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Confronting Testimonial Hearsay: Understanding the New Confrontation Clause

*Judge Daniel B. Shanes**

INTRODUCTION

In 2004, the United States Supreme Court rewrote its understanding of the Sixth Amendment Confrontation Clause¹ in *Crawford v. Washington*,² jettisoning a quarter-century of “reliability” jurisprudence in favor of a new testimonial/non-testimonial analysis. In doing so, the Supreme Court affected seismic change in the landscape of nearly every criminal trial in Illinois and across the United States. At its core, *Crawford* holds that when a hearsay declarant does not testify at trial, the Confrontation Clause prohibits admitting the declarant’s *testimonial* statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine.³

Even though the Supreme Court revisited the subject two years later in *Davis v. Washington*,⁴ many questions remain, leaving some courts scratching their heads. Courts today are looking at various formulae to identify testimonial hearsay. Among the issues pressing courts are: (1) what degree of governmental involvement in procuring a statement is necessary to render that statement testimonial;⁵ (2) whether a statement’s testimonial status is properly determined by its content or the context in which it is made;⁶ and (3) identifying the relationship

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

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

3. *Id.* at 68.

4. *Davis v. Washington*, 547 U.S. 813 (2006).

5. See *infra* Part I (discussing how much governmental involvement is necessary to make a statement testimonial).

6. See *infra* Part II (analyzing how the context of a statement, and not its content, renders it testimonial).

between the High Court's new understanding of the Confrontation Clause and its Fourth and Fifth Amendment jurisprudence.⁷ This Article examines and illuminates each of these issues in turn.

I. GOVERNMENTAL INVOLVEMENT: SIR WALTER RALEIGH FINALLY CARRIES THE DAY⁸

The first issue concerns how much governmental involvement in obtaining the hearsay statement is necessary before the statement can be deemed testimonial. This Part addresses that question by analyzing the historical foundations of the Confrontation Clause,⁹ Supreme Court jurisprudence,¹⁰ and Illinois case law,¹¹ concluding that some level of government involvement is necessary to render a statement testimonial and therefore subject to the Confrontation Clause.¹²

A. *The Origins of the Confrontation Clause*

Understanding the Confrontation Clause, and the level of government involvement necessary to implicate it, necessarily begins with a quick review of the clause's origins. In the course of identifying testimonial hearsay as the object of the Clause's protection, the *Crawford* Court repeatedly focused upon "the historical background of the Clause to understand its meaning."¹³ The Court explained:

[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the

7. See *infra* Part III (examining how the Court's understanding of the Fourth and Fifth Amendments affect its new Confrontation Clause jurisprudence).

8. An earlier version of this section originally appeared as Daniel B. Shanes, *The Crawford Confrontation-Clause Bar: Governmental Involvement Is Key to "Testimonial" Hearsay*, 96 ILL. B.J. 574 (2008).

9. See *infra* Part I.A (discussing the historical origins of the Confrontation Clause).

10. See *infra* Part I.B–E (examining recent U.S. Supreme Court decisions which address the Confrontation Clause).

11. See *infra* Part I.F (analyzing Illinois courts' treatment of the Confrontation Clause in the wake of recent U.S. Supreme Court decisions).

12. See *infra* Part I.G.

13. *Crawford v. Washington*, 541 U.S. 36, 43 (2004). In its earliest case interpreting the Confrontation Clause, the Supreme Court held that "[t]he primary object of . . . [the Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness." *Mattox v. United States*, 156 U.S. 237, 242 (1895). *Crawford* brought the Clause back home to its roots.

founding-era rhetoric decried. *The Sixth Amendment must be interpreted with this focus in mind.*¹⁴

Both *Crawford* and *Davis* discussed Sir Walter Raleigh's trial extensively.¹⁵ In Raleigh's time, government investigators (then variously called magistrates or justices of the peace) took witness statements for use in prosecution in lieu of in-court trial testimony.¹⁶ In Raleigh's trial, one such witness was an alleged co-conspirator, Lord Cobham, who implicated Raleigh in an examination before the Privy Council and in a written letter.¹⁷ These statements ultimately were read to the jury. Suspecting Cobham would recant, Raleigh demanded that Cobham appear so that he could confront "my accuser before my face."¹⁸ The judges refused, the jury convicted, and Raleigh was ultimately executed.¹⁹

Crawford identifies Raleigh's case as "a paradigmatic confrontation violation."²⁰ The *Davis* Court noted that Cobham's statements were used as "a weaker substitute for live testimony at trial."²¹ In other words, Cobham's out-of-court statements—formal declarations procured by the government—were used in lieu of his in-court testimony to convict Raleigh. Understanding the Sixth Amendment "with this focus in mind"²² makes clear that this practice of "trial by affidavit" is the Confrontation Clause's primary concern. A recurring theme throughout *Crawford* and *Davis*, Raleigh's case serves as an excellent illustration of the kind of evidence that constitutes testimonial hearsay.

B. Testimonial Hearsay Described

While the Court holds up Cobham's statements as the prime example of the kind of testimonial hearsay the Confrontation Clause was designed to prohibit, the Court's understanding of what constitutes testimonial hearsay is revealed more by description than definition. *Crawford* declares that testimonial hearsay is a "specific type of out-of-

14. *Crawford*, 541 U.S. at 50 (emphasis added).

15. See *id.* at 44 (citing *Raleigh's Case*, 2 How. St. Tr. 1 (1603)); see also *Davis v. Washington*, 547 U.S. 813, 828 (2006). To be sure, the *Crawford* Court discussed other historical cases as well.

16. *Crawford*, 541 U.S. at 53.

17. *Id.* at 44 (citing *Raleigh's Case*, 2 How. St. Tr., at 15–16 (1603)).

18. *Id.*

19. *Id.*

20. *Id.* at 52.

21. *Davis v. Washington*, 547 U.S. 813, 828 (2006) (quoting *United States v. Inadi*, 475 U.S. 387, 394 (1986)) (internal quotation marks omitted).

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

court statement”²³ that triggers the Confrontation Clause because it is “hearsay [that] consists of *ex parte* testimony.”²⁴ Providing some description of what constitutes testimonial hearsay, *Crawford* and *Davis* also clearly identify various types of hearsay that are not testimonial. In the end, it is the qualitative differences between those various out-of-court statements that distinguish testimonial from non-testimonial evidence.

As a starting point, *Crawford* holds that testimonial evidence includes prior testimony and statements made during certain police interrogations.²⁵ The Court noted that prior testimony can come from a variety of settings, including past trials, hearings, grand jury proceedings, plea allocutions, depositions, and affidavits.²⁶ These sworn or in-court statements include a significant degree of formality and governmental involvement, if from nothing more than placing the declarant under oath. The Court deems such statements plainly testimonial.²⁷

In *Crawford*, the Court noted that, by its own terms, the Confrontation Clause applies to “witnesses” against the accused.²⁸ The Court construed “witnesses” as those who bear testimony.²⁹ “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.”³⁰

Comparing the practices of sixteenth century England to modern procedures, the *Crawford* Court concluded that the “involvement of government officers in the production of testimonial evidence presents the same risk [of violating the Confrontation Clause], whether the officers are police or justices of the peace.”³¹ This is because “police interrogations bear a striking resemblance to examinations by justices of the peace in England.”³²

23. *Id.* at 51.

24. *Id.* at 60. See also *Davis*, 547 U.S. at 830 (holding that “statements under official interrogation [are testimonial as they] are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination”).

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

26. *Id.* at 51.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 53.

32. *Id.* at 52.

Accordingly, in addition to sworn statements, *Crawford* concluded that testimonial hearsay can also be produced during certain unsworn police interrogations.³³ Exploring the circumstances in which such statements yield testimonial hearsay, the *Davis* Court emphasized the government's purpose in obtaining out-of-court evidentiary statements for use in a later criminal prosecution as a defining factor that makes the statement testimonial.³⁴ The use of such "*ex parte* examinations" at trial smacks of the very practice the Confrontation Clause was designed to prevent.³⁵

The Supreme Court further explored the contours of testimonial hearsay by explaining what types of out-of-court statements are *not* testimonial hearsay.³⁶ *Crawford* specifically held that statements covered by most hearsay exceptions by their nature are not testimonial, mentioning business records and co-conspirator statements as but two examples.³⁷

While most hearsay-exception statements do not seem to have much in common, they are all similar in that none of them share the characteristics of testimonial hearsay. By their very definitions, their primary purpose is not to establish facts for a later criminal prosecution, and they are typically not made to the police. Indeed, many times no governmental actor is involved at all. In other words, they bear little resemblance to the evidence used to prosecute Sir Walter Raleigh. As such, declarants making statements that fall within most hearsay exceptions simply are not acting as "witnesses" within the meaning of the Confrontation Clause; such statements do not constitute "*ex parte* testimony."³⁸ As a result, these statements do not constitute testimonial hearsay.

33. *Id.*

34. As the Court explained:

Statements are non[-]testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822 (2006). See also *infra* Part II.B.

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

36. See *id.* at 56 (citing business records or statements in furtherance of conspiracy as examples of non-testimonial hearsay).

37. *Id.* Chief Justice Rehnquist's separate opinion further mentioned spontaneous declarations, statements made in the course of procuring medical treatment, dying declarations, "and countless other hearsay exceptions." *Id.* at 74 (Rehnquist, C.J., concurring in judgment).

38. *Id.* at 60.

C. *Bourjaily v. United States* and *Dutton v. Evans*

Understanding hearsay-exception evidence as outside the definition of testimonial hearsay comports with the *Crawford* Court's characterization of statements addressed in two prior Supreme Court cases, *Bourjaily v. United States*³⁹ and *Dutton v. Evans*,⁴⁰ as "clearly non-testimonial."⁴¹ A quick examination of those cases illustrates the comparison between hearsay-exception evidence and testimonial statements and shows why *Crawford* easily deems the hearsay statements in *Bourjaily* and *Dutton* non-testimonial.

In *Bourjaily*, the trial court admitted a co-conspirator's statement to an undercover government agent pursuant to the co-conspirator exception to the hearsay rule.⁴² As part of that ruling, the trial court had determined that the statements were made in furtherance of the conspiracy (rather than, for example, made post-arrest during structured police questioning). On review, the Supreme Court held that admitting those statements did not offend the Confrontation Clause.⁴³ In both *Crawford* and *Davis*, the Court reaffirmed that conclusion, declaring without discussion that those statements were not testimonial.⁴⁴

In *Dutton*, the trial court admitted statements of a co-defendant implicating the defendant to a third prisoner while they were all in jail.⁴⁵ The Supreme Court affirmed admitting those statements as co-conspirator statements (despite the fact that the declarant and the others were already in custody for those offenses).⁴⁶ As in *Bourjaily*, the Court in *Crawford* and *Davis* summarily declared those statements clearly not testimonial.⁴⁷

The Court deemed the statements in *Bourjaily* and *Dutton* clearly non-testimonial because they were neither solemn declarations, nor

39. *Bourjaily v. United States*, 483 U.S. 171 (1987).

40. *Dutton v. Evans*, 400 U.S. 74 (1970).

41. *Davis v. Washington*, 547 U.S. 813, 825 (2006).

42. *Bourjaily*, 483 U.S. at 173-74.

43. *Id.* at 181.

44. *Crawford v. Washington*, 541 U.S. 36, 58 (2004); *Davis*, 547 U.S. at 825. Writing for a plurality of the Court, Justice Scalia recently again reaffirmed *Bourjaily*, explaining that the co-conspirator statement "did not violate the Confrontation Clause [because] it was not (as an incriminating statement in furtherance of the conspiracy would probably never be) testimonial." *Giles v. California*, 128 S. Ct. 2678, 2691 n.6 (2008).

45. *Dutton*, 400 U.S. at 77-78.

46. *Id.* at 87-89. The Court noted that Georgia's statutory co-conspirator hearsay exception could include statements made to conceal the conspiracy even if co-conspirators were already being prosecuted. *Id.* at 78. The statements were made between co-conspirators; no police interrogation was involved. *Id.* at 77-78.

47. *Davis*, 547 U.S. at 825; *Crawford*, 541 U.S. at 58-59.

were they made to government agents for the purpose of providing evidence to convict. Indeed, they were quite the opposite. In *Bourjaily*, a co-conspirator was making statements to an undercover agent to further a criminal conspiracy, not for use against the defendant at trial.⁴⁸ In *Dutton*, no government agent was even involved.⁴⁹

In sum, neither statement was obtained by the government for use in lieu of live testimony at a subsequent trial. Neither declarant was constitutionally acting as a “witness” or “testifying.” Simply put, neither statement bore any resemblance to the evidence admitted against Sir Walter Raleigh. As a result, *Crawford* and *Davis* easily concluded that these statements were non-testimonial.⁵⁰

This teaching informs the analysis of statements in other contexts as well. In both *Crawford* and *Davis*, the Court made clear that the Confrontation Clause is aimed at curbing a particular practice: the use at trial of formalized, *ex parte* statements made to government officials investigating an offense. The *Crawford* Court explained at length that it is *governmental involvement* in eliciting the statement which bears the “closest kinship to the abuses at which the Confrontation Clause was directed.”⁵¹ Without governmental involvement, the concerns animating the Confrontation Clause are largely absent.

D. *White v. Illinois*

The *Crawford* Court’s discussion of *White v. Illinois*⁵² sheds more light on the importance of governmental involvement in eliciting a statement triggering the Confrontation Clause. The *Crawford* Court described *White* as “arguably in tension” with its rule requiring a prior opportunity for cross-examination for proffered testimonial statements.⁵³ *Crawford*’s discussion of *White* pertained to statements of the child-declarant to an investigating police officer that were admitted as spontaneous declarations. However, the four-year-old rape victim in *White* did not cry out only to the police officer—she did so as well to her babysitter and mother, and those statements were also admitted as

48. *Bourjaily*, 483 U.S. at 174.

49. *Dutton*, 400 U.S. at 77–78 (summarizing how the statement was made to a fellow inmate).

50. *Crawford*, 541 U.S. at 57; *Davis*, 547 U.S. at 825.

51. *Crawford*, 541 U.S. at 68. This is not to suggest that the declarant must speak directly to a prosecutor, judge, or law enforcement officer to render a statement testimonial. When a person is acting as an agent of the government, it is clear that the same “state action” is present as if the declarant were speaking to the governmental officer directly. See *Davis*, 547 U.S. at 823 n.2.

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

53. *Crawford*, 541 U.S. at 58 n.8. The *Davis* Court repeated this characterization of *White*. *Davis*, 547 U.S. at 825.

spontaneous declarations.⁵⁴ Further, her subsequent statements to both an emergency room nurse and doctor were admitted⁵⁵ pursuant to Illinois' statutory hearsay exception set forth in section 115-13 of the Code of Criminal Procedure.⁵⁶

While noting that admitting the child's statements to the police officer in *White* was "arguably" in tension with its holding, the *Crawford* Court was deafeningly silent regarding the avalanche of hearsay testimony from the babysitter, mother, nurse, and doctor in *White*.⁵⁷ The *Crawford* Court pointedly identified *only* the statements to the police officer as "arguably" testimonial hearsay. By not even mentioning the other statements as even possibly testimonial, the Court strongly signaled that all the other statements—to the babysitter, parent, nurse, and doctor—do not constitute testimonial hearsay.⁵⁸

What accounts for singling out the statements to the police officer from all the others? The obvious difference between the statements to the police officer and the statements to all the other witnesses is the governmental involvement in procuring those statements. The statements to the babysitter and mother are clearly more akin to "remark[s] to an acquaintance"⁵⁹ that do not constitute testimonial hearsay. The statements to the nurse and doctor similarly lack the qualities of a "formal statement to government officers"⁶⁰ that is the

54. *White*, 502 U.S. at 348–50.

55. *Id.* at 350–51.

56. 725 ILL. COMP. STAT. 5/115-13 (2006). Section 115-13 is broader than the common-law hearsay exception for statements made in the course of medical diagnosis or treatment because statements of a child sexual assault victim identifying her assailant can be admitted as part of the hearsay exception. *People v. Falaster*, 670 N.E.2d 624, 629 (Ill. 1996); *People v. Oehrke*, 860 N.E.2d 416, 420–22 (Ill. App. Ct. 2006). Nonetheless, the *White* Court did not seem to believe that had any constitutional significance. Compare *White*, 502 U.S. 346 (admitting statements as spontaneous declarations), with *Ohio v. Roberts*, 448 U.S. 56 (1980) (placing emphasis on firmly rooted common-law hearsay exceptions rather than statutory hearsay exceptions). Of course, *Crawford* overruled *Roberts*. *Whorton v. Bockting*, 549 U.S. 406, 413–14 (2007).

In addition, it is interesting that this distinction did not make a difference to the *Crawford* Court's lack of concern regarding admitting the statements to the nurse and doctor. Not only did the Court avoid identifying the statements to the nurse and doctor as possibly testimonial (in contrast to the statement to the police officer), the Court was similarly unconcerned that the content of the statement identified her abuser. See *infra* Part II.

57. See *People v. White*, 555 N.E.2d 1241 (Ill. App. Ct. 1990) (setting forth in detail the various hearsay testimony admitted at trial), *aff'd* 502 U.S. 346 (1992).

58. The *Crawford* Court was aware of the existence of the other hearsay evidence, describing *White* as having "involved, *inter alia*, statements of a child victim to an investigating police officer." *Crawford*, 541 U.S. at 58 n.8. Nonetheless, it was only the statements to the investigating police officer that drew the Court's attention while discussing testimonial hearsay.

59. *Id.* at 51.

60. *Id.*

hallmark of testimonial hearsay. Thus, all of those statements are non-testimonial.

Only the statement to the police officer is “arguably” testimonial, and it is so precisely because it was made to a police officer investigating a crime. However, that statement was also a spontaneous declaration, and because statements covered by most hearsay exceptions (such as spontaneous declarations) are typically not testimonial,⁶¹ the result in *White* is merely “arguably”—and ultimately not—inconsistent with *Crawford*.

E. *Giles v. California*

In 2008, the Supreme Court decided *Giles v. California*, in which the Court again reflected upon the specific type of out-of-court statement that triggers the Confrontation Clause—in other words, testimonial hearsay.⁶² In doing so, the Court identified a domestic-violence victim’s statement as “*testimony to police officers*.”⁶³ Its choice of language in describing a declarant’s out-of-court statement as *testimony to police officers* resonates with its analysis in *Crawford*. It is the declarant making a formal statement to a governmental agent (*i.e.* testimony to police officers) that is necessary to yield testimonial hearsay.

In addition, *Giles* reiterated that “only *testimonial* statements are excluded by the Confrontation Clause.”⁶⁴ The Court then importantly wrote as follows: “Statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent’s version of forfeiture by wrongdoing.”⁶⁵

What do friends, neighbors, and doctors have in common? None are governmental actors. Although *Giles* was focused upon the forfeiture-by-wrongdoing doctrine⁶⁶ rather than the contours of testimonial

61. *Id.* at 56. By definition, a spontaneous declaration is a statement made without reflection in the wake of a startling event; it is the antithesis of a formal statement made in court or to the police investigating a crime in response to persistent interrogation or structured questioning. See *People v. Williams*, 739 N.E.2d 455, 479 (Ill. 2000).

62. *Giles v. California*, 128 S. Ct. 2678, 2682–83 (2008).

63. *Id.* at 2693 (emphasis added).

64. *Id.* at 2692.

65. *Id.* at 2692–93. Nor did the dissenters disagree with this analysis. “Where a victim’s statement is not ‘testimonial,’ perhaps because she made it to a nurse, the statement could come into evidence under this rule.” *Giles*, 128 S. Ct. at 2700 (Breyer, J., joined by Stevens and Kennedy, JJ., dissenting).

66. The forfeiture-by-wrongdoing doctrine permits, under certain circumstances, the introduction of the out-of-court statements of a declarant who was prevented from testifying at

evidence,⁶⁷ the Court clearly reaffirmed the themes animating *Crawford* and *Davis*: without governmental involvement, the concerns animating the Confrontation Clause are absent.

F. Illinois Case Law

1. Illinois Supreme Court's Recent Analysis

In *In re Rolandis G.*,⁶⁸ the Illinois Supreme Court recently added its voice to the testimonial hearsay discussion. In *Rolandis*, the juvenile-defendant was adjudicated delinquent for the aggravated criminal sexual assault of a six-year-old boy. Although the victim did not testify, the trial court admitted various statements he made first to his mother, then to a child advocate at the local children's advocacy center,⁶⁹ and finally to a police officer pursuant to section 115-10 of the Code of Criminal Procedure.⁷⁰ Before the Illinois Supreme Court, the parties agreed that the victim's statements to his mother were not testimonial and that his statements to the police were; accordingly, the court addressed whether the boy's statements to the child advocate constituted testimonial hearsay.⁷¹

Central to the court's analysis was its determination that the circumstances in the case "objectively indicate that [the children's advocate] was acting as an agent of the police and that the primary purpose of her interview was to establish or prove past events that would be relevant in a future criminal prosecution."⁷² These considerations flow smoothly from *Crawford*'s understanding of the role of governmental involvement in testimonial hearsay, as well as

trial by the defendant.

67. The parties assumed, and the Court accepted without deciding, that the statements were testimonial. *Giles*, 128 S. Ct. at 2682. However, while concurring with the majority opinion, Justice Thomas and Justice Alito each wrote separately to note that (despite the fact the declarant was speaking to a police officer) they did not believe the statements constituted testimonial hearsay in the first place. *Id.* at 2694 (Thomas, J., and Alito, J., concurring). See *infra* Part II.B (discussing that statements to police officers are not necessarily testimonial under the *Davis* primary-purpose test).

68. *In re Rolandis G.*, No. 99581, 2008 WL 4943446 (Ill. 2008).

69. See 55 ILL. COMP. STAT. 80/1 *et seq.* (2008) (the Children's Advocacy Center Act)

70. 725 ILL. COMP. STAT. 5/115-10 (2002). Section 115-10 provides that in a prosecution for various offenses involving physical or sexual acts against a child or mentally disabled individual, the trial court may, under certain circumstances, admit the child's out-of-court statements regarding the offense. *Id.*

71. *Rolandis*, 2008 WL 4943446, at *8.

72. *Id.* at *9.

Davis's focus upon the statement's primary purpose.⁷³ Deciding that "the interview took place at the behest of the police,"⁷⁴ the appropriate inquiry then turned upon whether the circumstances objectively indicated the statement's primary purpose was for use in resolving an ongoing emergency or, instead, to establish past events for a later prosecution.⁷⁵ Determining that the objective circumstances showed the statement was to "gather information and establish past acts for future prosecution,"⁷⁶ the court's conclusion that it constituted testimonial hearsay entirely comports with *Crawford* and *Davis* and logically applies their holdings.

The court went on to note the plurality opinion in *People v. Stechly*,⁷⁷ a fractured case in which the seven members of the court filed four separate opinions. In the primary opinion, the plurality devised a framework for analyzing potential testimonial hearsay. That framework looked to whether the statement was made in a solemn fashion and whether it was intended to establish a particular fact.⁷⁸ It then provided a split test to examine the intent aspect: when a statement is made to the police or their agent, the intent of the questioner controls.⁷⁹ In other situations, however, the inquiry would be whether a reasonable declarant could conclude his statement could be used in court against the defendant.⁸⁰

Although the *Rolandis* court worked through the *Stechly* analysis, it clearly would have reached the same result even without this added layer of construction. First, the issue before the court was deciding the testimonial status of a statement to a governmental actor; the testimonial status of a hearsay statement to a non-governmental actor was not before the court. Accordingly, the *Stechly* plurality's framework

73. See, e.g., *Davis*, 547 U.S. at 822, 126 S. Ct. at 2273–74. The Court in *Davis* explained: Statements are non[–]testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. See also *infra* Part II.B (discussing *Davis* and the primary purpose test).

74. *Rolandis*, 2008 WL 4943446 at *9.

75. *Davis*, 547 U.S. at 822.

76. *Rolandis*, 2008 WL 4943446 at *9.

77. *People v. Stechly*, 870 N.E.2d 333 (Ill. 2007).

78. *Id.* at 355.

79. *Id.* at 356–57.

80. *Id.* at 359.

regarding statements to non-governmental actors is unnecessary to the *Rolandis* court's analysis and holding.

In addition, having determined that (1) the children's advocate was a governmental agent, and (2) the statements were to establish past events for a future prosecution, the court appropriately concluded that the statements constituted testimonial hearsay. Discussing the intent of the questioner versus declarant was similarly unnecessary; indeed, the statement constitutes testimonial hearsay either way. No ongoing emergency existed, and the statements were not intended—by anyone—to be used to resolve a flaring crisis. Instead, objectively viewed, the statements were clearly intended to establish past acts for future investigation and prosecution. As a result, they were testimonial. The additional layer of discussion did not affect the court's decision.

Importantly, while the *Stechly* discussion goes beyond *Crawford*, *Davis*, and *Giles*, the Illinois Supreme Court's holding in *Rolandis* remains perfectly consistent with the U.S. Supreme Court's teachings.⁸¹ Following those cases and viewing the facts as the Illinois Supreme Court did, the statements in *Rolandis* were testimonial, and the outcome perfectly comports with *Crawford*, *Davis*, and *Giles*.

Moreover, in support of its holding on the State's forfeiture-by-wrongdoing claim, the *Rolandis* court extensively and approvingly quoted the United States Supreme Court's declaration in *Giles* that "[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment"⁸² are not the types of statements that constitute testimonial hearsay. In doing so, the Illinois Supreme Court emphasized the clear guidance provided by *Giles* on the importance of the status of the person to whom the declarant makes her statement: testimonial hearsay—those statements subject to the Confrontation Clause—do not include statements to friends, neighbors, or doctors providing medical services.

2. Illinois Appellate Court Discusses Centrality of Governmental Involvement

Some courts have noted *Crawford*'s repeated concern regarding the involvement of government officers in the creation of testimonial hearsay. The clearest example in Illinois is *People v. R.F.*⁸³ In that

81. Compare *Crawford v. Washington*, 541 U.S. 36, 58 (2004) (stating that the Court's "recent cases, in their outcomes, hew closely to the traditional line"), with *id.* at 60 (noting that "the results of our [previous] decisions have generally been faithful to the original meaning of the Confrontation Clause, [even if] the same cannot be said of our rationales.").

82. *Giles v. California*, 128 S. Ct. 2678, 2692–93 (2008).

83. *People v. R.F.*, 825 N.E.2d 287, 295 (Ill. App. Ct. 2005).

case, a three-year-old girl told her mother, grandmother, and an investigating police officer that her father sexually assaulted her. At trial, the child did not testify, but her out-of-court statements were admitted pursuant to section 115-10 of the Code of Criminal Procedure.⁸⁴ On appeal, the defendant challenged the admission of these statements as violating the Confrontation Clause.

In a thorough discussion, the appellate court noted that “*Crawford* repeatedly emphasized the significance of governmental involvement in determining whether a hearsay statement is testimonial.”⁸⁵ Accordingly, the court held that “*Crawford* applies only to statements made to governmental officials; *Crawford* does not apply to statements made to non[-]governmental personnel, such as family members or physicians.”⁸⁶

In examining statements taken by police officers, the *R.F.* court explained that the testimonial nature of a statement turns upon whether “the officer involved was acting in an investigative capacity for the purpose of producing evidence in anticipation of a criminal prosecution.”⁸⁷ Although *R.F.* predated *Davis* by more than a year, this analysis is presciently consistent with the *Davis* primary-purpose test.⁸⁸

Reviewing the facts of the case, the appellate court concluded the statements to the police were testimonial because the officer was clearly “acting in an investigative capacity for the purposes of producing evidence in anticipation of a criminal prosecution when he questioned [the girl].”⁸⁹ At the same time, because the child’s statements to her mother and grandmother “were made to family members and not to governmental personnel, they were not testimonial.”⁹⁰

Crawford teaches that the Confrontation Clause is primarily concerned with government’s involvement in the production of statements used subsequently at trial in lieu of testimony. *Davis* emphasizes the formality in speaking to the police that is inherent in testimonial hearsay. Deeming a patient’s statements made to her doctor during diagnosis and treatment testimonial, for example, ignores these important lessons.

84. 725 ILL. COMP. STAT. 5/115-10 (2002).

85. *R.F.*, 825 N.E.2d 287 at 294.

86. *Id.* at 295.

87. *Id.* (citing *People v. West*, 823 N.E.2d 82, 89 (Ill. App. Ct. 2005)).

88. *See Davis*, 547 U.S. at 822.

89. *R.F.*, 825 N.E.2d 287 at 295.

90. *Id.* (internal quotation marks omitted).

G. Conclusion: Government Involvement in Testimonial Hearsay

The *Davis* Court declared that testimonial hearsay exists when “the *ex parte* actors and the evidentiary products of the *ex parte* communication align[] perfectly with their courtroom analogues.”⁹¹ This wholly comports with the *Crawford* Court’s repeated concern regarding the involvement of government agents in the production of out-of-court statements intended to be used as “a weaker substitute for live testimony at trial.”⁹² Testimonial hearsay is created when the government procures out-of-court statements reflecting later trial testimony, akin to the evidence used against Sir Walter Raleigh.

For the moment, the full scope of what testimonial hearsay encompasses remains uncertain. What is clear, however, is that *Crawford* teaches that government involvement is typically a key component of testimonial hearsay.⁹³ “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.”⁹⁴ In *Giles*, the Supreme Court echoed that teaching. A person simply does not *testify* to grandparents, friends, doctors, or others. Testimony, as that term is understood by *Crawford*, requires a formality and purpose attendant to sworn or courtroom proceedings or statements made to police investigating a crime.

Absent governmental involvement in the production of an out-of-court statement, courts should pause long and hard before deeming it testimonial hearsay.

II. TESTIMONIAL STATEMENTS: PRIMARY PURPOSE OR PARTICULAR CONTENT?

Another issue vexing some courts is whether the content of a statement alone can render it testimonial. *Davis* teaches that a statement must be examined by its context to determine whether it is testimonial. Nonetheless, some courts have followed a content-based—rather than context-based—approach in discerning testimonial hearsay, examining what the declarant said rather than the circumstances in which she said

91. *Davis*, 547 U.S. at 828. Justice Alito recently summarized the principle, writing that the “Confrontation Clause does not apply to out-of-court statements unless it can be said that they are the equivalent of statements made at trial by ‘witnesses’.” *Giles v. California*, 128 S. Ct. 2678, 2964 (2008) (Alito, J., concurring).

92. *Davis*, 547 U.S. at 828 (quoting *United States v. Inadi*, 475 U.S. 387, 394 (1986)) (internal quotation marks omitted).

93. *Davis* built upon that holding, demonstrating that governmental involvement alone is not a sufficient condition to render a statement testimonial. *See id.* at 828.

94. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

it. This viewpoint concludes that when an otherwise non-testimonial statement identifies or accuses a particular individual of certain conduct, that portion of the statement becomes testimonial. This content-based checkerboard practice is inconsistent with *Crawford* and *Davis*.

A. In re T.T.

Creating this segregated-statement approach in Illinois was the 2004 appellate court decision, *In re T.T.*⁹⁵ Interestingly, on May 31, 2007, the Illinois Supreme Court vacated the original *T.T.* opinion.⁹⁶ The appellate court subsequently filed an identical opinion upon remand (despite the U.S. Supreme Court's intervening opinion in *Davis* in 2006), but then withdrew it on January 22, 2008.⁹⁷ On May 29, 2008, the Illinois Supreme Court directed the appellate court to file a modified opinion,⁹⁸ which the appellate court did on July 25, 2008.⁹⁹ This latest *T.T.* opinion retains the segregated-statement discussion from its original opinion. Also, during *T.T.*'s unusual appellate travels, other panels of the appellate court followed its original decision.¹⁰⁰ As a result, like Lazarus, its analysis has risen from the dead.¹⁰¹

In *T.T.*,¹⁰² the juvenile-defendant was adjudicated delinquent for the aggravated criminal sexual assault of a seven-year-old girl. At trial, the court admitted various statements the victim made to her mother, a DCFS investigator, police detective, and a doctor.¹⁰³ On appeal, the appellate court first concluded that the victim's statements to the police detective and DCFS investigator were testimonial.¹⁰⁴

Turning to analyze the statements made to the doctor, the court then wrote as follows:

[The doctor] was a member of a child abuse protection unit at the hospital and had previously testified as an expert witness in child

95. *In re T.T.*, 815 N.E.2d 789 (Ill. App. Ct. 2004), *vacated*, 866 N.E.2d 1174 (Ill. 2007), *rev'd*, 2007 WL 2579869 (withdrawn), *vacated*, 886 N.E.2d 1026 (Ill. 2008), *rev'd*, 892 N.E.2d 1163 (Ill. App. Ct. 2008).

96. *In re T.T.*, 866 N.E.2d 1174 (Ill. 2007).

97. *In re T.T.*, 2007 WL 2579869 (Ill. App. Ct. 2007).

98. *In re T.T.*, 886 N.E.2d 1026 (Ill. 2008).

99. *In re T.T.*, 892 N.E.2d 1163 (Ill. App. Ct. 2008).

100. Of the panels that have followed *T.T.*, they usually simply cited and applied it without significant independent discussion.

101. Although unlike Lazarus, whose alleged rising was based upon divine power, *T.T.*'s analysis ignores higher authority.

102. Because the 2004 *T.T.* opinion introduced this analysis and has been cited by other courts, it is cited here as well.

103. *In re T.T.*, 815 N.E.2d at 792–95.

104. *Id.* at 800–01.

abuse cases. DCFS referred [the victim] to [the doctor] for diagnosis and evaluation of sexual abuse six months after the alleged assault. At trial, [the doctor] recounted her physical findings in addition to what [the victim] told her about where on her body she had been hurt, the offender's use of a lubricant, the pain, the absence of any blood or discharge, and the identity of the offender.

We do not find controlling the fact that [the victim's] medical exam was the result of a referral from DCFS. The record established that [the victim's] mother failed to take her for any medical treatment or evaluation after the alleged assault. Moreover, government officials like police officers commonly take sexual assault victims to the hospital for treatment and evaluation. We also find unpersuasive [defendant's] assertion that the relationship between DCFS and [the doctor] at the time of the examination indicated that she constructively acted as the government's agent in interrogating [the victim]. [The doctor's] exam was for a diagnostic purpose, and [the victim's] statement was the by-product of substantive medical activity. Although [the doctor] may have been part of a child abuse trauma team, she was not charged with facilitating the prosecution of the case against [defendant]. As a medical expert with a professional interest in a patient's treatment, [the doctor's] primary investment in cooperating with law enforcement agencies was in facilitating the least traumatic method of diagnosis and treatment for the alleged victim, rather than a specific interest in enforcing sexual abuse laws against [defendant]. In contrast to government officers like the police or DCFS investigators, medical personnel who treat and diagnose sexual assault victims do not take on a similar investigatory or prosecutorial function. Certainly, the medical examination of the victim involves the collection of evidence for later use at a trial, because the victim's body and the injuries sustained may provide evidence of the crime. Moreover, the medical evaluation undoubtedly becomes a component in the determination by the police, State's Attorney, or DCFS investigator regarding whether the alleged assault merits further investigation or prosecution.¹⁰⁵

This is an excellent analysis, and the appellate court was undoubtedly correct. But the court should have stopped there.

Instead, the court then inexplicably—and without citation to any authority—went on to state that the portions of a victim's statements to medical personnel that identify her assailant are testimonial, while the balance is not.¹⁰⁶ Accordingly, the court examined the content of the statement, segmenting it into testimonial and non-testimonial portions.

105. *Id.* at 803.

106. *Id.* at 804.

But this approach ignores *Crawford*'s focus on the purpose and scope of the Confrontation Clause as it pertains to the government's involvement in producing the evidence.¹⁰⁷ In addition, it is not consistent with the Supreme Court's teachings in *Davis*.

B. Davis and the Primary Purpose Test

In *Davis*, the Court brought its understanding of testimonial hearsay forward, teaching that a statement's testimonial nature is determined not by its content but rather by its purpose and the circumstances in which it was made. *Davis* explored situations in which statements to the police yield testimonial hearsay. While the Court framed the issue before it as determining "which police interrogations produce testimony,"¹⁰⁸ it provided much greater insight into what constitutes testimonial hearsay in other unsworn contexts as well.

To determine whether a statement made during police interrogation (as that term is used for confrontation purposes) constitutes testimonial hearsay, the *Davis* Court established a "primary purpose" test:

Statements are non[-]testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the *primary purpose of the interrogation* is to establish or prove past events potentially relevant to later criminal prosecution.¹⁰⁹

In other words, *Davis* looks to the "why" and the "when" of the statement. Is the statement obtained to address a current situation? Or, is the statement obtained by the government to determine what happened in the past for use in a future prosecution? Statements made

107. See *supra* Part I (discussing the role of government involvement in procuring a statement necessary to render it testimonial hearsay).

108. *Davis*, 547 U.S. at 822.

109. *Id.* (emphasis added). To be sure, *Davis* held that non-testimonial statements can "evolve into testimonial statements." *Id.* at 828 (quoting *Hammon v. Indiana*, 829 N.E.2d 444, 457 (Ind. 2005)). Using the facts of that case as an example, the Court hypothesized that at some point during the initially non-testimonial 911 call, the victim's statement may have "become" testimonial in "later parts of the call." *Id.* at 829. Through *in limine* procedures, trial courts can examine a statement and determine whether it was non-testimonial, or even whether at some point during the statement it became testimonial. In those situations, "trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial [(for example, interrogation after an emergency ends)]." *Id.* (emphasis added). Courts are not to snip and cut, moving forward and backward within the statement, leaving a checker-cloth remnant for trial. The analysis follows the chronological continuum, tracking the statement's primary purpose at the time it was made.

to deal with ongoing situations—for use in the “now”—are not testimonial while statements taken by the government to memorialize past events for use in later proceedings are testimonial.

*Davis*¹¹⁰ was consolidated before the Supreme Court with *Hammon v. Indiana*.¹¹¹ The Court’s recitation of the facts in those two cases reflects that chronological dichotomy of purpose. In *Davis*, the statements at issue were made by a domestic-violence victim calling the police for help.¹¹² The statements dealt with an ongoing emergency; they were for use by police to address an immediate situation.

In *Hammon*, conversely, the declarant spoke with police while they investigated the commission of a possible crime. The statements deliberately recounted past criminal conduct, were made during “structured police questioning”¹¹³ under sufficiently formal conditions (in a separate room where the police kept the declarant apart from the suspect), and culminated in the declarant completing an affidavit memorializing her statement. Rather than helping to resolve a flaring emergency, these statements were part of a typical police investigation into the past commission of a possible crime.¹¹⁴

The Court concluded that testimonial hearsay is produced when the primary purpose in obtaining the statement is to provide out-of-court testimony sufficient to use in lieu of the declarant testifying at trial.¹¹⁵ Thus, when “the *ex parte* actors and the evidentiary products of the *ex parte* communication align[] perfectly with their courtroom analogues,” the statement is testimonial.¹¹⁶ In other words, such “statements under official interrogation [are testimonial as they] are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination.”¹¹⁷

Conversely, when the declarant is not acting as a “witness”—that is, when the statement is not a solemn declaration or affirmation made for

110. *State v. Davis*, 111 P.3d 844 (Wash. 2005), *enforced sub nom.* *Davis v. Washington*, 547 U.S. 813 (2006).

111. *Hammon v. Indiana*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* *Davis v. Washington*, 547 U.S. 813 (2006).

112. *Davis*, 547 U.S. at 817–21.

113. *Crawford v. Washington*, 541 U.S. 36, 53 n.4 (2004).

114. *Davis*, 547 U.S. at 829.

115. *Compare id.* at 828 (stating that Cobham’s statements were used as “a weaker substitute for live testimony at trial” (quoting *United States v. Inadi*, 475 U.S. 387, 394 (1986)) (internal quotation marks omitted).

116. *Davis*, 547 U.S. at 828.

117. *Id.* at 830. As Justice Alito later wrote, the “Confrontation Clause does not apply to out-of-court statements unless it can be said that they are the equivalent of statements made at trial by ‘witnesses’.” *Giles*, 128 S. Ct. at 2694 (Alito, J., concurring).

the purpose of establishing some fact directed at proving the facts of a past crime to convict the perpetrator—the statement is not testimonial.¹¹⁸ As the Court observed, “[n]o ‘witness’ goes into court to proclaim an emergency and seek help.”¹¹⁹

By structuring its analysis in this way, the Court specifically did not look to the content—the “what”—of the statement. Instead, it solely considered the circumstances in which the statement was made—and not its substance—as determining whether the statement is testimonial. Accordingly, the Court held that the *all* of the declarant’s statements in *Hammon* were testimonial, whereas the statements at issue in *Davis* were not.

Nor did the fact that the declarant in *Davis* identified her attacker suggest to the Court that any portion of her statement was testimonial. During the 911 call, the operator asked the victim to identify her assailant, which she did. The Court concluded that the mere fact the declarant identified the offender, even to a governmental agent,¹²⁰ did not render the statement testimonial. Indeed, the Court went further and held that the statement—including the identification of the defendant—was not testimonial even with the 911 operator’s specific efforts to identify the assailant.¹²¹ In doing so, the Court reasoned that the identity of the assailant is pertinent to the police because they “need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.”¹²² As a result, *Davis*’s analysis is clearly inconsistent with *T.T.*’s word-by-word parsing, and necessarily rejects it.

This analysis comports with Illinois Supreme Court precedent regarding statements made in the course of medical treatment. In *People v. Falaster*,¹²³ the child victim was taken for a forensic medical examination.¹²⁴ The trial court admitted the victim’s statement to the nurse identifying the defendant as her abuser. On appeal, the court held that the victim’s identification of her assailant may be considered by

118. See *Davis*, 547 U.S. at 826.

119. *Id.* at 828 (internal quotation marks in original).

120. The Court assumed, without deciding, that the 911 operator was a governmental agent for these purposes. *Id.* at 823 n.2.

121. *Id.* at 827.

122. *Id.* at 833 (citing *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt County.*, 542 U.S. 117, 186 (2004)) (internal quotation marks omitted).

123. 670 N.E.2d 624 (Ill. 1996).

124. In fact, “[t]he victim was taken to [the doctor’s] office, accompanied by an assistant State’s Attorney according to the doctor’s account, for the sole purpose of bolstering the State’s case against the defendant.” *Falaster*, 670 N.E.2d at 631 (Harrison, J., specially concurring).

medical professionals in forming their diagnosis and treatment plan, and is therefore admissible.

The Illinois Supreme Court's analysis in *Falaster* is consistent with the *Davis* Court's conclusion that police consider the identity of a possible assailant when assessing a situation and possible danger. Although *Falaster* did not address the constitutional issue, pursuant to *Davis*, statements of identification do not automatically obtain special status.

Indeed, the facts in *Davis* itself seem closer to constituting testimonial hearsay than those of *T.T.* In *Davis*, the declarant was speaking to a (presumed) governmental agent, which is far more akin to the concerns that animate the Confrontation Clause. In *T.T.*, on the other hand, the victim was not speaking to a governmental actor but instead to a doctor in the course of seeking medical diagnosis and treatment. As the appellate court itself noted, the doctor was "not charged with facilitating the prosecution of the case against [defendant]. . . . In contrast to government officers . . . medical personnel who treat and diagnose sexual assault victims do not take on a similar investigatory or prosecutorial function."¹²⁵ If the *Davis* victim's statements during the 911 call are not testimonial, it seems impossible that a victim's statements to a doctor could be.

C. *Dutton v. Evans* and *White v. Illinois* Redux

As was the case in Part I, the Supreme Court's treatment of *Dutton*¹²⁶ and *White*¹²⁷ in *Crawford* and *Davis* further illustrates its understanding of what constitutes testimonial hearsay.

In both *Crawford* and *Davis*, the Court declared that the *Dutton* co-conspirator's statements were clearly not testimonial.¹²⁸ Importantly, like *Davis*, the out-of-court hearsay statement in *Dutton* specifically identified the defendant by name.¹²⁹ Nonetheless, even such a blatant and pejorative identification of an offender¹³⁰ did not slow the Supreme Court from declaring this accusatory statement non-testimonial. The

125. *In re T.T.*, 815 N.E.2d 789, 803 (Ill. App. Ct. 2004).

126. See *supra* Part I.B. for further discussion of *Dutton*.

127. See *supra* Part I.C. for further discussion of *White*.

128. *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004); *Davis v. Washington*, 547 U.S. 813, 825 (2006). Despite the fact that co-conspirator statements often identify other members of the conspiracy, the Court recently reaffirmed that such statements are not testimonial. *Giles v. California*, 128 S. Ct. 2678, 2691 (2008).

129. The full description actually states: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." *Dutton v. Evans*, 400 U.S. 74, 77 (1970).

130. See *supra* note 129 and accompanying text.

mere fact that an otherwise non-testimonial statement identified the defendant was constitutionally irrelevant to the Court's determination of the statement's testimonial status. It simply did not matter.

Factually similar to *T.T.*, *White* provides further evidence of the Court's understanding of testimonial hearsay. Recall that in *White*, a child declarant made statements to her babysitter, mother, an investigating police officer, emergency room nurse, and doctor. In each of those statements, the declarant identified the defendant as her abuser.¹³¹

The *Crawford* Court distinguished the statements to the police officer from the statements to all the other witnesses during its discussion of testimonial evidence—but not based upon the content of the statements.¹³² Indeed, the Court did not base any of its analysis on the content of the statements. The fact that all the statements (including those made to the police officer) identified the assailant was of no moment to the Court's discussion of what constituted testimonial hearsay. The Court took each statement as a whole, rather than dissecting them into testimonial and non-testimonial parts and, in the end was entirely unconcerned whether any of the statements identified the abuser.

Both *White* and *T.T.* involved a child victim making statements to emergency room personnel describing injuries as well as the person who caused those injuries. In *Crawford* and *Davis*, the Court looked at the statements in *White* (and *Dutton*) in their entirety and concluded that none of them constituted testimonial hearsay. As such, *T.T.* and its segregated-statement approach simply cannot be reconciled with the Supreme Court's controlling analysis.

D. Conclusion: Context Controls Testimonial Hearsay

Davis makes clear that a statement's testimonial status is determined by the context in which it was made rather than by any particular content. The *Crawford* and *Davis* Courts' construction of *Dutton* and *White* demonstrate that principle. The *Davis* primary-purpose test clearly foreclosed the viability of the *T.T.* court's analysis. Context controls, and content is a constitutional non-issue.

131. *White v. Illinois*, 502 U.S. 346, 348–51 (1992).

132. *Crawford*, 541 U.S. at 58 n.8.

III. THE CONFRONTATION CLAUSE'S PLACE IN THE BILL OF RIGHTS

Crawford teaches that government involvement in procuring an out-of-court statement is typically a component of testimonial hearsay. *Davis* teaches that in evaluating the government's actions, courts should determine the primary purpose of the statement. In these ways, the Supreme Court has introduced new concepts to its Sixth Amendment jurisprudence.

But these concepts are hardly novel in other areas of constitutional law. This Part examines the ways in which Fourth and Fifth Amendment concepts inform the Supreme Court's Sixth Amendment jurisprudence. Specifically, this Part addresses: (1) whether *Crawford*'s focus on governmental involvement in testimonial hearsay is akin to a Fourth or Fifth Amendment state-action requirement;¹³³ (2) whether the *Davis* primary-purpose test has antecedents in the Fourth and Fifth Amendments;¹³⁴ and (3) how *Crawford* and *Davis* reflect the Court's preference for objective evaluations.¹³⁵ Doing so clarifies our understanding of the Court's developing formulation of what constitutes testimonial hearsay.

A. "State Action" in the Sixth Amendment

At a basic level, the Bill of Rights reflects the concerns and views of the Founders who wrote it.¹³⁶ As a whole, it was intended to protect the people from government action, and not that of private individuals. Accordingly, the Supreme Court held long ago that the Fourth Amendment is a restraint "upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies."¹³⁷ Likewise, the same Court understood that the Fifth Amendment protects citizens against government-compelled self-incrimination.¹³⁸

As a result, it is now settled law that these various constitutional protections apply only when government action is involved.¹³⁹ The

133. See *infra* Part III.A.

134. See *infra* Part III.B.

135. See *infra* Part III.C.

136. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("[T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights . . .").

137. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

138. *Id.* at 475-76.

139. See also *Williams v. Nagel*, 643 N.E.2d 816, 819 (Ill. 1994) ("The Fourteenth Amendment erects 'no shield against merely private conduct, however discriminatory or wrongful.' *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). Therefore, in order to establish a violation of constitutional rights, a plaintiff must

Fourth Amendment only applies when there is “state action”; a search by a private person does not trigger Fourth Amendment protections.¹⁴⁰ Similarly, the Fifth Amendment only protects against custodial interrogation by law enforcement officers.¹⁴¹

The Sixth Amendment Confrontation Clause expresses the Founders’ concern with the use of a certain type of out-of-court statement by the government at trial, as exemplified by the case of Sir Walter Raleigh. The *Crawford* Court’s repeated emphasis on the Confrontation Clause’s concern regarding government involvement in the production of testimonial hearsay is wholly consistent with the purpose and scope of the Bill of Rights. Statements made among family or friends are not the objects of the Confrontation Clause.¹⁴² Understanding the Confrontation Clause as protecting an individual defendant from the use at trial of government-procured out-of-court statements in lieu of live witness testimony comports with the overarching purpose of the Bill of Rights.

B. Was the “Primary Purpose” Test Imported from the Fourth or Fifth Amendments?

The *Davis* Court’s formulation of testimonial hearsay based upon the governmental agent’s primary purpose¹⁴³ bears a striking resemblance to aspects of the Court’s understanding of the Fourth and Fifth Amendments. Indeed, *Davis* itself looked to cases interpreting those Amendments.¹⁴⁴ Understanding that concept in these other, more familiar arenas sheds light onto the meaning of “primary purpose” within the Sixth Amendment context.

demonstrate that the conduct complained of is conduct by the State rather than conduct of a private party.” (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948))).

140. *United States v. Jacobsen*, 466 U.S. 109, 113–15 (1984); *People v. Phillips*, 831 N.E.2d 574, 581 (Ill. 2005).

141. *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966). See also, e.g., *People v. Pankhurst*, 848 N.E.2d 628, 636 (Ill. App. Ct. 2006) (stating that a school principal was not a state actor that triggered *Miranda* requirements); *People v. Fuller*, 743 N.E.2d 1094, 1096–97 (Ill. App. Ct. 2001) (concluding that a store security guard was not a state actor, and consequently that *Miranda* warnings were not required).

142. *Giles v. California*, 128 S. Ct. 2678, 2692–93 (2008).

143. See *Davis v. Washington*, 547 U.S. 813, 822 (2006); *supra* Part II.B (discussing the *Davis* Court’s emphasis on the government’s purpose in obtaining out-of-court statements in determining whether the statement is testimonial).

144. E.g., *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 117 (2004) (interpreting the Fourth Amendment); *New York v. Quarles*, 467 U.S. 649 (1984) (interpreting the Fifth Amendment).

1. Fourth Amendment

The Supreme Court recently utilized a similar “primary purpose” test in a Fourth Amendment¹⁴⁵ context. In *Illinois v. Lidster*, the Court considered the constitutionality of an informational roadside checkpoint.¹⁴⁶ Attempting to gather information about a previous fatal hit-and-run incident, police set up a roadway checkpoint, stopping motorists to ask whether they had any information about the accident. During this procedure, the police arrested one driver for driving under the influence of alcohol. At trial, the driver challenged the admissibility of evidence utilized against him, claiming that the government obtaining it via the checkpoint violated the Fourth Amendment.

Rejecting the defendant’s arguments, the Court looked to the purpose of the checkpoint. The Court deemed controlling that the

stop’s *primary law enforcement purpose* was not to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle’s occupants, but other individuals.¹⁴⁷

In other words, the roadblock’s primary purpose was not to gather evidence or make a case against anyone they stopped.

Thus, the Court looked to the primary purpose of the agents’ actions to determine whether they triggered the Fourth Amendment’s protection. This mirrors how the Court in *Davis* defined testimonial hearsay triggering the Sixth Amendment Confrontation Clause: testimonial hearsay is created when the circumstances objectively indicate that the primary purpose of a police interrogation is to establish past events for a later prosecution, but not when the primary purpose of the questioning is to assist in an ongoing emergency.¹⁴⁸

Only a month before deciding *Davis*, the Court applied a similar ongoing-emergency analysis within another Fourth Amendment context: exigent circumstances. In *Brigham City v. Stuart*, it reaffirmed that police may enter a home without a warrant to render emergency

145. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

146. *Illinois v. Lidster*, 540 U.S. 419, 421 (2004).

147. *Id.* at 423 (emphases omitted and added).

148. *Davis*, 547 U.S. at 822.

assistance.¹⁴⁹ The Court observed that the “officers were confronted with *ongoing* violence,”¹⁵⁰ a theme that quickly resurfaced in the *Davis* primary-purpose test.

This is also strikingly similar to how the “community caretaking” function of the police relates to the Fourth Amendment. Community caretaking refers to police action in performing a task unrelated to the investigation of crime. In *People v. Luedemann*, the Illinois Supreme Court recently engaged in a thorough and scholarly discussion of this issue.¹⁵¹

Luedemann traced the origin of the community caretaking doctrine back to the U.S. Supreme Court’s opinion in *Cady v. Dombrowski*.¹⁵² In that case, the Court wrote that police officers often “engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”¹⁵³ When police obtain evidence during the course of the community caretaking function, it does not violate the Fourth Amendment to use that evidence at trial even though the officer lacked a warrant and probable cause.¹⁵⁴ This is so precisely because the police officer’s conduct was “divorced from the detection, investigation, or acquisition of evidence” of a crime; in other words, the officer’s primary purpose was not to investigate past events relevant to a later criminal prosecution.¹⁵⁵

The reasoning behind *Lidster*, the ongoing-emergency analysis, and community caretaking exception is entirely consistent with the *Davis* Court’s emphasis on the police officer’s primary purpose in questioning a declarant. Statements made to a police officer (even during an “interrogation”) when the primary purpose is not to “prove past events

149. *Brigham City v. Stuart*, 547 U.S. 398, 403, 406–07 (2006).

150. *Id.* at 405.

151. *People v. Luedemann*, 857 N.E.2d 187, 197–99 (Ill. 2006).

152. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

153. *Id.* The *Luedemann* court listed examples of such conduct, including responding to heart attack victims, helping children find their parents, helping inebriates find their way home, responding to calls about missing person or sick neighbors, mediating noise disputes, responding to calls about stray or injured animals, investigating premises left open at night, taking lost property into their possession, and removing abandoned property. *Luedemann*, 857 N.E.2d at 197.

154. *Cady*, 413 U.S. at 447–48.

155. *Id.* at 441. *Cf.* *Davis v. Washington*, 547 U.S. 813, 822 (2005) (holding that statements “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”).

potentially relevant to later criminal prosecution"¹⁵⁶—in other words, non-testimonial hearsay—is remarkably analogous to characterizing the police officer's primary purpose in asking questions as not for "the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."¹⁵⁷

When the government actor's primary purpose is to investigate a crime, (1) his search must comply with the Fourth Amendment to pass constitutional muster, and (2) his questioning yields a testimonial statement triggering Sixth Amendment protection at trial. In both analyses, the inquiry focuses upon the primary purpose of the government actor in obtaining the evidence. When the agent's primary purpose is something other than investigating a crime "with an eye toward trial,"¹⁵⁸ the action does not trigger these constitutional concerns.

2. Fifth Amendment

The Supreme Court engaged in a similar analysis within a Fifth Amendment¹⁵⁹ context a full twenty years before deciding *Crawford*. In *New York v. Quarles*, the Court recognized the existence of a "public safety" exception to the *Miranda* requirements.¹⁶⁰ In *Quarles*, a woman told police officers on road patrol that she had been raped by a man carrying a gun who had just entered a grocery store.¹⁶¹ The police chased the man through the store, caught him, patted him down, and found an empty shoulder holster. After placing him in custody, an officer asked the defendant where the gun was. He nodded in the direction of some empty cartons and responded, "the gun is over there."¹⁶² Only after finding the loaded gun did the police give the *Miranda* warnings.¹⁶³

The Court observed that this was "a situation in which police officers ask[ed] questions reasonably prompted by a concern for the public safety."¹⁶⁴ The Court deemed it important that the police officer "needed an answer to his question not simply to make his case against

156. *Davis*, 547 U.S. at 822.

157. *Cady*, 413 U.S. at 441.

158. *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004).

159. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself.").

160. *New York v. Quarles*, 467 U.S. 649, 655–56 (1984).

161. *Id.* at 651–52.

162. *Id.* at 652.

163. *Id.*

164. *Id.* at 656–57.

[defendant] but to insure that further danger to the public did not result from the concealment of the gun in a public area.”¹⁶⁵ The Court then concluded that this “need for answers to questions in a situation posing a threat to the public safety” removed this admittedly custodial interrogation from the ambit of *Miranda*’s requirements.¹⁶⁶

The core of this analysis is similarly reflected in the *Davis* primary-purpose test. The *Quarles* decision was based upon the officer’s motivation in asking the questions, much as the Court in *Davis* examined the officer’s primary purpose to determine whether statements constituted testimonial hearsay.¹⁶⁷ In addition, *Quarles*’s foundation is the importance of resolving an ongoing threat to public safety. The *Davis* Court similarly concluded that a declarant’s statements are non-testimonial when they are elicited “to resolve [a] present emergency.”¹⁶⁸ When the primary purpose of a police officer’s questions is to address an emergency situation, admitting the statements at trial offends neither the Fifth nor Sixth Amendments.

It was surely no slip of the tongue that *Davis* specifically cited *Quarles* in discussing how trial courts will recognize when a statement becomes testimonial.¹⁶⁹

C. Objective Tests and Bright Lines

So why is any of the Court’s Fourth and Fifth Amendment precedent significant to understanding the new Confrontation Clause jurisprudence? It is important because in these areas, the Supreme Court has demonstrated its preference for objective assessments. Lamenting that “[v]ague standards are manipulable,”¹⁷⁰ *Crawford* created its new testimonial-hearsay paradigm specifically to reject its prior “amorphous, if not entirely subjective”¹⁷¹ reliability-based standard, articulated in *Ohio v. Roberts*.¹⁷² Once again, the Court rejected an old subjective test.

The Supreme Court shuns subjective inquiries. As a result, the testimonial-hearsay doctrine established by *Crawford* is instead based upon objective assessments, the same analysis the Court has proclaimed

165. *Id.* at 657.

166. *Id.*

167. *Davis v. Washington*, 547 U.S. 813, 822, 827–28 (2005).

168. *Id.* at 827. This also mirrors the Court’s thinking in the Fourth Amendment contexts noted above. See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *supra* Part III.B.1.

169. *Davis*, 547 U.S. at 829.

170. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

171. *Id.* at 63.

172. *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980).

time and time again in Fourth and Fifth Amendment contexts. *Davis* advances this theme, repeatedly stating that its primary-purpose test rests upon an evaluation of circumstances objectively indicating the primary purpose of the police officer's conduct.¹⁷³

*Quarles*¹⁷⁴ demonstrated this preference in the Fifth Amendment context. In *Quarles*, the Court rejected a subjective test to determine whether the police officer's actions triggered *Miranda* requirements, holding that "the availability of that exception does not depend upon the motivation of the individuals involved."¹⁷⁵ The Court instead employed an objective test, determining that statements arising from such a "kaleidoscopic [emergency] situation"¹⁷⁶ should be evaluated in the context of "a situation in which police officers ask questions reasonably prompted by a concern for the public safety."¹⁷⁷ Neither the officer's nor the declarant's subjective motivation for the statements is relevant. Instead, it is an objective assessment of the circumstances in which a statement is made that controls the ultimate determination of the statement's constitutional status.

In *Rhode Island v. Innis*, the Court construed what constitutes interrogation in a *Miranda* context.¹⁷⁸ In doing so, it focused on objective factors, holding that interrogation includes words or actions that the police should know are reasonably likely to elicit an incriminating response.¹⁷⁹ The *Davis* Court's focus on objective circumstances used to evaluate a police officer's primary purpose in speaking with a declarant is similar to the *Innis* Court's reliance on an objective evaluation of an officer's interrogation of a suspect.

In *Stansbury v. California*, the Court addressed the proper analysis for determining whether a suspect is in custody for *Miranda* purposes.¹⁸⁰ In doing so, the Court held that its "decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."¹⁸¹ Recently, in *People v. Slater*, the Illinois Supreme Court cited *Stansbury*

173. See *supra* Part III.B.2 (discussing the *Davis* primary-purpose test).

174. Note again it was surely no accident that *Davis* cited *Quarles*. *Davis*, 547 U.S. at 829. See *supra* Part III.B.2.

175. *New York v. Quarles*, 467 U.S. 649, 656 (1984).

176. *Id.*

177. *Id.*

178. *Rhode Island v. Innis*, 446 U.S. 291, 300-02 (1980).

179. *Id.* at 301.

180. *Stansbury v. California*, 511 U.S. 318, 322-23 (1994).

181. *Id.* at 323.

and, in a thorough discussion, reaffirmed that whether a person is in custody for *Miranda* purposes is an objective determination based upon the circumstances surrounding the interrogation.¹⁸² Throughout *Quarles*, *Innis*, and *Stansbury*, the Court repeatedly relied upon objective assessments over subjective ones in applying the Fifth Amendment.

The Court invoked the same preference for objective inquiries in various Fourth Amendment contexts. In *Whren v. United States*, the it reaffirmed that reviewing the reasonableness of a police officer's conduct is solely an objective inquiry under the Fourth Amendment.¹⁸³ Refusing to evaluate reasonableness by considering the officer's actual motivations, the Court repudiated the defendant's argument seeking to include the officer's subjective motivations as a factor in the greater objective analysis. The Court went further, concluding that even an officer's actually improper (or pretextual) purpose does not invalidate an otherwise objectively reasonable action.¹⁸⁴ This preference for clear, objective assessments is woven throughout the *Davis*'s formulation of testimonial hearsay.

Reconfirming this commitment to objective analyses, the Court in *Stuart* explored exigent circumstances permitting an officer to enter a residence without a warrant. The Utah Supreme Court had held that purported exigent circumstances may not be primarily motivated by an actual intent to arrest and seize evidence¹⁸⁵—a colorable construction of the similarly phrased *Davis* primary purpose test. The United States Supreme Court emphatically reversed the Utah court, noting its repeated holdings that an officer's conduct is reasonable as long as the circumstances objectively justify the action, regardless of the officer's subjective state of mind.¹⁸⁶

In *Davis*, decided only a month later, the Court required an objective evaluation of the officer's primary purpose in speaking with a declarant to determine a statement's testimonial status.¹⁸⁷ In both situations it

182. *People v. Slater*, 886 N.E.2d 986, 994–96 (Ill. 2008).

183. *See Whren v. United States*, 517 U.S. 806, 813 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

184. *Id.* at 812, 814–15.

185. *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006).

186. *Id.* at 403.

187. In *Davis*, the Court held:

Statements are non[–]testimonial . . . 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 . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

relied upon an objective review of the facts, eschewing dependence upon the individual officer's subjective motivation, understanding, or intent. In its analysis, the *Stuart* Court noted at least one problem with relying upon police officers' subjective interpretations of a situation: the unlikelihood that "their subjective motives could be so neatly unraveled."¹⁸⁸ This same difficulty lies in examining an officer's primary purpose in speaking with a declarant to determine whether her statement constitutes testimonial hearsay.

In *Cady*, the Court articulated its community caretaking doctrine by describing police activities distinct from the investigation of a crime.¹⁸⁹ The *Stuart* Court noted that the "role of a peace officer includes preventing violence and restoring order,"¹⁹⁰ language notably similar to the Court's definition of community caretaking. Surely police action to resolve an ongoing emergency comport with these concepts. Viewing *Davis*'s primary purpose test with these concepts in mind brings familiar principles and helpful clarity to understanding testimonial hearsay.

D. Conclusion: Related Precedent Further Explains Testimonial Hearsay

Many concepts borne in Fourth and Fifth Amendment jurisprudence have found renewed life in the Court's new understanding of the Confrontation Clause. The protections embodied in the Fourth and Fifth Amendments are aimed at government action, a theme that resonates throughout *Crawford*. Objectively assessing a police officer's primary motivation and purpose is a familiar exercise in many Fourth and Fifth Amendment contexts. Applying the *Davis* primary-purpose test should be no different. The Court has been clear: vague and manipulable, subjective tests in these contexts must give way to objective assessments.

These familiar objective analyses provide both a workable practice in addressing everyday Confrontation Clause issues as well as insight into how the Court's understanding of the Clause continues to develop.

Davis v. Washington, 547 U.S. 813, 822 (2005) (emphasis added). Examining the facts in *Davis*, the Court concluded that the circumstances of the conversation "objectively indicat[ed] its primary purpose" were to deal with an emergency. *Id.* at 828. Turning to the companion case *Hammon v. Indiana*, the Court concluded that the statement was testimonial because, "[o]bjectively viewed, the primary . . . purpose of the interrogation was to investigate a possible crime." *Id.* at 830.

188. *Stuart*, 547 U.S. at 405.

189. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

190. *Stuart*, 547 U.S. at 406.

IV. WHAT IT ALL MEANS

Crawford represents a seismic change in how courts evaluate confrontation issues every day. Four centuries after the trial of Sir Walter Raleigh, the Supreme Court looked back to that experience to understand the meaning of the Sixth Amendment Confrontation Clause. Rallying against both the abuses that doomed Sir Walter Raleigh and the ambiguities and manipulability of its previous analysis, the *Crawford* Confrontation Clause is now tightly focused against the use of formalized, *ex parte* statements in lieu of live witness testimony at trial—the newly identified testimonial hearsay.

Crawford teaches that testimonial hearsay is a particular type of statement, one typically obtained by a governmental agent in a formal environment. An accuser making a formal statement to a governmental investigator bears testimony in a way that a person making a casual remark to an acquaintance does not. A person simply does not *testify* to family, friends, or others who are not governmental actors investigating a crime and gathering evidence for possible prosecution.

Additionally, a statement's testimonial status is determined by the context in which it was made rather than by its particular content. *Crawford*'s recognition that testimonial hearsay contemplates formal statements is furthered by the *Davis* Court's understanding of the formality inherently present or absent in various contexts. Just as no victim goes into court to proclaim an emergency and seek aid, a declarant's statement to police to assist them in resolving an ongoing emergency lacks the requisite formality inherent in testimonial hearsay. Instead, testimonial hearsay contemplates statements made to police in the more formal context of investigating a possible crime for subsequent prosecution. Cases suggesting that certain words or subjects within otherwise non-testimonial hearsay, *ipso facto* constitute testimonial hearsay conflict with the Supreme Court's holdings in *Crawford*, *Davis*, and *Giles*.

Through *Crawford* and *Davis*, the Court grafted into the Confrontation Clause concepts familiar in its Fourth and Fifth Amendment cases. The "state action" requirement in Fourth and Fifth Amendment contexts resonates throughout *Crawford*. Assessing a police officer's primary purpose for his actions within Fourth and Fifth Amendment challenges is strikingly reflected in the *Davis* primary-purpose test for testimonial hearsay. And the Court's clear preference for objective assessments, rather than manipulable and vague subjective tests, is a common thread now woven throughout its Fourth, Fifth, and Sixth Amendment case law.

After *Crawford*, some practitioners cried that the judicial sky had fallen and feared (or exulted over) the end of criminal trials as we know them. Careful review, however, shows that this confrontation revolution ultimately embodies familiar concepts. Utilizing these familiar concepts, the Supreme Court's new structure for analyzing confrontation issues should provide clarity for the bench and bar.