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Crumbling Patchwork: Massachusetts's Efforts to Fill the Gaps Left by Crawford are now Redundant

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CRUMBLING PATCHWORK: MASSACHUSETTS'S EFFORTS TO FILL THE GAPS LEFT BY *CRAWFORD* ARE NOW REDUNDANT

Recent decisions by courts at all levels have made a mess of Confrontation Clause analysis. By distinguishing between testimonial and non-testimonial statements, and then choosing not to elaborate, the United States Supreme Court wreaked havoc upon the state courts' interpretation of hearsay jurisprudence. In response, Massachusetts courts hastily constructed guidelines to adjust to this development, but as the Supreme Court continues to interpret the right of confrontation, some of the Commonwealth's framework has become redundant or inconsistent.

I. INTRODUCTION

In the Confrontation Clause, the United States Constitution gives criminal defendants the right to confront their accusers.[1] That right has ancient roots preceding the Constitution.[2] However, nearly as long as the right to confront one's accusers has existed, exceptions have been recognized.[3] Until recently, the Supreme Court interpreted the Confrontation Clause to include all the exceptions afforded to the hearsay doctrine, as well as evidence that bore "particularized guarantees of trustworthiness" that indicated the statements were "reliable."[4] Eventually, scholars, judges, and commentators criticized this approach, arguing that

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[1] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .")

[2] *See* Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481 *passim* (1994) (examining development of confrontation rights across western civilization).

[3] *See id.* at 491-92 (identifying exception to right of confrontation circa 491 A.D.).

[4] Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."), *abrogated by* Crawford v. Washington, 541 U.S. 36, 68 (2003).

judges implementing the reliability standard had developed a confusing body of caselaw that made predicting the admissibility of out-of-court statements an unreliable process.[5] Seeking to remedy this perceived unfairness, the Supreme Court rendered *Crawford v. Washington*.[6] In that decision, the Court held that under the Confrontation Clause, out-of-court statements elicited by police interrogation were testimonial, and therefore inadmissible, unless the defendant had the opportunity to cross examine the declarant.[7]

Crawford sent ripples through the legal community in three ways: (1) it revealed that the protections provided by the Confrontation Clause are separate from *stare decisis* hearsay; (2) it emphasized the need to distinguish testimonial and non-testimonial out-of-court statements, but failed to provide a clear definition of "testimonial statements"; and (3) it suggested all statements made in the course of law enforcement interrogations are testimonial, but lacked a clear description of what constitutes an interrogation.[8] The Massachusetts Supreme Judicial Court

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[5] *See* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1027 (1998) (criticizing reliability as "poor criterion" for hearsay exceptions and Confrontation
Clause analysis). Confrontation Clause interpretation under *Roberts* was also criticized as overly pedantic:

> At common law, the traditional hearsay "rule" was notoriously un-ruly, recognizing countless exceptions to its basic preference for live testimony; and more recent statutes have proliferated exceptions. But the words and grammar of the Confrontation Clause are emphatically rule-ish: "In *all* criminal prosecutions, the accused *shall* enjoy the *right* . . . to *be confronted* with *the* witnesses against him"—no ifs, ands, or buts. And so the modern Court has put itself in a bind. If the clause does truly prohibit all hearsay, as its grammar might imply, it is utterly unworkable; but to make it workable—by recognizing commonsensical exceptions—is to offend its seeming grammar.

Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 647 (1996). Instead of using linguistic analysis and legal interpretation to clarify the Confrontation Clause, it seemed the *Roberts* Court instead clouded the Framers' intent. *Id.* at 647-49.

[6] *See* 541 U.S. 36, 60-65 (2004) (criticizing *Roberts* and considering Framers' perceptions of confrontational rights).

[7] *Id.* at 68; *see also infra* Part II.A (discussing *Crawford*).

[8] *See, e.g.*, Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1363-66 (2005) (identifying unexpected challenges created by *Crawford* in criminal prosecutions, especially domestic violence charges); Franny A. Forsman & Rene L. Valladares, *Grappling With What Statements are Testimonial Under* Crawford v. Washington: *"The Reasonable Expectation of the Declarant" Test*, NEV. LAW., Oct. 13, 2005, at 26, 26 (pointing out unresolved issues created by *Crawford*); Adam Krischer, *"Though Justice May Be Blind, It Is Not Stupid"*, PROSECUTOR, Nov./Dec. 2004, at 14, 15-17 (describing effects of *Crawford* on forfeiture by wrongdoing doctrine); *see also infra* notes 34-35 and accompanying text (describing *Crawford*'s guidance on how to identify interrogation).

(SJC) addressed these issues in *Commonwealth v. Gonsalves*,[9] clarifying the definitions of "testimonial" and "interrogation," as well as creating a two-part procedure courts could use to determine whether a statement is testimonial per se or testimonial in fact.[10]

Despite its initial value to the Massachusetts courts, *Gonsalves* has become less applicable in the wake of the Supreme Court decisions in *Davis v. Washington*[11] and *Michigan v. Bryant*,[12] as these decisions have caused the SJC to adjust its analytical method of evaluating the admissibility of testimonial evidence.[13] The Supreme Court, however, has not addressed all the questions left open by *Crawford*, and *Gonsalves* remains applicable in Massachusetts under some circumstances.[14] Nevertheless, to the extent *Gonsalves* can be interpreted to create procedural steps or substantive law, it should be abandoned by all Massachusetts courts.[15]

II. A DAM AGAINST HEARSAY: THE DEVELOPMENT OF CONFRONTATION CLAUSE JURISPRUDENCE

Despite its ancient roots, the right to confront one's accusers in the American criminal justice system has evolved along with Western civilization.[16] The Framers, who were familiar with Sir Walter Raleigh's

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[9] 833 N.E.2d 549 (Mass. 2005), *cert. denied*, 548 U.S. 926 (2006).

[10] *See infra* Part II.B (discussing *Gonsalves*).

[11] 547 U.S. 813 (2006).

[12] 131 S. Ct. 1143 (2011); *see also infra* Part II.B (describing value of *Gonsalves* after *Crawford*); *infra* Part II.C (describing value of Davis v. Washington to Confrontation Clause analysis); *infra* Part III.A (explaining value of Michigan v. Bryant to Confrontation Clause analysis). The Supreme Court has also briefly touched upon the definition of "testimonial" in other cases. *See* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2717 (2011) (ruling blood alcohol test analyst's reports were testimonial under *Crawford*); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11 (2009) (ruling drug laboratory chemists' sworn certificates of analysis were testimonial under *Crawford*).

[13] *See infra* Part II.D (discussing SJC's adjustment to Confrontation Clause analysis after *Davis*).

[14] *See infra* Part IV (explaining lingering effects of *Gonsalves*).

[15] *See infra* Part IV (explaining potential consequences of retaining distinct federal and state Confrontation Clause analyses).

[16] *See* Herrmann & Speer, *supra* note 2 *passim* (recounting development of defendants' right to confront their accusers in Western civilization). An ancient predecessor to the modern confrontation right is even mentioned in the Bible. *See Acts* 25:16 (New American Standard) ("[I]t is not the custom of the Romans to give up any man, before that the accused have the accusers face to face, and have had opportunity to make his defense concerning the matter laid against him."). While historical accounts indicate the ancient Romans allowed confessions (and witness statements) obtained through torture, they also consistently indicate Roman justice demanded defendants be present at their proceedings and that they meet their accusers face-to-

infamous trial for treason, were influenced heavily by British common law and saw fit to enshrine the right in the Sixth Amendment of the U.S. Constitution.[17] For as long as the right has been recognized, courts have made exceptions by allowing the admission of statements made by absent persons into evidence.[18] For a generation, the admissibility of these words was controlled by hearsay common law and by the judiciary's notions of the evidentiary reliability.[19] If the declarant was unavailable, their statements remained admissible if the offering party showed "particularized guarantees of trustworthiness."[20]

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face. Herrmann & Speer, *supra* note 2, at 484-85. While written testimony by absent witnesses was admissible under certain circumstances, when witnesses testified in person, as was preferred, defendants had the right to cross-examination. *Id.* at 487-88.

[17] *See* Richard J. Goldstone, *Forward* to WILLIAM BLACKSTONE, THE COMMENTARIES OF SIR WILLIAM BLACKSTONE, KNIGHT, ON THE LAWS AND CONSTITUTION OF ENGLAND i, at iii, v-vi (Amer. Bar Ass'n ed., 2009) (describing influence of British common law on Framers). *Compare id.* at 460 ("[Defendants] shall have . . . compulsive process to bring in his witnesses *for* him, as was usual to compel their appearance *against* him."), *with* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."). In 1603, Sir Walter Raleigh of England famously faced a false capital charge of treason. *See generally* RENNELL RODD, SIR WALTER RALEIGH, 201-30 (1904) (detailing Sir Walter Raleigh's false capital charge of treason). Raleigh's accuser, Lord Cobham, faced similar charges, and only made his allegations after the prosecution falsely told him that Raleigh intended to testify against him. *Id.* at 208-09. Cobham fabricated the allegations to get revenge against Raleigh. *Id.* At Raleigh's trial the prosecution refused to examine Cobham directly, instead relying upon the out-of-court statements he made under their false pretenses. *Id.* at 221. Raleigh demanded the opportunity to face his accuser: "Let Cobham be here, let him speak it. Call my accuser before my face . . . ." Herrmann & Speer, *supra* note 2, at 545. The judges refused his demand on the most damning of rationales—if Cobham were present, he might recant his allegations, destroying the prosecution's case. *See id.* ("[T]o save [Raleigh], his old friend, it may be that [Cobham] will deny all that which he hath said."). Later, one of the presiding judges lamented that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." 1 DAVID JARDINE, CRIMINAL TRIALS 435, 520 (1832).

[18] *See* Peter Nicolas, *'I'm Dying to Tell You What Happened': The Admissibility of Testimonial Dying Declarations Post-Crawford*, 37 HASTINGS CONST. L.Q. 487, 495 (2010) (explaining pre-revolutionary roots of dying declaration exception to Confrontation Clause). The dying declaration exception to the hearsay rule, for example, was a well-rooted fixture in British common law in the Framers' time. *See id.* at 495-96.

[19] *See* Friedman, *supra* note 5, at 1014-15 (describing confluence of hearsay common law and Confrontation Clause jurisprudence).

[20] *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004) (holding hearsay falling within "firmly rooted hearsay exception[s]" or bearing "particularized guarantees of trustworthiness" admissible). The Federal Rules of Evidence, codified during *Roberts*'s influence, includes twenty-nine distinct hearsay exceptions, including the amorphous Rule 807—the residual exception—that renders the hearsay rule powerless if the statement is evidence of a material fact, more probative on the point than any other evidence, and the "purposes of the[] rules and the interests of justice" will be served, so long as the statements bear "circumstantial guarantees of trustworthiness." *See* FED. R. EVID. 803-04, 807 (listing exceptions to hearsay rule).

A. The Levy Breaks: Crawford v. Washington

As a result of this open-ended policy, courts and academics worried the ever-growing number of hearsay exceptions would render the Confrontation Clause moot.[21] Uneasy with this development, the Supreme Court recognized the procedural protections guaranteed by the Confrontation Clause in *Crawford v. Washington*.[22] In *Crawford*, the prosecution sought to admit voice-recorded inculpatory statements made by the defendant's wife to police while they were investigating the stabbing of a man who allegedly attempted to rape her.[23] Citing spousal privilege, she refused to testify at trial.[24] Over the defendant's objection, the prosecution persuaded the trial court to allow the recording to be admitted, arguing it was sufficiently trustworthy.[25] The defendant's appeal went all the way to the Supreme Court, who unanimously held that the statement should have been excluded because its admission violated the defendant's Sixth Amendment confrontation right.[26]

Writing for the Court in *Crawford*, Justice Scalia declared that judicial determination of a statement's reliability absent the cross-examination of the declarant fails to satisfy the Confrontation Clause.[27] Testimonial statements must be subject to cross-examination not only

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[21] *See* Leonard Birdsong, *The Residual Exception to the Hearsay Rule Has it Been Abused A Survey Since the 1997 Amendment*, 26 NOVA L. REV. 59, 61 (2001) (describing academic concern residual exception would "abuse traditional concepts of evidence").

[22] 541 U.S. 36, 51 (2004). The open-ended nature of *Roberts* was especially troubling to the Court because such an amorphous standard allowed courts too much discretion. *Id.* at 67-68. The majority found that "[b]y replacing categorical constitutional guarantees with open-ended balancing tests, [the Court will] do violence to [the Framers'] design. Vague standards are manipulable . . . ." *Id.*

[23] *Id.* at 38.

[24] *Id.* at 40; *see also* WASH. REV. CODE § 5.60.060 (1994) ("A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner . . . ."). Despite this privilege, prosecutors may seek to enter a spouse's out-of-court statements if they are admissible under a hearsay exception. *See* State v. Burden, 841 P.2d 758, 761 (Wash. 1992) (en banc) ("[T]he [marital] testimonial privilege [is] not served by excluding third person testimony of a spouse's extrajudicial statements and . . . the admission of such testimony does not violate [the marital privilege law].").

[25] *Crawford*, 541 U.S. at 40. The appellate court admitted the statements under Rule 804(b)(3) of the Federal Rules of Evidence for statements against penal interest, and found that corroborating circumstances were sufficient to satisfy the Confrontation Clause under *Roberts*. State v. Crawford, No. 25307-1-II, 2001 WL 850119, at *2 (Wash. Ct. App. July 20, 2001).

[26] *Crawford*, 541 U.S. at 68-69.

[27] *Id.* at 62. The Court found that while the Framers would certainly approve of some judicial flexibility, they clearly dictated that defendants must have an opportunity for cross-examination if testimonial statements by unavailable witnesses are to be admitted. *See id.* at 61, 68 (describing Framers' attitudes toward testimony of unavailable declarants).

because judicial assessment of reliability is unpredictable, but also because courts might mistakenly admit "core testimonial statements that the Confrontation Clause plainly meant to exclude."[28] To restore the protections against false testimony offered by the procedure, the Court ruled a defendant must have the opportunity to cross-examine witnesses regarding their out-of-court testimonial statements in order for them to be admissible.[29]

Leaving room for the admission of some out-of-court statements made by unavailable declarants, Justice Scalia distinguished testimonial statements from non-testimonial statements in the *Crawford* opinion.[30] Although the Court offered a number of formulations, it left the "comprehensive definition of 'testimonial'" to future decisions, ruling that the statements at bar—statements taken by police officers in the course of interrogation—fit the definition under any standard.[31] Additionally, Justice Scalia left the definition of "interrogation" open, suggesting only that he intended the term "in its colloquial, rather than any technical legal, sense."[32] In his concurrence, Justice Rehnquist criticized the

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[28] *Id.* at 61, 63. Justice Scalia noted the irony that a *Roberts* analysis may well have admitted Lord Cobham's testimony in Sir Walter Raleigh's trial. *Id.* at 62.

[29] *Id.* at 61 ("[W]e impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine . . . ."). To be admissible, out-of-court statements offered to prove their truth must meet a hearsay exception *and* satisfy *Crawford*'s requirements. *Id.* at 68.

[30] *See id.* at 51-52 (suggesting "off-hand, overheard remarks" do not implicate Confrontation Clause, but may remain inadmissible hearsay).

[31] *Crawford*, 541 U.S. at 51-52:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,"; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,"; [and] . . . "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,".

Id. (citations omitted). This broad range of possible definitions resulted in overwhelming criticism throughout the legal community. *See, e.g.*, Richard D. Friedman, *Grappling with the Meaning of "Testimonial"*, 71 BROOK. L. REV. 241 *passim* (2005) (criticizing *Crawford*'s failure to define "testimonial"); Adam Silberlight, *Confronting a Testimonial Definition in a Post-*Crawford *Era*, 29 AM. J. TRIAL ADVOC. 65 *passim* (2005) (same); Jeffrey A. Zick, *Rethinking Confrontation*, ARIZ. ATT'Y, Sept. 2006 at 1, 30 (same).

[32] *Crawford*, 541 U.S. at 53 n.4 (leaving precise definition of "interrogation" for later consideration). Commentators immediately seized upon this omission as a source of potential confusion. *See* Miguel A. Méndez, Crawford v. Washington: *A Critique*, 57 STAN. L. REV. 569, 602 n.187 (2004) (considering range of law enforcement interactions people might consider interrogations). Moreover, this scant advice left courts with little guidance about whose

testimonial/nontestimonial distinction, arguing that it not only lacked historical basis, but also that leaving these definitions unresolved left lower courts and prosecutors "in the dark."[33]

B. The SJC Stacks Sandbags: Commonwealth v. Gonsalves

As Justice Rehnquist predicted in his concurring opinion in *Crawford*, the SJC quickly found itself stumbling in the dark with *Commonwealth v. Gonsalves*: a case *Crawford* controlled but could not be resolved without further interpretation of what constituted a "testimonial" statement or an "interrogation."[34] In its decision, the SJC noted that it had insufficient guidance from the Supreme Court to determine whether statements made to persons other than law enforcement officers or statements spontaneously offered should be considered testimonial.[35] In its attempt to refine the definition of "testimonial," the SJC drew another distinction, parsing a line between statements that are testimonial per se and those that are testimonial in fact.[36] Statements are testimonial per se when they are made in response to police interrogations.[37] Alternatively,

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perspective—the declarant or the interrogator—determined whether an exchange qualified as an interrogation. *See id.*

[33] *Crawford*, 541 U.S. at 75-76 (Rehnquist, J., concurring in the judgment). Justice Rehnquist would have left *Roberts* untouched, and disagreed with Justice Scalia's interpretation of testimonial statements beyond sworn affidavits and depositions. *Id.* at 71-72, 75. From Justice Rehnquist's perspective, excluding testimonial statements altogether was irrational—the law was as unsettled at the Framers' time as it is today. *Id.* at 71-74.

[34] *See* Commonwealth v. Gonsalves, 833 N.E.2d 549, 554 (Mass. 2005) (describing limitations of *Crawford*). In *Gonsalves*, the defendant and his girlfriend had an argument in the girlfriend's bedroom while the girlfriend's mother was in another room. *Id.* at 552. Her mother entered the room, and the declarant, in tears, described how the defendant hit her and grabbed her shirt so tightly that she could not breathe. *Id.* Later, police arrived because of a report of a domestic disturbance and asked the women what had happened. *Id.* The girlfriend told the officers that the defendant "grabbed her by the neck, lifted her off the ground, choked her, and hit her head on the floor." *Id.* She also provided the police with the defendant's name and his physical description. *Id.* at 552-53. Based on those statements, Massachusetts charged Gonsalves with assault and battery. *Id.* at 553. At trial, the girlfriend invoked her Fifth Amendment rights and refused to testify. *Id.* Nevertheless, the prosecutor sought admission of the statements she made to her mother and to the police after the defendant left the scene. *Id.* The court granted Gonsalves's motion to suppress the statements, finding that they were testimonial under *Crawford*. *Id.* The Commonwealth sought an interlocutory appeal, and the SJC elected to address the matter. *Id.*

[35] *Id.* at 554.

[36] *Id.* at 557.

[37] *Id.* at 555. The court interpreted the term "interrogation . . . expansively to mean all law enforcement questioning related to the investigation or prosecution of a crime." *Id.*; *see also* Commonwealth v. Rodriguez, 833 N.E.2d 134, 135 (Mass. 2005) (ruling any statements arising from law enforcement questioning are testimonial per se). This interpretation includes "whether

statements are testimonial in fact when they are made under circumstances that the "declarant would reasonably believe that his or her statement might be used at trial."[38] Neither formulation relies upon "the declarant's knowledge of trial procedure or the formality of the statement," but instead "focuses on the declarant's intent by evaluating the specific circumstances in which the out-of-court statement is made."[39] From this viewpoint, "*all* statements the declarant knew or should have known might be used to investigate or prosecute an accused" are testimonial.[40] No other state has explicitly adopted the testimonial-per-se/testimonial-in-fact distinction as part of their *Crawford* analysis.

The SJC also struggled to ascertain what Justice Scalia described as the "colloquial" understanding of interrogation, settling upon "all law enforcement questioning related to the investigation or prosecution of a

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the statement is part of an affidavit, deposition, confession, or prior testimony at a preliminary hearing, before a grand jury, or at a former trial, or if it was procured through law enforcement interrogation." *Gonsalves*, 833 N.E.2d at 558.

[38] *Gonsalves*, 833 N.E.2d at 557 ("'*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial.'" (quoting *United States v. Saget*, 377 F.3d 223, 228-29 (2d Cir. 2004)). Not all state courts arrived at the same conclusion. *See Hammon v. State*, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004), *vacated*, 829 N.E.2d 444 (Ind. 2005), *cert. granted*, 546 U.S. 976 (2005), *rev'd and remanded sub nom.* Davis v. Washington, 547 U.S. 813 (2006) ("It appears to us that the common denominator underlying the Supreme Court's discussion of what constitutes a 'testimonial' statement is the official and formal quality of such a statement.").

[39] *Gonsalves*, 833 N.E.2d at 558. The SJC also considered other courts' interpretations, namely that the purpose of the statement was the controlling factor (without clarifying *whose* purpose—the interrogator's or the declarant's). *Id.* at 557-58; *see also* People v. West, 823 N.E.2d 82, 91-92 (Ind. Ct. App. 2005) (specific content, purpose, and facts surrounding each statement relevant to analysis); People v. Cortes, 781 N.Y.S.2d 401, 414-15 (N.Y. Sup. Ct. 2004) (discussing purpose of statement in evaluating testimonial nature).

[40] *Gonsalves*, 833 N.E.2d at 558. While statements are evaluated on a case-by-case analysis, several factors may be relevant to establishing whether a statement is testimonial in fact, including:

> 1. to whom was the statement made;
> 2. whether the statement was made in a public or private setting;
> 3. the emotional temperature of the declarant and the would-be witness;
> 4. the motivation behind the out-of-court statement (i.e., whether it was made to stop an ongoing emergency or to provide information related to past events);
> 5. fully develop the circumstances;
> 6. whether police were present;
> 7. the content of the statement at issue; and
> 8. whether the out-of-court statement was unsolicited or responsive to questioning.

David A. Lowy & Katherine Bowles Dudich, *After* Crawford: *Using the Confrontation Clause in Massachusetts Courts*, 12 SUFFOLK J. TRIAL & APP. ADVOC. 1, 25 (2007) (citing Commonwealth v. Kartell, No. 1999-0655, 2005 WL 2739786, at *10 (Mass. Super. Ct. Oct. 25, 2005)).

crime."[41] Under this broad definition, a law enforcement officer's preliminary fact-gathering to determine if a crime has taken place is an interrogation, and the statements those interrogations elicit are testimonial.[42] The SJC refused to limit the scope of testimony to "formal, solemnized, recorded accounts," arguing law enforcement officers would attempt to circumvent the Confrontation Clause by taking statements in the most informal circumstances possible.[43]

Because not all statements made to police are related to the investigation or prosecution of a crime, the SJC created an exception to its broad definition of "interrogation."[44] When police ask questions in the course of ongoing emergencies—to secure volatile scenes or provide medical care—those questions do not qualify as interrogations, and so, under *Gonsalves*, they were not definitively testimonial per se; nevertheless, courts could still categorize these statements as testimonial in fact.[45]

The *Gonsalves* Court also had to address another scenario unlike the fact pattern addressed by the Supreme Court in *Crawford*: the circumstances under which statements from one private citizen to another might be considered testimonial.[46] While those statements could never

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[41] *Gonsalves*, 833 N.E.2d at 554-55 (considering alternate definitions of "interrogation").

[42] *See id.* at 561 (finding preliminary fact gathering falls under scope of testimony). Justice Sosman, in her concurrence, strongly disagreed with the SJC's broad interpretation, arguing that it would cause confusion among the lower courts. *See id.* at 564 (Sosman, J., concurring in part) (suggesting court distinguish between preliminary questioning and interrogation); *see also* Ritu Bhatnagar, *The Pragmatic Jurist's Approach to the Confrontation Clause: Justice Martha B. Sosman's Concurrence in* Commonwealth v. Gonsalves, 42 NEW ENG. L. REV. 485, 492-93 (2008) (explaining difficulties arising from *Gonsalves*'s broad definition of "interrogation"); Morgan M. Long, Commonwealth v. Gonsalves: *Erroneously Expanding the Concept of Police Interrogation Set Forth in* Crawford v. Washington *to Include Investigatory Police Interrogations*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 171 *passim* (2007) (arguing *Gonsalves*'s definition of "interrogation" is overbroad).

[43] *See Gonsalves*, 833 N.E.2d at 555 (rejecting formality of circumstances as criterion for identifying interrogations). Justice Sosman disagreed, contending formality was a valuable criterion for identifying interrogations. *See id.* at 564-65 (Sosman, J., concurring in part) (suggesting "interrogation" connotes formal, structured interview).

[44] *See id.* at 556 ("[T]he government's peacekeeping or community caretaking function [is] 'totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute.'" (quoting Commonwealth v. Evans, 764 N.E.2d 841, 844 (Mass. 2002))). This peacekeeping function is implicated when "'there is an objectively reasonable basis for believing that the safety of an individual or the public is jeopardized.'" *Id.* (quoting Commonwealth v. Brinson, 800 N.E.2d 1032, 1037 (Mass. 2003)).

[45] *See id.* at 557 (ordering testimonial-in-fact analysis for statements made to law enforcement during ongoing emergencies); *see also* Commonwealth v. Foley, 833 N.E.2d 130, 133 (Mass. 2005) (subjecting statements made to law enforcement officer during ongoing emergency to testimonial-in-fact analysis).

[46] *See Gonsalves*, 833 N.E.2d at 561-62 (evaluating whether declarant's statements to her

qualify as testimonial per se, the SJC ruled they were nevertheless subject to testimonial-in-fact analysis.[47] While the victim's statements to her mother in *Gonsalves* were nontestimonial, the court admitted there could be circumstances where a reasonable declarant would expect his statements to be used against the accused at trial, even though the listener was not a member of the law enforcement community.[48]

C. The Supreme Court Stems the Tide: Davis v. Washington

The open definitions of "testimonial" and "interrogation" led to a number of discordant interpretations, and the Supreme Court soon took up the matter again in *Davis v. Washington*.[49] In *Davis*, the Court sought to resolve the conundrum of how to analyze ambiguous statements that could both address ongoing emergencies and convey information relevant to future prosecution.[50] Justice Scalia, again writing for the Court, introduced the Primary Purpose Test:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the

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mother were testimonial). Scholars have also considered that statements to private citizens may well be testimonial. *See* Jeffrey L. Fisher, *What Happened and What is Happening to the Confrontation Clause*, 15 J.L. & POL'Y 587, 616-26 (2007) (considering testimonial nature of statements made to persons other than law enforcement officers); Méndez, *supra* note 32, at 603 (same). Whether statements to employees of private victims' services organizations, medical personnel, or children's statements to their parents are testimonial remains unresolved. *See* Fisher, *supra*, at 616-26 (discussing confusion among courts regarding categorization of statements between private actors); Méndez, *supra* note 32, at 603 (same).

[47] *Gonsalves*, 833 N.E.2d at 561-62 (considering whether victim's statements to her mother were testimonial).

[48] *See id.* (suggesting other declarants could make testimonial statements to private citizens). The court reasoned that because the victim made the statements to her mother in her bedroom, without knowledge that law enforcement officers were on their way or intending to file a complaint, a reasonable person in the victim's shoes would not expect the statements to establish a basis for prosecution against the defendant. *Id.* at 562.

[49] 547 U.S. 813, 823 (2006) (admitting *Crawford* was imprecise).

[50] *Id.* For example, law enforcement officers arriving at a crime scene might ask a bystander about what happened and get a response that both seeks emergency help and identifies a criminal suspect. *Id.* If the court characterized the response as an off-hand remark under *Crawford*, it might rule the victim's statement is nontestimonial. *See* Crawford v. Washington, 541 U.S. 36, 51 (2004) (excepting off-hand remarks from characterization as testimony). Alternatively, another court might characterize the statement as the fruit of an interrogation, and noting its relevance to future prosecution, rule the statement is testimonial. *See id.* at 52 (characterizing statements elicited from law enforcement interrogations as testimonial).

primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[51]

The *Davis* Court also used several criteria to determine if an exchange occurred during an ongoing emergency, including "the level of formality" of the interview.[52] In *Gonsalves*, the SJC explicitly rejected this as a criterion for determining if a statement was testimonial, arguing it would encourage law enforcement officers to take statements under informal circumstances to circumvent the Confrontation Clause.[53]

D. Massachusetts's Patchwork Holds (Mostly): Commonwealth v. Simon

The *Davis* Court's broad definition of "interrogation" and adoption of an ongoing emergency exception affirmed that the SJC's interpretation of *Crawford* in *Gonsalves* was largely accurate.[54] However, the *Davis* Court made one distinction in its ongoing emergency exception that the SJC did not: once a statement qualified for the exception, the court could not subsequently categorize it as testimonial.[55] The SJC reacted to the distinction raised in *Davis* in *Commonwealth v. Simon*[56] by melding the two-part procedure it constructed in *Gonsalves* with the Supreme Court's rules from *Davis*.[57] In *Simon*, a gunshot victim called 911 to report his injury.[58] The SJC considered whether the victim's statements to the 911 dispatcher were testimonial using the framework it developed in

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[51] *Davis*, 547 U.S. at 822.

[52] *Id.* at 827. The Court also considered the following: (1) whether the declarant made the statements as they were actually happening; (2) whether a reasonable listener would understand the declarant was facing an ongoing emergency; and (3) whether what was asked and answered, viewed objectively, was necessary to resolve the emergency rather than merely learn what happened in the past. *Id.*

[53] *See Gonsalves*, 833 N.E.2d at 555 (considering ramifications of identifying formality as indicator of interrogation); *id.* at 564-65 (Sosman, J., concurring in part) (suggesting interrogation connotes formal and structured interview).

[54] *See supra* Part II.B (discussing SJC's interpretation of *Crawford* in *Gonsalves*).

[55] *See Davis*, 547 U.S. at 822 (ruling statements made during ongoing emergencies are nontestimonial).

[56] 923 N.E.2d 58 (Mass. 2010).

[57] *See id.* at 73-74 (discussing effects of *Davis* on Massachusetts two-step Confrontation Clause analytical procedure developed in *Gonsalves*).

[58] *Id.* at 62. The victim told the 911 dispatcher that he had been robbed, that he and his brother had been shot, and that he recognized his assailant. *Id.* at 62-63. Despite his serious wounds, the victim provided the dispatcher the defendant's first name, a physical description of the defendant, a description of the defendant's automobile, and the location where the defendant worked out. *Id.* at 63. The victim died of causes unrelated to the case before trial, becoming unavailable. *Id.* at 62 n.2. The defendant sought a motion in limine to suppress the victim's statements to the 911 dispatcher, and the SJC transferred the case from the appeals court on its own motion. *Id.* at 64.

Gonsalves.[59] Recognizing the effects of *Davis* upon the *Gonsalves* test, the SJC incorporated the emergency exception outlined in *Davis* into the testimonial-per-se analysis, but ruled the emergency exception did not affect testimonial-in-fact analysis.[60] Among the criteria it adopted to determine if conversations were interrogations, the SJC listed the "'level of formality of the interview,'" despite its previously held concerns that it might encourage law enforcement officers to elicit information from witnesses in informal settings.[61]

This revision attempted to resolve any discrepancies between Massachusetts's two-step process and the guidance laid out by the Supreme Court.[62] The *Davis* decision had largely validated the emergency exception outlined by the SJC in *Gonsalves*, but did not adopt the SJC's distinct two-step procedure.[63] Nonetheless, the SJC explicitly noted the two steps outlined in *Gonsalves* remained the controlling procedure for statements made to people other than law enforcement officers.[64]

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[59] *Id.* at 73-76 (applying two-step Confrontation Clause analysis).

[60] *See id.* at 73-74 ("Statements made in response to police questioning during an emergency are testimonial per se unless the emergency exception, as defined in *Davis,* applies. To the extent that the exception applies, the statements are not testimonial per se and they will not become testimonial in fact in any circumstances. To the extent that the emergency exception does not apply, statements made in response to police interrogation remain testimonial per se."). This adjustment foreclosed the possibility that the Massachusetts interpretation would exclude more statements than required by *Davis*. *See* Ann Hetherwick Pumphrey, *Admissibility of Hearsay Statements to Police:* Davis v. Washington *and* Hammon v. Indiana, BOS. B.J., Nov./Dec. 2006, at 17, 19 (considering effects of *Davis* on *Gonsalves*).

[61] *Compare Simon*, 923 N.E.2d at 73 (quoting Commonwealth v. Galicia, 857 N.E.2d 463, 469 (Mass. 2006)) (weighing formality as criterion to determine if conversations were interrogations), *with Gonsalves*, 833 N.E.2d 549, 555 (Mass. 2005) (rejecting formality of circumstances as criterion for identifying interrogations). This development validated Justice Sosman's argument that the formality of the exchange between law enforcement officers and declarants was valuable in discerning interrogations (and the testimonial statements that stem from them) and other conversations (and their nontestimonial results). *See supra* note 43 and accompanying text (describing Justice Sosman's view).

[62] *See Simon*, 923 N.E.2d at 73 (adjusting *Gonsalves*'s two-step test to match *Davis*).

[63] *Compare supra* Part II.C. (discussing *Davis*'s ongoing emergency exception), *with* Commonwealth v. Simon, 923 N.E.2d 58, 73-74 (Mass. 2010) (describing emergency exception created by SJC in *Gonsalves*). In fact, the Massachusetts Attorney General appealed to the Supreme Court to narrow the definition of "interrogation" to include the formality of the exchange as a criterion for determining whether an interrogation was testimonial, but the Court denied certiorari in three separate cases, including *Gonsalves*. *See* Roger W. Kirst, *Confrontation Rules After* Davis v. Washington, 15 J. L. & POL'Y 635, 651-52 (2007) (describing Supreme Court's implicit validation of SJC's definition of "interrogation").

[64] *See Simon*, 923 N.E.2d at 73 n.10 ("[B]oth steps of the test set forth in *Commonwealth v. Gonsalves*, continue to apply to statements made to people other than law enforcement officers." (citation omitted)).

III. LEAKS IN THE DIKE: FURTHER HEARSAY AMBIGUITIES APPEAR AFTER *CRAWFORD* AND *DAVIS*

A. Michigan v. Bryant

Critics quickly seized upon a further ambiguity left over by *Crawford* and *Davis*: when a court is examining whether an interrogation took place, should it consider the intent of the declarant, the interrogator, or both?[65] While the *Crawford* decision focused largely upon the intent of a reasonable declarant, the primary purpose test outlined in *Davis* focused on the intent of the law enforcement officer.[66] To resolve this confusion, the Supreme Court addressed the issue in *Michigan v. Bryant*.[67] Justice Sotomayor, writing for the majority, took an expansive approach, allowing courts to consider the statements and actions of all participants to determine the primary purpose of the interrogation.[68] Warning against misinterpretation, the Court carefully pointed out that "the declarant's statements, not the interrogator's questions" control whether the statement is testimonial.[69] The officer's primary purpose simply provides context the court may use in its analysis of the declarant's statement.[70] Despite Justice

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[65] *See* Andrew C. Fine, *Refining* Crawford: *The Confrontation Clause After* Davis v. Washington *and* Hammon v. Indiana, 105 MICH. L. REV. FIRST IMPRESSIONS 11, 11-12 (2006), http://www.michiganlawreview.org/assets/fi/105/fine.pdf (suggesting unpredictable effects of *Davis*'s "amorphous" definition of interrogation); Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 280 (2006) (describing theoretical and practical difficulties remaining after *Davis*). *But see* Kirst, *supra* note 63, at 675 (suggesting *Davis* removes confusion regarding interrogator and declarant intent by considering statements' objective meaning).

[66] *See* Lininger, *supra* note 65, at 280 (identifying focal shift from declarant to interrogator as source of confusion).

[67] 131 S. Ct. 1143, 1157-66 (2011) (clarifying primary purpose test). In *Bryant*, the Supreme Court considered whether a dying man's description of his attacker to the police was testimonial under the Confrontation Clause. *Id.* at 1150.

[68] *Id.* at 1162 ("[Courts are to] objectively ascertain[] the primary purpose of the interrogation by examining the statements and actions of all participants . . . .").

[69] *Id.* Whether a court considers the interrogator's intent is more than mere legal hairsplitting. *See* Mark S. Coven & James F. Comerford, *What's Going On? The Right to Confrontation*, 45 SUFFOLK U. L. REV. 269, 279 (2012). Because law enforcement officers speaking to victims will always have prosecution at least partially in mind, courts are more likely to exclude unavailable witnesses' accusatory statements if the officer's intent is controlling. *Id.* ("By evaluating the interrogator's purpose, the defendant may receive a greater benefit than if only the declarant's actions are examined: the exclusion of a declarant's statement unless the requirements of the Confrontation Clause are satisfied.").

[70] *See Bryant*, 131 S. Ct. at 1162. Justice Scalia dissented in *Bryant*, accusing the Court of making itself "the obfuscator of last resort." *Id.* at 1168 (Scalia, J., dissenting). He contended the majority grossly misread *Crawford* and *Davis*, arguing it "did not address whose perspective matters—the declarant's, the interrogator's, or both—when assessing 'the primary purpose of [an]

Sotomayor's clear guidance to focus on the purpose of the statement, limiting consideration of the interrogator's purpose to a contextual guide, some critics still warn against law enforcement's manipulation of circumstances to avoid characterization of statements as testimonial by the courts.[71]

The *Bryant* decision clarified the *Crawford* and *Davis* decisions: statements to law enforcement officers are testimonial when the circumstances would indicate to a reasonable person that they would be used in a subsequent criminal prosecution against the accused.[72] When the circumstances indicate there is an ongoing emergency, the declarant's statements are not testimonial for the purposes of Confrontation Clause analysis.[73]

B. The Flow is Stymied: Effects of Bryant *on Massachusetts Courts*

Massachusetts implemented the *Bryant* rule with little fanfare in *Commonwealth v. Smith*.[74] In this case, police investigating an armed robbery knocked on a suspect's apartment door, but no one answered.[75] As they were leaving, the defendant's girlfriend burst out of the apartment and appeared to be "'visibly shaken,' 'very nervous,' and 'frantic.'"[76] Without prompting, she told the police that the defendant had a gun and that he was wrapping it in a black sock.[77] At trial, the prosecution, unable to locate the girlfriend, sought to have the police testify to her statements.[78] These facts presented a conundrum to the court: when the police arrived at the

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interrogation.'" *Id.* (alteration in original). Justice Scalia's vehemence is curious: as the author of the *Davis* opinion, he was responsible for the primary purpose test's focus on the primary purpose of the interrogation rather than the primary purpose of the statements elicited by the interrogation. *See Davis*, 547 U.S. at 822 (introducing primary purpose test). Regardless, both the *Bryant* Court and Justice Scalia agreed: courts should focus upon the declarant rather than the interrogator. *Compare Bryant*, 131 S. Ct. at 1162 (focusing on declarant's statements, not interrogator's questions), *with id.* at 1168 (Scalia, J., dissenting) ("The declarant's intent is what counts.").

[71] *See* Jason Widdison, Michigan v. Bryant: *The Ghost of* Roberts *and the Return of Reliability*, 47 GONZ. L. REV. 219, 235 (2011) (suggesting police will delay response to emergencies to secure nontestimonial statements under ongoing emergency exception).

[72] *See Bryant*, 131 S. Ct. at 1154 (citing *Davis*, 547 U.S. at 822) (elaborating on meaning of "testimonial").

[73] *Id.* (stating difference based on context).

[74] 951 N.E.2d 674, 681-82 (Mass. 2011) (considering whether declarations meet *Bryant*'s ongoing emergency criteria).

[75] *Id.* at 679 (describing facts of incident in question).

[76] *Id.*

[77] *Id.* at 680.

[78] *Id.*

apartment, it was clear they did not believe there was an emergency; their primary purpose was to conduct an investigation for later criminal prosecution.[79] However, the circumstances indicated that the girlfriend had a different purpose: to alert the police to an immediate danger.[80] Applying guidance they received from the *Bryant* Court, the SJC considered whether "'the primary purpose of [the] interrogation [was] to enable police assistance to meet an ongoing emergency.'"[81] Notably, the SJC did not conduct a *Gonsalves*-type testimonial-per-se or testimonial-in-fact analysis.[82] No clear trend of when courts will use the testimonial per se/in fact rubric has emerged; some Massachusetts courts continue to use this analysis, while others simply cite the case without explicitly going through the steps.[83] Still others forego reliance upon *Gonsalves* altogether in their consideration of a statement's testimonial value.[84]

IV. REDUNDANT PATCHWORK: THE *GONSALVES* DECISION HAS BECOME IRRELEVANT

The SJC first developed its two-part Confrontation Clause analytical procedure in *Gonsalves* in response to *Crawford*, a case that was

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[79] *Smith*, 951 N.E.2d at 682 (stating defendant's arguments that primary purpose was investigation, not emergency response).

[80] *Id.* at 683.

[81] *Id.* at 682 (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)). The court found that the girlfriend's statements were nontestimonial under the ongoing emergency exception. *Id.* at 684.

[82] *See Smith*, 951 N.E.2d at 681-84 (relying upon *Crawford Davis Bryant* trilogy to determine if declarant's statements to police were testimonial). The SJC paid passing homage to its own jurisprudence, briefly citing the *Simon* and *Galicia* decisions and listing factors courts might consider in determining if an emergency exists, but it did not use the holdings from either case to arrive at its conclusion. *See id.* at 681-82.

[83] *See* Commonwealth v. Patterson, 946 N.E.2d 130, 134-35 (Mass. App. Ct. 2011) (citing *Crawford*, *Davis*, and *Bryant* as controlling authority for Confrontation Clause analysis). In *Patterson*, the court evaluated statements a child made to officers investigating a domestic violence report. *Id.* at 132. The court cited *Gonsalves*, but only as supporting authority and without conducting a two-step analysis. *Id.* at 134-35. *Compare* Commonwealth v. Linton, 924 N.E.2d 722, 737 (Mass. 2010) (using *Gonsalves*'s two-step analysis to determine if declarant's statements were testimonial), *and* Commonwealth v. Figueroa, 946 N.E.2d 142, 150-51 (Mass. App. Ct. 2011) (applying two-part *Gonsalves* test), *and* Commonwealth v. Shangkuan, 943 N.E.2d 466, 473-75 (Mass. App. Ct. 2011) (using two-step *Gonsalves* analysis to determine if statements testimonial), *with* Commonwealth v. Cheremond, 961 N.E.2d 97, 108 (Mass. 2012) (citing *Gonsalves* without considering whether declarant's statements were testimonial in fact or testimonial per se).

[84] *See* Commonwealth v. Beatrice, 951 N.E.2d 26, 31-35 (Mass. 2011) (resolving whether statements were testimonial without citing *Gonsalves* or using its two-step analysis); Commonwealth v. Taber, No. 10-P-1527, 2012 WL 177769, at *2 (Mass. App. Ct. Jan. 24, 2012) (same).

heavily criticized for leaving too many questions unanswered.[85] At the time, this process seemed necessary.[86] However, in light of *Davis* and *Bryant*, recent Massachusetts decisions indicate the procedure has become increasingly moot in cases where the court evaluates statements to law enforcement officers.[87]

The Massachusetts response to *Crawford* in *Gonsalves* closely mirrored the Supreme Court's subsequent interpretation of the right to confrontation.[88] *Crawford* left open the question of whose intent controlled the determination of whether a statement was testimonial.[89] Both the SJC and the Supreme Court later held that statements are testimonial when a reasonable person in the declarant's position would anticipate the statement would be used against the accused in investigating and prosecuting a crime.[90] *Crawford* also left open the question of when statements made to police should be considered testimonial.[91] Both courts determined that if statements are made primarily to obtain help during an emergency, they are not testimonial.[92] Lastly, the *Crawford* Court left open the question of how judges should consider the questions and procedures used by law enforcement officers and others to elicit statements from declarants.[93] Both courts decided that while law enforcement's questions should be used to inform a judge's ruling on whether the declarant's responses are testimonial, the focus of the analysis is on a reasonable declarant's intent under the circumstances.[94]

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[85] *See* Commonwealth v. Gonsalves, 833 N.E.2d 549, 554 (Mass. 2005) (evaluating open definition of "testimonial" after *Crawford*).

[86] *See* Mendez, *supra* note 33, at 587-88 (outlining uncertainties left by *Crawford*).

[87] *See* cases cited *supra* note 83 and accompanying text (discussing *Gonsalves*'s application in recent Massachusetts appellate decisions).

[88] *See supra* Part I (discussing federal and Massachusetts Confrontation Clause jurisprudence after *Crawford*); *see also* Bhatnagar, *supra* note 42, at 493 (noting Supreme Court's *Davis* decision matched with SJC's preceding interpretation in *Gonsalves*).

[89] *See* Méndez, *supra* note 32, at 602 n.187 (describing failures of *Crawford* and academic criticism).

[90] *Compare* Michigan v. Bryant, 131 S. Ct. 1143, 1162 (2011) (describing objective, context-driven analysis courts use to characterize declarant's statements as testimonial), *with Gonsalves*, 833 N.E.2d at 555-56 (describing objective, context-driven analysis SJC developed to determine if statements are testimonial-in-fact).

[91] *See* Méndez, *supra* note 32, at 602 n.187 and accompanying text (addressing ambiguity when questioning by police officers is not considered interrogation).

[92] *Compare Davis*, 547 U.S. at 822 (explaining statements made to police to secure emergency help are nontestimonial), *with Gonsalves*, 833 N.E.2d at 555-56 (characterizing statements made to secure "volatile" scenes or establish need for medical care as nontestimonial).

[93] *See* Méndez, *supra* note 32, at 587-89 (outlining uncertainties left by *Crawford*).

[94] *Compare Bryant*, 131 S. Ct. at 1162 (explaining testimonial qualities are determined using objective intents of both declarant and police), *with Gonsalves*, 833 N.E.2d at 558 (deciding to objectively evaluate declarant's statements in context with statements and actions of listener).

While both the SJC's and the Supreme Court's principles are harmonious, their processes are not; unlike the Supreme Court, the SJC created a two-step procedure to determine when statements are testimonial.[95] First, Massachusetts courts determine if a statement is testimonial per se, and if not, the court determines if the statement is testimonial in fact.[96] The Supreme Court has instead eschewed developing specific procedures, electing to develop the boundaries of testimonial statements on a case-by-case basis without further segmenting the types of statements through procedural devices.[97] Because Massachusetts has adopted a distinct procedure each time the Supreme Court refines the definition of testimonial, the SJC must adjust its own test to comply.[98]

This difference in analyses has resulted in two major changes since the SJC rendered *Gonsalves*.[99] First, the *Davis* decision incorporated the formality of the circumstances as a criterion of courts' evaluations of exchanges between law enforcement officers and declarants; a concept the SJC had considered, but rejected.[100] Second, the *Davis* Court held that statements made to law enforcement officers are nontestimonial if the declarant is seeking assistance during an ongoing emergency.[101] Massachusetts trial courts were obliged to subject such statements to further analysis under *Gonsalves*, leading to the possibility that those statements may be characterized as testimonial during the second step of the analysis.[102] Today, Massachusetts courts must examine, specifically in the context of statements made to law enforcement officers, whether the statement is testimonial per se, and if it is, whether the statement was made to secure help during an emergency.[103] If the statement qualifies for this emergency exception, then courts may not subsequently characterize it as

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[95] *See* Commonwealth v. Shangkuan, 943 N.E.2d 466, 473 (Mass. App. Ct. 2011) (noting Massachusetts process for evaluating testimonial statements is distinct from federal procedure).

[96] *See* Commonwealth v. Simon, 923 N.E.2d 58, 73-74 (discussing *Gonsalves*'s two-step analysis); Pumphrey, *supra* note 60, at 19 (considering *Gonsalves* analysis).

[97] *See Bryant*, 131 S. Ct. at 1156 (prescribing fact-driven analysis to determine if statements are testimonial).

[98] *See* Commonwealth v. DeOliveira, 849 N.E.2d 218, 221 n.1 (Mass. 2006) (noting SJC chose not to develop distinct confrontation rights under state law).

[99] *See supra* Part II.D (discussing SJC's adjustment of testimony analysis post-*Gonsalves*).

[100] *See* Commonwealth v. Gonsalves, 833 N.E.2d 549, 555 (Mass. 2005) (discussing SJC's rejection of formality of circumstances as a criterion for identifying interrogations).

[101] *See* Davis v. Washington, 547 U.S. 813, 822 (2006) (describing ongoing emergency exception).

[102] *See Gonsalves*, 833 N.E.2d at 557 (describing *Gonsalves*'s requirement that statements to police during emergencies undergo testimonial in fact analysis); Commonwealth v. Foley, 833 N.E.2d 130, 133 (Mass. 2005) (same), *cert. denied*, 548 U.S. 927 (2006).

[103] *See* Pumphrey, *supra* note 60, at 19 (describing effect of *Davis* on Confrontation Clause analysis in Massachusetts).

testimonial in fact.[104]

Today, Massachusetts courts evaluating statements made to law enforcement officers under *Gonsalves* first consider whether they are testimonial per se, and then, in accordance with *Simon*, they determine if the emergency exception applies.[105] After *Simon,* this initial categorization is superfluous: the testimonial-per-se/testimonial-in-fact distinction no longer has any effect in this context because once the court determines the ongoing emergency exception applies, the statements are no longer subject to further analysis under the testimonial-in-fact rubric.[106] In practice, courts can simply ask if a reasonable person in the declarant's position would anticipate that law enforcement officers would use the statement against the accused in investigating and prosecuting a crime.[107] Courts conducting this fact-driven analysis objectively evaluate all the facts and circumstances surrounding the statement, including the intent of reasonable persons in the parties' positions and the formality of the encounter, to determine if the statement qualifies as an ongoing emergency.[108] Given the amount of confusion associated with post-*Crawford* Confrontation Clause cases, Massachusetts should avoid adding steps to the process whenever possible.[109]

The SJC has noted that this two-step procedure remains the appropriate method for determining whether statements made to persons other than law enforcement officers are testimonial because the Supreme Court has not ruled on such a case.[110] As in cases where statements are

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[104] *See id.* (describing *Simon*'s rule foreclosing statements qualifying for ongoing emergency exception from testimonial-in-fact analysis); *see also* Commonwealth v. Simon, 923 N.E.2d 58, 73 (2010) ("To the extent that the [emergency] exception applies, the statements are not testimonial per se and they will not become testimonial in fact in any circumstances.").

[105] *See Gonsalves*, 833 N.E.2d at 554-57 (describing two-step process); Pumphrey, *supra* note 60, at 19 and accompanying text (describing effects of *Simon* on *Gonsalves*'s process); *see also* Commonwealth v. Rodriguez, 833 N.E.2d 134, 135 (Mass. 2005) (ruling statements arising from law enforcement questioning are testimonial per se).

[106] *See* Pumphrey, *supra* note 60, at 19 and accompanying text (describing present Confrontation Clause analysis).

[107] *See* Michigan v. Bryant, 131 S. Ct. 1143, 1160 (2011) (dictating inquiry courts should use to determine whether statements are testimonial).

[108] *See id.* (describing factors courts should consider in testimonial inquiry).

[109] *See Gonsalves*, 833 N.E.2d at 554-57 (demonstrating confusion associated with post-*Crawford* Confrontation Clause analysis).

[110] *See* Commonwealth v. Simon, 923 N.E.2d 58, 73 n.10 (Mass. 2010) (instructing courts to use two-step analysis when emergency exception does not apply). *Compare Gonsalves*, 833 N.E.2d at 561-62 (evaluating statements declarant made to her mother), *with Bryant*, 131 S. Ct. at 1163-67 (analyzing statements made to police), *and Davis*, 547 U.S. at 826-32 (analyzing statements made to 911 operator and to police), *and* Crawford v. Washington, 541 U.S. 36, 65-66 (2004) (analyzing statements declarant made to police).

made to law enforcement officers, no genuine procedural difference exists when declarants make statements to persons other than law enforcement officers because they simply cannot be testimonial per se.[111] Testimonial-per-se statements include affidavits, depositions, confessions, or prior testimony at a preliminary hearing, before a grand jury, or at a former trial, or statements procured through law enforcement interrogation, but not statements made to persons other than law enforcement.[112] If statements made to persons other than law enforcement officers cannot be testimonial per se under the Massachusetts procedure, then the only remaining analysis is whether the statements are testimonial in fact, which is merely an analysis of whether the statement is testimonial at all.[113]

The Supreme Court has not addressed a post-*Crawford* case involving a contested statement made to a private citizen, but the principles of analysis that emerged from the *Crawford–Davis–Bryant* trilogy are the substantive equivalent of those settled upon by the SJC in *Gonsalves* and *Simon*.[114] Both the Supreme Court and the SJC decisions agree that statements are testimonial when the primary purpose of a reasonable person in the declarant's position would be to establish or prove facts relevant to a later criminal prosecution.[115] The only distinction remaining is that while the federal jurisprudence considers the formality of the circumstances, the Massachusetts lineage arguably does not.[116] In *Gonsalves*, the SJC determined that the formality of the circumstances is not relevant to the determination of whether a statement is testimonial because it was concerned that police would purposefully keep circumstances informal.[117] The SJC later abandoned this rationale in *Simon*, adopting the formality of the circumstances as a relevant criterion per the Supreme Court's

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[111] *See Gonsalves*, 833 N.E.2d at 557-58 (omitting statements of private citizens from list of testimonial per se statements).

[112] *See id.* (outlining statements that are testimonial per se).

[113] *See id.* (explaining *Gonsalves*'s two step analysis and meaning of "testimonial in fact").

[114] *See generally* Parts II. and III. (describing *Crawford*, *Davis*, and *Bryant* rationales, and their effects on Massachusetts jurisprudence).

[115] *Compare Bryant*, 131 S. Ct. at 1162 ("[W]hen a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the 'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs."), *with* Commonwealth v. Smith, 951 N.E.2d 674, 682 (Mass. 2011) (adopting *Bryant*'s definition for testimonial per se analysis).

[116] *Compare* Davis v. Washington, 547 U.S. 813, 827 (2006) (describing *Davis*'s adoption of formality of circumstances in evaluating potentially testimonial statements), *with* Fisher, *supra* note 46, at 616 (describing SJC's limitation of the *Davis* holding to testimonial per se analysis), *and* Méndez, *supra* note 32, at 603 (same).

[117] *See Gonsalves*, 833 N.E.2d at 555 (explaining rationale for rejecting formality as criterion for identifying interrogations).

instruction in *Davis*.[118] That adoption, however, was limited to testimonial per se analysis.[119]

Future Massachusetts courts that fail to consider the formality of the circumstances surrounding statements to persons other than police in testimonial-in-fact analyses are failing to consider that the *Gonsalves* Court was concerned that police might intentionally manipulate the circumstances to later persuade judicial bodies that a statement is nontestimonial (and admissible under the Confrontation Clause), rather than testimonial (necessitating cross examination).[120] Moreover, the *Gonsalves* analysis itself indicated that the formality of the circumstances was relevant to its determination that the victim's statements to her mother were nontestimonial.[121] While choosing to overlook the formality of the circumstances might seem simpler, as Justice Sotomayor noted in *Bryant*: "simpler is not always better," and the formality of the circumstances is relevant to the analysis.[122] Additionally, it is far simpler to have one rule governing the evaluation of all statements that accounts for all circumstances regardless of this audience, rather than a separate rule for statements made to persons other than law enforcement officers that ignores the formality of the circumstances.[123]

After *Bryant*, it is clear that statements to law enforcement officers are testimonial when the circumstances would indicate to a reasonable person that they would be used in a subsequent criminal prosecution against the accused.[124] When the circumstances that indicate there is an ongoing emergency, the declarant's statements are not testimonial.[125] This rule is applicable to *any* type of statement, not just those made to law

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[118] *See* Commonwealth v. Simon, 923 N.E.2d 58, 73-74 (Mass. 2010) (adopting formality of circumstances as a relevant criteria in testimony per se analysis); Pumphrey, *supra* note 60, at 19 and accompanying text (same).

[119] *See Gonsalves*, 833 N.E.2d at 562 (describing SJC's limitation of the *Davis* holding to testimonial per se analysis).

[120] *See id.* at 555 (explaining rationale for rejecting formality as a criterion for identifying interrogations).

[121] *See id.* at 561-62 (describing fact-based analysis court used to find victim's statements to her mother nontestimonial).

[122] *See* Michigan v. Bryant, 131 S. Ct. 1143, 1162 (2011) (suggesting that limiting judicial discretion to consider all relevant facts would be unjustifiable restraint).

[123] *See* THOMAS AQUINAS, BASIC WRITINGS OF SAINT THOMAS AQUINAS 129 (Anton C. Pegis ed. 1945) ("If a thing can be done adequately by means of one, it is superfluous to do it by means of several; for we observe that nature does not employ two instruments where one suffices.").

[124] *See id.* at 1154 (citing Davis v. Washington, 547 U.S. 813, 822 (2006)) (elaborating on the meaning of "testimonial").

[125] *See* Davis v. Washington, 477 U.S. 813, 827 (2006) (describing ongoing emergency exception).

enforcement officers, because the context-driven analysis suggested by the Court is broad enough to apply in all scenarios.[126] For example, some statements, like affidavits, are easy to evaluate because they are likely always testimonial, as the formal circumstances under which they are taken would leave a reasonable person to expect them to be used later in criminal prosecutions.[127] However, as the circumstances under which the statement is made become less formal, but still involve law enforcement officers (i.e., 911 calls and police interrogations), a context-driven fact-specific inquiry becomes more difficult because reasonable people might disagree about when a person might expect their statements to be used in a later criminal proceeding.[128] Lastly, when the contested statements are part of a private conversation, the same context-driven analysis is appropriate, even if the circumstances are more difficult to evaluate.[129] Regardless of the facts, these evaluations should focus on whether a reasonable declarant under the circumstances would expect the statements to be used against the accused in a later criminal proceeding, and not whether the actual parties believed the statements were admissible—the more formal the circumstances, the more likely the parties are reasonable in their belief.[130]

The SJC's failure to explicitly abandon the two-step process may ultimately mislead and confuse Massachusetts's lower courts, even though its Confrontation Clause jurisprudence requires an analysis that is substantively equivalent to the Supreme Court's procedure—both are case-by-case examinations of the facts.[131] As Massachusetts courts may continue to apply additional steps to arrive at the same result, there is the possibility of divergent developments in federal and state common laws in the future; in fact, some Massachusetts courts have continued to rely upon

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[126] *See Bryant*, 131 S. Ct. at 1158-62 (suggesting courts should consider all relevant circumstances to determine testimonial nature of statements).

[127] *See* Commonwealth v. Simon, 923 N.E.2d 58, 73 (Mass. 2010) ("A statement is testimonial per se if it was made in a formal or solemnized form . . . ."). The simplicity of this test may lead courts to forego evaluating each statement in context—a step the *Bryant* Court discourages judges from overlooking. *See Bryant*, 131 S. Ct. at 1159 (describing court's omission of context-dependent analysis as a "failure").

[128] *See Bryant*, 131 S. Ct. at 1158-59 (listing factors that could inform context-driven analysis). For example, courts might find the medical condition of the declarant, the formality of the circumstances, or the existence of an ongoing emergency important factors to consider. *Id.* at 1159 (explaining that trial court should have considered declarant's medical condition).

[129] *See* Commonwealth v. Gonsalves, 833 N.E.2d 549, 561-62 (Mass. 2005) (conducting fact-specific analysis of declarant's statements to her mother).

[130] *See* Lowy & Dudich, *supra* note 40, at 25 (outlining criteria to determine when statement is testimonial in fact).

[131] *See Bryant*, 131 S. Ct. at 1162 (describing Supreme Court approach as context driven); *Gonsalves*, 833 N.E.2d at 555-56 (describing SJC approach as context-driven).

the *Gonsalves* analysis despite *Bryant*'s applicability.[132]

V. CONCLUSION

Through the *Crawford–Davis–Bryant* lineage, the Supreme Court provided a working definition of "testimonial" that parallels, but does not entirely overlap, the interpretation offered by the SJC in *Gonsalves*. The federal cases only address statements made to government officials in the course of criminal investigations, whereas the SJC and lower courts have had to apply the federal doctrine to statements made to persons other than government actors. While both courts' definitions are harmonious, Massachusetts requires an additional two-step analysis. The Supreme Court has not evaluated Massachusetts's process in its decisions, but nevertheless, the SJC has had to adjust the procedure to remain in step with federal Confrontation Clause jurisprudence. While this procedure was once valuable, it has become outdated in light of subsequent Supreme Court decisions, and is becoming increasingly useless as federal Confrontation Clause develops in the post-*Crawford* era.

All statements (including affidavits, 911 calls, and statements to police officers and family members) are measurable against the current federal standard. With *Gonsalves*'s two-step process having no genuine procedural effect and negligible (if any) substantive effect, courts evaluating whether statements made to persons other than law enforcement officers should abandon the procedure and simply rely upon the existing common law without making a distinction between statements that are testimonial per se and testimonial in fact. The court should ask: Would a reasonable person in the declarant's shoes expect their statement to be used against the defendant in a later criminal proceeding? If so, the statement is testimonial, and the defendant must have the opportunity to cross-examine the declarant.

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[132] *See* Commonwealth v. Figueroa, 946 N.E.2d 142, 150-51 (Mass. App. Ct. 2011) (evaluating declarant's statement to her doctor using *Gonsalves*'s two-step Confrontation Clause analysis). The court in *Figueroa* did not consider the *Bryant* ruling, published a month earlier, as part of its analysis. *Id.* While *Bryant* may not have been expressly controlling, the court missed the opportunity to support its analysis of the formality of the exchange with the Supreme Court's recent exposition of the importance of formality as a factor in identifying testimonial statements. *See Bryant*, 131 S. Ct. at 1160 (discussing value of considering formality of conversation in identifying testimonial statements).