary hearing testimony could be admitted in a subsequent criminal trial on the same matter when she was unavailable at trial and where she was not cross-examined at the preliminary hearing.⁷⁵ The respondent, Roberts, was arrested and charged with forging checks belonging to Bernard Isaacs and possession of stolen credit cards belonging to Bernard and Amy Isaacs, the parents of the declarant, Anita Isaacs.⁷⁶ At the preliminary hearing Robert's attorney called Anita Isaacs to the stand where she testified that she knew

⁷² *Id.* at 1047-48. Even though hearsay appears to have been freely admitted, the researchers reported an eighty-six percent acquittal rate, or nineteen out of twenty-two trials. Lyon & LaMagna, *supra* note 64, at 1047. The researchers have theorized that judges may have instructed jurors to ignore the hearsay evidence. *Id.* at 1046. The researchers also found numerous references to the insufficiency of the evidence to prove rape, particularly in the absence of the child victim's testimony. *Id.* at 1050-52. They found that in nine of the nineteen acquittals, although the defendants were acquitted of the rape charges, they were bound over to await a new trial on a lesser charge such as assault or attempted rape. *Id.* at 1051. They noted that child hearsay could be used to support a charge of assault or attempted rape, even while being insufficient to support a capital rape conviction. *Id.* at 1051-52. The hearsay evidence was found to be "insufficient rather than inadmissible." Lyon & LaMagna, *supra* note 64, at 1052.

⁷³ U.S. CONST. amend VI states in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

⁷⁴ 448 U.S. 56 (1980).

⁷⁵ *Id.* at 58.

⁷⁶ *Id.* at 58-59.

Roberts and that she had allowed him to stay at her apartment for a few days while she was away.⁷⁷ During defense counsel's direct examination, counsel tried to get Anita Isaacs to admit that she had given Roberts the checks and credit cards, but she denied doing so.⁷⁸ Defense counsel did not request to treat her as a hostile witness.⁷⁹ She was not questioned by the prosecutor.⁸⁰

Anita Isaacs left town following the preliminary hearing; although the prosecution issued several subpoenas, they were unable to procure her attendance at trial.⁸¹ Roberts took the stand during his trial and testified that Anita had given him the credit cards and the checks with the understanding that he was free to use them.⁸² On rebuttal, the prosecution offered into evidence the transcript of Anita Isaacs' preliminary hearing testimony.⁸³ The court allowed the transcript into evidence, and the jury convicted Roberts on all counts.⁸⁴

The Supreme Court began its discussion by noting that while the Confrontation Clause prefers "face-to-face confrontation at trial," the primary interest is the right of cross-examination.⁸⁵ The Court also noted that this right is not absolute, stating, "'[G]eneral rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.'" ⁸⁶ The Court further explained that "[t]he Confrontation Clause operates in two [distinct] ways to restrict the [scope] of admissible hearsay."⁸⁷ First, a rule of necessity is implicit in the Sixth Amendment, which requires that the

⁷⁷ *Id.* at 58.

⁷⁸ *Id.*

⁷⁹ *Roberts*, 448 U.S. at 58.

⁸⁰ *Id.*

⁸¹ *Id.* at 59-60.

⁸² *Id.* at 59.

⁸³ *Id.* The prosecution relied on an Ohio statute that permitted the use of preliminary examination testimony of a witness who "cannot for any reason be produced at the trial . . ." *Roberts*, 448 U.S. at 59 (quoting OHIO REV. CODE ANN. § 2945.49 (West 1975)). The trial court conducted a *voir dire* hearing, and the court admitted the transcript into evidence after testimony from Amy Isaacs in which she stated that she had no way to reach her daughter. *Id.* at 59-60.

⁸⁴ *Id.* at 60.

⁸⁵ *Id.* at 63 ("[A] primary interest secured by [the provision] is the right of cross-examination.") (alteration in the original) (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)).

⁸⁶ *Id.* at 64 (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

⁸⁷ *Roberts*, 448 U.S. at 65 (italics omitted).

hearsay declarant be unavailable at trial.⁸⁸ Second, the Confrontation Clause only allows the admission of that hearsay evidence which is found to be trustworthy; the statement must bear adequate “indicia of reliability.”⁸⁹ The Court stated that “[r]eliability [could] be inferred” where the hearsay “falls within a firmly rooted hearsay exception,” and that if it does not, then it may be admitted upon “a showing of particularized guarantees of trustworthiness.”⁹⁰ The Court concluded that Anita Isaacs’ preliminary examination testimony bore adequate indicia of reliability because Roberts’ attorney challenged her testimony at the preliminary hearing “with the equivalent of significant cross-examination.”⁹¹

⁸⁸ *Id.*

⁸⁹ *Id.* at 66 (internal quotation marks omitted).

⁹⁰ *Id.*

⁹¹ *Id.* at 70. Two decisions involving children’s hearsay statements and the Confrontation Clause were decided in the decade following the *Roberts* decision. See *Idaho v. Wright*, 497 U.S. 805 (1990); *White v. Illinois*, 502 U.S. 346 (1992). *Wright* involved the admissibility of hearsay statements made by a young child to a physician identifying her abuser. *Wright*, 497 U.S. at 808. The trial court admitted the statements under its residual hearsay exception. *Id.* at 811. The Idaho Supreme Court reversed. *Id.* at 813 (citing *State v. Wright*, 775 P.2d 1224, 1231 (Idaho 1989)). The United States Supreme Court noted that in order for hearsay statements to be admissible in a criminal trial, the statements “must possess indicia of reliability by virtue of [their] inherent trustworthiness” *Id.* at 822. The Court examined “the totality of the circumstances surrounding” the young child’s statements to the physician, including her age, her motive to fabricate, and the suggestive manner of the physician’s questioning, and concluded that the State had failed to show that her incriminating statements were particularly trustworthy. *Id.* at 826. It also held that evidence corroborating the truth of a hearsay statement may not be used to support a finding that the statement possesses indicia of reliability sufficient to meet the demands of the Confrontation Clause. *Wright*, 497 U.S. at 823. The Court noted that physical evidence of sexual abuse sheds no light on the reliability of a child’s statement identifying her abuser. *Id.* at 826. The Court did note however, that “the presence of corroborating evidence” might be used to demonstrate that the admission of the hearsay statement would be harmless error. *Id.* at 823.

In *White*, the second case decided in the decade following the *Roberts* decision, the Court held that the Confrontation Clause does not require a showing of unavailability before a young child’s hearsay statements could be admitted under “a firmly rooted exception to the hearsay rule.” *White*, 502 U.S. at 356. Here, a four-year-old child made statements to her mother, her babysitter, a police officer, an emergency room nurse, and a physician. *Id.* at 349-50. The trial court admitted these statements as either excited utterances or statements made in seeking medical treatment (two of the exceptions to the hearsay rule). *Id.* at 350-51. The Supreme Court upheld the trial court’s ruling finding that “a statement that qualifies for admission under a ‘firmly rooted’ hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability.” *Id.* at 357. This decision has subsequently been criticized by the *Crawford* Court, the *Davis* Court, and Justice Scalia’s dissenting opinion in *Bryant*. See *Bryant*, 131 S. Ct. at 1174 (Scalia, J., dissenting); *Davis*, 547 U.S. at 825; *Crawford*, 541 U.S. at 58 n.8.

B. *Crawford v. Washington*

In *Crawford v. Washington*,⁹² the Court overruled its decision in *Roberts*.⁹³ Justice Scalia, writing for a seven Justice majority, held that the prosecution's use of a tape-recorded statement, obtained by police during an interrogation of the defendant's wife, in the defendant's subsequent trial for assault and attempted murder violated the Confrontation Clause because the defendant's wife was not available to testify at trial.⁹⁴

The facts of the case are as follows. Michael Crawford and his wife, Sylvia, had gone in search of Kenneth Lee after Sylvia informed Michael that Lee had attempted to assault her.⁹⁵ They found Lee at his apartment where a fight ensued.⁹⁶ During the fight, Lee was stabbed in the chest and Michael's hand was cut.⁹⁷ The police arrested Michael and Sylvia who were subsequently interrogated separately after being given appropriate *Miranda* warnings.⁹⁸ Although Michael and Sylvia's accounts of the events leading up to the assault were substantially similar, their accounts differed as to whether Lee had drawn a weapon before Michael assaulted him.⁹⁹ Michael was subsequently charged with stabbing Lee.¹⁰⁰ The police did not press charges against Sylvia.¹⁰¹

At trial, Michael claimed self-defense.¹⁰² Due to the state's marital privilege, Sylvia was unavailable to testify.¹⁰³ The prosecution sought to introduce the statements that Sylvia had made to the police following the assault in order to show that Michael did not stab Lee in self-defense.¹⁰⁴ The trial court, following the decision in *Ro-*

⁹² 541 U.S. 36 (2004).

⁹³ *Id.* at 68-69.

⁹⁴ *Id.*

⁹⁵ *Id.* at 38.

⁹⁶ *Id.*

⁹⁷ *Crawford*, 541 U.S. at 38.

⁹⁸ *Id.*

⁹⁹ *Id.* at 38-40.

¹⁰⁰ *Id.* at 40.

¹⁰¹ *Id.*

¹⁰² *Crawford*, 541 U.S. at 40.

¹⁰³ *Id.*

¹⁰⁴ *Id.* Although Sylvia's statements generally corroborated those given by Michael, they differed on one significant point – whether Lee had a weapon. Michael stated:

I could a swore I seen him goin' [sic] for somethin' [sic] before, right before everything happened. He was like reachin' [sic], fiddlin'

berts, admitted the statements into evidence on the grounds that the statements bore “particularized guarantees of trustworthiness.”¹⁰⁵ As a result, Michael was convicted of assault.¹⁰⁶ On appeal the Washington Court of Appeals reversed; however, the Washington Supreme Court agreed with the trial court and reinstated the conviction.¹⁰⁷

Justice Scalia authored the Supreme Court’s opinion, starting with a lengthy discussion of the history of the Sixth Amendment’s Confrontation Clause, in which he traced its roots to the common law of England.¹⁰⁸ He also discussed the controversial *ex parte* examination procedures that were employed in the Colonies during the eighteenth century.¹⁰⁹ He suggested that this history permits two inferences about the meaning of the Confrontation Clause.¹¹⁰ First, the Confrontation Clause was specifically directed at the “use of *ex parte* examinations as evidence” in criminal proceedings against the accused; and second, “the Framers would not have allowed [the] admission of testimonial statements” of an unavailable witness unless the defendant was previously afforded an opportunity for cross-examination.¹¹¹

Justice Scalia explained that the Confrontation Clause applies to witnesses – “those who ‘bear testimony,’ ” and that testimony is “ ‘a solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ ”¹¹² He further explained, in a now oft-quoted phrase: “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes

[sic] around down here and stuff . . . and I just . . . I don’t know, I think, this is just a possibility, but I think, I think that he pulled somethin’ [sic] out and I grabbed for it and that’s how I got cut . . . but I’m not positive.

Id. at 38-39. Conversely, Sylvia stated:

Okay, he lifted his hand over his head maybe to strike Michael’s hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran.

Id. at 39. She also stated that she did not see anything in Lee’s hands during the fight. *Crawford*, 541 U.S. at 38.

¹⁰⁵ *Id.* at 40 (internal quotation marks omitted).

¹⁰⁶ *Id.* at 41.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 43-47.

¹⁰⁹ *Crawford*, 541 U.S. at 47.

¹¹⁰ *Id.* at 50.

¹¹¹ *Id.* at 50, 53-54.

¹¹² *Id.* at 51 (internal quotation marks omitted).

a casual remark to an acquaintance does not.”¹¹³ He provided several examples of testimonial statements including *ex parte* in-court testimony, affidavits, prior testimony that did not provide an opportunity for cross-examination, grand jury proceedings, and custodial examinations, and concluded that testimonial statements are “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”¹¹⁴

Justice Scalia criticized the Court’s previous decision in *Roberts* on the grounds that conditioning the admissibility of hearsay evidence on whether it “bears particularized guarantees of trustworthiness” or “falls [within] a firmly rooted hearsay exception” is in conflict with the original meaning of the Confrontation Clause, principally because it allows a jury to hear evidence, which can include statements that are in fact *ex parte* testimony, upon a simple judicial determination of reliability.¹¹⁵ In responding to the dissent’s argument that the fact that a statement might be testimonial does not undermine the “wisdom” of the hearsay exceptions, he stated:

Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out

¹¹³ *Id.*

¹¹⁴ *Crawford*, 541 U.S. at 51-52 (internal quotation marks omitted). He also explained that statements taken by police officers at interrogations are testimonial, in that they “bear a striking resemblance to the examinations conducted by justices of the peace in England.” *Id.* at 52. The fact that the “interrogators are police officers rather than magistrates does not change” the outcome. *Id.* at 53. Noting the function – he commented that English justices of the peace did not function as the magistrates of today; rather, they had essentially an investigative and prosecutorial role. *Id.* He also noted that there could be various definitions of “interrogation” just as there are of “testimonial.” *Id.* at n.4. He refused to articulate a comprehensive definition of “testimonial,” noting: “Whatever else the term covers, it applies at minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Crawford*, 541 U.S. at 68.

¹¹⁵ *Id.* at 60 (internal quotation marks omitted). He criticized one court for finding that a witness’s statements that were made to the police while in custody were reliable because they were clearly against the declarant’s penal interest. *Id.* at 63 (citing *Nowlin v. Commonwealth*, 579 S.E.2d 367, 371-72 (Va. Ct. App. 2003)). He also criticized other courts that found that statements were reliable because they were made under oath in a judicial proceeding such as a plea allocution or before a grand jury. *Id.* at 65 (citing *United States v. Gallego*, 191 F.3d 156, 168 (2d Cir. 1999) (plea allocution); *United States v. Papajohn*, 212 F.3d 1112, 1120 (8th Cir. 2000) (grand jury testimony)). He noted: “Dispensing 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.

time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.¹¹⁶

In closing, he noted that where testimonial evidence is at issue, “the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”¹¹⁷

C. *Davis v. Washington*

One year after its decision in *Crawford*, the Court granted certiorari in *Davis v. Washington*.¹¹⁸ In *Davis*, the Court consolidated two cases for review.¹¹⁹ The consolidated cases were *Davis v. Washington* and *Hammon v. Indiana*.¹²⁰ In *Davis*, Michelle McCottry made a 911 emergency call during a domestic dispute with her boyfriend, Adrian Davis.¹²¹ During the call, she identified Davis and informed the operator that he was beating her with his fists.¹²² While she was speaking to the operator, Davis left the house and drove away in his car.¹²³ The police arrived approximately four minutes later, finding McCottry in a “shaken state [with] . . . injuries on her forearm and face.”¹²⁴ Davis was charged with a felony violation of a no-contact order.¹²⁵ McCottry did not appear at trial and the court, over Davis’ objections, admitted the recording of McCottry’s 911 call.¹²⁶

In *Hammon*, police officers responded to a domestic distur-

¹¹⁶ *Crawford*, 541 U.S. at 56 n.7. Furthermore, the historical sources demonstrate that there is little evidence of exceptions employed to allow the admission of testimonial statements against an accused in a criminal trial. *Id.* He notes that the one deviation from this appears to be the exception for dying declarations – the existence of which he says cannot be disputed. *Id.* at n.6.

¹¹⁷ *Id.* at 68.

¹¹⁸ 547 U.S. 813 (2006).

¹¹⁹ *Id.* at 817, 819.

¹²⁰ *Id.*

¹²¹ *Id.* at 817.

¹²² *Id.*

¹²³ *Davis*, 547 U.S. at 818.

¹²⁴ *Id.* (internal quotation marks omitted).

¹²⁵ *Id.*

¹²⁶ *Id.* at 819.

bance report at the home of Hershel and Amy Hammon.¹²⁷ When they arrived, they found Amy on the front porch alone.¹²⁸ Although she appeared frightened, she told them that nothing was wrong.¹²⁹ When they entered the house, they noticed broken glass in the corner of the living room.¹³⁰ They found Hershel in the kitchen, where he told the officers that he and his wife had been fighting “but [that] everything was fine now.”¹³¹ The officers separated Amy and Hershel and after Amy presented her side of the story, they had her fill out a battery affidavit.¹³² In the affidavit, she explained that Hershel had broken their furnace, shoved her onto the floor, hit her in the chest, broke some lamps, and attacked her daughter.¹³³ Hershel was charged with domestic battery.¹³⁴ Amy was subpoenaed but did not appear at trial.¹³⁵ In her absence, the trial court allowed the officers to testify as to the statements she made and also granted the prosecution’s motion to admit her affidavit.¹³⁶

Justice Scalia, writing for the majority and citing *Crawford*, noted that the Confrontation Clause prohibits the “ ‘admission of testimonial statements of a witness unless the witness is unavailable to testify at trial and the defendant was afforded a prior opportunity for cross-examination.’ ”¹³⁷ He noted that under the definition provided in *Crawford*, testimonial statements include “ ‘[s]tatements taken by police officers in the course of interrogations.’ ”¹³⁸ However, he excluded police interrogations that occur in emergency situations from this rule, stating:

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. They are testimonial when the

¹²⁷ *Id.*

¹²⁸ *Davis*, 547 U.S. at 819.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* (internal quotation marks omitted).

¹³² *Id.* at 819-20.

¹³³ *Davis*, 547 U.S. at 820.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 821 (quoting *Crawford*, 541 U.S. at 53-54).

¹³⁸ *Davis*, 547 U.S. at 822 (quoting *Crawford*, 541 U.S. at 52).

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.¹³⁹

The Court explained that in determining whether an interrogation produced testimonial statements, courts should apply an objective test and determine the primary purpose of the interrogation.¹⁴⁰ Courts will need to consider whether the statements described a past event and whether a reasonable person in the listener's position would understand that the declarant's statements were a call for help amidst a genuine threat.¹⁴¹ Moreover, courts should examine the nature of the questions asked and the responses received to determine whether the statements were necessary to allow law enforcement to respond to the present emergency.¹⁴² Finally, courts should consider the degree of formality surrounding the interview because this is an important factor in determining whether a declarant's statements are testimonial.¹⁴³

In applying these rules to *Davis* and *Hammon*, the Court found that in *Davis*, it was clear that the victim's statements made during the 911 call were a call for help.¹⁴⁴ It was also clear from the nature of the questions asked by the 911 operator that the information elicited was necessary for the police to be able to respond to the present emergency.¹⁴⁵ The Court contrasted Sylvia Crawford's statements at the police station with McCottry's frantic statements made during the 911 call and found that the level of informality in the latter situation supported the conclusion that her statements were not

¹³⁹ *Id.* But see *id.* at n.2 (noting that although the holding refers to interrogations, "statements made in the absence of any interrogation[s] are [not] necessarily nontestimonial[,] which suggests that volunteered statements or responses to open-ended questions might, under the right circumstances, also be deemed testimonial for purposes of the Sixth Amendment).

¹⁴⁰ *Id.* at 826.

¹⁴¹ *Id.* at 826-27.

¹⁴² *Davis*, 547 U.S. at 827.

¹⁴³ *Id.*; see also *id.* at 822 n.1 (noting that statements made in the absence of interrogation might also be testimonial such as volunteered testimony or answers to open-ended questions. Justice Scalia emphasized that the focus is on the declarant stating: "[I]t is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.").

¹⁴⁴ *Id.* at 827 (citing *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion)).

¹⁴⁵ *Id.*

testimonial.¹⁴⁶

By contrast, the Court found that Amy Hammon's statements to the police were testimonial.¹⁴⁷ The Court noted that statements made during an interrogation, whose purpose is to determine the need for emergency assistance, may evolve into testimonial statements once the emergency has passed.¹⁴⁸ The Court further noted that in *Hammon*, the emergency had ended by the time the officers arrived on the scene, and Amy Hammon, now protected by the police, was in no immediate danger.¹⁴⁹ Therefore, the Court held that Amy and Hershel's statements to the police were testimonial because they were given some time after the dramatic events had ended and simply described how the criminal acts began and ended.¹⁵⁰

Finally, the Court acknowledged the argument put forth by the State for greater flexibility in the use of hearsay testimony in cases of domestic abuse because these crimes are "notoriously susceptible" to intimidation of the victims by their assailants to assure that they do not testify.¹⁵¹ The Court recognized that the "Confrontation Clause gives the criminal a windfall" when this occurs, but stated: "We may not . . . vitiate constitutional guarantees when they have the effect of allowing the guilty to go free."¹⁵² It reminded the State that the doctrine of forfeiture by wrongdoing, which provides that a person who attains the absence of a witness through wrongdoing forfeits the rights afforded by the Confrontation Clause, is the appropriate doctrine to be applied in these types of cases.¹⁵³

D. *Michigan v. Bryant*

In *Michigan v. Bryant*,¹⁵⁴ the Court examined the parameters of the ongoing emergency rule it established in *Davis* and held that

¹⁴⁶ *Davis*, 547 U.S. at 827.

¹⁴⁷ *Id.* at 830.

¹⁴⁸ *Id.* at 828-29 (noting that when this occurs, courts "[t]hrough *in limine* procedure[s] . . . should redact or exclude the portions of any statement that have become testimonial . . .").

¹⁴⁹ *Id.* at 829-30.

¹⁵⁰ *Id.* at 830; *see also Davis*, 547 U.S. at 828 (explaining that in *Davis* the respondent relied on *The King v. Brasier*, 168 Eng. Rep. 202 (1779), but that case did not involve an ongoing emergency because the emergency had passed by the time the young girl came home to report to her mother that she had been sexually assaulted).

¹⁵¹ *Id.* at 832-33.

¹⁵² *Id.* at 833.

¹⁵³ *Id.*

¹⁵⁴ 131 S. Ct. 1143 (2011).

the “circumstances of the interaction between [the decedent] and the police objectively indicate[d] that the ‘primary purpose of the interrogation’ was ‘to enable police assistance to meet an ongoing emergency.’”¹⁵⁵

In the early morning hours of April 29, 2001, the Detroit Police Department received a call from a gas station attendant reporting that a man had been shot.¹⁵⁶ When the police arrived at the gas station, they found the decedent, Anthony Covington, lying next to his car in the parking lot.¹⁵⁷ The officers noticed that he had been shot in the abdomen.¹⁵⁸ He also appeared to be in great pain and was having difficulty speaking.¹⁵⁹ They asked Covington “‘what had happened, who had shot him, and where the shooting had occurred.’”¹⁶⁰ He replied that “Rick” had shot him about a half hour before.¹⁶¹ He also told the police that he had gone to the defendant’s house, had a conversation with him through the back door of the house, and that the defendant shot him when he turned to leave.¹⁶² Covington then drove to the gas station where the police found him.¹⁶³ Police officers questioned him for approximately five to ten minutes.¹⁶⁴ The interrogation ended when emergency medical personnel arrived at the scene.¹⁶⁵

Covington was taken to a local hospital where he died a few hours later.¹⁶⁶ When the police later went to the defendant’s house, they found Covington’s wallet along with his identification in the back yard.¹⁶⁷ They also noticed what appeared to be a bullet hole in the back door of the house and a bullet and blood on the back porch.¹⁶⁸ Approximately one year later, Bryant was arrested in Cali-

¹⁵⁵ *Id.* at 1150 (quoting *Davis*, 547 U.S. at 822).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Bryant*, 131 S. Ct. at 1150.

¹⁶⁰ *Id.* (quoting *Michigan v. Bryant*, 768 N.W.2d 65, 71 (Mich. 2009), *vacated*, *Bryant*, 131 S. Ct. at 1167).

¹⁶¹ *Id.* (citing *Bryant*, 768 N.W.2d at 67 n.1).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Bryant*, 131 S. Ct. at 1150.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (indicating that at this time, the police called for backup and traveled to Bryant’s house). *But see id.* at 1173 (Scalia, J., dissenting) (indicating that it was approximately three hours before the police had “secured the scene” of the shooting).

¹⁶⁷ *Bryant*, 768 N.W.2d at 67.

¹⁶⁸ *Bryant*, 131 S. Ct. at 1150.

fornia and returned to Michigan, where he was subsequently tried for murder.¹⁶⁹

The trial court admitted the statements that Covington made to the police at the gas station in which he identified Bryant as his shooter.¹⁷⁰ Bryant was convicted of second-degree murder.¹⁷¹ However, the Supreme Court of Michigan reversed his conviction.¹⁷² Quoting *Davis*, it found that Covington's statements to the police were inadmissible on the grounds that they were testimonial hearsay.¹⁷³ The U.S. Supreme Court granted certiorari.¹⁷⁴

Justice Sotomayor authored the majority opinion.¹⁷⁵ She was joined by Chief Justice Roberts, and Justices Kennedy, Breyer, and Alito.¹⁷⁶ Justice Scalia, joined by Justice Ginsburg, dissented.¹⁷⁷ The majority opinion begins with a review of the Court's previous decisions in *Roberts*, *Crawford*, and *Davis*.¹⁷⁸ The majority reminds us of its ruling in *Crawford*, that the reach of the Confrontation Clause is limited to testimonial statements and that with respect to these statements "the Sixth Amendment 'demands what the common law required: unavailability and a prior opportunity for cross-examination.'"¹⁷⁹ The Court also explained that not all statements elicited as the result of police questioning are testimonial, quoting *Davis*, the Court stated:

"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. They 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

¹⁶⁹ *Bryant*, 768 N.W.2d at 67.

¹⁷⁰ *Id.* at 68.

¹⁷¹ *Id.* at 67-68.

¹⁷² *Bryant*, 131 S. Ct. at 1151 (citing *Bryant*, 768 N.W.2d at 67).

¹⁷³ *Bryant*, 768 N.W.2d at 67 (quoting *Davis*, 547 U.S. at 822).

¹⁷⁴ *Bryant*, 131 S. Ct. at 1152.

¹⁷⁵ *Id.* at 1149.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (Justice Thomas filed a concurring opinion; Justice Kagan did not take part in the decision).

¹⁷⁸ *Id.* at 1152.

¹⁷⁹ *Bryant*, 131 S. Ct. at 1152-53 (quoting *Crawford*, 541 U.S. at 68).

potentially relevant to later criminal prosecution.”¹⁸⁰

The Court explained that *Davis* did not attempt to provide a complete categorization of all possible statements that should be considered testimonial.¹⁸¹ The Court commented that the most important situations in which the Confrontation Clause restricts the admission of out-of-court statements are those where “state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.”¹⁸²

Next, the Court described the steps that courts should follow in determining the primary purpose of an interrogation.¹⁸³ Courts should perform an objective evaluation of the circumstances in which the encounter occurred and an objective assessment of the actions and statements of all of the parties involved.¹⁸⁴ The Court explained the rationale for this approach:

An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the ‘primary purpose of the interrogation.’ The circumstances in which an encounter occurs . . . are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.¹⁸⁵

Additionally, the Court noted that in assessing the circumstances under which statements are made, the existence of an ongoing emergency is one of the most important circumstances in determining the primary purpose of an interrogation, because an ongoing emergency focuses the individuals involved on something oth-

¹⁸⁰ *Id.* at 1154 (quoting *Davis*, 547 U.S. at 822).

¹⁸¹ *Id.* at 1155.

¹⁸² *Id.*; see also *id.* at n.3 (noting that as in *Davis*, it is explicitly reserving the question of whether statements made to persons other than law enforcement personnel can be testimonial).

¹⁸³ *Bryant*, 131 S. Ct. at 1156.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

er than “ ‘prov[ing] past events potentially relevant to later criminal prosecution.’ ”¹⁸⁶

The Court, without explanation, further stated that in determining the primary purpose of an interrogation, “standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”¹⁸⁷ The Court also stated:

Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination. This logic is not unlike that justifying the excited utterance exception in hearsay law.¹⁸⁸

This focus on reliability has been absent from the Court’s Confrontation Clause jurisprudence since the *Roberts* decision.¹⁸⁹

The Court went on to explain that determining whether an emergency exists is a fact-dependent inquiry.¹⁹⁰ It noted that the existence and duration of an emergency depends on “the type and scope of danger posed to the victim, the police, and the public.”¹⁹¹ The Court suggested that in cases such as *Davis* and *Hammon*, the emergency will have a shorter duration than the one in the present case because domestic violence cases have a “narrower zone of potential victims than cases involving threats to public safety.”¹⁹² Furthermore, determining whether an emergency is ongoing will require a court to ascertain not only the type of weapon involved, but also a victim’s medical condition at the time of the encounter.¹⁹³ A victim’s medical condition will be relevant because it “sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one.”¹⁹⁴

¹⁸⁶ *Id.* at 1157 (alteration in the original) (quoting *Davis*, 547 U.S. at 822).

¹⁸⁷ *Id.* at 1155.

¹⁸⁸ *Bryant*, 131 S. Ct. 1157.

¹⁸⁹ *See id.* at 1174 (Scalia, J., dissenting).

¹⁹⁰ *Id.* at 1158 (majority opinion).

¹⁹¹ *Id.* at 1162.

¹⁹² *Id.* at 1158.

¹⁹³ *Bryant*, 131 S. Ct. at 1159.

¹⁹⁴ *Id.*; *see also id.* (noting, as it did in *Davis*, that an encounter that begins as an emergency requiring police to determine the need for assistance may not always remain one: the in-

The Court next addressed the need to examine the statements and actions of the individuals involved including both the declarant's and the interrogator's questions and answers.¹⁹⁵ The Court indicated that this type of examination will eliminate problems that can arise when either the declarant or the interrogator has mixed motives.¹⁹⁶ Although the Court emphasized that determining the primary purpose of the interrogation is an objective test, it appeared to introduce some subjectivity into the analysis when it stated: "The existence of an emergency or the *parties' perception* that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial" ¹⁹⁷ The last factor that the Court found to be relevant to the determination of the primary purpose test is the degree of informality in the encounter.¹⁹⁸

In applying these rules to the case before it, the Court concluded that there was an ongoing emergency at the time the police officers interrogated Covington.¹⁹⁹ First, in assessing the circumstances surrounding the interrogation, the Court noted that crimes involving guns result in a heightened state of emergency.²⁰⁰ This case involved an armed shooter whose whereabouts were unknown at the time of the interrogation.²⁰¹ Second, in examining the statements and actions of the police officers, the Court found that they responded to a call that a man had been shot.²⁰² Their questions to Covington focused on obtaining information about the shooting which was necessary to allow them to " 'assess the situation, the threat to their own safety, and possible danger to the potential victim' In other words, they solicited the information necessary to enable them to 'meet an ongoing emergency.' " ²⁰³

Third, in examining the declarant's statements and actions, the Court found that there was nothing in Covington's responses that would indicate that the emergency had ended because Covington did

terrogation may evolve into a situation in which testimonial statements are made).

¹⁹⁵ *Id.* at 1160.

¹⁹⁶ *Id.* at 1161.

¹⁹⁷ *Bryant*, 131 S. Ct. at 1162 (emphasis added).

¹⁹⁸ *Id.* at 1166.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1158-59.

²⁰¹ *Id.* at 1165-66.

²⁰² *Bryant*, 131 S. Ct. at 1165.

²⁰³ *Id.* at 1166 (quoting *Davis*, 547 U.S. at 822, 832).

not know where the shooter was, nor did he give any indication that his assailant, “having shot at him twice, would be satisfied that [he] was only wounded.”²⁰⁴ The Court also found that “a person in Covington’s situation would [not] have had a ‘primary purpose’ ‘to establish or prove past events potentially relevant to later criminal prosecution,’ ”²⁰⁵ because at the time Covington made his statements, he “was lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen” and repeatedly asked when the emergency medical personnel would arrive.²⁰⁶

Finally, the Court found that the situation in *Bryant* was similar to the 911 phone call in *Davis*.²⁰⁷ It noted that “the officers arrived at different times,” the situation was “fluid and somewhat confused,” and that no structured interrogation took place.²⁰⁸ It concluded that the circumstances of the encounter, coupled with the statements and actions of Covington and the police officers, demonstrated that the primary purpose of the interrogation was to enable the police to respond to an ongoing emergency.²⁰⁹ Hence, Covington’s statements were “not testimonial” and not barred by the Confrontation Clause.²¹⁰

Justice Scalia delivered a scathing dissent, accusing the majority of “distort[ing] our Confrontation Clause jurisprudence and leav[ing] it in a shambles.”²¹¹ He disagreed with the majority’s interpretation of facts, stating:

Today’s tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose – is so transparently false that professing to believe it demeans this institution.²¹²

²⁰⁴ *Id.* The Court also suggested that Covington did not have any “reason to think that the shooter would not shoot again if he arrived on the scene.” *Id.*

²⁰⁵ *Id.* at 1165 (quoting *Davis*, 547 U.S. at 822).

²⁰⁶ *Bryant*, 131 S. Ct. at 1165.

²⁰⁷ *Id.* at 1166.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1166-67.

²¹⁰ *Id.* at 1167.

²¹¹ *Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting).

²¹² *Id.* In arguing that the majority has created an “expansive exception” for violent

He criticized the majority for creating an “expansive exception to the Confrontation Clause for violent crimes.”²¹³ He complained of the shift in focus from the declarant’s intent to that of the interrogator,²¹⁴ particularly in situations where the declarant may be operating under a disability.²¹⁵ He also criticized the majority for

crimes, Justice Scalia commented on the timeline for determining an “ongoing emergency.” *Id.* at 1173. He criticized the majority for failing to answer the question of how long the emergency situation lasted. *Id.* In response to the majority’s comments that the emergency may have persisted until the police determined the “[shooter’s] motive for and location after the shooting[,]” or until the police “secured the scene of the shooting[,]” Justice Scalia stated: “This is a dangerous definition of emergency[.]” because many witnesses who testify against defendants at subsequent criminal trials give their first statements to police within hours of a violent act. *Id.* He also noted that if the prosecution can claim that there was an ongoing threat to the public, defendants will not have a constitutionally protected right to exclude this hearsay at their trials. *Bryant*, 131 S. Ct. at 1173. He argued that the Framers would not have sanctioned this approach. In support of this argument he cited *The King v. Brasier*, in which the court refused to allow the testimony of a mother’s account of her young daughter’s statements that were made to her immediately after she came home after being sexually abused. *Id.* He theorized that the majority would find the daughter’s statements to her mother to be nontestimonial because they were “made during an ongoing emergency.” *Id.* He stated:

[T]oday’s majority presumably would hold the daughter’s account to her mother a nontestimonial statement made during an ongoing emergency. She could not have known whether her attacker might reappear to attack again or attempt to silence the lone witness against him. Her mother likely listened to the account to assess the threat to her own safety and to decide whether the rapist posed a threat to the community that required the immediate intervention of the local authorities. Utter nonsense.

Id.

²¹³ *Id.* In determining Covington’s purpose, Justice Scalia believed that his statements were made only to ensure the arrest and prosecution of Bryant. *Bryant*, 131 S. Ct. at 1170. He also believed that Covington knew the threat ended when he fled from Bryant’s house some twenty-five minutes earlier because he knew that he was shot by “a drug dealer, not a spree killer who might randomly threaten others.” *Id.* Likewise, Justice Scalia found that Covington’s medical needs reinforced the testimonial nature of his statements because it is likely that he knew that the police were focused on investigating the crime, not concentrating on his medical needs. *Id.* at 1171.

²¹⁴ *Id.* at 1168-69. Justice Scalia noted that only the declarant’s intent matters. *Id.* at 1168. “[T]he declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark[,]” and he should make the statement with the understanding that it may be used in subsequent criminal proceedings. *Bryant*, 131 S. Ct. at 1168-69. He did note, however, that the identity of the interrogator, together with the content and tone of his questions may be relevant, but only because it may bear upon whether the declarant intended to make a solemn statement which he understood could be used in a criminal trial. *Id.* at 1169.

²¹⁵ *Id.* Justice Scalia touched upon the question of how to assess whether a declarant with diminished capacity has made testimonial statements, but noted that the question was not raised in the case. *Id.* He commented that substituting the intentions of the police for those of the declarant in these types of situations is wrong. *Id.* He noted: “When the declarant has diminished capacity, focusing on the interrogators make less sense, not more. . . . But a per-

reintroducing the reliability factor back into the legal analysis.²¹⁶ Justice Scalia concluded:

Judicial decisions, like the Constitution itself, are nothing more than parchment barriers. Both depend on a judicial culture that understands its constitutionally assigned role, has the courage to persist in that role when it means announcing unpopular decisions, and has the modesty to persist when it produces results that go against the judges' policy preferences. Today's opinion falls far short of living up to that obligation—short on the facts, and short on the law.

For all I know, Bryant has received his just deserts. But he surely has not received them pursuant to the procedures that our Constitution requires. And what has been taken away from him has been taken away from us all.²¹⁷

IV. DECISIONS IN THE STATE AND FEDERAL COURTS PRIOR TO *MICHIGAN V. BRYANT*

A. Children's Hearsay Statements in Child Sexual Abuse Prosecution Cases Following *Ohio v. Roberts*

Following the Supreme Court's decision in *Roberts*, admission of children's hearsay statements in criminal prosecutions would not violate a defendant's right to confrontation provided the statements bore adequate "indicia of reliability."²¹⁸ Additionally, courts could infer reliability if the hearsay fell "within a firmly rooted hearsay exception."²¹⁹ The two hearsay exceptions that were routinely

son who cannot perceive his own purposes certainly cannot perceive why a listener might be interested in what he has to say." *Bryant*, 131 S. Ct. at 1169.

²¹⁶ *Id.* at 1176. Justice Scalia noted this is at direct odds with the decision in *Crawford* in which the Court stated: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 1174 (quoting *Crawford*, 541 U.S. at 68-69). He questioned whether the majority intended to resurrect the *Roberts* decision "by a thousand unprincipled distinctions without ever explicitly overruling *Crawford*?" *Id.* at 1175.

²¹⁷ *Id.* at 1176 (internal quotations omitted).

²¹⁸ *Roberts*, 448 U.S. 56, 66 (1980).

²¹⁹ *Id.*

applied to children's hearsay statements in cases of child sexual abuse were the excited utterance exception and the exception for statements made in connection with medical diagnosis and treatment.²²⁰ Courts have also admitted children's statements under the residual or catchall exceptions to the hearsay rule.²²¹

The vast majority of reported cases dealing with the medical diagnosis and treatment exception involve child sexual abuse, although prosecutions of these crimes comprise only a small percentage of criminal cases.²²² There are several issues that arise in connection with the use of this hearsay exception. The first issue is whether the proponent of the evidence should be required to demonstrate a connection between a declarant's motivation for making the statements and the circumstances surrounding the examination and treatment. Some jurisdictions freely admit children's statements regarding sexual abuse without requiring any connection between the treatment and the children's appreciation of the purpose for the treatment, while others do not.²²³ Another issue that arises in connection with this hearsay exception, since the Federal Rules of Evidence do not provide a definition of medical treatment or diagnosis, is what is properly included within the meaning of treatment or diagnosis.²²⁴ There are also concerns surrounding the use of this exception for the treatment of psychological maladies.²²⁵

The most significant issue on which courts have disagreed is whether children's statements, made in connection with a physical examination in which they identified their perpetrator, are admissible under the medical diagnosis or treatment exception to the hearsay rule.²²⁶ These types of identifying statements can be particularly da-

²²⁰ See *Wright*, 497 U.S. at 820 (explaining, in general, the rationale for the excited utterance and medical treatment hearsay exceptions).

²²¹ See *id.* at 816 (discussing the Idaho trial court's use of the residual evidence exception in admitting hearsay declarations of a two and a half year old sexual abuse victim).

²²² Robert P. Mosteller, *Children as Victims and Witnesses in the Criminal Trial Process: The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, 65 LAW & CONTEMP. PROB. 47, 56 (2002).

²²³ *Id.* at 51-52. The traditional justification for this exception is based on the idea that patients have a selfish treatment interest in providing truthful information to the physician along with the fact that they expect that the physician will rely on the information in diagnosing and treating them. *Id.*

²²⁴ *Id.* at 47-48.

²²⁵ *Id.* at 54.

²²⁶ See, e.g., *United States v. Iron Shell*, 633 F.2d 77, 84 (8th Cir. 1980) (noting that statements identifying a child's assailant "would seldom, if ever, be sufficiently related" to diagnosis or treatment). *But see* *United States v. Edward J.*, 224 F.3d 1216, 1219-20 (10th

maging to defendants because they may be the only statement identifying the defendant as the abuser if the child is unable to testify.²²⁷ Furthermore, even if the children testify, these hearsay statements are often more detailed than their actual testimony and therefore more powerful.²²⁸ Finally, these statements can be particularly harmful if used as corroborating evidence because they can sway the jury towards conviction and be viewed merely as harmless error on appeal.²²⁹

Courts that have held that these statements of identification are not covered by the medical treatment or diagnosis exception cite to the Advisory Committee's Note to Federal Rule of Evidence 803(4), which indicates that statements of cause will qualify under the rule, whereas statements of fault will not.²³⁰ The Committee Note provides the following example: "[A] patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light."²³¹ Under this rationale, children's statements describing the abuse are statements related to cause and relevant to proper diagnosis and treatment; whereas children's statements identifying the perpetrator are statements of fault and not medically pertinent.

Courts that have allowed children's hearsay statements of identification, made in connection with medical diagnosis or treatment, have justified their decisions on varying grounds. Some courts have viewed children's identification of their perpetrator to be relevant to medical diagnosis or treatment, reasoning that this information could provide a possible source of sexually transmitted disease or pregnancy, even in the absence of evidence to suggest these factors are at issue in the case.²³² Other courts have reasoned that children's

Cir. 2000).

²²⁷ Mosteller, *supra* note 222, at 60-61.

²²⁸ *Id.* at 61.

²²⁹ *Id.*

²³⁰ FED. R. EVID. 803 advisory committee's note.

²³¹ *Id.*

²³² *See, e.g.,* People v. Meeboer, 484 N.W.2d 621 (Mich. 1992). The court adopted an expansive interpretation of 'diagnosis and treatment' and, based on this, found that identification of a child's assailant could be important to the health of a child if the child has contracted a sexually transmitted disease and identification may be necessary for the assessment of pregnancy and in vitro problems related to genetic characteristics. *Id.* at 629. It also commented that treatment of a sexually abused child has psychological and developmental components that must be addressed. *Id.* The court found that identification of the assailant was necessary for treatment because when the physician learned that the assailant lived in

identification of their perpetrator was necessary because a doctor has an ethical responsibility to assure that any future contact between the child and perpetrator is eliminated if the perpetrator is a member of the child's household.²³³ Still others have opined that identification was medically related because it was relevant to the psychological well-being of the child.²³⁴ These latter two reasons appear more appropriately rooted in social welfare concerns than medical concerns and demonstrate how the medical treatment exception, as applied to child abuse prosecutions, has been clearly "stretched beyond the bounds of its theoretical justification."²³⁵

Moreover, other courts, following the Supreme Court's decision in *Ohio v. Roberts*,²³⁶ have given less consideration to establishing a connection between children's statements and the reason for the medical treatment and have instead focused principally on determining whether the statements were inherently trustworthy.²³⁷ The Michigan Supreme Court's decision in *People v. Meeboer*²³⁸ exemplifies

the victim's home, he "began her future treatment by alerting the authorities." *Id.* at 631.

²³³ Mosteller, *supra* note 222, at 63; *see, e.g.*, *Hawkins v. State*, 72 S.W.3d 493, 498 (Ark. 2002) (finding that disclosure of the identity of the perpetrator allowed the physician to fulfill her duty to report the abuse to state authorities).

²³⁴ Mosteller, *supra* note 222, at 50-51, 63.

²³⁵ *Id.* at 47, 65.

²³⁶ 448 U.S. 56 (1980).

²³⁷ *See* Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE 309-19 (3rd ed. 2009) (discussing Mississippi and New Hampshire statutes that require a court to find a child's statements made for the purposes of medical diagnosis or treatment to also be "made under circumstances indicating their trustworthiness").

²³⁸ 484 N.W.2d 621 (Mich. 1992). In this case, the court consolidated three cases for review. *Id.* at 622. The first case, *People v. Conn*, involved a seven-year-old who was taken by her mother to a physician two days after she complained of pain in her vaginal area. *Id.* at 630. During the examination, and in response to questioning by the physician, she identified the defendant, who had been residing in her home, as the one who had sexually assaulted her. *Id.* She initially told the doctor that she fell on her bicycle and that a "boy" had been "'messing' with her." *Id.* at 623. After repeated questioning she identified the defendant as her assailant. *Meeboer*, 484 N.W.2d at 623, 630. Following the examination, the physician contacted law enforcement authorities. *Id.* at 623. The defendant was charged with criminal sexual conduct in the first degree. *Id.* The complainant testified at trial and identified the defendant as her assailant. *Id.* The physician's testimony corroborated the complainant's testimony. *See id.* (detailing procedures leading to defendant's conviction using victim's testimony and physician's expert testimony; the issue in the case was whether the physician's testimony was based on hearsay). In the first of the three cases, the court held that the complainant's statements were trustworthy based on "circumstantial evidence of her understanding of the need to be truthful," even though the child had given inconsistent statements of identification. *Meeboer*, 484 N.W.2d at 630.

In *People v. Meeboer*, a six-year-old girl reported that the defendant sexually assaulted her while she was visiting his home, eleven days prior. *Id.* at 624. She was taken to the hos-

this approach.²³⁹ The court, citing *Idaho v. Wright*,²⁴⁰ examined the totality of the circumstances in order to determine whether the children's statements " 'possess[ed the necessary] indicia of reliability [to be deemed admissible] by virtue of [their] inherent trustworthiness.' ”²⁴¹ In doing so, it identified numerous factors to consider in making this determination, including: (1) whether the child understood the need to tell the truth; (2) the age and maturity of the child; (3) the child's use of age appropriate language; (4) the party initiating the examination; and (5) whether there is a motive on the part of the child to fabricate.²⁴²

pital by her mother, where she was examined by Dr. Karen Bentley, a specialist in child sexual abuse and a member of the child sexual abuse team at the hospital. *Id.* at 624, 631. The record indicated that the family had reported the incident to the police prior to the examination and that Dr. Bentley was aware of the suspected abuse prior to her examination of the complainant. *Id.* at 631. She concluded that sexual abuse had occurred and promptly reported this information to the authorities. *Id.* at 624. At trial, Dr. Bentley testified about the physical evidence of sexual abuse and the complainant's identification of the defendant as her abuser. *Meeboer*, 484 N.W.2d at 624. The court found sufficient circumstantial evidence of trustworthiness in the child's statements in the second case, yet in this case, it based its conclusion on the lack of evidence in the record. *Id.* at 631. Yet, the court found that there was no evidence that the child had fabricated the story; there was no evidence to explain how the child seemed to understand the nature of sexual intercourse; there was no evidence of the use of leading questions; and even though the allegations had been reported to the police and the physician before the examination, it found: "there is no indication that the examination was a pretext for an investigation." *Id.*

In the third case, *People v. Craft*, the defendant was charged with sexually assaulting his four-year-old stepdaughter. *Id.* at 625. The action originated from reports that the child's teachers had made to child protective services. *Id.* The complainant's mother took her to a physician four days after her teachers filed their report. *Meeboer*, 484 N.W.2d at 625. Following the examination, the doctor concluded that she had been sexually abused and reported his findings and conclusions to the authorities. *Id.* The child was removed from her home and placed in foster care. *Id.* However, she had made some conflicting statements to Dr. Cooke at one point telling him that someone other than the defendant had touched her two months later. *Id.* Complainant's foster mother took her to see a different physician who examined her and who also noticed physical signs of sexual abuse. *Id.* During this examination, the young child identified the defendant as her abuser. *Meeboer*, 484 N.W.2d at 625. The court found that there was not sufficient evidence of trustworthiness to support the admissibility of the child's statements. *Id.* at 633. In reaching its conclusion, the court relied on the fact that the child was only four years old and had been removed from her home at the time she identified the defendant as her abuser, coupled with the active participation of investigative authorities prior to the physical examination. *Id.* at 632-33.

²³⁹ *Id.* at 621.

²⁴⁰ 497 U.S. 805 (1990).

²⁴¹ *Meeboer*, 484 N.W.2d at 626 (quoting *Wright*, 497 U.S. at 822).

²⁴² *Id.* at 627 ("Factors related to trust-worthiness guarantees surrounding the actual making of the statement include: (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may

Another frequently employed exception to the hearsay rule in child sexual abuse prosecutions is the residual or catchall exception which allows the admission of hearsay statements that possess “circumstantial guarantees of trustworthiness” provided the court finds: “(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.”²⁴³ This exception has been applied to allow the admission of children’s statements to social workers and other professionals outside of the medical field.²⁴⁴ In *People v. Katt*,²⁴⁵ the court found that statements made by a seven-year-old boy to a child-protective-services worker, following a report of suspected abuse in which he described his abuse and named the defendant as his abuser, were admissible.²⁴⁶

The Michigan Supreme Court found that one of the requirements embodied in the residual exception, that the statements have “circumstantial guarantees of trustworthiness,”²⁴⁷ was in line with the

be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate.”); see *People v. Katt*, 662 N.W.2d 12, 24 (Mich. 2003) (listing fifteen non-inclusive factors courts will consider in determining reliability).

²⁴³ The Federal Residual Exception, Federal Rule of Evidence 807 also provides:

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 807.

²⁴⁴ See, e.g., *United States v. Grooms*, 978 F.2d 425, 427-28 (8th Cir. 1992) (admitting statements made by young girls to an FBI agent under the residual exception to the hearsay rule).

²⁴⁵ 662 N.W.2d 12 (Mich. 2003).

²⁴⁶ *Id.* at 14-15.

²⁴⁷ *Id.* at 23. The court referred to fifteen factors that courts have found to be relevant in evaluating the trustworthiness of statements, citing Federal Rules of Evidence Manual, *Matthew Bender & Co. Inc.* 2002 §807.02(4). *Id.* at 24. These factors are:

requirements of the Confrontation Clause.²⁴⁸ In this case, the court

(1) The relationship between the declarant and the person to whom the statement was made. For example, a statement to a trusted confidante should be considered more reliable than a statement to a total stranger.

(2) The capacity of the declarant at the time of the statement. For instance, if the declarant [were] drunk or on drugs at the time, that would cut against a finding of trustworthiness

(3) The personal truthfulness of the declarant. If the declarant is an untruthful person, this cuts against admissibility, while an unimpeachable character for veracity cuts in favor of admitting the statement. The government cannot seriously argue that the trust due an isolated statement should not be colored by compelling evidence of the lack of credibility of its source: although a checkout aisle tabloid might contain unvarnished truth, even a devotee would do well to view its claims with a measure of skepticism.

(4) Whether the declarant appeared to carefully consider his statement.

(5) Whether the declarant recanted or repudiated the statement after it was made.

(6) Whether the declarant has made other statements that were either consistent or inconsistent with the proffered statement.

(7) Whether the behavior of the declarant was consistent with the content of the statement.

(8) Whether the declarant had personal knowledge of the event or condition described.

(9) Whether the declarant's memory might have been impaired due to the lapse of time between the event and the statement.

(10) Whether the statement, as well as the event described by the statement, is clear and factual, or instead is vague and ambiguous.

(11) Whether the statement was made under formal circumstances or pursuant to formal duties, such that the declarant would have been likely to consider the accuracy of the statement when making it.

(12) Whether the statement appears to have been made in anticipation of litigation and is favorable to the person who made or prepared the statement.

(13) Whether the declarant was cross-examined by one who had interests similar to those of the party against whom the statement is offered.

(14) Whether the statement was given voluntarily or instead pursuant to a grant of immunity.

(15) Whether the declarant was a disinterested bystander or rather an interested party.

Id. (alteration in the original).

²⁴⁸ *Katt*, 662 N.W.2d at 23. The court also stated that the Confrontation Clause prohibits the use of corroborating evidence in criminal cases to determine the trustworthiness of statements offered unless the declarant testifies at trial. *Id.* at 23-24. This appears to be at odds with its decision three years earlier in *Meeboer* in which it held that that physical evidence of sexual abuse could be considered to determine the trustworthiness of the child's

found the child's statements were trustworthy because they were spontaneous; there was no evidence to indicate that the child had a motive to fabricate, and he spoke in language that was appropriate for his age.²⁴⁹ The court also found that the child's statements to the social worker were more probative than his testimony at trial because there was less opportunity for him to be influenced by adults at the time of his interview with the social worker than by the time of the trial.²⁵⁰

B. Children's Hearsay Statements in Child Sexual Abuse Prosecution Cases Following *Crawford v. Washington* and *Davis v. Washington*

The decision in *Crawford* dramatically altered the Court's Confrontation Clause jurisprudence and turned the law with respect to children's hearsay statements, particularly in cases of child sexual abuse, on its head. Whereas after *Roberts*, the test for admissibility of these statements was whether they were inherently trustworthy or bore "adequate indicia of reliability,"²⁵¹ after *Crawford*, courts are now required to determine if the hearsay statements were "testimonial."²⁵² A statement is testimonial if it was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."²⁵³

hearsay statements. *Meeboer*, 484 N.W.2d at 627-28. However, the court clarified this discrepancy when it conditioned the consideration of this evidence on the declarant's testimony at trial. *Katt*, 662 N.W.2d at 24. Because the declarant testified in *Meeboer*, the holding in *Katt* did not overrule its previous one. *Id.*

The defendant also argued that MICH. R. EVID. 803A (Michigan's version of a "tender years" exception) "covers the field" with respect to children's hearsay statements and that if the statements were not admissible under this rule, they are not admissible under the residual exception. *Id.* at 15-16. The court rejected this argument, noting that the majority of courts that have decided this issue have rejected this "near miss" theory. *Id.* at 20. The court held that statements otherwise not admissible under one of the categorical exceptions to the hearsay rule may, nonetheless, be admissible under the residual exception provided they meet the requirements of this rule. *Id.* at 21-23. In this case, the child's statements failed to meet the requirements of MICH. R. EVID. 803A because his statements to the social worker were not the first time that he raised his allegation of abuse, which is a requirement under Rule 803A. *Katt*, 662 N.W.2d at 25.

²⁴⁹ *Katt*, 662 N.W.2d at 25.

²⁵⁰ *Id.*

²⁵¹ *Roberts*, 448 U.S. at 66.

²⁵² *Crawford*, 541 U.S. at 68-69.

²⁵³ *Id.* at 52 (quoting Brief for Nat'l Ass'n Criminal Def. Lawyers et. al. as Amici Curiae Supporting Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410) at *3).

The objective witness test, with its focus on the declarant's perspective, has caused havoc in the courts with respect to children's hearsay statements. In the intervening period after the *Crawford* decision was handed down, but before the Court issued its opinion in *Davis*, courts questioned whether the objective witness test could rationally be applied to young children.²⁵⁴ There was much disagreement over whether the reasonable person determination should be made from the perspective of a mature witness or whether the statements should be viewed from a child's perspective.²⁵⁵

Courts that have examined the statements from a "reasonable child's" perspective have factored the child's age and cognitive abilities into the determination of whether a "reasonable child" would have understood the ramifications of his or her statements.²⁵⁶ For example, in a case before the Colorado Supreme Court, in which a young child made statements to a physician in connection with a sexual assault examination, the court held that the child's age was a "pertinent characteristic for analysis" in determining what an "objectively reasonable child" would comprehend.²⁵⁷ In addition to considering the child's age, the court also analyzed the circumstances surrounding his statements.²⁵⁸ Based on this, the court found that an objective seven-year-old child in the victim's position would have intended his statements to describe the source of his pain and symptoms; he would not have been able to comprehend that his statements would be used in a subsequent criminal trial.²⁵⁹

²⁵⁴ Christopher Cannon Funk, *The Reasonable Child Declarant After Davis v. Washington*, 61 STAN. L. REV. 923, 936-38 (2009). The author includes a lengthy presentation of cases that have addressed these issues. *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 939, 958.

²⁵⁷ *People v. Vigil*, 127 P.3d 916, 925-26 (Colo. 2006). The court also reviewed whether the physician's interrogation of the child was the functional equivalent of a police interrogation. *Id.* at 922. The court held that it was not since the doctor was not a government official and, therefore the statements were not produced for the purpose of developing testimony for trial. *Id.* at 924.

²⁵⁸ *Id.* at 926.

²⁵⁹ *Id.* The court also found that the fact that the examination was conducted in the doctor's offices with only the child, the doctor, and his mother present, lent further support to the conclusion that the child would not foresee his statements being used in a later trial. *Vigil*, 127 P.3d at 926; *see also* *State v. Bobadilla*, 709 N.W.2d 243, 255 (Minn. 2006) (commenting that it is doubtful that a three-year-old child would be capable of understanding that his statements would be used in a criminal prosecution); *State v. Scacchetti*, 690 N.W.2d 393, 396 (Minn. Ct. App. 2005) (noting that a three-year-old child's out-of-court statements to an examining physician would be testimonial only if the circumstances surrounding the making of the statements would lead a "three-year-old to reasonably believe her disclosures

However, not all courts have agreed with the rationale adopted by the Colorado Court. The Court of Appeals of Maryland, in *State v. Snowden*,²⁶⁰ held that “an objective test, using an objective person, rather than an objective child of that age, is the appropriate test for determining whether a statement is testimonial in nature.”²⁶¹ The American Prosecutors’ Research Institute filed an amicus brief in the appeal of this case and argued that a young child’s statements should never be testimonial given the “limited cognitive and developmental skills of young children.”²⁶² The court rejected this argument stating:

Although we recognize that there may be situations where a child may be so young or immature that he or she would be unable to understand the testimonial nature of his or her statements, we are unwilling to conclude that, as a matter of law, young children’s statements cannot possess the same testimonial nature as those of other, more clearly competent declarants.²⁶³

The *Snowden* court expressed concern that the focus on the “testimonial capacity of young children overlooks the fundamental principles underlying the Confrontation Clause.”²⁶⁴ It acknowledged that while there are valid public policy reasons for limiting a child victim’s exposure to an emotionally disturbing courtroom experience, courts “must be faithful to the Constitution’s deep concern for the fundamental rights of the accused.”²⁶⁵ The court found that the prop-

would be available for use at a later trial”).

²⁶⁰ 867 A.2d 314, 329 (Md. 2005). In this case, the trial court admitted the statements under Maryland’s “tender years” statute. *Id.* at 318-19. The statute allowed the prosecution to introduce a health or social work professional’s testimony as a substitute for that of a child if, *inter alia*, the trial court interviews the child in a closed hearing and makes a finding on the record that the child’s statements possess “specific guarantees of trustworthiness.” *Id.* at 319; MD. CODE ANN., CRIM. PROC. § 11-304 (West 2001).

²⁶¹ *Snowden*, 867 A.2d at 329.

²⁶² *Id.* at 328.

²⁶³ *Id.* at 328-29; *see, e.g.*, *People v. Mack*, 101 P.3d 349 (Or. 2004) (involving a three year-old-declarant); *People ex rel R.A.S.*, 111 P.3d 487, 488 (Colo. App. 2004) (involving a four-year-old declarant); *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 755-56 (Cal. Dist. Ct. App. 2004) (involving an eight-year-old victim and a four-year-old victim).

²⁶⁴ *Snowden*, 867 A.2d at 329.

²⁶⁵ *Id.* The court also noted that although the Supreme Court has recognized that the interest of protecting victims may trump some rights protected by the Confrontation Clause, these interests may never prevail over the explicit guarantees of the Clause. *Id.* (citing *Coy v. Iowa*, 487 U.S. 1012, 1019-21 (1988)).

er test for determining when a statement is testimonial should not only take into account the intentions of the declarant, but should also look to the intentions of the person eliciting the statement.²⁶⁶ The court noted that to do otherwise would allow the prosecution to freely use statements by young children, which were made under circumstances in which the interrogators undoubtedly contemplated their use at a later trial.²⁶⁷

The Maryland court's approach is the better reasoned one. It is illogical to apply the *Crawford* test, which was formulated with adult declarants in mind to young children, who unlike Sylvia Crawford, may for all intents and purposes be incapable of understanding the serious legal consequences that may occur as a result of their statements.²⁶⁸ Moreover, ascertaining what a child intended, requires a determination of what is "artificial or unknowable."²⁶⁹ Furthermore, because it is easy for courts to reach the conclusion that a child is too young to form the necessary intent, it provides prosecutors a free pass to have these statements admitted, as the Maryland Court recognized.²⁷⁰

The Supreme Court's decision in *Davis* altered the *Crawford* test by shifting the focus of the analysis from the objective intentions of the declarant to a "primary purpose" test.²⁷¹ Under this test, statements are "testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."²⁷² Further, under the primary purpose test, courts can consider not only the declarant's intent, but also the intentions of a "reasonable listener."²⁷³

In the period following the *Davis* decision, some courts have substituted the primary purpose test with the reasonable child test, but only in instances involving certain classes of listeners.²⁷⁴ The rea-

²⁶⁶ *Id.* (citing *Crawford*, 541 U.S. at 56 n.7).

²⁶⁷ *Id.* at 329.

²⁶⁸ See Mosteller, *supra* note 66, at 943 (stating that the children's explanations of the crime did not vary based on who they were speaking to, regardless of being in a testimonial or non-testimonial setting).

²⁶⁹ *Id.* at 970.

²⁷⁰ *Snowden*, 867 A.2d at 329.

²⁷¹ *Davis*, 547 U.S. at 828.

²⁷² *Id.* at 822.

²⁷³ *Id.* at 827.

²⁷⁴ Funk, *supra* note 254, at 940.

sonable child test continues to be applied in cases involving children's statements to parents, family members, caretakers, friends, and other private individuals. With a few exceptions, courts have found these statements to be nontestimonial.²⁷⁵ The fact that children's statements to such individuals tend to be spontaneous may have led these courts to conclude that a reasonable child would not comprehend that his or her statements would be used at trial.²⁷⁶ Even so, the courts that have applied the primary purpose test from the perspective of the listener have reached the same conclusion that such statements are nontestimonial, but on the grounds that the parents were motivated by the health and welfare of the child as opposed to a need to preserve evidence for use at a subsequent trial.²⁷⁷

With respect to statements that children made to persons other than the individuals mentioned in the categories addressed above, courts have continued to consider the age and cognitive abilities of a child, but they have drawn a clear line when dealing with children's

²⁷⁵ *Id.* at 942-43.

²⁷⁶ Mosteller, *supra* note 66, at 944-45; *see also* State v. Brigman, 615 S.E.2d 21, 25 (N.C. App. 2005). *Brigman* involved children's statements that were solicited by the foster mother after observing the children engaging in sexually oriented behavior. *Brigman*, 615 S.E.2d at 22. Following a call to the state social service agency, she continued her questioning of the children. *Id.* She also attempted to tape record the statements. *Id.* The court found the children's statements to be nontestimonial because given the age of the children, they would not have anticipated that their statements would be used in a criminal trial. *Id.* at 25-26. However, there are a few courts that have found this category of statements to raise Confrontation Clause concerns. State v. Spencer, 169 P.3d 384, 389-90 (Mont. 2007); People v. Stechly, 870 N.E.2d 333, 345 (Ill. 2007); *In re E.H.*, 823 N.E.2d 1029, 1030-31 (Ill. App. Ct. 2005), *vacated on other grounds*, 863 N.E.2d 231 (Ill. 2006). In one such case, the court found a child's statements to her grandmother to be testimonial because they were accusatory in nature. *In re E.H.*, 823 N.E.2d at 1035-36. The court stated:

Although some uncertainty remains regarding the exact definition of "testimonial statements," *we are certain that*, in this case, B.R.'s statement to her grandmother falls within the purview of the ruling of *Crawford* and is governed by the protections of the confrontation clause. It is true that certain types of hearsay statements, i.e., "an offhand, overheard remark," may not qualify as statements at which the confrontation clause was directed, but it does apply against "those who bear testimony." Here, the declarant, B.R., bore accusatory testimony against E.H. which was offered to prove the truth of the matter asserted, specifically, that E.H. sexually assaulted her.

Id. (internal citations omitted).

Additionally, Justice Scalia's use of *Brasier* in his opinions in *Davis* and *Bryant* suggest that he would view the child's statements as raising Confrontation Clause concerns. *See Davis*, 547 U.S. at 828; *Bryant*, 131 S. Ct. at 1173.

²⁷⁷ Mosteller, *supra* note 66, at 947-48.

statements to law enforcement personnel.²⁷⁸ After *Davis*, the majority of courts that have applied the primary purpose test to children's statements to law enforcement personnel, have placed the focus of the analysis squarely on the intent of the questioner.²⁷⁹ Courts have also applied this approach even where the questioning was not conducted by police officers, if they found that the questioning was the functional equivalent of a police interrogation.²⁸⁰ In determining whether questioning is the functional equivalent of a police interrogation, courts consider the amount of law enforcement participation in the interview, specifically whether law enforcement personnel appeared to direct or control the questioning.²⁸¹

In cases involving children's statements to physicians and counselors following the *Davis* decision, some courts, employing the primary purpose test, have concluded that the children's statements were nontestimonial on the grounds that the primary purpose of the interrogation was treatment or diagnosis.²⁸² Other courts have reached opposite conclusions.²⁸³ More difficult questions are raised

²⁷⁸ *Stechly*, 870 N.E.2d at 359. The court stated, "We believe that [outside the context of police interrogation] the only proper focus is on the declarant's intent: Would the objective circumstances have led a reasonable person to conclude that their statement could be used against the defendant?" *Id.* It also stated, "[T]he better view is to treat the child's age as one of the objective circumstances to be taken into account in determining whether a reasonable person in his or her circumstances would have understood that their statement would be available for use at a later trial." *Id.* at 363.

²⁷⁹ *Funk*, *supra* note 254, at 940. The Supreme Court of Illinois has noted: "[W]hen the statements under consideration are the product of questioning by the police (or those whose 'acts [are] acts of the police'), we must focus on the intent of the questioner in eliciting the statement." *Stechly*, 870 N.E.2d at 357 (alteration in the original).

²⁸⁰ *Snowden*, 867 A.2d at 329-30.

²⁸¹ *See Sisavath*, 13 Cal. Rptr. 3d at 756-58; *Mack*, 101 P.3d at 352; *In re Rolandis G.*, 902 N.E.2d 600, 611 (Ill. 2008).

²⁸² *See, e.g., Spencer*, 169 P.3d at 388-90 (holding that statements by a three-year-old to her parent and licensed counselor were not testimonial because the primary purpose of the statements was parenting and counseling); *Bush v. State*, 193 P.3d 203, 209-10 (Wyo. 2008) (finding that the primary purpose of a young child's statements to a psychiatrist was diagnosis and treatment; therefore the statements were not testimonial).

²⁸³ *See, e.g., Snowden*, 867 A.2d at 329-30. The Maryland Court of Appeals found that although there might have been a therapeutic element to a child's interview with a social worker, this did not disguise the fact that interviews were designed to develop testimony that would likely be used at trial. *Id.* The court stated:

Crawford's command in this regard is clear. No matter what other motives exist, if a statement is made under such circumstances that would lead an objective person to believe that statements made in response to government interrogation later would be used at trial, the admission of those statements must be conditioned upon *Crawford's* requirements of unavailability and a prior opportunity to cross-examine.

in cases where the professionals involved have mixed motives or mixed intentions when questioning children.

In recent years, state governments, encouraged by the Department of Justice, have established multidisciplinary teams to respond to the problems of child sexual abuse.²⁸⁴ These teams generally consist of social workers, therapists, physicians, prosecutors, and police officers who perform dual roles. These multidisciplinary teams have been successful in improving the skills of the individuals that interrogate children and in reducing the number of interviews that children are being subjected to.²⁸⁵ While there is little doubt that these practices serve important state interests, the statements procured as the result of these interviews face serious Confrontation Clause challenges.

Courts have adopted a variety of approaches in determining the primary purpose of interrogations in cases involving children's statements procured under these types of circumstances. Some courts have held that statements to non-government personnel are, by their very nature, nontestimonial.²⁸⁶ For example, in *People v. Geno*,²⁸⁷ the defendant was convicted of sexually assaulting his girlfriend's two-year-old daughter.²⁸⁸ The child's father contacted Children's Protective Services after he noticed physical signs of sexual abuse.²⁸⁹ The agency arranged for an assessment and interview of the child by the Children's Assessment Center.²⁹⁰ In response to questioning by the executive director of the Center as to whether the child "had an owie," pointing to her vaginal area, she answered, "[Y]es, Dale [de-

Id. at 330.

²⁸⁴ Raeder, *supra* note 1, at 381.

²⁸⁵ John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 17 (1996). Data has suggested that reducing the number of interviews that young children are subjected to eliminates stress and decreases the likelihood that suggestive questions will be directed at the child. *Id.*

²⁸⁶ See *Vigil*, 127 P.3d at 924 (holding that because the doctor was not a government official, the statements were not produced for the purpose of developing testimony for trial).

²⁸⁷ 683 N.W.2d 687 (Mich. Ct. App. 2004).

²⁸⁸ *Id.* at 689.

²⁸⁹ *Id.*

²⁹⁰ *Id.* The Children's Assessment Center in Grand Rapids, Michigan indicates that it provides assessment services, forensic interviewing, law enforcement, Children's Protective Services, and noninvasive medical exams. Children's Assessment Center, *Hearing the Story*, CHILD. ASSESSMENT CTR., www.cac-kent.org/hearing_the_story.php (last visited Jan. 3, 2012).

fendant] hurts me here.”²⁹¹ The trial court allowed the admission of the child’s statements under the residual exception to the hearsay rule.²⁹²

On review, the appellate court found that the child’s statements to the forensic interviewer were nontestimonial simply because they were made to a non-governmental employee.²⁹³ The court did not address the fact that the child identified her abuser in her statements, it did not question the nature or purpose of the interrogation, nor did it discuss the fact that Children’s Protection Services arranged for the assessment after the report of sexual abuse had been made. It simply concluded:

The child’s statement was made to the executive director of the Children’s Assessment Center, not to a government employee, and the child’s answer to the question whether she had an “owie” was not a statement in the nature of “*ex-parte* in-court testimony or its functional equivalent.”²⁹⁴

Other courts have found children’s statements to be nontestimonial provided there was some evidence of a non-prosecutorial purpose.²⁹⁵ The scant protection that confrontation rights can receive when courts strive to find a health and welfare purpose to the questioning, as distinct from a law enforcement purpose, is evidenced in the Minnesota Supreme Court’s decision in *State v. Bobadilla*.²⁹⁶

In *Bobadilla*, the court held that a child’s videotaped statement, given in response to questioning by a social worker, was nontestimonial despite the fact that the interview was performed at the police department and in the presence of a police detective.²⁹⁷ The defendant argued that the statements were testimonial because the interviews were conducted pursuant to a state statutory scheme that was created specifically for the purpose of investigating and responding to

²⁹¹ *Geno*, 683 N.W.2d at 689.

²⁹² *Id.* at 690. Defendant did not raise a constitutional objection to the admissibility of this evidence at trial; hence, it was not properly preserved for appeal. *Id.* In light of this, the Court of Appeals reviewed his argument for plain error. *Id.*

²⁹³ *Id.* at 692.

²⁹⁴ *Geno*, 683 N.W.2d at 692.

²⁹⁵ See Mueller & Kirkpatrick, *supra* note 237, at 310.

²⁹⁶ 709 N.W.2d 243 (Minn. 2006).

²⁹⁷ *Id.* at 257.

child abuse and neglect.²⁹⁸ The court rejected this argument and instead found that the principal purpose of the statutory scheme was to “protect the health and welfare of children.”²⁹⁹ Three years later, the Court of Appeals for the Eighth Circuit, in upholding a federal district court’s order granting a writ of habeas corpus to Bobadilla, found that the Minnesota Supreme Court “unreasonably applied” the U.S. Supreme Court’s holding in *Crawford v. Washington*.³⁰⁰ The Eighth Circuit found that the child’s statements were testimonial because (1) the interviews were initiated by the police, (2) the purpose of the interview was to further the police investigation because the social worker conducted the questioning at the request of the police officer, and (3) the interview was not conducted until five days after the allegations of abuse were raised.³⁰¹ The court concluded:

[T]he interview . . . was initiated by a police officer to obtain statements for use during a criminal investigation, was recorded so further law enforcement interviews would be unnecessary, and involved structured questioning designed to confirm a prior allegation of abuse. No one disputes [that if the detective] . . . conducted the questioning, such statements would be testimonial under *Crawford*. It was unreasonable for the Minnesota Supreme Court to conclude just because [the detective] requested another government agent to ask the same questions in order to achieve the same purpose, the result is different.³⁰²

Along the same lines, children’s statements made during forensic interviews in sexual abuse clinics or advocacy centers have been found to be testimonial.³⁰³ In fact, the majority of jurisdictions that have ruled on this issue have found children’s statements, made under these conditions, to be testimonial.³⁰⁴ The Supreme Court of

²⁹⁸ *Id.* at 254.

²⁹⁹ *Id.*

³⁰⁰ *Bobadilla v. Carlson*, 575 F.3d 785, 793 (8th Cir. 2009).

³⁰¹ *Id.* at 791.

³⁰² *Id.* at 793.

³⁰³ *See, e.g., Stechly*, 870 N.E.2d at 333 (finding that a child’s statements to a mandated reporter were testimonial); *State v. Justus*, 205 S.W.3d 872 (Mo. 2006) (finding that a child’s statements to a state Child Protection Worker were testimonial); *Mack*, 101 P.3d at 349 (finding that a child’s statements to a state caseworker were testimonial).

³⁰⁴ *In re Rolandis G.*, 902 N.E.2d at 611.

Illinois, in *In re Rolandis G.*,³⁰⁵ held that statements made by a seven-year-old to a child abuse investigator employed by a licensed advocacy center were testimonial.³⁰⁶ In reaching its decision, the court relied on the fact that the child advocate worked in concert with other agencies involved in the investigation and prosecution of child sexual abuse and was obligated, by statute, to share information with the police.³⁰⁷ The court stated:

We are not unsympathetic to the State's concern that child abuse victims are often unavailable to testify because of their tender years and, for that reason, "*Crawford* is incompatible with the realities of child abuse prosecutions." However, the Court in *Davis*, when faced with a similar argument in regard to victims of domestic violence, stated, "We may not, however, vitiating constitutional guarantees when they have the effect of allowing the guilty to go free." Thus here, too, we may not abridge constitutional guarantees simply because they are a hindrance to the prosecution of child sexual abuse crimes.³⁰⁸

More recently, in *People v. Spangler*,³⁰⁹ a Michigan court was asked to decide whether a young boy's statements, made to a Sexual Abuse Nurse Examiner ("SANE")³¹⁰ who performed a forensic ex-

³⁰⁵ 902 N.E.2d 600 (Ill. 2008).

³⁰⁶ *Id.* at 613.

³⁰⁷ *Id.*

³⁰⁸ *Id.* The court also found the following facts relevant: The defendant was not charged until after the interview with the child took place, and the police had retained a copy of the videotaped interview as evidence that the child was not in any danger from the defendant at the time of the interview. *Id.*; see also *Hernandez v. Florida*, 946 So.2d 1270, 1282-83 (Fla. Dist. Ct. App. 2007) (finding that the questions of a nurse who was a member of a Child Protection Team at a hospital were the functional equivalent of a police interrogation); *State v. Blue*, 717 N.W.2d 558, 567 (N.D. 2006) (finding that a child's videotaped interview with a forensic interviewer at the Child Advocacy Center was testimonial); *Sisavath*, 13 Cal. Rptr. 3d at 758 (finding that a child victim's videotaped interview at the county facility designed and staffed for interviewing children victims of sexual abuse was testimonial); *Contreras v. State*, 910 So. 2d 901, 905 (Fla. Dist. Ct. App. 2005) (holding testimonial a videotaped statement given by a thirteen-year-old to a coordinator of the state's child protection team where a sheriff was connected electronically in another room).

³⁰⁹ 774 N.W.2d 702 (Mich. Ct. App. 2009).

³¹⁰ *SANE – Sexual Assault Nurse Examiner*, ALLNURSES, <http://allnurses.com/forensic-nursing/sexual-assault-nurse-152900.html> (last updated May 8, 2007, 8:39 AM). The role of the SANE includes the following functions: "Perform a physical examination on the victim, [c]ollect evidence, [t]reat minor injuries such as cuts/bruises, [e]xpert testimony regarding

amination, were testimonial.³¹¹ The court engaged in a lengthy discussion of decisions rendered by courts in other states and noted that the majority of courts have found statements made under these types of circumstances to be testimonial.³¹² The court presented a series of factors that other courts have considered important in making this determination.³¹³ However, the court ultimately found that the record was insufficiently developed to allow it to make the necessary findings.³¹⁴ It remanded the case to the trial court with instructions to develop the record in accordance with its rulings.³¹⁵

the forensic evidence collected, [s]erve on a SANE response team (SART), [w]ork closely with law enforcement agencies and the prosecutor's office, [s]upport the psychological needs of the victim." *Id.*

³¹¹ *Spangler*, 774 N.W.2d at 704.

³¹² *Id.* at 709-12.

³¹³ *Id.* at 713. The factors are:

- (1) The reason for the victim's presentation to the SANE, e.g., to be checked for injuries or for signs of abuse;
- (2) the length of time between the abuse and the presentation;
- (3) what, if any, preliminary questions were asked of the victim or the victim's representative, or what preliminary conversations took place, before the official interview or examination;
- (4) where the interview or examination took place, e.g., a hospital emergency room, another location in the hospital, or an off-site location;
- (5) the manner in which the interview or examination was conducted;
- (6) whether the SANE conducted a medical examination and, if so, the extent of the examination and whether the SANE provided or recommended any medical treatment;
- (7) whether the SANE took photographs or collected any other evidence;
- (8) whether the victim's statements were offered spontaneously, or in response to particular questions, and at what point during the interview or examination the statements were made;
- (9) whether the SANE completed a forensic form during or after the interview or examination;
- (10) whether the victim or the victim's representative signed release or authorization forms, or was privy to any portion of the forensic form, before or during the interview or examination;
- (11) whether individuals other than the victim and the SANE were involved in the interview or examination and, if so, the level of their involvement;
- (12) if and when law enforcement became involved in the case, how they became involved and the level of their involvement; and
- (13) how SANEs are used by the particular hospital or facility where the interview or examination took place.

Id.

³¹⁴ *Id.* at 714.

³¹⁵ *Spangler*, 774 N.W.2d at 714.

V. THE IMPACT OF *MICHIGAN V. BRYANT* ON THE ADMISSIBILITY OF CHILDREN’S HEARSAY STATEMENTS IN CHILD SEXUAL ABUSE PROSECUTIONS

A. The Significant Portions of the *Bryant* Opinion

Bryant affirmed the primary purpose test that the Court set out in *Davis* along with its holding that statements are testimonial when the “primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”³¹⁶ The factors that are important to the determination of the primary purpose of an interrogation are the intentions of the declarant and the listener, the circumstances surrounding the interrogation including whether the statements were made during an ongoing emergency, and the role of the interrogator.³¹⁷

The *Bryant* Court affirmed the *Davis* Court’s requirement that courts apply an objective standard in determining whether statements are testimonial.³¹⁸ In determining the primary purpose of an interrogation, courts should ascertain “the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.”³¹⁹ However, the *Bryant* Court changes from whose perspective this objective standard is applied. While *Crawford* placed the focus of the inquiry squarely on the declarant and *Davis* suggested instances where it might be appropriate for courts to examine the intentions of the interrogators, *Bryant* appears to require that the interrogator’s intent become a key element in the analysis.³²⁰ Moreover, it seems to consider the interrogator’s intent to be paramount in situations where the declarant is operating under a disability, such as the gunshot victim in *Bryant*.³²¹

The *Bryant* decision also altered the concept of what can constitute an ongoing emergency. It suggested that the duration of an ongoing emergency can be quite long in cases involving guns and

³¹⁶ *Bryant*, 131 S. Ct. at 1154.

³¹⁷ *Id.* at 1156-57.

³¹⁸ *Id.* at 1156.

³¹⁹ *Id.*

³²⁰ *Id.* at 1160-62.

³²¹ *Bryant*, 131 S. Ct. at 1158-59.

any possible, albeit negligible, threat to the public at large.³²² Further, it clearly indicated that the duration of emergencies in domestic violence cases will oftentimes be relatively short because they involve a known perpetrator and have a “narrower zone of potential victims than cases involving threats to public safety.”³²³ It also suggested that an emergency ends when the perpetrator flees the scene of the crime with little prospect of posing a threat to the public.³²⁴

With respect to the role of the interrogator in determining whether a declarant’s statements are testimonial, *Crawford*, *Davis*, and *Bryant* all dealt with interrogations by law enforcement personnel, albeit under three distinct sets of circumstances.³²⁵ Whereas, *Crawford* did not shut out the possibility that statements made outside the context of a police interrogation could be testimonial,³²⁶ *Davis* explicitly reserved for another time the question of “whether and when statements made to someone other than law enforcement personnel are testimonial.”³²⁷ However, the Court in *Bryant* clearly took the position that the determination of whether a statement is testimonial is not limited to interrogations by law enforcement personnel when it stated that “the most important instances in which the Clause restricts the introduction of out-of-court statements are those in which *state actors* are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.”³²⁸

Finally, in what is the most disconcerting feature of the *Bryant* opinion, the Court appeared to reintroduce the concept of reliability into its Confrontation Clause jurisprudence.³²⁹ Without explanation, it stated that “standard rules of hearsay, designed to identify some statements as reliable, will be relevant” in determining the primary purpose of an interrogation.³³⁰ However, it provided no guidance as to how this rule should be interpreted or applied, nor did

³²² *Id.* at 1164.

³²³ *Id.* at 1158.

³²⁴ *Id.* at 1159.

³²⁵ *Id.* (involving interrogations of a gunshot victim by police officers in a gas station parking lot); *Davis*, 547 U.S. 813 (involving a 911 call and police interrogations of domestic violence victims in their homes); *Crawford*, 541 U.S. 36 (involving police interrogations of defendant’s spouse while she was in police custody).

³²⁶ *Crawford*, 541 U.S. at 68.

³²⁷ *Davis*, 547 U.S. at 823 n.2.

³²⁸ *Bryant*, 131 S. Ct. at 1155 (emphasis added).

³²⁹ *Id.* at 1174 (Scalia, J., dissenting).

³³⁰ *Id.* at 1155 (majority opinion).

it explain how the reliability of hearsay statements is relevant to the determination of the purpose of an interrogation.

B. The Admissibility of Children’s Hearsay Statements in Criminal Sexual Abuse Prosecutions After *Michigan v. Bryant*

The U.S. Supreme Court’s decision in *Bryant* significantly impacts the admissibility of children’s out of court statements in that it increases the likelihood that the statements will be found to be testimonial, thereby decreasing the likelihood that they will be admitted in criminal prosecutions. First, because of the Court’s choice of the phrase “state actors,”³³¹ courts should no longer be able to find that statements are nontestimonial solely on the grounds that they were not made to law enforcement or government employees. Second, after *Bryant*, courts should be less likely to find that children’s statements reporting sexual abuse are made during ongoing emergencies. Lastly, the shift in focus from the declarant’s intent to that of the interrogator, particularly in situations where the declarant is found to be operating under a disability,³³² should result in an increased number of children’s hearsay statements being found to be testimonial.

1. Mandatory Reporters Are State Actors and Should Be Included in the Category of Individuals to Whom Testimonial Statements Can Be Made

The *Bryant* Court indicated that a statement would be testimonial if made in situations “in which *state actors* are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.”³³³ The Court’s use of the phrase “state actors” is worthy of note.³³⁴ It implies that the category of persons to whom testimonial

³³¹ See *id.* at 1155.

³³² *Id.* at 1161-62. What is uncertain is the effect that the Court’s references to reliability will have. Although it indicated that well-established hearsay exceptions could be considered in determining the primary purpose of an interrogation, how this should happen remains unclear.

³³³ *Bryant*, 131 S. Ct. at 1155 (emphasis added).

³³⁴ *Id.* It might be argued after *Bryant* that the Court’s use of the phrase “state actor” implies that statements made to parents, siblings or other family members or friends might not be testimonial because these individuals would ordinarily not fall into the category of “state actor.” *Id.* However, the Court indicated that state actors would be involved in the “most

statements can be made is not limited to government employees, as some courts have held.³³⁵

A private person can be a state actor pursuant to 42 U.S.C. § 1983³³⁶ when there is a “sufficiently close nexus between the State and the challenged action of the [private person] so that the action of the latter may be fairly treated as that of the State itself.”³³⁷ This can occur in cases in which a particular activity has been specifically authorized or sufficiently encouraged by the state.³³⁸ The U.S. Supreme

important instances” in which testimonial statements might be made. *Id.* Therefore it did not exclude parents or other family members. *Id.*

³³⁵ See *Geno*, 683 N.W.2d at 692; *Vigil*, 127 P.3d at 923-24 (holding that a doctor, absent direct and controlling police presence, is not acting as an agent for the government when questioning a child victim during a medical examination).

³³⁶ See 42 U.S.C. § 1983 (allowing a cause of action against persons who act “under color of any statute, ordinance, regulation, custom or usage, of any State or Territory”). It provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

³³⁷ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972)) (addressing the circumstances under which a private person has acted “under color of law”). Legal scholars have noted three general theories under which “courts have found a sufficient nexus to support state action: the public function test; the government ‘entanglement’ theory; and cases where there has been specific authorization or [sufficient] encouragement” by the state of the particular activity. Sheila S. Kennedy, *When is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 *GEO. MASON U. C.R. L. J.* 203, 210 (2001). Others have viewed the state-action inquiry as being composed of two competing models. John Dorsett Niles et al., *Making Sense of State Action*, 51 *SANTA CLARA L. REV.* 885, 897 (2011) (citing G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 *HOUS. L. REV.* 333, 356 (1997)). Under the first model, referred to as the “characterization model,” a court examines whether the conduct of the private actor can be reasonably characterized as action by the state. Buchanan, *supra*. This question is generally resolved through the nexus or public function test. Niles et al., *supra*. Under this test, state action will be found when the private actor performs “activities or functions which are traditionally associated with sovereign governments, and which are operated almost exclusively by governmental entities.” 2 Ronald D. Rotunda & John E. Nowak, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 1010 (4th ed. 2007); see also *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (finding state action by the actions of a company in owning and running a town on the grounds that this was a function traditionally and exclusively undertaken by the state); *Terry v. Adams*, 345 U.S. 461, 469 (1953) (ruling that holding an election for a candidate for public office is a function traditionally reserved to the state).

³³⁸ See, e.g., *Peterson v. Greenville*, 373 U.S. 244, 247-48 (1963). This includes instances

Court explained this principle in *Rendell-Baker v. Kohn*³³⁹: “[A] State normally can be held responsible for a private decision when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”³⁴⁰ Importantly, when the government mandates certain actions, through *inter alia*, legislation or administrative rules and regulations, a private person’s compliance with these requirements is state action.³⁴¹ In *Peterson v. City of Greenville*,³⁴² the Court found that actions by restaurant owners who discriminated against their customers based on race was state action because existing state legislation commanded that restaurants serve food on a racially segregated basis.³⁴³ Furthermore, in *Adickes v. S.H. Kress & Co.*,³⁴⁴ the Court stated: “[A] State is responsible for the . . . act[s] of a private party when the State, by its law, has compelled the act.”³⁴⁵

Individuals who are required to report suspected cases of child abuse or neglect under state mandatory reporting statutes should be included in the category of individuals to whom testimonial statements can be made, because they would likely be considered state actors under prevailing civil rights litigation jurisprudence.³⁴⁶ Every state has laws mandating reporting of suspected child abuse or neglect.³⁴⁷ These statutes identify the category of professionals that are required to report suspected abuse or neglect and the procedures to be

when the state takes affirmative steps to encourage or compel interaction between private actors and the government. *Id.* In this model, termed the “state authorization” model, the court’s inquiry focuses on the extent to which the state has authorized a private actor’s behavior by “placing the private actor in a position where the actor may ‘gouge’ the challenger with legal impunity.” Niles et al., *supra* note 337, at 897.

³³⁹ 457 U.S. 830 (1982).

³⁴⁰ *Id.* at 840 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

³⁴¹ *Rotunda & Nowak, supra* note 337, at 1010; *see, e.g., Peterson*, 373 U.S. at 247-48.

³⁴² 373 U.S. 244 (1963).

³⁴³ *Id.* at 247-48; *see, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (applying these principles). In *Lugar*, the Court held that a debtor could bring a § 1983 action challenging, on procedural due process grounds, a state procedure that allowed a creditor to secure an *ex parte* writ of attachment against the debtor’s property. *Id.* at 941. The Court found that the joint actions of the sheriff and the creditor, acting pursuant to a state statute, constituted state action. *Id.* at 935. It explained that a private party can be a state actor when “he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.” *Id.* at 937.

³⁴⁴ 398 U.S. 144 (1970).

³⁴⁵ *Id.* at 170.

³⁴⁶ *See* 42 U.S.C. § 1983 (2006) (defining a state actor for purposes of civil rights claims).

³⁴⁷ *Raeder, supra* note 1, at 313.

followed.³⁴⁸ For instance, Michigan's mandatory reporting statute provides in pertinent part:

A physician, dentist, . . . nurse, . . . psychologist, . . . social worker, . . . school counselor or teacher, . . . member of the clergy, or regulated child care provider who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the department. Within 72 hours after making the oral report, the reporting person shall file a written report as required in this act.³⁴⁹

Prior to the *Bryant* decision, some courts were hesitant to find that statements made to mandated reporters were testimonial. In a case involving statements of abuse by a young boy to a physician, the California Supreme Court rejected the defendant's argument that the statements were testimonial even though the physician was obligated by statute to report the abuse.³⁵⁰ The court stated: "The mere fact that doctors must report abuse they *see, suspect or know of* in the course of practice does not transform them into *investigative agents* of law enforcement."³⁵¹

³⁴⁸ *Id.* at 374. The information that must be reported to the child protection agency is also set forth in the statute which provides:

The written report shall contain the name of the child and a description of the abuse or neglect. If possible, the report shall contain the names and addresses of the child's parents, the child's guardian, the persons with whom the child resides, and the child's age. The report shall contain other information available to the reporting person that might establish the cause of the abuse or neglect, and the manner in which the abuse or neglect occurred.

M.C.L. § 722.623(1)(c)(2) (2011).

³⁴⁹ *Id.* §722.623(1)(a). The full list of mandated reporters includes: "physician[s], dentist[s], physician's assistant[s], registered dental hygienist[s], medical examiner[s], nurse[s], person[s] licensed to provide emergency medical care, audiologist[s], psychologist[s], marriage and family therapist[s], licensed professional counselor[s], social worker[s], licensed master's social worker[s], licensed bachelor's social worker[s], registered social service technician[s], social service technician[s], person[s] employed in a professional capacity in any office of the friend of the court, school administrator[s], school counselor[s] or teacher[s], law enforcement officer[s], member[s] of the clergy, or regulated child care provider[s] . . ." *Id.*

³⁵⁰ *People v. Cage*, 155 P.3d 205, 218-20 (Cal. 2007).

³⁵¹ *Id.* at 220. One author has argued that, although physicians are mandated reporters in most jurisdictions, any statements made to them should not be testimonial because physi-

Not all courts have agreed with the California court. The Supreme Court of Illinois held that a child's statements describing sexual abuse that were made to the nurse in charge of a child-abuse team at a local hospital and to a social worker at her school were testimonial.³⁵² It supported its conclusion by the fact that both of these individuals were mandated reporters and therefore had a legal obligation under penalty of criminal law to report information to the child protection agency.³⁵³ The court stated:

[B]y virtue of their status as mandated reporters both [individuals] . . . were legally required to report to the Department and then to testify, and the Department itself was also required to cooperate with law enforcement.³⁵⁴ These facts substantially buttress our conclusion that in this case, in conducting their interviews of the victim, . . . [they] were acting as agents of law enforcement for purposes of confrontation clause analysis.³⁵⁵

The *Bryant* Court's use of the term "state actor" suggests that the cases in which courts have found children's statements to manda-

cians can never be considered to be agents of the government. Tom Harbinson, *Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians are Nontestimonial and Admissible as an Exception to the Confrontation Clause*, 58 MERCER L. REV. 569, 616-17 (2007). The author argues that physicians are not agents of the government because agency law requires a free choice on the part of the agent in entering into the relationship with the principal, which is not present in the case of mandatory reporting. *Id.* at 616-17. Additionally, a physician's ethical duty requires that he act on behalf of the best interests of his patient and not on the part of the government, which would be required by agency law. *Id.* at 618. Finally, there is no agreement between mandated reporters and the state nor is the physician under the control of the government, two principles that are required under agency law. *Id.* The author also argued that the fact that the interview is videotaped should not make statements testimonial. *Id.* at 629. He suggests that the purpose is simply to "memorialize[e] the child's statements," and "allow[] the child's demeanor to be recorded on videotape." Harbinson, *supra* at 628. However, he does not explain why a physician would be interested in preserving a record of the child's demeanor, if not for potential use at subsequent criminal proceedings.

³⁵² *Stechly*, 870 N.E.2d at 363-65. In this case, her mother took the child to a hospital, where she was interviewed by a nurse and subsequently examined by a physician. *Id.* at 339. The school social worker interviewed the child the following day, after receiving a call from the child's mother. *Id.* at 339-40; *see also* *State v. Hosty*, 944 So. 2d 255 (Fla. 2006) (Pariente, J., concurring in part and dissenting in part) (discussing the fact that a teacher had a duty to report a child's statement to law enforcement personnel as a pertinent factor in determining whether the statements were testimonial).

³⁵³ *Stechly*, 870 N.E.2d at 365.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

tory reporters to be testimonial were correctly decided. Under the prevailing mandated reporting statutes, it is clear that states have commanded particular action from specifically named individuals. States require these named individuals to file reports of suspected cases of child abuse and neglect with law enforcement authorities.³⁵⁶ These statutes also prescribe criminal sanctions for failure to comply.³⁵⁷ Therefore, the actions of these private persons, in reporting suspected cases of child abuse and neglect pursuant to these statutes, are state action and the individuals involved are state actors.³⁵⁸ Following *Bryant*, courts should no longer be able to conclude that statements made to this category of individuals are nontestimonial on the grounds that they are not made to governmental employees.

2. *The Primary Purpose Test: The Scope of an Ongoing Emergency*

The Court's discussion of the factors that demonstrate an ongoing emergency, particularly the manner in which it distinguished the circumstances in *Bryant* from those in *Davis*, will have a significant impact on the admissibility of children's statements in future criminal prosecutions. The Court clearly stated that the duration of an emergency in cases of domestic violence is far shorter than in other types of crimes.³⁵⁹ It is significant that the Court emphasized that domestic violence cases have a narrower zone of potential victims than those presented in *Bryant*; it is also significant that the Court emphasized the fact that in both *Davis* and *Hammon* the perpetrator was known to the victim.³⁶⁰ And it is noteworthy that in *Hammon*, the Court found that the threat was neutralized once law enforcement personnel arrived on the scene.³⁶¹ Lastly, the Court's comments that an emergency would end once the perpetrator flees the scene of the

³⁵⁶ M.C.L. § 722.623 (2011).

³⁵⁷ M.C.L. § 722.633 (2011).

³⁵⁸ *Kia P. v. McIntyre*, 235 F.3d 749, 756-57 (2d Cir. 2000). Further, it is likely that legislatures contemplated this result when they provided a grant of immunity to persons acting in conformity with the reporting statutes. *See, e.g.*, M.C.L. § 722.625 (providing immunity from civil or criminal liability for any "person acting in good faith who makes a report, cooperates in an investigation, or assists in any other requirement of this act A person making a report or assisting in any other requirement of this act is presumed to have acted in good faith").

³⁵⁹ *Bryant*, 131 S. Ct. at 1158.

³⁶⁰ *Id.*; *Davis*, 547 U.S. at 832-33.

³⁶¹ *Davis*, 547 U.S. at 829-30; *Bryant*, 131 S. Ct. at 1158.

crime with little prospect of posing a threat to the public will prove to be quite important for future cases to come because any statement made after this point could be considered testimonial.³⁶²

If this reasoning is applied to child sexual abuse cases (and it is likely that it will be given the analogous nature of domestic violence and sexual abuse crimes), the effect will be to significantly limit the time frame during which children's statements can be found to be nontestimonial. Prior to *Bryant*, some courts found that an ongoing emergency existed at the time a young child was taken to a hospital for an examination following reports of sexual abuse.³⁶³ However, this finding will no longer align with the *Bryant* decision. The perpetrator in a child sexual abuse case is more analogous to a batterer in domestic violence cases than the armed gunman in *Bryant*. In child sexual abuse cases, the perpetrator is generally known to the victim since the vast majority of children are sexually abused by family members or friends.³⁶⁴ Additionally, like the perpetrators in *Hammon* and *Davis*, the perpetrator in a child sexual abuse case generally does not present a threat to the public at large.

Furthermore, although some courts found an ongoing emergency in child sexual abuse cases when the perpetrator continued to live in the same household as the child,³⁶⁵ going forward, these conclusions will also be difficult to square with the *Bryant* decision. In analyzing the span of the emergency in *Davis*, the *Bryant* Court never considered the very real possibility that an abusive partner is likely to repeat his actions in the very near future. In reviewing *Hammon*, the Court found that the emergency had ended even though the husband never left the home.³⁶⁶ Moreover, the *Bryant* Court commented that since the husband in *Hammon* was “armed only with his fists when he attacked his wife, . . . removing [her] to a separate room was sufficient to end the emergency.”³⁶⁷ By analogy, in child sexual abuse cases, removing the child victim from the physical presence of the perpetrator would also end the emergency because, like the abusive spouse in *Hammon*, a child molester is generally “armed only with”

³⁶² *Bryant*, 131 S. Ct. at 1159; *Davis*, 547 U.S. at 828.

³⁶³ See *Seely v. State*, 282 S.W.3d 778, 789-90 (Ark. 2008); *State v. Krasky*, 736 N.W.2d 636, 641-42 (Minn. 2007).

³⁶⁴ *Burch v. Millas*, 663 F. Supp. 2d 151, 169 (W.D.N.Y. 2009).

³⁶⁵ *Id.*

³⁶⁶ *Davis*, 547 U.S. at 829-30.

³⁶⁷ *Bryant*, 131 S. Ct. at 1159 (emphasis added).

his physical anatomy.

3. *The Primary Purpose Test: Considering the Interrogator's Intentions*

The *Bryant* Court stated that in determining the primary purpose of an interrogation, courts should ascertain “the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.”³⁶⁸ Following *Crawford*, yet before the decision of *Bryant*, with the focus of a court’s inquiry centered on the intent of the declarant, many courts felt free to find that children’s statements were nontestimonial on the grounds that a “reasonable child” would be unable to comprehend that his or her statements may be used in a subsequent criminal trial.³⁶⁹ Thus, *Bryant* has shifted the focus to consider the interrogator’s intent especially in situations where the declarant is operating under a disability. Therefore, resolution of whether a young child’s out-of-court statements are testimonial will require a court to focus on the interrogator’s intent. Because of this, *Bryant* may also change the manner in which courts resolve cases in which professionals who perform dual functions interrogate children. For example, physicians perform dual roles in cases involving the sexual abuse of children. They provide medical care, but because they are mandated reporters, they also serve as investigators for the state.³⁷⁰ In Michigan, physicians are required to report “information available to the reporting person that might establish the cause of the abuse or neglect, and the manner in which the abuse or neglect occurred.”³⁷¹ These reporting requirements necessitate that physicians perform investigatory functions, particularly with respect to the manner in which the abuse occurred, which include obtaining information about the identity of the perpetrator and reporting this information to state authorities.

Professor Robert Mosteller has commented that cases such as these, in which the professionals have mixed motives and intentions, “present[] a key test of whether the testimonial statement system has

³⁶⁸ *Id.* at 1156.

³⁶⁹ *Vigil*, 127 P.3d at 926.

³⁷⁰ *State v. Goins*, No. CA2000-09-190, 2001 WL 1525298, at *6 (Ohio Ct. App. Dec. 3, 2001).

³⁷¹ M.C.L. § 722.623(1)(c)(2).

substance or only requires a precise articulation of another acceptable purpose as an avoidance strategy.³⁷² Courts that found a nontestimonial purpose for interrogations in situations where the professional had mixed motives appear to have done so in an effort to achieve the desired result from a policy perspective.³⁷³ However, in doing so, these courts have produced opinions in which the law has been stretched beyond its rational boundaries.³⁷⁴

In these types of cases, it is not necessary for courts to find only one purpose behind an interrogation. Both *Bryant* and *Davis* have recognized, at least with respect to ongoing emergencies, that conversations that originate as an interrogation, whose main purpose is to determine the need for emergency assistance, can develop into testimonial statements.³⁷⁵ The same reasoning should apply to situations where an interrogator has mixed motives and intentions. For example, questioning by a physician that begins with the need to obtain information from the child that is necessary for medical diagnosis or treatment can transform into testimonial statements. The interrogation becomes prosecutorial in nature once the medical status is properly assessed. At this point, the purpose of any additional questioning shifts to ascertaining fault, particularly when the questions are designed to elicit the identity of the perpetrator. In these cases, children's statements identifying their abusers should be considered to be testimonial.³⁷⁶ The physician is a state actor, the circumstances under which the statements are elicited are not likely to be considered an ongoing emergency, and by inquiring into the identity of the perpetrator, the physician is engaging in the role of a state investigator. Moreover, the physician has reason to know that the information he or she obtains and reports to the law enforcement authorities will likely be used at a subsequent trial.

Even more compelling arguments can be made that children's statements obtained in response to questioning by SANEs or members of multidisciplinary teams that operate in hospitals and specia-

³⁷² Mosteller, *supra* note 66, at 974.

³⁷³ *Id.* at 970-75 (noting that some courts that have found a nontestimonial purpose behind interrogations of children have based their decision on finding that the questioning was motivated by concerns for the health and welfare of the child).

³⁷⁴ *Geno*, 683 N.W.2d at 692 (concluding that the child's statement to the executive director of a forensic center was not testimonial simply because the director was not a governmental employee).

³⁷⁵ *Bryant*, 131 S. Ct. at 1159.

³⁷⁶ *Vigil*, 127 P.3d at 926.

lized clinics should be considered testimonial. Not only are these professionals state actors but they are frequently so closely aligned with law enforcement as to be considered an arm of law enforcement. For example, one agency reports on its website that it engages in forensic interviewing conducted with other “team members” observing the interview via a one-way glass, and that it has three city police officers; two sheriff detectives; and four state child protection workers housed at its facilities.³⁷⁷ It also reports that a pediatrician at the agency performs physical exams and collects evidence in cases of sexual abuse.³⁷⁸

Likewise after *Bryant*, children’s statements reporting sexual abuse made to employees of a state’s child protection agency should be found to be testimonial. It is routine practice for investigators employed by a state’s child protection agency to question young children after the agency has received a report of suspected abuse.³⁷⁹ In these situations, the child protection worker is a state actor, and although concerns for the child’s welfare will have prompted the investigation, there is no doubt that there is also a prosecutorial purpose to the questioning. In fact, the child protection agency is normally required to forward a copy of its investigation report to law enforcement in cases of child sexual abuse and to continue to work in tandem with the police departments and the county prosecutor’s office.³⁸⁰

In determining whether children’s statements are testimonial, when they are made in situations in which the interrogators have mixed motives and intentions, the inquiry test should not focus on whether there is some accompanying, nontestimonial reason for the interrogation. Rather, the inquiry should focus on the investigative role that these persons are performing and whether they have reason to know that the information they obtain and report to law enforcement will likely be used in a subsequent criminal trial.

³⁷⁷ Children’s Assessment Center, *Hearing the Story*, CHILD ASSESSMENT CTR., www.cac-kent.org/hearing_the_story.php (last visited Jan. 3, 2012).

³⁷⁸ *Id.*

³⁷⁹ *The Statewide Central Register of Child Abuse and Maltreatment*, CHILD PROTECTIVE SERVS., <http://www.ocfs.state.ny.us/main/cps/> (last visited Jan. 4, 2012).

³⁸⁰ *See, e.g.*, M.C.L. § 722.623(c)(6).

C. Recommendations

The testimonial approach to Confrontation Clause jurisprudence has been criticized as being “intellectually and ethically bankrupt,”³⁸¹ particularly as it relates to children’s hearsay statements. Professor Eileen Scallen has commented that under the current state of the law, out-of-court statements made by “hysterical, unavailable declarants whose ability to perceive, recall, and communicate key facts is questionable” are admissible in criminal trials.³⁸² Yet, ironically, videotaped interviews of children that are conducted by trained investigators “questioning a vulnerable child witness whose memory will only likely deteriorate with time” will likely be excluded.³⁸³ There is certainly much truth to Professor Scallen’s statements. Nonetheless, if the Confrontation Clause is to be accorded its due respect, courts must require what the Clause demands: “[that] the accused shall enjoy the right to . . . be confronted with the witnesses against him”³⁸⁴

Unfortunately, issues of competency often arise when young children are called as witnesses, which can prevent them from testifying at trial.³⁸⁵ Courts require a witness to be capable of discerning truth from lies, willing and able to swear an oath or make some other promise that he or she will testify truthfully, and capable of speaking about the facts at issue.³⁸⁶ Although there is a rebuttable presumption in Federal Rule of Evidence 601 that everyone is competent to testify,³⁸⁷ research suggests that some courts are hesitant to find children competent to testify.³⁸⁸

Not only do courts differ in their positions on whether children are competent enough to testify under evidentiary rules, but they also take different positions on what is required to constitute sufficient cross-examination to satisfy the Confrontation Clause. The

³⁸¹ Eileen A. Scallen, *Coping with Crawford: Confrontation of Children and Other Challenging Witnesses*, 35 WM. MITCHELL L. REV. 1558, 1607 (2009).

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ U.S. CONST. amend. VI.

³⁸⁵ See Aviva A. Orenstein, *Children as Witnesses: A Symposium on Child Competence and the Accused’s Right to Confront Child Witnesses*, 82 IND. L. J. 909 (2007).

³⁸⁶ *Kentucky v. Stincer*, 482 U.S. 730, 741 (1987).

³⁸⁷ FED R. EVID. 601 (providing that witnesses are competent “except as otherwise provided”).

³⁸⁸ Scallen, *supra* note 381, at 1586 (citing Thomas D. Lyon & Karen J. Saywitz, *Young Maltreated Children’s Competence to Take the Oath*, 3 APPLIED DEV. SCI. 16, 16-27 (1999)).

Eighth Circuit has held that if a child is too young to be cross-examined or if she is too young or frightened to be subjected to a thorough cross-examination, “the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Clause.”³⁸⁹ On the other hand, the U.S. Supreme Court has set a low threshold for determining a witness’ availability for cross-examination purposes.³⁹⁰ In *United States v. Owens*,³⁹¹ the Court held that a witness is available for, and hence subject to cross-examination for Confrontation Clause purposes, when he takes the stand, swears an oath, and responds willingly to questions, although he may have no memory of the events to which he was called to testify.³⁹² The Court stated that “the Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’”³⁹³

In response to the hesitancy of some courts to find children competent to testify, scholars have appealed to these courts to be flexible in their approach to child witnesses.³⁹⁴ Professors Thomas Lyon and Karen Saywitz from U.C.L.A. Medical Center have suggested that judges and advocates have inadvertently “skew[ed] the competency hearing results by the [manner in which] they frame the questions” to young children.³⁹⁵ They have created alternative competency assessment tools for courts to employ that they believe will improve the competency determinations of young children.³⁹⁶ These alternative methods focus on determining whether a child can understand if statements are false and on the child’s ability to communi-

³⁸⁹ *United States v. Spotted War Bonnet*, 933 F.2d 1471, 1474 (8th Cir. 1991) (citing *United States v. Dorian*, 803 F.2d 1439, 1446 (8th Cir. 1986)). For an in depth discussion, see Raeder, *supra* note 1, at 384-85.

³⁹⁰ *United States v. Owens*, 484 U.S. 554 (1988).

³⁹¹ *Id.* During the crime, the witness suffered amnesia from a blow to his head. *Id.* at 556. At the time of the trial, he remembered that he had previously identified the defendant as his assailant; however he could not remember seeing his assailant and was unable to recall details of the assault. *Id.*

³⁹² *Id.* at 564.

³⁹³ *Owens*, 484 U.S. at 559 (emphasis added) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

³⁹⁴ Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1022 (2000).

³⁹⁵ Scallen, *supra* note 381, at 1587 (citing Thomas D. Lyon & Karen J. Saywitz, *Qualifying Children to Take the Oath: Materials for Interviewing Professionals* (May 2000), available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1008&context=thomaslyon>).

³⁹⁶ *Id.* (citing Lyon & Saywitz, *supra* note 395).

cate.

If the lack of testimonial competency of a young child is due to the child's inability to communicate with the jury, then courts have flexibility under *Maryland v. Craig*³⁹⁷ to utilize alternative methods to traditional testimony such as closed circuit televisions or screening devices.³⁹⁸ These alternative procedures can improve a child's competency level by enhancing the child's ability to communicate with the jury, and if used effectively, can operate to assure that more children will testify at trial.³⁹⁹ Although some commentators have questioned the continued viability of *Craig* after *Crawford*, lower federal courts have upheld it, finding that *Crawford* applies only to testimonial statements made prior to trial and not to procedures or methods utilized to enhance a child's testimony during trial.⁴⁰⁰

In cases in which a child is found incompetent to testify or is otherwise unavailable at the time of trial, the admissibility of the child's testimonial statements will depend on whether the defendant was afforded a prior opportunity for cross-examination. A pre-trial deposition, which should take place after formal criminal charges are filed, can provide the defendant with this opportunity, and assure that a child's testimonial statements can be admitted at trial. Furthermore, provided that certain requirements are met, a video-taped deposition

³⁹⁷ 497 U.S. 836 (1990). This case addressed the constitutionality of a Maryland statute that existed at the time that allowed one-way closed circuit testimony of child witnesses upon a showing that testifying in a courtroom would cause the child to suffer "serious emotional distress such that the child cannot reasonably communicate." *Id.* at 841 (citing MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii)(1989)). The Court noted that the principal concern of the Confrontation Clause is to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Id.* at 845. The Court found that the Maryland procedure preserved all of the elements of the confrontation right except for face-to-face confrontation and found that it furthered an important state interest – "protecting child witnesses from the trauma of testifying in [] child abuse case[s] is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." *Id.* at 855.

³⁹⁸ Raeder, *supra* note 6, at 1015.

³⁹⁹ Scallen, *supra* note 381, at 1592-93. For a discussion of *Maryland v. Craig* in a post-*Crawford* world, see Raeder, *supra* note 1, at 386-87. Professor Raeder's recent work contains an in-depth discussion of the various methods of alternative testimony that may be employed. Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don't Die and Ways to Facilitate Child Testimony*, 16 WIDENER. L. REV. 239, 261-62 (2010).

⁴⁰⁰ Scallen, *supra* note 381, at 1591-92 (citing *United States v. Yates*, 438 F.3d 1307, 1313-14 n.4 (11th Cir. 2006)); see also *United States v. Bordeaux*, 400 F.3d 548, 553-56 (8th Cir. 2005).

can be admitted at trial in lieu of the child's in-court testimony.⁴⁰¹

⁴⁰¹ 18 U.S.C. § 3509 (2006 & Supp. III 2009). This statute provides comprehensive and thoughtful standards to be applied in circumstances involving the remote testimony of a child and the use at trial of videotaped depositions at trial.

(2) Videotaped deposition of child.--(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under subsection (h) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

(B)

(i) Upon timely receipt of an application described in subparagraph (A), the court shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public for any of the following reasons:

(I) The child will be unable to testify because of fear.

(II) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.

(III) The child suffers a mental or other infirmity.

(IV) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

(ii) If the court finds that the child is likely to be unable to testify in open court for any of the reasons stated in clause (i), the court shall order that the child's deposition be taken and preserved by videotape.

(iii) The trial judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are—

(I) the attorney for the Government;

(II) the attorney for the defendant;

(III) the child's attorney or guardian ad litem appointed under subsection (h);

(IV) persons necessary to operate the videotape equipment;

(V) subject to clause (iv), the defendant; and

(VI) other persons whose presence is determined by the court to be necessary to the welfare and well-being of the child.

The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be confronted with the witness against the defendant, and the right to cross-examine the child.

(iv) If the preliminary finding of inability under clause (i) is based on evidence that the child is unable to testify in the physical presence of the defendant, the court may order that the defendant, including a defendant represented pro se, be excluded from the room in which the deposition is

Prosecutors should be encouraged to employ these procedures whenever it is feasible to do so. Thus, the use of alternative competency assessment tools, modifying the conditions under which young children testify, will operate to significantly increase the likelihood that the testimony of young children will be admissible at trial.

VI. CONCLUSION

The Supreme Court's Confrontation Clause jurisprudence, with its shift from a reliability-based approach to the current testimonial approach, has made it more difficult for prosecutors to have children's hearsay statements admitted at trial. The Court's recent decision in *Bryant* will likely add to this difficulty. First, the decision treats domestic violence cases differently from other crimes in terms of determining the state of an ongoing emergency. Second, it shifts the focus of the primary purpose analysis to interrogators in instances where the declarant operates under a disability. Third, it suggests that statements made to "state actors" can be testimonial.⁴⁰² As a result, the *Bryant* opinion will likely increase the chances that courts will find a child's out-of-court statements to be testimonial and therefore not admissible at trial unless the child testifies.

However, courts can increase the chances that children will testify at trial by adopting alternative competency assessment tools and by allowing children to testify under alternative conditions, such as through the use of closed-circuit television or through the use of pre-trial depositions in which the defendant is afforded an opportunity for cross-examination. These tools will assure that children will be heard and that their complaints of sexual abuse will be admissible at trial under circumstances that recognize the delicate balance that is

conducted. If the court orders that the defendant be excluded from the deposition room, the court shall order that 2-way closed circuit television equipment relay the defendant's image into the room in which the child is testifying, and the child's testimony into the room in which the defendant is viewing the proceeding, and that the defendant be provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition.

Id. § 3509(b)(2)(B)(i)-(iv); see also Mueller & Kirkpatrick, *supra* note 237, at 316-17 (citing John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 706 (1987)); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 808 (1985).

⁴⁰² *Bryant*, 131 S. Ct. at 1155.

required to protect the compelling, yet competing, interests at stake: the need to prosecute offenders of these horrific crimes and the need to honor the mandate of the Confrontation Clause.