

# Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them”<sup>1</sup>

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1. *Isaiah* 11:6 (King James).

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#### INTRODUCTION

In *Crawford v. Washington*,<sup>2</sup> the United States Supreme Court announced a radically different paradigm for Confrontation Clause analysis. In an opinion authored by Justice Scalia, the Court ruled that “testimonial” statements are the core, perhaps exclusive, concern of the Confrontation Clause. The Court declined to develop a comprehensive definition of the testimonial concept, which it left for another day.<sup>3</sup> The Court, albeit cautiously and with many issues left deliberately ambiguous, began a process of defining the testimonial-statement concept.

*Crawford* found testimonial a tape-recorded statement obtained from a criminal suspect who was in police custody and who was being interrogated by known government agents using what the Court termed “structured” questioning. Justice Scalia provided only a somewhat generalized version of the necessary implications of the fact pattern covered in *Crawford*, which was roughly appended to the most restrictive of the three suggested definitions:<sup>4</sup> “it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”<sup>5</sup> The new rule covers a very problematic and historically important, but isolated, group of cases—statements given by co-participants under police interrogation in the stationhouse.

Two years later, the Court came back to the task of redefining the Confrontation Clause. In *Davis v. Washington*,<sup>6</sup> an opinion again written by Justice Scalia, the Court examined two more fact patterns, this time related to domestic violence. It found nontestimonial one set of statements made in an apparent emergency situation and pertaining to that emergency. It ruled testimonial another set of statements made by an apparent victim in the field to a police officer soon after the alleged assault, where the purpose of the questioners was to establish facts about past events.

Like the stationhouse statements of co-participants examined in *Crawford*, the class of statements *Davis* examined—emergency calls and statements to police in domestic

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2. 541 U.S. 36 (2004).

3. *Id.* at 68.

4. *See id.* at 51–52 (noting that one core class of testimonial statements consists of “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions” (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)) (alteration in original)).

5. *Id.* at 68.

6. 126 S. Ct. 2266 (2006).

violence cases—are extremely important. Domestic violence cases have great social importance, and their treatment under Confrontation Clause analysis is often critical to legal action because often victims do not testify and the prosecution relies upon hearsay evidence. Despite the importance of what *Davis*, like *Crawford*, decided, the Court failed to even attempt a comprehensive definition of the testimonial concept.

Instead, it apparently only slightly amplified the coverage of testimonial statements set out in *Crawford*:

Statements are not testimonial 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 is to establish or prove past events potentially relevant to later criminal prosecution.<sup>7</sup>

We now definitely know that testimonial statements include affidavits; prior testimony; confessions; stationhouse police interrogations; and nonemergency, official-investigative statements taken by the police regarding past criminal events in the field. We know relatively little about what other statements are covered by the concept, and an enormous number of important coverage and analytical points remain unresolved. Whenever the Court decides to examine a case involving a child witness, we will likely learn far, far more.

The typical reported case involves a young child, from two and one-half to eleven years old,<sup>8</sup> who is an apparent victim of sexual abuse. The evidence at issue is a set of

7. *Id.* at 2273–74.

8. Two years old: *United States v. Peneaux*, 432 F.3d 882, 887 (8th Cir. 2005); *People v. Geno*, 683 N.W.2d 687, 689 (Mich. Ct. App. 2004); *State v. Fisher*, 108 P.3d 1262, 1264 (Wash. Ct. App. 2005).

Three years old: *State v. Scacchetti*, 711 N.W.2d 508, 510 (Minn. 2006) (three and one-half); *State v. Bobadilla*, 709 N.W.2d 243, 246 (Minn. 2006); *State v. Buda*, 931 A.2d 735, 737 (N.J. Super. Ct. App. Div. 2006); *State v. Mack*, 101 P.3d 349, 349 (Or. 2004); *State v. Shafer*, 128 P.3d 87, 89 (Wash. 2006).

Four years old: *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 755, 756 (Cal. Ct. App. 2004) (the younger of the children was four and the older was eight; only the four-year-old's testimony was challenged because she was disqualified from testifying); *State v. Justus*, 205 S.W.3d 872, 874, 880 n.9 (Mo. 2006) (at the time of the incident, the child was three, but by the time of the interview, she had turned four); *State v. Blue*, 717 N.W.2d 558, 560 (N.D. 2006); *State v. Pitt*, 147 P.3d 940, 942 (Or. Ct. App. 2006); *Morales v. State*, No. 13-05-188-CR, 2006 WL 3234073, at \*1 (Tex. Ct. App. Nov. 9, 2006); *Rangel v. State*, 199 S.W.3d 523, 529, 535 (Tex. Ct. App. 2006) (four at the time of the incident and six at the time of trial); *Lagunas v. State*, 187 S.W.3d 503, 506, 512 (Tex. Ct. App. 2006) (four at the time of the incident and seven at the time of trial); *State v. Price*, 146 P.3d 1183, 1183 (Wash. 2006) (four at the time of the incident and six at the time of trial); *State v. Vogelsberg*, 724 N.W.2d 649, 650 (Wis. Ct. App. 2006).

Five years old: *People v. Soria*, No. B182682, 2006 WL 3060052, at \*1 (Cal. Ct. App. Oct. 30, 2006) (unpublished opinion); *People v. Sharp*, 155 P.3d 577 (Colo. Ct. App. 2006); *In re E.H.*, 823 N.E.2d 1029, 1031 (Ill. App. Ct. 2005); *In re Welfare of A.J.A.*, No. A06-479, 2006 WL 2474267, at \*2 (Minn. Ct. App. Aug. 29, 2006) (unpublished opinion); *Foley v. State*, 914 So. 2d 677, 682 (Miss. 2005); *State v. Brigman*, 615 S.E.2d 21, 25 (N.C. Ct. App. 2005).

Six years old: *In re S.S.*, 637 S.E.2d 151, 152 (Ga. Ct. App. 2006); *State v. Hooper*, No.

hearsay statements made by the child to (1) parents, relatives, and other private parties closely associated with the child or family; (2) teachers and other public officials who have no criminal investigative duties;<sup>9</sup> (3) nurses and doctors who have been called upon to examine the child (sometimes in a private treatment capacity, sometimes in a quite explicitly forensic capacity, and many times in a mixed or indeterminate capacity—but always against an environment that recognizes child abuse must be reported for potential prosecution); (4) social workers and child abuse investigation team members, from both public and private organizations, questioning the child for a number of potentially different purposes; and (5) police officers.

If it chooses to do so, the Court may avoid many of the remaining unanswered questions by granting certiorari on a child's case that involves a single narrow issue. However, the reported cases are numerous enough and present such a rich array of issues and factual backgrounds that resolving child hearsay cases will certainly provide an opportunity for the Court to answer a number of the most critical remaining issues.

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31025, 2006 WL 2328233, at \*1 (Idaho Ct. App. 2006), *review granted*, Jan. 18, 2007; Commonwealth v. DeOliveira, 849 N.E.2d 218, 220 (Mass. 2006); State v. Krasky, 721 N.W.2d 916, 917 (Minn. Ct. App. 2006) (the contested statement was taken from the older of the two children who was six at the time of the incident but apparently would have been eight at the time of the interview two years after the incident).

Seven years old: People v. Vigil, 127 P.3d 916, 919 (Colo. 2006); *In re Rolandis G.*, 817 N.E.2d 183, 185 (Ill. App. Ct. 2004); *In re T.T.*, 815 N.E.2d 789, 792 (Ill. App. Ct. 2004) (nine at the time of testimony); Pantano v. State, 138 P.3d 477, 479 (Nev. 2006).

Eight years old: T.P. v. State, 911 So. 2d 1117, 1119 (Ala. Crim. App. 2004); State v. Snowden, 867 A.2d 314, 316 (Md. 2005) (the case involves three children, one age eight and the other two age ten; the younger age is used).

Nine years old: Contreras v. State, 910 So. 2d 901, 912 (Fla. Dist. Ct. App. 2005), *review granted*, 924 So. 2d 810 (Fla. 2006); State v. Johnson, No. CA2005-10-422, 2006 WL 2796826, at \*1 (Ohio Ct. App. Oct. 2, 2006) (unpublished opinion).

Ten years old: State v. Grace, 111 P.3d 28, 31 (Haw. Ct. App. 2005) (two children were involved, one ten and the other eleven); Purvis v. State, 829 N.E.2d 572, 576 (Ind. Ct. App. 2005) (chronological age of ten but because of a brain disorder, the child functions at approximately the age of five to six).

Eleven years old: State v. Noah, 137 P.3d 1093, \*1 (Kan. Ct. App. 2006) (unpublished table decision); State v. Walker, 118 P.3d 935, 938 (Wash. Ct. App. 2005) (child in included case of *State v. Garrison* was eleven).

9. I excluded from this category social workers who have duties regarding the child's placement and safety that overlap with law enforcement duties. These non-law-enforcement government officials are treated in a separate category.

Cases involving teachers receiving statements from children have been infrequent since *Crawford*. *State v. Hosty*, 944 So. 2d 255, 257 (Fla. 2006), might be considered in this category because the mentally disabled victim, who was twenty-three, had the mental capacity of a ten-year-old child. The Florida Supreme Court, without analysis, considered the victim's statement to the teacher regarding abuse nontestimonial. *Id.* at 259. The teacher, having noticed that the victim was withdrawn and lethargic, asked her if something was wrong. *Id.* at 257. In response, the victim told the teacher that the defendant, her school bus driver, had sex with her and provided further details after additional questioning. *Id.* As discussed later for other categories of questioners, nontestimonial treatment of such statements is consistent with the general pattern that considers statements nontestimonial even though highly accusatory—that is, they identify the defendant as the perpetrator of a crime—if the questioner's primary purpose concerns the health and welfare of the victim.

These remaining issues include: (1) Whose intent or perspective matters—the child/witness or the questioner? If it is the child/witness’s perspective, how is that perspective to be examined subjectively or objectively? If objectively, is it to be judged from the perspective of the objective person or the objective person of the age and circumstances of the child? (2) Can statements to private parties be treated as testimonial in any situation, and if so, under what circumstances? (3) When should statements to government officials who are not police officers be treated as testimonial? (4) Must statements be made for an explicitly criminal justice purpose in order to be excluded, and if so, must that purpose be a sole, a primary, or an important purpose?

On some of the major issues regarding the practical definition of the testimonial concept, the lower court cases are much closer to consensus than one might expect, given their rampant disagreement on the meaning of *Crawford* in other areas.<sup>10</sup> However, the lower courts’ agreement in terms of result does not extend to doctrinal justification for some of the results, and the key features that should determine the testimonial decision in close cases are often unclear.

Although many children testify at trial and do so in a way that resembles adult testimony, some extremely difficult issues arise when the child testifies, but the testimony and the child are limited and arguably legally inadequate. Limitations may exist for a number of reasons, which include the inherent deficits in capabilities of quite young children, possible inability to understand the oath, trauma involved in testifying, and reticence or refusals to testify.

Disqualification of children to testify through judicial determination of incompetence or a ruling of unavailability present quite substantive issues, but they are largely unchallenged or unchallengeable at the appellate level. This is because of the discretionary nature of the ruling, and the deference accorded it on appeal—as a result of the critical importance of demeanor and behavior that cannot fully be captured in the written record. Even at the trial court level, accurately determining the cause of the child’s difficulty in testifying can be very challenging. Unlike the situation when an adult acts on the witness stand in a way that raises questions about that person’s ability or willingness to proceed, similar conduct by a child who has apparently been tragically victimized can only be examined delicately, if at all. A quite different but no less problematic situation arises when the child is not ruled incompetent or unavailable, takes the stand, and is found legally “available” for cross-examination despite being a quite limited and arguably legally inadequate witness.

These complex areas generally appear entirely separate because they are not considered in the same appellate opinion. In one set of cases, children are found

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10. For example, the treatment of lab tests is in complete disarray. For cases ruling that lab reports are not testimonial, see *United States v. Feliz*, 467 F.3d 227, 229–33 (2d Cir. 2006); *United States v. Ellis*, 460 F.3d 920, 923–27 (7th Cir. 2006); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005); *State v. Dedman*, 102 P.3d 628, 634–36 (N.M. 2004); *State v. Cao*, 626 S.E.2d 301, 305 (N.C. Ct. App. 2006); and *Oregon v. Thackaberry*, 95 P.3d 1142, 1145 (Or. Ct. App. 2004). For cases holding such reports testimonial, see *Thomas v. United States*, 914 A.2d 1, 8–20 (D.C. 2006); *Shiver v. State*, 900 So. 2d 615, 618 (Fla. Dist. Ct. App. 2005); *People v. Lonsby*, 707 N.W.2d 610, 618 (Mich. Ct. App. 2005); *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006); *People v. Rogers*, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004); and *State v. Crager*, 844 N.E.2d 390, 397, 399 (Ohio Ct. App. 2005).

incompetent because they are unable to answer questions or take the oath or are unavailable because of trauma. In another group of cases, children are ruled available for cross-examination with a focus on the statutory basis for hearsay admission or the constitutional standard to satisfy confrontation—without attention to the competency determination that was a necessary prerequisite. I look at disqualification (incompetency) and legal adequacy (availability for cross-examination) as related concerns which, I argue, should be linked by an approach that encourages confrontation rather than focusing principally on the impact of the Clause to exclude some hearsay.

For a child with limited capacities, for example, the factual picture is often largely the same—in terms of the lack of meaningful interchange—whether declared incompetent or ruled available for cross-examination. The difference in legal ruling may lie in the litigation strategy of the prosecution based on the nature of the prior hearsay statements made by the child, rather than resting on differences in the child's performance. To secure admission of the hearsay statement, the prosecutor may support a finding of unavailability, for example, as the consequence of trauma, or it may argue that the child is competent and indeed legally available for cross-examination. The difference in terms of confrontation between the two rulings is obviously enormous.

Developing a unified approach to incompetency/availability for cross-examination will be difficult. We are not close to having a unified conceptual approach to these issues. Moreover, even if concepts were agreed upon, legal rules would defy practical enforcement in many situations. For example, the varying conduct of prosecutors in preparing the child outside the courtroom and defense counsel in questioning the child during cross-examination present enormous hurdles for effective implementation of any proposed rules and could render conceptual agreement largely inconsequential in many situations.<sup>11</sup>

In Part I, I set out the data that the Supreme Court has given us regarding its thinking about confrontation in children's cases in *Crawford* and *Davis* through its references to—and omissions of—three cases involving children. I begin with the apparent outlier cited in *Davis*, *The King v. Brasier*,<sup>12</sup> which if interpreted in a reasonably straightforward way and taken at face value would represent an extraordinary change in modern treatment of statements by children about past crime to adult family members. I then move to the omission of the *Roberts*-era case of *Idaho v. Wright*. Finally, I examine *White v. Illinois*, cited in *Crawford* as (perhaps) the Court's one mistake with respect to the admission of the child's statement to a police officer.

In Parts II and III, I work through the major issues involving confrontation in children's cases decided in the lower court cases after *Crawford* and *Davis*, looking at the patterns in results and the search for justifying rationale. Part II examines statements to parents and private parties associated with the child's family, medical professionals, and police officers, all of which were at issue in *White*. In this Part, I

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11. If the Court chooses to examine a confrontation case involving children, it may address issues regarding incompetence and/or availability for cross-examination. My sense, however, is that it would be difficult for the Court to provide a sophisticated answer to those questions at this time, given the current lack of careful conceptual development of these issues under the new Confrontation Clause jurisprudence.

12. 1 Leach 199, 168 Eng. Rep. 202 (1779).

also examine two categories of statements consistently treated as testimonial: statements where the government official's purpose is to create a statement admissible at trial, and statements where the questioning by non-law-enforcement personnel, both private and governmental, is treated as the functional equivalent of police interrogation. Part III examines the very challenging and problematic category of statements made for mixed purposes; treatment of statements in this category will reveal much regarding whether quite formal statements, such as videotaped interviews of the child, may be received as nontestimonial because the primary purpose of the statement is a non-law-enforcement purpose. This category either provides a major opportunity for courts to enable interviewers to manipulate the testimonial finding or will require a sophisticated and likely policy-driven examination of the questioner's purpose to avoid such manipulation.

Part IV looks at the treatment of whose perspective—that of the questioner or the child—matters in determining the testimonial nature of the statement. Choosing the perspective of the child could render virtually all statements by young children nontestimonial; however, courts have generally chosen an alternative perspective—the purpose of the adult questioner—in cases where other indicators strongly support a testimonial result. The analysis of the perspective question for children should provide useful insights into the appropriate general perspective. Part V attempts to fashion a coordinated examination for children with limited cognitive and communicative abilities for the concepts of unavailability as a consequence of incompetency or trauma and minimal availability for cross-examination. The resolution suggested is one that would make a finding of unavailability more difficult and encourage and require, where feasible, an effort to afford confrontation.

#### I. THE DATA PROVIDED BY THE SUPREME COURT REGARDING TESTIMONIAL STATEMENTS IN CHILDREN'S CASES

##### A. The King v. Brasier

The first item of evidence from the Supreme Court regarding the operation of the testimonial concept in children's cases that I will examine is *The King v. Brasier*. In *Davis*, the Court cited *Brasier* and stated the following:

*Davis* seeks to cast McCottry [the apparent victim of Davis's domestic abuse] in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. In *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), for example, a young rape victim, "immediately on her coming home, told all the circumstances of the injury" to her mother. *Id.*, at 200, 168 Eng. Rep., at 202. The case would be helpful to *Davis* if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.<sup>13</sup>

I will spend some time with *Brasier* for reasons beyond the issue of confrontation in children's cases. This citation gives a window into some of the difficulties of historical

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13. *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006).

certainty and originalism as a method of constitutional analysis. I begin with the case as cited by the Supreme Court—it was decided in 1779, in England, long before the Sixth Amendment was proposed by Congress in 1789 and adopted in 1791. As the Court indicates, it is published in the English Reports and in Leach, with the cited decision date of 1791. The implicit suggestion is that this case was available for use by the Framers to provide meaning to the Clause.

The volume of the English Reports cited by the Court for *Brasier* was not published until 1925. It is a compilation, and reproduces the much earlier published version contained in Leach, but the reproduced case is from the fourth edition of Leach, which itself was not published until 1815.<sup>14</sup> As I will show below, the version used by the Supreme Court is very different from the version that was first published by Leach in 1789, perhaps just in time to be shipped across the Atlantic and immediately read by the Framers, if they were not otherwise involved in building a nation.

One of my points here is to highlight the uncertain role that a case like *Brasier* can play in our understanding of what the American Confrontation Clause means. One potential role would be that the opinion itself was part of the Framers' discussion of the law. However, for that purpose, the Framers must have known about the case, and its "content" at the time of the Framing is critical.

In another role, the case could reflect a precise understanding of the law at that time. However, one should ask why the American Confrontation Clause should be reflective of an ordinary English criminal case. America had just fought a war to separate from England and many states took note of the nation's legal separation from the law of England.<sup>15</sup> I suggest that while we may have a relatively good idea of what the Framers

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14. 168 Eng. Rep. 103 (stating that "Cases in Crown Law" are taken from the fourth edition of Leach published in 1815). I thank Professor Thomas Y. Davies for his insights on the uncertainties of publication timing and content, which prompted the discoveries discussed in this section. For his treatment of *Brasier*, see Thomas Y. Davies, *Not "the Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y 349 (2007) [hereinafter Davies, *Not "the Framers' Design"*].

15. The general pattern for the thirteen original states in the new nation was to adopt English common law as a basis for their law; however, it generally was the English common law as it existed at the time that the American Revolution began. Thus, it would not have included *Brasier* even if the impossible had happened and it had been transmitted to the Framers in the form cited in *Davis*. Most states picked the cutoff point of July 4, 1776, the date of the Declaration of Independence, or another date in that period, such as the Battle of Lexington (April 15, 1776). See, e.g., Charles A. Bane, *From Holt and Mansfield to Story and Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351, 362 (1983); Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 153–54, 154 n.156 (2005).

The above history suggests an uncertain role for a post-revolutionary English common law case in informing American law. More fundamentally, where the sources exist—which they do not in regards to the Confrontation Clause—we know that although Americans were interested in the English common law, they did not believe they were bound by it, for their experience and their institutions were different. See H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* (2002) (describing the debate between William Cushing, chief justice of the Massachusetts high court, and John Adams in 1789 as to the



generally opposed (the inquisitorial system)—and what they preferred (the basic features of the English and American common law systems)—we have little evidence that the Framers were intending to capture the law as it existed in England.

Finally, *Brasier* could be seen as playing a more general role that requires less precision in the Framers' knowledge and intent. It may have reflected broadly a group of propositions that everyone at the time understood. This third use would be the one most impervious to dates of publication and subtle shifts in legal thinking from the English common law to a provision of the American Constitution. However, at that level, the case shows that legal thinkers of that time, much like legal thinkers today, had many opinions rather than settling on a single proposition, such as the centrality of testimonial statements to hearsay or confrontation.

I begin with the version of *Brasier* that the Supreme Court quoted in *Davis*, which as noted above is contained in the English Reports but comes from the fourth edition of Leach. It appears below with its explanatory marginal note, reproduced as a headnote:

(An infant witness under seven years of age, if apprized of the nature of an oath, must be sworn; for no testimony is legal except it be given upon oath.)

This was a case reserved for the opinion of the Twelve Judges, by Mr. Justice Buller, at the Spring Assizes for Reading, in the year 1779, on the trial of an indictment for an assault with intent to commit a rape on the body of Mary Harris, an infant under seven years of age.

The case against the prisoner was proved by the mother of the child, and by another woman who lodged with her, to whom the child, immediately on her coming home, told all the circumstances of the injury which had been done to her: and there was no fact or circumstance to confirm the information which the child had given, except that the prisoner lodged at the very place which she had described, and that she had received some hurt, and that she, on seeing him the next day, had declared that he was the man; but she was not sworn or produced as a witness on the trial.

The prisoner was convicted; but the judgment was respited, on a doubt, created by a marginal note to a case in Dyer's Reports; for these notes having been made by Lord Chief-Justice Treby, are considered of great weight and authority; and it was submitted to the Twelve Judges, Whether this evidence was sufficient in point of law?

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relationship between common law and a constitutional provision protecting free speech in which neither in arguing for his interpretation contended the provision necessarily tracked English common law).

Despite the fact that it could have had no effect on the Framing, one can understand why originalists use sources such as *Brasier*: American sources do not exist. This is much like the story of a person who loses his or her keys at night and lacks a flashlight. That person sensibly looks under the street lights because the keys may have been lost there and looking anywhere else is impossible. However, as to *Brasier*, the analogy gets worse. It is a street light in another country. The person knows his or her keys could not be there, but perhaps they have the same keys. If keys are generic and/or stable enough in design, the car will start. Unfortunately, hearsay and the newly developing doctrine of confrontation was likely shifting and little is certain. In any case, the finder should not claim that he or she has found the lost keys (original meaning), for that is impossible. Thus, *Brasier* had no effect on the formulation of the Confrontation Clause, and it reflects the Court's assertion of the meaning of the Confrontation Clause rather than proof of it.

The Judges assembled at Serjeants'-Inn Hall 29 April 1779, were unanimously of opinion, That no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath (see *White's case, post*, 430 Old Bailey October Session, 1786), for there is no precise or fixed rules as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received. The Judges determined, therefore, that the evidence of the information which the infant had given to her mother and the other witness, ought not to have been received.—The prisoner received a pardon (see the case of *Rex v. Travers*, 2 Strange, 700).<sup>16</sup>

Before we layer in the complication of other published versions of the opinion, let us try to understand the significance of the case the Supreme Court cited. To gauge the significance of *Brasier*, obviously one must interpret it. For most of us unaccustomed to reading eighteenth century English cases—and all of us from a different time and legal regime—reading this short opinion several times is probably appropriate. When that is done, several observations are almost obvious. First, perhaps, is a question: What does this case have to do with confrontation? It does not mention the word confrontation, and it does not speak of either personal presence<sup>17</sup> or cross-examination,<sup>18</sup> the central features of the modern confrontation right. Hearsay is also not mentioned, and the focus is upon the oath,<sup>19</sup> which appears to be necessary to receive out-of-court statements of the type in this case. The uncertain connection between this case and confrontation and its very different orientation challenge the certainty of the Court's conclusions regarding the historical common law right and the Constitution.<sup>20</sup> Nevertheless, *Brasier* is apparently considered by Scalia, oblivious to

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16. *The King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779) (citations omitted).

17. See *Coy v. Iowa*, 487 U.S. 1012, 1015–20 (1988) (tracing the historical and the contemporary importance of face-to-face confrontation as part of the Sixth Amendment right).

18. See *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (“The central 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.”).

19. JOHN H. LANGBEIN, *THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL* 245 (2003) (finding the lack of oath the chief concern of hearsay under eighteenth century English practice with the concern for cross-examination a muted concern); see also Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 740–42 (tracing the development of the hearsay concept in England during the eighteenth century as the focus of concern moved from the accused's personal presence, to the oath combined with a best evidence concept, and finally—as the role of lawyers grew in trials—to cross-examination).

20. As Professor Thomas Davies persuasively argues, cases such as *Brasier*, decided long before the Framing in 1779, were likely unavailable at the critical time. The one-volume first edition of Leach's *Crown Cases* became available in London no earlier (and perhaps later) than May, 1789. The London publication date was roughly a month before Madison proposed the antecedent to the Sixth Amendment and two months before the Committee of Eleven proposed

these difficulties, as one of the “English cases that were the progenitors of the Confrontation Clause.”<sup>21</sup>

Taken at face value, *Brasier* focuses on whether children of this young age may take the oath. Its first conclusion is that the determination is not precluded by the fact she is not yet seven years old, but rather is to be left to the in-person examination of the child by the trial court. The case concludes that whether the child could take the oath depends “upon the sense and reason they [children so examined] entertain of the danger and impiety of falsehood.” Next, it concludes that if “found to be incompetent to take the oath, their testimony cannot be received.” Finally, and apparently most significantly for the confrontation inquiry, the opinion states that “no testimony whatever can be legally received except upon oath” and that since the child had not been sworn, “that the evidence of the information which the infant had given to her mother and the other witness, ought not to have been received.”

The case as described above, and apparently as the Court in *Davis* meant it to be understood,<sup>22</sup> says that a child’s version of the alleged rape was treated as testimony and that such testimony could not be received except if given under oath. The women testified and were under oath; the only bit of “testimony” that was not under oath was the hearsay statement of the child.

Such an understanding of the law of hearsay and/or confrontation at the time of the Framing would substantially affect the meaning of “testimonial.” It would certainly change the practice that has existed for decades in this country regarding children’s hearsay and would alter the vast majority of decided cases on the subject of statements by children to a child’s parents, acquaintances, and neighbors—such as the other witness in *Brasier*.

Now let us turn to the case as originally published by Leach in 1789.

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the final language. To assume *Brasier* had an impact is thus to assume the volume was published and made it to America in time, and that the busy members of the First Congress put aside the critical work of forming a new government to read about and be influenced by ordinary criminal trials in England. See Davies, *Not “the Framers’ Design,” supra* note 14, at 376.

The record is indeed even murkier. The amicus brief filed by the National Association for Children in *Davis* and *Hammon* asserts that an examination of child rape trials in London’s Old Bailey courthouse from 1744 to 1779 shows that in a number of cases adults testified to statements made by children when the children did not testify. Brief for The National Association Of Counsel For Children as Amicus Curiae Supporting Respondents at 19–22, *Davis v. Washington & Hammon v. Indiana*, 126 S. Ct. 2266 (2006) (Nos. 05-5224 & 05-5705) [hereinafter *Nat’l Ass’n Of Counsel For Children Brief*]. See *infra* notes 37–41 and accompanying text.

If hearsay was received, it is not particularly surprising since Professor John Langbein argues hearsay was mixed among other evidence and no doubt received in a more informal trial process that predated the development of a central role for lawyers. LANGBEIN, *supra* note 19, at 234–35, 249. Professor Davies does not dispute the likely truth of this assessment but argues that the receipt of hearsay contrary to the formal rules of evidence as they existed at the time is poor evidence that the Framers intended to incorporate the violation rather than the rule. See Davies, *Not “the Framers’ Design,” supra* note 14, at 456.

21. *Davis v. Washington*, 126 S. Ct. 2266, 2276 (2006) (stating that “the case would be helpful to *Davis* if . . .”).

22. *Id.*

Case 149. No testimony can be received except upon oath; and an infant under seven years may be sworn, if she appears to understand the nature of an oath.

The King *against* Brasier.

This was a case reserved for the opinion of the twelve Judges, by Mr. Justice *Gould*, at the Summer Assizes for York, in the year \_\_\_\_\_, on the trial of an indictment for a rape on the body of an infant under seven years of age. *The information of the infant was received in evidence against the prisoner; but as she had not attained the years of presumed discretion, and did not appear to possess sufficient understanding to be aware of the dangers of perjury, she was not sworn.*

The prisoner was convicted; but the judgment was respited, on a doubt, Whether evidence, under any circumstances whatever, could be legally admitted in a criminal prosecution except upon *oath*?

The Judges were unanimously of opinion, That no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath; for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent, their testimony cannot be received.<sup>23</sup>

This is the entire case as it appears in the first edition of Leach, which was published in 1789 in London, England. The difference with respect to hearsay is stunning. According to the opinion, as reported at that time, neither hearsay nor confrontation played any part in the case. The recited facts give no indication that the child's statement was presented through the testimony of the child's mother and another witness. They are not indicated in any way to have played a role—indeed they are not mentioned at all.

The picture given is that the child appeared, was unable to take the oath, and that her information was received without an oath being given, as was sometimes done<sup>24</sup> and was recommended by some authorities.<sup>25</sup> The facts appear to state, however, that because she was unable to take the oath, the assembled judges ruled that her testimony should not have been received.

If this version of the case was received and read by the Framers, it could not have played a role in determining the dimensions of the Confrontation Clause. Moreover, as to the point for which Scalia quotes the case—“‘immediately on her coming home, told all the circumstances of the injury’ to her mother”<sup>26</sup>—those words do not even appear

23. 1 THOMAS LEACH, CASES IN CROWN LAW DETERMINED BY THE TWELVE JUDGES; THE COURT OF KING'S BENCH AND BY COMMISSIONERS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY 346 (1st ed., Dublin 1789) (emphasis added). The date is left blank in the original.

24. See, e.g., *The King v. Arrowsmith* (Dec. 11, 1678), available at <http://hri.shef.ac.uk/luceneweb/bailey/highlight.jsp?ref=t16781211e-2>.

25. 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 441 (London 1803) (discussing Lord Hale's position that the child should be heard even if she could not take the oath).

26. *Davis*, 126 S. Ct. at 2277 (2006) (quoting *The King v. Brasier*, 1 Leach 199, 168 Eng.

in the opinion. They are not included by Leach until his fourth edition, published in 1815. Justice Scalia uses those words to support a division for Confrontation Clause purposes between an ongoing emergency situation and a report of past events. The concept they reflect may support such a division, but those words could not have had that impact upon the Framers' understanding of the law on this point. They were not in the Leach opinion at the time of the Framing.

The first indication in Leach that the child did not appear and attempt to testify is provided in the third edition, which was published in London in 1800. A footnote states: "It appears by a manuscript note of this case, in the possession of a gentlemen of the bar, that the child's evidence was not received at all; but that the mother and another witness gave evidence of what the child had said at the time."<sup>27</sup>

Another apparently more complete version of *Brasier* appeared in 1806, in Edmond East's *A Treatise of the Pleas of the Crown*.<sup>28</sup> His treatment of the case, in a chapter dealing with victim's testimony in cases of carnal knowledge of children, is shown below:

The last case which has occurred on this doubtful subject is that of William Brazier [sic], who was tried for assaulting Mary Harris, an infant of five years old, with intent to ravish her. The case on the part of the prosecution was proved *by the mother of the child and another woman* who lodged with her, to whom the child immediately on her coming home told all the circumstances of the injury done to her, and described the prisoner, who was a soldier, as the person who had committed it; but she did not know his name. The next day the prisoner was called from the guard by the serjeant, and shewn to the child, who immediately said that was the man. Two other soldiers had been before shewn to her, of whom she at once denied any knowledge. There was no fact or circumstance to confirm the account given by the girl that the prisoner was the man who committed the offence, except that he lodged where she described. That she had received some hurt was proved by a surgeon as well as by the two women. The child was coming from school when the prisoner attacked her. The school did not break up till four o'clock, and she was at home before five, and had no conversation or communication with the mother before she had told all that had passed. The prisoner was convicted. But Mr. Justice Buller reserved the above statement of facts for the opinion of the judges, whether this evidence ought to have been received, or was sufficient in point of law to be left to the jury. On the first day of Easter term 1779 the judges met on this subject, when all of them except Gould and Willes Js. held that this evidence of the information of the child ought not to have been received, as she herself was not heard on oath: as to which some, particularly Blackstone, Nares, Eyre, and Buller Js. thought that if she had appeared on examination to have been capable of distinguishing between good and evil, she might have been sworn. But as to that, others, particularly Gould and Willes Js. held that the presumption of law of want of discretion under the age of seven is conclusive; so as not to admit an infant under that age to be sworn on any examination as to her capacity. And as to the information or narration from a child, Gould and Willes Js. held that it being recently after the fact, so that it excluded a

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Rep. 202 (1779)).

27. 1 THOMAS LEACH, CASES IN CROWN LAW, DETERMINED BY THE TWELVE JUDGES; THE COURT OF KING'S BENCH; AND BY COMMISSIONERS OF OYER AND TERMINER, AND GENERAL GAOL DELIVERY 237 (3d ed., London 1800).

28. EAST, *supra* note 25, at 443–44.

possibility of practising on her, it was a part of the fact or transaction itself, and therefore admissible: and Buller J. held the same, if by law the child could not be examined on oath. But as to what happened the next day, Gould J. thought it not admissible, by reason of the danger of her being influenced in the interval. But on the 29th April all the judges being assembled, they unanimously agreed that a child of any age, if she were capable of distinguishing between good and evil, might be examined on oath; and consequently that evidence of what she had said ought not to have been received. And that a child of whatever age cannot be examined unless sworn. The prisoner was pardoned.

It does not however appear to have been denied by any in the above case, that the fact of the child's having complained of the injury recently after it was received is confirmatory evidence.<sup>29</sup>

Although the end result is much the same, we learn a good deal more about the concerns of the judges of that era, England in 1806, from East's account and from his general commentary on this subject. It is as if Leach omitted the concurring opinions.

Several of the judges (Gould and Willes) would apparently have admitted the statement of the child because it was made "recently after the fact, so that it excluded a possibility of practising on her, it was a part of the fact or transaction itself."<sup>30</sup> Another judge, Buller, believed that the statement was admissible apparently on the same grounds but only if the child was legally unavailable—"if by law the child could not be examined on oath."<sup>31</sup> But the group of judges seemed unwilling to rule that the child's statements were admissible, and insisted instead that the child must testify under oath and that since that did not occur the evidence should not have been received.

The judges apparently all agreed that "the fact of the child's having complained of the injury recently after it was received is confirmatory evidence."<sup>32</sup> This statement is consistent with the general position of the time that hearsay could be received to corroborate a point but could not stand as the sole independent proof of it.<sup>33</sup>

East's version of the case shows something of the non-uniformity of opinion among English judges of the era about receiving hearsay testimony and its use as

29. *Id.* (emphasis in original).

30. *Id.* Justice Scalia used the fact that this case involved a statement made after the event to distinguish it from a statement made as part of the event. However, the only two judges who express an opinion on the matter would find no difference between the two situations and give no historical support to Scalia's distinction. Of course, it is possible that, if it had been part of the event, a majority of the judges would have decided the case on this basis, but that is not shown and that is not what *Brasier*, as decided, supports. Also, the view of these two judges on what constitutes "recently after the fact," appears to conflict with the requirement of "immediat[ely] upon the hurt received," which Scalia asserted in *Crawford* was part of the accepted English common law established by *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1693). See *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2004) (quoting *Thompson*, Skin. 402, 90 Eng. Rep. 179) (alteration in original).

31. EAST, *supra* note 25, at 443–44.

32. *Id.* at 444.

33. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 19–20 (James H. Chadbourne rev., 1974) (1904) (noting that into the early 1700s, hearsay was admissible to corroborate direct testimony and concluding that use of prior consistent statements to corroborate testimony is derived from early limitations on direct use of hearsay and survived until the end of 1700s); see also LANGBEIN, *supra* note 19, at 238–39.

corroborating evidence. One additional point is worthy of note. In his introduction to the subject of the testimony “of the Party grieved”<sup>34</sup> where *Brasier* is found, East recounts the position of Lord Hale and Blackstone on the subject of children’s testimony and the oath. He notes among the arguments that Hale made for receiving the child’s statement, even if not under oath, was to correct mistransmission by those who recount it in court:

Next, because if the child complain presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken; yet it is but a narrative of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself, than to receive it at second hand from those that swear they heard her say so; for such a relation may be falsified, or otherwise represented at second hand, than when it was first delivered.<sup>35</sup>

What exactly can be made of *Brasier* is unclear. Historical sources demonstrate one point: it played no direct role in shaping confrontation because the Framers could not possibly have known about it as a hearsay/confrontation case, and it therefore could not have affected their thinking. On the other hand, *Brasier* does reflect the thinking of the English judges of the time regarding the law of the oath, the admission of hearsay, and/or the progenitors of the right to confront the accuser; it demonstrates that they resisted receiving the statement of the child regarding the identity of her attacker through the hearsay statements of her mother and another associated private individual even when those statements were made shortly after the event and not prompted by questioning. The judges gave no indication of being concerned as to whether the statement was testimonial, nor do they take note of any of the circumstances that *Crawford* and *Davis* suggest might lead to treating the statement as testimonial.

I find it difficult to move in a straight line from *Brasier* to a discussion of the intricacies of the testimonial concept as developed in *Crawford* and *Davis*. If *Brasier*, in its final version, is read to mean what it fairly seems to mean, it proves too much in the sense that it would substantially unsettle what appears to be the Supreme Court’s new approach to confrontation. *Brasier* suggests a confrontation right that extends to accusatory statements made to private individuals. Formality is not a part of *Brasier*’s analysis, and one has a difficult time arguing from it for the central importance of the role of the government official and/or a police investigator in producing the statement, which appears to be central in *Crawford* and *Davis*. Perhaps the citation in *Davis* to this case has great portend for the future development of Confrontation Clause

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34. EAST, *supra* note 25, at 441.

35. *Id.* Blackstone made this point about “an artful or careless scribe [who] may make a witness speak what he never meant, by dressing up his depositions in his own forms and language” as an argument for open examination *viva voce*, where the witness “is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken.” WILLIAM BLACKSTONE, 3 COMMENTARIES \*373–74. Gilbert made a similar argument for preferring a “present Examination *viva voce*” over depositions, reasoning that “Examiners and Commissioners . . . do often dress up secret Examinations, and set a quite different Air upon them from what they would seem, if the same Testimony had been plainly delivered under the strict and open Examination of the Judge at the Assizes.” GEOFFREY GILBERT, THE LAW OF EVIDENCE 45 (Garland Pub. 1979) (1754).

jurisprudence. My guess, however, is that it will be ignored or quickly cabined in some fashion.<sup>36</sup>

Before *Brasier* was cited in *Davis*, the authors of the amicus brief by the National Association of Counsel for Children on behalf of the prosecution attempted to distinguish it as irrelevant, arguing the case dealt only with whether the child can testify unsworn and not at all with whether an out-of-court statement could be received from a child properly found incompetent.<sup>37</sup> The brief argues generally that in fact children's statements of sexual abuse were "frequently" received when made to trusted adults in trials at about the time of the Framing. It cites six cases tried in London's Old Bailey courthouse between 1744 and 1789:<sup>38</sup> *The King v. Moulcer* (1744), *The King v. Crosby* (1757),<sup>39</sup> *The King v. Tibbel* (1765), *The King v. Allam* (1768), *The King v. Craige* (1771), and *The King v. Ketteridge* (1779).

These reports do show that adults testified as to the statements of children, although what to make of it is unclear. Professor John Langbein contends that generally hearsay was admitted in this period before lawyers became prominent figures in trials. But, the understanding of the law was changing as the Framing occurred. Moreover, we do not know if the Framers even knew of these practices in England,<sup>40</sup> and we certainly do not know if they approved.

Unlike most of the cases cited above, *Brasier*, the case that provoked the judges to decide the issue, involved a conviction, and their examination may well have been for the purpose of disapproving past practices of admitting the evidence. All of the cited cases except *Moulcer* resulted in acquittals. In *Moulcer*, the evidence also included an admission by the accused of an attempt to have sex with the child and the additional independent evidence that both victim and perpetrator had the same venereal disease.<sup>41</sup> As a result, the child's statement was only corroborative, a role approved in *Brasier* by all the judges according to East's account. More generally, given the imprecision of reporting we see in *Brasier*, one should probably be cautious in attributing great certainty to the discussion of the facts in the reports from Old Bailey, including which witnesses testified; the reports were prepared for popular consumption and not as official reports of trial proceedings.

Why begin a discussion of children's hearsay with *Brasier* if its impact is so uncertain? First, the case has the potential to turn the treatment of child hearsay post-*Crawford* on its head. I strongly doubt that result will occur, but its blockbuster

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36. The effort of the National Association of Counsel for Children to distinguish *Brasier* does not appear to be a fair treatment of the case. However, as discussed extensively in the text above, I am far from claiming certainty as to what the case means, and I assume its impact will be limited.

37. *Nat'l Ass'n Of Counsel For Children Brief*, *supra* note 20, at 22.

38. *Id.* at 19–21. These cases are available at <http://www.oldbailey.online.org>.

39. *The King v. Crosby*, (Old Bailey Proceedings Dec. 7, 1757), [http://www.oldbaileyonline.org/html\\_units/1750s/t17571207-14.html](http://www.oldbaileyonline.org/html_units/1750s/t17571207-14.html) ("The child being but nine years and three quarters old, and not being examined upon oath, he was acquitted . . .").

40. Davies, *Not "the Framers' Design," supra* note 14.

41. *The King v. Moulcer* (Old Bailey Proceedings Oct. 17, 1744), [http://www.oldbaileyonline.org/html\\_units/1740s/t17441017-25.html](http://www.oldbaileyonline.org/html_units/1740s/t17441017-25.html). This is the oldest of the cases noted by the Brief of the National Association Of Counsel For Children involving hearsay from children.



potential is at least worthy of note.<sup>42</sup> In a somewhat similar vein, it provides a strong cautionary tale about the difficulty of historical certainty. This uncertainty should give us reason to consider the purpose of the rule being developed, rather than accepting that its dimensions are fully determined by text, history, and originalism. The case also suggests that the testimonial concept does not encompass all the concerns of the Framing era. Given the largely unknown impact on the Framing of cases such as *Brasier*, current judgment as to policy should matter just as much as historical records reflecting the discussions that judges had long ago regarding those same policy questions.

### B. Idaho v. Wright

The second case reflecting the Supreme Court's thinking on the issue of confrontation in children's cases is *Idaho v. Wright*.<sup>43</sup> *Wright* is a pre-*Crawford* case, decided under the general analysis of trustworthiness set out in *Ohio v. Roberts*.<sup>44</sup> The hearsay in *Wright* involved accusatory statements by a young child, who was two and one-half when interviewed by Dr. Jambura, a pediatrician with extensive experience in child abuse cases. The younger child's statements were made the day after that child's older sister, who was five and one-half, had undergone a medical examination that revealed evidence of sexual abuse. One of the doctors conducting the older child's examination was Dr. Jambura. The younger child was then taken into custody for protection and investigation. The following day, Dr. Jambura examined her. It is the statement that he secured during that examination that the Court excluded in *Wright*.<sup>45</sup>

Jambura testified that he began by conducting a physical examination of the younger child, which he said revealed conditions "'strongly suggestive of sexual abuse' . . . occurring approximately two to three days before the examination."<sup>46</sup> The critical portion of Jambura's testimony regarding the younger child's statements is as follows:

When I asked her "Does daddy touch you with his pee-pee," she did admit to that. . . . [Although] [s]he would not elucidate . . . what kind of touching was taking place . . . [s]he did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.<sup>47</sup>

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42. See generally Robert P. Mosteller, *Softening of the Formality and Formalism of the "Testimonial" Statement Concept*, 19 REGENT U. L. REV. 429 (2007) (noting Professor Friedman's discussion of this case suggests the testimonial concept applies to private statements); see also Richard D. Friedman, "We Really (For the Most Part) Mean It!", 105 MICH. L. REV. FIRST IMPRESSIONS 1, 5 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/friedman.pdf>.

43. 497 U.S. 805 (1990).

44. 448 U.S. 56, 66 (1980). The Supreme Court ruled in *Whorton v. Bockting*, 127 S. Ct. 1173, 1183 (2007), that the Confrontation Clause has no application to unreliable hearsay that is nontestimonial thereby eliminating any argument that *Wright* could be sustained under a residual impact of *Roberts*.

45. *Wright*, 497 U.S. at 809.

46. *Id.*

47. *Id.* at 811.

The Idaho Supreme Court found that admission of Jambura's testimony regarding the child's statement violated the Confrontation Clause, *inter alia*, because "blatantly leading questions were used in the interrogation" and because "interrogation was performed by someone with a preconceived idea of what the child should be disclosing."<sup>48</sup> The state court was concerned about the suggestibility of children, the potential distorting effect of leading questions on responses obtained from the child, and the circumstances that it believed demonstrated dangers of unreliability.<sup>49</sup>

Justice O'Connor, writing for the majority, stated that the Idaho Supreme Court properly focused on the presumptive unreliability<sup>50</sup> of the out-of-court statements and the suggestive manner in which Jambura questioned the child.<sup>51</sup> She claimed that the statement was not made under circumstances of reliability comparable to those required for excited utterances or statements made for the purpose of medical diagnosis or treatment.<sup>52</sup> "Given the presumption of inadmissibility accorded accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception," the state failed to show sufficient "'particularized guarantees of trustworthiness' . . . to overcome the presumption."<sup>53</sup>

The data point here is that *Wright* is not mentioned by Justice Scalia's opinions in either *Crawford* or *Davis*, although Chief Justice Rehnquist's concurring opinion cited it as an easy basis for exclusion of Sylvia Crawford's testimony under existing principles.<sup>54</sup> In the footnote recognizing the problematic nature of *White*, Scalia noted that it was the "[o]ne case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial."<sup>55</sup> Since *Wright* approved exclusion of, rather than admission of, testimony, the Court was not

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48. *Id.* at 812–13.

49. *Id.* at 813.

50. "Presumptive unreliability" might be taken as an overstatement of the state court's concern about reliability. The presumption came simply from the fact that the statement was "inculpatory" and fell within no traditional hearsay exception. *See State v. Wright*, 775 P.2d 1224, 1227 (Idaho 1989).

51. *Wright*, 497 U.S. at 826.

52. *See infra* note 61 and accompanying text (noting that had the state simply contended that the statement fell within the state's medical treatment exception, the statements would have been consistent with those admitted in other states and automatically received under *Roberts*, and observing that the prosecutor in *Wright* chose to use the residual exception despite not being prohibited by the facts or state law from using state rule 803(4)).

53. *Wright*, 497 U.S. at 827 (quoting *Wright*, 775 P.2d at 1227). Precisely why the Court decided to find the hearsay in *Wright* inadmissible because not supported by particularized indicia of reliability cannot be clearly established. However, the decision may have flowed from the arguments made by Professor Margaret Berger in an amicus brief. There, she noted that Dr. Jambura's testimony does not in fact reveal the words used by the child; upon careful scrutiny, it appears to be his characterizations of the conversation rather than the child's own words. She argued that the jury would gain much insight by hearing the actual words of the child. Brief for American Civil Liberties Union as Amicus Curiae Supporting Respondent at 9–10, *Idaho v. Wright*, 497 U.S. 805 (1990) (No. 89-260). In addition, she emphasized the suggestibility of young children, *id.* at 10–14, and the fact that the child's statements were summarized by "an interviewer with an agenda." *Id.* at 16.

54. *Crawford v. Washington*, 541 U.S. 36, 76 (2004) (Rehnquist, C.J., concurring).

55. *Id.* at 58 n.8.

required to discuss *Wright*, but one might suspect the category may have been carefully delimited to permit the Court not to pass upon its merits.

How *Wright* might fit within the testimonial concept had been a matter of attention by two of the seminal authorities contributing to the development of the testimonial concept. The Court's current approach can be traced most directly to the amicus brief for the United States in *White v. Illinois*.<sup>56</sup> That brief, like the *Crawford* opinion, compared results under the proposed approach and the outcome under the Court's prior cases,<sup>57</sup> but unlike *Crawford*, it noted a possible deviation between its proposed approach and the results in earlier cases that excluded evidence:

The only case in which the "general approach" from *Roberts* has been employed to exclude evidence other than prior testimony or testimonial statements to law enforcement authorities is *Idaho v. Wright*. In *Wright*, however, the Court did not address the question whether the child declarant was acting as a witness when she made statements to a pediatrician that were excluded under the Confrontation Clause. Moreover, the questioning in that case occurred after the declarant had been taken into custody by police, and the state court's characterization of the questioning suggests that it was designed to develop evidence for a criminal case. The questioning therefore may be regarded as functionally equivalent to other forms of official interrogation that result in statements by a "witness." The decision in *Wright* is therefore not necessarily inconsistent with our position.<sup>58</sup>

Similarly, Professor Akhil Amar, whom the Supreme Court cited as one of its principal theoretical sources for its new approach,<sup>59</sup> squared his version of a new approach with decided cases, including *Wright*, and concluded on the basis of the government's argument that even this "result might well be justifiable on my approach."<sup>60</sup>

*Wright* would provide a test for some of the factors determinative of a "testimonial" statement. The questioning was done by a medical doctor and not a government agent. Indeed, there was no reason why these statements could not have been admitted under the exception for Statements for the Purpose of Medical Diagnosis or Treatment as was the practice for similar statements of identity in some other states at the time. However, neither the prosecutor nor the Idaho courts used this firmly rooted exception, but rather the catchall.<sup>61</sup> The use of the catchall allowed Justice O'Connor to highlight her concern about reliability, which fit under the *Roberts* system, but would provide no

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56. 502 U.S. 346 (1992).

57. In his concurring opinion in *White*, Justice Thomas adopted a version of the amicus brief, noting that "[s]uch an approach would be consistent with the vast majority of our cases . . ." *Id.* at 365 (Thomas, J., concurring).

58. Brief for the United States as Amicus Curiae Supporting Respondent at 46 n.18, *White v. Illinois*, 502 U.S. 346 (1992) (No. 90-6113) (citations omitted).

59. *Crawford*, 541 U.S. at 61 (citing AKHIL H. AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 125-31 (1997)).

60. AMAR, *supra* note 59, at 131 & 245 n.193.

61. See Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, 65 *LAW & CONTEMP. PROBS.* 47, 71-74 (2002) (examining carefully the Idaho case law and the briefs and arguments of the parties and concluding that there was no clear reason why the statements could not have been offered and received as statements for the purpose of medical diagnosis or treatment).

basis for exclusion under *Crawford* and its exclusive focus on whether the statement is testimonial.

Dr. Jambura was a private individual, which would test whether the Confrontation Clause applies to nongovernmental individuals. He is clearly not a police officer, but he was not divorced from the criminal investigation. Indeed, as the amicus brief for the United States stated, “[T]he questioning in that case occurred after the declarant had been taken into custody by police, and the state court’s characterization of the questioning suggests that it was designed to develop evidence for a criminal case.”<sup>62</sup>

Such a connection to police investigation may prove significant under *Crawford* and *Davis*, but if the pattern of cases decided by the lower court is a fair guide, this level of government involvement in *Wright* would not have been sufficient to render the statement testimonial. Far more explicit direction by the police or involvement is typically now required.<sup>63</sup> Dr. Jambura’s anticipation of what he would find, which raised concerns about reliability, would likewise do little to make the statement testimonial. His interest in investigating and his anticipation that a crime had taken place would likely be outweighed by the medical purpose that could have been found the primary purpose for both the child’s initial physical examination and his interrogation of her.

Justice O’Connor stated in *Wright* that the statements were “accusatory,”<sup>64</sup> but that apparently key feature of the statement has received no recognition under the Supreme Court’s treatment of the testimonial concept. Despite invitation to employ the accusatory concept in its analysis, the *Davis* Court did not do so.<sup>65</sup> Perhaps the concept does not define a clear enough and/or a narrow enough category to satisfy the current Court.<sup>66</sup> A final issue is what would be made of the expectation or intent of the child of two and one-half years regarding the testimonial potential of statements made to a doctor or other adults, including a police officer. If that particular child’s perspective were used, the statement would likely be found nontestimonial.

After *Crawford*, *Wright* is the only case of exclusion that can be clearly attributed to *Roberts* and is not necessarily accounted for by *Crawford*. It constitutes the one protective result from the old system that is not necessarily consistent with the new “testimonial” approach as applied to date.

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62. Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 58, at 28 n.18.

63. See generally *infra* Part II.E.

64. *Idaho v. Wright*, 497 U.S. 805, 827 (1990) (stating that trustworthiness had not been shown “[g]iven the presumption of inadmissibility accorded *accusatory* hearsay statements not admitted pursuant to a firmly rooted hearsay exception”) (emphasis added).

65. See Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford’s Birth Did Not Require that Roberts Had to Die*, 15 J.L. & POL’Y 685, 709 n.94 (2007) (noting the frequent use of accusatorial language in the briefs by both *Hammon* and *Davis* but the apparent refusal of the Court in *Davis* to use such language).

66. *White v. Illinois*, 502 U.S. 346, 364 (1992) (Thomas, J., concurring) (expressing concern that the category of statements covered by the Confrontation Clause be easily and clearly delineated).

C. *White v. Illinois*

Both *Crawford* and *Davis* have recognized that the Court has perhaps committed an error in one case, *White v. Illinois*,<sup>67</sup> in admitting testimonial hearsay in the absence of prior cross-examination and unavailability. In *Crawford*, the Court stated:

One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois*, which involved, *inter alia*, statements of a child victim to an investigating police officer admitted as spontaneous declarations. It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made “immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.” In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded even if the witness was unavailable. We “[took] as a given . . . that the testimony properly falls within the relevant hearsay exceptions.”<sup>68</sup>

In *Davis*, the Court again briefly noted the arguable exception to the pattern of excluding testimonial statements in *White*.<sup>69</sup>

The important point is not simply that an error was suggested in *White*, but rather that only the admission of one statement was erroneous—the child’s statement to a police officer. As the examination of the facts below show, the child did not testify, and not only was the statement to the police officer admitted, but four other statements of very similar character in terms of content were admitted. Two were given to private individuals closely connected to the child, a babysitter and the child’s mother. These statements were both given before the police officer arrived and received a statement from the child. Two other quite detailed and incriminating statements were given to a nurse and a doctor a number of hours after the statement to the police officer.

As these statements, their content, and their sequence are recounted, it is useful to note several features of the testimonial concept as explained by *Crawford* and *Davis*. In *Crawford*, Justice Scalia set out a contemporary definition of “witness” and “testimony” as follows:

The text of the Confrontation Clause reflects this focus. It applies to “witnesses” against the accused—in other words, those who “bear testimony.” 1 N. WEBSTER,

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67. 502 U.S. 346 (1992).

68. *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2004) (alterations and omissions in original) (citations omitted) (emphasis omitted).

69. The Court stated: “Even our later cases, conforming to the reasoning of *Ohio v. Roberts*, 448 U.S. 56 (1980), never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases that involved testimonial hearsay, *see Crawford*, 541 U.S. at 57–59 (citing cases), with one arguable exception, *see id.*, at 58 n.8, (discussing *White v. Illinois*, 502 U.S. 346 (1992)).” *Davis v. Washington*, 126 S. Ct. 2266, 2275 (2006) (parallel citations omitted).

AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” [*Id.*]<sup>70</sup>

As discussed below, the test in *Davis* involved a dividing line between a primary purpose of police interrogation in order to prove a fact relevant to a later criminal prosecution and a primary purpose to enable police to meet an emergency; the line appears to separate purpose between past facts (and prosecution use) and present events (and emergency use). As discussed below, when the purpose of questioning is something other than the police responding to a current emergency, the division between past and present events may not be so significant in determining whether a statement is testimonial. Establishing or proving past events, however, is a key element of Webster’s definition of testimony, which was heavily relied upon in both *Crawford* and *Davis*.

Examination of the five statements made by the child in *White* demonstrates potential benefits and difficulties in the use of various possible tests for determining whether a statement is testimonial. Such an examination clearly shows that establishing past events and a prosecutorial purpose do not always correspond. These statements illustrate the importance of deciding what must be shown (or not shown) with regard to purpose to render a statement testimonial. The different statements also illustrate how a questioner’s intent—the focus of *Davis*—changes, or at least may be characterized as changing, when the identity of the questioner changes. On the other hand, if the child’s expectation is used, differences in the testimonial nature of these statements will likely be far less clear than if the focus is on the questioner’s purpose. Finally, examining the formality of the questions or whether what occurred can properly be characterized as “interrogation” would produce potentially interesting, but quite confusing results.

With those different frames of reference in mind, I set out the five statements made by the child in *White*.<sup>71</sup>

The four-year-old alleged victim, S.G., did not testify at trial. Instead, five witnesses were permitted by the court to testify as to statements made to them by S.G. Those witnesses were Tony DeVore, S.G.’s baby-sitter; Tammy Grigsby, S.G.’s mother; police officer Terry Lewis; nurse Cheryl Reents; and Dr. Michael Meinzen. The testimony of each of these witnesses will be discussed in detail, as will the circumstances under which S.G. spoke to each witness.<sup>72</sup>

#### **First Statement: To the Babysitter at 4:00 a.m.**

The events relevant to the offenses charged occurred on April 16, 1988, at 4 a.m. in the home of S.G., while Tony DeVore was baby-sitting for S.G. and S.G.’s three-year-old brother, Eric. DeVore, who was fourteen, was awakened by S.G.’s scream, went to the victim’s bedroom, and saw the defendant exit that room and then the residence.

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70. *Crawford*, 541 U.S. at 51.

71. These facts are taken from the court’s opinion in *People v. White*, 555 N.E.2d 1241 (Ill. App. Ct. 1990).

72. *Id.* at 1243.

At trial, DeVore testified that she asked S.G. what happened, and S.G. told her. Defense counsel's objection to DeVore's testifying as to what S.G. told her was overruled on the ground that S.G.'s statements were spontaneous declarations and therefore admissible as an exception to the rule against hearsay. DeVore's testimony continued as follows:

"Q. [By prosecutor:] Okay. What did [S.G.] say at that point?

A. When I went in there she said he put his hand over her mouth. He'd been choking her. And she told me that he was touching her in the wrong places and he also said that if she screamed then he would whip her and then call me up there to whip her.

Q. Okay. Now, as best you recall what did [S.G.] say he or did she identify the person or what?

A. She said—well, first she said his name, Randy.

Q. Okay.

A. And then she went on with he.

Q. Okay. Start off with Randy?

A. Yeah.

Q. Okay. Now, you said—you testified that she said he touched her in wrong places. How did she phrase that as best you recall?

A. She said—she said, 'He was touching me.' And when I asked where she point [sic] to her private places.

Q. Okay. And [I] ask you could you describe where she pointed?

A. To the lower part of her body.

Q. Okay. And—[.]

[The defendant's continuing hearsay objection was overruled.]

Q. Do you know the name for the portion of the anatomy for what you talked about?

A. Yes, I do.

Q. What was she pointing to?

A. The vaginal area."

DeVore testified that after she tried to comfort S.G., "she finally calmed down and she quit crying a little bit."<sup>73</sup>

Note that the accused had run from the home prior to this first statement.

### **Second Statement: To Mother at 4:30 a.m.**

According to DeVore, Tammy Grigsby, the victim's mother, arrived home approximately 30 minutes after the incident. DeVore spoke very briefly to Grigsby, who then sat with S.G. and asked her exactly what happened. Defense counsel's objection to Grigsby's testifying about what S.G. told her was overruled for the same reason that the objection as to DeVore's testimony was overruled. Grigsby testified that S.G.'s response to her question was as follows:

"A. She said she woke up and that Randy was in the room. And that he had put his hand on her mouth and told her that if she screamed that he would, you know, whip her, and Tony [DeVore] would whip her too. And then she said that he put his mouth on her front part.

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73. *Id.* (alterations in original).

Q. [By prosecutor:] And did you clarify what she meant by that?

A. What do you mean? I—yeah, I asked her exactly, you know, what he did. And she told me that he had pulled her pants down a little bit and put his mouth down there and—.”

Grigsby described her daughter as appearing scared and a “little hyper.” Grigsby testified that she noticed “bruises or red marks” on S.G.’s neck that were not present when Grigsby left the residence earlier that evening.<sup>74</sup>

### Third Statement: To Police Officer at 4:47 a.m.

This conversation produces the sole statement that the Court identifies as likely improperly admitted. Immediately after her conversation with her daughter, Grigsby called the police. Officer Lewis testified that he arrived at S.G.’s home around 4:47 a.m. He spoke with the child privately. Grigsby testified that, at the suggestion of Officer Lewis, she checked her daughter’s “front part” and she noticed that it was a “little red.”<sup>75</sup>

The officer’s testimony as to what the victim told him was essentially identical to the testimony given by DeVore and Grigsby, with the addition of the following:

“A. She went on and she started talking about her pants being wet.

Q. [By prosecutor:] Okay.

A. And when I referred to them as pants she advised me they were not pants they are underwear. And that they were wet. I asked if she had peed in her pants and she got disgusted with me and said, ‘I don’t pee in my pants, my underwear’ she said.

Q. Uh-huh.

A. And she said Randy done it. So I asked her then I said how did Randy make them wet. And she told me that he had pulled her pants to one side and used his tongue on her private parts, what she called her private parts.”

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Lewis also testified that he noticed a “small cluster of scratches” on the right side of S.G.’s mouth. They appeared to be “very fresh cuts.” He said S.G. also had two long, parallel, fresh scratches on the left side of her neck. She told Lewis that “Randy” had done that to her when he had his hand on her.<sup>76</sup>

### Fourth Statement: To Nurse at 8:00 a.m.

Approximately three hours later, the child was taken to an emergency room where she was first examined by a nurse, Cheryl Reents.

Reents testified that she asked questions of S.G. in order to obtain a history to assist herself and the attending emergency room physician in making a diagnosis and providing treatment. . . . Reents testified that S.G. told her, *inter alia*, the following:

“A. Okay. Then I asked if he touched her anywhere else [besides her mouth and neck]. And she said yes. And I asked her where.

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74. *Id.* at 1243–44 (alterations and omission in original).

75. *Id.* at 1244 (internal quotation marks omitted).

76. *Id.* (alteration in original).



And she said, ‘On my front part.’ And then for clarification I asked her to point where. And the patient pointed to the mons area.

Q. [By prosecutor:] Okay. And that’s what?

A. That’s the genital, the labia majora and the surrounding tissue in the genital area.

Q. On the female?

A. Yes, on the female. Okay. And I—then I, for more clarification, I asked her what he touched her with. And she stated his mouth. And then I asked her if he touched her with anything else. She said no. Then I asked her if he touched her with his front part and she stated no. I asked her if he touched her back—her back part. And she said no. And then I asked her if he made her touch him. She said no. Then I asked her if he made her put her mouth anywhere. She said no. And then I asked if anything was put inside of her. She said no. And I asked if it had ever happened before and she said yes when it was cold out.

Q. Okay.

A. And then she continued to say that he put his mouth on her, but he didn’t hurt her that time.”

Initially, S.G. would not look at Reents, but instead looked down at her ID bracelet as she twisted the bracelet around her wrist. Later, S.G. was cooperative and answered Reents’ questions. Reents testified that in questioning S.G., Reents phrased her questions “very open ended to just let [S.G.] just say whatever.” Reents also noticed some bruising on the left side of S.G.’s neck.<sup>77</sup>

#### **Fifth Statement: To Physician sometime after 8:00 a.m.**

Dr. Michael Meinzen testified that he was the physician on duty at the hospital emergency room to which S.G. was brought. Meinzen said he spoke with S.G. shortly after 8 a.m. in order to obtain a history from the patient for the purposes of making a diagnosis and treating her medically if that was needed. Meinzen attached great importance to obtaining a history from a patient, noting that, “in medicine we’re taught that 90 percent of our diagnosis is based on the history. You listen to what the person tells you and then decide where to go from there, what areas to focus on.”

Meinzen then testified that after S.G. told him “Randy” awakened her, she told him the following:

“A. . . . [W]e asked her to direct attention to what—where was it that she was touched. She said he put his hands over her mouth and on her neck. And asked what else happened. And she said that he put his mouth down there. We tried to get her to be more specific. And asked her to point and touch where exactly he had placed his mouth. And she pointed in the—in the area of her external genitalia.

Q. [By prosecutor:] All right.

A. At that point asked her was she hurt anywhere. And she didn’t state that she was in any pain at that particular time. She was

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77. *Id.* at 1244–45 (alterations in original).

rubbing an area on her neck that initially then we directed her attention elsewhere and she didn't seem to be holding that area too much more. Specific questions then that we asked was she hurting anywhere in her genital area. And breaking it down you know into children's terms pointing and asking her specifically where she pee-pee and where she pointed was she hurting anywhere there. And she said no that she wasn't. We asked had anything put in they're [sic]. Had he put any finger in or any other things. She said that nothing had been pushed into her. And we encourage her to identify her anatomy a little bit more so we knew what we were talking about.

Q. Okay.

A. Then asked her a lot of these questions were asked very slowly to make sure that she understood what we were talking about. And, you know, case was such she just said that only that he placed his mouth over her external genitalia and just pointed in that general region. We asked whether she had had to touch him anywhere. Whether she had to place her mouth or anything on any of his parts. And she said that she had not.”

The physician described S.G. as “calm and comfortable” when he spoke to her.<sup>78</sup>

As noted earlier, the victim did not testify and the prosecution's case consisted largely of the witnesses' testimony recounting her statements and their observations of her body. The defendant raised timely objections to the admission of all the statements. The appellate court approved admission of the first three statements—those to the babysitter, the child's mother, and the police officer—under the spontaneous declaration/excited utterance exception.<sup>79</sup> The court also approved the admission of the statements to the nurse and the doctor under the hearsay exception for statements with the purpose of medical diagnosis or treatment.<sup>80</sup> The defendant's confrontation challenge, as the Supreme Court in *Crawford* noted,<sup>81</sup> was to the failure of the state to show that the child was unavailable.<sup>82</sup>

The five sets of statements are incredibly similar in content. They were all made after the defendant fled the premises. They are all accusatory. They all describe past facts. They are all relevant to establish or prove past events relevant to a criminal prosecution. Criminal prosecution is likely from the moment of the child's very first statement. Its probability becomes extremely likely when the child's mother calls the police and the officer interviews the child and receives an accusatory statement against the defendant. Thus, the prosecutorial potential of the statements is firmly established at the time the child is taken to the hospital for examination. Moreover, the testimony by the nurse describes a careful questioning that deserves the name “interrogation.”

The broad purpose of the questioner changes quite clearly as the identities and professions of the adult questioners change. The mother is a concerned parent who is seeking to learn of the injuries and harm to her child and the source of those injuries

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78. *Id.* at 1245–46 (alterations and second omission in original).

79. *Id.* at 1246–50.

80. *Id.* at 1250–51.

81. *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2003).

82. *White*, 555 N.E.2d at 1250–51. The appellate court denied the claim. *Id.*

and harm. The police officer is attempting to establish facts to determine whether to charge the perpetrator. Finally, the nurse and the doctor are attempting to learn the nature of the injuries and determine the corresponding treatment (a medical purpose), but also may be attempting to secure the child against future harm from the perpetrator (a medical/social/prosecutorial purpose). Thus, the questioner's purpose relates to the respective roles of the witnesses.

One cannot tell for sure a four-year-old child's intent, but her statements appear to demonstrate knowledge of the seriousness of what occurred and the concern that adults immediately showed. In talking to the five individuals, I suggest that the child's mindset as to whether her statement would be used in court changed far less from speaker to speaker than did the purposes of the adults on the other side of the conversations, who had quite different professional roles. I suspect the child's expectation or intention probably changed only slightly as the adult questioning her changed and their uniforms changed, but their questions and the child's responses remained extremely similar.

The patterns of the cases reported in the lower courts post-*Crawford* reveal that these five statements are dealt with quite differently. With only rare exceptions, statements to family members and private individuals such as babysitters are found nontestimonial. Statements to the police are almost equally and consistently treated as testimonial. Those to doctors are uniformly treated as nontestimonial, except that a few courts consider statements identifying the perpetrator as testimonial. Those to nurses, such as the nurse in *White*, who are associated with a medical treatment staff, like the statements to doctors are found nontestimonial. A different treatment occurs when nurses take the role of forensic interviewers for a process that is found to be the equivalent of police interrogation.<sup>83</sup> The results are clear based at least on the tally of the lower court decisions.

While the outcomes are remarkably consistent within categories, that consistency hides a great deal of uncertainty as to when an investigative purpose is involved and how involved it must be in order to find a statement testimonial. Issues of the child's state of mind are also sometimes important, but less so than might be expected.

In the next Part, I examine five categories of statement, all of which have been treated rather consistently by lower courts under the testimonial approach. As this material is presented, I suggest that the reader occasionally ponder the general question of whether conversations that are so similar in terms of content should be treated so differently, and whether from the perspective of protecting the defendant's confrontation rights the divisions are sensible. One might also ask whether the results in the testimonial category for children—except for statements to police officers—have fallen into a pattern that closely resembles those under *Ohio v. Roberts*.<sup>84</sup> If so, the result may be for doctrinal reasons. On the other hand, these outcomes may be the result of resistance by courts to reach results that do not comport with their sensibilities—a refusal I heard a prosecutor attribute to an aversion to the results dictated by opinions based on radical originalism.<sup>85</sup>

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83. See *State v. Hooper*, No. 31025, 2006 WL 2328233, at \*4 (Idaho Ct. App. Aug. 11, 2006) (referring to interviewer as “forensic interviewer and sexual assault nurse examiner”), review granted, Jan. 18, 2007.

84. 448 U.S. 56 (1980).

85. In September 2006, I attended a symposium on *Crawford* and *Davis* at Brooklyn Law School. A prosecutor on one panel made a provocative statement. He theorized that decisions

II. PATTERNS AND ISSUES IN THE POST-*CRAWFORD* AND THE POST-*DAVIS* CASES

Predicting what future Supreme Court rulings will be within the new Confrontation Clause paradigm based on past patterns in lower court cases is potentially misleading. The lower courts are engaged in the same type of analysis based upon the same limited information that scholars are. In addition, courts are probably aware of the distorting effect that the practical impact of their rulings have. When the correct answer under the new Confrontation Clause analysis is uncertain, as it frequently is, a court's decision to err on the side of community safety is hardly illogical. Accordingly, the patterns are not dispositive and may be somewhat biased in favor of a politically conservative outcome,<sup>86</sup> but they provide interesting data on the reactions of appellate judges to the open issues in *Crawford* and *Davis*. When the results are relatively consistent, they also give momentum to what might be seen as reasonable judicial interpretation in a situation of ambiguity. Moreover, the mounting convictions affirmed under a narrow construction of the Clause increase the costs of a broader construction by the Supreme Court.<sup>87</sup>

With all these caveats in mind, the patterns in the cases are largely consistent. Indeed, some categories are remarkably consistent. I deal first with the three types of statements presented in *White*. I then examine two additional classes of cases. One includes statements where the purpose of the government questioner is to create an admissible statement. In the other, the involvement or direction of law enforcement agents is sufficiently substantial to make the questioning by non-law-enforcement government employees or private parties the functional equivalent of police interrogation.

*A. Statements to Parents, Family Members, Friends and Acquaintances, and Other Private Individuals*

With only highly infrequent exceptions, statements by children to parents, family members, and friends<sup>88</sup> are treated as nontestimonial.<sup>89</sup> Presumably, the same results

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admitting lab results that appear inconsistent with "testimonial" theory and presumably other decisions showing reticence in following the Supreme Court's apparent direction in *Crawford* and *Davis* reflected the lower courts' unwillingness to exclude statements that they found reliable but were to be excluded under the Supreme Court's new confrontation analysis based in "radical originalism." I do not claim to know whether he hit upon the basis of resistance, but I sense that lower courts do resist excluding statements that a fair reading of *Crawford* would support. Courts seem particularly reluctant to exclude statements that they sense are basically reliable, despite the fact that reliability has been rejected as an element of the new confrontation analysis.

86. Arguably, the lower courts were more conservative in their approach to the fact pattern in *Davis* and *Hammon*—closer to Justice Thomas' dissent—than was the Supreme Court majority.

87. See Robert P. Mosteller, "Testimonial" and the Formalistic Definition—the Case for an "Accusatorial" Fix, 20 CRIM. JUST., Summer 2005, at 14, 21–22 (arguing that delay in adjudication on issues that arise in large numbers of cases adds an incentive for the Court to adopt a narrow construction of the testimonial concept).

88. In *People v. Griffin*, 93 P.3d 344 (Cal. 2004), the court ruled nontestimonial the statement of a twelve-year-old child to a friend at school that the defendant had fondled her and

will follow for other entirely private individuals, such as babysitters. Even if the child's statement is strongly accusatory, the outcome is generally the same. A series of factors play a role. First, the statements are made to private individuals who have no governmental function whatsoever and certainly no criminal investigative role.<sup>90</sup> While the decisions have not treated statements as nontestimonial solely because a government officer does not receive them, the Court's emphasis upon the danger of governmental involvement in creating evidence<sup>91</sup> makes these truly private statements less-likely candidates for testimonial treatment. Second, some of the statements are spontaneous responses from the child's perspective. Frequently, from the perspective of the parents, the statements are at least a somewhat unexpected response, prompted by a troubling, but somewhat ambiguous, observation.<sup>92</sup> These characteristics also lead to the conclusion that these statements are informal.<sup>93</sup>

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she intended to confront him if he continued. *Id.* at 369–72. The conclusion may be explained both by the fact that it was made to a friend under circumstances that did not suggest court use and that it was made regarding a crime that had not yet taken place, the victim's subsequent murder. *Id.*

89. *State v. Shafer*, 128 P.3d 87 (Wash. 2006), involved both statements to the child's mother and quite problematic statements in response to questions by the mother's friend. With prompting the morning after the apparent abuse, the child told her mother of the abuse. *Id.* at 89. After further inquiry the child provided a detailed version. *See id.* In addition, approximately a week after defendant's arrest, a family friend who had a history of acting as a confidential informant solicited comments from the child by talking about "privates" and then videotaped an interview with the child. *Id.* The court ruled both statements nontestimonial. *Id.* at 90–92. As to the statements to the mother, they were first seen as not solicited, and then as questions expected of a concerned parent. *Id.* at 92. The court also asserted that the responses were not the result of leading questions or "structured" interrogation, and concluded that the child had no reason to believe the statement would be used at trial. *Id.* As to the statement to the friend, the court concluded that the friend was not acting as a law enforcement agent at the time, and that the child had no reason to expect that her statements would later be used in court. *Id.* The court observed that the most problematic part of the friend's questioning, the videotape itself, was excluded. *Id.*

*State v. Brigman*, 615 S.E.2d 21 (N.C. Ct. App. 2005), also has problematic elements, but the statements to a foster parent were nevertheless considered nontestimonial. *Id.* at 22–26. The first statements were solicited after the foster mother saw sexual play between the children. *Id.* at 22. She then called the Department of Social Services (DSS) and continued to talk with the boys and attempted to tape-record the conversation. *Id.* The appellate court found all of the statements nontestimonial. *Id.* at 23–26. It considered the first statements spontaneously made to one of the people closest to the child. *Id.* at 25. It found the remaining statements, solicited after the telephone conversation with DSS, nontestimonial, relying on the lack of any indication that the child anticipated that they would be used prosecutorially. *Id.*

90. *See People v. Vigil*, 127 P.3d 916, 920–21 (Colo. 2006) (admitting statement by child to his father and the father's friend because they were made to private individuals and because the excited statements were "not solemn or formal statements").

91. *Crawford* noted the Framers' concern for the "[i]nvolvement of government officers in the production of testimony with an eye toward trial . . ." *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004).

92. In *In re Rolandis G.*, 817 N.E.2d 183 (Ill. Ct. App. 2004), the appellate court found the statements by the child to his mother not testimonial because they were more in the nature of a "casual remark to an acquaintance." *Id.* at 191 (quoting *Crawford*, 541 U.S. at 51). The mother "merely noticed that her son was behaving strangely and attempted to ascertain what was wrong.

However, the nontestimonial result generally remains the same even when questioning becomes much more directed. This is true even though one of the Court's examples in *Crawford* coupled the private identity of the hearer with the casual, rather than purposeful, nature of the statement to conclude the statement was nontestimonial.<sup>94</sup> To maintain the nontestimonial conclusion, the analysis often moves to the apparent character of the child's intent in making the statement, an intent which is asserted not to be for use at trial. That argument in many cases seems merely conclusory and not necessarily supported by a reasonable construction of the facts.<sup>95</sup> In some cases of child sexual abuse, the perpetrator has warned the child not to reveal the information,<sup>96</sup> and occasionally children will understand that "telling on" the perpetrator will get him into trouble.<sup>97</sup>

Under some formulations, courts could use facts suggesting a child's awareness of consequences upon revelation of abuse to conclude that the child did have some appreciation that the statements might be used against the perpetrator, which in the child's world could be the equivalent of expected use in court. However, the significance of such a warning is not noted, and it has played no role in the testimonial

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There is no indication that she suspected he had been the victim of a crime and that she was attempting to elicit evidence for a future prosecution." *Id.* at 189. The focus of the court was clearly on the intent of the questioner.

93. *See* *People v. Soria*, No. B182682, 2006 WL 3060052, at \*6 (Cal. Ct. App. Oct. 30, 2006) (unpublished opinion).

94. The *Crawford* Court gave as an example of a nontestimonial statement a "casual remark to an acquaintance," *Crawford*, 541 U.S. at 51, which relies on both lack of purpose and its private nature.

As another example of a nontestimonial statement it offered an "off-hand, overheard remark." *Id.* Such a statement would likely be made to a private individual, but its nontestimonial character depends entirely upon the lack of intent by the speaker, since the suggestion is that it is nontestimonial even if overheard by a government official.

95. In *Herrera-Vega v. State*, 888 So. 2d 66, 67 (Fla. Dist. Ct. App. 2004), the child spontaneously reported to her mother oral sexual conduct and "reluctantly repeated the story to her father minutes later." Both parents testified at trial. *See id.* The court concluded neither the spontaneous statement nor the other statements to the father were testimonial. *See id.* at 68. The court's conclusion that from both the speaker's and the questioners' perspective there was no intention to use the statements in a criminal trial, *see id.*, seemed to explain the result.

96. *See, e.g., State v. Walker*, 118 P.3d 935, 938 (Wash. Ct. App. 2005) (recounting that perpetrator threatened to kill her brother if she did not keep quiet); *T.P. v. State*, 911 So. 2d 1117, 1120 (Ala. Crim. App. 2004) (noting that perpetrator told victim "not to tell his daddy"); *In re T.T.*, 815 N.E.2d 789, 794 (Ill. App. Ct. 2004) (indicating that perpetrator told child he would kill her if she told anyone).

97. *See* Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1068-70 (2000) (discussing threats and inducements that perpetrators use in an attempt to discourage the child from reporting the abuse and citing JUDITH HERMAN, *FATHER-DAUGHTER INCEST* 88 (1981), which notes that many of the incest victims interviewed reported threats that included the warning that their fathers would be put in jail if it were reported, and BARBARA E. SMITH & SHARON GORETSKY ELSTEIN, *THE PROSECUTION OF CHILD SEXUAL AND PHYSICAL ABUSE CASES: FINAL REPORT* 93 (1993), which similarly indicated that threats not to reveal abuse included both warnings of physical violence against the child or others and "pleas that the abuser would get into trouble if the child told"); *cf. Pantano v. State*, 138 P.3d 477, 480 (noting that perpetrator warned the child that she would be in trouble if she told what had happened).

determination of decided cases. Thus, courts find that even statements that arguably are understood by the child as ones which will cause problems for the perpetrator are not testimonial when made to family and friends.

The apparent shift of focus by *Davis* from the intent or expectation of the child who made the statement to the purpose of the person who received it may provide an easier articulation for the ruling that such statements, particularly when made to family members, are nontestimonial. The option to focus on the purpose of the questioner does not change the result, but it has had the apparent effect of making the intent/purpose element more prominent in the analysis and giving courts more confidence in the nontestimonial conclusion when purposefully accusatory statements are at issue. Highly accusatory statements to parents that the child might well anticipate (and a reasonable person surely assumes) would result in serious trouble for the person identified are found nontestimonial because the statements were produced by questions motivated primarily by the parents' concerns for the health and welfare of the child, rather than for criminal prosecution.

In *State v. Pantano*,<sup>98</sup> the court put the explanation in terms of the purpose of conversation from the parents' perspective. The child's mother discovered the child's stained underwear, and while the conversation is not described, the child disclosed, apparently in response to the mother's inquiries, that the defendant had sexually abused her.<sup>99</sup> The mother asked the child to repeat the statement to her father, and after some further conversation, the child again accused the defendant.<sup>100</sup> The father's inquiry for details and the child's responses were substantial.<sup>101</sup>

The Nevada Supreme Court addressed the testimonial nature of the statements—despite the fact that the child's availability for cross-examination at trial eliminated the confrontation issue—because it wanted to clarify treatment of this class of statements.<sup>102</sup> It rejected the argument that the child's responses to the father were like the statement to the police in *Crawford* using a questioner-purpose response:

A parent questioning his or her child regarding possible sexual abuse is inquiring into the health, safety, and well-being of the child. To characterize such parental question as the gathering of evidence for the purpose of litigation would unnecessarily and undesirably militate against a parent's ability to support and nurture a child at a time when the child most needs that support. We therefore conclude that [the child's] statements to her father were nontestimonial in nature.<sup>103</sup>

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98. See *Pantano*, 138 P.3d at 482. Because the child testified and was available for cross-examination, the court recognized that the Confrontation Clause would not be violated regardless of whether the statement was testimonial. *Id.*

99. *Id.*

100. *Id.*

101. See *id.* at 479–80.

102. See *id.* at 483. The court seemed eager to articulate the impact of the analysis from *Davis* that focuses on the primary purpose of the questioner. See *infra* Part IV.C.

103. *Pantano*, 138 P.3d at 483.

*State v. Purvis*, 829 N.E.2d 572 (Ind. Ct. App. 2005), takes this approach and uses reasoning remarkably similar, particularly since the emphasis on the questioners' purpose predates *Davis*. Regarding the statement of the child, M.B., it stated:

The cases that have found statements by children to private individuals testimonial appear simply to be unexplained outliers. They latch onto the accusatory nature of the statement,<sup>104</sup> which other courts ignore or treat as inconsequential. If *The King v. Brasier*<sup>105</sup> were to be followed, these cases finding accusatory statements to family members testimonial would be solidly reasoned. These cases are certainly in the minority, and accepting their result or following *Brasier* would have far-reaching consequences and a broadened scope for testimonial statements. It is of course possible, but I believe unlikely, that the minority position will be adopted by the Supreme Court.

### B. Statements to Police Officers

The treatment of statements by children to police officers as testimonial is just as consistent as the conclusion that statements to family members are nontestimonial. Although there may be an outlier that goes the other way in unusual circumstances,<sup>106</sup>

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Purvis argues that M.B.'s statements to Gray and Shawn should be classified as testimonial because the two adults suspected some illegal or nefarious activity and were, in effect, "investigating" and turning up evidence eventually provided to police. This argument sweeps too broadly. Parents of young children constantly question them about their activities, often to ensure that the children are behaving safely. When parents find illegal activity or victimization, they naturally contact appropriate authorities. The fact that parents turn over information about crimes to law enforcement authorities does not transform their interactions with their children into police investigations. When they questioned M.B., Gray and Shawn were motivated primarily to find out what happened so that they could protect M.B.'s safety. This activity is sufficiently attenuated from law enforcement conduct to be non-testimonial under *Crawford*.

*Id.* at 579. In *State v. Walker*, 118 P.3d 935, 942 (Wash. Ct. App. 2005), the court considered responses by the child to questions by a "concerned" mother nontestimonial because the conversation was between "a concerned parent and an upset child, nothing more." The court also viewed the statement from the perspective of the child, and concluded that the statement would not have been reasonably believed by the child to be available for use at a trial. *See id.*

104. In *In re E.H.*, 823 N.E.2d 1029, 1035 (Ill. App. Ct. 2005), the court found a statement of a child to her grandmother testimonial. Its reasoning followed that of *In re T.T.*, 815 N.E.2d 789, 804 (Ill. App. Ct. 2004), that the private nature of the statement was not dispositive if the nature of the statement was accusatory. *See In re E.H.*, 823 N.E.2d at 1037. *E.H.* concluded that the child's statements "concern[ed] fault and identity of E.H. and these 'accusatory statements' invoke the protections of the confrontation clause." *Id.* Also, *State v. Harr*, 821 N.E.2d 1058, 1067 (Ohio Ct. App. 2004), appears to find testimonial a child's statement to her mother some two weeks after a sexual assault and in response to leading questions. However, the court only clearly found the statement inadmissible as an excited utterance. *See id.* It viewed the question as whether the child's statements to her mother were "testimonial or excited utterances," *id.*, which are not the only two options, and found that the trial court erred in admitting the statement as an excited utterance. *See id.*

105. 1 Leach 199, 168 Eng. Rep. 202 (1779).

106. *Lagunas v. State*, 187 S.W.3d 503 (Tex. Ct. App. 2005), is something of an exception. It resembled the fact pattern of a ordinary criminal case more than the typical case where child sexual abuse is involved. *See id.* at 505-11. The child's mother had been kidnapped from her home where a four-year-old child remained. A police officer returned to the home after the



the cases are remarkably uniform in characterizing statements, even by young children, as testimonial when made to police officers.<sup>107</sup> Courts here, if pressed, move to the view of the objective witness rather than a child of the age and understanding of the particular declarant when determining the testimonial nature of the statement, or they effectively ignore the child's expectations entirely.<sup>108</sup>

This consistent testimonial result stands in contrast to the variable treatment of statements by victims of domestic violence to the police, which may be the consequence of differences between the typical circumstances under which victims of the two crimes make statements. Unlike in domestic violence cases, the police do not generally encounter a child still in an emergency situation, nor does the child call an agent of the police, such as a 911 operator. Rather, in cases involving children, the

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mother escaped, where he found the child. The statements came from the conversation between the officer and the child. *See id.*

The court stated in conclusion:

In this case, Officer Sullivan elicited some of [the child's] statements, a factor that might otherwise weigh toward a finding that they were testimonial. However, we conclude that the child's statements, when viewed in light of her age and state of mind, together with the circumstances surrounding her interaction with Officer Sullivan, lack the indicia of solemn declarations made to establish or prove a fact.

*Id.* at 520. The initial question was motivated by concerns for the safety and welfare of the child. The child's response "amounted to a small child's expressions of fear." *Id.* at 519. The follow-up question likely should have been considered as different and testimonial, much as the Supreme Court in *Davis* treated the 911 call, made after the defendant had left the premises. *See Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006). However, the Texas court did not have the benefit of the later *Davis* decision.

107. In *People v. Cage*, 155 P.3d 205, 210, 217–18 (Cal. 2007), the California Supreme Court found a statement made to a police officer by a fifteen-year-old in a hospital emergency room testimonial, reversing the conclusion of the appellate court that the statement's informality rendered it nontestimonial. In *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 755, 757 (Cal. Ct. App. 2004), the prosecution conceded that the statements taken by a police officer after being called by the child's mother were in response to structured questioning and were testimonial. The videotaped statement of a child to a police officer was ruled testimonial in *People ex rel. R.A.S.*, 111 P.3d 487, 490 (Colo. Ct. App. 2004). *See also* *People v. Vigil*, 104 P.3d 258, 261–63 (Colo. Ct. App. 2004), *rev'd on other grounds*, 127 P.3d 916, 929–30 (Colo. 2006) (finding no plain error). In *State v. Grace*, 111 P.3d 28, 31, 38 (Haw. Ct. App. 2005), the court found the statements of ten- and eleven-year-old children to a police officer testimonial. In *In re T.T.*, 815 N.E.2d 789, 801 (Ill. App. Ct. 2004), statements by a child to the police six months after the incident were treated as testimonial. In *In re Rolandis G.*, 817 N.E.2d 183, 186, 188 (Ill. App. Ct. 2004), the statement to a police officer who responded to the family home and spoke to the child shortly after the child's mother reported that sexual abuse had been committed was ruled testimonial. In *State v. Pantano*, 138 P.3d 477, 483 (Nev. 2006), the state conceded that the statements of the child to a police officer were testimonial. In *State v. Purvis*, 829 N.E.2d 572, 577, 580 (Ind. Ct. App. 2005), statements by the child to a police officer less than two hours after he initially reported to his parents that he had been molested were treated as testimonial.

108. *See Sisavath*, 13 Cal. Rptr. 3d at 758 n.3; *Grace*, 111 P.3d at 38. In *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006), the Minnesota Supreme Court observed that the perspective of the speaker is indeed ignored where the conduct of a government questioner is clearly aimed at producing a testimonial statement: "Most courts have also determined that a statement is testimonial if a government questioner is acting largely for the purpose of preserving a statement for trial, even if the declarant is not." *Id.* at 251.

police are summoned by parents or other adults after these private parties have secured the child's immediate safety and often after they have determined that a crime has occurred.

Perhaps also the uniformity of the response has resulted because Justice Scalia indicated that a mistake had likely been made in *White* regarding the statement of the child to the police.<sup>109</sup> The circumstances of the statement in *White* were completely typical in terms of intent of the child, age (four) and understanding, and formality of the procedure (interviewed in the family home).<sup>110</sup> Thus, Scalia's suggestion that an error likely occurred in *White* in the treatment of the child's statement to the police officer suggested broad applicability.<sup>111</sup> For whatever reason, the lower courts have reached a remarkably clear consensus that statements by children are testimonial when made to police officers.<sup>112</sup>

### C. Statements to Medical Treatment Personnel

As noted earlier, the statements in *White* to the medical personnel occurred after the child reported the sexual abuse to the police. Thus, if a serious likelihood of prosecution turns the situation testimonial, the same testimonial result should obtain for statements in *White* to the nurse and doctor who spoke to the child after the police received a clear statement that a crime had occurred. The Supreme Court in *Crawford* does not make such a suggestion about timing generally, and the lower courts do not treat statements made to medical professionals after the victim has made contact with the police differently.<sup>113</sup> Also, no emphasis is placed on the fact that these statements are typically focused on establishing past facts. The articulation of that apparently critical distinction in *Davis*<sup>114</sup> changes nothing.

Rather, statements of children to doctors and nurses who are the first to examine the child after the report of assault are almost universally treated as nontestimonial.<sup>115</sup> The

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109. *White v. Illinois*, 502 U.S. 346, 350 (1992).

110. *Id.*

111. *Id.*

112. *See Purvis*, 829 N.E.2d at 580 (noting the uniformity of treatment of initial statements by children to police as testimonial at the same time other citizen-police conversations in the field may be treated as nontestimonial).

113. *Cf. United States v. Bordeaux*, 400 F.3d 549, 555 (8th Cir. 2005) (receiving a doctor's testimony, including what the child said during the interview, even though a videotaped interview given to a forensic interviewer immediately prior to the doctor's examination was found testimonial and improperly admitted).

114. *Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006) ("to establish or prove past events").

115. *See, e.g., United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005) ("Where statements are made to a physician seeking to give medical aid in the form of diagnosis or treatment, they are presumptively nontestimonial."); *People v. Cage*, 155 P.3d 205, 218–20 (Cal. 2007) (finding statement to doctor in emergency room regarding assault nontestimonial because the primary purpose was medical); *Foley v. State*, 914 So. 2d 677, 685 (Miss. 2005) ("[Victim's] statements were made as a part of neutral medical evaluations and thus do not meet *Crawford's* 'testimonial' criterion." (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004))); *State v. Vaught*, 682 N.W.2d 284, 289 (Neb. 2004) (concluding generally that medical statements are not testimonial); *State v. Johnson*, No. CA2005-10-422, 2006 WL 2796826, at \*8

only exception is the specific issue of the identity of the perpetrator, with a few cases treating the part of the child's statement that names the perpetrator as testimonial based on its accusatory nature.

Nurses' statements are treated the same as doctors' if the function of the conversation is to aid medical examination and diagnosis or treatment. Because nurses often are given responsibility for asking questions for nonmedical purposes, which include the prosecution's use of the statement, some statements to nurses are treated as falling into another category, which I will discuss below.<sup>116</sup> In these other situations, the fact that the questioner is a nurse is beside the point because medical concerns are not at the center of the conversation.

The statements children make to medical personnel are so similar in basic circumstances—or the circumstances that differ are so easily subject to change if testimonially dispositive—that I believe there should be an answer to whether medical oriented statements within broad categories are testimonial. Moreover, while I recognize it to be apostasy to indicate a connection from the *Roberts* era to what is currently transpiring, I have trouble believing that much will change from the *Roberts* regime—where these statements were admissible except in rare situations—to the *Crawford/Davis* regime. Continuity in the admissibility result is certainly the message that the lower courts have given, with roughly the same concerns as under *Roberts*. Continued admissibility is the signal from the Supreme Court in its summary treatment of *White*, which suggested no problems with the statements to the nurse or doctor in that case despite the prior involvement of the police, the interrogation about past facts by the nurse, and the highly accusatory nature of the child's statement.

#### 1. Medical Purpose—First Examination Implicitly a Matter of Necessity

The realities of the sexual abuse or physical abuse situation mandate that whether the examination is occasioned by an emergency with recent or severe injury, or the abuse occurred much earlier but has never been medically assessed, a doctor examine the child. Regardless of whether the examination also has a prosecutorial purpose, a medical assessment of the child's condition is fundamentally important to the child's health. Thus, as to the initial medical examination after the report of abuse, there is undeniably a medical purpose that may overlap with, but stands separate from, the prosecutorial interest in apprehending and punishing the abuser. Particularly after *Davis* and its "primary purpose" test, the key inquiry should be, and effectively appears to be, whether the questioning is for a medical purpose.<sup>117</sup>

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(Ohio Ct. App. Oct. 2, 2006) (unpublished opinion) ("In general, statements made by child abuse victims to medical providers are not testimonial."); *State v. Fisher*, 108 P.3d 1262, 1269 (Wash. Ct. App. 2005) (concluding that statements by child to doctor not testimonial).

116. See *infra* Part II.E (discussing interviews that are considered the functional equivalent of police interrogation).

117. See, e.g., *State v. Kirby*, 908 A.2d 506, 527 (Conn. 2006) ("The key to the inquiry is whether the examination and questioning were for a 'diagnostic purpose' and whether the 'statement was the by-product of substantive medical activity.'" (quoting *In re T.T.*, 815 N.E.2d 789, 803 (Ill. App. Ct. 2004))).

## 2. Mandatory Reporting of Abuse to Prosecuting Authorities

In all or almost all jurisdictions, a doctor who finds substantial evidence of sexual or physical abuse of a child is required by law to report the findings to authorities for possible prosecution.<sup>118</sup> In most jurisdictions, some and often all of what is conveyed will be admissible under the hearsay rules. There is every reason to assume that the vast majority of doctors and nurses are aware both of reporting requirements and the admissibility of many statements made to them during the examination process.<sup>119</sup> The medical examination thus always has the potential to feed directly into the criminal process, and use of the statements at trial is an obvious possibility.

The legal requirement imposed upon doctors in most states to report reasonable suspicion of abuse would seem to have some bearing on the testimonial issue. However, in none of the lower court opinions has a court ruled that the reporting requirement renders the statement automatically testimonial. Indeed, the reporting requirement has no impact at all.<sup>120</sup>

## 3. Experience with Abuse—Not a Dispositive Factor

The doctors and nurses who perform initial examinations are almost universally private rather than public employees. Some examinations are conducted by the child's personal pediatrician. Some of those pediatricians, and certainly the more specialized practitioners that children will be referred to, have substantial experience with sexual or physical abuse.<sup>121</sup>

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118. See Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 211–13 (1992) (tracing the history of reporting laws, which were in force in every state by 1967, and which began with mandatory reporting solely by physicians, and continued expanding generally to include physicians along with other specifically listed professionals required to report suspected abuse).

119. Children, regardless of age, will almost never have knowledge about the admissibility of their statements unless they have previously been involved in litigated cases. Even so, I submit that in many of these cases children know that something quite unusual is occurring in the doctor's office when an examination regarding sexual abuse is conducted.

120. See *People v. Cage*, 155 P.3d 205, 219–20 (Cal. 2007) (rejecting defendant's argument that mandatory child abuse reporting law applicable to doctors rendered the statement testimonial, concluding that the statutory requirement did not transform doctors into investigative agents and that the primary purpose of the questioning remained medical, which rendered the statement nontestimonial). *But see* *State v. Hosty*, 944 So. 2d 255, 266 (Fla. 2006) (Pariente, J., dissenting) (noting that the teacher's responsibility to report abuse may affect the testimonial determination with regard to child sexual abuse allegations made to the teacher).

121. In *People v. Vigil*, 127 P.3d 916 (Colo. 2006), the doctor's examination as part of a sexual assault evaluation was not considered to be the functional equivalent of police interrogation even though the doctor spoke with a police officer before eliciting the statements and "was not a person unassociated with government activity." *Id.* at 921–24. In *State v. Scacchetti*, 711 N.W.2d 508 (Minn. 2006), the Minnesota Supreme Court rejected the argument that the nurse was acting for the purpose of collecting statements for the prosecution rather than pursuing a medical purpose because she had testified in the past in child sexual abuse cases. *Id.* at 515.

I believe that, if possible, legal doctrines designed to protect the defendant's rights should not penalize examination of a child by particularly experienced physicians since such expertise likely leads to more discriminating examination and questioning and likely produces more reliable conclusions. Accepting experience may mean that the examination is not a totally private undertaking, but the fact that the doctor has frequently been involved in criminal investigations should not change the testimonial/nontestimonial outcome if the nurse or doctor's purpose is essentially medical in nature.

#### 4. Provision of Information to the Medical Staff by the Police Regarding Abuse

When an examination of a patient begins, medical personnel typically seek what is known about the circumstances of the condition. Denying the examining personnel that information seems unwise. Whether the doctor receives information via statements from a parent or from the police should not alter the testimonial/nontestimonial character of statements if the doctor is performing a medical examination rather than asking questions as a police agent.<sup>122</sup> Whenever a pediatrician is asked to investigate possible sexual abuse, he or she will assume criminal prosecution will result. Having more or less specific information will not change the fundamental character of the examination.

#### 5. Questioning Regarding the Identity of the Perpetrator

The one point of contention among the cases is whether questioning about and statements of the child regarding the identity of the perpetrator of the abuse are testimonial. Several courts have treated them as testimonial<sup>123</sup> or have endorsed the

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122. In *Commonwealth v. DeOliveira*, 849 N.E.2d 218, 223 (Mass. 2006), the doctor testified that he acted independently from the police and that the purpose of his examination was to determine whether the child had been sexually abused, injured, and needed medical treatment. The court ruled the child's statements nontestimonial even though the police provided information to the doctor and were present at the hospital, rejecting the argument that the doctor had become an agent of the police. *Id.* at 222–25. Atypically, the court decided the issue on the lack of the child's anticipation that the statements would be used at trial. *Id.* at 225–26. This decision was handed down on the same day as *Davis*, and did not have the benefit of *Davis*'s focus on the primary purpose of the questioning.

123. The court in *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 2004), accepted the general proposition that statements by children to doctors are not testimonial despite the fact that the medical examination was performed on a referral from the state's department of social services and was conducted six months after the incident. *Id.* at 803. The mitigating factor in the lateness of the examination was that the child's mother had not taken her for medical treatment earlier. *Id.* The court did not find dispositive the fact that the doctor was part of a child abuse trauma team. *Id.* It noted instead that the physician's interest was in treatment and that her primary investment in cooperating with law enforcement was to facilitate the least traumatic method of diagnosis and treatment, rather than a specific interest in enforcing sexual abuse laws. *Id.* The court excluded those identifying the defendant, which it found to be accusatory and to implicate the core concerns of the Confrontation Clause, but found all other statements to be nontestimonial and therefore admissible. *Id.* at 804. *State v. Kirby*, 908 A.2d 506, 527 (Conn. 2006), follows *T.T.*'s analysis and treats as significant whether the statements "accuse or identify

exclusion of such information under the relevant jurisdiction's hearsay rule, apparently thankful that a difficult constitutional issue was thereby avoided.<sup>124</sup> Some courts view them as no different than other statements made to a doctor during the child's examination.<sup>125</sup> In other jurisdictions or contexts, courts recognize that there is a medical purpose to the inquiry regarding identity. In *United States v. Peneaux*,<sup>126</sup> on the question of the scope of the Federal Rule of Evidence 803(4), the court noted two reasons for a physician to find identity relevant to the treatment of child victims of sexual abuse.<sup>127</sup> First, emotional and psychological problems that typically accompany sexual abuse are affected by whether or not the perpetrator is a family member, and second, knowing the identity of the abuser helps the doctor avoid recurrent abuse, which the court considered a general medical concern.<sup>128</sup>

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the perpetrator," but since the statement at issue in *Kirby* did not have those characteristics, the court found it to be nontestimonial. *Id.* at 527 (quoting *In re T.T.*, 815 N.E.2d at 804). Similarly, in *Johnson*, the court used the absence of any statement identifying the perpetrator as evidence of its nontestimonial quality. *State v. Johnson*, No. CA2005-10-422, 2006 WL 2796826, at \*8 (Ohio Ct. App. Oct. 2, 2006) (unpublished opinion).

124. In *Vigil*, the Colorado Supreme Court noted that, using analysis under the Colorado Rules of Evidence, "the trial court carefully distinguished between those aspects of the examination which were diagnostic in nature and those aspects which could arguably be labeled investigatory." *Vigil*, 127 P.3d at 924. Under this analysis, the trial court excluded references to the defendant by name in the child's statements. *Id.* In *DeOliveira*, the court likewise noted that the trial court, using state evidence law, had not admitted the portion of the statement implicitly identifying the defendant as the perpetrator. *DeOliveira*, 849 N.E.2d at 224.

125. In *State v. Vaught*, 682 N.W.2d 284 (Neb. 2004), after noting the validity of the questioning for purposes of the hearsay exception, the court treated the confrontation issue as straightforward. *Id.* at 291. It stated:

In the present case, the victim was taken to the hospital by her family to be examined and the only evidence regarding the purpose of the medical examination, including the information regarding the cause of the symptoms, was to obtain medical treatment. There was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination.

*Id.*; see also *Scacchetti*, 711 N.W.2d at 514–15 (admitting statement to nurse identifying perpetrator); *In re Welfare of A.J.A.*, No. A06-479, 2006 WL 2474267, at \*4–5 (Minn. Ct. App. Aug. 29, 2006) (unpublished opinion) (same).

126. 432 F.3d 882 (8th Cir. 2005).

127. *Id.* at 894. The argument that the identity of the person who committed a sexual assault is related to medical purpose would be much more difficult to make when an adult victim is involved. Indeed, the primary purpose of that questioning would not appear to be medical. See *State v. Bartholomew*, No. 59385-0-I, 2005 WL 941913, at \*3 (Wash. Ct. App. Apr. 25, 2005) (unpublished opinion) (holding such statements not pertinent to medical treatment and also that the adult victim would objectively know that the identifying statements would lead to prosecution).

128. *Peneaux*, 432 F.3d at 894; see also *Vaught*, 682 N.W.2d at 287, 289 (noting the doctor's testimony that it was medically important to know the perpetrator's identity both to avoid releasing the patient into the abuser's care and for the purpose of treating the patient's mental well-being). See generally 2 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 278, at 290 n.8 (Kenneth S. Broun, ed., 6th ed. 2006) (describing these as two general arguments for the pertinence of identity to treatment).

Given that confrontation is a federal constitutional right, it is inappropriate to make the testimonial determination regarding medical questioning about identity turn on whether a particular jurisdiction or a specific doctor recognizes the medical pertinence of learning the perpetrator's identity. Such concerns about identity should be categorically considered either part of medically pertinent questioning and nontestimonial or considered testimonial because these interests are not sufficiently divorced from law enforcement.<sup>129</sup>

In *Davis*, the Court considered information identifying the perpetrator to be related to the ongoing emergency.<sup>130</sup> That ruling, which treats an identifying statement as nontestimonial even though it quite clearly serves a law-enforcement purpose, makes far easier a general ruling that children's statements identifying the perpetrator are nontestimonial because of a possible medical purpose.

The futility of any other ruling is an additional reason to allow the identity question without this subject-matter restriction in the medical-examination situation. An easily accomplished change in sequencing of the questioning could render a contrary ruling almost inconsequential. A 911 operator may be compelled by concerns about the victim's safety to begin the call with questions about safety, and only after that emergency is resolved would the operator move to prosecution-related questions. Thus, the timing of the identity question for a 911 operator would be limited somewhat by the imperative of ensuring the victim's immediate safety.<sup>131</sup> By contrast, other than to establish rapport with the child, a nurse or doctor would not be constrained as to when the identity question is asked. The medical professional could ask about identity early in a conversation while clearly still primarily concerned with the physical health of the child. Thus, if the Court intends to follow and generalize its exclusion from the testimonial category of statements that are made in response to questions for a primarily non-law-enforcement purpose, identity questions should be categorically treated as nontestimonial when made as part of a medical examination. However, exclusion would still be warranted if the Court instructs lower courts to break larger

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129. Some commentators have criticized these as social and legal interests outside medical expertise. *E.g.*, 4 CHRISTOPHER M. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 442, at 464 (2d ed. 1994). This is a sound argument with regard to the hearsay rule. However, if such a social interest is an acceptable purpose separate from law enforcement, which it is likely to be considered, that determination should be made as a matter of constitutional construction by the Supreme Court, not by a factual determination based on the assertions of each witness or a balancing of case-specific or jurisdiction-specific factors.

130. *Davis v. Washington*, 126 S. Ct. 2266, 2276 (2006) (contending that the information was useful so that the officers dealing with the ongoing emergency might know whether they would be encountering a violent felon).

131. The Supreme Court in *Davis* argued that trial courts will recognize when statements become testimonial much like police officers “distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect . . . .” *Davis*, 126 S. Ct. at 2277 (quoting *New York v. Quarles*, 467 U.S. 649, 658–59 (1984)). That type of instinctive or clear dividing line would not likely be discernable between treatment interests and identifying the perpetrator in children's cases. The identity question certainly need not necessarily be asked near the end of the medical examination.

statements into their individual elements, rather than looking to the primary purpose of the overall statement at any particular time.<sup>132</sup>

#### 6. The Statement in *Wright* Would Likely Be Ruled Nontestimonial

No post-*Crawford* case presents a close replay of the facts of *Wright*. Thus, it is not possible to say with confidence how *Wright* would be decided today. However, there is little in these cases to indicate that the statements given to Dr. Jambura in *Wright*<sup>133</sup> would now be treated as testimonial. A testimonial designation would have to rest on a combination of the facts that (a) the doctor had an expectation of what he would learn (sexual abuse had occurred); (b) he used leading questions; (c) he had extensive experience in child abuse cases; and (d) a directly accusatory statement resulted. The first two of these factors relate to the *Roberts* trustworthiness/reliability test that *Crawford* abandoned. The third factor, experience, is hardly enough to show prosecutorial purpose. The accusatory nature of the statement has not been embraced as a factor by *Crawford* or *Davis*. While of interest to an occasional lower court with respect to identity, it appears too broad for the Court's new confrontation jurisprudence that is anchored in a testimonial rather than accusatory orientation.

I believe the best reading of Supreme Court and lower court case law is that the problematic statements in *Wright* would today be treated as nontestimonial. Their evidentiary weakness relates to the absence of trustworthiness, which is irrelevant under *Crawford*. Viewed objectively, Dr. Jambura had a primarily medical purpose in conducting the examination and asking the leading questions that the Court found problematic in *Wright*. Under *Davis*, that medical purpose alone would likely determine the statements' nontestimonial character.

#### 7. The Limiting Principle for Medical Examinations

My reading of the lower court cases is that none of the factors mentioned above changes the nontestimonial character of an initial medical examination in a child abuse case. I accept that this outcome is sensible. The primary purpose of the examination is not for criminal law enforcement but for a substantial and largely independent purpose—medical care.

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132. At some point, the Court should determine whether it will divide questioning into minute and separate assertions rather than as paragraphs or as a whole as it did when determining if a *statement* is against interest in *United States v. Williamson*, 512 U.S. 594, 599–602 (1994), to the primary purpose test of *Davis*. In *Davis*, the Court stated that trial courts should “redact or exclude” testimonial portions of a statement. *Davis*, 126 S. Ct. at 2277. That phrasing suggests that testimonial and nontestimonial comments may be interspersed in statements, and that the testimonial ones may be removed. However, the primary purpose test of *Davis* suggests that instead of these parts being interspersed, there would come a point in the statement when the primary purpose of the questioning would change (such as when a perpetrator leaves the domestic violence victim's home) and presumably it would remain for that other purpose until the entire matter shifted. I suggest that the identity question would not likely change the primary purpose of the doctor's overall questions, which otherwise relate to the child's medical condition.

133. *Idaho v. Wright*, 497 U.S. 805, 810–12 (1990).



However, once the medical status of the child has been assessed, the involvement of a doctor should not eliminate the testimonial quality of the statement. Thus, after the report of abuse, the initial medical examination, or multiple examinations done in a concentrated period of time, may be considered to be independent of a prosecutorial purpose. Subsequent examinations, however, should be presumed prosecutorial in nature and the statements received considered testimonial. A claim of medical purpose is not a talisman for a nontestimonial determination.

As discussed below, the creation of a formal statement, such as videotaping the examination, should weigh against a nontestimonial determination. If such formality is to be ignored, firm evidence should be produced demonstrating its substantial medical purpose.

#### *D. Statements Made for the Purpose of Creating Admissible Testimony*

Statements secured from children for the explicit purpose of admission in court through a hearsay exception have been uniformly treated as testimonial. In this pure form, these cases are likely a historical relic of the *Roberts* era. However, they may prove instructive in that some situations continue to arise that share features with statements in this category.

Historically, these cases arose because states created vehicles for the admission of hearsay from children that tracked the trustworthiness requirements of *Roberts* and/or attempted to deal with the problem of children's unresponsiveness in the courtroom setting by admitting recorded out-of-court interviews.<sup>134</sup> When these statements are offered in the post-*Crawford* world, they run contrary to the new doctrine's restrictions on testimonial hearsay.

*State v. Snowden*,<sup>135</sup> investigated and tried before *Crawford*, is the archetype. In *Snowden*, a statement was introduced under a special "tender years" statute that admitted statements in child abuse cases made to certain health or social-work professionals.<sup>136</sup> The statute responded to concerns that child abuse and sexual offenses were being inadequately prosecuted because victims were unable to testify given their immaturity and fragile emotional state.<sup>137</sup> It allowed certain designated professionals to testify to the statements obtained from the child.<sup>138</sup>

The facts supporting the testimonial quality of the statement were particularly clear. Two children believed to have been abused by the same individual were interviewed at the police station by the social worker upon the request of a police detective, and prior to the interview the social worker had been provided with a police report identifying

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134. See, e.g., MD. CODE ANN., CRIM. PROC. § 11-304 (LexisNexis Supp. 2006) (admitting out-of-court statements made to certain types of professionals, such as physicians, psychologists, nurses, social workers, and school officials); TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon 2005) (admitting result of child interview by neutral investigator).

135. 867 A.2d 314 (Md. 2005).

136. *Id.* at 325–26.

137. *Id.* at 321.

138. *Id.* at 320–21. Originally, the statute required the child to either testify at the proceeding or be unavailable, but it was modified to permit admission even when the child was available and did not testify. *Id.* at 321–22.

the defendant as the perpetrator.<sup>139</sup> Each child indicated at the beginning of the interviews that she was aware that she was being interviewed as a result of her accusation against the defendant.<sup>140</sup> Additionally, the intermediate appellate court found that the interviews were conducted for the express purpose of satisfying the requirements of the tender years statute, and thereby admitted the children's statements at trial.<sup>141</sup>

Despite the clarity of the situation, the American Prosecutors Research Institute argued as amicus that the limited cognitive and developmental skills of the children supported a conclusion that the statements were not testimonial because they were unable to understand the potential use of their statements at trial.<sup>142</sup> The court reasoned that it should not accept this type of argument because to do so would enable the prosecution to "utilize statements by a young child made in an environment and under circumstances in which the investigators clearly contemplated use of the statements at a later trial."<sup>143</sup> Instead, the Maryland court ruled that the testimonial determination should both take the intentions of the person eliciting the statement into account and view the child/declarant's intention from the perspective of an objective person, rather than an objective child of the victim's age.<sup>144</sup>

*Rangel v. State*,<sup>145</sup> in which a videotaped statement from the child was recorded before *Crawford* but which was tried after the decision, is similar.<sup>146</sup> The interview with the child occurred two months after Texas social services removed the child from the defendant's home but before the defendant was indicted on sexual assault charges.

The police were not as directly involved in *Rangel* as they were in *Snowden*. The Texas court in *Rangel*, in its examination of the statements of the child, C.R., focused on several other factors. First, it made some use of the emphasis in *Davis* on the timing, and therefore the prosecutorial purpose, of the questioning:

Here, unlike in *Davis*, C.R. was describing past events. The CPS investigator did not even interview C.R. until two months after CPS removed her from her home. Additionally, when C.R. talked with the investigator, she was not facing an ongoing emergency. C.R. had already been removed from her home, was placed in foster care, and was receiving counseling for the abuse. When viewed objectively, the nature of what was asked and answered during the interview was such that C.R.'s statements were elicited simply to learn about what had happened in the past.<sup>147</sup>

Second, it emphasized the statement's quite formal nature:

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139. *Id.* at 316.

140. *Id.* at 316–17, 325–26. The court saw the social worker's questions as "in every way the functional equivalent of the formal police questioning discussed in *Crawford*." *Id.* at 325.

141. *Id.* at 326.

142. *Id.* at 328.

143. *Id.* at 329.

144. *Id.*

145. 199 S.W.3d 523 (Tex. Ct. App. 2006).

146. *See id.* at 529.

147. *Id.* at 534 (emphasis omitted).

[T]he structured, formalized questioning of C.R. by the investigator, regardless of whether the statement was sworn or unsworn, is more akin to the types of ex parte examination discussed and condemned in *Crawford* than a “casual remark to an acquaintance” or even to initial statements made to a police officer responding to a call.<sup>148</sup>

Finally, the court recognized that the statement was taken to substitute for testimony:

Here, regardless of whether the four-year-old child may or may not have perceived when she made the statements that they could be used against appellant as evidence in a criminal case, the statute itself clearly contemplates that a child’s statement admitted under article 38.071 will function as *testimony* in a criminal case. . . . Thus, regardless of what C.R. thought her statements would be used for, they were clearly admitted at trial to function as testimony against appellant.<sup>149</sup>

Although disagreement may exist as to whether creating admissible evidence is the clear purpose of soliciting the statement, when it is found to be the purpose, the statements are treated as testimonial. This result is not affected by other factors, such as the age and lack of understanding of the child.

#### *E. The Functional Equivalent of Police Interrogation*

Statements that are made in situations that are the functional equivalent of police interrogation are analytically related to those made for the purpose of creating admissible evidence. Indeed, the two categories are sometimes inseparable.<sup>150</sup> For the “functional equivalent” cases,<sup>151</sup> the testimonial determination is not so much dependent on the fact the statement was taken in order to be admitted at trial under a

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148. *Id.* at 535 (citing *Crawford v. Washington*, 541 U.S. 36, 51(2004)).

149. *Id.* at 535 (emphasis in original). Although the court refused to determine what standard should be used to determine the child’s intention, it concluded that “either under a subjective or an objective standard” the child would understand that her words would be used make the defendant stop the abuse. *Id.*

150. *See, e.g.*, *State v. Justus*, 205 S.W.3d 872, 880 (Mo. 2006) (finding both that the forensic interview was performing the function of law enforcement and that the interview was made to preserve the child’s statement for trial).

151. *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005); *T.P. v. State*, 911 So. 2d 1117 (Ala. Crim. App. 2004); *People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004); *People v. Sharp*, 155 P.3d 577, 580–82 (Colo. Ct. App. 2006); *Contreras v. State*, 910 So. 2d 901 (Fla. Dist. Ct. App. 2005), *review granted*, 924 So. 2d 810 (Fla. 2006); *State v. Hooper*, No. 31025, 2006 WL 2328233 (Idaho Ct. App. Aug. 11, 2006), *review granted*, Jan. 18, 2007; *State v. Krasky*, 721 N.W.2d 916 (Minn. Ct. App. 2006); *State v. Justus*, 205 S.W.3d 872 (Mo. 2006); *State v. Mack*, 101 P.3d 349 (Or. 2004); *State v. Pitt*, 147 P.3d 940 (Or. Ct. App. 2006); and *State v. Blue*, 717 N.W.2d 558 (N.D. 2006), are examples of cases in this category. Of these, all except *T.P.* involved videotaped statements. *In re T.T.*, 815 N.E.2d 789, 801–02 (Ill. App. Ct. 2004), *In re Rolandis G.*, 817 N.E.2d 183, 188 (Ill. App. Ct. 2004), and *State v. Buda*, 912 A.2d 735, 742–46 (N.J. Super. Ct. App. Div. 2006), reached the conclusion that statements made by children to investigators for the state’s department of child protective services were testimonial principally because of the agency’s shared responsibility for prosecution. The statements in these last three cases were not videotaped.

*Roberts*-based hearsay statute as was the former category. Instead, the key feature is that the questioning is done by either members of a private organization or by non-law-enforcement government officials, but with substantial police involvement or direction. The interviews are not conducted for another non-law-enforcement purpose of immediate concern. The interviews are formally taken by trained questioners and are often preserved on videotape. Finally, when examining cases in this category, courts focus principally or exclusively on the purpose of the questioner rather than the intent or expectation of the “witness”/declarant.

### 1. Police Involvement in, or Direction of, the Questioning

The degree of police investigative involvement, which varies, is seen as making the questioning the functional equivalent of police interrogation. Falling within this category requires more than simple government involvement.<sup>152</sup> Instead, substantial law enforcement control or direction is seen as making the questioning functionally equivalent to police interrogation. Direct involvement of criminal investigative personnel in the questioning process, although they do not conduct the questioning itself, is often a decisive factor.<sup>153</sup>

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152. As discussed below, *see infra* Part IV.B, at least some government involvement may ultimately prove a necessary element of a testimonial finding under the Supreme Court’s new Confrontation Clause jurisprudence.

153. In *Hooper*, the court noted that “[t]oward the end of the interview, the nurse inquired of the officer whether all the questions that the officer desired had been asked, and then returned to the interview room with several additional queries, apparently at the officer’s instruction.” *State v. Hooper*, No. 31025, 2006 WL 2328233 at \*4 (Idaho Ct. App. Aug. 11, 2006), *review granted*, Jan. 18, 2007.

In *T.P. v. State*, 911 So. 2d 1117 (Ala. 2004), an interview by a non-police-officer government agent was seen as the functional equivalent of police interrogation because of the degree of police involvement. In *T.P.*, a police investigator was contacted by the Department of Human Resources (DHR) concerning a suspected case of child sexual abuse. That investigator and a DHR social worker interviewed the victim together. The social worker conducted the questioning and the police officer took notes of the interview, which was not videotaped, but did not participate in the questioning. *Id.* at 1119–20. The statement was admitted under a tender years statute that permitted such interviews to be admitted, like other statements, when (with a finding of reliability) the child is unavailable due to likelihood of severe emotional trauma. *Id.* at 1122–23. The court concluded:

[The child’s] statements were the result of an interview conducted by [a] DHR social worker . . . and [police] [i]nvestigator . . . as part of a criminal investigation. Under these circumstances, . . . because the interview was intended to be used as an investigative tool for a potential criminal prosecution, the interview is similar to a police interrogation and, thus, falls within the definition of ‘testimonial’ contained in *Crawford v. Washington*.

*Id.* at 1123.

## 2. Absence of Non-Law-Enforcement Purpose of Current Concern

In these cases, the only purpose of the questioning was law enforcement.<sup>154</sup> In none of these interviews was there a claim that the information was needed to protect the health and welfare of the child or to secure the child's immediate placement in the custody of another caretaker. A clear example is given in *State v. Krasky*.<sup>155</sup> There, the interview was deemed testimonial when it occurred "approximately two years after the suspected sexual abuse, after the suspect's parental rights had been terminated, and two months after the child had been placed in foster care."<sup>156</sup> Another purpose might be imagined for the interview and videotape, but it was not substantial or immediate.

## 3. Formality of Statement Form and Interview Process

The questioners were typically trained interviewers of children—often labeled forensic interviewers—which by itself is almost sufficient for some courts to conclude the statement testimonial.<sup>157</sup> In general, courts are concerned about the degree of "formality" of the statement,<sup>158</sup> which may also involve its recordation, often on

154. In *Hooper*, the court stated: "There is no evidence that the interview had a diagnostic, therapeutic or medical purpose." *Hooper*, 2006 WL 2328233 at \*4.

155. 721 N.W.2d 916 (Minn. Ct. App. 2006).

156. *Id.* at 917. On the basis of this and other timing issues, the court concluded that the "interview was 'part of an investigation into possibly criminal *past* conduct.'" *Id.* at 922–23 (citing *Davis v. Washington*, 126 S. Ct. 2266, 2278 (2006) (emphasis added)).

Although I have treated *Rangel* in another category, the lack of an alternative purpose was also established there in substantial part by the absence of a current issue. The child was not interviewed until two months after the child was removed from her home, was placed in foster care, and was receiving counseling for the abuse. *Rangel v. State*, 199 S.W.3d 523, 535 (Tex. Ct. App. 2006). Similarly, in *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 2004), the interview with police and a social worker occurred six months after the alleged assault and in a situation where there was no imminent prospect that the child would be taken into protective custody by social services. *Id.* at 793, 802.

157. In several cases where the interviewers were identified as "forensic" interviewers, courts went to their dictionary and noted that their purpose related to courtroom use of the statement. *See, e.g.*, *United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005) (citing Oxford English Dictionary Online Edition, [http://dictionary.oed.com/cgi/entry\\_main/50088116?query\\_type=word&queryword=forensic&first=18&max\\_to\\_show=10](http://dictionary.oed.com/cgi/entry_main/50088116?query_type=word&queryword=forensic&first=18&max_to_show=10) (taken from second print ed.1989) ("[M]eaning that it 'pertain[ed] to, [was] connected with, or [was to be] used in courts of law.'"); *Contreras v. State*, 910 So. 2d 901, 905 (Fla. Dist. Ct. App. 2005) (referring to forensic duties given by statute to interviewers), *review granted*, 924 So. 2d 810 (Fla. 2006); *Hooper* 2006 WL 2328233 \*4 n.6 (stating that the definition of "forensic" includes a relation to the courts); *State v. Blue*, 717 N.W.2d 558, 564 (N.D. 2006) (citing Merriam-Webster's Collegiate Dictionary 490 (11th ed. 2004)) ("The forensic interviewer's purpose was undoubtedly to prepare for trial. Forensic by definition means 'suitable to courts.'"). In *State v. Justus*, 205 S.W.3d 872, 880 (Mo. 2006), the interviewer stated in her testimony that "'forensic interview' . . . meant 'an official interview done for law enforcement.'"

158. The most extensive use of this factor appeared in *Hooper*, which stated:

Turning to the case before us, it cannot be seriously disputed that the interview of A.H. by the STAR nurse bears far more similarity to the police interviews in *Crawford* and *Hammon* than to the 911 call at issue in *Davis*. A.H. gave her

videotape. In some of those cases, a copy of the videotape was reserved for, or delivered to, the police.<sup>159</sup>

#### 4. Focus on Purpose of Questioner

Each of the cases in this category categorizes the statement as testimonial based on the purpose of the questioner. None looks to the intention, understanding, or expectation of the child. Several of the cases flatly state that in situations of this sort, where the questioning is the functional equivalent of police interrogation, the purpose of the questioner is dispositive.<sup>160</sup>

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statement several hours after the alleged criminal event; it was not a plea for assistance in the face of an ongoing emergency, but a recitation of events that occurred earlier that day. A.H. was separated from the perpetrator in a safe, controlled environment and responded calmly to the questions. Although it would not have been a crime for A.H. to lie to the nurse, and the interview therefore lacked one of the formality components present in *Hammon* and *Crawford*, A.H.'s interview did have many trappings of formality, including structured questioning in a closed environment, supervision by a police officer, and recordation by videotape. Perhaps of greatest importance, the statement that A.H. gave was precisely the kind of statement that a witness would give on direct examination at trial. At the outset, the interviewer asked several preliminary questions to ensure that A.H. knew the difference between the truth and a lie, and asked A.H. to correct the interviewer if she said something inaccurate. These questions very much resemble the initial questions a prosecutor would ask when examining a child witness on the stand, and the substantive questioning that followed elicited the details of the crime and the identity of the perpetrator. A.H.'s statements in the interview "aligned perfectly with their courtroom analogues."

*Hooper*, 2006 WL 2328233 at \*3 (citing *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006)).

159. See *Bordeaux*, 400 F.3d at 555 (noting a second copy of the videotape was made for law enforcement officials); *Blue*, 717 N.W.2d at 561 (recounting that a forensic interviewer conducted a videotaped interview with the child while a police officer watched on a television from a different room, and after the interview was completed, the videotape recording was given to the officer).

160. In the context of statements elicited by the functional equivalent of the police interrogation, courts have been unaffected by questions of the speaker's expectations, understanding, or intention. *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006), states a general test: "Most courts have also determined that a statement is testimonial if a government questioner is acting largely for the purpose of preserving a statement for trial, even if the declarant is not." *Id.* at 251. "We do not think that an approach that makes the declarant's perspective dispositive gives adequate consideration to *Crawford's* fear of governmental abuses." *Id.* at 252 n.3. In *Krasky*, the Minnesota Court of Appeals stated: "It has become evident under *Crawford* and *Davis* that the Supreme Court has deliberately abandoned a prior, vague Confrontation Clause test in favor of a new approach that focuses on an uncomplicated study of the purpose of an interviewer who takes a statement that is later introduced as trial evidence." 721 N.W.2d at 924. Likewise, *Hooper* rejected the state's argument that the statement was not testimonial because a six-year-old child would not have understood that her statements would be used at a later trial. It stated that although such an approach might be a reasonable interpretation of *Crawford*, it has been discredited by "*Davis*, which focuses not at all on the expectations of the declarant but on the content of the statement, the circumstances under which it was made, and the interrogator's purpose in asking the questions." *Hooper*, 2006 WL 2328233 at \*5.

### 5. Representative Cases Where Questioning Was Functional Equivalent of Police Interrogation

*State v. Mack*<sup>161</sup> is among the earliest and most definitive cases in the “functional equivalent” category. The statement was videotaped in the police station shortly after the crime (a homicide). The social worker explained to the child that the interview was needed for the police department to complete its investigation. Initially, the Department of Human Services caseworker was supposed to be acting as interview support for the child, but when the detective had difficulty establishing rapport, the caseworker became the primary questioner.<sup>162</sup> At a later interview, the caseworker again did the questioning. Both interviews were videotaped.<sup>163</sup>

The Oregon Supreme Court treated this case as the equivalent to police interrogation, with the caseworker as a proxy for the police. It noted that the caseworker elicited the statements so the police could videotape them for use in a criminal proceeding.<sup>164</sup> The court rejected the state’s argument that it should look to the speaker’s intent:

The state’s argument is difficult to square with the reasoning in *Crawford*. As noted, the Court explained that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.” . . . The primary focus in *Crawford* was on the method by which government officials elicited out-of-court statements for use in criminal trials, not on the declarant’s intent or purpose in making the statement.<sup>165</sup>

*People v. Sisavath*,<sup>166</sup> also decided shortly after the *Crawford* opinion, ruled that a videotaped statement made at the county’s Multidisciplinary Interview Center (MDIC) was testimonial. It did not use the terminology of functional equivalency, but employed the basic analysis articulated in terms of the reasonable reaction of an objective witness. The appellate court stated:

The status of the MDIC interview statement is less obvious. The People contend that it is not testimonial. We disagree. The MDIC interview took place on June 12, 2002. By that time, the original complaint and information had been filed and a preliminary hearing had been held. The deputy district attorney who prosecuted the case was present at the interview, along with an investigator from the district attorney’s office. The interview was conducted by a “forensic interview specialist.” Under these circumstances, there is no serious question but that Victim 2’s statement 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.”

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161. 101 P.3d 349 (Or. 2004).

162. *Id.* at 349–50.

163. *Id.* at 350.

164. *Id.* at 352.

165. *Id.* at 353 (quoting *Crawford v. Washington*, 541 U.S. 36, 50 (2004)) (citation omitted).

166. 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004).

The People argue that the statement was not testimonial because the interviewer was “not a government employee”; the MDIC is a “neutral location”; [and that] the interview might have been intended for a therapeutic purpose or related to removal proceedings and not intended for a prosecutorial purpose . . . .  
 . . . Victim 2’s interview took place after a prosecution was initiated, was attended by the prosecutor and the prosecutor’s investigator, and was conducted by a person trained in forensic interviewing. Under these circumstances, it does not matter what the government’s actual intent was in setting up the interview, where the interview took place, or who employed the interviewer. It was eminently reasonable to expect that the interview would be available for use at trial.<sup>167</sup>

*Contreras* is similar.<sup>168</sup> There, the court dealt with a videotaped statement of the victim taken by the Child Protection Team (CPT), “working with the [s]heriff”; a police officer was in another room and was connected electronically “to suggest questions.”<sup>169</sup> The court stated:

We begin by noting that a statute has established the CPT as part of the Department of Children and Families for the express purpose of “process[ing] child abuse cases.” The statute explicitly states that a purpose of child protection teams is to provide “expert medical, psychological, and related professional testimony in court cases.” The statute also specifies that the CPT shall provide “forensic interviews.” Under these statutes, interviews of child victims of sexual abuse by the protection team are routine. A principal purpose of those interviews is for testimonial use at trial.

. . . The CPT interview of the victim, admitted as an ex parte statement, constitutes a police interrogation.

This kind of interview by a CPT is indistinguishable from an ordinary police interrogation. . . . If the team is part of the police investigation, the interview is in fact police interrogation.<sup>170</sup>

In *Hooper*, the court summarized the facts and its conclusions as follows:

In the present case, it is clear that the interviewer acted in concert with or at the behest of the police. The interviewing nurse described herself as a “forensic interviewer and sexual assault nurse examiner.” Police directed the victim’s mother to take her to the STAR Center, and an officer watched the interview from another room. Toward the end of the interview, the nurse inquired of the officer whether all the questions that the officer desired had been asked, and then returned to the interview room with several additional queries, apparently at the officer’s instruction. In addition, the nurse testified that the purpose of the questioning was in preparation for trial and that she knew the interview would be used in a subsequent criminal prosecution. There is no evidence that the interview had a diagnostic, therapeutic or medical purpose. The conclusion is inescapable that the

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167. *Id.* at 757 (citations omitted).

168. *Contreras v. State*, 910 So. 2d 901 (Fla. Dist. Ct. App. 2005), *review granted*, 924 So. 2d 810 (Fla. 2006).

169. *Id.* at 902–03.

170. *Id.* at 905 (citations omitted) (emphasis in original).



nurse was acting in tandem with law enforcement officers to gain evidence of past events potentially to be used in a later criminal prosecution.<sup>171</sup>

In *United States v. Bordeaux*,<sup>172</sup> the single-purpose nature of the questioning is less clear, but the court nevertheless found the statements testimonial on the basis of government involvement, formality, and intended government use of the videotaped statement. Because of the presence of another motivation, *Bordeaux* sets up the transition to the next section, in which courts reach a nontestimonial conclusion on quite similar facts.

In *Bordeaux*, the key elements of the court's analysis are as follows:

After the allegations of sexual abuse arose, government officials referred AWH to a center for child evaluation. At this center, she was interviewed by a forensic interviewer before being examined by a doctor. Consistent with the center's standard operating procedure, the interview was videotaped: as was the custom, two copies of the videotape were made—one for the patient's medical records and one for law enforcement officials. On the videotape, AWH indicates that Mr. Bordeaux put his penis in her mouth. The district court admitted the tape into evidence, and it was shown to the jury. The district court also admitted hearsay statements from a doctor at the center who observed the interview; the doctor recounted what AWH had said during her interview.

... The formality of the questioning and the government involvement in it are undisputed in this case. The purpose of the interview . . . is disputed [with the government contending it was for medical purposes], but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a "forensic" interview, meaning that it "pertain[ed] to, [was] connected with, or [was to be] used in courts of law." That AWH's statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.<sup>173</sup>

### III. MAJOR CHALLENGE FOR THE FUTURE

#### A. Mixed Purpose Statements

The previous Section dealt with five categories of statements frequently encountered in the decided cases. As we move forward, classes that are likely to diminish in importance include statements taken for the purpose of creating admissible evidence and statements taken by non-law-enforcement personnel that are so entangled with law enforcement that the questioning becomes the functional equivalent of police interrogation. The primary reason that these categories are likely to play a less important role in the future is that their utility has diminished. They have been ruled

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171. *State v. Hooper*, No. 31025, 2006 WL 2328233, at \*4 (Idaho Ct. App. Aug. 11, 2006), review granted, Jan. 18, 2007.

172. 400 F.3d 548 (8th Cir. 2005).

173. *Id.* at 555–56 (first bracketed alteration added) (citations omitted).

testimonial and therefore inadmissible unless the child is available for cross-examination at trial.

Some elements of the questioning could be changed without much harm to the other purpose served by the interview. If their alteration would render the statement nontestimonial, such changes predictably will be made. Appropriate to the important work they do with children who are abused, many of the groups conducting interviews are experienced professionals, involved in multiple cases, and have excellent training programs and communication networks.

If the only characteristic that must be changed is substantial police involvement in the interview, that can be easily accomplished. If another purpose of substantial current concern is needed to make the statement nontestimonial, that requirement also may be satisfied in many cases, particularly when the other purpose is the general welfare of the child. Eliminating videotaping of the statement would be problematic since it enables effective communication between agencies and reduces trauma by reducing the number of interviews. However, if such videotapes are admissible as long as they are created for a non-law-enforcement purpose, these other uses of videotape can be maintained while the prosecution benefits from the persuasive power of the child's statements on videotape.

In the cases I examine in this Part, the statements are recorded on videotape. The individual asking the questions is a trained questioner, a nurse or social services caseworker, which I will interchangeably term a social worker. The purpose of the questioning is medical in nature or more generally for the protection of the child. Such statements certainly may also be used by other groups without constitutional problems; however, they present a major Confrontation Clause issue because the videotape is used as evidence at trial. Important questions are: How much must the other purpose for the statement differ from investigation of crime to render the statement nontestimonial? Under what circumstances will the potential use of the statement at trial render it testimonial? Does the particular formality of videotaping the statement play a decisive role in rendering it testimonial?

I examine principally a group of cases from the Minnesota courts. These cases test the limitations of the testimonial concept in quite interesting ways.

### *B. Degree of Government Involvement*

*Crawford* and *Davis* involved police questioning, and in two situations, such questioning was found testimonial. Courts rather consistently find that where the police direct the question, it is almost automatically considered testimonial as the functional equivalent of police interrogation. As the degree of governmental involvement—particularly police involvement—grows, the likelihood increases that the statement will be found testimonial.

At the other end of the spectrum, it is not yet clear that statements made to private parties can be testimonial. *People v. Geno*,<sup>174</sup> decided only months after *Crawford*, adopted the polar position that private statements are not testimonial.

In *Geno*, an “interviewer noticed blood in the two-year-old child’s pull-up underpants and asked the child if she ‘had an owie?’ The child answered ‘yes, Dale

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174. 683 N.W.2d 687 (Mich. Ct. App. 2004).

[defendant] hurts me here,' pointing to her vaginal area."<sup>175</sup> As a result of the child's father noticing both physical evidence of possible abuse and other concerning behavior,<sup>176</sup> he contacted Children's Protective Services, which is a state agency.<sup>177</sup> The state agency then arranged an assessment and interview of the child by the Children's Assessment Center, a private organization.<sup>178</sup> The Michigan Court of Appeals found the statement to the Center nontestimonial. In addition to recounting the nature of the statement, the court's only indication of a reason for the decision was its observation that "[t]he child's statement was made to the executive director of the Children's Assessment Center, not a government employee."<sup>179</sup> The upshot of the ruling seems to be that questioning by a private organization was not considered testimonial.

Whether eliminating government involvement can eliminate the possibility of the statement being considered testimonial may be doubtful. However, limiting the degree of government involvement seems rather clearly to contribute to a nontestimonial finding.<sup>180</sup>

In the first of the Minnesota cases, *In re Welfare of A.J.A.*,<sup>181</sup> the government involvement was perhaps purposefully minimized. The detective had been advised that Midwest Children's Resource Center (MCRC) should handle the examination and advised the parents to contact the center, giving them the information, but leaving the actual contact and scheduling of the interview to the parents.<sup>182</sup> The opinion stated that there was "no indication that the detective influenced [the nurse's] interview or physical examination of the child. And [the nurse] stated that if law enforcement or child protective officers asked examiners to direct an exam in a certain way, MCRC staff rejects those suggestions because MCRC is a 'free-standing medical facility,' and its staff members 'do what's medically correct for a child.'"<sup>183</sup>

*Krasky*, a *Roberts*-era case that took place at a time when courts put less emphasis on minimizing government involvement, shows how a very different decision by the police regarding their involvement can lead to a testimonial finding. The court, in this post-*Davis* decision, stated:

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175. *Id.* at 689.

176. *See id.*

177. Children's Protective Services is a part of the Michigan Department of Human Services. *See* *People v. Tombs*, 697 N.W.2d 494, 496 n.1 (Mich. 2005).

178. *Geno*, 683 N.W.2d at 689.

179. *Id.* at 692.

180. We know that, for example, police direction of the questioning will cause the statement to be viewed as the functional equivalent of police interrogation. In *State v. Scacchetti*, 711 N.W.2d 508, 514 (Minn. 2006), the court stated "we must determine whether the questioner was acting in concert with or as an agent of the government."

181. No. A06-479, 2006 WL 2474267 (Minn. Ct. App. Aug. 29, 2006) (unpublished opinion).

182. *Id.* at \*3.

183. *Id.* at \*4. The government involvement in *A.J.A.* was more extensive than in *Scacchetti*, where there appears to have had been no police involvement until after all the medical assessments had been completed. In *A.J.A.*, however, the detective contacted MCRC before the child's appointment to inquire as to procedures and protocol—but did not provide information about the case. *Id.*

Here, the nurse practitioner who interviewed [the child] did so at the request of the child protection worker and the investigating officer, Detective Manuel. These two “government officers” had determined that the interview was “the best way to proceed with the investigation.” The child protection worker monitored the interview, a videotape was provided to Detective Manuel who reviewed it shortly thereafter, and the prosecution followed almost immediately. We conclude that the nurse practitioner was at least “acting in concert with” the government in conducting the interview.<sup>184</sup>

### C. Medical Examinations and Multipurpose Videotaping

The concept of a multipurpose interview is very easy to grasp. Different groups need information from children that, while varying somewhat in detail, overlaps significantly. The more difficult question is deciding when courts must recognize one of these other purposes—the use of the interview as evidence at trial—to render the statement testimonial. I will examine this general question more directly below. First, I want to illustrate that the case law in the medical area already permits admission of such interviews even when it is clear that they have evidentiary purposes. Doctors must report abuse if they have reasonable grounds to believe that it occurred; nevertheless, statements by children revealing such abuse are routinely admitted as nontestimonial.

In *State v. Scacchetti*,<sup>185</sup> the court found an examination nontestimonial—despite its similarities to many that were found testimonial under the “functionally equivalent” rationale—because of the questioner’s ostensible medical purpose. The child’s statements were obtained over two interviews, the second of which was videotaped and presented as testimony at trial. The facts in *Scacchetti* advance the uncomfortable principle that medical interviews can have a secondary, testimonial purpose. If this general approach is approved, other jurisdictions may follow a similar path.

In *Scacchetti*, the child’s mother took her child to a local women’s shelter two days after finding multiple bruises and burn marks on her daughter’s body. Employees there suggested to the mother that her daughter be taken to a hospital for examination. A day later, the mother took her daughter to Minneapolis Children’s Hospital for examination.<sup>186</sup> While at the hospital, the child told her mother that the defendant “had touched her ‘down there.’”<sup>187</sup> The examining doctor was concerned that the child’s genital examination indicated abnormalities, and hospital personnel called a pediatric nurse practitioner from the Midwest Children’s Resource Center (MCRC), Laurel Edinburg, to set up a further examination of the child.<sup>188</sup>

Edinburg assessed the child, R.J., twice. The first assessment occurred the day after the hospital’s referral and was not videotaped. During this visit, the nurse met first with the child’s mother to gather background information and then with the child to ask questions about her injuries and to conduct a physical examination. “While examining R.J.’s anal and vaginal area, Edinburg asked R.J. ‘did anything ever happen to this area right here?’ to which R.J. responded ‘yes.’ Edinburg asked ‘What touched

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184. *State v. Krasky*, 721 N.W.2d 916, 919 (Minn. Ct. App. 2006).

185. 711 N.W.2d 508 (Minn. 2006).

186. *Id.* at 511.

187. *Id.*

188. *Id.*

there?’ and R.J. responded ‘Tony’s pee-pee.’<sup>189</sup> During the physical examination, Edinburgh found a bruise in the indicated area.<sup>190</sup>

The next day, Edinburgh conducted a videotaped assessment at the MCRC office in Saint Paul, which is arranged in the layout of a typical doctor’s office.<sup>191</sup> Edinburgh testified that she used a protocol when assessing R.J. Dr. Carolyn Levitt, physician and the founder of MCRC, described the protocol, which included an interview, an external exam, and a colposcopic exam of the child’s genital area. Levitt stated that the questioning portion was

“pretty much based on what I would be doing if I were evaluating a child . . . who had abdominal pain and appendicitis, but it’s a medical protocol and it specializes in getting specific details from the child.” . . . In explaining why the assessments are videotaped, Levitt stated, “There are many children seen at our center who have videotaped interviews so that the evaluations are then reviewed. The videotape is reviewed by me, the videotaped colposcopic examination is reviewed by me.”<sup>192</sup>

The process described here is both ordinary and unusual in medical examination of sexual abuse cases. It involves questioning over several interviews by both nurses and doctors, a common occurrence. The unusual creation of an explicitly accusatorial, videotaped statement by the child—naming the defendant as the perpetrator—during a third medical interview and examination potentially threatens the integrity of the testimonial statement concept.

The Minnesota Supreme Court reasoned that the most important factor in assessing the statement’s testimonial quality is the purpose of the interview, a position apparently solidified by *Davis*. In *Scacchetti*, the court first concluded that the examination was done without substantial government involvement.<sup>193</sup> More starkly, the court broadened that finding, stating:

Even if we had concluded that Edinburgh was acting in concert with or as an agent of the government, our conclusion that R.J.’s statements to Edinburgh are not testimonial would not change. The record here indicates that Edinburgh’s purpose in interviewing and examining R.J. was to assess her medical condition. Both Edinburgh and Dr. Levitt testified that their purpose in evaluating children such as R.J. is to determine whether the child has been abused and, if necessary, to connect the child and family to appropriate services. There is no evidence or other

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189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. To determine the extent of government involvement, the court examined Edinburgh and the purposes behind her questions. Here, the court distinguished the case from *Bobadilla* since “no government actor initiated, participated, or was involved in any way with the assessments of R.J. that resulted in the statements at issue.” *Id.* at 514. Unlike *Bobadilla*, the court found “that Edinburgh [was] not a government questioner” and questioned R.J. in a doctor’s office without any police involvement. *Id.* (alteration added). Therefore, the court held that Edinburgh was not “acting in concert with or as an agent of the government” and “R.J.’s statements to Edinburgh were not testimonial.” *Id.* at 514–15.

testimony in the record to the contrary. The fact that MCRC generally does not have ongoing contact with the child after the assessment does not minimize the medical purpose for which the assessment is conducted.<sup>194</sup>

This analysis of *Scacchetti* may well be valid. However, it still moves substantially toward authorizing the creation of highly formal statements that are the culmination of a series of medically oriented interviews. Its reasoning also may be followed by other jurisdictions.

*D. The Significance of Questioner Purpose or the  
Intent or Expectation of the Speaker*

In this section, I examine *State v. Bobadilla*.<sup>195</sup> Following and generalizing the case's holdings in other jurisdictions could have a major practical impact on children's cases by sanctioning admissible statements that challenge the practical integrity of the testimonial concept. First, however, I present some of the broader critical concepts at issue. *Davis* arguably identified the purpose of the questioner as the primary focus for determining the testimonial quality of a statement, which has enormous implications in children's cases. However, even before apparent shift in *Davis*, the case law was fumbling toward that focus. I hypothesize that courts were making this move for two reasons. First, a focus on the intent or expectation of the child feels artificial or unknowable. Second, especially for statements made by small children or to police, a focus on the child's intent or expectation would give a free pass to government production of evidence that the Supreme Court has said should receive special scrutiny.

After *Davis*'s explicit acceptance of questioner focus, courts have embraced it as a definitive way to reach conclusions that otherwise would be theoretically contestable. For example, a child may make a clearly accusatory statement and fully understand its impact, but courts can ignore contrary indicators if the child makes the statement to a parent or doctor with a primary purpose other than criminal prosecution.

1. Recognizing Many Non-Prosecutorial Purposes

"Purpose," in children's cases, demonstrates the multitude of non-prosecutorial purposes that can animate a questioner. *Davis* divided statements into two types, testimonial and nontestimonial. Testimonial statements are made for the purpose of establishing past facts which are relevant to a criminal prosecution. Nontestimonial statements concern present circumstances and are relevant to an ongoing emergency.

In children's cases, statements may have other nontestimonial purposes that do not involve a present emergency, including establishment of past facts. When a parent questions a child, it may be to deal with an immediate emergency regarding injury from abuse. However, the questions often reflect the parent's concern for the health and welfare of the child. From its inception, this concern overlaps with possible prosecution and may quickly mature into an explicit prosecutorial interest, but the conversation begins with parental concern for the child. Moreover, courts appear reticent to attribute to the parents a primary prosecutorial purpose in these initial,

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194. *Id.* at 515.

195. 709 N.W.2d 243 (Minn. 2006).

generally relatively brief, conversations. Another non-prosecutorial purpose is the medical treatment of the child by a doctor. Even though a prosecutorial interest may quickly follow, it is hard to argue that the first medical examination after the discovery of abuse does not have a primary medical purpose.<sup>196</sup> For school teachers, early conversations may have recognizable non-prosecutorial purposes. Conversations between a child and a social services caseworker whose professional interests include the health, physical placement, and safety of the child are more problematic, because of the clear overlap with the prosecutorial interest.

While courts could recognize any number of other purposes as distinct from prosecutorial purposes, several potential purposes neither necessarily concern an ongoing emergency nor exclude an interest in past events. Indeed, *Davis*'s immediacy requirement may only apply to the police, who can briefly shed their prosecutorial purpose in order to meet an immediate emergency. Such an emergency overrides their otherwise presumptive primary law enforcement interest.

## 2. Establishing Past Facts Does Not Necessarily Coincide with Testimonial Statements and Does Not Necessarily Indicate a Prosecutorial Purpose

In *Davis*, a police officer establishing past facts signaled that the primary purpose was not to address an ongoing emergency but was instead prosecutorial, rendering the statement testimonial. For questioners other than law enforcement officials, as in *Scacchetti*, establishing past facts is not necessarily disqualifying. For example, to develop history for the purpose of diagnosis and treatment, a doctor may ask about past events that led to the current condition. Both past and present symptoms and causes are medically relevant to the assessment and treatment of any patient, including children who may have been abused.

However, although the courts are less acutely sensitive to it,<sup>197</sup> the passage of time is often relevant not only to the elimination of an emergency, but also to the termination of other non-prosecutorial interests.<sup>198</sup> For example, if the child has already been

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196. In assessing the scope of the exception for statements made for medical diagnosis or treatment and the Confrontation Clause under *Roberts*, I argued that even admitting statements of identity is a reasonable compromise if the statements are given at the initial medical examination. These types of statements are "(1) reasonably contemporaneous with the abuse or its discovery, (2) often not adversarial, and (3) intermeshed with statements obviously related to physical well-being." Mosteller, *supra* note 61, at 92. I contend that this suggestion continues to have validity, and matches well with *Davis*'s questioner-purpose analysis.

197. *But see* State v. Buda, 912 A.2d 735, 744–46 (N.J. Super. Ct. App. Div. 2006). In *Buda*, the court held that a child's statement during an interview with a social worker "must be deemed testimonial" because "there was no 'ongoing emergency.'" *Id.* (internal citation omitted). The effect of the passage of time on non-prosecutorial statements is unclear, since the court also noted that the statement at issue had a primarily prosecutorial purpose. *Id.* at 746.

198. Rangel v. State, 199 S.W.3d 523, 538 (Tex. Ct. App. 2006) (distinguishing the case from *Davis* since the interview that described past events took place two months after the child's placement in foster care and counseling, rather than during an ongoing emergency); *see also* *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 2004) (reversing lower court and holding statements by child to social services to be testimonial). In *In re T.T.*, the sexual abuse happened on December 18–19, 2000, the "hotline report" to social services occurred in March 2001, and the interview with the child took place on May 4, 2001. *Id.* at 793, 802.

removed from the apparent offender's home, the interview by social services is less likely to primarily concern placement than prosecution.

*E. Examination of the Critical Test Case—Civil Governmental Purpose Regarding Treatment and Placement of Child that Coincides with Prosecutorial Purpose*

In *Bobadilla*, the parents of a three-year-old boy saw some redness on their child's bottom. In response to their questions, the child described sexual abuse by his uncle. The parents took the child to the hospital emergency room, where a physician observed abnormality around the child's rectum. A police officer arrived at the hospital, met with the child's parents and an emergency room nurse, and filed an assault report, which he sent to both the police department and the county's Family Service Department.<sup>199</sup>

Several days later, an interview by a child protection social worker was arranged at the law enforcement center in the center's "child friendly room," . . . specifically used for interviewing children" and recording the exchanges.<sup>200</sup> With a police detective present, the child protection worker used a question protocol "which she described as a technique 'specifically geared towards interviewing children who have been victims of sexual abuse.'"<sup>201</sup> In response to a question of whether anyone had hurt his body, the child named the defendant and said he put his finger in the child's "bootie" (buttocks).<sup>202</sup>

The Minnesota Supreme Court found the videotaped statement of the child, T.B., nontestimonial despite the fact that a police report had already been filed, that a child protective worker had interviewed the child at the law enforcement center and videotaped the statement with the detective (and the parents) present, and that she had used a protocol designed to question children who had been sexually abused. The court found dispositive the non-prosecutorial purpose of the government questioner. Despite the court's acknowledgment that "the interview of T.B. was conducted in accord with a statutory scheme for reporting, investigating, and responding to threats to children's health or welfare,"<sup>203</sup> it concluded that "neither the child-protection worker nor the child declarant, T.B., were acting, to a substantial degree, in order to produce a statement for trial."<sup>204</sup> Critically, the court stated that "[t]he clearly delineated purpose of this statutory scheme is to protect the health and welfare of children . . . ."<sup>205</sup>

Also, the court recognized a nontestimonial purpose for the videotape recording. It stated:

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199. *Bobadilla*, 709 N.W.2d at 246–47. See generally Michael Everson, Note, *Conflicting Values: Confrontation Rights in Sexual Abuse Cases Involving the Youngest of Victims*—*State v. Bobadilla*, 33 WM. MITCHELL L. REV. 653 (2007) (criticizing the court's reasoning and misconstruction of facts).

200. *Id.* at 247.

201. *Id.*

202. *Id.*

203. *Id.* at 254.

204. *Id.*

205. *Id.* (internal citation omitted).



Avoiding multiple interviews is a critical concern when dealing with children not only because the interviews are often traumatic for the child, but also because multiple interviews increase the chance that the children will be confused by unnecessarily suggestive questions. That, by statute, the initial risk-assessment interview is recorded does not, therefore, necessarily indicate that the purpose of the interview was to create a formalized statement for trial. Given the clear need to limit a child's exposure to stressful and confusing interviews, and the accompanying need to accurately assess risks to the child, there is a compelling need for a single recorded assessment interview solely in order to best protect the health and welfare of the child.<sup>206</sup>

The court treated the statutory purpose of the state social service agency—to protect the health and welfare of children—as separate from a law enforcement purpose even though it acknowledged that the agency's role was within a coordinated statutory scheme that required cooperation with an investigation of any allegation of abuse by law enforcement.<sup>207</sup> It found the videotaped interview nontestimonial for those reasons, despite the formal way in which it was secured—the separation of the child from his parents, the use of a standard questioning protocol, and its recordation on videotape—and that the questioner was a governmental officer.

The confrontation right can be diminished to shallow formalism in a critical area if the health and welfare purpose is recognized as a separate purpose from law enforcement and if all that is required to make a statement nontestimonial is that the person conducting the questioning has health and welfare as his or her primary purpose.<sup>208</sup> The fact pattern of *Bobadilla* could be replicated very easily in many

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206. *Id.* at 255.

207. *Bobadilla*, 709 N.W.2d at 254. The court quoted from MINN. STAT. § 626.556, subd. 10(a) (2004), stating that “[t]o the extent that an allegation of abuse alleges a violation of a criminal statute, the local welfare agency and law enforcement must ‘coordinate the planning and execution of their respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews.’” *Id.* at 254. *Contra Buda*, 912 A.2d 735.

208. How the Supreme Court will treat the mixture of a prosecution purpose and another government purpose is unsettled. It may consider whether there is a non-prosecutorial purpose sufficient to eliminate the constitutional prohibition if that non-prosecutorial purpose has any separate plausibility, much as it does with the “special needs” doctrine under the Fourth Amendment. *Compare* *New York v. Burger*, 482 U.S. 691 (1987) (finding administrative regulation of junkyards constitutional despite the heavy criminal law component because of facial civil regulatory purpose), *with* *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (striking down drug interdiction checkpoint because of its facial and primary purpose of general crime control).

There is some basis to believe that the Court may be more exacting in the confrontation area than with the Fourth Amendment. The Fourth Amendment relies upon the neutrality of decisions by judges—government officials—in evaluating probable cause for warrants; indeed, this determination by a “neutral and detached magistrate,” *Johnson v. United States*, 333 U.S. 10, 14 (1948), is the cornerstone of the preference for warrants in the modern Fourth Amendment jurisprudence. It is a preference for one sort of government officer—a judge—over the far more competitively charged police officer.

By contrast, the Confrontation Clause does not choose between different government officials to make or substitute for a reasonableness determination. Instead, it puts its faith in the jurors who view the confrontation with the witness. Indeed, the Court in *Crawford* explicitly

jurisdictions with coordinated systems for investigating child abuse. It presents a key test of whether the testimonial statement system has substance or only requires a precise articulation of another acceptable purpose as an avoidance strategy. I have tried to be somewhat evenhanded in suggesting arguments that may support nontestimonial treatment of such statements and ways to limit admission without taking a categorical position that all such statements in nonemergency situations are testimonial. However, I want to emphasize the point that I fear that for situations like that in *Bobadilla* involving nonmedical social evaluation, anything less than a categorical approach will reduce the testimonial approach and the confrontation protection to empty formalism in sophisticated jurisdictions.

*F. Non-Categorical Limitations on Mixed-Purpose Statements*

As noted above, the mixed-purpose category of statements could, by virtue of a shift in the formal purpose of the interview, allow for the recording and admission in criminal prosecutions of highly formal and accusatory statements. The clearest non-categorical limitation, which flows from the teaching of *Davis*, should restrict interviews for a safety and welfare purpose to situations where an immediate need for action, such as the need to change placement of the child based on the allegations of abuse, triggers the interview. While this is not an emergency situation as in *Davis*, it is time-limited.

A second limitation that may be supported by *Davis* is likely a necessity: a general health and safety purpose of a “neutral government official” should not be considered as separate from a law enforcement purpose. The statements can obviously be secured, and because their use to determine placement and even parental rights is not criminal, the Confrontation Clause has no impact on these other uses.<sup>209</sup> However, if offered in a criminal case, the statement should be considered testimonial. If this categorical limitation is not adopted by courts, then such statements should be viewed with a jaundiced eye. Any other indications that the non-law-enforcement purpose is insubstantial, such as the lack of pressing need to act or the formality of the statement, should render the statement testimonial under a combination-of-circumstances approach.

Mechanically recording statements, typically done on videotape today, adds an element of formality and greatly increases their usefulness to the prosecution. By itself,

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noted that “[t]he Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by ‘neutral’ government officers.” *Crawford*, 541 U.S. at 66. The skepticism of “neutral” government officials extended to judges as well. *Id.* at 67 (“The Framers . . . would not have been content to indulge this assumption [good faith reliability finding by courts].”); see also *State v. Krasky*, 721 N.W.2d 916, 923 (Minn. Ct. App. 2006) (employing this skepticism of neutral government agents to find statements testimonial that were given to medical staff enlisted to investigate reports of abuse); *In re T.T.*, 815 N.E.2d at 802 (finding “neutral motives of the government officials toward the declarant . . . irrelevant”).

209. The mechanism here works with a rough analogy to statements in the public employment context under *Garrity v. New Jersey*, 385 U.S. 493 (1967). The statements can be secured and used for the employment purpose and the refusal to provide them may be sanctioned, but if produced they may not be used in criminal litigation because to do so would violate the defendant’s Fifth Amendment rights. See generally Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309 (2001).

mechanically recording a statement should be taken as a strong indication of a testimonial purpose. This does not mean the statements may not be videotaped for use by other private and governmental actors to increase efficiency and reduce trauma to the child through repetitive interviews. Recordation can safely continue, because the testimonial determination does not interfere with those other non-criminal uses. Even though not a per se indicator of the testimonial character of the statement, videotaping or other mechanical recording should be taken as a strong indicator of the questioner's testimonial purpose. In combination with the suspect general nature of the governmental safety and welfare purpose, such a recording should in fact render the statement testimonial.

IV. A CENTRAL CONCEPT IN THE TESTIMONIAL STATEMENT DEFINITION: WHOSE PERSPECTIVE MATTERS—THE QUESTIONER'S OR DECLARANT "WITNESS'S"—AND UNDER WHAT STANDARD?

*A. Even Young Children Act as Functioning Witnesses*

How to treat children as witnesses is a tremendously difficult practical problem, but I suggest their testimonial capacity should generally not present a difficult philosophical one. Their statements as presented in the cases reported since *Crawford* show that children function as knowing witnesses who make pointed accusations used in criminal cases in precisely the same way as do adult witnesses testifying about past facts in the courtroom.<sup>210</sup>

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210. Professor Richard Friedman has made two arguments to exempt children's statements from scrutiny under the Confrontation Clause. I believe that both are invalid: the first on factual grounds, the second on theoretical grounds.

He has argued first that "some very young children should be considered incapable of being witnesses for Confrontation Clause purposes . . . [because] . . . [t]heir understanding is so undeveloped that their words ought to be considered more like the bark of a bloodhound than the testimony of an adult witness." Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 272 (2005) [hereinafter Friedman, *Grappling*]. He illustrates his position with *State v. Webb*, where an eighteen-month-old child stated when lowered into the bath, "Ow bum" and later "Ow bum daddy." Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 250 (2002) (quoting *State v. Webb*, 779 P.2d 1108, 1109 (Utah 1989)). Friedman's argument on the facts of *Webb* may be well taken. *Webb*, however, is an aberrational case as to the child's lack of understanding of the wrong done and the child's mental capacity. The cases examined in this Article do not involve children acting as barking dogs. Rather, they are acting as humans with purposeful communicative abilities.

Friedman's second argument is that we "should consider that morally [children] are so undeveloped that we do not want to impose on them the responsibility of being witnesses." Friedman, *Grappling, supra*, at 272. In support, he cites the work of his colleague Sherman Clark. *Id.* at 272 n.67 (citing Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1280–85 (2003)). I believe that approach, which predates *Crawford*, does not do justice to the plain language of the Sixth Amendment and its intended protection of criminal defendants that suggests nothing regarding the moral obligation of witnesses. I believe the history of the confrontation right and the Sixth Amendment is based on practical concerns, not moral obligation.

Let us look at statements by an extremely young group of children, those less than three years old. In *State v. Fisher*,<sup>211</sup> a 29-month-old child, in response to a question as to what happened, pointed to his forehead and said ““Stacey hit me right here.””<sup>212</sup> In *People v. Geno*,<sup>213</sup> responding to whether she had an “owie,” the child stated ““yes, Dale [defendant] hurts me here,” pointing to her vaginal area.””<sup>214</sup> In *United States v. Peneaux*,<sup>215</sup> when asked how he was hurt, in very child-like terms, the child said “burn.” When asked what that meant, the child answered “Sherman” and “Sherman hurt.”<sup>216</sup> One might add to that group of recent cases involving statements by children younger than three, the statements in *Wright*, quoted earlier, which were as follows:

When I asked her “does daddy touch you with his pee-pee,” she did admit to that. . . . [Although] [s]he would not elucidate . . . what kind of touching was taking place, . . . [s]he did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.<sup>217</sup>

These statements appear quite purposeful in communicating a knowing accusation of wrong. They recount past facts and certainly do the work and have the effect of testimony in the courtroom. Moreover, for slightly older children, their statements, as in *White*, become even more substantial and detailed in content and are functionally indistinguishable from the statements of adults and, I submit, from courtroom testimony.

#### *B. The Choice of Perspectives*

There are a range of options in the perspective to take in determining the testimonial quality of statements. The most obvious are as follows: (1) to focus on the declarant/“witness,” and within that perspective to use (a) a subjective approach, (b) an objective approach considering the age and circumstances of the child, or (c) an objective person (adult) approach; or (2) a focus on the intent of the questioner, (although here we have the Court’s answer that the approach is objective);<sup>218</sup> or (3) a combination approach that considers (a) both perspectives equally or (b) gives primacy to one perspective uniformly, or (c) to one perspective or the other in particular circumstances. Finally, if both perspectives may be examined, an overall decision must be made when at least one of the perspectives point in the direction of a testimonial determination. The most obvious options in that situation are as follows: (4) to (a)

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The difficulties of providing meaningful confrontation are enormous. However, exempting children below a certain age on the premise that they cannot bear the responsibility of being a witness seems very wrong when their words are the words of a witness and have the impact of any other witness. Other concerns may exempt the child, such as trauma involved in testifying, but not the metaphysical concept of whether the child can morally be a witness.

211. 108 P.3d 1262 (Wash. Ct. App. 2005).

212. *Id.* at 1265.

213. 683 N.W.2d 687 (Mich. Ct. App. 2004).

214. *Id.* at 689.

215. 432 F.3d 882 (8th Cir. 2005).

216. *Id.* at 889.

217. *Idaho v. Wright*, 497 U.S. 805, 811 (1990) (quoting App. 121–23).

218. *Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006) (“under circumstances objectively indicating”).

declare the statement testimonial if, either from the perspective of the questioner or the declarant/“witness,” a testimonial intent or expectation is established, or (b) consider the statement testimonial only if both perspectives indicate that result.

*C. Multiple Focuses—Largely Non-Doctrinaire and Functional*

Although *Davis* focused on the purpose of the interrogation<sup>219</sup> (and therefore the interrogator), there is clearly a basis in both *Davis* and *Crawford* to examine the intent or expectation of the declarant/“witness.” Immediately after the court articulates a test based on the interrogation’s purpose, *Davis* states in a footnote that “it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.”<sup>220</sup> In *Crawford*, two of the three proposed definitions focus in whole or in part on expectation or intention. The amicus’s definition centers the testimonial determination on the “circumstances” that would lead “an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>221</sup> The petitioner’s definition turns on what “declarants would reasonably expect.”<sup>222</sup> Both definitions focus on the speaker rather than the questioner. Both definitions employ a reasonable perspective standard; but one uses the perspective of the “objective witness.”

In *State v. Stahl*,<sup>223</sup> a post-*Davis* case involving a statement by an adult rape victim rather than a child, the Ohio Supreme Court adopted a pure “objective witness” test. It stated:

[W]e adopt the “objective witness” test in Ohio. For Confrontation Clause purposes, a testimonial statement includes one made “under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” . . . In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant’s expectation. . . . This definition . . . prevents trampling on other portions of hearsay law that *Crawford* expressly states do not implicate the right to confront witnesses.<sup>224</sup>

The victim first gave a statement the day after the offense to a police officer at the police station. After taking a detailed statement, the officer transported the victim to a unit at a private hospital that specializes in health care services for victims of sexual assault and domestic violence, Developing Options for Violent Emergencies (DOVE). Prior to her examination, the victim signed a consent form “authorizing the examination and agreeing to release any evidence, information, clothing, and photographs for prosecution of the case.”<sup>225</sup> A nurse practitioner, who was coordinator

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219. *Id.*

220. *Id.* at 2274 n.1.

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

222. *Id.* at 51.

223. 855 N.E.2d 834 (Ohio 2006).

224. *Id.* at 844 (citations omitted).

225. *Id.* at 836.

for victim services at DOVE, began the examination by taking a detailed medical and incident history, which identified the attacker and described the sexual assault.<sup>226</sup>

The victim died approximately one month later from an unrelated seizure disorder without having given any formal testimony. The prosecution gave notice that it intended to introduce the record of the interview, and the defense challenged it under *Crawford*. The lower court found the statement testimonial.<sup>227</sup> Using the “objective witness” test, the Ohio Supreme Court reversed, finding the statement nontestimonial.<sup>228</sup>

My sense is that *Stahl*, which appears to involve a rather clearly testimonial statement, illustrates the general reticence of courts to find statements testimonial, presumably because of the decisive impact that the determination has on the prosecution. If my speculation about the courts’ apprehension of the impact of their ruling on outcomes is correct, one may infer that the “objective witness” perspective was chosen because it made the nontestimonial determination easier to reach in a case where from the questioner’s perspective it would have been more clearly testimonial. My belief is that Professor Friedman, who articulated one form of *Crawford*’s reasonable declarant test sees it, *inter alia*, as expanding, rather than restricting, a testimonial determination. However, in many cases, courts appear to use this approach to find statements nontestimonial.

Now let us turn to children’s cases where the choice of perspectives has even a greater impact on the determination of whether the statement is testimonial. Although there are some exceptions,<sup>229</sup> using a perspectives approach centered on the characteristics of the particular child would mean that most statements by young children would be considered testimonial.<sup>230</sup> The starkness of the impact of such a definition appears to have deterred a number of courts from adopting it.

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226. *Id.* at 837.

227. *Id.* at 838.

228. *Id.* at 844–46. The state had argued additionally that the statement should not be considered testimonial “even if the DOVE unit does provide a service for the prosecution, [because] its primary purpose is diagnosis and treatment of rape victims.” *Id.* at 838.

229. In *State v. Justus*, 205 S.W.3d 872, 876 (Mo. 2006), the child told one interviewer that she knew that person would protect her from her father and told another that she would tell the judge what her father had done. The court stated that “[e]ven at four years old, [the child] . . . was aware that her statements could be used to prosecute [her father].” *Id.* at 880. Similarly, in *People v. Vigil*, 104 P.3d 258, 262 (Colo. Ct. App. 2004), the court stated: “Nor can the statements be characterized as nontestimonial on the basis that a seven-year-old child would not reasonably expect them to be used prosecutorially. During the interview, the police officer asked the child what should happen to defendant, and the child replied that defendant should go to jail.” *Id.*

230. For example, in *Commonwealth v. DeOliveira*, 849 N.E.2d 218 (Mass. 2006), the court reasoned:

Logic informs that a six year old child can have little or no comprehension of a criminal prosecution in which the child’s words might be introduced as evidence against another person in a court of law. If the *Crawford* inquiry were dependent on a very young declarant’s knowledge of trial procedure, even under an objective reasonableness standard, that inquiry would lead, in every case, to a determination that statements are nontestimonial and result in the admissibility, at least so far as *Crawford* is concerned, of every out-of-court statement by a young child to

Several courts have ruled that a statement is nontestimonial if from the perspective of a reasonable child, because of age-related limits on awareness, the child would not reasonably have anticipated a prosecutorial or testimonial use of the statement.<sup>231</sup> For example, in *Vigil*, the Colorado Supreme Court uses “reasonable expectations of a person in the declarant’s position under the circumstances of the case” because the testimonial formulations center upon the declarant’s expectations.<sup>232</sup> The court rejected the “objectively reasonable adult observer educated in the law” perspective argued by the defendant.<sup>233</sup>

The court stated:

Turning now to the application of the objective witness test to the statements the child made to the doctor, we analyze the circumstances surrounding the statements to determine whether an objective witness in the position of the child would believe that his statements would be used at trial. We hold that no objective witness in the position of the child would believe that his statements to the doctor would be used at trial. Rather, an objective seven-year-old child would reasonably be interested in feeling better and would intend his statements to describe the source of his pain and his symptoms. In addition, an objectively reasonable seven-year-old child would expect that a doctor would use his statements to make him feel better and to formulate a medical diagnosis. He would not foresee the statements being used in a later trial.

Thus, from the perspective of an objective witness in the child’s position, it would be reasonable to assume that this examination was only for the purpose of medical diagnosis, and not related to the criminal prosecution. No police officer was present at the time of the examination, nor was the examination conducted at

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another (except those made in response to police questioning and, therefore, per se testimonial). We are hesitant to believe that the Supreme Court would indorse a rule of such encompassing latitude, given *Crawford*’s repeated admonitions reminding us of the importance of honoring the right to cross-examination.

*Id.* at 225–26. *See also* *State v. Bobadilla*, 709 N.W.2d 243, 255–56 (Minn. 2006) (“[G]iven [the child’s] very young age [three years old], it is doubtful that he was even capable of understanding that his statements would be used at a trial. As amicus American Prosecutors Research Institute makes clear, children of [the child’s] age are simply unable to understand the legal system and the consequences of statements made during the legal process.”)

231. Although the subjective understanding of the child is sometimes discussed, it is unclear that any court has used it. The court in *In re Rolandis G.*, 817 N.E.2d 183 (Ill. App. Ct. 2004), appeared to be rejecting as well the age-limited perspective of a reasonable child, but was most critical of a subjective standard with children. It stated:

Moreover, the focus of the opinion is on a defendant’s right to confront the witnesses against him. Accordingly, a defendant’s confrontation right should not depend on whether the maker of an out-of-court statement subjectively understood that the statement might be used at a later trial. A definition of “testimonial” that turned solely on the subjective knowledge or intent of the declarant would be both unfair and unworkable. Given that the declarant must be unavailable for the confrontation clause issue to come into play, how would the speaker’s subjective understanding be determined?

*Id.* at 188–89.

232. *See* *People v. Vigil*, 127 P.3d 916, 924–25 (Colo. 2006).

233. *Id.* at 924.

the police department. The child, the doctor, and the child's mother were present in the examination room.<sup>234</sup>

My analysis is that although a number of cases find statements nontestimonial and cite the intent or expectations of the child as one of the determinants, the perspective of the child is not in fact the critical determinant. Rather, in these cases, the statement would be found nontestimonial even if the perspective of the reasonable adult in the same situation were used or the statement were examined using the primary purpose of the questioner test.<sup>235</sup>

In situations where the statement would be clearly testimonial if judged from the questioner's perspective, courts generally reject limiting the testimonial concept based on either the subjective and limited child's perspective or the similar result achieved by an objective approach considering the age and circumstances of the child.<sup>236</sup> I suggest that the cases discussed immediately below do so because they find outcomes based on those perspectives so unpalatable. The statement may be highly accusatorial and would have been clearly testimonial if it had been made by an adult, and the adult who is receiving the statement may fully appreciate its use. The courts seem most troubled that this analysis would permit the statement to be used despite extraordinary clear purpose by the government questioner, given the Supreme Court's focus on the dangers of governmental manipulation.

In *Sisavath*, a case decided shortly after the *Crawford* decision, the court neither examined the questioner's purpose nor applied the concept of questioning that is the functional equivalent of police interrogation—which it might have done if decided later

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234. *Id.* at 926. The court, however, would not apply this test if there were police interrogation, which is testimonial irrespective of the child's expectations about use at a later trial. *See id.* at 926 n.8.

Also, in *Shafer*, the court used the reasonable person in the declarant's position standard, which means a reasonable three-year-old child and concluded that "it defies logic to think that . . . [such a child] would have an expectation that her statements [to her mother and a family friend in private settings] about alleged sexual abuse could be used for prosecutorial purposes." *State v. Shafer*, 128 P.3d 87, 92 n.8 (Wash. 2006). Similarly, in *In re A.J.A.*, the court stated: "Given the circumstances under which the interview and examination were conducted, we cannot say that a reasonable five-year-old would expect that her statements would be available for later use at trial." *In re Welfare of A.J.A.*, No. A06-479, 2006 WL 2474267, at \*4, \*5 (Minn. Ct. App. Aug. 29, 2006) (unpublished opinion).

235. *State v. Brigman*, 615 S.E.2d 21 (N.C. Ct. App. 2005), is arguably an exception. In that case, the intent of the child is arguably the critical ingredient in finding the statement nontestimonial. *See id.* The statement was made to a private individual, a foster parent, but she questioned the child after she reported her initial suspicions of child sexual abuse to the Department of Social Services and she both wrote notes of what they said and tried to tape record the conversation. However, the court found the statements nontestimonial in substantial part because of the child's lack of understanding. It stated that the circumstances made it "highly implausible that [the child] reasonably believed that his statements to his foster mother would be used prosecutorially." *Id.* at 25–26.

236. In *Noah*, despite using the "reasonable person in [the child's] position" standard, the court found the circumstances would lead such a person to believe her statements would be used prosecutorially when made to a social worker together with a police officer. *See State v. Noah*, 137 P.3d 1093 (Kan. Ct. App. 2006) (unpublished table decision).



in light of other courts' analyses on similar facts.<sup>237</sup> Instead, the critical analysis was stated in terms of the reasonable reaction of an objective (adult) witness.

On the issue of how to define "objective witness," the court stated:

Conceivably, the Supreme Court's reference to an "objective witness" should be taken to mean an objective witness in the same category of persons as the actual witness—here an objective four year old. But we do not think so. It is more likely that the Supreme Court meant simply that if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer, then the statement is testimonial.<sup>238</sup>

As to the evaluation of the facts given that perspective, the court observed:

The status of the MDIC [Multidisciplinary Interview Center] interview statement is less obvious. The People contend that it is not testimonial. We disagree. The MDIC interview took place on June 12, 2002. By that time, the original complaint and information had been filed and a preliminary hearing had been held. The deputy district attorney who prosecuted the case was present at the interview, along with an investigator from the district attorney's office. The interview was conducted by a "forensic interview specialist." Under these circumstances, there is no serious question but that Victim 2's statement 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."

. . . .  
 . . . The pertinent question is whether an objective observer would reasonably expect the statement to be *available for use* in a prosecution. Victim 2's interview took place after a prosecution was initiated, was attended by the prosecutor and the prosecutor's investigator, and was conducted by a person trained in forensic interviewing. Under these circumstances, it does not matter what the government's actual intent was in setting up the interview, where the interview took place, or who employed the interviewer. It was eminently reasonable to expect that the interview would be available for use at trial.<sup>239</sup>

The result is the same, but by contrast, a focus on the intent of the speaker was rejected as dispositive by the Oregon Supreme Court in *Mack*.<sup>240</sup> On the state's

237. See *People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004).

238. *Id.* at 758 n.3. In *State v. Grace*, 111 P.3d 28, 38 (Haw. 2005), the court accepted *Sisavath*'s basic argument that the perspective should be that of an "objective witness," although the Hawaii court preferred the "objective observer" terminology, which means "a witness shorn of the vagaries of knowledge and personal characteristics" of the specific witness. Adopting a reasonable adult standard was, however, less important in *Grace* than in *Sisavath* because the conversations occurred between the police and "older" children, ages ten and eleven. See *id.* at 31.

239. *Sisavath*, 13 Cal. Rptr. 3d at 757–58 (emphasis in original) (citations omitted).

240. See *State v. Mack*, 101 P.3d 349, 350 (Or. 2004). The Oregon Supreme Court treated this case as the equivalent of a police interrogation with the case worker as proxy for the police. It noted further that the second statement taken was videotaped for use in a criminal proceeding. *Id.* at 352.

argument that it should look to the speaker's intent in making the statement, the court replied:

The state's argument is difficult to square with the reasoning in *Crawford*. As noted, the Court explained that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." The primary focus in *Crawford* was on the method by which government officials elicited out-of-court statements for use in criminal trials, not on the declarant's intent or purpose in making the statement.<sup>241</sup>

In *Hooper*, the state argued that the videotaped interview was not testimonial because a six-year-old child would not have understood her statements would be subject to later use at trial. The court characterized the proposed approach as "discredited by *Davis*, which focuses not at all on the expectations of the declarant but on the content of the statement, the circumstances under which it was made, and the interrogator's purpose in asking questions."<sup>242</sup>

In *Snowden*, Maryland's highest court makes the clearest statement of the danger of government manipulation in the context of adopting the reasonable objective adult standard. It observed:

The American Prosecutors Research Institute's amicus brief argues that the limited cognitive and developmental skills of young children must be taken into account when determining whether a child's statement is testimonial. Although cautious not to dismiss out of hand the research concerning child development pointed to in the amicus brief, we conclude nonetheless that these contentions are not relevant in this case because each child was able facially to give a full and complete account . . . .

We therefore are reluctant to accept amicus's generalized contentions that a young child's statement may never be testimonial. . . .

. . . .

This concern for the testimonial capacity of young children overlooks the fundamental principles underlying the Confrontation Clause. Even though there are sound public policy reasons for limiting a child victim's exposure to a potentially traumatizing courtroom experience, we nonetheless must be faithful to the Constitution's deep concern for the fundamental rights of the accused . . . . To this end, the formulations in *Crawford* outlining what is testimonial not only take into account the intentions of the declarant, but also look to the intentions of the person eliciting the statement. *To allow the prosecution to utilize statements by a*

241. *Id.* at 353 (citations omitted).

242. *State v. Hooper*, No. 31025, 2006 WL 2328233, at \*5 (Idaho Ct. App. Aug. 11, 2006), *review granted*, Jan. 18, 2007. In *Krasky*, the Minnesota Court of Appeals similarly found that *Davis* changed the focus to the purpose of the questioner. *See State v. Krasky*, 721 N.W.2d 916, 924 (Minn. Ct. App. 2006). It stated:

It has become evident under *Crawford* and *Davis* that the Supreme Court has deliberately abandoned a prior, vague Confrontation Clause test in favor of a new approach that focuses on an uncomplicated study of the purpose of an interviewer who takes a statement that is later introduced as trial evidence.

*Id.* at 924.

*young child made in an environment and under circumstances in which the investigators clearly contemplated use of the statements at a later trial would create an exception that we are not prepared to recognize.* Thus, we are satisfied 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.

The American Prosecutors Research Institute asks us to consider, when determining whether the children's statements are testimonial, the fact that this case involves vulnerable child witnesses. . . . In determining the testimonial quality of a statement, however, it is the circumstances of the statement that is paramount, and not necessarily the nature of some inherent characteristic of the declarant.<sup>243</sup>

In *Bobadilla*, the Minnesota Supreme Court recognized that both perspectives may need to be examined:

Whether a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial is determined by asking whether a reasonable government questioner *or* declarant in the relevant situation would exhibit that purpose. We make this inquiry, as opposed to an inquiry into the subjective motivations of declarants or questioners, because *Crawford* explained that "only cross-examination" can reveal a declarant's subjective perception of his or her situation.<sup>244</sup>

In justifying the joint analysis, the court stated: "We do not think that an approach that makes the declarant's perspective dispositive gives adequate consideration to *Crawford's* fear of governmental abuses."<sup>245</sup>

*Bobadilla* and other cases recognize that the intent of the questioner, if clear, can be sufficient to establish the testimonial character of the statement. It stated: "Most courts have also determined that a statement is testimonial if a government questioner is acting largely for the purpose of preserving a statement for trial, even if the declarant is not."<sup>246</sup>

243. *State v. Snowden*, 867 A.2d 314, 328–29 & 329 n.20 (Md. 2005) (emphasis added) (citations omitted).

244. *State v. Bobadilla*, 709 N.W.2d 243, 253 (Minn. 2006) (emphasis added).

245. *Id.* at 251–52 n.3 (citing *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004)).

246. *Id.* at 251. Despite adopting and using the perspective of the reasonable expectations of a person in the child's position and circumstances, *Vigil* reached a similar conclusion:

We emphasize that the objective witness test involves an analysis separate from and in addition to the police interrogation test. For example, if a child makes a statement to a government agent as part of a police interrogation, his statement is testimonial irrespective of the child's expectations regarding whether the statement will be available for use at a later trial.

*People v. Vigil*, 127 P.3d 916, 926 n.8 (Colo. 2006). Similarly, in *State v. Rangel*, 199 S.W.2d 523 (Tex. App. 2006), even though it found that the child—under a subjective or objective standard—understood that the purpose of the questioning was to "make appellant stop" his sexually assaultive conduct, the court seemed to say that the child's perceptions were beside the point:

Here, regardless of whether the four-year-old child may or may not have perceived when she made the statements that they could be used against appellant as

The courts in children's cases have sometimes, in my judgment, mis-evaluated the facts, but they have generally not allowed the government to introduce as nontestimonial statements that would be testimonial if made by adults. In the process, these opinions have developed a critical focus on the circumstances of the questioning rather than the expectation, understanding, or intent of the "witness." The approach has been forced by the unpalatable nature of the focus on the child. I believe that these cases demonstrate the correct approach for the garden variety statement made to government officials. It finds the purpose of the government agent to develop past facts sufficient to render a statement testimonial in the absence of another important non-law-enforcement purpose. The cases also at least occasionally return to the concern of the Confrontation Clause to protect the criminal accused, a concern not dependent on the perspective of the witness (child) when from the objective circumstances of its making the nature of the statement is testimonial.

*D. The Children's Case Solution to the General  
Question of Whose Perspective Matters*

Children's cases demonstrate clearly that a testimonial purpose by a government questioner with a law-enforcement or evidence-creation purpose renders the statement testimonial despite uncertainty about the expectation of the child. This result is suggested by *Davis's* focus on the questioner's purpose. It is supported historically, doctrinally, and as a matter of policy by the concern for the government's role in producing evidence to be admitted against the criminal defendant. A primary purpose by the government agent to produce a testimonial statement should be recognized as a *sufficient* basis to find the statement testimonial.<sup>247</sup>

The conclusion that governmental purpose is a sufficient basis for declaring the statement testimonial does not answer all questions, and it certainly does not mean that such a purpose is a necessary one. For example, I believe it will be appropriate in some situations to find statements testimonial where the speaker's expectation or intent is testimonial even if no government actor is involved. However, children's cases give no special insight into that issue.<sup>248</sup>

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evidence in a criminal case, the statute itself clearly contemplates that a child's statement admitted under [it] will function as *testimony* in a criminal case.

*Id.* at 535 (emphasis in original).

247. Professor Friedman would accept this result as a matter of estoppel, *see* Friedman, *Grappling*, *supra* note 210, at 273, but it should be recognized as flowing from the testimonial analysis itself rather than a secondary doctrine.

248. The principle that I argue for and believe is established by children's cases does not dictate a contrary result for coconspirator statements made unknowingly to a government agent. If appropriate, the two can be treated differently, and coconspirator statements can be ruled nontestimonial. The confrontation right may require that the declarant know that the questioner is a government agent, *cf.* *Perkins v. Illinois*, 496 U.S. 292, 294 (1990) (holding that "*Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer"), or that it be knowable to a reasonable observer where the declarant has limited capacity.

## V. INTERACTION OF AVAILABILITY FOR CROSS-EXAMINATION AND INCOMPETENCE

*A. Need for a Paired Approach to Incompetence and Availability for Cross-Examination*

The law generally considers and treats separately incompetency and unavailability, on the one hand, and the minimal capabilities to be considered available for cross-examination, on the other. Indeed, most cases discuss only one of the two issues. However, for children with limited cognitive capacities, the minimum ability to perceive, recall, and narrate events that would negate a finding of incompetency/unavailability should be quite similar to the capacity to respond adequately to cross-examination. Despite the overlap, the issues are not generally considered together in the same cases.

The greatest convergence in the analysis should be found where incompetency is based on limited cognitive ability that makes testimony inadequate.<sup>249</sup> Availability for cross-examination may be found despite almost total loss of cognitive ability.<sup>250</sup> As a result, the same quite-limited child ruled available for cross-examination in one case could easily be found unavailable in another.

Unavailability can also be based on trauma that makes testimony impossible or excessively harmful to the child. Where trauma is involved, the relationship of the unavailability finding to availability for cross-examination is often less obvious because the child may never attempt to testify. However, where trauma causes the child to answer incompletely on cross-examination, the convergence becomes obvious since the court must rule either that the child is unavailable or declare the answers given to satisfy the constitutionally required opportunity to cross-examine.

Many of the situations encountered in these cases, particularly those involving demonstrated trauma with young, fragile, and damaged children, defy a solution by a rule that I can envision being effectively enforced in trial courts. In situations that lend themselves to resolution by relatively clear rules, I will suggest them. In others, I offer a guiding perspective—encouraging confrontation rather than facilitating its avoidance, even if the confrontation that can be provided is imperfect.

In this analysis, I suggest that the prosecution frequently exercises an element of choice in the child's availability or unavailability, as illustrated in *Ohio v. Roberts*.<sup>251</sup> There, the declarant, whom the prosecution argued was unavailable, had given testimony damaging to the defendant when called by defense counsel at the preliminary hearing. At trial, the prosecution built its case on that prior testimony, which was admissible because the declarant could not be located. About a year before the trial, the declarant's parents had been contacted by a social worker in San Francisco where she had applied for public assistance, and their final contact was a phone call seven to eight months before trial in which she stated she was traveling outside the state.<sup>252</sup>

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249. Unavailability may also be based on an inability to understand and take an oath, which is often treated as a more technical issue but usually involves similar inadequacy in capability.

250. See *United States v. Owen*, 484 U.S. 554, 556–59 (1988) (finding available for cross-examination a declarant who could remember identifying his attacker but could not recall the attack or what anyone said to him before he made the identification).

251. 448 U.S. 56 (1980).

252. *Id.* at 59–60, 75.

Nevertheless, the prosecution's effort to secure the declarant's presence consisted of five subpoenas sent to her parents' home, three sent there despite the authorities' knowledge that the witness had moved away.<sup>253</sup>

On the record in *Roberts*, it is unclear whether the witness could have been found even with extraordinary efforts. I believe Justice Brennan is absolutely accurate in his conclusion in dissent that "[i]t is difficult to believe that the State would have been so derelict in attempting to secure the witness's presence at trial had it not had her favorable preliminary hearing testimony upon which to rely in the event of her 'unavailability.'"<sup>254</sup> As a criminal defense attorney practicing at the Washington, D.C., Public Defender Service, my experience was that I could generally find witnesses, even in the days before national internet search engines, whom I really needed to find. However, I was substantially less successful, despite far greater efforts than the state exerted in *Roberts*, when I felt less need to have the witness's testimony.

In the context of a child victim, the court in *In re T.T.*<sup>255</sup> expressed a similar concern:

We assign no ill motives to the State, but if the State could simply use the surrogate testimony of social workers provided that certain formalities—like a scheduled interview at a government office in a question-and-answer format—were absent, then prosecutors would have less motivation to acclimate the child witness to the courtroom setting, prepare them for trial and make them available for the rigors and trauma of cross-examination.<sup>256</sup>

Based on the nature of the hearsay statements made by the child, the prosecution will have varying interests as to whether to argue that the child is unavailable because traumatized/incompetent, or instead available for cross-examination. Where the prior statement is un-cross-examined and testimonial, the prosecution has an interest in arguing for availability for cross-examination and prefers as low a threshold for such a finding as possible. It will be motivated to argue that the limitations of the child are not disabling, permit cross-examination, and do not constitute incompetence. The prosecution likewise has an incentive to overcome or diminish the trauma to the child from testifying.

By contrast, if the defendant has previously had a legally sufficient opportunity to cross-examine the child, the prosecution has an interest in a high threshold for competency and an easy finding of trauma (which has the same effect). This is because if the child is declared unavailable, the prior statement can be admitted without any further opportunity for the defendant to question the child. *Howard v. State*<sup>257</sup> presents such a situation. There, the defendant had been able to cross-examine the child during a discovery deposition, which he argued was constitutionally insufficient but the court ruled satisfied *Crawford's* required opportunity to cross-examine.<sup>258</sup> In such a

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253. *Id.* at 79 (Brennan, J., dissenting).

254. *Id.* at 79–80 (Brennan, J., dissenting).

255. 815 N.E.2d 789 (Ill. App. Ct. 2004).

256. *Id.* at 802–03.

257. 853 N.E.2d 461 (Ind. 2006).

258. *Id.* at 468–70 (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (“unavailability and a prior opportunity for cross-examination”)).

situation, the statement is admissible without further cross-examination if the child is unable to testify because of the trauma (often supported by the testimony of a medical or mental health professional) or if found incompetent to testify on grounds that do not render the testimony valueless.<sup>259</sup>

The child's statement could also be admitted if the child is found unavailable as a result of trauma that was caused by the wrongdoing of the defendant. In that situation, the prosecutor gains two benefits: the admission of the testimonial statement and the defendant's loss of any opportunity for cross-examination. If the Supreme Court ultimately determines that an intent to silence the witness by the wrongdoing is not required for forfeiture through wrongdoing,<sup>260</sup> the forfeiture concept may theoretically be extended to the commission of the sexual abuse, which the prosecution could argue is the source of the trauma preventing the child from testifying. If that possibility is realized, then the incentive for the prosecution to argue that victims of abuse are too traumatized to testify would become enormous because such a finding would admit virtually all prior statements of the child, including testimonial statements, and prevent an opportunity for confrontation.

For children with cooperative caretakers, I believe that—unlike the situation with domestic violence victims—the child's availability is frequently within the control of the prosecution. In most cases with cooperative caretakers, the prosecution has relatively free access to the child. It is able to take steps to enable the child witness to testify, such as reducing trauma by familiarizing the child with the courtroom and the trial process. Alternatively, the prosecution can choose the opposite strategy and seek expert testimony concluding that any testimony by the child would be traumatic and damaging to the child's health.

The legal determination is also malleable. Competency decisions vest the trial court with broad discretion in most jurisdictions.<sup>261</sup> Similarly, the determination of availability for cross-examination is easily made. The upshot of these standards is that a trial judge will have substantial discretion that would permit it to declare the same child of limited ability either incompetent or available for cross-examination. Given the awful nature of many of these cases, it will be inviting for courts to make the decision that benefits the prosecution.

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259. *Id.* at 467–68. The court recognized that incompetence because of inability to take an oath does not mean the child's prior statement is legally incompetent testimony. *Id.* at 467 n.3; see also Robert P. Mosteller, *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 597 (2005) (discussing the distinction that the Court made in *Wright* between a finding that the child was unavailable because unable to communicate with the jury—which did not render the testimony per se unreliable—and a conclusion (that had not been made) that the child was incompetent because incapable of receiving “just impressions,” which might render the testimony valueless).

260. See, e.g., *State v. Meeks*, 88 P.3d 789, 793–94 (Kan. 2004) (finding forfeiture by wrongdoing in the defendant's murder of the witness during a fight without requiring a finding that the murder was committed with the intent to eliminate the person as a witness).

261. In *Contreras v. State*, 910 So. 2d 901 (Fla. Dist. Ct. App. 2005), review granted, 924 So. 2d 810 (Fla. 2006), the court argued that the standard of “substantial likelihood of severe emotional or mental harm” was the type of vague, subjective, and manipulable standard that *Crawford* would not tolerate. *Id.* at 903.

I suggest that the two determinations should be viewed as paired. I argue for what I believe is a relatively neutral position on both. Courts should apply a low threshold under a policy choice to encourage confrontation. The low standard would not allow the government to deny confrontation while admitting testimonial hearsay. On the other hand, such a standard should not aid the defendant in intimidating the child into unavailability and thereby figuratively securing a “get-out-of-jail-free card” by excluding the hearsay of a child who took the stand and attempted to testify.

### *B. Patterns Within Unavailability*

#### 1. Traumatized and Frightened Children

##### a. Trauma Demonstrated During Testimony

Some children demonstrate the very real and painful trauma they endure by breaking down during their testimony, particularly during cross-examination.<sup>262</sup> Many of these children are undeniably so affected that they cannot testify. These situations, which are painful and real, must be largely within the control of the trial court and reviewed deferentially.

For example, in *State v. Noah*,<sup>263</sup> the defense counsel’s examination of the child was cut short when the child began crying and was unable to testify. The state then moved to disqualify the child as a witness, and the court ordered an evaluation to determine the probability, nature, and extent of psychological injury if she testified again. After examination, the court disqualified child.<sup>264</sup>

The treatment of trauma demonstrated by the child’s testimony is not subject to careful regulation by a legal rule. If the child’s performance demonstrates trauma, a court must protect the child; to suggest a rigorous hearing or skepticism is unrealistic.

If the prosecution were to contribute to this result by inadequate preparation of the child, there is little recourse. However, practical considerations are quite helpful here, perhaps more helpful than a rule could be. I believe the prosecution has a strong instinct to protect a child who testifies from needless trauma and that instinct strongly militates against poor preparation. Indeed, the prosecution’s desire to avoid infliction of trauma to a child who testifies (as distinguished from protecting the child from any trauma by a strategy to declare the child unavailable and admit the prior statement) is a substantial protection against poor preparation that might result in an avoidable finding of trauma. Indeed, it supports requiring the child to attempt to testify instead of allowing the prosecution to rely solely on expert testimony regarding trauma, discussed in the next subsection.

A finding of trauma caused by defense counsel’s questioning should mean that cross-examination is adequate. If the child ceases to testify because of rough treatment by the defense, there is little reason to attempt to fashion a rule to protect the defendant, whether the child’s reactions result in a finding of unavailability or result in

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262. In *State v. Hooper*, No. 31025, 2006 WL 2328233, at \*1 (Idaho Ct. App. Aug. 11, 2006), *review granted*, Jan. 18, 2007, the child was called by the state at trial, but she was “too frightened to take the oath or testify.”

263. 137 P.3d 1093, \*3 (Kan. Ct. App. 2006) (unpublished table decision).

264. *Id.*



the forfeiture of the defendant's confrontation right. The possibility that a child will feign trauma during cross-examination is not subject to resolution other than by the sound evaluation of the trial court.<sup>265</sup>

#### b. Expert Testimony Establishing Trauma

In a number of cases, courts have found trauma based on expert testimony—without any testimony by the child. In *T.P. v. State*,<sup>266</sup> the state advised the trial court that the victim would be unable to testify and called an expert who opined that forcing the victim to testify could result in emotional trauma. The trial court ruled that the victim was unavailable and admitted an earlier interview of the child by a social worker.<sup>267</sup> In *Rangel v. State*,<sup>268</sup> the trial court ruled, based on testimony from a licensed professional counselor, that it would be an extremely traumatic experience for the six-year-old child to testify. The counselor testified that the child, who was in counseling, continued to have symptoms of sexual trauma, and when she talked about the event, the symptoms became pronounced and she was unable to express herself. The trial court also accepted the expert's conclusion that, although closed-circuit television would be less traumatic for the child, she would still not be able to testify because strangers would be involved.<sup>269</sup>

Although I cannot prove the connection, the use of expert testimony to support the prosecutor's argument of unavailability in *Rangel* based on trauma is consistent with a self-interested perspective by the prosecution that I described earlier. A finding of unavailability was a condition of admitting the videotaped hearsay statement.<sup>270</sup> The court in *Contreras v. State*<sup>271</sup> recognized this incentive and ruled against it. The state requested that the child be declared unavailable and arranged for an evaluation by a psychologist, who stated that the child would suffer severe "emotional and psychological harm" if she testified in person.<sup>272</sup> The appellate court disagreed, arguing that the generalized harm from testifying did not make the witness unavailable because such recognition would mean the protection intended by *Crawford* would disappear.<sup>273</sup>

I contend that the showing of trauma through the testimony of experts poses great danger to confrontation rights, particularly if it can be combined with a showing for forfeiture through wrongdoing. In *Maryland v. Craig*<sup>274</sup> the Supreme Court rejected the lower court's requirement that before testimony could be received without physical

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265. Failure to respond to questions presents a somewhat different situation and should not be treated the same as demonstrated trauma. It is discussed below in Part V.B.2.

266. 911 So. 2d 1117, 1120 (Ala. 2004).

267. *Id.*

268. 199 S.W.3d 523, 529 (Tex. Ct. App. 2006).

269. *Id.* at 529. *See also* *Morales v. State*, No. 13-05-188-CR, 2006 WL 3234073, at \*1 (Tex. App. Nov. 9, 2006) (finding child unavailable based on affidavit of licensed counselor and sworn testimony of an assistant district attorney that child would suffer serious and undue psychological harm if required to testify).

270. *Rangel*, 199 S.W.3d at 530.

271. 910 So. 2d 901, 907–08 (Fla. Dist. Ct. App. 2005), *review granted*, 924 So. 2d 810 (Fla. 2006).

272. *Id.* at 903.

273. *See id.* at 907.

274. 497 U.S. 836 (1990).

confrontation the child had to be observed attempting to testify in the presence of the defendant.<sup>275</sup> That ruling suggests that requiring an effort by the child to testify out of the presence of the defendant before the child is declared unavailable might likewise be rejected. I contend, however, that before confrontation is excused entirely—a total denial of the confrontation right as opposed to the minor limitation on it in *Craig*—some effort at testimony outside the presence of the defendant should be required.<sup>276</sup>

## 2. Failure to Respond to Questions

Early in the child's testimony in *In re T.T.*, the child, who was nine at the time of the testimony, said the accused did "nothing." However, she stopped answering questions during the prosecutor's direct examination. The trial court found her "unavailable where she 'froze,' noting she would not say anything after she testified that respondent unbuttoned her pajama suit."<sup>277</sup> The appellate court ruled that she was unavailable because the child was not cross-examined.<sup>278</sup> Similarly, in *In re Rolandis G.*, the child testified briefly on direct but did not respond when asked whether she knew the respondent and did not respond to any more questions. No cross-examination was attempted.<sup>279</sup> The trial court ruled that the witness was available because he took the stand and answered some questions,<sup>280</sup> but the appellate court determined that the child was unavailable.<sup>281</sup>

Here too, courts should require an effort to secure the child's testimony in a shielded environment before declaring testimony at an end. Receiving the child's testimony under procedures allowed by *Maryland v. Craig*<sup>282</sup> may ameliorate the trauma and should be required before that trauma is accepted as a reason to declare the child unavailable and deny confrontation.<sup>283</sup>

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275. *See id.* at 859–60.

276. I recognize that explicit testimony like that given by the expert in *Rangel* (who testified that even remote testimony would be excessively traumatic) will be accepted by courts as sufficient.

277. *In re T.T.*, 815 N.E.2d 789, 795–96 (Ill. App. Ct. 2004).

278. *Id.* at 792.

279. *In re Rolandis G.*, 817 N.E.2d 183, 185 (Ill. App. Ct. 2004).

280. *Id.* at 186.

281. *Id.* at 190–91.

282. 497 U.S. 836, 845 (1990). In *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006), Justice Scalia criticized the approach in *Craig* while examining a right to counsel issue. He stated: "[w]hat the Government urges upon us here is what was urged upon us . . . [under *Roberts* with regard to confrontation]—a line of reasoning that 'abstracts from the right to its purposes, and then eliminates the right.'" *Id.* at 2562 (quoting *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting)). Although this criticism and *Crawford's* emphasis on originalism and historical practices suggest possible revision of *Craig's* premise that face-to-face confrontation can be eliminated if cross-examination is maintained and if an individualized showing of trauma is established, courts continue to follow *Craig*. *See, e.g.*, *State v. Vogelsbert*, 724 N.W.2d 649, 654–55 (Wis. Ct. App. 2006).

283. *Hooper* encourages trial courts to formulate alternatives to live, in-court testimony that "accommodate a child's capability and fears while also protecting the accused's constitutional rights." *See State v. Hooper*, No. 31025, 2006 WL 2328233, at \*6 (Idaho Ct. App. Aug. 11, 2006), *review granted*, Jan. 18, 2007.

In this area, I suggest a conceptually different basis for determining when a child who ceases to respond to questions is incompetent/unavailable or considered available for cross-examination. If the child ceases answering questions before cross-examination, she is clearly not available for cross-examination because none was possible. However, if a child of minimal ability answers some cross-examination questions, she should be treated as available for cross-examination if the questions answered give the jury a sufficient basis to evaluate her testimony.

This position may seem inconsistent with the standard set out in *United States v. Owens*,<sup>284</sup> where the Court used language that the witness “responds willingly to questions.”<sup>285</sup> However, at another point, the Court spoke only of “unrestricted cross-examination.”<sup>286</sup> It ruled that restrictions by the trial court on the scope of cross-examination and the assertion of privilege render the examination constitutionally inadequate.<sup>287</sup> These two impediments to cross-examination have the common feature that the failure to receive answers provides the jury with no basis upon which to evaluate the testimony of the witness. By contrast, failure of memory and “testimony that is marred by . . . evasion”<sup>288</sup> is adequate because it does provide a basis for evaluation.

Children generally do not possess the guile of adults to willingly respond but effectively evade answering. Instead, they simply discontinue testifying. Courts are loath to force an answer from a potentially traumatized child through threat of sanction (and certainly not contempt) which might, in some instances, be used with an adult.<sup>289</sup> I suggest that the child’s form of evasion be treated the same as the more subtle action of the adult, which is ruled consistent with availability for cross-examination. Thus, when a child of at least minimal ability is asked on direct examination about the allegations of abuse and any prior statements she has made and responds to some cross-examination, the issue is not the refusal to answer some questions but whether she has given enough of a response to enable the jury to evaluate her as a witness.<sup>290</sup> This is in

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284. 484 U.S. 554 (1988).

285. *Id.* at 561. The Court was speaking here specifically of the interpretation of “subject to cross-examination” under Federal Evidence Rule 801(d)(1), but its interpretation generally comported with constitutional standards, which it referenced in the very next sentence as to limitations on cross-examination that would render cross-examination no longer meaningful, “[j]ust as with the constitutional prohibition.”

286. *Id.* at 560.

287. *See id.* at 561–62.

288. *Id.* at 558 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 21–22 (1985)). *Nelson v. O’Neil*, 402 U.S. 622, 624 (1971), dealt with such an evasive witness, who willingly answered questions but was apparently lying when he claimed not to have made the prior statement and denied the truth of the underlying accusation. *See generally* Mosteller, *supra* note 259, at 586–90 (discussing witness limitations).

289. *See* *Howard v. State*, 853 N.E.2d 461, 466 (Ind. 2006) (arguing that the defense was required to ask the court to force a reluctant adult witness to testify or face contempt, but acknowledging that “‘the harsh reality of ordinary trial procedures,’” is not suited for a child witness (quoting *Fowler v. State*, 829 N.E.2d 459, 465 (Ind. 2005))).

290. I disagree with Professor Lyon that a forfeiture concept need be used. In some cases, as where the defense counsel badgers the child into silence, it may be appropriate. However, where the child has taken the stand and given some answers, her reasons for declining to answer further will often be unknowable, and there is no reason to assume forfeiture. The preferable

substance the standard used by cases that find children available for cross-examination when the child minimally continues answering,<sup>291</sup> and it should be used when the child instead ceases to respond on cross-examination and when the issue is competency or unavailability.

### 3. Finding of Incompetence Based on Limitations in Cognitive or Communicative Abilities or Ability to Take the Oath

A finding of unavailability or incompetence is often made based on the child's inadequate performance when testifying. For example, in *State v. Blue*,<sup>292</sup> the trial court conducted an evidentiary hearing at which the child, then five, was asked questions. The child answered some questions, but the court concluded she was unavailable due to a lack of memory.<sup>293</sup> In *People v. Sisavath*,<sup>294</sup> the child was ruled incompetent when she failed to respond to most of the questions that she was asked at a competency hearing. Disqualification was based on the grounds that "she could not express herself so as to be understood and because she was unable to understand her duty to tell the truth."<sup>295</sup>

This situation is one of the few amenable to resolution by a rule. If testimonial hearsay will be admitted, a child should not, absent acquiescence by the defense, be found incompetent because of a lack of cognitive abilities or because of inability to take the oath. The prosecution may properly limit confrontation where it would harm the child. There is no similar justification to deny confrontation simply because of the child's inadequacies. Given the Supreme Court's originalist orientation, whether the oath is constitutionally required is an issue because the oath was considered important in the period before the Framing.<sup>296</sup> However, under contemporary values, honoring the oath is not a sufficient justification for denying confrontation.

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perspective is to determine first whether the child has minimal testimonial capacity to make her testimony of value to be received and then whether she has given the jury a sufficient basis to judge and evaluate the worth of her statements.

291. See *State v. Price*, 146 P.3d 1183, 1186–92 (Wash. 2006), which requires that the prosecutor seek to introduce both the child's version on the incident and of the prior statements and not seek to shield the child from cross-examination.

292. 717 N.W.2d 558, 561 (N.D. 2006).

293. *Id.* at 561.

294. 13 Cal. Rptr. 3d 753, 757 (Cal. Ct. App. 2004).

295. *Id.* at 756 (citations omitted). Similarly, in *Lagunas v. State*, 187 S.W.3d 503, 512 (Tex. Ct. App. 2005), the trial court refused to allow the seven-year-old child to testify because "she hadn't answered enough questions to establish her ability to know the difference between the truth and what is not the truth at this point."

296. See Mosteller, *supra* note 19, at 740 (noting that according to one eighteenth-century English treatise writer, the oath was so important that the "absence of an oath not only rendered oral hearsay evidence not the best evidence, but no evidence at all" (quoting GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 107 (Garland Pub. 1979) (1754))).

#### 4. Government Argument that Merely Making the Child Available Satisfies Confrontation

In *State v. Snowden*,<sup>297</sup> no finding of unavailability or incompetency was made, and the state did not attempt to call the children because the hearsay exception did not require it to do so. The state argued that the defendant's complaint did not resemble that of Sir Walter Raleigh, who gladly would have called his accuser to the stand if permitted to do so. In effect, the prosecution argued that the defendant had the duty to call his accusers. The Maryland Court of Appeals rejected the state's argument.<sup>298</sup>

Accepting this argument would change the confrontation right into a right of compulsory process. The state's argument in *Snowden* is occasionally made but is usually rejected<sup>299</sup> because the right to be "confronted with witnesses" includes the Framers' expectation that the prosecution must present the accusations in open court, rather than require the defendant to call the accusers so as to be able to cross-examine them.

#### *C. The Problem of Limited Children and the Finding of Availability for Cross-Examination*

I have already discussed above the problem of a finding that the child is unavailable through trauma or incompetence. The other potential finding—that the child is available for cross—is hardly a great solution for the confrontation right when the child is very limited in terms of cognitive ability or the capacity to communicate. Recent cases concerning children illustrate the difficulty involved when they testify that they do not remember the prior statements, the alleged crime, or both, or when they deny the crime occurred. *People v. Warner*<sup>300</sup> presents the first situation. There, a four-year-old child testified that the defendant touched her "private" one time and could not remember telling anyone about the event.<sup>301</sup> The prosecution nevertheless introduced a videotaped interview of the child, which described numerous sexual touchings.<sup>302</sup> The child's limited in-court statement regarding one incident and her memory of making no statements were ruled sufficient to render her available for cross-examination and make admissible these much more substantial out-of-court statements.<sup>303</sup> In *State v. Price*,<sup>304</sup>

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297. 867 A.2d 314 (Md. 2005).

298. *See id.* at 333.

299. *See* *People v. Bastien*, 541 N.E.2d 670 (Ill. 1989). *But see* *State v. Schaal*, 806 S.W.2d 659 (Mo. 1991) (giving the opposite result). *See generally* Mosteller, *supra* note 19, 763–68 (discussing these cases and related developments).

300. 14 Cal. Rptr. 3d 419 (Ct. App. 2004).

301. *Id.* at 424.

302. *Id.*

303. *See id.* at 429–31. *State v. Sevigny*, 722 N.W.2d 515 (N.D. 2006), presents a similar fact pattern but with much less detail. The facts indicate that "S.S. and S.J.M. testified, but were reluctant to discuss what happened and gave limited testimony. Both girls confirmed they had been sexually abused by Sevigny, although S.S.'s testimony was very limited." *Id.* at 520. Without amplification, the court found the defendant's confrontation right satisfied by the opportunity to cross-examine the children. *See id.* at 525.

304. 146 P.3d 1183 (Wash. 2006).

the child did not recall the incident or the prior statements. She answered some preliminary questions about school and the difference between truth and lies, but when asked about the alleged abuse and her prior statements about it, she shrugged or said she had forgotten.<sup>305</sup> *People v. Monroe*<sup>306</sup> presents the other common situation: a witness who denies making out-of-court statements establishing abuse.<sup>307</sup> The court concluded the opportunity to cross-examine was adequate since the children willingly responded to the defendant's questions.<sup>308</sup>

I do not mean to argue that cross-examination of mentally limited children can be the same as cross-examination of a fully functional adult witness—far from it. My point is that the alternatives are either not palatable to courts or generally inferior in protecting confrontation rights. Cross-examining children is often difficult. It may, however, produce some predictably good results.

First, such questions can demonstrate the child's limited abilities to the jury. Second, cross-examination may reveal how easily the child is subject to suggestion by an adult with vastly superior linguistic skills and intelligence, which defense counsel can demonstrate through the child's responses to skillful questioning. Third, as Lord Hale recognized before the time of the Framing, the child may correct the statement to the benefit of the accused if the adult who conveyed the story to the authorities enhanced its detail or changed its content.<sup>309</sup>

I suggest that gaining some of these benefits is preferable to the out-of-court statement being received without the ability to cross-examine the child. I worry that courts will find ways to admit such statements, if apparently important to what they perceive as the demands of justice, when the alternative is to declare a failure of confrontation and grant the defendant his "get-out-of-jail-free card."

Critics of the Supreme Court's decision in *United States v. Owens*<sup>310</sup> often cite the inadequacy of the cross-examination of the declarant in that case. Having a fully functioning adult witness on the stand is often excellent from the defense perspective, but it is also often devastating. I can easily imagine the results of a cross-examination in a case like *Owens* that are far worse than what actually occurred. If a fully functioning victim takes the stand and with apparent accuracy and candor and without

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305. *Id.* at 1185.

306. 852 N.E.2d 888 (Ill. App. Ct. 2006).

307. *Id.* at 896–97.

308. *Id.* at 897–98.

309. See EAST, *supra* note 25 (discussing Hale's position). I do not list in the text the possible, but rarely achieved result, that the child will give a substantively helpful answer to the questioner. That is possible, see Roger Byron, *Children of a Lesser Law: The Failure of the Born-Alive Infants Protection Act and a Plan for Its Redemption*, 19 REGENT U. L. REV. 523 (2007) (describing such success by a gifted defense attorney), but occurs so infrequently that it should not be given any prominence. Given my pessimism on this point and the only slightly more likely result suggested by Lord Hale that embellishments will be corrected, readers concerned about fairness may well challenge my position. I come to it reluctantly, but I do conclude that the Confrontation Clause as construed by the Supreme Court is generally satisfied if the person who made the statement takes the stand in front of the finder of fact deciding the case, makes an effort to repeat the accusation, and is available to be asked cross-examination questions. Secondary protections, such as those provided by *Roberts* might be appropriate, but apparently not, according to this Court.

310. 484 U.S. 554 (1988).

apparent bias describes the crime and identifies the defendant, the cross-examination may be full, but it often accomplishes little good. Indeed, there may be no cross-examination at all, but a well-advised guilty plea instead.

What happened in *Owens* was not ideal from the defendant's perspective, but it provided a substantial benefit. On direct examination, the assault victim testified to making an identification of his attacker. On cross, he admitted that he could not remember seeing the attacker, that he could not remember any of the numerous people who visited him while in the hospital other than the FBI agent who received the incriminating identification, and that he could not remember whether any of these visitors suggested that the defendant was the attacker.<sup>311</sup>

If the alternative to the cross-examination in *Owens* were the exclusion of the victim's out-of-court identification, then certainly the defendant would prefer the latter. However, if the realistic alternative is to declare the victim to be unavailable and admit his statement under some exception to confrontation, such as that the defendant's forfeiture as a result of the commission of the assault that rendered the victim unavailable, then the less than fully adequate confrontation of *Owens* is preferable. As noted earlier, I doubt many confrontation rulings will be made that effectively grant the defendant an acquittal, and I believe encouraging the best confrontation realistically possible is the preferable way to honor the confrontation right.

*D. Substantive Concerns that Should Govern a Combined Perspective on Unavailability and Availability for Cross-Examination of Children*

I have argued elsewhere for a concept of minimum capacity below which the child cannot be considered to be available for cross-examination.<sup>312</sup> This is still a valid concept, although defining that minimum level is admittedly difficult.

My primary perspective, however, is that the overriding goal should be to provide, rather than deny, confrontation to the defendant. When a statement is found testimonial and the child cannot currently be cross-examined, the courts should exclude the testimony. Courts will infrequently reach this conclusion, and will employ virtually any reasoning that permits them to admit critical hearsay from a victim. That realization prompts me to push for solutions that provide at least minimal confrontation.

Long ago, Lord Hale argued that, if the child's statement is introduced through parents or friends, the child should also testify.<sup>313</sup> His major concern was that those

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311. *See id.* at 556.

312. *See* Mosteller, *supra* note 259, at 596. I stated the proposition as follows:

To be sure, simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns. If, for example, a child is so young that she cannot be cross-examined at all . . . the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Clause. Confrontation theory, the Due Process Clause, or the competency concept must provide some constitutional floor, albeit certainly at a very low level, as to minimal testimonial adequacy. To date, courts have gone no further than *Spotted War Bonnet* in recognizing that a limit must exist, but not yet attempting a concrete definition.

*Id.* (citation omitted).

313. *See supra* note 25 and accompanying text.

who recount the statement may embellish it, and that the child's version could correct at least that important error. I suggest that Hale's basic insight is a correct and valuable one. If the child's testimonial statement will be admitted, having the child testify is advantageous to justice and to the defendant's confrontation interests.

It appears to me that we are moving toward admission under *Crawford* of many of the statements received under *Roberts*. I now assume that most important statements by child victims will continue to be admitted because any other outcome is perceived as too costly. As a matter of policy in support of the confrontation right, we should encourage a finding that statements are testimonial and insist upon confrontation. However, I believe achieving that broad acceptance of a right to confront will require embracing imperfect confrontation, since I fear that insisting on perfection may well lead to admission of the hearsay coupled with the denial of all confrontation.

#### CONCLUSION

The pattern that has emerged from cases involving children is one largely of continuity in admitting statements received under *Roberts*—except as to statements from children to police officers and those closely analogous—where exclusion under *Crawford* and *Davis* is now relatively uniform. The most significant development in analysis in recent cases is the focus on the purpose of the questioner, which in many situations simply provides a clearer explanation for an unchanged result.

Statements for medical purposes are universally received. This result is buttressed by *Davis*'s questioner-purpose analysis. However, the nontestimonial treatment, while generally appropriate even for statements of identity during the initial medical assessment, should not, despite a medical label, continue for subsequent examinations where the prosecutorial purpose likely predominates.

The most unsettled and contentious area involves statements with multiple purposes. The critical question for the future is whether videotaped statements that ultimately are used in court as the equivalent of testimony will be treated as nontestimonial if they are taken by government officers who are not explicitly pursuing a law enforcement purpose. The test case is the statement taken in a nonemergency situation that has as its primary purpose the general welfare of the child (such as the child's placement), and results in a videotaped statement which is ultimately offered in evidence at trial describing abuse and identifying the defendant as the perpetrator. I have argued that timing should provide a clear limitation in some cases (though it should be less sensitive than the emergency purpose in *Davis*). Absent a current non-law-enforcement purpose—such as the need to establish the placement of the child based on new allegations of abuse—this welfare concern should not be recognized as independent from a prosecutorial purpose. Where the interview is mechanically recorded, its formality and enormous utility for use at trial should cause courts to presume the statement's testimonial character absent clear evidence of a substantial independent purpose.

If such statements are considered nontestimonial, an enormous hole will have been blown in the *Crawford/Davis* bulwark of providing confrontation rights to defendants in cases involving children. I contend that a welfare purpose by a government child-protective agency should not be considered a "neutral governmental purpose" and therefore should not qualify as separate from law enforcement to render the statement nontestimonial under *Davis*. If such a relatively categorical answer is given, much will be clarified regarding the definition of testimonial. If not, either the breach will be



substantial and confrontation reduced to a formalistic game for many children's statements, or at best, control will only be had through a difficult case-by-case analysis of the formality of the statement and the legitimacy and true independence of the questioner's other purpose.

In addition, children's cases put in stark view the impact of the different treatments of intent by either the questioner or the speaker. The majority of the cases recognize that where the questioner's purpose is clearly testimonial in character, the intent or expectation of the child is inconsequential. In addition to its practical sensibility, that answer has strong theoretical support in the Framers' concern with government-created evidence. I believe it reveals a general truth that the defendant is harmed equally by such statements, regardless of the child's expectation or intent.

The final concern of this Article, which is probably the most difficult practically and conceptually, is the treatment of the child who suffers trauma or has limited cognitive abilities. I argue that decisions that declare that child unavailable will, on balance, deny the confrontation right. The orientation of the law should be to support putting the child on the stand to reveal those limited abilities and in some situations to correct the errors in transmission of her statement by adult witnesses or to correct facts. This orientation will also help to avoid manipulation of the unavailability concept by competing litigants.

The biggest changes in treatment of statements involving children have been the exclusion of statements to police officers, statements that are functionally the equivalent of police interrogation, and statements taken for the explicit purpose of generating admissible evidence. This is a positive step in protecting confrontation rights. In other areas of hearsay, the results under *Roberts* have remained much the same, with most hearsay passing the Confrontation Clause test. We have likely taken a step backwards, in that untrustworthy but nontestimonial statements like those in *Wright* may now be more easily admitted. What will happen with multi-purposed statements presents the most important unknown. Other open questions are whether admission of videotaped statements is largely a relic of the past and whether more or fewer children will take the stand because of the change in Confrontation Clause analysis.

We will know far more about the state of the law if the Court reviews one of the many children's cases rich with unresolved Confrontation Clause issues: "A little child shall lead them."