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Crawford/Davis "Testimonial" Interpreted, Removing the Clutter: Application Summary

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HYPOTHETICAL

John, age twelve, comes running out the front door of a condominium high-rise building. He runs right up to two men talking to each other on the sidewalk in front of the building. John blurts out, "Oh my God!!! My mom just pushed my dad off the balcony of our twentieth-story condo!!! What should I do now?" One of the two men is a plain-clothes police officer. The other is an old friend from college, now working as a stock broker.

Is John's statement "testimonial" in a criminal prosecution of his mom for homicide? Does it matter who testifies to the existence of the statement?

SYNOPSIS OF *CRAWFORD* AND *DAVIS*

In *Crawford v. Washington*, the U.S. Supreme Court held that a "testimonial" statement is not admissible under the Confrontation Clause if the out-of-court declarant does not testify at the criminal trial subject to cross-examination unless the criminal defendant had a prior opportunity for cross-examination.[1] The Supreme Court, however, stated, "[w]e leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" while adding "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations."[2]

Justice Scalia, writing for the majority and taking a historical approach, stated that with respect to the meaning of the Confrontation Clause the history of the Sixth Amendment supports two inferences.[3] "First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of

* Professor of Law, University of Miami School of Law. I would like to dedicate this article to John T. Gaubatz, who was a very close and personal friend. John and his wife, Kathy, were very kind to me in a moment of need for which I will always be grateful.

1. 541 U.S. 36, 59 (2004).

2. *Id.* at 68.

3. *Id.* at 50.

ex parte examinations as evidence against the accused,"[4] i.e., "flagrant inquisitorial practices."[5] Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[6]

With respect to defining "testimonial" statements, *Crawford* states:

> 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,"; "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." These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.[7]
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> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.[8]
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> . . . .
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> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.[9]

Justice Scalia's already famous reference that the "[v]arious formu-

4. *Id.*
5. *Id.* at 51.
6. *Id.* at 53–54.
7. *Id.* at 51–52 (footnote omitted).
8. *Id.* at 52.
9. *Id.* at 68 (citations omitted).

lation of this core class of 'testimonial' statements exist"[10] followed by two of three formulations incorporating a focus on the "reasonable" expectation of the declarant is a classic illustration of antinomy, i.e., a contradiction in logic, in this case the process of reliance on that which had previously been rejected. The parties and amicus curiae clearly reasonably assumed that if the U.S. Supreme Court chose to reinvent the Confrontation Clause once again as it did in *Dutton v. Evans*[11] and then again in *Ohio v. Roberts*,[12] that the Court would bear in mind that the Confrontation Clause itself speaks of "confronted with witnesses against him" and thus focus on the "reasonable" expectation or belief that the statement would be used "against" the accused at trial by the prosecution.[13] One way to view the issue of "reasonable" expectation or belief is to ask whether the statement is "accusatory in nature," i.e., may be of assistance in the apprehension or prosecution of a criminal defendant. But *Crawford*'s majority rejected this more obvious "plain meaning" of the Confrontation Clause in favor of focusing *solely* on governmental conduct in acquiring evidence against the accused. Simply put, Justice Scalia set forth two inferences that history supports as to the meaning of the Confrontation Clause, and *only two inferences.*[14] When Justice Scalia *unfortunately* and *confusingly* attempted to define testimonial, he had simply failed to realize that any reference to a declarant's "reasonable" belief or expectation was simply completely outside the scope of the protection of the Confrontation Clause as previously clearly delineated and, as importantly, completely unrelated to the reasons, i.e., the two inferences, set forth in support thereof.

Yet given the absence in *Crawford* of a "comprehensive definition of 'testimonial',"[15] it was not surprising that lower courts immediately employed a plethora of interpretations of "testimonial" leading to conflicting results. Of particular concern was the lack of coherence in the numerous decisions addressing whether 911 calls and statements made to police officers on arrival at the scene were "testimonial."

In response, in *Davis v. Washington*, Justice Scalia, once again writing for the majority, stated:

> Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in

10. *Id.* at 51.

11. 400 U.S. 74 (1970).

12. 448 U.S. 56 (1980).

13. *See* Brief for the Petitioner, Crawford v. Washington, 541 U.S. 36 (2003) (No. 02-9410); Brief for The National Association of Criminal Defense Lawyers, et al. as Amici Curiae Supporting Petitioner, *Crawford*, 541 U.S. 36 (No. 02-9410).

14. *Crawford*, 541 U.S. at 50.

15. *Id.* at 68.

> response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[16]

Davis continued that statements volunteered to a government official may also be testimonial if the primary purpose on receipt of such statements is to establish or prove past events potentially relevant to later criminal prosecution.[17] Whether the circumstances surrounding the making of the out-of-court statement were formal and solemn, and whether the statement resulted from police interrogation or judicial examination—components of the concept of "testimonial" contained in *Crawford, see infra*—were completely abandoned as significant to Confrontation Clause analysis in *Davis*.[18]

Under *Davis*, *any* statement made to or elicited by a police officer,

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16. Davis v. Washington, 126 S. Ct. 2266, 2273–74 (2006) (footnote omitted).

17. *Id.* at 2274 n.1 ("Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations—which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning.) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." (citation omitted)).

18. Justice Scalia, in response to Justice Thomas's dissent, feebly, unsuccessfully, and unnecessarily, attempts to assert a continued relevance of solemnity, an impossible task in the context of an oral volunteered statement to a 911 operator, on the basis that making a statement that is a deliberate falsehood to an investigating officer is criminal:

> The question before us in *Davis*, then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in *Crawford* that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford*," '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " (The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood.) A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or

other law-enforcement personnel, or a judicial officer under circumstances objectively indicating at the time made that the primary purpose to which the statement will be used by the government is to establish or prove past events potentially relevant to later criminal prosecutions is "testimonial."[19] Statements that are "testimonial" are not admissible under the Confrontation Clause if the out-of-court declarant does not testify at the criminal trial subject to cross-examination, unless the criminal defendant had a prior opportunity for cross-examination.[20] Conversely, any statement made to or elicited by a police officer, other law-enforcement personnel, or a judicial officer under circumstances objectively indicating at the time made that the primary purpose to which the statement will be used by the government is other than prosecution of a past criminal event is "nontestimonial."[21] In addition to curtailment of an ongoing crime, the other primary purpose encompassed by the term "emergency" in *Davis*, protection of the police and third parties, as well as the victim from immediate further attack illustrate primary other purposes.[22] Although emergency as another primary purpose in *Davis* was not defined, emergency logically extends to circumstances requiring assistance from medical personnel, firefighters, or other governmental services such as those dealing with hazardous materials.

Very importantly, note that even though *Davis*, like *Crawford* before it,[23] explicitly declined to present a comprehensive definition of "testimonial," *Davis* clearly supports the proposition that *all other statements* are not "testimonial"—namely, statements where the primary purpose to which the statement is employed at the time received does not relate to prosecuting a past criminal event, even when made to a government official.[24] Thus, as occurred in *Davis*, a 911 call to an operator considered a government official, describing an ongoing emergency as to which the police will be called to act is "nontestimonial," while any statements made once the emergency has ceased are "testimonial" as the primary purpose on the part of the government viewed objectively

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> prov[e]" some past fact, but to describe current circumstances requiring police assistance.

Id. at 2276 (first and second alteration in original) (citations omitted). If the Confrontation Clause is concerned solely with the primary purpose to which a statement is put to use when received by a government official, whether the declarant is "solemn" is completely irrelevant. Finally, an excited utterance made to 911 on its face is the complete opposite of "solemn."

19. *Id.* at 2273–74.

20. *Crawford*, 541 U.S. at 59.

21. *Davis*, 126 S. Ct. at 2273–74.

22. *Id.*

23. *Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial'.").

24. *Davis*, 126 S. Ct. at 2273–74.

shifted from responding to the emergency to proving past events relevant to later criminal prosecution.[25] All statements made to someone

25. "The relevant statements in *Davis v. Washington* were made to a 911 emergency operator on February 1, 2001. When the operator answered the initial call, the connection terminated before anyone spoke. She reversed the call, and Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic disturbance with her former boyfriend Adrian Davis, the petitioner in [*Davis*]:

"911 Operator: Hello.

"Complainant: Hello.

"911 Operator: What's going on?

"Complainant: He's here jumpin' on me again.

"911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?

"Complainant: I'm in a house.

"911 Operator: Are there any weapons?

"Complainant: No. He's usin' his fists.

"911 Operator: Okay. Has he been drinking?

"Complainant: No.

"911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?

"Complainant: I'm on the line.

"911 Operator: Listen to me carefully. Do you know his last name?

"Complainant: It's Davis.

"911 Operator: Davis? Okay, what's his first name?

"Complainant: Adrian

"911 Operator: What is it?

"Complainant: Adrian.

"911 Operator: Adrian?

"Complainant: Yeah.

"911 Operator: Okay. What's his middle initial?

"Complainant: Martell. He's runnin' now."

As the conversation continued, the operator learned that Davis had "just r[un] out the door" after hitting McCottry, and that he was leaving in a car with someone else. McCottry started talking, but the operator cut her off, saying, "Stop talking and answer my questions." She then gathered more information about Davis (including his birthday), and learned that Davis had told McCottry that his purpose in coming to the house was "to get his stuff," since McCottry was moving. McCottry described the context of the assault, after which the operator told her that the police were on their way. "They're gonna check the area for him first," the operator said, "and then they're gonna come talk to you."

The police arrived within four minutes of the 911 call and observed McCottry's shaken state, the "fresh injuries on her forearm and her face," and her "frantic efforts to gather her belongings and her children so that they could leave the residence."

Davis, 126 S. Ct. at 2270–71 (citations omitted). It is unclear exactly when during the conversation the 911 operator notified the police to proceed to the location of the domestic disturbance. Under *Davis*, even if the police were dispatched only on conclusion of the conversation, a point in time at which statements received had ceased being "testimonial," even though no emergency would have thus existed when the police were dispatched, the initial statements made by the caller up to the point of disclosure that the perpetrator had "just r[un] out the door" and was leaving in a car with someone else would nevertheless be admissible "nontestimonial" excited utterances. Primary purpose under *Davis* is thus determined at the moment of receipt.

other than a government official are always "nontestimonial;" unavailability of the declarant for cross-examination does not preclude admissibility against the criminal defendant.[26]

Davis, both from what it states and does not state, clearly opines that the objective circumstance is to be considered from the eliciting or receiving government agent's perspective and not from the declarant's in determining the primary purpose to which such statements are to be employed.[27] Thus, consistent with the two historical inferences described in *Crawford* of consequence in determining the meaning of the Confrontation Clause, it is solely the conduct of police officers, other law-enforcement personnel, and judicial officers that is of concern.

In short, while *Davis* expressly states that it is not presenting a comprehensive definition of "testimonial,"[28] *Davis* may nevertheless in fact have done so, or come very close to having done so, and thus be the "another day" referred to in *Crawford*.[29] *Davis*, by its facts, considered together with what it said and didn't say, clearly rejects all three of the possible definitions of "testimonial" suggested in *Crawford*, including in particular any focus on whether hearsay statements made by the nontestifying out-of-court declarants were statements "that declarants would reasonably expect to be used prosecutorily," or "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."[30] In *Davis*, the declarant's 911 statement that Davis was then beating on her and the later statement that Davis had just run out the door after hitting her would both be statements an objective witness would reasonably expect or believe would be available for use at a later trial.[31] If a statement to law enforcement reporting a current crime and a subsequent statement reporting a past crime do not meet the foregoing concept of "reasonable expect or belief," it is hard to imagine a statement that would. *Yet no mention of such a fact was made in* Davis *whatsoever*. Instead, *Davis* focused its definition of testimonial solely on the eliciting or receiving police officer, other law-enforcement personnel, or judicial officer asking whether at the time made the primary purpose to which the statement will be used by the government is to establish or prove past events potentially relevant to a later criminal prosecution.[32] In *Davis*, the initial statement received for the primary purpose of responding to an emer-

26. *See* cases cited *infra* note 104.
27. *See Davis*, 126 S. Ct. at 2276.
28. *Id.* at 2273.
29. Crawford v. Washington, 541 U.S. 36, 68 (2004).
30. *Id.* at 51–52 (citations and internal quotation marks omitted).
31. *See Davis*, 126 S. Ct. at 2271.
32. *Id.* at 2273–74.

gency case was declared nontestimonial while the subsequent statement was held to be testimonial in that the primary purpose to which the statement was employed by the police was "to establish or prove past events potentially relevant to later criminal prosecution."[33] Similarly, as *Crawford* is currently being interpreted, a statement made by a doorman that Mr. Smith left by taxi at about 6:00 a.m. yesterday morning to a police officer would be testimonial regardless of the fact that since the statement is not accusatory in nature, an objective witness would not reasonably expect or believe the statement to be used in a later trial, unless one unreasonably was to conclude that every statement made to law enforcement satisfies the test of reasonable expect or belief, thus making the in fact nonexistent requirement of reasonable expect or belief once again meaningless. On the other hand, a statement made to a police officer, "Call 911 and get an ambulance, my son just shot his father," would be nontestimonial according to *Davis* as the primary purpose on receipt would be to respond to a medical emergency in spite of the fact that the declarant, as an objective witness, would reasonably expect or believe that the statement would be used in a later trial. The declarant's expectations or beliefs are irrelevant—only the primary purpose to which the police officer, other law-enforcement personnel, or judicial officer puts the statement is of concern in determining whether a statement is testimonial. Obviously, all statements not being testified to by a police officer, other law-enforcement personnel, or a judicial officer are nontestimonial.

Any analysis, evaluation, or prediction concerning *Crawford*, as narrowed in *Davis*, must begin and end with the caveat that given the variety of approaches taken by the lower courts both to *Lilly v. Virginia*[34] and to *Crawford*, one should fully expect the tremendous diversity of interpretation of the Confrontation Clause to continue, with a significant number of court decisions clearly running in the face of the *Davis* narrowing of *Crawford*. Simply put, one expects, for example, that several courts would continue to espouse the view that a declarant's reasonable expectation or belief, objective or subjective, that the statement would be used "against" the accused by the prosecution at trial makes the statement "testimonial"—at least when made to a government official. This likelihood is enhanced by the fact that *Davis* neither explicitly dismisses this possible formulation of "testimonial" nor purports to present a comprehensive definition of "testimonial." Such opinions have indeed been forthcoming.[35] In short, various contrary

33. *Id.* at 2274 (footnote omitted).

34. 527 U.S. 116 (1999).

35. *See* cases cited *infra* note 54.

viewpoints, some politically inspired while others simply incredulous and unaccepting that *Davis* actually says what it clearly says, will continue to be espoused in spite of the extremely clear narrowing of *Crawford* by *Davis.*

Finally, what role is played by the Confrontation Clause, if any, in governing the admissibility of hearsay statements that are "nontestimonial" admitted pursuant to a hearsay exception made by a declarant who does not testify at the criminal trial subject to cross-examination? In other words, is the *Roberts* "firmly rooted" or "particularized guarantees of trustworthiness" requirement[36] applicable to "nontestimonial" statements of nontestifying declarants? After *Crawford* failed to directly address this issue, lower courts almost unanimously concluded that *Roberts* did govern "nontestimonial" statements.[37] *Davis*, however, opines that the Confrontation Clause applies only to "testimonial" hearsay statements from which it follows that *Roberts* does not govern admissibility under the Confrontation Clause of "nontestimonial" statements. That *Crawford* did in fact overrule *Roberts* was confirmed in *Whorton v. Bockting*, which held that *Crawford/Davis* does not apply retroactively.[38]

DEFINING "TESTIMONIAL" AND "NONTESTIMONIAL"

What, if anything, is the role in making a *Crawford/Davis* testimonial-versus-nontestimonial determination of the concepts of "interrogation," "formality," "solemnity," "structured," "bearing testimony," and finally and very importantly the mental state of the declarant, i.e., whether, objectively or subjectively viewed, the declarant would have reasonably expected or believed his statement to be used or to be available for use by the prosecution at a later trial? While each of the foregoing terms and concepts are discussed in *Crawford* and several in *Davis*, *none* has any role to play at all in determining whether a statement is or is not testimonial.

Simply put, under *Crawford* and *Davis* a hearsay statement is "testimonial" when, and only when, the statement of a nongovernment official (1) was made to or elicited by a police officer, other law-enforcement personnel, or a judicial officer ("government official"), and

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

37. *See, e.g.*, United States v. Johnson, 440 F.3d 832, 843–44 (6th Cir. 2006) ("Although *Crawford* reformed the Confrontation Clause analysis regarding out-of-court testimonial statements, this court has held that the *Ohio v. Roberts* line of cases continues to control as to nontestimonial statements.") (citation omitted); United States v. Saget, 377 F.3d 223, 227 (2d Cir. 2004) ("*Crawford* leaves the *Roberts* approach untouched with respect to nontestimonial statements.").

38. 127 S. Ct. 1173, 1184 (2007).

(2) was made to or elicited by a government official under circumstances objectively indicating at the time that the primary purpose to which the statement will be used by the government is to establish or prove past events potentially relevant to later criminal prosecution. Conversely, a hearsay statement is "nontestimonial" when, and only when, the nongovernment official's statement was either (1) made to or elicited by someone who is not a police officer, other law-enforcement personnel, or a judicial officer, or (2) was in fact made to or elicited by a government official under circumstances objectively indicating at the time made that the primary purpose to which the statement will be used by the government is something other than establishing or proving past events potentially relevant to a later criminal prosecution. In the context of *Davis*, some such other purposes were collectively referred to as "meet[ing] an ongoing emergency."[39] In fact, any primary purpose on the part of the government on receiving or eliciting the statement from a nongovernment official other than to establish or prove past events potentially relevant to later criminal prosecution makes the statement "nontestimonial."

HYPOTHETICAL: ANSWER

Applying the definition of "testimonial" developed above, the same statement made by John, age twelve, is "testimonial" if testified to by the plain-clothes police officer, but "nontestimonial" if testified to by the stockbroker.

THE CLUTTER IN *CRAWFORD/DAVIS*: THE EMPEROR'S NEW CLOTHES

The conclusion that *Davis* mandates that John's statement, "Oh my God!!! My mom just pushed my dad over the balcony of our twentieth-story condo!!! What should I do now?" be classified as testimonial when testified to by the plain-clothes police officer, but nontestimonal when testified to by the stockbroker, illustrates and exemplifies that most of the criteria once suggested in *Crawford* as possibly relevant, some, but by no means all being also mentioned in *Davis*, are simply irrelevant in practice and in theory in determining whether a statement is testimonial. The now simply "clutter" concepts originally introduced in *Crawford* and made clearly irrelevant under *Davis* include "interrogation," "formality," "solemnity," "structured," the summary term "bear testimony," and finally, and very importantly, the mental state of the declarant, objectively or subjectively viewed, i.e., would the declarant

39. Davis v. Washington, 126 S. Ct. 2266, 2273.

reasonably expect or believe his statement to be used or available for use by the prosecution at a later trial.

John's statement in any reasonable sense was voluntary and not the product of "interrogation," "structured" or otherwise, was informal rather than "formal," the surrounding circumstances did not indicate "solemnity," not even under the fallacious argument of solemnity espoused in *Davis* supposedly brought about solely because one under a state of excitement exclaims to a police officer, i.e., it is criminal to lie to the police.[40] (John couldn't possibly know one of the two men was a police officer.) Moreover, whether John, objectively or subjectively, would have reasonably expected or believed his statement to be used or be available for use by the prosecution at a later criminal trial is completely irrelevant. Under *Davis*, the government official's primary purpose on obtaining the statement alone controls. *Each term or concept is simply clutter that clouds courts from reaching a clear understanding of the* Davis *limitation modification and clarification of* Crawford. If *Davis* on its facts and on its holding compels the conclusion that John's statement to the plain-clothes police officer is "testimonial," as it most certainly does, there simply is no role to be played by the foregoing terms and concepts. Thus it follows like night the day that all references to such terms and concepts are confusing, unhelpful, and, most critically, simply wrong.

Nevertheless, this clutter unfortunately continues to raise its useless head in many decisions,[41] which is not surprising given the lack of clarity in *Crawford*, even as modified and restricted in *Davis*. The very disappointing fact that *Davis* itself expressly states that it is not presenting a comprehensive definition of testimonial when it may have done so, or come extremely close to having done so, as will be suggested below, clearly does not encourage courts to search for the meaning of "testimonial" based on what *Davis* actually holds.

CRAWFORD INTRODUCTION

Crawford speaks of "bear testimony" as equivalent to a "witness" against the accused.[42] "Testimony" is stated to be "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[43] Finally, *Crawford* in this context opines that "[a]n accuser who makes a formal statement to government officers bears testimony in a

40. *See supra* note 18.

41. *See* cases cited *infra* notes 51, 53.

42. Crawford v. Washington, 541 U.S. 36, 51 (2004) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (internal quotation marks omitted).

43. *Id.* (quoting WEBSTER, *supra* note 42) (alteration in original).

sense that a person who makes a casual remark to an acquaintance does not."[44] *Crawford* herein introduces the concept of "bear testimony," "solemnity," and "formality" all at once. *Crawford* later speaks of "interrogation" referring in that context to "structured" as well.[45] *Crawford* opines: "In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class."[46]

Footnote 4 states:

> We use the term "interrogation" in its colloquial, rather than any technical legal, sense. Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.[47]

Davis Continuation

Davis feebly, unsuccessfully, and most critically inexplicably and inconsistently attempts to retain some utility for each of the foregoing concepts. With respect to "interrogation," *Davis* concludes that simple questions from the 911 operator such as, "What's going on?" and "Do you know his last name?" constitute "interrogation." Moreover, in footnote 1, *Davis* is forced to recognize that even a volunteered statement can be testimonial:

> Our holding refers to interrogations because . . . the statements in the cases presently before us are the products of interrogations—which in some circumstances tend to generate testimonial responses. *This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial.* The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning.) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.[48]

This last sentence that "in the final analysis" it is the declarant's state-

44. *Id.*
45. *Id.* at 53 & n.4.
46. *Id.* at 53 (footnote omitted).
47. *Id.* at 53 n.4 (citation omitted).
48. Davis v. Washington, 126 S. Ct. 2266, 2274 n.1 (2006).

ment "that the Confrontation Clause requires [the Supreme Court] to evaluate" simply means that the content of the declarant's statement is necessarily critical in determining the primary purpose to which the statement will be used by government officials to whom the statement was made, *nothing more and nothing less.*

Davis unfortunately attempts in the context of a simple, for all intents and purposes volunteered, 911 call to attempt to preserve some utility for the concepts of "interrogation," "formality," "solemnity," and even "structured" questioning and with them "bear testimony":

> The question before us in *Davis*, then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements. When we said in *Crawford* that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial. It is, in the terms of the 1828 American dictionary quoted in *Crawford*, "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood.) A 911 call, on the other hand, and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance.
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> The difference between the interrogation in *Davis* and the one in *Crawford* is apparent on the face of things. In *Davis*, McCottry was speaking about events *as they were actually happening*, rather than "describe[ing] past events." Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. And finally, the difference in the level of formality between

the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*. What she said was not "a weaker substitute for live testimony" at trial, like Lord Cobham's statements in *Raleigh's Case*, or Jane Dingler's *ex parte* statements against her husband in *King v. Dingler*, or Sylvia Crawford's statement in *Crawford*. In each of those cases, the *ex parte* actors and the evidentiary products of the *ex parte* communication aligned perfectly with their courtroom analogues. McCottry's emergency statement does not. No "witness" goes into court to proclaim an emergency and seek help.

Davis seeks to cast McCottry in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. In *King v. Brasier*, for example, a young rape victim, "immediately on her coming home, told all the circumstances of the injury" to her mother. The case would be helpful to Davis if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events.

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, "evolve into testimonial statements," once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*. This presents no great problem. Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.

> Davis's jury did not hear the *complete* 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial. That court also concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.[49]
>
> . . . .
>
> As for the charge that our holding is not a "targeted attempt to reach the abuses forbidden by the [Confrontation] Clause," which the dissent describes as the depositions taken by Marian magistrates, characterized by a high degree of formality: We do not dispute that formality is indeed essential to testimonial utterance. But we no longer have examining Marian magistrates; and we do have, as our 18th-century forebears did not, examining police officers—who perform investigative and testimonial functions once performed by examining Marian magistrates. It imports sufficient formality, in our view, that lies to such officers are criminal offenses. Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.[50]

EVALUATION OF *CRAWFORD/DAVIS* CLUTTER

Viewing the hypothetical illustration in light of the conclusion mandated by *Davis* that the same statement is testimonial when testified to by the plain-clothes police officer but nontestimonial when testified to by the stockbroker, it becomes patent that everything else introduced in *Crawford* is irrelevant clutter regardless of whether a feeble attempt was made in *Davis* to opine that such matters matter. The statement was volunteered, not the product of any interrogation, a result explicitly sanctioned in *Davis*; the statement was not the result of structured questioning, no questioning occurred at all; the statement possessed no formality, being an oral statement not under oath to strangers in front of a condominium building; and the statement was not solemn, the supposed solemnity brought about by the fact that lying to the police is a crime was not present as the police officer was in plain clothes. Nor does the statement "bear testimony" as it was neither formal nor solemn nor made by the declarant to prove some fact; the son in shock was not accusatory in his own mind but rather simply reporting a horrible event to someone he hoped would help him in some unspecified and probably uncontemplated manner. Primary purpose for which the statement was

49. *Id.* at 2776–78 (alterations in original) (citations omitted).

50. *Id.* at 2278 n.5 (alteration in original) (citations omitted).

elicited or received by the government official as the determining factor for testimonial versus nontestimonial simply does not contemplate, incorporate, or permit consideration of any such clutter.[51]

Finally, and very importantly, the declarant's mental state, whether viewed objectively or subjectively, is irrelevant, i.e., whether the declarant would reasonably expect or believe his statement would be used or be available for use by the prosecution at a later trial does not impact on whether the statement is testimonial. If the 911 statement in *Davis* that "He's here jumpin' on me again," is not one that meets not one but both of the formulations in *Crawford* suggested as possible definitions of testimonial implicating the mental state of the declarant, no statement would so qualify. Yet the statement was found to be nontestimonial; *no mention of the mental state of the declarant appears in* Davis *whatsoever.* Very importantly, nor should it, as the mental state of the declarant is simply not within the core concern of the Confrontation Clause as stated in *Crawford*:

> [T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.[52]

Fortunately, *Davis* removed the declarant's mental state from consideration as a potential contributing factor in defining testimonial. As developed below, what would be useful in further development of "testimonial" would be an introduction of the prerequisite concept of "accusa-

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51. Naturally enough, some courts miss the boat and continue to maintain the relevance of clutter. *See, e.g.*, People v. Cage, 155 P.3d 205, 216–17 (Cal. 2007) ("We derive several basic principles from *Davis*. First . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.") (footnotes omitted).

52. *Crawford*, 541 U.S. at 50.

tory" that would function independently of the mental state of the declarant.

Determining in practice whether the appropriate mental state of the declarant was present would often be difficult if mental state were in fact relevant. How does one determine whether a declarant, objectively or subjectively viewed, would reasonably expect or believe the statement to be available for use by the prosecution? If the statement is made to the police, do all statements automatically comply, even nonaccusatory statements such as, "The last time I saw Harry was 8:00 p.m. yesterday outside the apartment building"? What does "would" reasonably expect mean in comparison to "could" or "may"? In short, is every statement of every kind made to a police officer or other government official sufficiently likely to be available for use prosecutorial to qualify?

What about statements not made to a government official? Under *Davis*, all such statements are clearly nontestimonial falling outside the core meaning of the Confrontation Clause—the principal evil of civil-law-type ex parte examinations admitted against the accused. If *Davis* had not effectively so held,[53] how would the court determine whether the declarant, most likely objectively, "would" reasonably expect or believe the statement to be available to the prosecution for use at trial?

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53. *See* cases cited *infra* note 104. Since *Davis*, there appears to be only one significant outlier—People v. Stechly, 870 N.E.2d 333 (Ill. 2007). In *Stechly* the Supreme Court of Illinois held that statements made to nongovernment officials are not always "nontestimonial." *Id.* at 357–59. Instead, *Stechly* stated that with respect to such statements, the proper focus is on the declarant's intent: "Would the objective circumstances have led a reasonable person to conclude that their statement could be used against the defendant?" *Id.* at 359. In addition, *Stechly* concluded that with respect to a child's statement to a nongovernment official, the child's age should be treated as one of the objective circumstances to be taken into account in determining whether a reasonable person in his or her circumstances would have understood that their statement would be available for use at a later trial. *Id.* at 363.

Stechly is simply incorrect given the *Crawford/Davis* pronouncement that a statement made to a nongovernment official can sometimes be testimonial. Nothing in *Davis*, which both narrowed and reinforced *Crawford*, permits such an interpretation. As *Stechly* itself recognized, *Crawford* declared that the history of the Confrontation Clause in the Sixth Amendment supports two and only two inferences. *Id.* at 347. "First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* (quoting Crawford v. Washington, 541 U.S. 36, 50 (2004)) (internal quotation marks omitted). Second, the "Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 347 (quoting *Crawford*, 541 U.S. at 53–54) (internal quotation marks omitted). When statements are made to or elicited by a nongovernment official, the "principal evil" the Confrontational Clause addresses is simply never present. *Such statements, as every other reported opinion after* Davis *concludes, are never testimonial. Stechly* itself cites no opinions in support authored *after Davis.* Nor does *Stechly* offer any rationale whatsoever as to why the Confrontation Clause should apply to statements made to nongovernment officials. It simply concludes that certain authority before *Davis* got it right and that it is the declarant's perspective that is paramount in determining whether a statement to a nongovernment official is "testimonial" or "nontestimonial."

Do reasonable people ever expect or believe statements not made to law enforcement, not specifically intended to be conveyed to law enforcement, would be used or available for use by the prosecution at a later trial? If such circumstances in practice can exist only when the statement is made to a government official, not only is any discussion of declarant's intent theoretically incorrect and contrary to reported opinions, but practically meaningless as well.[54]

How should one judge the twelve year old's statement, whether made to his mother or a police officer? Should one apply an objective or subjective test? The cases disagree.[55] Fortunately, all the cases discussing the question of the declarant's mental state after *Davis* are simply wrong because (1) all statements to a nongovernment official are nontestimonial and (2) the declarant's mental state is totally irrelevant in determining whether statements made to a government official are testimonial.

"TESTIMONIAL" SHOULD ENCOMPASS SOLELY "ACCUSATORY" STATEMENTS TO GOVERNMENT OFFICIALS

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him."[56] *Crawford* equates "witnesses" against the accused to witnesses who "bear testimony."[57] "Testimony" is then in turn defined as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[58] Such an interpretation of "witness against" the accused focuses on formality and the statement's purpose as viewed from the declarant's perspective. But *Davis*, in speaking about 911 calls, rejects by its hold-

54. *See, e.g.*, State v. Camacho, 924 A.2d 99, 117 (Conn. 2007) ("With respect to Martin, Henry made the contested statements to her on the night of the murders, in the privacy of their motel room, before the police had contacted them. We are not persuaded by the defendant's argument that Henry must have considered Martin to be a dishonest person based on his relationship with her, and thus presumed that she would 'quickly tell police everything she knew about the homicides and the murder weapon to protect herself from charges and to protect her custody of her children.'"); People v. Gash, 165 P.3d 779, 782 (Colo. Ct. App. 2006) ("In analyzing the circumstances surrounding the statements, we conclude that no objective witness in the victim's position would believe that her statements would be used at trial. From the perspective of an objective witness in the victim's position, it would be reasonable to assume that the statements were only part of a private conversation with a relative, and not related to a prosecution for a crime that had yet to occur. Thus, we conclude the victim was speaking informally to her nephew.").

55. *See generally Stechly*, 870 N.E.2d at 361–63 (considering objective and subjective factors).

56. U.S. CONST. amend. VI.

57. *Crawford*, 541 U.S. at 51 (quoting WEBSTER, *supra* note 42).

58. *Id.* (quoting WEBSTER, *supra* note 42) (alteration in original).

ing the concepts of formality and solemnity altogether and even more importantly opined that the determination of what is or is not testimonial is to be determined solely from the eliciting or receiving government official's perspective and not from the declarant's, i.e., is the primary purpose of the government official on receipt or on the eliciting of the statement to meet an ongoing emergency or is the primary purpose of the government official on receipt or eliciting of the statement to establish or prove past events potentially relevant to later criminal prosecution. In short, *Davis*, in its holding, as well as *Crawford*, in speaking of the "principal evil at which the Confrontation Clause was directed,"[59] rejects the idea that the term "witnesses" against the accused is defined in terms of a formal solemn statement "made [by the declarant] for the purpose of establishing or proving some fact."[60]

To properly interpret "testimonial," it is necessary to return to the principal evil the Confrontation Clause was designed to address as reflected in *both Crawford* and *Davis*. That principal evil was and is *government officials eliciting or receiving solely "accusatory statements" from third parties*.[61] All of the historical discussion of *Crawford* is in accord.[62] An accusation is "a charge of wrongdoing, delinquency, or fault[;] the declaration containing such a charge."[63] As currently interpreted by the Supreme Court, the "charge of wrongdoing" that the Confrontation Clause was designed to curb is an out-of-court declaration charging the accused—i.e., the defendant now on trial—of having committed a crime. For example, "Harry Smith robbed me at gun point last week." The Confrontation Clause should not be concerned with a declarant's out-of-court statement that is unavailable to be cross-examined at trial asserting only that a crime was committed, i.e., corpus delicti. The Confrontation Clause should be concerned solely with the "identification" of the accused as having committed a crime. Thus, the out-of-court statement to a police officer, "I was robbed at gunpoint," would not evince the wrath of Justice Scalia. Nor would a statement, "Harry left by taxi at 8:00 p.m.," similarly made to a police officer. Such statements, not accusing the defendant of having committed a crime, should be considered "nontestimonial" when made to a govern-

59. *Id.* at 50 (providing that "the principal evil at which the *Confrontation Clause* was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations of evidence against the accused") (emphasis added).

60. Davis v. Washington, 126 S. Ct. 2266, 2276 (2006); *see also id.* ("A 911 call . . . and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed to "establis[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance.") (alteration in original).

61. *See Crawford*, 541 U.S. at 70.

62. *See supra* notes 3–5 and accompanying text.

63. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 14 (1976).

ment official even though the declarant "made [the statement] for the purpose of establishing or proving some fact."

In sum, the out-of-court statement should be found "testimonial" only when it is an *accusation of criminal conduct by an identified or identifiable accused* elicited or received by a government official under circumstances objectively indicating that at the time elicited or received the primary purpose for which the statement will be used by the government is to establish or prove past events potentially relevant to a later criminal prosecution of the identified or identifiable perpetrator. The content of the statement controls; the mental state of the declarant, objectively or subjectively viewed, is irrelevant. Thus when made to a government official both "Harry Smith robbed me at gun point last week", accused identified, and "A very large, white man with a snake tattoo on his left forearm robbed me last week," accused identifiable, are "testimonial."

Crawford/Davis makes some sense, *some sense only*, when one views the "principal evil" of admitting into evidence a nontestifying third-party declarant's statement to government officials accusing the current criminal defendant of having committed a criminal act presented to the trier of fact absent the accused's ability to cross-examine the third-party out-of-court declarant as extremely similar to, i.e., almost but not quite, structural or fundamental error. Structural or fundamental error "affect[s] the framework within which the trial proceeds."[64] As stated in *Rose v. Clark*, "[w]ithout these basic protections a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, *and no criminal punishment may be regarded as fundamentally fair.*"[65] Structural or fundamental error has been applied to errors that undermine the entire trial process, e.g., right of counsel, biased judge, or denial of a public trial.[66] Structural or fundamental error affects the fairness, integrity, or public reputation of judicial proceedings; namely, it creates fundamental unfairness.[67] Such errors require automatic reversal regardless of whether the error can be shown to have substantially affected the verdict and regardless of whether the error was properly preserved below. Structural or fundamental error is not subject to reversible-error, harmless-error, or plain-error analysis.[68] Although Confrontation Clause errors under *Crawford/Davis* remain subject to harmless-error analysis, *Crawford/Davis* clearly opines that presentation

64. Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

65. 478 U.S. 570, 577–78 (1986) (citation omitted) (emphasis added).

66. *See, e.g., id.* (listing cases and "basic protections").

67. *See id.* at 577.

68. *See* MICHAEL H. GRAHAM, EVIDENCE: AN INTRODUCTORY PROBLEM APPROACH 672–73 (2d ed. 2006).

of statements—made by a declarant not available at trial for cross-examination accusing the criminal defendant now on trial of having committed a crime—affects the fairness, integrity, and public reputation of judicial proceedings whenever the statement is made by a nongovernment official to a government official and the primary purpose for which it was elicited or received is to establish a past event potentially relevant to a later criminal prosecution of the person accused in the statement. Such statements are "testimonial."

Concern with law-enforcement officials' conduct in gathering statements from supposed witnesses to criminal conduct accusing the defendant of having committed the offense emerged in Congress during its debates in the early 1970s leading to the enactment of the Federal Rules of Evidence. As proposed by the Advisory Committee, under Rule 801(d)(1)(A), all prior inconsistent statements of a declarant subject to cross-examination were to become substantively admissible rather than admissible solely for the purpose of impeachment.[69] But Congress rejected the proposal in favor of limiting substantive admissibility of a declarant's prior inconsistent statements who testifies at the trial or hearing and is subject to cross-examination concerning the statement to those statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."[70] Thus only those prior inconsistent statements made under oath at formal proceedings are now substantively admissible. Grand-jury testimony is included within the concept of "other proceeding."[71] Accordingly, statements, whether oral or written, even if given under oath and videotaped, if made to law-enforcement officials, fall outside the concept of "other proceedings." The rationale behind the limited departure from the common law represented by Rule 801(d)(1)(A) is that expressed by the House Committee on the Judiciary that (1) unlike most other situations involving unsworn or oral statements, including, for example, oral statements made by an occurrence witness to a crime, there can be no dispute about whether the prior statement was made, and (2) the context of a formal proceeding and an oath, provide firm additional assurances of the reliability of the prior statement.[72]

Critics of the common-law prohibition against substantive use of a prior inconsistent statement have long contended that the declarant at

69. FED. R. EVID. 801(d)(1)(A) advisory committee's note, *reprinted in* PROPOSED FEDERAL RULES OF EVIDENCE 128 (John R. Schmertz, Jr. ed., 1974) ("Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence.").

70. FED. R. EVID. 801(d)(1)(A).

71. GRAHAM, *supra* note 68, at 97.

72. *Id.*

trial is under oath, his demeanor may be observed, his credibility tested by cross-examination, and that the time of cross-examination is not critical.[73] Rule 801(d)(1)(A) accepts the critics' arguments "only to the extent that the non-contemporaneous cross-examination relates to a prior inconsistent statement made under oath at a formal proceeding; substantive admissibility is allowed only for those statements possessing the highest degree of certainty of making made under circumstances conducive to truth telling."[74]

In short, just as *Crawford/Davis* doesn't trust the jury in a criminal case to properly evaluate a police officer's in-court testimony that a third party, who does not testify in court and subject to cross-examination, out of court did in fact openly, freely, and without coercion, trickery, or deception accuse the defendant of having committed the offense for which he is on trial, Rule 801(d)(1)(A) doesn't trust a jury to evaluate a police officer's in-court testimony that a third party who has testified in court subject to cross-examination had in fact previously out of court, inconsistent with the witness's in-court testimony, openly, freely, and without coercion, trickery, or deception told the police officer that the defendant committed the crime for which he is on trial.[75] Congress can be seen as concluding that fairness, integrity, and public reputation of judicial proceedings require that only those inconsistent statement allegedly made to law-enforcement officials accusing the defendant of having committed the crime for which he is on trial made under formal circumstances as to which there is substantial assurance of actual making be admitted as substantive evidence under Rule 801(d)(1)(A).

Similarly, Rules 803(8)(B) and (C) contain provisos added by Congress during the enactment of the Federal Rules of Evidence operating in criminal cases against the government that records, reports, statements, or data compilations, in any form of public offices or agencies setting forth matters observed under a duty imposed by law as to which matters here was a duty to report, are excluded when police officers and other law-enforcement personnel observed such matters,[76] and are excluded when the government in criminal cases offers such items set forth factual findings resulting from an investigation made under authority granted by law.[77] "The exclusion in Rule 803(8)(B) applies to observations made by police officers and other law-enforcement personnel at the scene of the crime, at the apprehension of the accused, or otherwise in

73. *Id.*

74. *Id.*

75. *See* FED. R. EVID. 801(d)(1)(A).

76. *See id.* 803(8)(B).

77. *See id.* 803(8)(C).

connection with an investigation."[78] But it does not "apply to records of routine, ministerial, objective nonevaluative matters made in nonadversarial settings."[79] The Report of the Senate Committee on the Judiciary states that "the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases."[80] Once again fairness, integrity, and public reputation of judicial proceedings require exclusion.

APPLICATION SUMMARY

Having discussed the *Crawford/Davis* rule, this section summarizes application of the rule by labeling various categories of statements or evidence as "nontestimonial," "testimonial," or "available," thus satisfying the right to confrontation.

"AVAILABLE": THUS SATISFYING THE RIGHT TO CONFRONTATION

Closed-circuit television.[81]

Lack of recollection. A witness's refusal or inability to recall the events recorded in a prior statement does not render the witness unavailable for purposes of cross-examination and the Confrontation Clause.[82]

Written interrogatories. The availability of written interrogatories satisfies the Confrontation Clause.[83]

"NONTESTIMONIAL" STATEMENT

Absence of existence of official public record.[84]

Admission by party-opponent, Rule 801(d)(2)(A).[85]

Autopsy reports.[86]

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78. GRAHAM, *supra* note 68, at 156.

79. *Id.*

80. S. REP. No. 93-1277 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7064.

81. *See* Horn v. Quarterman, 508 F.3d 306 (5th Cir. 2007).

82. *See* United States v. Kappell, 418 F.3d 550, 555–56 (6th Cir. 2005); State v. Real, 150 P.3d 805, 808 (Ariz. Ct. App. 2007); State v. Fields, 168 P.3d 955 (Haw. 2007); State v. Rockette, 718 N.W.2d 269, 277 (Wis. Ct. App. 2006).

83. *See* Rangel v. State, 199 S.W.3d 523, 537 (Tex. App. 2006).

84. *See* Jackson v. United States, 924 A.2d 1016 (D.C. 2007); Jasper v. Commonwealth, 644 S.E.2d 406 (Va. Ct. App. 2007); State v. Kirkpatrick, 161 P.3d 990 (Wash. 2007).

85. *See* United States v. Tolliver, 454 F.3d 660, 665–66 (7th Cir. 2006); People v. Duff, 872 N.E.2d 46, 50–51 (Ill. App. Ct. 2007).

86. *See* United States v. Feliz, 467 F.3d 227, 237 (2d Cir. 2006); *cf.* Rollins v. State, 897 A.2d 821, 845–46 (Md. 2006).

Business records.[87]

Certification of breath testing and similar equipment.[88]

Certified domestic and foreign business records, Rules 902(11) and (12),[89] *and similar authentications.*[90]

Co-conspirator statement. Co-conspirator statements have been found to be nontestimonial as verbal acts not being offered for their truth[91] or simply because *Crawford* says so.[92]

Dying declaration.[93]

Medical diagnosis or treatment as primary purpose of statement, even if person receiving statement associated with law enforcement.[94]

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87. *See* United States v. Ellis, 460 F.3d 920, 924, 926–27 (7th Cir. 2006); *Feliz*, 467 F.3d at 233–36; United States v. Baker, 458 F.3d 513, 519–20 (6th Cir. 2006).

88. *See* State v. Jacobson, 728 N.W.2d 613 (Neb. 2007); State v. Dorman, 922 A.2d 766 (N.J. Super. Ct. App. Div. 2007); People v. Lebrecht, 823 N.Y.S.2d 824, 828 (App. Term 2006).

89. *See Ellis*, 460 F.3d at 927.

90. *See* United States v. Urqhart, 469 F.3d 745, 748 (8th Cir. 2006). *Contra* United States v. Sandles, 469 F.3d 508, 515–16 (6th Cir. 2006).

91. *See* United States v. Bobb, 471 F.3d 491, 499 (3d Cir. 2006); United States v. Van Sach, 458 F.3d 694, 701 (7th Cir. 2006); United States v. Faulkner, 439 F.3d 1221, 1226–27 (10th Cir. 2006).

92. *See* McKinney v. State, 635 S.E.2d 153, 157–58 (Ga. 2006); *cf.* United States v. W.R. Grace, 455 F. Supp. 2d 1199, 1202–03 (D. Mont. 2006).

93. *See* People v. Taylor, 737 N.W.2d 790, 795 (Mich. Ct. App. 2007).

94. *See* State v. Kirby, 908 A.2d 506, 527 (Conn. 2006); State v. Bentley, 739 N.W.2d 296 (Iowa 2007); Commonwealth v. DeOliveira, 849 N.E.2d 218, 226–27 (Mass. 2006); State v. Krasky, 736 N.W.2d 636, 641–42 (Minn. 2007); State v. Stahl, 855 N.E.2d 834, 836, 839–40 (Ohio 2006).

With respect to classifying governmental social-services agency conduct as "law enforcement," see People v. Stechly, 870 N.E.2d 333, 367 (Ill. 2007) ("The case is distinguishable. First, in this case, we have not found Grote and Yates to have been acting on behalf of law enforcement merely based on their status as mandated reporters. Our conclusion is instead based primarily on the circumstances surrounding the statements they took from M.M., especially the fact that they appear to have done nothing as a result of taking those statements other than contacting the authorities. The fact that they are mandated reporters merely buttresses our conclusion. Moreover, *C.J.* was an appeal from a circuit court ruling dismissing a delinquency petition because a Department investigator had destroyed potentially exculpatory material. We held it would be entirely unfair to impute responsibility for the destroyed evidence to the State's Attorney, especially in light of the fact that there was 'no evidence to support the conclusion that the [Department] investigator here functioned, intentionally or otherwise, as an aid in the prosecution of this case.' The situation here is different—in this case the question is whether it is fair for a criminal defendant to be tried based on hearsay statements without the opportunity to confront the declarant, when the persons taking the statements too no action other than to pass them on to the authorities, and moreover the persons taking the statements had a legal obligation to transmit them to the Department and subsequently to testify in any case arising therefrom, and the Department had a legal obligation to cooperate with law enforcement agencies to the fullest extent possible. In addition to the statement from *C.J.* to which the State draws our attention, we also said in that case that 'where DCFS acts at the behest of an in tandem with the State's attorney, with the intent and purpose of assisting in the prosecutorial effort, *DCFS functions as an agent of the prosecution.*' We do not believe that the framers intended to permit the government to evade the requirements of the confrontation clause by the simple expedient of

Medical emergency.[95]

Not hearsay statements. The Confrontation Clause does not apply to out-of-court statements offered in evidence for a purpose other than establishing the truth of the matter asserted as hearsay as defined in Rule 801(a)–(c), including[96] statements offered for their effect on listener,[97] to place other statements in context[98] and as reasonably relied on under Rule 703.[99]

Official public records and the absence thereof.[100]

Police ongoing or other emergency; initial investigation.[101]

Police ongoing or other emergency; 911.[102]

Rule of completeness.[103]

Statements other than to government officials.[104]

"TESTIMONIAL" STATEMENT

Co-defendant's confession.[105]

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placing responsibility for investigation with a separate agency of government with a legal responsibility to cooperate with law enforcement.") (citations omitted) (alteration in original).

95. *See* State v. Alvarez, 143 P.3d 668, 674 (Ariz. Ct. App. 2006); *In re* German F., 821 N.Y.S.2d 410, 414–15 (Fam. Ct. 2006).

96. *See* United States v. Paulino, 445 F.3d 211, 216–17 (2d Cir. 2006); United States v. Price 418 F.3d 771, 780–81 (7th Cir. 2005); United States v. Lopez-Moreno, 420 F.3d 420, 436 (5th Cir. 2005); United States v. Pugh, 405 F.3d 390, 399 (6th Cir. 2005); United States v. Trala, 386 F.3d 536, 544 (3d Cir. 2004); State v. Araujo, 169 P.3d 1123 (Kan. 2007); State v. Athan, 158 P.3d 27, 41 (Wash. 2007).

97. *See* United States v. Gibbs, 506 F.3d 479 (6th Cir. 2007); State v. Wiggins, 648 S.E.2d 865, 871 (N.C. Ct. App. 2007).

98. *See* United States v. Tolliver, 454 F.3d 660, 666 (7th Cir. 2006).

99. *See* United States v. Stone, 222 F.R.D. 334, 339 (E.D. Tenn. 2004); Veney v. United States, 929 A.2d 448, 469 (D.C. 2007).

100. *See* State v. King, 146 P.3d 1274, 1279–80 (Ariz. Ct. App. 2006); Jackson v. United States, 924 A.2d 1016, 1020–21 (D.C. 2007); People v. Jambor, 729 N.W.2d 569, 573–74 (Mich. Ct. App. 2007); Azeez v. State, 203 S.W.3d 456, 465–66 (Tex. Crim. App. 2006); Jasper v. Commonwealth, 644 S.E.2d 406, 410–11 (Va. Ct. App. 2007); State v. Kirkpatrick, 161 P.3d 990, 995–97 (Wash. 2007).

101. *See* People v. Cooper, 56 Cal. Rptr. 3d 6, 13–16 (Ct. App. 2007); People v. Pedroza, 54 Cal. Rptr. 3d 636, 642–43 (Ct. App. 2007); State v. Warsame, 723 N.W.2d 637, 643 (Minn. Ct. App. 2006), *aff'd in part, rev'd in part*, 735 N.W.2d 684 (Minn. 2007); State v. Ayer, 917 A.2d 214, 222 (N.H. 2006); People v. Nieves-Andino, 872 N.E.2d 1188, 1189–90 (N.Y. 2007); People v. Watson, 827 N.Y.S.2d 822, 836 (Sup. Ct. 2007); State v. Reardon, 860 N.E.2d 141, 144 (Ohio Ct. App. 2006); State v. Rodriguez, 722 N.W.2d 136, 147–48 (Wis. Ct. App. 2006).

102. *See* United States v. Thomas, 453 F.3d 838, 844 (7th Cir. 2006); People v. Saracoglu, 62 Cal. Rptr. 3d 418, 423–28 (Ct. App. 2007).

103. *See* People v. Parrish, 60 Cal. Rptr. 3d 868 (Ct. App. 2007).

104. *See* State v. Slater, 908 A.2d 1097, 1104–05 (Conn. App. Ct. 2006); Franklin v. State, 965 So. 2d 79 (Fla. 2007); *In re* T.T., 815 N.E.2d 789 (Ill. App. Ct. 2004); State v. Kemp, 212 S.W.3d 135, 150 (Mo. 2007); Freeman v. State, 230 S.W.3d 392, 401 (Tex. Ct. App. 2007); State v. Hopkins, 154 P.3d 250, 256–57 (Wash. Ct. App. 2007). *Contra* People v. Stechly, 870 N.E.2d 333, 361–67 (Ill. 2007).

105. *See* People v. Duff, 872 N.E.2d 46 (Ill. App. Ct. 2007).

Future prosecution was primary purpose of person receiving statement of alleged victim made to medical professional associated with law enforcement.[106]

No police or other ongoing emergency; initial investigation.[107]

No police or other ongoing emergency; 911.[108]

Plea allocution.[109]

It appears from reported decisions that lower courts have correctly seized on a liberal interpretation of "ongoing emergency" set forth in *Davis* in both the 911 and initial police contact contexts. Findings of the existence of a medical emergency, as well as broadly interpreting police emergency to include, among others, concern about potential future criminal conduct of one kind or another, have significantly reduced what is "testimonial" and the unnecessary, unhelpful, and potentially excessive exclusionary power of *Crawford/Davis*. Similarly, finding nontestimonial statements made to medical professionals by alleged victims of child and adult sexual abuse, received for the primary purpose of medical diagnosis or treatment even by a medical professional associated with law enforcement, is both a correct and functionally useful interpretation of *Crawford/Davis*.

FORENSIC LABORATORY REPORTS

The greatest difficulty that lower courts presently face in interpreting *Crawford/Davis* concerns forensic laboratory reports created by unavailable forensic technicians. A vast majority of reported decisions, but by no means all reported decisions, declare forensic laboratory reports to be "nontestimonial," in spite of the fact that they were prepared by law-enforcement personnel with a view toward subsequent criminal prosecution.[110] But the rationales employed to accomplish this clearly desirable result have, naturally enough given the structure of *Crawford/Davis* themselves, been many. Some are useful and insightful, while others are strained, to say the least.[111]

If, under *Crawford*, law-enforcement officials' interrogation of

106. *See* L.J.K. v. State, 942 So. 2d 854, 861 (Ala. Crim. App. 2005); State v. Henderson, 160 P.3d 776, 789–92 (Kan. 2007); State v. Blue, 717 N.W.2d 558, 563–64 (N.D. 2006); State v. Pitt, 147 P.3d 940, 945 (Or. Ct. App. 2006).

107. *See* Raile v. People, 148 P.3d 126, 133 (Colo. 2006); Commonwealth v. Galicia, 857 N.E.2d 463, 470 (Mass. 2006); State v. Graves, 157 P.3d 295, 300 (Or. Ct. App. 2007); Mason v. State, 225 S.W.3d 902, 911–12 (Tex. Ct. App. 2007).

108. *See* Davis v. Washington, 126 S. Ct. 2266, 2279 (2006).

109. *See* United States v. Becker, 502 F.3d 122, 130 (2d Cir. 2007).

110. *See generally* Cyrus P.W. Rieck, *How To Deal with Laboratory Reports Under* Crawford v. Washington*: A Question with No Good Answer*, 62 U. MIAMI L. REV. 839 (2008)

111. See a summary of the reported decisions in People v. Geier, 161 P.3d 104, 133–40 (Cal. 2007), Hinojos-Mendoza v. People, 169 P.3d 662 (Colo. 2007), and State v. O'Maley, 932 A.2d 1

third-party witnesses is the "principal evil" that the Confrontation Clause addresses, then why wouldn't and shouldn't statements *created by law-enforcement officials themselves* in the form of forensic laboratory reports the "primary purpose [of which] is to establish or prove past events potentially relevant to later current prosecutions,"[112] not be "testimonial" and thus be barred by the Confrontation Clause in the absence of the opportunity for cross-examination of the creating forensic laboratory technician?

What distinguishes forensic laboratory reports from an alleged victim's statements, days after the event, to a rape-crisis counselor or police officer?

The critical distinction, occasionally recognized in various ways and to various extents in state-court opinions applying *Crawford/Davis* and holding that reports of unavailable laboratory technicians are "nontestimonial," is and should be the concept of "accusatory" as developed above. Obviously, forensic laboratory reports do not themselves accuse an identified or identifiable person of having committed a crime. Forensic laboratory reports concern matters such as matching ballistics, fingerprints, or DNA, determining whether a gun was fired recently, and whether the substance tested was cocaine. As such, forensic laboratory reports are simply "nontestimonial." Finally, forensic laboratory reports rarely involve contact between the laboratory technician and a person who is not part of law enforcement, thus not bringing into play the principal evil that *Crawford/Davis* asserts the Confrontation Clause was enacted to address: the eliciting or receiving of government officials' statements from nongovernment officials the primary purpose of which elicited or received is to establish a past event that is potentially relevant to a later criminal prosecution of the person accused in the statement.

(N.H. 2007), and compare State v. Kent, 918 A.2d 626 (N.J. Super. Ct. App. Div. 2007). *See generally* Rieck, *supra* note 110.

112. *See Davis*, 126 S. Ct. at 2274 (2006).