

AMBIGUOUS-PURPOSE STATEMENTS OF CHILDREN AND OTHER VICTIMS OF ABUSE UNDER THE CONFRONTATION CLAUSE

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A former Oxford University Fulbright Scholar, Law Review Editor-in-Chief, Wash., D.C. trial and appellate practitioner, and federal public defender, he has been special counsel or consultant to the Judiciary Committees of both Houses of Congress (in drafting the Federal Rules of Evidence and the Federal Crime Victims Compensation Act and revising the entire Federal Criminal Code, substantive and sentencing), the National Conference of Commissioners on Uniform State Laws (drafting the Uniform Crime Victims Reparations Act and revising the Uniform Rules of Evidence), the National Academy of Sciences (study panels on both voiceprint evidence and new airport security technology), the Federal Judicial Center (training federal judges and contributing to and peer-reviewing the Center’s Scientific Evidence Manual), the National Judicial College (training state judges), Rand, Carnegie, Brookings and the American Enterprise Institute (all on mass civil lawsuits, science in court, and *Daubert*), federal agencies including the U.S. Department of Justice (inter alia training Justice Department trial attorneys), and (principally on constitutional, judicial, evidentiary or criminal law reform) the Governments of, among others, Canada, the Philippines, and over a dozen nations emerging from the former Soviet Union (Russia, Ukraine, Lithuania, Hungary, Kazakhstan, and others).

He has helped draft the constitutions of several of these countries, including the current constitution of Russia; and assisted nations like Macedonia and Mongolia on matters such as criminal law and procedural reform needed to combat domestic violence. He has also assisted several U.S. state governments (on civil, criminal, judicial, and evidentiary reform), federal agencies (inter alia training Federal Trade Commission trial attorneys), bar associations including the American Bar Association and the Federal Bar Association (concerning U.S. Supreme Court and other judicial nominations, continuing legal education, and various substantive legal matters), and

I. INTRODUCTION

With the passing of Professor Myrna Raeder, the world has lost one of its most able, vigorous, and beloved advocates for the rights of women and children in legal proceedings¹—an advocate who was at the same time alive to the fair-trial rights of criminal defendants.²

It is fitting at this conference honoring Prof. Raeder that we examine one of her chief interests as a teacher of Evidence and Criminal Procedure: the admissibility under the U.S. Constitutional Confrontation Clause of out-of-court statements of abused women and children about their abuse.³

In the last few weeks this topic has taken center stage even more than usual, because the U.S. Supreme Court granted certiorari to review the case of *Ohio v. Clark*,⁴ in which a very young child made statements to a pre-

some of the nation's most prominent Washington law firms (training their trial attorneys, and various substantive legal matters).

In addition to holding leadership positions in the American Bar Association and Federal Bar Association, he chaired the Association of American Law Schools Evidence Section and an American Bar Association committee monitoring developments under the Federal and Uniform Rules of Evidence, suggesting changes to the Rules, a number of which have been made. His series of national conferences on the Federal Rules of Evidence, and his accompanying book, the first on the Rules, are credited with introducing the bench, bar, and much of academia to what they would be facing under the new Rules.

Rothstein is also noted for his appearances in the print, radio, television, and digital media. He is listed in a number of international and national scholarly and professional directories as well as in "Who's Who" (worldwide), "Who's Who in America," and "Who's Who in American Education." He is a lifetime member of the Oxford University and Oxford Union Societies.

1. I feel a very special personal sense of sorrow because Prof. Raeder was my good friend and also a deeply valued colleague on an ABA committee I chaired, a brilliant co-author of mine on two books, and, as a student, she was an outstanding fellow in Georgetown Law's E. Barrett Prettyman clinic for criminal trial advocacy.

2. See, e.g., Myrna S. Raeder, *Navigating Between Scylla and Charybdis: Ohio's Efforts to Protect Children Without Eviscerating the Rights of Criminal Defendants—Evidentiary Considerations and the Rebirth of Confrontation Clause Analysis in Child Abuse Cases*, 25 U. TOL. L. REV. 43 (1994).

3. See Myrna S. Raeder, *White's Effect on the Right to Confront One's Accuser: Are Expanding Interpretations of Firmly Rooted Hearsay Exceptions Collapsing Confrontation Clause Analysis?* 7-WTR CRIM. JUST. 2 (1993); Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 J. L. & POL'Y 759 (2007); Myrna S. Raeder, *Child Abuse, and Trustworthiness Exceptions After Crawford*, 20-SUM CRIM. JUST. 24 (2005); Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009 (2007); Myrna S. Raeder, *Enhancing the Legal Profession's Response to Victims of Child Abuse*, 24 CRIM. JUST. 12 (2009); Myrna S. Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases* 71 BROOK. L. REV. 311 (2005); Myrna S. Raeder, *Distrusting Young Children Who Allege Sexual Abuse: Why Stereotypes Don't Die and Ways to Facilitate Child Testimony*, 16 WIDENER L. REV. 239 (2010).

4. *Ohio v. Clark*, 999 N.E.2d 592 (Ohio 2013).

school teacher⁵ about his physical injuries, implicating the defendant as his abuser. The child was considered incompetent to testify in person.⁶ Over a strong dissent, the state court held it error under the U.S. Constitution's Confrontation Clause to admit the child's out-of-court statement against the defendant in his criminal trial for the abuse because the teacher, under a statutory duty to report abuse, was therefore an agent of law enforcement and the primary purpose of the exchange with the child, objectively viewed, was to obtain evidence that could be used prosecutorially⁷ (although there may have been other subordinate purposes and functions of the teacher as well). This, the state court said, made the statement "testimonial" and therefore inadmissible under the Confrontation Clause.⁸ The U.S. Supreme Court granted certiorari to resolve whether the teacher could be regarded as an agent of the state for these purposes (if that is significant) and whether the Confrontation Clause rendered the statement inadmissible.⁹ The U.S. Supreme Court's decision on the merits—expected by July this year—hopefully will clear up some of the uncertainty in Supreme Court jurisprudence about whether these, and similar ambiguous-purpose statements, are inadmissible evidence under the Confrontation Clause.

I will examine in this paper two kinds of ambiguous-purpose out-of-court statements that are especially problematic under current Confrontation law—problematic in ways that we hope will be solved directly or indirectly by the Supreme Court when it renders its decision in *Ohio v. Clark*.¹⁰ The statements I will examine are:

(1) Statements made by abused children concerning their abuse, for example to police, physicians, teachers, welfare workers, baby sitters, or

5. Presumably the school was a private school.

6. *Clark*, 999 N.E.2d at 595. That the child was incompetent to take the stand yet competent enough to make the hearsay statements, qualifying for a special state child hearsay exception seems odd to many, but it is frequent in these cases. It is well accepted that a young child's inability to function with dependable reliability in a courtroom is different than making statements outside of court that may have certain other indicia of reliability operable at the time. See Myrna S. Raeder, *Comments on Child Abuse Litigation in a Testimonial World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009 (2007).

7. *Clark*, 999 N.E.2d at 597.

8. *Id.* at 597.

9. *Id.* at 592, cert. granted, 82 U.S.L.W. 3688 (U.S. Oct. 2, 2014) (No. 13-1352).

10. There are of course other ambiguous-purpose statements that are problematic under the Confrontation Clause which I will not address in this paper. See, e.g., Marc D. Ginsberg, *Confrontation Clause and Forensic Autopsy Reports - A "Testimonial,"* 74 LA. L. REV. 117 (2013); Daniel J. Capra & Joseph Tartakovsky, *Autopsy Reports and the Confrontation Clause: A Presumption of Admissibility*, 2 VA. J. CRIM. L. 62 (2014); Caleb Mason & Jessica Berch, *Confrontation Clause and the Border Patrol: Applying the Primary Purpose Test to Multifunction Agencies*, 96 MARQ. L. REV. 793 (2013).

family members, some of whom may be under a legal duty to report suspected abuse to legal authorities.¹¹ At least some of these statements will be directly addressed by the Court in *Ohio v. Clark*.

(2) Statements made by adult victims of sexual assaults to specially trained medical personnel (sometimes known as S.A.N.E. nurses or members of D.O.V.E. hospital units, or S.A.R.T. units¹²) whose task is simultaneously to medically treat the victim and to gather or preserve evidence for a legal case or investigation. These statements may be inferentially addressed by the Court in *Ohio v. Clark*.

U.S. Supreme Court Confrontation Clause jurisprudence stemming from *Crawford v. Washington*¹³ holds that when a declarant (like the child or adult victim here) does not testify,¹⁴ her out-of-court statement's admissibility against the alleged perpetrator in a criminal case is normally determined by what the "primary purpose" was when the statement was made, at least if it was made to law enforcement or its affiliates.¹⁵ If that "primary purpose" was prosecutorial or evidentiary, the statement will ordinarily be inadmissible. If the purpose was something else—for example a primarily medical or a relatively immediate protective purpose or to deal with an on-going emergency—the statement is normally admissible insofar as the Confrontation Clause is concerned.¹⁶

11. See, e.g., Aviva A. Orenstein, *Children as Witnesses: A Symposium on Child Competence and the Accused's Right to Confront Child Witnesses*, 82 IND. L.J. 909 (2007). The entire symposium is very worthwhile. The introduction by Prof. Aviva Orenstein gives an excellent overview. Of special pertinence here are the articles by Profs. Raeder and Mosteller. See also Jonathon Scher, *Out-of-Court Statements by Victims of Child Sexual Abuse to Multidisciplinary Teams: A Confrontation Clause Analysis*, FAM. CT. REV. 167 (2009).

12. The acronyms are for "Sexual Assault Nurse Examiners" and "Developing Options for Violent Emergency" units. Sometimes the acronym S.A.R.T. (sexual assault response team) is used which may connote a more formal connection to the police.

13. 541 U.S. 36 (2004).

14. There are a number of reasons why the victims frequently don't testify in these cases, including, among others, loyalty, fear, or death (from the abuse or from independent causes), under circumstances that do not qualify as waiver of confrontation rights, *Giles v. California*, 554 U.S. 353 (2008), nor render the statement a dying declaration (which *Crawford* suggests may be a *sui generis* exception to the confrontation clause); or to be spared a damaging public spectacle; or because of incompetence to testify at trial (as, e.g., where a child is declared incompetent for reasons peculiar to the trial process that do not infect the child's off-the-stand statement). A few cases by analogy to the notice-and-demand procedure seemingly approved by the U.S. Supreme Court in dicta in *Melendez-Diaz* have treated as waiver of confrontation rights by defendant, a situation where the victim is present in the courtroom and the defendant does not call the victim to the witness stand. See, e.g., *Trevizo v. State*, No. 08-12-0063, 2014 WL 260591, at *8-10 (Tex. App. Jan. 22, 2014).

15. See *Crawford*, 541 U.S. at 53. If the declarant is genuinely unavailable for trial, the Clause may be satisfied if there was an equivalent opportunity for cross-examination at some earlier time.

16. *Id.* at 74.

The main problem with the victims' and childrens' statements identified above, is the difficulty in determining their "primary purpose." Is it medical? Legal? Protective? Is it responding to an emergency? A related problem is whether the person to whom the statement was made had a substantial enough connection to law enforcement or government (if such connection is an independent requirement for there to be a Confrontation issue¹⁷). A subsidiary question is whether there has to be anything like a questioning or interrogation—or some kind of formality attending the taking of the statement—in order for the Confrontation Clause to be applicable.¹⁸

II. THE SUPREME COURT'S AMBIGUOUS CONFRONTATION CLAUSE JURISPRUDENCE

A. *The Crawford Case: Setting a New Approach*

*Ohio v. Roberts*¹⁹ governed Confrontation Clause analysis from 1980 to 2004. In 2004, *Crawford v. Washington*²⁰ overruled it. In *Roberts* part of the transcript of the preliminary hearing was offered at defendant's state criminal trial. That transcript portion contained testimony of a witness who did not appear at the trial.²¹ This was, of course, hearsay, but arguably within a hearsay exception. *Roberts*, as elucidated by subsequent cases interpreting it,²² essentially held that before hearsay statements could be deemed admissible under the Confrontation Clause, they must, if the declarant does not take the stand, be deemed reliable, which meant they must come within a "firmly rooted" hearsay exception or be found reliable on the particular facts.²³ Alternatively, the Confrontation requirement could be satisfied if the declarant was sufficiently unavailable at trial and there was an adequate opportunity to cross-examine her earlier.

Crawford overturned this *Roberts* approach. In *Crawford*, police were

17. Alternatively, a connection to law enforcement might not be an absolute or independent requirement, but just a factor to consider in deciding the purpose of the exchange. There is also authority that, although a law enforcement connection is not required, the purpose test to be applied under the Confrontation Clause is different depending on whether the person to whom the statement was made had such a connection. See *Clark*, 999 N.E.2d at 601 (O'Connor, J., dissenting) (the state decision for which certiorari was just granted by the U.S. Supreme Court).

18. Conceivably, this too could be just a factor in determining purpose, and not an independent requirement.

19. *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36.

20. *Crawford*, 541 U.S. 36.

21. *Roberts*, 448 U.S. at 59.

22. E.g., *Idaho v. Wright*, 497 U.S. 805 (1990); *White v. Illinois*, 502 U.S. 346 (1992).

23. *Roberts*, 448 U.S. at 66.

investigating a stabbing by Mr. Crawford of an acquaintance.²⁴ Mrs. Crawford was interrogated and tape-recorded by police about the stabbing. Her statements were somewhat inconsistent with her husband's story of self-defense. She did not testify at trial because of marital privilege. The prosecution introduced into evidence the tape-recording of her statements to the police under the declarations against interest hearsay exception and Mr. Crawford was convicted.²⁵ The U.S. Supreme Court held that the introduction of Mrs. Crawford's statement violated the Confrontation Clause.²⁶ In the course of so ruling, the Court launched a totally new approach to the Confrontation Clause.

Under *Crawford* the Confrontation Clause no longer tracks the hearsay exceptions nor allows hearsay that is otherwise found reliable.²⁷ Reliability is repudiated as the criterion. Instead, out-of-court statements the Court would deem "testimonial" are inadmissible if there is no opportunity at the trial for defendant to cross-examine the declarant.²⁸ If the declarant is unavailable then, the statement would be admissible if there was a previous opportunity for such cross-examination.²⁹

In deciding what statements are "testimonial," the effort—as described by Justice Scalia writing for the Court in *Crawford*—is to identify out-of-court statements of a kind that were specially disapproved in England in the period preceding the adoption of the U.S. Confrontation Clause.³⁰ Such statements included the statements taken, and later used at trial, by prosecutors in the Sir Walter Raleigh case,³¹ without confronting Raleigh with them.³² The *Crawford* opinion specifically mentions, among others included in the "testimonial" class, officially obtained statements like grand jury statements, affidavits, recorded testimony at previous proceedings, and statements taken in police investigations.³³ But exactly what other statements

24. *Crawford*, 541 U.S. at 38.

25. *Id.*

26. *See id.* at 76.

27. *See id.*

28. *Id.* at 61.

29. As case law develops under *Crawford*, issues will surface concerning what kind of former opportunity to cross-examine is sufficient for these purposes. Will there be a "similar motive" requirement as there is under FED. R. EVID. 804(b)(1) (the former testimony hearsay exception) and will it be defined the same way? Will there be a same-party or similar-party requirement? Issues will also surface about whether unavailability here is to be the same as under FED. R. EVID. 804(a)

30. *Crawford*, 541 U.S. at 66.

31. *See Crawford*, 541 U.S. at 43.

32. Raleigh was convicted of treason based on an out-of-court affidavit by Lord Cobham given to authorities, which affidavit incriminated Raleigh. Cobham subsequently repudiated the statement and professed he would have done so if he had been called to the stand as a witness. *See id.* at 44.

33. *Id.* at 51-52.

might be deemed “testimonial” is left vague. The Court expressly states that a fuller definition of “testimonial” will emerge in future cases.³⁴

But there is some general language in *Crawford* pertinent to what the Court had in mind. Although it is not exactly clear, the Court suggests “testimonial” may have something to do with whether government was involved in obtaining the statement. With what subjective or objectively determined purpose, and on whose part, is left unclear:

[T]he Confrontation Clause . . . applies to “witnesses” against the accused—in other words, those who “bear testimony.” “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not . . . [An] “off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules [but not under the Confrontation Clause].”³⁵

Testimoniality clearly was linked to purpose, but exactly whose purpose and how it is linked were not precisely described. The statement may be testimonial if declarant or possibly the questioner knew, or perhaps a reasonable person would have known, that the statement could be used in a prosecution:

[Testimonial statements include] *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.*³⁶

The court hints without clearly holding, that an important—or perhaps even indispensable—factor may be whether the statement was made in a formal police proceeding, or in formal materials like depositions or affidavits.³⁷ It is uncertain whether this has independent significance, or is important only as it indicates purpose. *Crawford* could afford to be non-definitive on all these matters because Mrs. Crawford’s recorded statement was clearly “testimonial” on any version of any of the criteria mentioned.

34. *See id.* at 68.

35. *Id.* at 51 (citing WEBSTER’S DICTIONARY (1828)).

36. *Id.* at 51-52 (emphasis added).

37. *See id.* at 51-52.

Thus, under *Crawford*, factors to consider in the “testimoniality” determination *might* include all of the following:

- (a) Purpose.
- (b) Government or law enforcement involvement.³⁸
- (c) Formality or solemnity to the proceeding.³⁹
- (d) That the statement was made under some kind of interrogation or questioning.⁴⁰

Mrs. Crawford’s statement qualified under all of them. Problems occur in interpreting what they mean in less clear cases.⁴¹

B. The Davis Case: The Primary Purpose Test and the Emergency Doctrine

Two years after *Crawford*, the Supreme Court shed a little more light on the purpose factor and created what some call an emergency exception to the confrontation right. The case was *Davis v. Washington*.⁴²

The *Davis* decision actually combined two cases decided by the Court simultaneously. In one, the Court held that the statements of a domestic violence victim—made in a 911 call by the victim during a physical altercation with her domestic partner—were *non-testimonial* because the primary purpose was to get help in or resolve an ongoing emergency.⁴³ In the other, a statement made to police on the scene by a victim immediately after a domestic violence attack was held *testimonial* because the attack was finished and the attacker was isolated in an adjoining room when the

38. This may or may not have significance beyond how it reflects on purpose.

39. Justice Sotomayor’s opinion for five members of the Court subsequently in *Bryant* interpreting *Crawford*, hints that this factor may only be significant as one of the circumstances indicating that the purpose was probably to provide evidence (a testimonial purpose). See *Michigan v. Bryant*, 131 S. Ct. 1143, 1160 (2011).

40. The Court in the subsequent *Davis* case interpreting *Crawford*, says, in dictum, “volunteered testimony” can still be subject to the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

41. Cf. Michael A. Sabino & Anthony Michael Sabino, *Confronting the Crucible of Cross-Examination: Reconciling the Supreme Court’s Recent Edicts on the Sixth Amendment’s Confrontation Clause*, 65 BAYLOR L. REV. 255 (2013); Josephine Ross, *What’s Reliability Got to Do With the Confrontation Clause after Crawford?*, 14 WIDENER L. REV. 383 (2009).

42. *Davis*, 547 U.S. 813 (2006).

43. In setting forth this finding, the Court additionally notes that usually 911 calls are designed to relay a current situation demanding police assistance, not to establish a past fact, but the opinion expressly also acknowledges that someone might call 911 to report past crime. This latter kind of statement would be excluded as testimonial. *Id.* at 827.

statement was taken (and reduced to writing in the form of an affidavit) all in relative calmness.⁴⁴ Thus the “primary purpose” was to gather evidence of past fact for use in a prosecution—as a potential “stand in” for trial testimony. Any emergency had already terminated.⁴⁵ Unlike the 911 operator/dispatcher, the officers in this instance were trying to establish what *had* happened rather than what *was currently* happening.⁴⁶ “[It was] entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct [rather than a response to an ongoing emergency]”.⁴⁷

Davis held that the inquiry under *Crawford* is into what was the “primary purpose” of the exchange.⁴⁸ If the primary purpose, objectively viewed, was to gather evidence of past fact for potential use in a prosecution, the statement is testimonial:

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.⁴⁹

Quoting *New York v. Quarles*,⁵⁰ the Court further observes that “[p]olice 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.”⁵¹ But, perhaps in part as an attempt to countermand some of the implications of this, the

44. *Id.*

45. *Id.* at 830.

46. *Id.* at 831-32.

47. *Id.* at 828-29.

48. *Id.* at 822.

49. It is interesting to note a subtle change in this language from the formulation of a similar concept in *Crawford*. See *supra* text accompanying note 36. The *Crawford* quote makes clear that the potential relevance to later criminal prosecution must be part of the purpose. The last few lines of the present *Davis* quote do not necessarily say that has to be part of the purpose. Arguably under that language, the only thing the purpose needs embrace is “to establish or prove past events.” Then if those events prove to be relevant to later criminal prosecution, the statement is testimonial. The language about relevance—that the facts “are relevant to later criminal prosecution”—is not something that has to be part of the purpose—just something that is true. This is a distinction that arguably has a good deal of significance regarding the victims’ statements we are dealing with in this article. It is not clear if the Supreme Court realizes it has said two different things that can have different consequences. See *id.* at 51.

50. *New York v. Quarles*, 467 U.S. 649 (1984).

51. *Id.* at 658-59.

Court insists that the “primary purpose” determination is to be made on a purely objective basis as distinct from subjective determinations of interviewer or interviewee intent.⁵²

In the course of the decision, the Court said a number of other things pertinent to our inquiry, some by way of *dicta*, some quite ambiguous:

—When the emergency is over, declarant’s further statements about the event may change to being testimonial in character.⁵³

—“Volunteered testimony” can still be subject to the Confrontation Clause.⁵⁴

—The 911 operator/dispatcher was acting as an agent of the police.⁵⁵ Significantly for our purposes, the Court further notes, “[O]ur holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are testimonial.”⁵⁶ This suggests the possibility that statements made to private persons could, in certain unspecified circumstances, be “testimonial” and excludable evidentially.

There was considerable agreement among all the Justices in *Davis*, except that in a partial concurrence and partial dissent, Justice Thomas focused on formality. Under his view, formality is required for a statement to be testimonial, in a degree not shared by the other Justices.⁵⁷

C. The Bryant Case: Refining the Primary Purpose Test and Extending the Concept of Emergency

Five years later, in 2011, *Michigan v. Bryant*⁵⁸ extended the emergency concept coined in *Davis* to include less immediate emergencies. In *Bryant*, a citizen shot and bleeding on the street told police the identity of who had shot him—the defendant—who was still on the loose.⁵⁹ The Court (per Justice Sotomayor writing for the majority) extended *Davis*’ notion of a primary purpose to resolve an on-going emergency, to include as an emergency the

52. See *Davis v. Washington*, 547 U.S. 813, 822, 827, 828 (2006).

53. See *id.* at 828.

54. See *id.* at 822 n.1.

55. See *id.* at 823 n.2.

56. *Id.*

57. See *id.* at 836 (Thomas, J., concurring).

58. 131 S. Ct. 1143 (2011). Justice Sotomayor wrote the opinion for the court in which Justices Roberts, Kennedy, Breyer and Alito joined. Justices Ginsburg and Scalia dissented. Justice Thomas filed a concurrence. Justice Kagan recused herself. See *id.* at 1149.

59. See *id.* at 1150.

necessity of catching the shooter,⁶⁰ since he was at large with a gun and may have presented a continuing danger to the public.⁶¹ Thus the victim's statement to police was held not testimonial.⁶²

Justice Scalia, who authored *Crawford*, dissented from the extension of the emergency doctrine in *Bryant*. He had voted for it in *Davis*, but argued in *Bryant* that extension to a broader kind of emergency like this eviscerated *Crawford* and gave the word "emergency" an almost unlimited scope.⁶³ He believed that under Justice Sotomayor's view of emergency in *Bryant*, almost any criminal situation could be regarded as involving an emergency if the suspect was still at large. It is indeed true that Justice Sotomayor expresses the opinion that the emergency concept may embrace situations even where shots have not been fired (perhaps foreshadowing our situation where a rapist or abuser may be on the loose).⁶⁴

The Court in *Bryant* emphasized that the "primary purpose" of the verbal exchange must be determined by an objective analysis: "The relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred."⁶⁵

To be considered in determining this "primary purpose" are the objective facts of where the exchange occurred, the formality or informality of the questioning, and other factors—that is, the totality of the circumstances.⁶⁶ The Court expressly relies on the kind of details given to the officers by the declarant, the presence of a deadly weapon, the undetermined whereabouts of the escaped assailant, and the general informality of the interview.⁶⁷ Considerations include (in addition to the existence of the emergency) the

60. See *id.* at 1156, 1167-67; *cf.* *United States v. Liera-Morales*, 759 F.3d 1105 (9th Cir. 2014) (extending the emergency concept to a telephone conversation of a mother with the kidnapers of her son which she arranged for law enforcement to hear). The phone call was made for the purpose of obtaining her son's safe release. See *id.* at 1106-07.

61. See *Bryant*, 131 S. Ct. at 1156, 1163, 1165-66, even though the shooting appeared to be caused by a particular grievance against this single victim only.

62. See *id.* at 1167.

63. See *Davis*, 547 U.S. at 822; *Bryant*, 131 S. Ct. at 1173 (Scalia, J., dissenting).

64. See *Bryant*, 131 S. Ct. at 1163-65; *cf.* *Liera-Morales*, 759 F.3d 1105 (extending the emergency concept to a telephone conversation of a mother with the kidnapers of her son which she arranged for law enforcement to hear). The phone call was made for the purpose of obtaining her son's safe release. See *id.* at 1106-07.

65. *Bryant*, 131 S. Ct. at 1156. It is doubtful that *Bryant* means that if objectively viewed a statement does not appear to be for a prosecutorial, accusatory, incriminatory, evidential purpose, but secretly in fact is intended for that purpose, that this would not be testimonial.

66. See *id.* at 1156-62.

67. See *id.* at 1157-60.

potential scope of it, the physical condition of the declarant (victim), his mental state, and the degree of structure to the interview.⁶⁸

And, the Court says, just because an on-going emergency existed at the time does not necessarily mean the statements were concerned with it and were therefore non-testimonial: “We reiterate . . . that the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry; rather, the ultimate inquiry is whether the primary purpose of the interrogation was to enable police assistance to meet ongoing emergency.”⁶⁹

The Court makes a big point of the fact that the actions and statements of *both* the interviewer and the interviewee are to be considered when determining the interview’s objective primary purpose.⁷⁰ Perhaps somewhat disingenuously, the opinion goes on to say that this approach will take care of the multiple “mixed motives” problems that could arise under the majority’s test—dual motives of the victim who may both seek help from the officers and also wish to incapacitate the offender, compounded by dual motives of the police who may be concerned both with public safety and securing evidence for conviction.⁷¹ Nevertheless, while professing that the purpose of both participants must be taken into account, the opinion seems to at times emphasize the declarant’s intention, rather than that of the interviewer.⁷²

The Court acknowledges that while certain sentences in *Davis* seem to suggest that “the relevant purpose is that of the interrogator,” in actuality it is “the declarant’s statements, not the interrogator’s questions” that are the subject of the Confrontation Clause scrutiny.⁷³ Somewhat confusingly, in the same note, the Court reiterates that the interviewer’s purpose is also pertinent. Justice Scalia, in his dissent, accuses Justice Sotomayor of placing primary emphasis on the interrogator’s purpose.⁷⁴ He says that the significant purpose under *Crawford* (which he wrote) is that of the declarant, although *Crawford* did not have to specifically decide that point.⁷⁵

Fostering more confusion for our purposes, is the fact that the opinion equivocates on both the question of whether state actors *must* be involved for

68. *See id.* at 1158-62.

69. *Id.* at 1165 (internal quotation marks omitted).

70. *See id.* at 1156, 1162.

71. *See id.* at 1161.

72. *See id.* at 1160 n.11.

73. *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 822 n.1 (2006)).

74. *Bryant*, 131 S. Ct. at 1171-72 (Scalia, J., dissenting).

75. *See id.* at 1168; *cf.* Shari H. Silver, Michigan v. Bryant: *Returning to an Open-Ended Confrontation Clause Analysis*, 71 MD. L. REV. 545, 545, 564 (2012) (*Bryant* had to cope with contradictory statements in *Crawford* and *Davis* on this; declarant’s purpose should be the exclusive focus).

a statement to be testimonial, and on the question whether formality and interrogation *necessarily* need be involved: “[T]he *most important* instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.”⁷⁶

Although the opinion expressly declines to narrow the purposes that may be considered, to include only emergency resolution versus evidence gathering,⁷⁷ it also says that resolving an emergency is among the “most important” things to look at in the primary purpose inquiry: “The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than prov[ing] past events potentially relevant to later criminal prosecution.”⁷⁸

Of particular importance to our inquiry concerning children, Justice Sotomayor counts as a non-testimonial purpose a lack of ability to form any purpose, as perhaps in the case of the seriously injured declarant in *Bryant*.⁷⁹

In a particularly confusing passage, the Court supports its decision by noting the reliability of statements made in an emergency like this, mentioning that such reliability is responsible for the hearsay exception for excited utterances. The Court continues, “In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”⁸⁰ Apart from a certain illogic to this, it seems to fly in the face of *Crawford*, which emphatically repudiated *Roberts*’ dependence on reliability and hearsay rules. It does, however, reinforce the idea that medical purposes are non-testimonial, because the hearsay exception for statements made for purposes of medical diagnosis or treatment recognizes such purposes as trustworthy.⁸¹ This is quite relevant to the problem of the victims’ statements discussed in this article.

Like *Davis*, *Bryant* expressly declines to decide when, if ever, statements to others than law enforcement personnel can be testimonial.⁸² Because the interrogators in all of these cases coming to the Court so far were members

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

77. *See id.* at 1159, which seems to recognize, for example, that an out-of-court statement may be made and obtained for the primary purpose of diagnosing or treating an illness or injury. The Court also takes pains to confine its emergency versus evidence gathering dichotomy to the specific police situations involved in these cases. *See id.* at 1159-60.

78. *See id.* at 1157 (quoting *Davis*, 547 U.S. at 822) (internal quotation marks omitted).

79. *See id.* at 1159.

80. *Id.* at 1155.

81. *See id.* at 1157, 1157 n.9.

82. *See id.* at 1155, 1155 n.3.

of the police, the matter has never needed to be decided by the Court (at least until the currently pending case of *Ohio v. Clark*). This leaves open the possibility that such statements can be testimonial.

Finally, like *Crawford* and *Davis* before it, *Bryant* takes pains to expressly notify us that the Court in *Bryant* is not attempting a complete definition or delineation of the boundaries of testimoniality.⁸³

D. The Williams Case: Introducing the “Targeted Person” Test, the Expert Testimony End-Run, and the Importance of Formality

In 2012 the Court decided *Williams v. Illinois*.⁸⁴ In that case, a specimen of semen was obtained from the person of a rape victim and sent by the Illinois state police laboratory to Cellmark Diagnostics, a leading Maryland private laboratory specializing in DNA analysis.⁸⁵ Cellmark reported back to the Illinois lab the characteristics of the DNA. Meanwhile Mr. Williams had become a suspect in the rape. The Illinois state police lab analyzed a blood sample from Williams, isolating the characteristics of the DNA in it. In the bench trial of Williams for the rape, an expert witness from the Illinois state police lab testified that the two sets of characteristics (the ones obtained by Cellmark and the ones obtained by the Illinois police lab) matched.⁸⁶ Cellmark personnel did not testify. The victim identified Williams from the stand. Williams was convicted⁸⁷ and ultimately appealed to the Supreme Court on grounds that Williams’ Confrontation Clause rights were violated.⁸⁸ This was so, he posited, because the Cellmark analyst did not testify, yet his

83. *See id.* at 1167.

84. 132 S. Ct. 2221 (U.S. 2012).

85. *See id.* at 2229.

86. *See id.* at 2229-30. The testimony was essentially in this form (after the on-the-stand expert testified to obtaining the vaginal swab and sending it to Cellmark, and taking Williams’ blood and doing a DNA analysis on it):

Q. Did you subsequently get a report back from Cellmark concerning what you had sent them?

A. Yes.

Q. Did it contain a report of DNA characteristics [perhaps specifying types].

A. Yes. [Perhaps specifying the characteristics.]

Q. Did they match the DNA characteristics your lab had obtained from Mr. Williams’ blood?

A. Yes. [Perhaps going into more detail about the characteristics of both.]

See id.

87. *See id.* at 2221, 2223.

88. *See id.* at 2231. For a debate on the issues raised by *Williams* published just prior to the decision, see Ronald J. Coleman & Paul Rothstein, *Williams v. Illinois and the Confrontation Clause: Does Testimony by a Surrogate Witness Violate the Confrontation Clause?*, GEO U. L. CENTER (Dec. 6, 2011), <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1740&context=facpub>, <http://publicsquare.net/williams-v-illinois-confrontation-clause>.

out-of-court statements (the Cellmark report) were used against Williams.⁸⁹ Mr. Williams relied on two previous Supreme Court cases that held that the prosecution's introduction of laboratory reports showing the suspect's blood alcohol content and the composition of narcotic substances seized from the suspect, without introducing as witnesses those responsible for the reports, violated the suspects' rights to confrontation—one of the cases also holding that a stand-in expert witness would not do.⁹⁰

Justice Alito announced the judgment of the court in *Williams*. The analyst's testimony was not required and the conviction was affirmed.⁹¹ Alito wrote the opinion for a plurality of four Justices (himself and Justices Roberts, Kennedy, and Breyer). The plurality carried the day because a fifth, Justice Thomas, joined in the result, but on different grounds.⁹² Justice Breyer also filed a concurring opinion suggesting it might be time to re-examine *Crawford*. Justice Kagan authored a dissent—in which Justices Scalia, Ginsburg, and Sotomayor joined—supporting a broad reading of *Crawford* and requiring Cellmark analyst testimony.

Justice Alito writing for the plurality first assumes that the Cellmark report was testimonial and could not itself have been introduced to establish the truth of what it reported without the responsible analyst.⁹³ But, he says, establishing the report's truth was not why the report was used at the trial. Rather, the report's contents were used more in the nature of a hypothetical set of facts put to the on-the-stand expert (the one from the Illinois state police lab who testified to the match). Thus its contents were not offered for their truth, but as the basis of the expert's testimony.⁹⁴ *Crawford* had said, in a general context, that statements not offered for their truth do not present a Confrontation Clause problem.⁹⁵ Essentially, in other words, the examination

89. See *Williams*, 132 S. Ct. at 2227.

90. See *id.* at 2232-33; the two decisions he relied on were *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). The prosecution in *Bullcoming* had attempted to get around the holding in *Melendez-Diaz*—that for the lab report to be admissible the analyst had to testify—by presenting on the stand an expert co-worker in the lab who had nothing to do with the particular test and report but could testify to the process. The Court rejected such a “surrogate witness” approach. See *Bullcoming*, 131 S. Ct. at 2709-10. Exactly what *Bullcoming* did and didn't decide is discussed in Ronald J. Coleman & Paul F. Rothstein, *Grabbing the Bullcoming by the Horns: How the Supreme Court Could Have Used Bullcoming v. New Mexico to Clarify Confrontation Clause Requirements for CSI-Type Reports*, 90 NEB. L. REV. 502, 524-52 (2011).

91. See *Williams*, 132 S. Ct. at 2244.

92. See *id.* at 2255 (Thomas, J., concurring).

93. See *id.* at 2239-40 (plurality opinion).

94. See *id.* at 2228.

95. See *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

in *Williams* was treated by Justice Alito as the equivalent of this:

Q. [By the prosecutor to the testifying expert from the Illinois police lab, perhaps after some preliminaries about the taking and sending of the sample to Cellmark and what the Cellmark report that came back contained]: “Assuming that the profile Cellmark sent back to you at the police lab was an accurate representation of the DNA profile of the sample of the semen that you sent to Cellmark that had been taken from the person of the victim, does it match the one that your state lab took from the defendant?”

A. “Yes. It was a match.”⁹⁶ [Perhaps with some more explanation.]

Alito’s position is that the witness’ *actual* testimony—though not precisely in the same form as above—was essentially like the above. Alito says the testimony was intended to be conditional on the assumption that the facts in the report would be independently proven true. The critical point for Alito is that, on the theory for which it was offered, the witness’ testimony should not be read as claiming that anything in the report was true—just that she relied on its contents in forming her opinion.⁹⁷ Since this was a bench trial without a jury, Alito says the judge, being sophisticated in such legal matters, understood that the facts in the report were not being advanced as true but merely as hypothetical assumptions, even though the form of the testimony could have made this limitation of purpose clearer (as it might have to do in a jury trial).

The testimony therefore conforms, Alito notes, to a well-accepted evidentiary (though not necessarily constitutional) procedure, codified by Federal Rule of Evidence 703.⁹⁸ Rule 703 allows experts to expressly base their testimony on an assumed hypothetical state of facts.⁹⁹ Such hypothetical facts are not to be taken as proven by the fact-finder until there is independent evidence they are true. If there is no such subsequent proof that is believed, the opinion should be discounted or disregarded. The facts contained this way in expert testimony are not being offered to prove they are true, but rather are offered to show what *assumptions* the expert indulged in, in the process of arriving at his or her opinion testimony. If these assumptions prove not to be true, or are not proven, the worth of the testimony is to be judged accordingly. What would invoke the Confrontation Clause and require the Cellmark analysts live testimony is if the Cellmark report were claimed to express truth.¹⁰⁰ If not offered for their truth, the argument goes, the statements in the

96. *See Williams*, 132 S. Ct. at 2236.

97. *See id.*

98. *See id.* at 2239–40; FED. R. EVID. 703.

99. *See* FED. R. EVID. 703 advisory committee’s note.

100. *See Williams*, 132 S. Ct. at 2240.

Cellmark report as used in *Williams* are not testimonial under *Crawford*.¹⁰¹

Justice Alito may be in error about Rule 703. Upon closer examination of the Rule, we see it allows this procedure only if the facts are “reasonably” relied upon by the testifying expert.¹⁰² Even then the judge has discretion to suppress them if they would be too prejudicial. Arguably when the material relied on would be constitutionally inadmissible—as Alito concedes it is in this part of the opinion—the judge might exercise this discretion.

In general it may be sound to say a statement is not covered by the Confrontation Clause if not offered for its truth. Also, it may be a sound notion for evidentiary expert testimony and hearsay purposes, as 703 intends. But should this Rule 703 definition of “truth of the matter asserted”—which holds that an out-of-court statement is not offered for its truth when an expert’s testimony expressly relies on it—be accepted for Confrontation Clause purposes? I would answer “no.” Such expert testimony so based inevitably influences fact-finders to accept the basic facts as true, despite instructions to the contrary. Moreover, there are a number of things confrontation and cross examination could reveal¹⁰³ which would justify requiring those responsible for a forensic report—or other declarants on whom prosecution expert witnesses rely—to appear in court.

But even if Justice Alito is correct in his entire not-for-truth analysis, it would still be up to the fact-finder to decide whether the assumed hypothetical facts are indeed true before they could use the testifying expert’s opinion as evidence of guilt. If there is no other evidence to support the hypothetical facts on which the testifying expert’s opinion depends—here, the features of the DNA taken from the victim as reported in the Cellmark report—the trier-of-fact may not credit the on-the-stand expert’s opinion that there is a match between the DNA on the swab taken off the person of the victim, and the DNA in the defendant’s blood, since that opinion is based on hypothetical facts that have not been proven.

So, the question in *Williams* then comes down to this: Was there other evidence supporting what was reported in the Cellmark report—that the DNA in the sample they examined from the victim had a certain set of features? If not, under standard evidentiary law, the expert’s testimony should have been stricken or disregarded and could not be considered to help establish guilt.

On this point, Justice Alito says there was indeed “other” evidence to

101. See *id.*; cf. Jennifer Mnookin & David Kaye, *Confronting Science: Expert Evidence and the Confrontation Clause*, 2012 SUP. CT. REV. 99 (2013).

102. See FED. R. EVID. 703.

103. See Coleman & Rothstein, *supra* note 88.

support the hypothetical facts. That “other” evidence was the circumstantial evidence that the police sent a sample swabbed from the victim to Cellmark, a DNA profile came back from Cellmark, and it exactly matched the defendant’s, the person the victim testifies raped her.¹⁰⁴ I will not go into Alito’s “other evidence” argument here. Questions have been raised about it elsewhere.¹⁰⁵

But so far we have only examined the first part of Justice Alito’s opinion. Still writing for the plurality, he goes on to offer a second, independent, theory justifying admissibility in *Williams*—a theory additional to the not-for-truth theory discussed above.

This second theory is that the report itself was not testimonial, and thus could have been introduced directly even without using expert testimony as the conduit, because Mr. Williams was not a suspect for the rape at the time of the Cellmark report, and only became one after the report. Alito holds that a statement can only be testimonial if there already is someone the police suspect—a “targeted” individual, so to speak.¹⁰⁶

Alito here relies in part on the word “against” in the Confrontation Clause, which provides that criminal accuseds must be confronted with the “witnesses against” them. The Cellmark report was not testimonial because it was not specifically against the accused, but rather was to find a rapist.¹⁰⁷

While this is a relatively new theory in the Supreme Court cases,¹⁰⁸ it bears some kinship to the expansion in *Bryant* of the emergency purpose doctrine of *Davis*. Alito’s theory could be regarded as an even further extension of the criminal-at-large-with-gun notion of emergency—that there is a kind of emergency or danger to the public whenever a rapist has not yet been identified—i.e. whenever there is, on the loose, a person prone to violence, whether or not he has a gun—so that statements made in aid of identifying and arresting an unknown rapist are not made for testimonial purposes because they are preventive of a public danger rather than meant to memorialize evidence for potential use at trial.

104. See *Williams*, 132 S. Ct. at 2239.

105. See PAUL F. ROTHSTEIN, MYRNA S. RAEDER, & DAVID CRUMP, *EVIDENCE: CASES, MATERIALS, AND PROBLEMS* 637-41 (4th ed. 2013).

106. This somewhat resembles the routine or non-adversarial record doctrine that provides an exception to the law enforcement records exclusion in the hearsay exception for public records in Federal Rule of Evidence 803(8). See *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976); *United States v. Brown*, 9 F.3d 907 (11th Cir. 1993); *United States v. Orozco*, 590 F.2d 789 (9th Cir. 1979); *United States v. Quezada*, 754 F.2d 1190 (5th Cir. 1984).

107. Alito adds that DNA tests have the potential of exculpating perhaps more than inculcating. *Williams*, 132 S. Ct. at 2228.

108. It adds a twist to the primary purpose test, which previously seemed to require merely contemplation of use prosecutorially not necessarily against any particular individual.

Justice Alito puts his theory this way, also shedding some light on his view of the role of formality:

The [Confrontation] Clause refers to testimony by witnesses against an accused, prohibiting modern-day practices that are tantamount to the abuses that gave rise to the confrontation right, namely, (a) out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct, and (b) formalized statements such as affidavits, depositions, prior testimony, or confessions.¹⁰⁹

His part (a) is his new “target” theory. Thus, the plurality holds, under this new theory, that:

The primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial. When the [Illinois police] lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time.¹¹⁰

Under the plurality’s “target” theory, it is uncertain exactly what circumstances at the time of the testing or report would render the report non-testimonial. For example, such circumstances might conceivably include any of the following but it is uncertain: (1) the police do not yet have *any* suspect; (2) defendant himself not yet suspected in the particular crime; (3) defendant not yet suspected in *any* crime; (4) police not telling the lab there is a suspect (at least if the lab is truly an independent lab); or (5) no pertinent crime has yet been perpetrated (as when, for example, routine records of fingerprints or DNA are taken from a certain population for identity later when and if a crime is subsequently committed). Further, if suspicion of crime is the relevant factor, when does “interest” in an individual in connection with a crime, ripen into suspicion?

The Supreme Court, of course, consists of nine Justices, the views of at least five of which constitute a majority. In *Williams*, which is the latest of the Court’s Confrontation Clause decisions, no five Justices lined up behind any of the theories of the Confrontation Clause that were expressed in the multiple opinions in the case. Four (the plurality: Justices Alito, Roberts, Kennedy and Breyer) lined up behind the not-for-truth and the target theory, both theories indicating no violation on the facts of *Williams*. Another four (the dissenters: Justices Kagan, Scalia, Ginsburg, and Sotomayor) rejected both those theories as engrafting made-up requirements onto the Confrontation Clause, and felt it was clear and obvious from *Crawford*, *Melendez-Diaz*, and *Bullcoming* that *Williams*’ confrontation rights had been

109. *Williams*, 132 S. Ct. at 2225.

110. *Id.* at 2243.

violated. The vote determining the result, and thus likely to become controlling in many future cases, was Justice Thomas'. His theory was not accepted by any other Justice, and he rejected all their theories. His theory was that the report was not formally attested to and thus was not testimonial.¹¹¹ In final admissibility result, then, he lined up with the four plurality votes, that Williams' rights had not been violated and the evidence was admissible, but he rejected the plurality's reasons as amounting to new, fabricated, conditions attached to the Confrontation Clause.

Having set forth the relevant Supreme Court precedents above, let us examine the two classes of statements that are the main focus of this article.

III. CHILD VICTIM'S STATEMENTS TO TEACHERS, DOCTORS, AND THE LIKE: PROBLEMATIC UNDER CONFRONTATION PRECEDENT.

In the case of the abused children's statements we are concerned with in this paper,¹¹² there can be a number of problems under the somewhat confusing Supreme Court precedent just outlined. The statement may have been made to a private¹¹³ professional (teacher or doctor) who, in addition to her educational, caring, or treating function, is charged by statute with reporting child abuse to authorities. Thus, when receiving the child's statement, the professional may have been performing a dual function: a legal one in addition to his or her normal one. This may make the "primary purpose" and "agent of the law enforcement" determinations difficult and uncertain under existing precedent. A child's statement to a welfare worker involves the same problems, and an additional one: Does the fact that the welfare worker actually works for the state make a difference? Is working for the state the same thing as working for law enforcement? What is significant for Confrontation Clause purposes: working for law enforcement, the government, or "none of the above"? When the statement is to a teacher, if the teacher is a public school teacher, as opposed to a private school teacher, would that change things (always assuming there is a duty to report abuse

111. Under Justice Thomas' "Formality" ("Solemnity") theory, there is a distinction between the report in *Williams*, where Thomas voted for admissibility because the report was informal, and the reports in *Melendez-Diaz* and *Bullcoming* in which Thomas voted against admissibility. The report in *Melendez-Diaz*, was basically a sworn affidavit. The report in *Bullcoming* was not sworn, but was certified with the signatory affirming its truth. State law established the procedures in *Melendez-Diaz* and *Bullcoming*, providing for the reports' evidentiary use if in the proper form. Perhaps also contributing to the characterization of the reports as formal/solemn *vel non* was the fact that in *Williams*, as opposed to *Melendez-Diaz* and *Bullcoming*, the private reporting lab was not an arm of the state.

112. See *supra* statement (1) in the Introduction.

113. We will assume the teacher or doctor is not formally employed by the state. If they are, the agency problem is more marked.

whether the teacher is public or private)?

Often these child statements will be made to a parent, family member, baby sitter, or teacher; or to a physician who may or may not have been suggested by the police or have some other law enforcement connection, in addition to the duty to report abuse. At what point is a connection to law enforcement (if required at all) sufficient for confrontation purposes? How does the connection affect purpose?

Further complicating the matter, a teacher or doctor's "legal" purpose (under the reporting statute) might conceivably be deemed a protective purpose—to prevent further abuse of this child—almost an emergency, perhaps. It could be a purpose to trigger child protective welfare services and removal of the child from the abusive situation. Legally this might not be deemed a testimonial purpose. On the other hand, it might be. It could be viewed as a purpose to gain evidence for later adverse use or prosecutorial use. (However, even prosecution is also, in major part, for child protection.) If the statement is made to a welfare worker, perhaps the protective purpose is stronger.

Aside from ambiguity about the professional's purpose, the Supreme Court has said the purpose of the statement's *maker* (here, the child) is also important. It will often be unclear whether a child of tender years can entertain *any* particular purpose when making these statements.¹¹⁴ Even if the child could entertain some purpose, it may be especially difficult to determine what purpose it was. Conceivably the child may have believed there was some kind of medical purpose to the visit. But it may be clear to adults that the person to whom the statement was being made definitely had a different purpose.

There is further uncertainty if the child's statement was volunteered, and not the subject of any real questioning or interrogation. It is unclear under present law, whether anything like questioning is required. Further, if there were questions, the questions may have had an agenda unknown to the child, clouding the purpose inquiry.

Let us consider a hypothetical that is fairly representative of the situation in cases of child victimization.

A. *Representative Child Victim Hypothetical.*

Janie S., 4 years old, comes home one day following a private pre-kindergarten session and an after-school visit with her estranged father.

114. Justice Sotomayor writing for the Court in *Bryant* states in dicta that a lack of purpose counts as non-testimonial. See *Bryant*, 131 S. Ct. at 1165, 1166. Sometimes children are purposely told that a forthcoming interview has a certain purpose, to manipulate the confrontation result.

1. Janie's Statement to Friend. On her way home, Janie tells her best friend, Maria, that her father (Mr. S.) did so-and-so to her. They are acts which would constitute child abuse. When Janie arrives home, Janie's mother (Mrs. S.) notices some unusual physical and psychological symptoms. Janie won't talk about it, but her mother suspects foul play, and calls the police. They suggest taking Janie to Dr. Martina Ellingsworth, a general practitioner specializing in treating physical and mental conditions of injured children, for a diagnosis of what happened and for treatment if necessary. Mrs. S. takes Janie to see Dr. Ellingsworth.

2. Janie's Statement to Doctor. Janie goes into the Dr.'s inner office without her mother, and privately recounts to Dr. Ellingsworth (who has a very soothing and kindly visage) that Janie's father did certain things to her. The things she recounts are indeed physical abuse.

3. Janie's Statement to Police. After that session, Janie and her mother go to the police, though Janie does not know it is the police and thinks it is just some friends of her mother—they are a plain-clothes unit established for these purposes. Janie goes privately, without her mother, into a child-friendly room with Officer Amanda Carr, who gains her confidence. Janie tells Officer Carr the same story she told the doctor.

4. Janie's Statement to Mother. Janie later recounts the same thing in a little more detail, to her mother. Just before telling her mother, Janie has been apprised by her mother that there is a custody battle between Mr. and Mrs. S. concerning Janie, and that if Janie wishes to continue living with Mommy (which Janie does wish), "we have to have something bad on Daddy."

5. Janie's Statement to Baby Sitter. Janie later recounts the same story she told the doctor and her mother, to the babysitter, out of the presence of her mother.

6. Janie's Statement to Child Welfare Worker. At some point, Janie tells the same story to a government child welfare worker who has been assigned to investigate the case.

Mr. S. is subsequently criminally charged with the physical abuse of little Janie. For one reason or another little Janie does not or cannot testify at trial,¹¹⁵ does not attend the trial,¹¹⁶ and has not been available for cross-

115. See *supra* text accompanying notes 11, 14. Normally, if the declarant testifies at trial, then the former out-of-court statements would be admissible insofar as the Confrontation Clause is concerned. If Janie does testify at trial, conceivably a question could arise as to whether the opportunity to cross-examine an extremely young child about an earlier statement is constitutionally adequate, but a good argument can be made based on *United States v. Owens*, 484 U.S. 554 (1988) that it would be.

116. A few cases by analogy to the notice-and-demand procedure seemingly approved by the U.S. Supreme Court in dicta in *Melendez-Diaz*, 129 S. Ct. at 2541, have treated as waiver of confrontation rights by defendant, a situation where the victim is present in the courtroom and the

examination at any other point.¹¹⁷

Under the Confrontation Clause,¹¹⁸ which of the above statements of Janie would be admissible against Mr. S. at his trial? Assume the person to whom Janie made each statement proposes to testify to it and that none of this would be blocked by the jurisdiction's hearsay rule because the jurisdiction has a wide-reaching child hearsay exception that would cover all these statements.¹¹⁹

1. Janie's Statement to Her Friend.

This statement seems to lack any of the indicia of testimoniality that *might* be requirements under *Crawford* and its progeny. They were all mentioned in *Crawford* in support of its finding of Mrs. Crawford's statement to be testimonial. Whether they are all *required*, is uncertain. But at least we know that if none of them were present, the statement is not testimonial.

Recall what those indicia were:

- Prosecutorial or similar purpose.
- Government or law enforcement involvement.
- Formality, solemnity, or structure to the interview.
- That the statement was made under some kind of interrogation or questioning.¹²⁰

Crawford specifically says, concerning statements to friends without

defendant does not call the victim to the witness stand. *See, e.g., Trevizo v. State*, No. 08-12-0063-CR, 2014 WL 260591 (Tex. Ct. App. Jan. 22, 2014).

117. If the child was available for cross exam at some previous time (and unavailable for on-the-stand testimony now) this normally would solve the Confrontation problem and the hearsay statement would be admissible, but, depending on the circumstances of that former opportunity to cross examine, questions could arise as to the constitutional adequacy of that opportunity much like those that arise under the former testimony exception to the hearsay rule regarding similarity of motive, whether anyone other than defendant's opportunity would suffice, etc. Questions might also arise as to what exactly constitutes present unavailability. *See* PAUL ROTHSTEIN, MYRNA RAEDER, & DAVID CRUMP, *EVIDENCE: CASES, MATERIALS, AND PROBLEMS*, § 11.03 at 583 (LexisNexis 4th ed. 2013). And, if the child is presently declared incompetent to testify, questions could be raised about the competency of the hearsay statement and adequacy of any previous cross-examination of the child, depending upon the reason given for the declared incompetency to testify at trial.

118. There may be other problems with this evidence, e.g., evidentiary or Due Process problems. But let us concentrate on the Confrontation Clause.

119. I will treat each of the enumerated statements separately, independent of the others—i.e. as though each were the only statement made. This is to avoid the possibility that later statements may be considered the product of an earlier one that is testimonial, with the result that the later one would be tainted, too, even if the later one viewed in isolation would not be. I want to examine the testimoniality of each statement itself, without the possibility of this kind of taint. I also have not built in facts that might justify application of the doctrine that by threatening the child, the defendant may have forfeited his constitutional rights. *See generally* Clifford S. Fishman, *The Child Declarant, the Confrontation Clause, and the Forfeiture Doctrine*, 16 WIDENER L. REV. 279 (2010).

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

testimonial purpose:

[T]he Confrontation Clause . . . applies to “witnesses” against the accused—in other words, those who “bear testimony.” “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. . . . *An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules [but not under the Confrontation Clause].*¹²¹

And the court makes a similar point about wholly private statements in the domestic violence case of *Giles v. California* when it states that the Confrontation Clause does not exclude “[s]tatements to friends and neighbors about abuse and intimidation and statements to physicians in the course of receiving treatment”¹²²

This statement to Janie’s friend would be constitutionally admissible.¹²³

2. Janie’s Statement to Dr. Ellingsworth.

Under current confrontation law, as outlined above, there are a number of legal issues that are unresolved concerning this statement’s status under the Confrontation Clause:

- a. *Does a statement have to be received by an agent of the government (or law enforcement) for the statement to be inadmissible under the Confrontation Clause? If so, would Dr. Ellingsworth qualify as such an agent for these purposes?*

The Supreme Court has never answered whether an agent of the state (or law enforcement) must be involved.¹²⁴ In all of the Confrontation cases so

121. *Id.* at 51 (emphasis added).

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

123. *See, e.g.*, *United States v. Harry*, No. CR10-1915JB, 2014 WL 1950409 (USDC. D. N.M. May 7, 2014) (victim’s statement recounting the rape to a friend while still upset and crying immediately after the rape, admissible insofar as hearsay rule is concerned and insofar as Confrontation Clause concerned; additional reason for the latter was because prosecution said it intended to have the victim testify); *State v. Avila*, No. 109,069, 2014 WL 1795818 (Kan. Ct. App. May 2, 2014) (victim statement to friend constitutionally subject to multi-factor test; here, very casual statement about medical condition held not testimonial because no testimonial purpose or contemplation).

124. In a context particularly pertinent to our consideration of the statement to Dr. Ellingsworth, a “no” answer to this question is inferentially *suggested* by the fact that *Crawford* expressed approval of the Confrontation Clause result (though overruling the particular approach to the clause) of *Idaho v. Wright*, 497 U.S. 805 (1990). *Crawford*, 541 U.S. at 76. *Wright* excluded pursuant to

far, the people to whom the statement was given have been law enforcement agents of the state, like police or prosecutors.¹²⁵ In *Davis*, the 911 operator was assumed to be part of the police without deciding because it didn't matter: the statement was non-testimonial for other reasons.¹²⁶

Depending upon the evil at which the Confrontation Clause is aimed, an argument can be made that an agent of the state (or of law enforcement) must be involved in obtaining the statement before the Clause kicks in. If the Clause's concern is with state overreaching, an agent of the state (or maybe more particularly, law enforcement) would be required. If the concern is solely with unreliability (whether state-produced or not), such agency might not be required. For example, a statement made purposely to get someone into legal trouble, made to someone not connected with law enforcement or the state, might qualify. This might be the case, for example, in Janie's statements (4) and (5), above.

If an agent is required, there is an open question about how much connection a person must have with the state or law enforcement to be deemed an agent for these purposes. On the facts here, Dr. Ellingsworth may or may not have been selected by the police, and may have some longer-standing arrangements with them. But in any event, she may have another connection to law enforcement as well: she probably is under a statutory duty to report suspected child abuse. It is uncertain whether either of these, alone or in combination, would constitute sufficient connection if there is a connection requirement.¹²⁷

the Confrontation Clause a statement of a child about the child's molestation made to a private pediatrician. *Wright*, 497 U.S. at 827. Similarly, Justice Scalia (the author of the *Crawford* opinion) indirectly indicates no state agency is required, in his dissent in *Bryant*, by relying on *King v. Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202, 202-03 (K.B. 1799) in which the court rejected a hearsay statement by a child to her mother (a private person) after the child was sexually assaulted, offered in evidence against the accused assaulter. *Bryant*, 131 S. Ct. at 1173 (Scalia, J., concurring in part and concurring in the judgment). See PAUL ROTHSTEIN, MYRNA RAEDER, & DAVID CRUMP, EVIDENCE: CASES, MATERIALS, AND PROBLEMS, §11.03 at 612 (LexisNexis 4th ed. 2013). *Ohio v. Clark*, when decided, may shed some light on this.

125. It is possible that law enforcement affiliation is not in itself an independent requirement, but merely a part of the purpose determination: that normally the law enforcement connection is evidence suggesting a testimonial purpose.

126. *Davis v. Washington*, 547 U.S. 813, 828-829 (2006).

127. The U.S. Supreme Court, in the pending *Ohio v. Clark* case, will presumably decide by July 2015 whether an agent of law enforcement is required, and if so, may shed some light on what connection to law enforcement is needed for one to be such an agent. The question there is whether a child's statement upon questioning by a private teacher implicating defendant in abuse of the child, should be excluded as a testimonial statement under the Confrontation Clause when the teacher is obligated under law to report suspected child abuse. The dissent in that case suggested that a law enforcement connection is not required, but that the purpose test may be different if there is such agency. *Ohio v. Clark*, 999 N.E.2d 592, 606-07, 610-12 (2013) (O'Connor, C.J., Lanzinger, J., and French, J., dissenting).

b. *Must there be an interrogation? Must there be “formality”?*

The Court has been ambiguous about whether there must be something that can be called questioning or interrogation, for there to be a Confrontation violation, and if so, what counts as questioning or interrogation. Every pertinent Supreme Court case so far has involved some kind of questioning. The court has sidestepped the issue until now because there has not been a case of a volunteered statement yet and the court has said in situations where there might be doubt, that the questioning was enough even if there is a requirement along these lines. On our hypothetical facts, there probably is some questioning by the doctor, although we don't know how much and if it is enough, assuming the requirement applies at all.

Closely allied is the question as to whether some “formality” of the conversation is required before there can be a Confrontation violation. Only Justice Thomas seems to concentrate on formality, but *Crawford* itself may suggest something along the lines of a kind of formality requirement.

The formality in the session with the doctor in our case is very little. The Court has said mere questioning by the police is sufficient if formality is required. The formality of the doctor setting in our problem is less than that, but it is anybody's guess as to whether it would be sufficient for the Court. It probably would not be for Justice Thomas.¹²⁸

c. *What is the Statement's Primary Purpose?*

In *Bryant*, the Court said if its “primary purpose” is to gather evidence, the statement is testimonial and impermissible.¹²⁹ The Court goes on to say the purpose of both maker and recipient must be taken into account, but the test is an “objective” one: what a reasonable person viewing all the circumstances would say the primary purpose was.¹³⁰ It is unclear whether the “objective” purpose would be deemed by the Court to govern if a statement that had a benign purpose when objectively viewed was in actuality motivated by a purpose to incriminate or make evidence against someone.

Here, Dr. Ellingsworth's purpose was twofold, presumably: to treat, and at least in part, to secure evidence. The latter further subdivides into two possible purposes: to provide evidence for a prosecution, or to provide evidence for removal of Janie (and any other siblings) from further contact with her father—i.e., to protect Janie and any siblings. While we know the prosecutorial purpose would be a testimonial purpose, the Court's decisions

128. When decided, *Ohio v. Clark* may shed some light on the issue of questioning and formality. See *supra* note 127.

129. *Bryant*, 131 S. Ct. at 1159-60.

130. *Id.* at 1160-62.

are not clear about whether the removal purpose would be or not.¹³¹ (A prosecutorial purpose may be precluded if there is a doctor-patient privilege covering the child's statement, although a counter-argument would be that the child or her mother would probably waive it. In federal law and the law of some states, there is no doctor-patient privilege. In many states there are exceptions that may cover this kind of child's statement. So, privilege would *probably* not preclude a prosecutorial purpose on the part of Dr. Ellingsworth.)

It is a difficult or insoluble question to ask which of these many purposes was his "primary" purpose—medical or legal and which legal purpose.

Further, perhaps it varied from part to part of the questioning. Questions like "Does it hurt here?" are probably medical. A question like "Who did it?" might be solely a legal question except where, as here, the treatment by the doctor is both medical and psychological. The identity of the abuser as a family member may bear strongly on the psychological treatment.

While the medical and psychological purpose might be clearly non-testimonial, the legal purpose of the "Who did it" question might be either testimonial or not—clearly testimonial if meant to gather evidence for a prosecution; not so clearly testimonial if meant to secure evidence to protect Janie by removal of visitation.

But anyway, is the purpose of the statement's recipient (the doctor) enough? Janie, the maker of the statement, may have thought that, since this is a doctor, the purpose of the whole thing is medical treatment, if she thought anything about purpose at all.

However, Justice Sotomayor in *Bryant* tells us it is not so much what the participants actually thought was the primary purpose, but what an objective reasonable person viewing all the circumstances would think was the purpose.¹³²

Depending on more facts, which we don't have, a reasonable adult looking at the circumstances from outside might know there was an evidence-

131. It is unclear under the precedent whether (1) this could be a non-testimonial purpose even if it doesn't qualify as a *Davis* or *Bryant* emergency purpose, and (2) whether it might qualify as a *Davis* or *Bryant* emergency purpose.

132. It is interesting to note that Justice Sotomayor makes a significant change in the language of *Crawford* as to purpose. *Bryant*: to objective observer "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Bryant*, 131 S. Ct. at 1160. *Crawford*: "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52. Sotomayor's version could be read to mean all that the purpose need to encompass is proving past events, if in fact those events are relevant to later criminal prosecution whether or not their relevance to criminal prosecution was known or part of the purpose. The *Crawford* articulation precludes that interpretation, and requires awareness of the possibility of use at a later trial.

gathering purpose in the session with Dr. Ellingsworth, as well as a medical treatment purpose, but might be unable to say which was “primary” overall—except perhaps if each question asked in the interview were considered separately. In that event some questions might be understood as having a clear treative purpose, some a clear legal purpose, but what legal purpose—prosecutorial or protective, to remove Janie from the situation?

With some of the questions—like “Who did it?” an adult objective observer might not even be able to narrow the purpose down as between legal and medical, let alone which legal one, as indicated above about that particular question.

At any rate, the Court has not told us if this kind of piecemeal characterization of parts of the conversation is proper or whether the effort should be to characterize the whole session.¹³³

The Court has left us with a further ambiguity, making a solution to our hypothetical even more difficult—an ambiguity that re-introduces a problem that may appear to have been removed by the “objective” approach—that is, the problem that the child’s view may be different than the doctor’s. Under the “objective” approach, is the objective reasonable observer an adult looking in from the outside, or is it one standing in the shoes of the participants? And what attributes does this reasonable person have? In our case, is it the reasonable child (like the person making the statement, Janie)? Or the reasonable adult (like the doctor)? That could make a vast difference here. When the court says the purpose of both participants must be taken into account, but cautions that an “objective” view must be taken, we are at a loss to know how this is to be done where the two participants might perceive or have different purposes.¹³⁴

Needless to say, the Court has not given us a clear message on this kind

133. *Bryant* states, in what is probably dictum, that the character of an interview as testimonial or non-testimonial can change if the purpose changes as the interview moves forward. *Bryant*, 131 S. Ct. at 1159-60.

134. *Ohio v. Clark* when decided by the Supreme Court may shed some light on how primary purpose is to be determined where a child statement is involved, and whether a protective (removal) purpose is testimonial or not. The dissent in the state Supreme Court suggests that a different test of purpose applies if the statement is made to non-law-enforcement personnel like a teacher (or presumably a doctor). *Clark*, 999 N.E.2d at 606 (O’Connor, C.J., Lanzinger, J., and French, J., dissenting). This different test seems to be one that (1) asks what would an objective (non-child) reasonable person observer from outside at the time have felt the declarant thought was the questioner’s purpose, and (2) does not limit us, in deciding purpose, to a choice between resolving an emergency and gathering evidence for prosecution, as in the case where law enforcement is directly involved, but could entertain lots of other non-testimonial purposes, such as a child-protective purpose, or preventing transmission of venereal diseases. The reason the choice is limited in the law enforcer situation is that “[p]olice officers in our society function as both first responders and criminal investigators.” *Id.* at 604 (O’Connor, C.J., Lanzinger, J., and French, J., dissenting).

of statement by children.¹³⁵

d. Must there be a “targeted” suspect? If so, what constitutes “targeting”?

Four members of the Court have said (in *Williams*) that the Confrontation Clause is not involved unless the police have a suspect at the time of the making of the statement. I.e., they must have targeted an individual, and, presumably, that individual has to be the one the statement implicates, the one the statement is offered against at trial.¹³⁶ This “target” requirement is probably based on the notion that the Confrontation Clause is primarily concerned with avoiding potential state overreaching rather than with assuring against all the various kinds of incredibility with which cross-exam is customarily concerned.

It is uncertain whether the “target” requirement would apply to our hypothetical, because only four of the nine members of the Court believe it is a requirement. But let us examine the vagaries if it did apply.

The Court has not said to what degree the investigation has to have focused on an individual for him to qualify as “targeted.” In our hypothetical, suspicion certainly was focused on a small number of culprits from the beginning, since Janie had just come from both a pre-school session and an after-school visit with her father. Her father was an obvious suspect, along with people from the pre-school. Was the father sufficiently “targeted” by police at the time she made her statement? It is unclear how far the investigation had focused on her father, and how focused it had to be to satisfy the “target” requirement.¹³⁷

e. Can the statement escape Confrontation Clause scrutiny if it is made the basis for expert testimony?

In *Williams*, four members of the Court held that the Confrontation Clause may allow an expert to incorporate into her testimony a statement of another person which statement if offered into evidence directly, without the expert, would violate the Confrontation Clause.¹³⁸ (Let us call this Justice Alito’s “not-for-truth” theory as he wrote the opinion for these four.)

In our hypothetical, Dr. Ellingsworth might try to avail herself of this

135. Cf. Deborah Paruch, *Silencing the Victims in Child Sexual Abuse Prosecutions: The Confrontation Clause and Children’s Hearsay Statements Before and After Michigan v. Bryant*, 28 *TOURO L. REV.* 85 (2012).

136. *Williams v. Illinois*, 132 S. Ct. 2221, 2243-44 (U.S. 2012).

137. *Ohio v. Clark* may shed some light on this problem of “targeting.”

138. *Williams*, 132 S. Ct. at 2239-40.

option by, say, giving an opinion on the stand that Janie was physically abused by her father, and expressly basing that opinion in part on what Janie said in Ellingsworth's office. Assuming the jurisdiction's evidentiary law of expert testimony and hearsay allowed this (which it well might), Justice Alito's not-for-truth theory would allow this under the Confrontation Clause as a permissible end-run even if Janie's statement itself were found to violate the Clause.

Since five members of the Court in *Williams* rejected the legitimacy of this kind of expert end-run,¹³⁹ this theory alone would not secure the admissibility of this Ellingsworth evidence in our hypothetical.

In sum, it is very unclear as to whether Janie's statement to Dr. Ellingsworth would be constitutionally admissible or not.¹⁴⁰

3. Janie's Statement to the Police

Here, Janie probably has no purpose other than to tell the story (probably counted as a non-testimonial purpose).¹⁴¹ The police, however, have an agenda—to gather evidence, probably for prosecution rather than for removal of contact between Janie and her father.¹⁴² This squarely poses the question of what is to be done where the questioner has a different purpose than the speaker, even objectively viewed, only one of which would make the statement violative of the Confrontation Clause.

Justice Sotomayor's formulation in *Bryant*, that both intentions must be considered on an objective basis,¹⁴³ does not make clear what should be the approach in this situation. Again, it may depend on one's view of what is the main concern of the Confrontation Clause—state overreaching, or facilitating exploration of all the kinds of inaccuracies—lying, mistake, insincerity—customarily explored by cross-examination. A concern with state overreaching suggests the purpose of the questioner should be paramount. If the concern is a broader range of potential sources of inaccuracy and incredibility, the purpose of the speaker seems significant. This was issue (c)

139. *Id.* at 2265 (Kagan, J., Scalia, J., Ginsburg, J. and Sotomayor, J., dissenting) (Thomas, J., concurring in the judgment).

140. *See generally* Paul C. Giannelli, *Confrontation Clause and Experts*, 27 CRIM. JUST. 55 (2012).

141. *Bryant*, 131 S. Ct. at 1165-67 (stating in dictum that having no purpose is equivalent to a non-testimonial purpose).

142. Perhaps an argument could be made that police have a purpose to catch a dangerous criminal on the loose, as in *Bryant*, but that is stretching the "resolving an emergency" concept too far. They may, however, have a protective purpose that is not a prosecutorial purpose.

143. *Bryant*, 131 S. Ct. at 1160, 1161-62, 1165.

(purpose) above, under Janie's statement to Dr. Ellingsworth, and it is a problem as well here, in this situation where Janie is speaking to the police.

Let us see how some of the other lettered issues above (under Janie's statement to Dr. Ellingsworth) apply to this situation.

Issue (a) (state agency) is not a problem here. The police are clearly agents of the state and law enforcement.

Issue (b) (interrogation, formality). It seems this is not a problem here. It is almost the same on this score as *Crawford* itself, except probably no tape recording made (although our hypothetical is unclear on this). But *Davis* and *Bryant* do not seem to require a tape recording. Justice Thomas may require an affidavit or the like, but the other Justices in these cases, and particularly in the forensic reports cases, do not seem to feel that this degree of formality is an indispensable requirement for a Confrontation violation. We do not know in our hypothetical, whether the police wrote the statement down, had Janie sign it, or had any other accoutrements of an affidavit; probably none of these. In all the cases thus far in the Supreme Court where the statement has been held testimonial, there has either been a sound or written recordation (*Crawford*, *Davis*, *Bryant*) and that has been mentioned as possibly significant. This might (though it is unlikely) form the basis for an argument that Janie's statement to the police is nontestimonial.

Issue (c) (targeting). The same problem is involved here, as above under Janie's statement to Dr. Ellingsworth.

Although it is far from clear, the result here would probably be that Janie's statement to the police would be considered testimonial.¹⁴⁴

4. Janie's Statement to Her Mother

Here, both speaker and recipient have an actual purpose to incriminate, which can be taken as equivalent to a purpose to make evidence against a targeted individual, although one could split hairs and say it is a non-prosecutorial purpose in that it was only meant to affect civil custody proceedings.¹⁴⁵

Presumably such actual purpose prevails over "objectively determined" purpose, if that means anything different.

So the only problem here is that there is no argument that agents of the state or law enforcement are involved in the session. If such agents are

144. Cf. Thomas D. Lyon & Julia A. Dente, *Child Witnesses and the Confrontation Clause*, 102 J. CRIM. L. & CRIMINOLOGY 1181 (2012).

145. Detracting from clarity here, however, is the fact that the child may not clearly regard this as any kind of thing that would be deemed an evidentiary-legal-testimonial purpose. Further complicating the matter is that the mother has a protective purpose too.

significant only to help determine purpose, it should not matter that no agent is involved. But it is not clear from the precedent that *that* is the only significance. Such agency may be an independent requirement. The Supreme Court has not yet decided a Confrontation case in which no agent of the state or law enforcement was involved in securing the statement.¹⁴⁶

If the Confrontation Clause is concerned only with the possibility of state overreaching, that would not be a concern here and the Clause should not apply.¹⁴⁷ If the Clause is concerned with providing an opportunity for a relatively thorough exploration of credibility, then the Clause should apply.

The ultimate result is uncertain.

5. Janie's Statement to Babysitter

In some ways this is the converse of (3) (statement to police), because here the speaker has the testimonial intent but the listener probably does not—but there is no state involvement so in that respect it is like (4) (statement to mother) except both parties to the exchange do not have the testimonial intent.

Thus, the ultimate result is even more uncertain.

6. Janie's Statement to the Welfare Worker

Assuming the conversation with the government welfare worker came before the mother told Janie “we need something bad on Daddy,” and before police had focused on the father, Janie's statements to the welfare worker are like the statement to the doctor. But there are certain pertinent differences. The argument the welfare worker is an agent of the state is stronger because she works for the government. Further, instead of one of the purposes being

146. However, *Ohio v. Clark*, when decided, may shed some light on this. See *supra* note 127. Justice Scalia (the author of the Supreme Court's *Crawford* opinion) indirectly indicates no agent of the state need be involved, by a case he cites in his dissent in *Bryant*. The case he cites is particularly appropriate to our hypothetical statement at this point (a statement by Janie to her mother) because it involves a practically identical statement by a child to her mother about abuse. *Bryant*, 131 S. Ct. at 1173 (Scalia, J., dissenting). The case is *King v. Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202, 202-03 (K.B. 1799) in which the court rejected a hearsay statement by a child to her mother (a private person) after the child was sexually assaulted, offered in evidence against the accused assaulter. *Id.* A similar possible indicator that no agent of the state need be involved, could conceivably be inferred by the fact that *Crawford* expressed approval of the result under the Confrontation Clause (though overruled the precise reasoning) of *Idaho v. Wright*, 497 U.S. 805 (1990), which case excluded pursuant to the Confrontation Clause a statement of a child about the child's molestation made to a private pediatrician. See PAUL ROTHSTEIN, MYRNA RAEDER, & DAVID CRUMP, *EVIDENCE: CASES, MATERIALS AND PROBLEMS*, §11.03 at 612 (LexisNexis 4th ed. 2013).

147. I am putting aside the possibility that what happened in the earlier statements might be considered state participation that influenced this statement to her mother.

a medical treatment purpose, there is a protective purpose of preventing contact by the father with Janie and siblings (if any).¹⁴⁸ More of the questions will be directed to that end, although there may be some concern with the medical needs of the child as well. The professional's motive of reporting for prosecutorial purposes may be less. In the current state of the law, it is extremely unclear whether the statements here would be regarded as testimonial. The stronger "agency of the state" factor may tip this more toward inadmissibility than in the case of the statement to the doctor. But if there is a privilege—that is not waivable by the client, as in some states—covering statements to the welfare worker so that they could not be used prosecutorially, then the statements to the social worker are less likely to be considered testimonial than the statements to the doctor.

If the session with the social worker came after the mother's urging the child to get something "bad on Daddy," this would increase the chances the statements to the social worker would be considered testimonial because of the arguably "incriminating" intent of the declarant.

Bottom line, with respect to all these statements of Janie, it is uncertain what the constitutional admissibility result would be. There are factual unclaritys, but more importantly, unclaritys of Supreme Court doctrine.

IV. ADULT VICTIMS' STATEMENTS TO THE DUAL FUNCTIONING PROFESSIONAL (E.G. TO SANES, DOVES, AND SARTS)¹⁴⁹

A. *What are SANEs, DOVEs, and SARTs?*¹⁵⁰

148. It is unclear under the precedent whether (1) this could be a non-testimonial purpose even if it doesn't qualify as a *Davis* or *Bryant* emergency purpose, and (2) whether and under what circumstances it might qualify as a *Davis* or *Bryant* emergency purpose.

149. See generally Julia Chapman, *Nursing the Truth: Developing a Framework for Admission of SANE Testimony Under the Medical Treatment Hearsay Exception and the Confrontation Clause*, 50 AM. CRIM. L. REV. 277 (2013).

150. See generally Jenifer A. Ort, *The Sexual Assault Nurse Examiner*, 102 AM. J. NURSING 24GG (Sept. 2009); DEP'T OF JUSTICE, SEXUAL ASSAULT NURSE EXAMINER DEVELOPMENT & OPERATION GUIDE (1999); Stacey Beth Plichta, et. al., *The Emergency Department and Victims of Sexual Violence: An Assessment of Preparedness to Help*, J. HEALTH & HUMAN SERVICES ADMIN., Winter 2006, at 286; *Sexual Assault Nurse Examiners*, INT'L ASS'N FORENSIC NURSES, <http://www.iafn.org>; Kelly Gray-Eurom, *The Sexual Assault Forensic Examination: Do We Make a Difference?*, EMERGENCY MEDICINE NEWS, June 2002, at 3; *SANE Program Locator*, SEXUAL ASSAULT RESOURCE SERVICE <http://www.sane-sart.com>; NAT'L DIST. ATT'YS ASS'N, THE ROLE OF THE SEXUAL ASSAULT NURSE EXAMINER (2007); TEX. OFFICE OF ATTORNEY GEN., SEXUAL ASSAULT PREVENTION AND CRISIS SERVICES (2012); N.J. DEP'T OF CRIMINAL JUSTICE, STANDARDS FOR PROVIDING SERVICES TO SURVIVORS OF SEXUAL ASSAULT (1998); Janet Ericson, et. al., *Clients' Experience with a Specialized Sexual Assault Service*, 28 J. EMERGENCY NURSING 86, 87-90 (Feb. 2002).

Programs designed to specially address the then-underserved needs of sexual assault victims burgeoned in the 1990s in hospitals and emergency rooms throughout the U.S. so that today they operate in all states and D.C. They began and continue in most places under the name SANE (“Sexual Assault Nurse Examiners”). In 1995 SANE nursing was recognized as a subspecialty of forensic nursing by the American Nursing Association.¹⁵¹

SANEs frequently operate out of hospital departments specially equipped for the SANE task or the task of forensic nurses generally. These units are sometimes called DOVE units (“Developing Options for Violent Emergencies”). Additionally, somewhat similar units have occasionally sprung up called SARTs (“Sexual Assault Response Teams”). These sometimes have a more formal connection to the police and may operate out of the police department.

To become a SANE, a person must be a registered nurse first and then undergo special SANE training.¹⁵² SANEs, like nurses generally, are under an ethical duty to serve the patient’s best interests.¹⁵³ SANEs are charged with attending to the medical, psychological, and social problems of these special victims; with employing sound scientific methods for obtaining and preserving evidence; and with equipping themselves to testify if needed in judicial proceedings about both the injuries and the proper handling of the evidence.¹⁵⁴

151. Forensic nurses who are not SANEs perform similar tasks with respect to other violent offenses.

152. A basic SANE course is comprised of about 40 hours. Hospitals sometimes obtain state funding of these training programs. Although there is no national certification, there are local training and state certification programs. National guidelines have been promulgated by the U.S. Department of Justice and state guidelines are published by state attorneys general and departments of health and human services. A SANE training program typically includes, on the treatment side, specialty medical techniques, how to test for and treat sexually transmitted diseases, how to test for and counsel on preventing pregnancy, how to assess injuries, psychological instruction about how victims typically react to their situation, and crisis intervention techniques. On the forensic side, the nurses are trained in forensic photography, the documenting of injuries, and how to prepare for and give courtroom testimony. Gynecologists generally do the medical training; forensic instruction is often handled by local police or by personnel from prosecuting attorneys’ offices.

153. The nurse’s “primary commitment is to . . . the patient. . . .” AM. NURSING ASS’N CODE OF ETHICS, 2.1: Primacy of Patient Interests.

154. Their duties include emotional support, prevention of, treatment for, and guidance concerning sexually transmitted diseases, emergency contraception, and referral to counseling. SANEs are also tasked with identifying and keeping a record of injuries and collecting and preserving evidence for subsequent use in criminal proceedings. Their file will include a combination of items like the patient’s medical history, a physical assessment of the patient, and details of the assault. SANEs also instruct victims on how to report the assault, and the SANE prepares a “rape kit” for victims who choose to so report. The rape kit includes items of evidentiary significance such as a description by the victim of the assault, any background concerning it, and matters preceding the assault. It also includes a medical history and evaluation, an assessment of

B. Representative Adult Victim and SANE Nurse Hypothetical

One evening on a shopping center parking lot, R.R. is forced into her car and raped by a stranger, who then runs off into the night. R.R. is able to cell-phone her best friend, Marilyn, who arrives at the car moments later to find R.R. disheveled and crying. Marilyn drives R.R. to the emergency room at nearby Samaritan Hospital where, upon hearing it was a sexual assault, the desk summons a female SANE immediately. The SANE takes R.R. into a private examining room, finds out what happened, and obtains the information and performs the functions described in our subsection just above. In the course of that examination, R.R. describes in detail the assault, and its perpetrator, who has some very distinctive features, ultimately enabling the police to catch the defendant when the police are subsequently notified of the rape.

At defendant's trial—in order to help prove the rape occurred, that it was not consenting, and that this defendant, with his distinctive features, was the rapist—the SANE proposes to testify to what the victim told her. R.R. has been declared unavailable for trial because of the severe mental trauma of the event. She has not been available for any earlier cross-examination, either. (Let us assume that the finding of unavailability for both purposes is sufficient for any legal question to which it is relevant.) The state in which this is being tried has a hearsay exception which will allow the statement into evidence insofar as the hearsay rule is concerned. The state will regard the victim's statements to the SANE as within the hearsay exception for statements made for purposes of medical diagnosis or treatment. Assume the jurisdiction has a line of cases notoriously lenient about what qualifies for the exception.¹⁵⁵ Assume further that the victim's statements to the SANE are offered for their truth and not merely to explain the conduct of the police in going after the defendant, or any other purpose that is non-hearsay or not for

trauma, what orifices were involved, sperm and seminal fluid specimens, foreign biological matter collected, scrapings and clippings from fingernails, results of public hair combings for material, blood for typing or DNA analysis, urine samples, torn clothing, stains, etc. Evidence is collected and given to law enforcement only if the victim consents. The SANE is responsible for maintaining a secure chain of custody for the evidence.

155. See *Williams v. State*, No. 10-13-00149-CR, 2014 Tex. App. LEXIS 2618, at *9-10 (Tex. App. 2014) (victim's statement to SANE recounting the rape, injuries, and identity of rapist is admissible under the statements for purposes of medical diagnosis or treatment hearsay exception as well as under the Confrontation Clause, in both instances because the overall purpose of SANES in such cases is medical). It should be noted that the hearsay exception determination and the Confrontation Clause determination are not inevitably linked to each other. The constitutional determination concerns "primary" purpose, not just purpose, and not necessarily of the declarant. Further, the decision is made by a different court (or at least a different line of precedent, deriving from the U.S. Supreme Court in the case of the Confrontation Clause) for different purposes.

the truth of the matter asserted by the victim.

Is this testimony of the SANE constitutionally admissible under the Confrontation Clause?

Let us examine in connection with this hypothetical, the lettered issues raised above in our hypothetical concerning the child Janie, where she speaks to Dr. Ellingsworth. They are the issues in the present hypothetical as well but with perhaps a slightly different posture. We will examine them in the same order:

a. The Law Enforcement Issue.

One real problem with the statements to the SANE will be whether the SANE is sufficiently connected with law enforcement,¹⁵⁶ assuming that is an independent requirement for there to be a confrontation violation. The argument with respect to Janie's statement to the doctor was that he had such a connection because he had a legal duty to report child abuse. It would seem the connection with law enforcement is even stronger in the case of the law-enforcement trained SANE, although it is not quite so clear the SANE has a duty to report if the victim does not wish to. This connection would be further strengthened in the SANE context if—as has been true in some cases—a policeman were present during the SANE interview of the victim, which may also affect “objective” perception of the primary purpose.¹⁵⁷

b. The Interrogation and Formality Issues.

There will probably be no problem with formality, because the sessions are at least as formal as in *Crawford*. Nor will there be a problem concerning whether there was questioning or interrogation, because, again, the situation seems to be the equivalent of the session in *Crawford* insofar as this factor is concerned.

c. The Primary Purpose Issue.

In the case of an adult victim's statements to the dual functioning nurse

156. Compare *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 244-45 (Ky. 2009) (SANE's testimony recounting victim's statements inadmissible because SANE's are agents of the police for collecting evidence; thus purpose not medical treatment), with *State v. Lee*, No. 22262 2005 WL 544837, at *3 (Ohio Ct. App. March 5, 2005) (SANE's recounting of similar victim statement admissible: SANEs are medical practitioners, not law enforcement officers; purpose thus medical treatment, not trial testimony), *aff'd*, 856 N.E.2d 921 (Ohio 2006).

157. See, e.g., *State v. Bennington*, 293 Kan. 503, 520-21 (2011) (presence of law enforcement officer dispositive); *State v. Hopper*, 145 Idaho 139, 143 (2007) (somewhat semble); *State v. Avila*, No. 109,069, 2014 WL 1795818, at *15-16 (Kan. Ct. App. May 2, 2014) (mentioning that police presence at a SANE interview could make a difference).

(the SANE or to other such doubly-functioning professional) there is obviously a major “primary purpose” problem in ascertaining whether the statement is “testimonial” and therefore inadmissible under the Confrontation Clause if the victim does not testify. This may be the most important problem here. Usually in this situation, both participants will understand that the general overall purpose is both treatative and prosecutorial. They may differ as to the *primary* purpose, with the victim, perhaps, more concerned about medical treatment.¹⁵⁸

The “primary purpose” problem stems in major part from the professional’s dual role. It will often be ambiguous as to whether the statement was pursuant to the medical function (to treat the injury and the mental state of the victim) or the legal function (and what legal function: Prosecutorial? Protection of the victim from the rapist? Protection of the public from an at-large rapist?).

The purpose of the professional with respect to particular statements may have been different than that of the victim. And different parts of statements—all in the same interview—may have different purposes. For example, an identification of the assaulter made by the victim, or the victim’s recounting of verbal exchanges during the attack, could arguably be regarded as having a more testimonial non-medical purpose than a statement describing physical injuries or pain which might have a more medical purpose. But, on the other hand, the identification or verbal exchanges (for example if they are threats) could be regarded as helpful to preventing further attacks on the victim or on members of the public—as in *Bryant*—or as necessary to diagnose, treat, or prevent HIV infection to the victim or others.¹⁵⁹ Or it could be part of the psychological treatment if the assaulter was a friend or relative.

Some statements may be clearly dual in purpose, to both examiner and examinee. Or some may appear to the victim to be primarily or even solely treatative where in fact they are not to the professional.

158. A number of courts focus on the declarant’s purpose in SANE cases, which tends to indicate a non-testimonial, medical treatment purpose. *See, e.g., Michigan v. Garland*, 777 N.W.2d 732, 736-37 (Mich. Ct. App. 2009) (because victim went to emergency room to seek out medical treatment she intended statements relating the assault to be for treatment); *State v. Stahl*, 855 N.E.2d 834, 844 (“[in] determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant’s expectations”). Query whether or not this approach complies with *Bryant*’s mandate to consider both declarant and declaree, but perhaps it does. It is not exactly clear what *Bryant* meant.

159. This might be akin to the emergency doctrine of *Davis* and *Bryant*. It is arguable that a criminal on the loose who has HIV may constitute an emergency as much as a criminal on the loose with a weapon.

The victim may be unaware that a certain statement has significance in telling a more compelling narrative at trial (such as a recounting of certain peculiarities or perversions perpetrated that are not significant medically¹⁶⁰).

If the examination and statement are too long after the event the medical connection may be tenuous.¹⁶¹

By and large, cases seem reluctant to look at individual details like these, and decline to parse particular statements or parts of statements to determine their individual purpose, but rather choose to characterize the whole interview, as primarily either medical or law enforcement, depending largely on the particular court's view of the overall nature of the SANE institution,¹⁶² some courts seeing the SANE's function as primarily gathering and preserving evidence for potential prosecution, and some as primarily medical.¹⁶³ Moreover, most of these courts see this characterization as dispositive—that is, the primary purpose determination determines the result, regardless of the other issues we have indicated are pertinent to the ultimate outcome on Constitutional Confrontation-Clause admissibility.

There is occasionally a deviation from this blanket approach in certain extreme fact situations where the SANE's general function decidedly should not be the sole indicator of purpose. For example, a policeman's presence

160. Such as sniffing the victim's hair or items of clothing, or taking possession of stockings or underwear, which appear to be not unheard-of practices in some of these cases.

161. But, again, even here the statement may have medical significance—for example to follow up on injuries or to determine HIV infection—or to prevent the spread of infection to others.

162. For example, in *State v. Romero*, 141 N.M. 403, 407-08 (2006), the victim's statement did not identify the assailant, and contained what seemed to be matters related to her condition, yet the court said because it recounted a crime it was accusatory and therefore testimonial. There are cases that are exceptions to the blanket approach. *E.g.*, *State v. Avila*, No. 109,069, 2014 WL 1795818, at *13-16 (Kan. Ct. App. May 2, 2014) (suggesting that a statement of identity to a paramedic might be testimonial despite an overall medical purpose, and discussing the different status of various different kinds of statements made to SANEs); *State v. Simmons*, No. 98613, 2013 WL 1858929 (Ohio Ct. App. May 2, 2013) (parsing into parts a rape victim's statements under the hearsay exception for statements for purposes of medical diagnosis or treatment to identify those that relate to treatment and those that do not, but did not find it necessary to do so for confrontation purposes because the victim testified).

163. Compare *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 244-45 (Ky. 2009) (SANE's testimony recounting victim's statements inadmissible because SANEs are agents of the police for collecting evidence; thus purpose not medical treatment), with *State v. Lee*, No. 22262, 2005 WL 544837, at *3 (Ohio Ct. App. March 5, 2005) (SANE's recounting of similar victim statement admissible: SANEs are medical practitioners, not law enforcement officers; purpose thus medical treatment, not trial testimony), *aff'd*, 856 N.E.2d 921 (Ohio 2006). See also *Herrera v. State*, 424 S.W.3d 52, 53-54 (Tex. Crim. App. 2014) (citing cases from various jurisdictions on both sides of the conflict of constitutional authority concerning victim statements to SANEs); *Williams v. State*, No. 10-13-00149-CR, 2014 Tex. App. LEXIS 2618, at *9-10 (Tex. App. 2014) (victim's statement to SANE recounting the rape, injuries, and identity of rapist is constitutionally admissible because the overall purpose was medical).

during the SANE interview has tilted the purpose determination toward a purpose of gathering evidence for prosecution.¹⁶⁴ So too has the result been shifted in that direction where, because of the length of time between the rape and the interview, the interview's purpose could not reasonably be construed as *treative*.¹⁶⁵ Some decisions have found it significant that the location of the exam was in an emergency room rather than a police station, boosting the medical purpose.¹⁶⁶ Other factors that have sometimes been influential in swinging the determination toward finding a testimonial purpose have on rare occasion included:

- the signing of a consent form (preceding the interview) that disclosed the law enforcement aspects of the examination;
- the victim's awareness of the law enforcement functions of the SANE, DOVE, or SART members doing the interviewing; or
- close consultation between the SANE and the police or prosecution on particular matters or tests concerning the specific individual patient.

However, most cases make a determination as to the testimoniality of the statements based on a general characterization of the functions of SANES, DOVEs and SARTs generally, without much attention to these kinds of details.

d. The "Targeting" Issue.

The resolution of this issue in theory depends upon whether the identity of the assaulter is known or suspected at the time of the statement to the SANE. Was it an unknown stranger? Or an acquaintance or relative? A question of how focused the investigation is on a particular person is similar to that above concerning little Janie's statements. The cases by and large have not discussed this. In our hypothetical case, the perpetrator is not yet known.

e. The Expert Testimony Issue.

The issue here is similar to the issue above under the Janie hypothetical. California has apparently picked up on the fact that Justice Thomas'

164. *E.g.*, *State v. Bennington*, 293 Kan. 503, 521-22 (2011) (presence of law enforcement officer dispositive); *State v. Hopper*, 145 Idaho 139, 143 (2007) (somewhat *semble*); *State v. Avila*, No. 109,069, 2014 WL 1795818 (Kan. Ct. App. May 2, 2014) (mentioning that police presence at a SANE interview could make a difference).

165. *See, e.g.*, *Romero*, 141 N.M. at 408 (the lengthy time between assault and the SANE exam militates against medical purpose).

166. *See, e.g.*, *Michigan v. Garland*, 777 N.W.2d 732, 736-37 (Mich. Ct. App. 2009). The theory here is that *Bryant* stated that location is one of the important factors in the totality of the circumstances computation.

formality/solemnity view carried the day in *Williams*, as recounted *supra*,¹⁶⁷ and, citing other California cases relying on the formality/solemnity theory, has approved the admission of an informal, internal report of a SART team.¹⁶⁸

V. CONCLUSION: THE TROUBLESOME AMBIGUITIES IN SUPREME COURT CONFRONTATION JURISPRUDENCE WHICH *OHIO V. CLARK* NEEDS TO CLEAR UP

The difficulty in these victims' and children's statements treated in the above two hypotheticals is in considerable measure due to the fact that the Supreme Court in its Confrontation jurisprudence (as spawned by *Crawford*, *Davis*, and *Bryant*) has been less than definitive about:

- (a) What makes a purpose “primary” when there are mixed purposes?
- (b) In determining purpose, what exactly is the dichotomy the Supreme Court has drawn between a purpose to “gather evidence of past fact” and a purpose to “resolve an emergency?” On which side of the line is preventing further abuse—say protecting a child or siblings from a parent by gathering evidence potentially usable in removal-of-the-child-from-the-home proceedings or preventing visitation or other contact?¹⁶⁹
- (c) Whose purpose—declarant or questioner—is the most significant when the purpose of each is materially different?

167. *Supra* note 111.

168. *People v. Perez*, No. H038106, 2013 Cal. App. LEXIS 9283, at *19-20 (Cal. Ct. App. 2013).

169. The non-testimonial purpose to “resolve an on-going emergency” side of the dichotomy, first articulated in *Davis* in connection with a 911 call, has been expanded time-wise by *Bryant* to include averting a threat to the public, e.g. apprehending an at-large violent criminal. Conceptually, there is a spectrum of purposes that stretches from stopping an immediate threat transpiring while the statement is being made (a clearly non-testimonial purpose) to convicting and putting a criminal behind bars, which is in some sense stopping a continuing threat to the public, but has been declared by the Court to be clearly testimonial. Thus, one end point of the spectrum is non-testimonial, the other is testimonial. The difference seems to be in the immediacy of the threat, time-wise, and whether prosecution is the way the threat is to be stopped. There is a vast spectrum between the end points, however, and just when the threat that is being averted is close enough in time to the statement to say it is non-testimonial, is uncertain.

- (d) What exactly is meant when the Supreme Court says the purpose is to be determined “objectively” from the standpoint of the reasonable person in the same circumstances?
- (i) Are we to consider the objective *questioner*, or the objective *declarant*?
 - (ii) How much of the particular circumstances, experiences, sophistication, etc., of each are to be taken into account? Or, if it is an outside observer, again, an observer with what experience, sophistication, and other characteristics?
 - (iii) Is an objective child different from an objective adult?
 - (iv) Will an actual, express purpose, say to legally implicate somebody, or to obtain medical treatment, prevail over a presumed “objectively appearing” purpose?
- (e) Should a statement be broken into parts when applying the primary purpose test, so that scrutiny of the purpose of each segment of a statement is necessary?¹⁷⁰
- (f) Before there can be a Confrontation issue, is a connection to law enforcement or government required on the part of the person to whom the statement is made,¹⁷¹ and, if so, which is it, and how substantial a connection? For example, would an obligation to report child abuse be enough? Would it be enough that police often refer victims to this professional for

170. Justice Sotomayor, writing for the Court in *Bryant*, does seem to recognize that the purpose and the nature of an interview as testimonial or non-testimonial can change as the interview progresses. But this is dictum.

171. Justice Scalia (the author of the Supreme Court’s *Crawford* opinion) indirectly indicates the answer is “no” in his dissent in *Bryant*, by relying on *King v. Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202, 202-03 (K.B. 1799), in which the court rejected a hearsay statement by a child to her mother (a private person) after the child was sexually assaulted, offered in evidence against the accused assaulter. A similar “no” answer is at least *suggested* by the fact that *Crawford* expressed approval of the result (though overruled the rationale) of *Idaho v. Wright*, 497 U.S. 805, 836-37 (1990), which excluded pursuant to the Confrontation Clause a statement of a child about the child’s molestation made to a private pediatrician. See PAUL ROTHSTEIN, MYRNA RAEDER, AND DAVID CRUMP, EVIDENCE: CASES, MATERIALS, AND PROBLEMS 612 (4th ed. 2013); Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 259-60 (2005) (the confrontation right was recognized before government agents became involved, i.e., when criminal prosecutions were primarily privately done).

treatment? Is there an independent requirement of such connection, or is the connection significant only to determining the purpose of the exchange? Is a connection with a non-law-enforcement part of the government (as, e.g., a state social worker) distinguishable from a connection to law enforcement?

- (g) Does a different test of purpose apply if the statement is made to someone who is not connected with law enforcement (assuming law enforcement connection is not an absolute requirement)? Does a different test apply if the recipient is not connected with government in *any* way?¹⁷²
- (h) Can volunteered statements without questioning or interrogation violate the Confrontation Clause?

Additional complexities have been introduced by the decision of the Supreme Court in *Williams v. Illinois* where no majority of justices lined up behind any of the competing views of the Confrontation Clause expressed by any of the justices, and a decision was reached only because two different views of the Confrontation Clause accidentally pointed to the same result on the particular facts.¹⁷³ The difficulties posed for our problem specifically by *Williams* are:

- (i) Under what circumstances, if any, can expert testimony relying on the child's or victim's statement circumvent the applicability of the Confrontation Clause to the statement?
- (ii) Under what circumstances, if any, is a statement made *before* police suspect a particular person subject to the Confrontation Clause?
- (iii) Does the formality of the child's or adult victim's statement make a difference (and if so, what is meant by formality)?¹⁷⁴

The Georgetown Law Library has supplied me with every state and

172. See *Ohio v. Clark*, 999 N.E.2d 592, 601 (Ohio 2013) (O'Connor, C.J., dissenting) (suggesting a different variety of "purpose" test should apply where the child's statement is to a pre-school teacher than applied in *Crawford, Davis*, and *Bryant* where the declarant's statements were to police).

173. See generally *Williams v. Illinois*, 132 S. Ct. 2221 (U.S. 2012).

174. The California courts have made "formality" a nearly dispositive factor. See *People v. Perez*, No. H038106, 2013 Cal. App. LEXIS 9283, at *15-17 (Cal. Ct. App 2013).

federal case involving our two classes of statements¹⁷⁵ decided in the last four years. My conclusion is that the cases are in hopeless disarray and quite inconsistent with one another.¹⁷⁶ This state of affairs can only be corrected if the Supreme Court clarifies its Confrontation jurisprudence. *Ohio v. Clark* provides the Justices with an opportunity to do just that. Let us hope they take the opportunity.

My tentative prediction is the Court will rule on the above issues in a way that will narrow the scope of the Confrontation Clause, because a majority of the Justices feel they have painted themselves into a corner in their Confrontation jurisprudence so far and are looking for a way out. They feel that carrying out the full implications of *Crawford* has proven to have some unacceptable results in terms of an adverse effect on law enforcement.¹⁷⁷ In particular, if *Clark* were to affirm the lower court's decision in *Clark* that the teacher's duty to report child abuse brings the child's statement to her within the Confrontation Clause, this would outlaw a broad range of prosecution evidence, rendering inadmissible not only many statements to teachers, but also to doctors, welfare workers, nurses, hospital personnel, and others—statements which I think the Court will feel are needed for successful prosecution in the many cases where the victim cannot or will not testify.

In other words, I think the following passage from the dissent in the lower court decision of *Clark* will have traction in the U.S. Supreme Court:

[T]he majority [by holding the teacher's duty to report makes the child's statement testimonial and inadmissible] creates a beneficial catch-22 for pedophiles and other abusers of children. The very people who have the expertise and opportunity to recognize child abuse are now prohibited. . . from testifying about any out-of-court statements that a child makes about abuse or neglect when the child, for whatever reason, is unable to testify. Child abusers often evade prosecution because the victims are unable to disclose the abuse, let alone testify. [Our child-hearsay exception] which applies only when the child victim's testimony is not reasonably obtainable, sought to ameliorate the difficulty in securing prosecutions in these difficult

175. I.e., the two classes that are the subject of this paper, set forth in the Introduction, *supra*, and that are the basis of our two hypotheticals.

176. For just one example among many, compare *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 244-45 (Ky. 2009) (SANE's recounting victim's statements inadmissible because SANEs are agents of the police for collecting evidence; thus purpose not medical treatment), with *State v. Lee*, No. 22262, 2005 WL 544837, at *3 (Ohio Ct. App. March 5, 2005) (SANE's recounting of similar victim statement admissible: SANEs are medical practitioners, not law enforcement officers; purpose thus medical treatment, not trial testimony), *aff'd*, 856 N.E.2d 921 (Ohio 2006).

177. This is more fully spelled out in Paul F. Rothstein, *Unwrapping the Box the Supreme Court Justices Have Gotten Themselves Into: Internal Confrontations Over Confronting the Confrontation Clause*, 58 HOWARD L.J. (forthcoming 2015).

cases. Under the majority's rule, if a child victim of abuse is not able to testify, a mandatory reporter's testimony regarding the child's out-of-court statements about the abuse is barred by the Confrontation Clause.¹⁷⁸

. . . .

The majority reaches an illogical result, the straightforward application of which dictates that when a teacher notices that a child is hungry and asks whether the child had breakfast, the teacher is a police interrogator because the child might disclose reportable neglect. When a licensed psychologist questions a child about insomnia, the majority would conclude, the psychologist is a police interrogator because the child might disclose reportable abuse. When a dentist observes an injury in a child's mouth and asks the child "what happened," under the majority holding, the dentist is an agent of law enforcement for Confrontation Clause purposes. Common sense dictates that those conclusions are incorrect.¹⁷⁹

178. *Clark*, 999 N.E.2d at 614.

179. *Id.* at 612.

EDITORS NOTE: As this article was going to press, the U.S. Supreme Court decided *Ohio v. Clark*. To see the extent to which the Supreme Court did and did not answer the questions raised in this article, see Professor Rothstein's blog post on the decision at <https://casetext.com/posts/a-comment-on-the-supreme-courts-decision-in-ohio-v-clark>.