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CONFRONTATION IN CHILDREN'S CASES: THE DIMENSIONS OF LIMITED COVERAGE

*Robert P. Mosteller**

I. INTRODUCTION

Application of the rules of evidence in cases involving children is often different than in those involving adults. The central reason for the variation is not difficult to understand. Children have limited capacities, and in providing evidence generally and presenting evidence in the courtroom, they face special challenges. In multiple minor ways, courts simply have no alternative other than making some adjustments. Frequently, judges will entertain more significant accommodations, as well, to avoid the loss of valuable evidence or minimize the trauma of testimony. In child sexual abuse cases, the revolting nature of the crimes puts its own emotional pressure on courts to admit the child's evidence.

Hearsay is particularly important in many cases in which children are victims because of the need to supplement the incomplete versions of events provided by children as witnesses in the stressful environment of trials. Initial statements regarding the events are often needed to convict because the crimes are committed in private with no outside witnesses and frequently no definitive physical or scientific evidence of either the crime or the identity of the perpetrator.

Given these background facts, it would hardly be surprising if application of *Crawford v. Washington* and its new testimonial

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statement approach to confrontation doctrine¹ was more nuanced, complicated, and uncertain in cases involving children. Although the doctrine's application is undeniably different, it is generally not less certain. The lines in most cases involving children are just as clear as in adult cases—perhaps even clearer for some commonly encountered situations.

However, the general uncertainty and flexibility brought into the confrontation analysis by the United States Supreme Court's decision in *Michigan v. Bryant*,² with its elaborate multifactor test to determine whether the questioning relates to an ongoing emergency, will likely have a significant effect in children's cases. The complicated *Bryant* test effectively gives lower courts a large measure of discretion in resolving the testimonial concept's application by making the determination dependent upon numerous elements of the case, potentially going beyond the emergency issue that was the immediate focus of *Bryant*.³

Where the law of confrontation goes from here, in general and in children's cases, is hardly settled. As it now stands, the doctrine applies clearly only to a limited number of situations, regardless of whether the declarant is a child or an adult. In the large remainder of cases, lower courts make decisions regarding a potentially testimonial statement using a heavily fact-dependent and largely discretionary form of analysis that is likely to result in admission of apparently important and reliable, but un-confronted, hearsay. We are moving toward a Confrontation Clause where *Crawford* is uniformly applied to a very modest number of cases and where, for a sizeable group of other cases, its application is unpredictable. This same pattern is found in

¹ *Crawford v. Washington*, 541 U.S. 36 (2004), refocused the Confrontation Clause on testimonial statements in sharp contrast to the trustworthiness or reliability basis of *Ohio v. Roberts*, 448 U.S. 56 (1980). *Crawford*, 541 U.S. at 68.

² *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

³ In *Bryant*, statements of a seriously injured man to police officers about the identity of the person who shot him and the circumstances of the shooting, although removed in time and space from the offense, were ruled nontestimonial because the police inquiry related to resolving the existence of an ongoing emergency. *Id.* at 1150.

cases involving children.⁴ As the dimensions of the *Crawford* system were initially being defined, courts and commentators complained primarily of the unpredictability of Confrontation Clause law. Another two major questions should be added now: whether the lines drawn by the testimonial doctrine make sense, and, more significantly, whether the resulting system has been worth the effort.

In Part II, I describe the somewhat uncertain future of the *Crawford* doctrine. As the doctrine is applied to hearsay of different types and in varying situations, its support among members of the Supreme Court has declined. In Part III, I demonstrate the clarity of application of the testimonial statement doctrine to most types of statements made by children. By bringing trial court discretion into play, *Bryant* has the potential to limit the application of the doctrine in the one area where protection has been clear. Part IV highlights the difficulty of reaching clear results for statements produced for multiple purposes. Part V examines a number of discrete issues involving principally the elicitation of testimony from children who testify, bemoaning the limited efforts to help facilitate and expand confrontation as an alternative to exclusion of the testimony or broadly denying defendants the right to confront child witnesses.

II. THE UNCERTAIN STATUS OF *CRAWFORD* AS CONSENSUS ERODES IN THE SUPREME COURT

As the *Crawford* approach loses commitment within the Court, it is possible, although unlikely, that the testimonial statement doctrine could be greatly limited or wiped off the books. While the present Court is unlikely to do an about-face and reverse *Crawford*, the voting pattern shows declining support. The near consensus that existed in the *Crawford*

⁴ Although a few features of the analysis might resemble the old *Roberts* system, the new multi-factored analysis is directed to the definitional question of whether the statement is testimonial, whereas the old system focused upon the substantive issue of trustworthiness. *See id.* at 1162 (“In determining whether a declarant’s statements are testimonial, courts should look to all of the relevant circumstances.”).

decision—which commanded a 7-2 majority⁵—and *Davis v. Washington*—which was virtually unanimous⁶—is a relic of the past.

On the one hand, Justice Scalia remains enthusiastically on board as architect and author of *Crawford*,⁷ *Davis*, *California v. Giles*,⁸ and *Melendez-Diaz v. Massachusetts*.⁹ Among the justices on the Court, Justice Ginsburg has been his most consistent supporter, apparently driven by her liberal views rather than Justice Scalia's originalism. The remaining seven justices, however, are not consistent supporters of *Crawford*.

Changes in the Court's membership played a minor role in reducing support for the *Crawford* approach. When the more liberal Justices Stevens and Souter were replaced by the more moderate Justices Sotomayor and Kagan, whatever impact the right to confrontation might have had on criminal procedure was reduced.¹⁰ Justice Breyer's conversion from a contributing member of the group of Justices and scholars who created the new Confrontation Clause doctrine that became *Crawford*,¹¹ to a full-fledged opponent, played a more major role. During oral argument in *Giles*, Breyer and Scalia had a telling exchange in which Breyer announced his impending exit from the *Crawford* enterprise:

⁵ Chief Justice Rehnquist and Justice O'Connor agreed with the result, but they would have retained *Roberts*. See *Crawford*, 541 U.S. at 75-76 (Rehnquist, C.J., joined by O'Connor, J., concurring).

⁶ *Davis v. Washington*, 547 U.S. 813 (2006). *Davis* was unanimous but for Justice Thomas' concurrence, which related to the lack of formality of the statement, which was not at issue in the case.

⁷ Scalia has described *Crawford* as his favorite opinion. See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 317 (2007).

⁸ *California v. Giles*, 554 U.S. 353 (2008).

⁹ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

¹⁰ On the other hand, Justice Stevens' sensitivity to domestic abuse may have also have produced his dissenting vote in *Giles*. See *Giles*, 554 U.S. at 404 (Breyer, J., dissenting) (noting that the Court's requiring subjective intent to silence the witness as a predicate for forfeiture by wrongdoing would disproportionately impact domestic violence prosecutions).

¹¹ Justice Breyer proposed examining an alternative to the *Roberts* system in his concurring opinion in *Lilly v. Virginia*, 527 U.S. 116, 140-43 (1999) (Breyer, J., concurring).

Justice Breyer: I joined *Crawford*, and Justice Scalia would like to kick me off the boat, which I'm rapidly leaving in any event, but the

Justice Scalia: You jumped off in *Crawford*, I thought.¹²

Justice Breyer's vigorous dissent in *Giles* confirmed his departure.¹³ Concerns about the impact of *Crawford* on domestic violence prosecutions are likely at the heart of his shift in position.¹⁴ Justice Breyer is now a solid vote for a much different approach than the current *Crawford*-based doctrine offers, and potentially even for starting over.¹⁵

Chief Justice Roberts supported the *Crawford* enterprise initially, joining the *Davis* and *Giles* opinions, but he turned away in *Melendez-Diaz* and *Bullcoming v. New Mexico*, joining the dissent in both opinions,¹⁶ and he joined Justice Sotomayor's limiting opinion in *Bryant*. Justice Alito has had a similar voting pattern to Chief Justice Roberts, although his earlier support was even more limited.¹⁷ Three Justices, Roberts, Alito, and Breyer, constitute a solid group in opposition to *Crawford*'s approach, and Justice Kennedy, who authored a spirited dissent in *Bullcoming*¹⁸ appears to be part of that oppositional group.¹⁹

¹² Transcript of Oral Argument at 13, *Giles*, 554 U.S. 353 (No. 07-6053) [hereinafter *Giles* Transcript]. In the *Bryant* argument, Justice Breyer stated: "I joined *Crawford*, but I have to admit to you I have had many second thoughts when I've seen how far it has extended" Transcript of Oral Argument at 35, *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (No. 09-150) [hereinafter *Bryant* Transcript].

¹³ See *Giles*, 554 U.S. at 381-404 (Breyer, J., dissenting).

¹⁴ See *id.* at 404 (noting the particular impact on domestic violence cases of the Court's rule requiring intent to silence the witness for a forfeiture by wrongdoing).

¹⁵ In the *Giles* argument, Justice Breyer expressed a strong opposition to *Crawford*'s approach: "[m]aybe we have to assume an intent to allow the contours of the Confrontation Clause to evolve as the law of evidence itself evolves." *Giles* Transcript, *supra* note 12, at 34-35.

¹⁶ See *Bullcoming v. New Mexico*, 131 U.S. 2705, 2723 (2011) (Kennedy, J., dissenting); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Thomas, J., dissenting).

¹⁷ See *infra* notes 23-24 (describing Justice Alito's strict view of the formality requirement for testimonial statements).

¹⁸ Chief Justice Roberts and Justices Alito and Breyer joined Kennedy's

Justice Thomas shares Justice Scalia's commitment to the originalist jurisprudence on which the testimonial concept and the *Crawford* opinion are based, but he supports a much narrower definition of "testimonial" that requires strict formality of the statement.²⁰ In Justice Thomas's view, the statement must be memorialized in written or recorded form to be testimonial, a requirement that would significantly limit the application of the testimonial concept.²¹ Indeed, Justice Thomas takes the position that, except where statements are informally taken to evade confrontation, if the statement is not in written form or its modern equivalent (such as recorded interrogation in *Crawford*), it is not testimonial.²² Justice Alito has joined Justice Thomas's

apparent repudiation of the *Crawford* doctrine in his dissent in *Bullcoming*.

¹⁹ Although questioning in an oral argument is often poor evidence for a justice's position, Kennedy's questioning in the most recent confrontation case, *Williams v. Illinois*, 131 S. Ct. 3090 (2011), suggests a more supportive position regarding the *Crawford* approach to expert evidence than his recent dissents in *Bullcoming* and *Melendez-Diaz* would suggest. See Transcript of Oral Argument at 22, *Williams*, 131 S. Ct. 3090 (No. 10-8505) (apparently supporting the defendant's position in noting that if the expert's statement was not used for its truth it would be irrelevant). The other Justices—Roberts, Alito, and Breyer—showed no signs of uncertainty in their opposition during that oral argument. See generally *id.*

²⁰ See Robert P. Mosteller, *Softening the Formality and Formalism of the "Testimonial" Statement Concept*, 19 REGENT U. L. REV. 429, 433–38 (2007) (discussing the majority's softening of formality in the definition of "testimonial" as compared to the approach taken by Justice Thomas).

²¹ See *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment) ("[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.").

²² In *Giles v. California*, 554 U.S. 353 (2008), Justice Thomas concurred in the judgment because the parties had not contested the testimonial quality of the statement. Nevertheless, he expressed his commitment to the fundamental requirement of formality of the statement, expressing his position as follows:

I write separately to note that I adhere to my view that statements like those made by the victim in this case do not implicate the Confrontation Clause. The contested evidence is indistinguishable from the statements made during police questioning in response to the report of domestic violence in *Hammon v. Indiana*, decided with

strict formality position.²³ Thus, despite their approval of the holding in *Crawford*, Justices Thomas and Alito have expressed opposition to treating oral statements to the police as testimonial. Their position is contrary to the outcomes in *Hammon v. Indiana*²⁴ and *Giles*,²⁵ which both involved such oral statements. As a result, a majority of the Court now opposes finding ordinary witness statements to the police testimonial, eliminating the right of confrontation for a substantial category of the statements that lower courts routinely find within *Crawford*'s testimonial definition.²⁶

Davis v. Washington. There, as here, the police questioning was not “a formalized dialogue”; it was not “sufficiently formal to resemble the Marian examinations” because “the statements were neither Mirandized nor custodial, nor accompanied by any similar indicia of formality”; and “there is no suggestion that the prosecution attempted to offer [Ms. Avie’s] hearsay evidence at trial in order to evade confrontation.”

Id. at 377–78 (Thomas, J., concurring) (citations omitted) (quoting *Davis v. Washington*, 547 U.S. 813, 840 (2006) (Thomas, J., concurring in the judgment and dissenting in part)).

²³ In his *Giles* concurrence, Justice Alito wrote “separately to make clear that, like Justice Thomas, [he was] not convinced that the out-of-court statement at issue [t]here fell within the Confrontation Clause in the first place.” *Id.* at 378 (Alito, J., concurring).

²⁴ In addition to a written statement by the victim, *Hammon* involved the police officer’s testimony regarding what she orally told him. *See Davis*, 547 U.S. at 820. Given the position Justice Alito took in *Giles* to associate himself with Justice Thomas’ view, it is somewhat inexplicable that he joined the *Davis* opinion rather than joining Justice Thomas’ concurring opinion. *See id.* at 840 (Thomas, J., concurring) (noting the oral statement given to the police in *Hammon* lacked sufficient formality to be considered testimonial).

²⁵ In *Giles*, Justices Thomas and Alito joined the opinion because the state had not contested the testimonial character of the statement to police. *Giles*, 554 U.S. at 377 (Thomas, J., concurring); *Id.* at 377 (Alito, J., concurring).

²⁶ These two justices diverge, however, in their view of the propriety of treating forensic certificates as testimonial, Justice Thomas supporting that treatment and Justice Alito opposing it. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530, 2543 (2009) (Justice Thomas joining Justice Scalia’s opinion and Justice Alito joining Justice Kennedy’s dissent); *see also Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709, 2723 (2011) (Justice Thomas joining Justice Ginsburg’s majority except as to two parts and Justice

Let's imagine that the Court considers in its next term an oral statement to a police officer by a victim, and the prosecution challenges the testimonial quality of the oral statement on grounds that included its lack of formality. Were it not for stare decisis, the Court would presumably find the statement not testimonial by a vote of 5 to 4. Justice Thomas would join the four who dissented in *Melendez-Diaz* and *Bullcoming*—Roberts, Breyer, Kennedy, and Alito—to form a five-justice majority that would find the statement outside the testimonial definition. The newly reshaped doctrine would bar only the formally testimonial statements endorsed by Justice Thomas in his *White* concurrence, which include formal written statements, forensic certificates, and other formal testimonial documents of the type covered by *Melendez-Diaz*, as well as recorded interrogations at the stationhouse of the type involved in the *Crawford* case.²⁷ However, assuming a commitment to stare decisis is sufficient to preserve the *Hammon* and *Giles* results, there appears to be a sustainable majority for *Crawford*'s basic testimonial statement approach, albeit with a limited reach.

Justice Sotomayor provides the swing vote to shape the testimonial doctrine. Her opinion in *Bryant* effectively narrowed the scope of testimonial statements by expanding the meaning of ongoing emergency and enlarging the factors, including hearsay exceptions, relevant to a testimonial determination. She supported the *Melendez-Diaz* concept, but she suggested limitations on that aspect of the doctrine through her concurring opinion in *Bullcoming*.²⁸

Alito joining Justice Kennedy's dissent).

²⁷ It is a substantial question whether that retrenchment would cause the Court to overrule the *Crawford* doctrine and start over, or maintain the dramatically restricted doctrine going forward.

²⁸ *Bullcoming*, 131 S. Ct. at 2720–23 (Sotomayor, J., concurring). Certiorari was granted a few days later to resolve the issue identified in her concurring opinion of whether testimonial documents are covered by the Confrontation Clause when used for the traditional non-hearsay purpose of supporting the opinion of a testifying expert. See *People v. Williams*, 939 N.E.2d 268 (Ill. 2010), cert. granted, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8505).

III. RESULTS IN CHILDREN'S CASES

I will not restate here why I find analysis that focuses on the compromised intent or expectation of the child because of developmental limitations to be practically unhelpful,²⁹ or why I conclude there is no reason to create a general exception for treating children as witnesses covered by the Confrontation Clause.³⁰ Where the declarant is a child, *Davis* effectively shifts

²⁹ See Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 975–84 (2007).

³⁰ At this symposium, Professor Richard Friedman continued to argue for developing a general exception to treating young children as witness even when they make clearly accusatory statements to law enforcement officials because he contends their statements are qualitatively different from those made by adults and outside the definition of testimonial utterances. His proposal would eliminate all protections against these accusatory statements under the Confrontation Clause. He develops his generalized argument from the aberrational case of *State v. Webb*, 779 P.2d 1108 (Utah 1989). See Richard D. Friedman & Stephen J. Ceci, *The Child Quasi-Witness* (Nov. 11, 2011) (unpublished manuscript) (on file with the Journal of Law and Policy); see also Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 272 (2005). *Webb* involved virtually incomprehensible words uttered by an eighteen-month child, 779 P.2d at 1108–09, which the state court ultimately held were insufficient as a matter of state law to support a guilty verdict. *Id.* at 1115.

As I have set out in an earlier article, when one reads the vast range of cases, particularly criminal cases, that involve the words of children presented through their hearsay statement, one finds these statements to be comprehensible assertions of functioning human beings with purposeful communicative abilities. They are not, I contend, mere pieces of evidence that are distinct in kind from the statements of adults. See Mosteller, *supra* note 29, at 975–76. Professor Friedman's proposal, which unfortunately is not carefully cabined to the aberrational case, is ill-conceived and destructive of the limited confrontation rights defendants enjoy under the testimonial approach. His contention that the destruction of Confrontation Clause protections in this area would be offset by the creation of a right of examination of the child by a defendant-selected expert under the Due Process Clause is unfortunately highly unlikely under existing doctrine or as a matter of legislative grace in a world of constrained resources. Moreover, he provides no theory for a necessary link between his proposed destruction of Confrontation Clause coverage for children's statements and creation of this new right. If there is a right of expert examination of children, it should

the court's analysis of whether a statement is testimonial from the declarant's purpose in giving a statement to the purpose of the questioner. Although Justice Scalia, citing Professor Richard Friedman's work, contends that "[t]he declarant's intent is what counts,"³¹ the Supreme Court in *Bryant* stated that "*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator."³² In my view, courts analyze the intent of the questioner in children's cases because that perspective has some potential to give the inquiry an objective base and avoid easy manipulation of outcomes.³³

A. Statements to Police

In cases involving child declarants, statements to police are generally treated as testimonial because children are typically not

already have been recognized, particularly in the myriad of situations where the right of confrontation is not presently protected. Finally, courts can embrace his destruction of the Confrontation Clause right under his argument that such children's statements are not testimonial even for accusatory statements made by children to government investigators without providing any compensating protection, and I fear that if they do anything with his proposal, this one-way denial of confrontation protection will be the result.

³¹ *Michigan v. Bryant*, 131 S. Ct. 1143, 1168 (Scalia, J., dissenting) (citing Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 259 (2005)).

³² *Id.* at 1160 (majority opinion).

³³ In an earlier article, I elaborated on my analysis as follows:

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. I suggest that [they] 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.

Mosteller, *supra* note 29, at 980 (citations omitted).

accessible to the police until after an ongoing emergency has concluded. However, *Bryant* may alter that result at the margins and potentially work more substantial changes in outcomes through its invitation to lower courts to apply an open-textured, multifactor analysis.

In an earlier article, I wrote:

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 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.³⁴

The cases treat statements to the police as nontestimonial in the unusual situation where the police encounter the child in an undefined situation or a clear emergency.³⁵ The *Bryant* decision

³⁴ See *id.* at 949–50. In *Wright v. State*, 673 S.E.2d 249, 253 (Ga. 2009), the Georgia Supreme Court found that statements made by a child, who was three or four at the time of the statement, were testimonial when made in response to an officer's question regarding "what happened." *Wright*, 673 S.E.2d at 253. The child's mother had a bruise on her face. This conclusion was reached without extended analysis apparently because it was straightforward in the absence of evidence presented regarding an ongoing emergency. *Id.*

³⁵ In *Commonwealth v. Patterson*, 946 N.E.2d 130, 134 (Mass. App. Ct. 2011), the Massachusetts Appeals Court ruled nontestimonial the statements of a five-year-old child as the officers walked into what the court described as a "volatile and unstable scene of domestic disturbance." The child stated: "He pushed Mommy into the wall. He had a gun." *Id.* at 132. The statement was made spontaneously, without police questioning. The court concluded that there was nothing to indicate that it was made for any purpose other than securing aid.

Lagunas v. State, 187 S.W.3d 503 (Tex. Ct. App. 2005), which was decided before the *Davis* decision, presents a fact pattern resembling an ordinary criminal case more than the typical child sexual abuse case. The child's mother had been kidnapped from her home where a four-year-old

is unlikely to change the outcome in the typical situation, since no ongoing emergency will exist at the time the police have their first conversation with the child. However, *Bryant* will certainly add some flexibility for courts to find initial statements by a child to law enforcement officers to be nontestimonial by expanding the definition of an ongoing emergency to include those where the potential dangers to the child or the child's condition, for example, have not been fully clarified.

Questioning by law enforcement may serve many nontestimonial purposes. *Bryant* recognized that the existence or nature of the declarant's injuries might be relevant to the primary purpose inquiry enunciated in *Davis*.³⁶ The police may also want to learn the identity of the perpetrator to determine whether he remains a threat to other children or to the victim herself. If they are uncertain of the accuracy of information provided by adults caring for or having access to the child, the police may also want to confirm with the child the identity of the perpetrator.

In most situations, those issues will be clearly resolved before the officers gain their first access to the child. In other cases, where a known perpetrator "flee[s] with little prospect of posing a threat to the public," as occurred in both *Illinois v. White*³⁷ and *Davis*, there is a diminished likelihood that an emergency continues. Nevertheless, after *Bryant*, arguments that a declaration by a child is nontestimonial will be quite plausible in a number of standard situations, such as where the perpetrator

child remained. A police officer returned to the home after the mother escaped, where he found the child. The officer asked the child "what happened to her mommy. And she stated that 'A bad man had killed her and took her away.'" *Id.* at 508. The court concluded that the initial question was not testimonial because the officer's questions were 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 officer also asked follow-up questions, which might be treated as testimonial, as the Supreme Court in *Davis* treated the victim's statements after the defendant had left the premises. *See Davis*, 547 U.S. at 828.

³⁶ *See Bryant*, 131 S. Ct. at 1159.

³⁷ *Illinois v. White*, 502 U.S. 346, 349 (1992) (describing the babysitter being awakened by the child's screams and seeing the defendant first leave the child's room and then the house).

remains unidentified, may be a member of the household, or may potentially have continuing access to the child or other children. Indeed, before *Bryant*, in response to arguments of this type, courts found these statements to be nontestimonial because the period of the emergency was extended, and social workers were seen as questioning the child to meet their responsibility for her safety and welfare.³⁸ After *Bryant*'s general expansion of the scope of emergencies and the types of concerns viewed as included in police questioning directed to resolving those emergencies, arguments of this sort will likely have more persuasive power if made regarding police inquiries of the child.

Justice Scalia's dissent in *Bryant* may have overstated the impact of the case on the *Crawford* testimonial doctrine. However, the opinion's one clear impact is the signal it sends to lower courts, particularly trial courts, that the line between testimonial and nontestimonial statements is not clear. This is the case even when the statement was made to law enforcement officers regarding past criminal events, and the testimonial quality of the statement is subject to a fact-dependent and uncertain analysis. My sense is that in the wake of the *Davis* opinion, courts have consistently ruled that statements by

³⁸ In *Commonwealth v. Allshouse*, 985 A.2d 847, 857–58 (Pa. 2009), cert. granted, vacated, 131 S. Ct. 1597 (2011), the Pennsylvania Supreme Court ruled that questioning by a county caseworker a week after an assault was nontestimonial because it was for the purpose of ensuring children's safety given unresolved issues about who was the person responsible for the assault. On remand from the United States Supreme Court after *Bryant*, the Pennsylvania Supreme Court affirmed the result on largely the same grounds, albeit slightly broader grounds invited by *Bryant*. See *Allshouse*, 36 A.3d at 176–82 (Pa. 2012). Similarly, in *State v. Buda*, 949 A.2d 761, 778–80 (N.J. 2008), the New Jersey Supreme Court found that questioning by a member of a special response team from the Division of Youth and Family Services was not testimonial because it was for the purpose of determining how to protect a injured child from the source of his injuries, which appeared to be the adults charged with his care. See generally Christopher C. Kendall, Note & Comment, *Ongoing Emergency in Incest Cases: Forensic Interviewing Post Davis*, 10 WHITTIER J. CHILD & FAM. ADVOC. 157, 170–80 (2010) (arguing that in cases of incest the gathering of data to determine the identity of the perpetrator and to protect the child from continued victimization should be treated as nontestimonial because its purpose is to meet an ongoing emergency).

children to law enforcement officers are testimonial, despite disliking the outcome, because they conclude that there are no credible alternative interpretations. This consistency in treating such statements as testimonial is in contrast to the early decisions after *Crawford* when a number of courts latched onto widely varying arguments in an apparent attempt to avoid finding the statements excluded under the Confrontation Clause.³⁹ Whatever else results from *Bryant*, it provides judges with multiple additional grounds⁴⁰ on which to justify admission when they are concerned about the consequences of excluding hearsay statements to the police, even those previously clearly testimonial statements made by children in relatively settled situations. Consistency will predictably diminish with regard to the admissibility of children's statements to the police.⁴¹

B. Statements to Family Members and Friends

Statements to parents, family members, and friends are uniformly considered not testimonial. This result was solidified after *Davis* established that the primary purpose of the questioner was relevant. Courts freely assume that private individuals generally, and family members in particular, ask questions of the child for the primary purpose of ensuring the health and welfare of the child rather than prosecuting the

³⁹ See, e.g., *State v. Forrest*, 596 S.E.2d 22, 27–29 (N.C. Ct. App. 2004), *aff'd*, 611 S.E.2d 833 (N.C. 2005) (ruling statement by victim to police officer not testimonial because not sufficiently formal in that it was spontaneous and made in the field), *cert. granted, vacated*, 548 U.S. 923 (2006) (remanding “for further consideration in light of *Davis*”).

⁴⁰ See *Bryant*, 131 S. Ct. at 1175–76 (Scalia, J., dissenting) (listing the many types of factors to be considered by the trial court under the Court's newly established open-ended and amorphous definition of an ongoing emergency).

⁴¹ The implications of *Bryant* are likely to be felt in other areas as well. Statements to multidisciplinary teams, discussed later, *see infra* Part IV, which are frequently videotaped and introduced at trial, are not testimonial if made primarily for a medical purpose and if made during an ongoing emergency, both of which may be broadly construed after *Bryant*. They are testimonial if made for a clearly forensic purpose, and clarity may be difficult to find in *Bryant*'s wake.

perpetrator, even though both purposes are logically of concern.⁴²

Some lower courts have identified a more fundamental dichotomy, which the Supreme Court has certainly not rejected: statements to private individuals are categorically not testimonial,⁴³ except in the rare situation where they were made purposefully to avoid the making of what would be considered a testimonial statement.⁴⁴ In *Michigan v. Bryant*,⁴⁵ Justice

⁴² In *State v. Ahmed*, 782 N.W.2d 253, 259 (Minn. Ct. App. 2010), the Minnesota Court of Appeals concluded that a statement made to the child's grandmother outside an interview room was not testimonial. Its result was justified under both a far-reaching approach that the statement was nontestimonial because not made to a government official and a traditional approach regarding the purpose of the questioning. *Id.* Utilizing the traditional interpretation, it recognized that the child was expressing pain to a close relative from whom he expected help and comfort, albeit a statement made just outside the room where a formal interview by governmental officials was to occur. *Id.* Similarly, in *State v. Hopkins*, 154 P.3d 250, 256 (Wash. Ct. App. 2007), the Washington Court of Appeals ruled that a child's statement made to her family members was not testimonial because the questioners were not contemplating prosecution of a criminal case but rather were concerned about her physical well-being and future safety.

⁴³ In *Ahmed*, the Minnesota Court of Appeals stated that "[s]tatements made to nongovernmental questioners, who are 'not acting in concert with or as an agent of the government' are considered nontestimonial." *Ahmed*, 782 N.W.2d at 259 (quoting *State v. Scacchetti*, 711 N.W.2d 508, 514-15 (Minn. 2006)). Similarly, in *State v. Coder*, 968 A.2d 1175 (N.J. 2009), the New Jersey Supreme Court stated the inference negatively: "neither mother acted 'predominantly as an agent/proxy or an operative for law enforcement in the collection of evidence of past crimes for use in a later criminal prosecution, circumstances that may well render the hearsay statements thereby procured testimonial under *Crawford*.'" *Id.* at 1186 (quoting *Buda*, 949 A.2d at 779-80).

The Supreme Court of Tennessee in *State v. Franklin*, 308 S.W.3d 799, 816 (Tenn. 2010), entertained making a ruling that statements made to private parties are *per se* not testimonial. However, following the lead of the Supreme Court of Kansas in *State v. Brown*, 173 P.3d 612, 633 (Kan. 2007), it chose to avoid resting its result exclusively on that ground and instead applied a multi-factored analysis. *Franklin*, 308 S.W.3d at 818.

⁴⁴ In *Davis*, Justice Thomas acknowledged that statements to private individuals, which he believed were generally excluded from the class of testimonial statements, had to be considered testimonial if made to avoid the protections of the Confrontation Clause. He stated his position as follows:

Sotomayor noted that the Court in *Davis* had “explicitly reserved the question of ‘whether and when statements made to someone other than law enforcement personnel are “testimonial.””⁴⁶ She remarked that Justice Scalia in his dissent had supported one of his arguments with *King v. Brasier*,⁴⁷ a Framing-era English case involving a statement made by a child to her mother, a private citizen, just after the child had been sexually assaulted. However, Justice Scalia responded that he “remain[ed] agnostic about whether and when statements to nonstate actors are testimonial.”⁴⁸

The citation of *Brasier* has implications for several major issues of confrontation interpretation. As I have noted earlier, *Brasier* is a difficult case to analyze from an originalist point of view because at the time the Sixth Amendment was framed, the published version of the opinion discussed the competency of a young child to testify, without addressing hearsay and confrontation.⁴⁹ However, Scalia quotes from a version of the case published some decades later. In this later version, the facts had been revised to indicate that the case involved a hearsay accusation by the child presented in court by her mother and another witness, which the English court ruled could not be received.⁵⁰ If accepted as part of the originalist foundational understanding of excluded hearsay at the time of the Constitution’s framing, *Brasier* would alter current confrontation outcomes substantially. The statement of the child to her mother

“Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through use of *ex parte* statements as evidence against the accused, it also reaches the use of technically informal statements when used to evade the formalized process.” *Davis v. Washington*, 547 U.S. 813, 838 (2006) (Thomas, J., dissenting).

⁴⁵ *Bryant*, 131 S. Ct. 1143.

⁴⁶ *See id.* at 1155 n.3.

⁴⁷ *King v. Brasier*, (1779) 168 Eng. Rep. 202 (K.B.) 202–03; 1 Leach 199. She also commented that Chief Justice Rehnquist had cited it in *Crawford*. *See Crawford v. Washington*, 541 U.S. 36, 69–70 (2004) (Rehnquist, J., concurring). Justice Scalia had previously cited *Brasier* in *Davis*. *See Davis*, 547 U.S. at 828.

⁴⁸ *Bryant*, 131 S. Ct. at 1169 n.1 (Scalia, J., dissenting).

⁴⁹ *See Mosteller*, *supra* note 29, at 927–29.

⁵⁰ *Brasier*, 168 Eng. Rep. at 203; 1 Leach at 200.

and another private individual in *Brasier* are similar to those generally ruled nontestimonial by modern courts, but in *Brasier*, the statements were seen as equivalent to testimony. *Brasier's* existence and citation are unlikely to have such a profound effect as to alter all these outcomes. I suspect that the broader interpretation will be ignored.⁵¹

Indeed, the Court may well treat as nontestimonial all statements to private parties. Shortly after *Crawford* was decided, a few courts took that position. In *State v. Geno*,⁵² for example, the Michigan Court of Appeals ruled that a statement made by a child to the executive director of the local Children's Assessment Center was nontestimonial, relying heavily on the fact that the person receiving the information was a private individual.⁵³ This change or clarification of confrontation law would have a substantial effect. Many, likely most, individuals who receive accusatory statements from children are private individuals, and many organizations that conduct interviews of children are private nonprofit agencies and private organizations, such as hospitals.

The New Jersey Supreme Court's opinion in *State v. Buda*⁵⁴ goes a bit further and considers statements nontestimonial if made even to government investigators when they are not enforcing the criminal law. This more subtle distinction was made in a case involving questioning by an employee of the Office of Child Abuse Control at the Division of Youth and Family Services ("DYFS"): the court ruled that the statements were not testimonial because the questions were asked for a protective purpose. In the discussion of the work done by the interviewer, the court stated that the investigative role of the interviewer was civil in nature—as opposed to the criminal purpose of law enforcement—despite the fact that these civil and criminal systems were both operating against a defendant. The court concluded that "our inquiry is informed by the explicit recognition that a DYFS worker acting in a proper civil role

⁵¹ See Mosteller, *supra* note 29, at 931–32.

⁵² *State v. Geno*, 683 N.W.2d 687 (Mich. Ct. App. 2004).

⁵³ *Id.* at 692.

⁵⁴ *State v. Buda*, 949 A.2d 761 (N.J. 2008).

does not trigger considerations that are unique to criminal trials, including the Confrontation Clause.”⁵⁵ Conceivably, the Supreme Court could rule that only criminal investigations conducted by law enforcement agents and those working in explicit cooperation with them are even potentially testimonial. While this would have little impact in most traditional criminal prosecutions, it would potentially change many of the current standard responses in children’s cases and sexual assault cases where governmental employees at social service agencies are frequently involved in interviews.

C. Statements to Doctors

In *Bryant*, the Court stated:

When, as in *Davis*, the primary purpose of an interrogation is to respond to an “ongoing emergency,” its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.⁵⁶

More specifically, the Court stated in *Giles* that “statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules.”⁵⁷ Thus, when doctors receive statements in the course of treatment, those statements are nontestimonial. In *People v. Duhs*,⁵⁸ a doctor treated a three-year-old child in the emergency room for second- and third-degree burns to his feet. During the course of the examination,

⁵⁵ *Id.* at 779.

⁵⁶ See *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011).

⁵⁷ *Giles v. California*, 554 U.S. 353, 376 (2008).

⁵⁸ *People v. Duhs*, 947 N.E.2d 617 (N.Y. 2011).

the doctor asked the child how he had been injured to properly administer treatment. The New York Court of Appeals stated that

it is of no moment that the pediatrician may have had a secondary motive for her inquiry, namely, to fulfill her ethical and legal duty, as a mandatory reporter of child abuse, to investigate whether the child was potentially a victim of abuse. Her first and paramount duty was to render medical assistance to an injured child.⁵⁹

In an earlier article, I suggested that a broad reading should be given to medical purpose, which would usually include the identity of the perpetrator when statements are elicited during the initial medical exam or exams.⁶⁰ This appears to be the pattern in the lower courts, and with the liberalizing impact of *Bryant*, one would assume at least such a broad interpretation would continue. However, simply citing the term “medical purpose” should not be a talisman. For example, an examination by a psychologist rather than a medical doctor secured weeks after an injury at the behest of law enforcement or a social service agency should have no presumption of nontestimonial status.⁶¹ Similarly, after the treatment inquiry has been completed, later interviews by medical personnel gathering evidence for prosecutions should be considered testimonial even though it is secured by medical personnel.⁶²

⁵⁹ *Id.* at 620; *see also, e.g.*, *People v. Cage*, 155 P.3d 205, 218–22 (Cal. 2007) (ruling that response to question “what happened” from emergency room physician treating the victim for a laceration to his face and neck was nontestimonial and finding that reporting requirement for abuse does not transform doctors into investigative agents); *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008) (making a similar nontestimonial ruling for statements made by a rape victim to a nurse in the emergency room).

⁶⁰ Mosteller, *supra* note 29, at 950–57. *But see* David J. Carey, *Reliability Discarded: The Irrelevance of the Medical Exception to Hearsay in Post-Crawford Confrontation Clause Jurisprudence*, 64 N.Y.U. ANN. SURV. AM. L. 653 (2009) (protesting the effective expansion of medical hearsay exception and its use as a basis for exclusion of statements from testimonial concept).

⁶¹ *See* *Commonwealth v. Allshouse*, 985 A.2d 847, 858–59 (Pa. 2009), *cert. granted, vacated*, 131 S. Ct. 1597 (2011) (not reaching the issue with regard to a psychologist interview two weeks after injury because it would have been harmless in any case).

⁶² *See Cannon*, 254 S.W.3d at 305 (ruling that statements to sexual

D. Statements to Social Workers

Social workers for departments of social services generally have responsibilities that overlap with law enforcement duties, and statutes frequently require coordination between the two groups.⁶³ Whether statements secured by social workers investigating potential abuse are testimonial depends on whether the statements are secured for the purpose of ensuring the child's safety and well-being, or collecting information about past events for prosecutorial purposes.⁶⁴ The degree of coordination with, and involvement by, the police can be critical.⁶⁵ However, because it demonstrates the existence of an ongoing emergency, the most important factor, where it exists, is a genuine and immediate need to assess the circumstances for the purpose of protecting the child, which renders the statement nontestimonial under the rationale of *Davis*.

In *Bobadilla v. Carlson*,⁶⁶ the Court of Appeals for the Eighth Circuit found an interview testimonial despite arguments by the government that the purpose was the welfare of the child, relying heavily on the lack of an ongoing emergency and the absence of an immediate need for protective action. The interview took place five days after the abuse, which was seen by the court as strong evidence that the purpose was to confirm past allegations of abuse rather than to assess immediate threats to the child's health and welfare.⁶⁷ A similar result was reached

assault nurse examiner subsequent to treatment in the emergency room were testimonial).

⁶³ See, e.g., MINN. STAT. § 626.556(3)(f) (2011); see also *Bobadilla v. Carlson*, 575 F.3d 785, 792–93 (8th Cir. 2009).

⁶⁴ See *State v. Buda*, 949 A.2d 761, 780 (N.J. 2008).

⁶⁵ See *Bobadilla*, 575 F.3d at 791–92; see also *Styron v. State*, 34 So. 3d 724, 732 (Ala. Crim. App. 2009).

⁶⁶ *Bobadilla*, 575 F.3d at 791.

⁶⁷ See *id.* at 791; see also *Styron*, 34 So. 3d at 732 (noting that the interview did not occur until four days after the report of molestation). Time must be evaluated relative to the information about the nature of the threat to the child's safety. In *Commonwealth v. Allshouse*, 985 A.2d 847, 858 (Pa. 2009), although a week had passed from the time of the abuse, the statement was ruled nontestimonial because the interview occurred only a day after the social worker received information that the threat to the child was from a

in *State v. Hopkins*, involving statements made by a child when a social worker visited the child for a second time after the child had made new disclosures regarding abuse.⁶⁸ There, the court found that, although the second interview could be construed as protecting the child, it was far removed from the initial emergency and produced incriminating statements, and therefore was testimonial.⁶⁹ By contrast, in *State v. Buda*,⁷⁰ concern for the child's safety was ongoing at the time of the interview since the social worker had reason to conclude the battered child needed protection from the adults charged with her basic care.⁷¹

IV. MULTIPURPOSE STATEMENTS

As the Court's opinion in *Davis* concluded, a single statement—there, a call to a 911 operator—can have multiple purposes.⁷² In child sexual abuse cases, many statements can have multiple purposes, including statements made to sexual assault nurses. I will concentrate on a specialized form of the multipurpose statement. In child abuse cases, many jurisdictions have developed procedures for videotaped interviews that serve the purposes of multiple organizations. The recorded statement produced for these multiple parties is designed to reduce the number of times a child must be interviewed. Determining how to treat these interviews, and specifically the issue of their primary purpose, presents a challenge. The interview procedures create a record that serves very effectively as evidence at trial. It also has the potential nontestimonial purposes of protecting the child from future harm and facilitating treatment.

Although the treatment of such an interview depends on the specific facts of the particular case, a large number of courts

person with immediate access to the child.

⁶⁸ *State v. Hopkins*, 154 P.3d 250 (Wash. Ct. App. 2007).

⁶⁹ *Id.* at 256–58.

⁷⁰ *State v. Buda*, 949 A.2d 761 (N.J. 2008).

⁷¹ *Id.* at 778–80.

⁷² *See Davis v. Washington*, 547 U.S. 813, 828 (2006) (stating that a conversation that begins as an interrogation to determine the need for emergency assistance can evolve into testimonial statements once the initial purpose has been achieved).

have found these statements to be testimonial, determining that there was no ongoing emergency and the primary purpose was to prove past facts for prosecution.⁷³ However, the decisions of two state supreme courts that use differing modes of assessment for the primary purpose analysis illustrate the uncertainty of outcomes that is likely only to be exacerbated by the *Bryant* decision.

In *In re S.P.*,⁷⁴ the Supreme Court of Oregon concluded that an interview conducted by CARES Northwest, a child abuse assessment center, was testimonial. It recognized the evaluation served a dual purpose for the child, referred to as N.

N's statements were necessary to provide an accurate diagnosis of whether N had been abused, but they were also necessary to develop and preserve evidence of the alleged abuse for later presentation in juvenile court. The two purposes "are concurrent and coequal; both are 'primary' in the sense that neither takes precedence over the other."⁷⁵

The *S.P.* court resolved the dual purpose by concluding that this agency, which acts as a proxy for the police, conducts the type of ex parte examinations that trigger Confrontation Clause protection. The court, therefore, concluded that statements by the child describing the abuse and identifying the perpetrator were testimonial.⁷⁶

⁷³ See, e.g., *State v. Contreras*, 979 So. 2d 896, 905 (Fla. 2008) ("[T]he primary, if not the sole, purpose of the [Child Protection Team] interview was to investigate whether the crime of child sexual abuse had occurred, and to establish facts potentially relevant to a later criminal prosecution."); *In re Rolandis G.*, 902 N.E.2d 600, 613 (Ill. 2008) ("Furthermore, since there is no indication that the primary purpose of the interview was for treatment and because [the child] was no longer in any danger from the respondent, it must be concluded that the main purpose of the interview was to gather information about past events for potential future prosecution.").

⁷⁴ *In re S.P.*, 215 P.3d 847 (Or. 2009).

⁷⁵ *Id.* at 864 (quoting *State ex rel. Juvenile Dep't of Multnomah Cnty. v. S.P.*, 178 P.3d 318, 330 (Or. Ct. App. 2008)).

⁷⁶ *Id.* at 865. In *State v. Moreno-Garcia*, 260 P.3d 522, 527 (Or. Ct. App. 2011), the Oregon Court of Appeals stated that "[a]lthough we agree with the state that CARES's functions are diagnostic and forensic, the forensic aspect is pervasive."

In *State v. Arnold*,⁷⁷ the Supreme Court of Ohio examined an interview by an employee of a Child Advocacy Center (“CAC”). The court considered the objectives of the interview to be neither exclusively for purposes of medical diagnosis or treatment, nor solely for forensic investigation.⁷⁸ The court took the view that neither police officers nor medical personnel in the multidisciplinary team became agents of the other and that the single interviewer acted as an agent of each team. The court ruled that statements made for medical diagnosis and treatment were nontestimonial. It ruled that other statements that served primarily a forensic or investigative purpose were testimonial. The court directed the lower courts to sort these statements out within the interview rather than treating them under a single category.⁷⁹

The Supreme Court's decision in *Bryant* may be read by courts to provide flexibility to make just this type of rule. However, *Bryant* did not suggest that emergencies continue forever, and it did not give license to courts to ignore the fact that an interview had only forensic purposes. *Bryant* will, nevertheless, push the dividing line at the margin in the direction of a nontestimonial determination.⁸⁰

⁷⁷ *State v. Arnold*, 933 N.E.2d 775 (Ohio 2010).

⁷⁸ *Id.* at 782–83.

⁷⁹ *Id.* at 785–86. Albeit supposedly applicable only to hearsay analysis and not Confrontation Clause treatment, the Supreme Court of New Mexico pulled back from a categorical approach that excluded “medically pertinent statements just because they were made to a [sexual assault nurse examiner] when those same statements would be admissible if made to a doctor or to a nurse in the emergency room.” *State v. Mendez*, 242 P.3d 328, 339 (N.M. 2010). Instead, it directed the courts to consider the substance and circumstances surrounding each individual statement, determining in each instance the purpose for which each was made. *Id.* at 339. *Mendez* overruled in part *State v. Ortega*, 175 P.3d 929 (N.M. 2007). See Kimberly Y. Chin, Note, “Minute and Separate”: Considering the Admissibility of Videotaped Forensic Interviews in Child Sexual Abuse Cases After Crawford and Davis, 30 B.C. THIRD WORLD L.J. 67, 99 (2010) (arguing for an approach that examines the videotaped interview closely and excludes only the specific portions that are testimonial).

⁸⁰ In *State v. Cannon*, 254 S.W.3d 287, 304–05 (Tenn. 2008), the Tennessee Supreme Court held that the statements made by the victim to the

By contrast, the decision in *S.P.* has the very different effect of correcting what I see as a fundamental error in the effective burden of showing that a statement should enjoy Confrontation Clause protection. Most lower courts understood the *Davis* opinion to require that the defense show that the primary purpose of the interrogation was to create a testimonial statement. In essence, *S.P.* stands for the proposition that a statement is testimonial if one of the purposes of the interrogation was to create a testimonial statement. That allocation of the burden is the appropriate one in enforcing this constitutional right. The defendant should have a constitutional right to confront statements which were made with a substantial or significant purpose of creating a testimonial statement, or where that purpose was a clear motivating factor. Nothing about the structure or effect of the fundamental confrontation right suggests that it should be applied with reluctance, or indicates that a heavy burden should be placed on the defendant in claiming its application.⁸¹ However, even before the negative impact on Confrontation Clause protection that I anticipate from the *Bryant* decision, the cases did not recognize the importance of allocating the burden to the prosecution to show investigation of a crime was not a significant purpose, nor a trend to follow the path of *S.P.*

nurse in the emergency room were not testimonial but those made to the sexual assault nurse examiner were testimonial. It stated: “We caution, however, that our conclusion in this case should not be interpreted as a blanket rule characterizing as testimonial all the portions of all out-of-court statements given by sexual assault victims to sexual assault nurse examiners.” *Id.* at 305. It suggested that in other cases, the interview may move from nontestimonial to testimonial, and trial courts should redact some portions of the interview rather than exclude it all. *Id.* Use of the latter approach that admits much of these interviews is likely to increase after *Bryant*.

⁸¹ The analysis that I suggest should be followed is similar to that illustrated by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). There in the employment discrimination context, the Court determined that discrimination had been shown if the plaintiff showed that it was a “motivating factor” or “substantial factor” in the adverse employment action rather than the sole factor that was required under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

V. OTHER ISSUES

Courts in children's cases have continued to make some progress in addressing a range of issues raised in eliciting statements outside of court, and in presenting children's testimony when they appear at trial and are cross-examined. However, courts have largely failed to provide ways to facilitate meaningful confrontation in particularly challenging circumstances.

A. Application of Melendez-Diaz Concepts in Children's Cases

Under *Crawford's* testimonial doctrine, when a witness takes the stand and repeats an out-of-court statement that she has heard, the Confrontation Clause is implicated only if the statement being repeated by this "ear witness" was testimonial in nature. Thus, if a doctor takes the stand and repeats a child's statement made to secure medical treatment, or if a grandmother takes the stand and repeats her granddaughter's statements about sexual abuse elicited out of concern for the child's welfare, no constitutional violation has occurred. The nontestimonial nature of the declarant's statement means that it is exempt from scrutiny under the confrontation doctrine.

However, the "ear witness" must testify. If instead, the child's statements are presented through a document prepared by the "ear witness" with an expectation that it would be used as a record of past events for potential use in a criminal prosecution, then the Confrontation Clause is violated. This is not because the nature of the declarant's original statement was testimonial, but because the repetition of that statement occurs in the form of a testimonial statement from the nontestifying "ear witness."

In *Vega v. State*,⁸² the Supreme Court of Nevada ruled that the Confrontation Clause was violated when the content of a report of a sexual abuse examination by a nurse at a county child advocacy center was introduced through a doctor.⁸³ The

⁸² *Vega v. State*, 236 P.3d 632 (Nev. 2010).

⁸³ *Id.* at 637-38.

court focused on whether an objective witness would reasonably have believed that the nurse's statement would be available for use at a later trial.⁸⁴ In *Green v. State*,⁸⁵ the Maryland Court of Special Appeals found the report of a sexual assault forensic examiner ("SAFE") to be testimonial using the same reasoning.⁸⁶

This issue is similar to, but distinct from, the analysis used when determining the primary purpose of the interrogation. In *Melendez-Diaz*, Justice Scalia noted that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial."⁸⁷

Justice Scalia is not describing an emergency purpose for the initial statement, but is resting the decision on the fact that the document reciting that statement was created for a nontestimonial purpose. The appropriate inquiry is whether the document was prepared with an understanding that it would be available for use at a later trial. In this inquiry, the intent of the declarant is irrelevant, because the testimonial act is that of the recorder in writing down the statement to be presented in court, not of the declarant in making the initial statement. Multiple-purpose statements that are videotaped do not present this issue because the words of the initial declarant are mechanically reproduced in court. However, when it is memorialized through the potentially selective and inaccurate words of the interviewer, the same interview should be treated as testimonial if the person creating the written document understood that its purpose was to constitute evidence.

⁸⁴ *Id.* at 638 (applying *Crawford* and *Melendez-Diaz*, rather than the primary purpose test under *Davis*).

⁸⁵ *Green v. State*, 22 A.3d 941 (Md. Ct. Spec. App. 2011).

⁸⁶ *Id.* at 950–56.

⁸⁷ *Melendez-Diaz*, 129 S. Ct. 2527, 2539–41 (2009). He also observed that medical reports created for treatment purposes would not be testimonial. *Id.* at 2533 n.2.

*B. Requirement of the Prosecution Calling the Witness
Rather than Mere Availability to Satisfy Confronting
the Witness*

In *Crawford*, the Supreme Court stated: “we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”⁸⁸ In *Melendez-Diaz*, the Court made clear that the defendant’s ability to call the witness for cross-examination is not sufficient to satisfy the Confrontation Clause. The Court stated that

the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.⁸⁹

These principles should require that children be called to the stand by the prosecution before their statements may be introduced under this “present confrontation” exception to *Crawford*. I encourage use of this procedure in preference to loss of evidence to the prosecution and denial of confrontation to the defendant. To some readers, the insistence that children be called and, as discussed in the next section, questioned by the prosecution on direct about the crime and be subject to cross-examination by the defense, may appear to be insensitive and to subject the victim to further victimization. Sensitivity is appropriate. However, prosecutors and researchers frequently find that children can be enabled to testify by carefully working with the child to familiarize her with the court proceedings.⁹⁰

⁸⁸ *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (citing *California v. Green*, 399 U.S. 149, 162 (1970)).

⁸⁹ *Melendez-Diaz*, 129 S. Ct. at 2540 (“[The witness] was subpoenaed, but she did not appear at . . . trial.” (quoting *Davis v. Washington*, 547 U.S. 813, 820 (2006))).

⁹⁰ See Robert P. Mosteller, *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 592 (2005); see also Eileen A.

In *State v. Caper*,⁹¹ the Louisiana Court of Appeals applied these principles. It held that the defendant's confrontation rights were violated where recorded testimonial statements of two children were presented but the children did not testify, "[a]lthough they were present at the courthouse and were available to be called as witnesses."⁹²

*C. The Meaning of "Subject to Cross-Examination" for
Compliance with Confrontation Through Current
Cross-Examination*

"Subject to cross-examination" requires the presence of the child on the stand in a situation where he or she can be asked questions, but it does require more than merely placing a child on the stand. I have argued previously for a requirement of "minimal capacity" for a witness, which most often presents an issue for very young children:

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,

Scallen, *Coping with Crawford: Confrontation of Children and Other Challenging Witnesses*, 35 WM. MITCHELL L. REV. 1558, 1575-76 (2009) (citing sources that most children are able to testify if prepared and supported in the process and that the outcome of the prosecution may have as much impact on the child's well being as whether the child testifies).

⁹¹ *State v. Caper*, 41 So. 3d 605 (La. Ct. App. 2010).

⁹² *Id.* at 607, 617. In *State ex rel. D.G.*, 40 So. 3d 409, 411 (La. Ct. App. 2010), another panel of the Louisiana Court of Appeals ruled, after the Supreme Court reversed and remanded *D.G. v. Louisiana*, 130 S. Ct. 1729 (2010), in light of *Melendez-Diaz*, that in a juvenile case where there is no jury, the prosecution making the child witness available is sufficient. The result appears plainly wrong.

courts have gone no further than *Spotted War Bonnet* in recognizing that a limit must exist, but not yet attempting a concrete definition.⁹³

In addition, two other types of relatively bright line rules should apply to how the testimony is elicited. First, the prosecution must make an effort to elicit the accusation of abuse from the child. Asking about innocuous details is not sufficient without asking about the criminal actions of the perpetrator. On the other hand, the child need not acknowledge the criminal activity, and can even deny it. However, the child must be asked about it. Such a question gives the witness an opportunity to make her accusation in the presence of the defendant and provides the jury a basis for evaluation, regardless of the answer given by the child to the prosecutor's question regarding the alleged criminal activity.⁹⁴

In addition, I contend the participation of the child in cross-examination is required, absent defense complicity in silencing the witness' responses.

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.⁹⁵

A number of cases found limited responses by young witnesses minimally sufficient. Two cases from the Illinois Appeals Court are representative. In *People v. Bryant*,⁹⁶ the seven-year-old victim described sex acts committed by the defendant under one count, but did not describe any conduct

⁹³ Mosteller, *supra* note 90, at 596 (quoting *United States v. Spotted War Bonnet*, 933 F.2d 1471, 1474 (8th Cir. 1991)). In *Cookson v. Schwartz*, 556 F.3d 647, 652 (7th Cir. 2009), the Seventh Circuit characterized *Spotted War Bonnet* as dealing with "witnesses who are 'too young' or 'too frightened' to be cross-examined."

⁹⁴ See Mosteller, *supra* note 90, at 585.

⁹⁵ Mosteller, *supra* note 29, at 991.

⁹⁶ *People v. Bryant*, 909 N.E.2d 391 (Ill. App. Ct. 2009).

satisfying the charge in another count. The court nevertheless found the child subject to cross-examination about the second count because she answered defense counsel's questions on cross-examination.⁹⁷ Similarly, in *People v. Major-Fisk*,⁹⁸ the court found a child subject to cross-examination where the child testified on direct examination that the defendant made the child sit on his hand—which could be seen as related to the conduct charged although without facts necessary to constitute a crime—and then answered all the questions posed on cross-examination by defense counsel.⁹⁹

By contrast, the requisites of confrontation and availability for cross-examination were satisfied in *People v. Learn*,¹⁰⁰ but the Illinois Appeals Court held the child's testimony inadequate. The child gave only general answers to the prosecutor's questions, but the prosecution generally attempted to elicit the accusation. The child admitted knowing the defendant, but when asked about going to the police station and whether she had been asked some questions there, she put her head down and began to cry. After a short recess, the prosecution asked whether the child felt better, to which the child responded that she did not know. The prosecution then asked no further questions.¹⁰¹ The trial court imposed no limitations on cross-examination,¹⁰² and the child answered all the questions asked by the defense on cross-examination, although defense counsel did not broach the subject of the crime with her.¹⁰³ The requisites were satisfied because the prosecution attempted to elicit the accusation from the child and the child responded to defense questions on cross-examination, which the defense apparently chose to limit to innocuous matters.

⁹⁷ *Id.* at 400.

⁹⁸ *People v. Major-Fisk*, 923 N.E.2d 324 (Ill. App. Ct. 2010).

⁹⁹ *Id.* at 336; *see also, e.g., Bush v. State*, 193 P.3d 203, 212 (Wyo. 2008) (ruling that failure of memory by child does not affect the determination that the child was subject to cross-examination under the Confrontation Clause).

¹⁰⁰ *People v. Learn*, 819 N.E.2d 1042 (Ill. App. Ct. 2009).

¹⁰¹ *Id.* at 1048–49.

¹⁰² *Id.* at 1050.

¹⁰³ *Id.* at 1057 (Hudson, J., dissenting).

These minimal requirements for availability for cross-examination will be challenging to apply, for example, when determining when a child who is predominantly unresponsive has responded sufficiently on cross-examination. Realistically, little is required beyond the presence of a minimally competent child on the stand, along with both an effort by the prosecution to secure an accusation and an opportunity for the defense to ask questions of a child who is minimally responsive.¹⁰⁴

The logistics of when to introduce the prior statement of the child, relative to the child's testimony, present challenges in assuring the defense an opportunity to cross-examine the child regarding the out-of-court statement. *Myer v. State*¹⁰⁵ dealt with the important issue of the timing of cross-examination: the Maryland Court of Appeals concluded that, when a statement is admitted after the child's testimony, the defense must be permitted to recall the child for cross-examination.¹⁰⁶

D. Alternative Methods of Achieving Confrontation

Efforts should be made to encourage confrontation rather than to focus on excluding testimony.¹⁰⁷ Any change to current doctrine that reduces confrontation is arguably problematic. However, when the only available options are the exclusion of evidence or a ruling that the defendant's confrontation rights

¹⁰⁴ This is only modestly different from the concept of the "The 'Warm Breathing Body' Rule" suggested by Professor Eileen Scallen. See Scallen, *supra* note 90, at 1575-81.

¹⁰⁵ *Myer v. State*, 943 A.2d 615 (Md. 2008).

¹⁰⁶ *Id.* at 626-29; *cf.* *Hernandez v. Schuetzle*, No. 1:07-cv-056, 2009 WL 395781, at *28 (D.N.D. Feb. 17, 2009) (indicating skepticism of the state's argument that the burden of calling a child witness could be placed generally on the defendant, but recognizing that there might be an argument for a different result where the child appears and testifies about the acts related to the charged conduct, and the burden-shifting relates only to hearsay statements regarding uncharged bad act evidence); *State v. Hill*, 715 S.E.2d 368, 375 (S.C. Ct. App. 2011) (finding no error when the child's recorded statement was introduced after she had completed her examination, given that the defense was not prohibited from recalling her to examine the child regarding the statement).

¹⁰⁷ See Mosteller, *supra* note 90, at 519.

either did not exist or were not violated, some compromise regarding the degree of confrontation required may be the best course. This is particularly true in cases involving abhorrent crimes and sympathetic victims, which put great pressure on the courts to admit incriminating hearsay that is apparently reliable despite a lack of confrontation. Unfortunately, only modest efforts have been made to secure more testimony and confrontation through the creation of alternative procedures, such as having hearings prior to trial where witnesses can testify and face confrontation.

The Nevada Supreme Court has ruled that the preliminary hearing under the state's criminal procedure guaranteed to defendants an adequate opportunity for cross-examination. It permits examination into credibility and does not limit the scope of cross-examination to only matters of probable cause. Moreover, the state permits discovery before the preliminary hearing.¹⁰⁸ On the other hand, the Florida Supreme Court ruled that its discovery deposition procedure was inadequate to constitute prior confrontation. It reasoned that the procedure "was not designed as an opportunity to engage in adversarial testing of the evidence against the defendant" but instead "to learn what the testimony will be," and that the defendant could not conduct an adequate cross-examination during a deposition when he learns for the first time of the information. Moreover, the deposition could not serve as "the functional substitute for in-court confrontation" because it was admissible only for the purpose of impeachment and the defendant was not entitled to be present.¹⁰⁹

Like Nevada, states should develop alternative procedures to allow the defendant to have an opportunity to challenge witnesses' testimony before trial or in alternative procedural settings. However, Texas has gone too far in authorizing the receipt of recorded testimony with only the opportunity for cross-

¹⁰⁸ See *Chavez v. State*, 213 P.3d 476, 484–86 (Nev. 2009).

¹⁰⁹ *Blanton v. State*, 978 So. 2d 149, 155 (Fla. 2008); see also *State v. Lopez*, 974 So. 2d 340, 347–50 (Fla. 2008) (citing *State v. Basiliere*, 353 So. 2d 820, 824–25 (Fla. 1977)) (reaching the same conclusion and setting out the analysis summarized in *Blanton*).

examination through written interrogatories.¹¹⁰ The lack of the opportunity for the jury to observe how questions are asked, and how the child gives the answers, is a central failing of this alternative procedure. Nevertheless, the state's effort to provide somewhat limited confrontation if, in fact, full confrontation is not feasible is commendable.

VI. CONCLUSION

Confrontation Clause results in cases involving child declarants under the *Crawford* testimonial model have been reasonably stable and consistent over the past few years. Courts have found statements to police officers testimonial in almost all cases. In a substantial number of cases, courts concluded that where social workers or forensic interviewers conducted recorded interviews with an investigative purpose, the statements secured were testimonial. Relatively few cases found such interviews to be responding to an ongoing emergency. However, statements by children in the vast bulk of other circumstances were generally found to be nontestimonial.

The apparent clarity of the Supreme Court's directive can account, at least in part, for the relatively consistent findings that statements were testimonial in the two situations described above. *Davis* appeared to draw a clear line with respect to timing and purpose, and courts acted as if they had no real alternative. Unfortunately, the *Bryant* decision will likely inject substantially more discretion—and therefore uncertainty—into the analysis of these two classes of statements, with the result that many of them will now be found nontestimonial.

Crawford has provided some protection to defendants from government-generated hearsay of the most dangerous accusatorial type. When statements are made to the police or their clear surrogates, the protection is substantial. Relatively

¹¹⁰ See *Coronado v. State*, 310 S.W.3d 156, 162–65 (Tex. Ct. App. 2010). The procedure is only used where the child is found unavailable, but the existence of the alternative procedure presents a far too inviting incentive for the prosecution to develop evidence of trauma if the child testifies and far too easy an avenue for avoiding real confrontation for the judge.

little else receives any protection under the Confrontation Clause. I am not convinced that the system that has resulted from *Crawford*, where the vast bulk of even accusatorial statements made to others are freed from confrontation, is rational under confrontation policy or consistent with history. It is unclear whether *Crawford*'s impact on children's cases was worth the substantial upheaval in trial courts reflected in the mass of litigation it engendered. If *Bryant* has the effect that I anticipate of expanding trial court discretion to find even statements to government investigators exempt from confrontation protection, that impact will be even more modest and the current predictability of results will diminish.

For those who hold a defendant's right to confront witnesses in high regard, the *Crawford* effort was likely still justified because it requires confrontation or exclusion for the particularly problematic category of statements made by alleged accomplices during police interrogation, and, at least prior to *Bryant*, strictly regulated most statements by witnesses to the police about past events. However, the doctrine's dimensions are far less substantial, protective, and beneficial than could reasonably have been anticipated when it was first decided. The *Crawford* approach is an improvement on *Ohio v. Roberts*,¹¹¹ but its development has been disappointing, and the evolving doctrine shows limited promise.

¹¹¹ *Ohio v. Roberts*, 448 U.S. 56 (1980) (describing a system of confrontation analysis replaced by *Crawford*).