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COMMENTS

DEPUTY-DOCTORS: THE MEDICAL TREATMENT EXCEPTION AFTER *DAVIS V. WASHINGTON*

In 1991, nine San Diego children accused Dale Akiki, a mentally and physically handicapped church daycare worker, of physical and sexual abuse. They told child therapists that Akiki had forced them to engage in satanic rituals and animal mutilation. Without any physical evidence, the State charged Akiki with child sexual abuse and kidnapping. None of the children appeared at Akiki's preliminary hearing, but their hearsay statements were read into the record. They did testify at Akiki's 1993 trial: under cross-examination, their stories grew increasingly fantastic and contradictory; one girl admitted she did not know Akiki had done "bad things to kids" until a therapist told her so. The jury acquitted Akiki of all wrongdoing—but only after he had languished thirty months in the county jail. According to his attorney, the case never should have gone to court. "For four years, nobody got to cross-examine those children . . . Had they been cross-examined in a preliminary hearing, a judge would have stopped it right there."¹

But what if those children had *never* been cross-examined?

I. INTRODUCTION

The United States Constitution guarantees criminal defendants the right "to be confronted with the witnesses against" them,² but "victim-

1. Michael Granberry, *Case Illustrates Flaws in Child Abuse Trials*, L.A. TIMES, Nov. 29, 1993, at A3.

2. U.S. CONST. amend. VI. The text in full reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

less” prosecutions, in which the crime victim does not testify against the assailant, do occur.³ These victims are either unable—as with many children—or unwilling—as in many domestic violence cases—to aid in their assailants’ prosecutions by testifying. Instead, they “speak” in the courtroom when their out-of-court statements are admitted under statutory exceptions to the general ban on hearsay.⁴ For many years, the U.S. Supreme Court reconciled these admissions with the Sixth Amendment’s Confrontation Clause by narrowing its view of the Clause’s purpose: confrontation tests the truth of a witness’s statements; therefore, if a judge determines a hearsay statement bears sufficient indicia of truthfulness, confrontation is unnecessary.⁵ Yet the confrontation right is also a *procedural* guarantee⁶ that satisfies a visceral notion of fairness. Just as the Fourth Amendment would be “an empty promise” if prosecutors could use evidence obtained through unreasonable searches if it is highly probative,⁷ so too does the right to confront one’s accuser lose its value when “a mere judicial determination of reliability” can reason it away.⁸

In 2004, in *Crawford v. Washington*, the Court reaffirmed criminal defendants’ right to confront their accusers; it changed the rules dramatically, proscribing “testimonial” hearsay absent declarant unavailability and a prior opportunity for cross-examination.⁹ Yet this initial proscription was ill-defined.

3. See, e.g., *White v. Illinois*, 502 U.S. 346 (1992) (child sexual abuse); *Idaho v. Wright*, 497 U.S. 805 (1990) (same); *United States v. Hadley*, 431 F.3d 484 (6th Cir. 2005) (domestic violence); *T.P. v. State*, 911 So. 2d 1117 (Ala. Crim. App. 2004) (child sexual abuse); *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006) (same); *Medina v. State*, 131 P.3d 15 (Nev. 2006) (rape); *State v. Romero*, 133 P.3d 842 (N.M. Ct. App. 2006) (sexual assault).

4. See FED. R. EVID. 801 (defining “hearsay” and associated terms); FED. R. EVID. 802 (“Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.”); FED. R. EVID. 803 (listing twenty-three exceptions to Rule 802, for which the declarant’s availability is “immaterial”); FED. R. EVID. 804 (defining “unavailable” and listing five additional exceptions to Rule 802 for which declarant unavailability is necessary); FED. R. EVID. 807 (“residual exception” to Rule 802).

5. See *Ohio v. Roberts*, 448 U.S. 56, 64–66 (1980).

6. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

7. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

8. *Crawford*, 541 U.S. at 62.

9. *Id.* at 54.

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In June 2006, the Court refined its new rule in *Davis v. Washington*, focusing on statements made in one specific situation: police interrogations.¹⁰ The Court set new rules for when an unavailable victim's statements to police are testimonial and hence inadmissible without prior cross-examination.¹¹ But these rules reach beyond law enforcement.¹² *Davis* also provides a workable framework for evaluating statements to health care professionals, whose testimony, like that of police, can be critical to victimless prosecutions.

This Comment argues that under *Davis*, medical experts consulted to prepare for trial, medical providers who have a statutory duty to report certain injuries, Sexual Assault Nurse Examiners, and other state-connected health care professionals act as police agents when they question crime victims. Where this is so, victims' statements to them should often be inadmissible unless the victim testifies or has been previously cross-examined. Before 2004, courts admitted these hearsay statements under statutory exceptions for "[s]tatements made for purposes of medical diagnosis or treatment."¹³ Now, they are only admissible by this means if they are non-testimonial—that is, if the victim's medical condition qualifies as an emergency, and the interaction's primary purpose is to resolve that emergency.¹⁴

What does this mean for victimless prosecutions? In child sexual abuse cases, for instance, most victims' responses to medical professionals' queries are testimonial because no ongoing emergency exists, and the questions primarily seek to establish past events potentially relevant to prosecution. In domestic violence cases, many victims' statements to health care providers are testimonial for these same rea-

10. *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006).

11. *Id.*

12. *Contra* Allie Phillips, *Health Care Providers' Roles after Crawford, Davis & Hammon*, PROSECUTOR, Sept.-Oct. 2006, at 18, 19 (asserting that "the Davis/Hammon 'primary purpose' rule [is] limited to law enforcement interrogations" and hence should not apply to health care providers).

13. FED. R. EVID. 803(4); *see, e.g.*, *White v. Illinois*, 502 U.S. 346, 348-49 (1992). Courts have also applied the exception to statements made to nontraditional medical providers. *See, e.g.*, *United States v. Balfany*, 965 F.2d 575, 581 (8th Cir. 1992) (trained social worker); *McKenna v. St. Joseph Hosp.*, 557 A.2d 854, 858 (R.I. 1989) (fire department rescue personnel); *see also* FED. R. EVID. 803(4) advisory committee's note (explaining the exception could embrace "statements to hospital attendants, ambulance drivers, or even members of the family").

14. *Davis*, 126 S. Ct. at 2273-74.

sons. Thus, *Davis* excludes a large class of victims' out-of-court statements and safeguards defendants' right to confrontation in victimless prosecutions.

To reach this conclusion, this Comment first places *Davis* in the context of the Court's Confrontation Clause jurisprudence in Part II. Part III analyzes the case itself. Finally, Part IV applies *Davis* to medical treatment statements and examines how it limits their admissibility.

II. DAVIS IN HISTORICAL CONTEXT

The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him."¹⁵ Yet hearsay—out-of-court statements offered into evidence for their truth¹⁶—has long been admissible at criminal trials even when the declarant does not appear for a physical confrontation.¹⁷ As at common law, modern courts nominally exclude hearsay,¹⁸ but recognized exceptions to this rule abound.¹⁹

Before 2004, the U.S. Supreme Court perceived no contradiction between the Sixth Amendment's explicit guarantee and hearsay's routine admission against criminal defendants.²⁰ Rather, in *Ohio v. Rob-*

15. U.S. CONST. amend. VI.

16. FED. R. EVID. 801(c).

17. *See, e.g.,* *Blackburn v. Crawfords*, 70 U.S. 175, 187 (1865) (hearsay evidence as to pedigree is admissible); *Queen v. Hepburn*, 11 U.S. 290, 296 (1813) (observing "there are some [hearsay] exceptions which are said to be as old as the rule itself"); *Thompson v. Trevanion*, 90 Eng. Rep. 179 (K.B. 1694), *cited in White*, 502 U.S. at 355 n.8 (spontaneous declaration admitted despite declarant's failure to testify).

18. *See* FED. R. EVID. 802.

19. *See* FED. R. EVID. 803, 804, 807. This Comment refers to the Federal Rules but will rely on many state court cases for illustration. The hearsay exceptions in many states' evidence codes mirror those in the Federal Rules. *See* DAVID W. MILLER, *FEDERAL & CALIFORNIA EVIDENCE RULES* at xi (2005); *see, e.g.,* WASH. R. EVID. 803, 804 (substantially echoing the Federal Rules except with respect to business records, public records, and forfeiture by wrongdoing).

20. *See Ohio v. Roberts*, 448 U.S. 56, 63 (1980) ("If one were to read [the Sixth Amendment's] language literally, it would require . . . the exclusion of any statement made by a declarant not present at trial. . . . But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.").

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erts, it read the Confrontation Clause to require only that hearsay evidence be reliable—a requirement satisfied if a statement fell within a “firmly rooted” hearsay exception or possessed particularized guarantees of trustworthiness.²¹ As Professor Richard Friedman observed, the *Roberts* test “put[] the cart before the horse, essentially asking whether the assertion made by the statement [was] true as a precondition to admissibility.”²² A defendant’s constitutional right to confrontation turned on “[a] mere judicial determination of reliability.”²³

With *Crawford*, the Court sharply curtailed this broad judicial discretion.²⁴ Michael Crawford appealed his state court conviction for assaulting his wife’s alleged rapist.²⁵ Hours after the alleged assault, police tape-recorded their station house interrogation of Crawford’s wife, Sylvia, and her statements undermined Crawford’s self-defense claims.²⁶ Asserting the marital privilege, Sylvia refused to testify at trial, but the jury heard her recorded interrogation.²⁷ On appeal, Crawford argued the tape’s admission violated his Sixth Amendment confrontation right.²⁸ Applying *Roberts*, the state supreme court held the statement’s admission constitutional, but the U.S. Supreme Court granted certiorari to confront the constitutional issue Crawford raised.²⁹

Sharply rebuking *Roberts*’ “malleable standard,” the Court held that the Confrontation Clause forbids admission of “testimonial” hearsay against criminal defendants unless (1) the declarant is unavailable and (2) the defendant has had a prior opportunity to cross-examine him.³⁰ Writing for the majority, Justice Scalia explained the confronta-

21. *Id.* at 66.

22. Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1027-28 (1998).

23. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

24. *See id.* at 68-69.

25. *Id.* at 38, 41.

26. *Id.* at 38-39.

27. *Id.* at 40.

28. *Id.*

29. *Id.* at 42.

30. *Id.* at 53-54, 68. The Court compared the eighteenth century civil law tradition—which permitted private examinations by judicial officers—with the Framers’ common-law heritage. *Id.* at 43. Their legal tradition prescribed “live testimony in court subject to adversarial testing.” *Id.* Because “the common law in 1791 condi-

tion right was not, as *Roberts* implied, a substantive guarantee that evidence be reliable, but rather a *procedural* one that reliability be tested by cross-examination.³¹ Because Sylvia's statement was testimonial³² and Crawford had had no opportunity to cross-examine her, its admission violated his confrontation right.³³

After pronouncing this new and radically different rule, the Court explicitly disclaimed "any effort to spell out a comprehensive definition of 'testimonial.'"³⁴ Chief Justice Rehnquist, in concurrence, criticized this deliberate evasion: "Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner."³⁵

But some light pierced the darkness. The Court's language is only occasionally unequivocal.³⁶ Otherwise, its reasoning, phrasing, and

tioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine[,] [t]he Sixth Amendment therefore incorporates those limitations." *Id.* at 54. Earlier English statutes permitted out-of-court examination of felony suspects and witnesses by justices of the peace, but by 1791 widespread abuse had discredited these procedures. *Id.* at 43-44.

31. *Id.* at 61. "Where *testimonial* statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69 (emphasis added).

32. *Id.* at 65-66.

33. *Id.* at 68.

34. *Id.* Instead, it illustrated the need to strictly interpret the Confrontation Clause by describing Sir Walter Raleigh's 1603 treason trial: Raleigh was convicted and sentenced to death after his alleged accomplice, Lord Cobham, implicated him during a private examination by the Privy Council and in a letter—both of which were read to the jury. Though Raleigh insisted Cobham merely hoped to secure mercy for himself and would recant in court, the Crown never permitted Raleigh to confront his accuser. *Id.* at 44.

35. *Id.* at 75-76 (Rehnquist, C.J., concurring).

36. Some hearsay—including "off-hand, overheard remark[s]"—is definitely non-testimonial. *Id.* at 51 (majority opinion). For instance, "business records or statements in furtherance of a conspiracy" are "by their nature . . . not testimonial." *Id.* at 56. Instead, the Confrontation Clause reflects an "acute concern with a specific type of out-of-court statement"—namely, "testimonial" statements. *Id.* at 51. "Various formulations of [the] core class of 'testimonial' statements exist . . . [but] all share a common nucleus." *Id.* at 51-52. At a minimum, the term encompasses "prior testimony at a preliminary hearing, before a grand jury, or at a former trial," as well as statements made during "police interrogations." *Id.* at 68. The Court also identified "plea allocution[s], showing the existence of a conspiracy" as testimonial statements "the Confrontation Clause was plainly meant to exclude." *Id.* at 63-64. The

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cited authorities reveal three factors relevant to whether a statement is testimonial: formality, government involvement, and a declarant's objective expectations of his statement's future prosecutorial use.

First, citing an 1828 dictionary definition of "testimony"—"[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact"—the Court reasoned "[a]n 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."³⁷ Such "functional equivalent[s]" of live testimony include affidavits, depositions, and confessions.³⁸

These examples point to an alternative or additional consideration: government involvement. Statements procured by government interrogation, whether interrogators are police officers or magistrates, merit particular scrutiny.³⁹ Declining to select from "various definitions of 'interrogation,'" the Court observed only that Sylvia Crawford's statement qualified under any definition.⁴⁰ Further, the interrogator's subjective intent seems to matter: where a government officer obtains the declarant's statement "with an eye toward trial," the statement is more likely to be testimonial.⁴¹ In discussing this factor, the Court cited the work of Professor Akhil Reed Amar.⁴² Amar suggested only extrajudicial statements prepared by the government for trial—"affidavits, depositions, videotapes, and the like"—are testimo-

Court further noted the Sixth Amendment *may* exempt testimonial dying declarations but declined to firmly decide. *Id.* at 56 n.6.

37. *Id.* at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (emphasis added).

38. *Id.* at 52. This reasoning evokes one possible broad definition of "testimonial" statements offered but not endorsed by the Court: "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Id.* at 51-52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

39. *Id.* at 53.

40. *Id.* at 53 n.4.

41. *Id.* at 56 n.7.

42. *Id.* at 61 (citing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 125-31 (1997)). See also Akhil Reed Amar, *Confrontation Clause First Principles, a Reply to Professor Friedman*, 86 GEO. L.J. 1045 (1998) [hereinafter Amar, *Reply*] (responding to criticism of his approach).

nial.⁴³ But he did not extend this umbrella to out-of-court statements between private persons.⁴⁴

On this point, Amar's view opposed another cited by the *Crawford* Court:⁴⁵ according to Professor Friedman, a statement made to another private party is testimonial when the declarant anticipates it will likely be presented at trial.⁴⁶ Yet *Crawford* also appears to favor a variation of Friedman's proposal, quoting but not endorsing a "reasonable declarant" standard advanced in two briefs.⁴⁷

Indeed, the Court failed to endorse any of the "testimonial" formulations it quoted. Hence, lower courts were left to weigh these three concepts—formality, government involvement, and a declarant's objective expectations—with no guidance as to their overall and/or relative weight. A bright-line rule now existed: testimonial hearsay absent unavailability and cross-examination was inadmissible.⁴⁸ But its parameters remained murky.

43. Amar, *Reply*, *supra* note 42, at 1045.

44. *Id.* at 1045-46. Amar explains his reasoning with a simple example:

When Abner tells his best friend Betty—before the government has even appeared on the scene—that he saw Carl rob the liquor store, Abner is not a Confrontation Clause "witness" simply because *Betty* later takes the stand against Carl, and tells the jury what Abner told her. . . . Within the meaning of both *constitutional law*—as evidenced by text, history, and structure—and *common sense*, Betty is the "witness," not Abner.

Id.

45. *Crawford*, 541 U.S. at 61 (citing Friedman, *supra* note 22).

46. Friedman, *supra* note 22, at 1039. For Friedman, "[a] statement made by a person claiming to be the victim of a crime," must almost always be considered testimonial, regardless of to whom it is made. *Id.* at 1042-43. Only statements made before any crime is committed, co-conspirators' statements in furtherance of a criminal enterprise, and statements made in the course of regular business are usually not testimonial. *Id.* at 1043.

47. *See Crawford*, 541 U.S. at 51-52. Crawford contended "'ex-parte in-court testimony or its functional equivalent . . . [including] similar pretrial statements that declarants would reasonably expect to be used prosecutorially'" was testimonial. *Id.* at 51 (quoting Brief for Petitioner 23). An amicus brief pointed to "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id.* at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3).

48. *Id.* at 68-69.

III. *DAVIS v. WASHINGTON* AND ITS EXPRESS IMPLICATIONS

In 2006, the Court returned to testimonial hearsay in *Davis v. Washington*.⁴⁹ This section examines the Court's opinion in these consolidated cases, focusing first on a new test enunciated therein, then on its application to the facts in each case, and finally on two additional elements of the opinion critical to the analysis in Part IV.⁵⁰

A. *The Test for "Testimonial"*

Crawford declared that statements made during "police interrogations" are testimonial⁵¹—but what constitutes a "police interrogation"? The Court offered only that it used the term "in its colloquial, rather than any technical legal sense."⁵² In *Davis*, the Court declined "to produce an exhaustive classification of . . . all conceivable statements in response to police interrogation . . . as either testimonial or nontestimonial," but enunciated a new test to ferret out this distinction:

49. *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006) (addressing both *State v. Davis*, 111 P.3d 844 (Wash. 2005), *cert. granted*, 126 S. Ct. 547 (2005), and *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *cert. granted*, 126 S. Ct. 552 (2005)).

50. As an initial matter, the Court resolved a fundamental question raised by *Crawford*: Does the Confrontation Clause apply only to testimonial hearsay? *Davis*, 126 S. Ct. at 2274. Quoting its previous assessment that "[t]he text of the Confrontation Clause reflects this focus [on testimonial hearsay]," the Court concludes "[a] limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter." *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)) (alteration in original). Thus the Confrontation Clause's scope extends only to testimonial hearsay statements, and for these statements, it mandates either courtroom confrontation or unavailability coupled with a prior opportunity for cross-examination. *Id.* at 2273-74.

51. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). As Lisa Kern Griffin, a UCLA law lecturer, astutely points out, *Davis* qualifies this apparently unequivocal statement when it refers to "determining 'which police interrogations produce testimony.'" Lisa Kern Griffin, *Circling Around the Confrontation Clause: Redefined Reach but Not a Robust Right*, 105 MICH. L. REV. FIRST IMPRESSIONS 16, 18 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/griffin.pdf> (quoting *Davis*, 126 S. Ct. at 2273) (emphasis added by this author).

52. *Crawford*, 541 U.S. at 53 n.4 (citing *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (defining "interrogation" to embrace "not only . . . express questioning, but also . . . any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response"))).

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.⁵³

These latter statements, the Court explained, “are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination.”⁵⁴

Davis thus established a three-part formula. First, police interrogation is a threshold requirement.⁵⁵ Two additional elements then distinguish testimonial from non-testimonial statements: the existence of an ongoing emergency and the interrogation’s primary purpose.⁵⁶

But what qualifies as police interrogation? Only custodial interrogations, or questions posed during a *Terry* stop⁵⁷ or posed to a non-suspect as well? On some level, any question asked by a police officer

53. *Davis*, 126 S. Ct. at 2273-74.

54. *Id.* at 2278. Notably, the Court minimized *Crawford*’s emphasis on formality in this context, asserting that “[i]t imports sufficient formality . . . that lies to [examining police] officers are criminal offenses.” *Id.* at 2278 n.5. Responding to Justice Thomas, who dissented in *Hammon*, the Court did “not dispute that formality is indeed essential to testimonial utterance” but—rather surprisingly—Justice Scalia reasoned that “[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.” *Id.* Professor Friedman detects some continued uncertainty in these pronouncements but concludes “if [the Court] continues to speak in terms of formality, the standard will be a very loose one.” Richard D. Friedman, “*We Really (For the Most Part) Mean It!*,” 105 MICH. L. REV. FIRST IMPRESSIONS 1, 4 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/friedman.pdf>; *see also* Robert P. Mosteller, *Davis v. Washington and Hammon v. Indiana: Beating Expectations*, 105 MICH. L. REV. FIRST IMPRESSIONS 6, 9 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/mosteller.pdf> (concurring that formality plays a minimal role under *Davis*).

55. *Davis*, 126 S. Ct. at 2273-74.

56. *Id.*

57. *See Terry v. Ohio*, 392 U.S. 1 (1968) (holding that momentary seizure by a police officer on reasonable suspicion of imminent, violent criminal activity based on personal observations was not unreasonable and thus did not violate the Fourth Amendment).

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in the course of his duties is interrogation, or another questioner may act as his proxy. So, how far should *Davis* extend?

Second, when is an emergency “ongoing”?⁵⁸ Must the declarant be at risk, or is danger to others or to the general public sufficient? Does imminent and probable danger suffice?

Third, whose purpose should a court examine—the declarant’s or the interrogator’s? This third element has inspired the most debate. Alone in a partial dissent, Justice Thomas criticized the primary purpose inquiry, calling it “an exercise in fiction.”⁵⁹ He observed that “[i]n many, if not most, cases where police respond to a report of a crime, . . . the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence.”⁶⁰ The test’s hindsight judgment—one “not necessarily tethered to the actual purpose for which the police performed the interrogation”—will thus be inherently arbitrary.⁶¹ Justice Thomas logically assumed the primary purpose inquiry focuses on the police interrogator.⁶² But in a footnote, the Court instructed that even in an

58. See Friedman, *supra* note 54, at 4 (posing this same query).

59. *Davis*, 126 S. Ct. at 2283 (Thomas, J., concurring in the judgment in part and dissenting in part); see also Joan S. Meier, *Davis/Hammon, Domestic Violence, and the Supreme Court: The Case for Cautious Optimism*, 105 MICH. L. REV. FIRST IMPRESSIONS 22, 25 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/meier.pdf> (dismissing *Davis*’s primary purpose test as “a legal fiction”).

60. *Davis*, 126 S. Ct. at 2283. For additional critiques of the primary purpose test that echo this concern, see Friedman, *supra* note 54, at 3 and Tom Lininger, *Davis and Hammon: A Step Forward, or a Step Back?*, 105 MICH. L. REV. FIRST IMPRESSIONS 28, 29 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/lininger.pdf>. But see Memorandum from the Public Defender Service of the District of Columbia’s Special Litigation Division and Division Law Clerk Dawn Davison to Professor Friedman and the Confrontation Blog 1 (Aug. 8, 2005), available at <http://www-personal.umich.edu/%7Eerdfrdman/pdsgvr.pdf> [hereinafter Memorandum] (“[*Davis*] strengthens the confrontation guarantee by holding that reports of criminal activity made to law enforcement officers and their agents may only be deemed nontestimonial where . . . the statements are solely directed at resolving [the] emergency situation.”).

61. *Davis*, 126 S. Ct. at 2284.

62. *Id.* at 2283; see also Lininger, *supra* note 60, at 29 (“The test’s focus [is] on the intent of the police rather than the intent of the declarant.”).

interrogation, lower courts should focus on the declarant's statements, not the interrogator's questions.⁶³

Early commentators have interpreted these somewhat contradictory indications in various ways. Professor Robert Mosteller believes choice of perspective will not normally dictate the result because "[w]hen the objectively discernable purpose of the police is to establish or prove a past fact potentially relevant to criminal prosecution, that should be readily observable to the speaker as well as the police."⁶⁴ Professor Tom Lininger predicts that a new focus on the interrogator's objective will prevent investigators from circumventing the confrontation requirement by manipulating witnesses' perceptions.⁶⁵

By contrast, Andrew Fine, attorney for The Legal Aid Society of New York, believes any focus on the interrogator's purpose "rather than the motive or reasonable expectation of the declarant, whose status as a 'witness' under the Confrontation Clause is at issue . . . creates the potential for police manipulation."⁶⁶ But Fine reads certain language in the opinion to strongly suggest "that the declarant's reasonable expectation or motive may also be important."⁶⁷

63. *Davis*, 126 S. Ct. at 2274 n.1 (majority opinion); see Friedman, *supra* note 54, at 3 ("Why does the purpose of the interrogation matter" when the Court later cautions "'it is in the final analysis the declarant's statements, not the interrogator's questions,' that are decisive under the Confrontation Clause?").

64. Mosteller, *supra* note 54, at 9.

65. Lininger, *supra* note 60, at 30 (new focus will deter police from questioning "declarants for investigative purposes . . . when [they] are so distraught that they are not contemplating prosecutorial use of their statements" or "contriv[ing] circumstances in which a plain-clothes interlocutor speaks with a child for investigative purposes while the child . . . may not believe that he or she is providing information for prosecutorial use").

66. Andrew C. Fine, *Refining Crawford: The Confrontation Clause after Davis v. Washington and Hammon v. Indiana*, 105 MICH. L. REV. FIRST IMPRESSIONS 11, 12 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/fine.pdf> (emphasis added). Fine suggests "it will be difficult for courts to ignore an officer's claim that he believed the emergency to be ongoing when he questioned the declarant," *id.* at 12, and unscrupulous officers may "question victims of domestic violence before ensuring their safety" when they fear the declarant "may subsequently become reluctant to cooperate," *id.* at 13.

67. *Id.* In particular, Fine cites Justice Scalia's characterization of "the 911 call in *Davis* [as] 'plainly a call for help'" in which the speaker "'simply was not acting as a witness,' or 'testifying.'" *Id.* (quoting *Davis*, 126 S. Ct. at 2276-77). Two footnotes provide further evidence, declaring "'it is in the final analysis the declarant's

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Standing alone, the Court's new test thus raises as many questions as it answers, but its application to the facts in *Davis* and *Hammon* provides greater clarity.

B. *Davis*

A Washington jury convicted *Davis* of violating a domestic no-contact order after the trial judge admitted the victim's statements to a 911 operator as excited utterances⁶⁸ over *Davis*'s *Crawford*-based objection.⁶⁹ The victim called 911 but immediately hung up, so the operator reversed the call.⁷⁰ Responding to the operator's specific inquiries, the victim stated *Davis* was "'jumpin' on [her] again'" and, critically, provided his full name.⁷¹ *Davis* fled, and the operator then posed a series of structured questions concerning his identity and details of the assault.⁷² Because the victim disappeared before trial and no one else could identify *Davis* as her assailant, the judge admitted an un-redacted recording of the 911 call.⁷³ The Washington Supreme Court affirmed, "concluding that the portion of the 911 conversation in which [the victim] identified *Davis* was not testimonial," and that if other portions were, their admission was harmless error.⁷⁴

On review, the U.S. Supreme Court classified 911 operators, for purposes of its opinion, as "agents of law enforcement when they conduct interrogations of 911 callers."⁷⁵ Applying its new test, however, the Court classified responses to operators' initial questions as non-testimonial because they are "ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circum-

statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate,' and that 'police conduct' cannot 'govern the Confrontation Clause.'" *Id.* (quoting *Davis*, 126 S. Ct. at 2274 n.1, 2279 n.6).

68. See FED. R. EVID. 803(2) (providing that a hearsay "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible).

69. *Davis*, 126 S. Ct. at 2271; *State v. Davis*, 111 P.3d 844, 847 (Wash. 2005).

70. *Davis*, 126 S. Ct. at 2270.

71. *Id.* at 2271 (quoting the record).

72. *Id.*

73. *Id.*

74. *Id.* at 2271-72.

75. *Id.* at 2274 n.2.

stances requiring police assistance.”⁷⁶ But, if an operator persists in asking substantive questions after obtaining information necessary to resolve the emergency situation or after the exigency has ended, a caller’s subsequent responses *might be testimonial*.⁷⁷ When admitting 911 call recordings, lower courts must “redact or exclude the portions of any statement that have become testimonial” due to such a shift in primary purpose.⁷⁸

Continuing to the test’s ongoing emergency element, the Court indicated the operator’s questions in the instant case had straddled this line. Unlike Sylvia Crawford, the victim here “was speaking about events *as they were actually happening*, rather than ‘describ[ing] past events’”⁷⁹—until Davis fled the scene, that is. The Court recognized his departure may have triggered a critical shift in purpose.⁸⁰ Thereafter, “[i]t could readily be maintained that . . . [her] statements were testimonial.”⁸¹ But the Court also emphasized formality, contrasting the calmly executed “station house” interview in *Crawford* with the “frantic” phone dialogue in *Davis*.⁸² And it observed that unlike Sylvia Crawford, Davis’s victim spoke in the midst of “an ongoing emergency” involving a “bona fide physical threat.”⁸³ The 911 operator’s

76. *Id.* at 2276 (alteration in original).

77. *Id.* at 2277.

78. *Id.* The majority drew a parallel to Fifth Amendment jurisprudence: “Just as . . . ‘police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect,’” lower courts should be able to pinpoint when responses to police questions become testimonial. *Id.* Notably, the Court seemed to rest this dividing line on the nature and timing of *the operator’s questions*. See *id.* The operator, as investigator, directs the course of the interview. If the operator asks more than is necessary to resolve the emergency, responses are testimonial because the purpose of the exchange simply cannot be to resolve the emergency.

79. *Id.* at 2276 (quoting *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion)) (alteration in original).

80. *Id.* at 2277 (“[A]fter the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises).”).

81. *Id.*

82. *Id.*

83. *Id.* at 2276-77.

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initial questions, and the victim's answers to them, were needed to resolve that emergency.⁸⁴

Commentators have sharply criticized this conclusion. Professor Friedman asks, "[W]hy did the setting of *Davis* qualify as an 'ongoing emergency,' given that by the time of the 911 call the alleged assailant was leaving the scene . . . ?"⁸⁵ Professor Joan Meier contends *Davis*'s name was "only minimally relevant to providing emergency assistance" and disagrees with the Court's reasoning "that it is necessary to determine if the accused is a 'violent felon,'" a fact she believes should be obvious "from the 911 call itself."⁸⁶ The Court's analysis of *Hammon*, the companion case, did not answer these criticisms.

C. Hammon

Police officers responded to a reported domestic dispute at the Hammons' home and found a distraught Amy Hammon on the porch.⁸⁷ Though she initially voiced no complaint, she permitted the officers to enter the house, where they saw evidence of a recent physical altercation.⁸⁸ Over Mr. Hammon's strenuous objections, the officers sequestered the couple in separate but adjacent rooms for questioning, at which point Amy accused Hammon of battery and signed an affidavit at the interviewing officer's request.⁸⁹ Amy did not respond to a subpoena to testify at Hammon's domestic battery trial, so the judge admitted both the interviewing officer's testimony about Amy's statements to him and the affidavit, as an excited utterance and present sense impression, respectively.⁹⁰ When Hammon appealed his

84. *Id.* at 2277.

85. Friedman, *supra* note 54, at 4; *see also* Griffin, *supra* note 51, at 17 (interpreting this apparent factual discrepancy as evidence that the Court defines an ongoing emergency to include "[a]n unspecified amount of aftermath questioning").

86. Meier, *supra* note 59, at 25 (quoting *Davis*, 126 S. Ct. at 2276).

87. *Davis*, 126 S. Ct. at 2272.

88. *Id.* The officers testified they observed a gas heating unit, surrounded by shards of shattered glass, emitting flames from its broken cover. *Id.*

89. *Id.*

90. *Id.* at 2272-73; *see* FED. R. EVID. 803(1) (a hearsay statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is admissible as a present sense impression); FED. R. EVID. 803(2) (a hearsay "statement relating to a startling event or

conviction, the Indiana Supreme Court upheld the admission of the officer's testimony and concluded admission of the affidavit, which it found testimonial, was harmless error.⁹¹

Professor Friedman had predicted the Court would find both Amy's statements *and* the affidavit testimonial.⁹² "Otherwise, . . . an accuser could create evidence for the prosecution—in other words, testify—simply by speaking to an officer in her living room, without any need to come to court, take an oath, face the accused, or submit to cross-examination."⁹³

The U.S. Supreme Court validated Friedman's prediction.⁹⁴ Applying the new test, it determined *both* admissions were erroneous by comparing the facts in *Crawford* and *Davis*, and zeroing in on the "ongoing emergency" element.⁹⁵ Like the interrogation in *Crawford*—and unlike the *Davis* 911 operator's initial questions—Amy's interrogation focused on *past* events:

condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible as an excited utterance).

91. *Davis*, 126 S. Ct. at 2273.

92. Friedman, *supra* note 54, at 2. Friedman obtained Hammon's permission to petition for certiorari because he believed the case was "a perfect vehicle for the United States Supreme Court to refine the meaning of 'testimonial.'" *Id.* His assessment was, of course, correct. *See Davis*, 126 S. Ct. at 2278. *Davis*'s outcome defied his forecasting ability, however. Friedman deemed the 911 call even less likely to pass constitutional muster:

[*Davis*'s victim] made an accusation of a crime to a government agent who was a direct conduit to the police, and she did so in circumstances that would lead any reasonable person to understand that she was invoking the power of the state against the accused, since much of the conversation concerned a restraining order [against] *Davis*. . . . If she or the 911 operator had been afraid that *Davis* would return immediately to the house, then the obvious response would have been to send police there. But instead the operator told her that the police would *first* find *Davis* and then come to *talk* to her. In short, a reasonable person would understand that [the victim] was providing information that would be used immediately to enforce the restraining order and might well be used later for criminal prosecution.

Friedman, *supra* note 54, at 2.

93. Friedman, *supra* note 54, at 2.

94. *Davis*, 126 S. Ct. at 2278.

95. *Id.*

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There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything. When the officers first arrived, Amy told them things were fine, and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) “what is happening,” but rather “what happened.”⁹⁶

Addressing Amy’s verbal allegations, the Court recognized that responding officers’ *initial* inquiries—those necessary to assess a potentially dangerous situation—may *often* elicit non-testimonial responses.⁹⁷ But where responses are neither “a cry for help nor the provision of information enabling officers immediately to end a threatening situation,” they are testimonial.⁹⁸

Professor Meier disputes the Court’s conclusions.⁹⁹ She contends Amy did face an ongoing emergency, citing Hammon’s attempt “to control and intimidate” his wife while the officer questioned her, and she warns that even “when a single [domestic violence] incident is ‘over,’ the danger is still ongoing.”¹⁰⁰ Yet the Court was not wholly insensitive to these concerns.

96. *Id.* (citations omitted). Responding to *Indiana* and the United States, which argued as *amicus curiae* that *Davis* and *Hammon* should be resolved similarly, the Court emphasized several distinctions between the cases: *Davis*’s victim was alone with and in immediate danger from *Davis* when she spoke, while *Hammon*’s wife was protected by police; *Davis*’s victim spoke in the present tense and sought aid, while *Hammon*’s wife narrated past events after danger to her had subsided; and *Hammon*’s wife executed an affidavit at the interrogating officer’s request for the express purpose of establishing what had previously transpired. *Id.* at 2279.

97. *Id.*

98. *Id.* at 2278-79. Buttressing its conclusion, the Court again turned to formality as an indicator of testimonial statements, noting the custodial setting of *Sylvia Crawford*’s interrogation was not dispositive to her statement’s testimonial character. *Id.* at 2278. Amy’s interrogation “was conducted in a separate room, away from her husband (who tried to intervene) with the officer receiving her replies for use in his ‘investigation,’” and was thus more similar to the station house interview in *Crawford* than to the 911 call in *Davis*. *Id.*

99. Meier, *supra* note 59, at 26.

100. *Id.*

D. Forfeiture by Wrongdoing

Both *Davis* and *Hammon* involved domestic violence, and the Court acknowledged that victims in such cases are “notoriously susceptible to intimidation or coercion” designed to deter them from testifying.¹⁰¹ It brushed aside suggestions that prosecution of such crimes necessitates “greater flexibility in the use of testimonial evidence,”¹⁰² noting that constitutional guarantees are not subordinate to the goal of punishing the guilty.¹⁰³ “But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.”¹⁰⁴ In *Crawford*, the Court reasoned that “the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds” and does not purport to replace cross-examination as a means of assessing reliability.¹⁰⁵ *Davis* is more to the point: “[O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”¹⁰⁶ Expressly taking “no position on the standards necessary to demonstrate such forfeiture,” the Court noted federal courts frequently apply the preponderance-of-the-evidence standard, and some courts admit hearsay at forfeiture hearings.¹⁰⁷

Though critical of *Hammon*’s result, Professor Meier applauds the Court’s willingness to balance *Crawford*’s “absolute version of the confrontation right” against “the dark realities with which domestic violence victims and their advocates contend every day.”¹⁰⁸ Meier

101. *Davis*, 126 S. Ct. at 2279-80.

102. *Id.* at 2279.

103. *Id.* at 2280.

104. *Id.*

105. *Crawford v. Washington*, 541 U.S. 36, 62 (2004); see FED. R. EVID. 804(6).

106. *Davis*, 126 S. Ct. at 2280.

107. *Id.*

108. Meier, *supra* note 59, at 23-24. Indeed, the Court’s comments radically expand *Crawford*’s oblique, approving reference to the forfeiture rule. According to Professor Myrna Raeder, the *Crawford* Court’s citation of *United States v. Reynolds* indicated “forfeiture hearsay exceptions [were] generally limited to witness tampering.” Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOKLYN L. REV. 311, 362 (2005).

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suggests the Court “effectively invites lower courts to utilize liberal burdens of proof and evidentiary standards in making forfeiture determinations,” thus ensuring hearsay’s continued admissibility in victimless prosecutions.¹⁰⁹ Indeed, because the forfeiture rule applies to *all* hearsay statements, including those made to private persons, its use in domestic violence and other victimless prosecutions will almost certainly increase.

E. *Statements Outside an Interrogation*

In a footnote, the *Davis* Court cautioned that the definitions of testimonial and non-testimonial hearsay it had provided were not all-encompassing, but rather were tailored to their factual context. Indeed, statements made outside interrogation may be testimonial because “[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed questioning.”¹¹⁰ According to Professor Mosteller, this suggests almost *any* statement “made to known government investigative agents” is testimonial.¹¹¹

Perhaps more significantly, however, the Court also indicated statements to private parties could be testimonial—that government involvement is no more necessary to a testimonial statement than interrogation. Responding to an argument from *Davis*, the Court cited a 1779 English case, *King v. Brasier*, in which the judges reversed *Brasier*’s conviction because testimonial hearsay had been admitted.¹¹² There, a child sexual assault victim told her mother about the assault “immediately on . . . coming home.”¹¹³ She later described the perpetrator’s residence and visually identified him, but although her mother testified at trial to the child’s description of the assault, the child herself “was not sworn or produced as a witness.”¹¹⁴ Because “no testi-

109. Meier, *supra* note 59, at 24.

110. *Davis*, 126 S. Ct. at 2274 n.1.

111. Mosteller, *supra* note 54, at 6, 8; *cf.* Fine, *supra* note 66, at 14 (predicting “the classification of most statements elicited by police at the scene of a domestic disturbance as testimonial”).

112. *Davis*, 126 S. Ct. at 2277; *King v. Brasier*, 168 Eng. Rep. 202, 202-03 (1779).

113. *Brasier*, 168 Eng. Rep. at 202.

114. *Id.*

mony whatever can be legally received except upon oath," these statements' admission was error.¹¹⁵

Andrew Fine believes the Court's approving reference to this case suggests "statements made to . . . private citizens *may* be testimonial."¹¹⁶ This Comment contends many such statements *are* testimonial—either because the listener is a police agent, or simply because application of the three *Crawford* factors inevitably leads to this conclusion. Part IV considers only the former situation. Supportively, one commentator has suggested the *Davis* test's "logic would seem to apply as well to statements whose primary purpose is to seek medical treatment, even where medical personnel are asking questions that also gather investigative details."¹¹⁷ Yet when medical personnel ask such questions, they may function as police agents, and for responses

115. *Id.* at 202-03.

116. Fine, *supra* note 66, at 13 (emphasis added); *see also* Friedman, *supra* note 54, at 5 (observing that "neither the immediacy of the statement, the youth of the declarant, nor the private status of the audience remove[d] the statement from the protections of the confrontation right").

117. Griffin, *supra* note 51, at 18. *But cf.* Phillips, *supra* note 12. Writing for prosecutors, Phillips argues that health care providers should only be treated as government agents when their questions serve *no* diagnosis or treatment function or are dictated by law enforcement. *Id.* at 21, 25-26. She asserts that *Davis*'s primary purpose test applies only to law enforcement but considers governmental agency relevant to the more general *Crawford* inquiry. *Id.* at 19. Citing post-*Crawford* cases, she suggests that when "a health care provider . . . is primarily or exclusively working . . . with law enforcement for purposes of gathering evidence of criminal activity, and . . . does not engage in diagnosis or treatment of the victim, then the statements made by the victim during the examination will likely be deemed testimonial." *Id.* at 21. Phillips offers several prescriptions for prosecutors who seek to introduce victims' hearsay statements through medical providers' testimony. *Id.* at 25-27. Though she believes the primary purpose test applies only to law enforcement, she warns courts may still apply it to health care providers. *Id.* at 25. Where this results in exclusion of victims' statements as testimonial, Phillips urges prosecutors to restructure health care providers' protocols to better emphasize their treatment function, to prepare providers to explain the medical purpose of their questions when they testify, and to direct providers to refrain from discussing criminal prosecution or court appearances with victims, even when victims raise these issues themselves. *Id.* at 25-26. In her conclusion, Phillips specifically warns prosecutors against two situations: (1) where police investigators ask health care providers to pose certain questions to the victim "in order to develop the investigation" and (2) where law enforcement officers are present in the medical examination room. *Id.* at 27.

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to be non-testimonial, they must be primarily directed to resolving an ongoing emergency.¹¹⁸

IV. *DAVIS v. WASHINGTON* AND DOCTORS AS DEPUTIES

Davis's impact on statements to health care providers is less dramatic than its impact on statements to police officers—but it is undeniable. This Comment examines this impact through the lens of the medical treatment exception.¹¹⁹ Under the Federal Rules of Evidence, medical treatment statements' subject matter may include only "medical history"; "past or present symptoms, pain, or sensations"; and "the inception or general character of [their] cause or external source."¹²⁰ Further, such statements are admissible only if they reasonably pertain to diagnosis or treatment.¹²¹ This exception comports with the *Roberts* rationale for admitting hearsay: a patient knows lying to his doctor may endanger his life or health, so his statements are likely to be truthful.¹²² But after *Crawford* and *Davis*, this inherent credibility no longer suffices.¹²³

118. *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006).

119. Courts do admit statements to health care providers under other hearsay exceptions. *See, e.g.*, *Marshall v. State*, 121 So. 72, 73-74 (Ala. 1929) (dying declaration); *State v. Johnson*, 905 P.2d 1002, 1012-13 (Ariz. Ct. App. 1995) (excited utterance); *People v. Tilley*, 104 N.E.2d 499, 500 (Ill. 1952) (dying declaration); *Moore v. State*, 338 A.2d 344, 346 (Md. Ct. Spec. App. 1975) (excited utterance). But the medical treatment exception lends itself to this Comment's overall inquiry because, like the *Davis* test, it considers a statement's "purpose." *See Davis*, 126 S. Ct. at 2273-74; FED. R. EVID. 803(4).

120. FED. R. EVID. 803(4).

121. *Id.*

122. *See White v. Illinois*, 502 U.S. 346, 356 (1992) ("[A] statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony."). Under *Roberts*, hearsay statements were admissible so long as they bore "adequate 'indicia of reliability,'" and a statement that "[fell] within a firmly rooted hearsay exception" satisfied this requirement. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Dicta in *White v. Illinois* explained the medical treatment exception was so rooted due to its recognition in the Federal Rules of Evidence and wide acceptance among the states. *White*, 502 U.S. at 355 n.8. Hence, the Confrontation Clause did not bar admission of *any* statement within the scope of Rule 803(4).

123. *See Crawford v. Washington*, 541 U.S. 36, 62 (2004) ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury

This Comment argues that under *Davis*, courts should treat health care providers as agents of the police and their interactions with the declarant as police interrogation in many circumstances. If so, unless the declarant's medical condition constitutes an ongoing emergency, his or her statements may be testimonial. The determination ultimately turns on the interrogation's primary purpose, necessitating close factual inquiry.

This Part applies *Davis* to medical treatment statements in three stages, focusing first on the threshold issue—whether an interaction should be characterized as “police interrogation”—then on each of the two elements in turn. Several post-*Davis* cases in which the Court addressed certiorari petitions inform this analysis.¹²⁴

A. Police Interrogation

Like *Crawford*, *Davis* deliberately declined to define “police interrogation.”¹²⁵ *Crawford* offered only that it used the term “in its colloquial, rather than any technical legal, sense”¹²⁶ but cited an earlier case in which “interrogation” embraced “not only . . . express ques-

trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”); *Davis*, 126 S. Ct. at 2273-74.

124. In some (the GVR cases), the Court issued orders granting certiorari, vacating the lower courts' decisions, and remanding for reconsideration in light of *Davis*. See *infra* note 195. The Court has explained the purpose and rationale for GVR orders as follows:

Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Lawrence v. Chater, 516 U.S. 163, 167 (1996) (emphasis added). Hence, the orders indicate the Court believes *Davis* compels a different result in these cases. In others, however, it merely denied certiorari without further explanation. See *infra* note 208. Justice Oliver Wendell Holmes himself cautioned that “denial of a writ of certiorari imports no expression of opinion on the merits of the case.” *United States v. Carver*, 260 U.S. 482, 490 (1923). But these particular denials' context permits some tentative conclusions.

125. *Davis*, 126 S. Ct. at 2273.

126. *Crawford*, 541 U.S. at 53 n.4.

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tioning, but also . . . any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response.”¹²⁷ Yet *Davis* went further, treating a 911 operator as a police agent and opening the door to characterizing other persons as agents if they perform similar investigatory functions.¹²⁸ Since *Crawford*, and even more so since *Davis*, commentators have speculated that health care professionals might fall within this class.¹²⁹

This Comment contends the Court referred to agency, like interrogation, in its colloquial sense.¹³⁰ For Confrontation Clause purposes, courts should classify as police interrogators all persons who act on behalf of or in place of law enforcement by intentionally investigating crime and/or gathering evidence. This includes (1) medical experts consulted to prepare for trial, (2) persons charged with a statutory duty to report domestic and/or child abuse, (3) Sexual Assault Nurse Examiners, and (4) persons connected with law enforcement, either through police referral of the victim or knowing aid to police investigation.

127. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

128. *Davis*, 126 S. Ct. at 2274 n.2.

129. See Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511 (2005). Professor Mosteller cites “private organizations that investigate suspected child abuse or support domestic violence victims” and—“when the government has substantial involvement by requesting the information or through enforcement of reporting requirements, interrogation systems, or physical presence”—other private parties. *Id.* at 574. But he later suggests *Crawford*’s failure to specifically address the medical treatment statement at issue in *White v. Illinois* implies these may be non-testimonial. *Id.* at 600. For post-*Davis* musings, see Mosteller, *supra* note 54, at 10 (“Whether statements to doctors who have some treatment function will be virtually automatically excluded when they clearly also have a prosecution function must be answered.”). For earlier comments, see, for example, Matthew M. Staab, Note, *Child’s Play: Avoiding the Pitfalls of Crawford v. Washington in Child Abuse Prosecution*, 108 W. VA. L. REV. 501, 527 (2005) (stating that when “the medical examination of [a] child occur[s] during the course of a police investigative process,” most children referred to the physician by police “would believe that statements they made to a treating doctor would be used prosecutorially”) and Ariana J. Torchin, Note, *A Multidimensional Framework for the Analysis of Testimonial Hearsay under Crawford v. Washington*, 94 GEO. L.J. 581, 615 (2006) (stating that “an agency relationship between a medical doctor and law enforcement” could render a patient’s statements testimonial).

130. Cf. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2002) (accepted legal definition of agency).

1. *Experts Consulted to Prepare for Trial*

Under the medical treatment exception, statements made to a health care provider whom the victim consults specifically to allow the provider to testify at trial are admissible, even if the provider works for the state or regularly with law enforcement.¹³¹ This sharp divergence from conventional hearsay doctrine is anathema to *Crawford*'s reading of the Confrontation Clause.¹³²

Though *Crawford*'s precise parameters were uncertain, the Court indicated quite strongly that statements prepared in anticipation of trial fell within the "core class of 'testimonial' statements."¹³³ Commentators generally concurred that statements to medical experts consulted merely for *diagnosis*—as distinguished from *treatment*—were most problematic. For example, Professor Mosteller suggested that "[s]tatements made after treatment [has] been completed, particularly for a second opinion or a diagnosis-only purpose, should be carefully screened under the Confrontation Clause."¹³⁴ Referring to multidisciplinary investigative teams, which blurred the line between diagnosis and treatment, Professor Raeder observed that "*Crawford* appears to undo" this investigative "best practice[]" involving cooperation among "social workers, physicians, therapists, prosecutors, judges,

131. FED. R. EVID. 803(4) advisory committee's note. "[T]he rule abolished the distinction between the doctor who is consulted for the purpose of treatment and an examination for the purpose of diagnosis only; the latter usually refers to a doctor who is consulted only in order to testify as a witness." *United States v. Iron Shell*, 633 F.2d 77, 83 (8th Cir. 1980); *see also* *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993) (finding the trial court properly admitted victim's statements to the psychologist who examined victim in anticipation of providing expert testimony); *Morgan v. Foretich*, 846 F.2d 941, 948, 950 (4th Cir. 1988) (holding victim's hearsay statements to her doctor, who was "consulted in order to testify as a witness rather than for treatment," were admissible).

132. The Advisory Committee specifically endorsed the change, explaining it as a nod to practical realities: "While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries." FED. R. EVID. 803(4) advisory committee's note.

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

134. Mosteller, *supra* note 129, at 602 ("Unless . . . the Confrontation Clause can only be violated if the statement is received by a government agent, statements in [this] category should now be excluded under *Crawford*.").

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and police officers.”¹³⁵ In these situations, when statements are prepared with trial in mind, *Crawford* alone should bar their admission.

Yet some courts disagreed. For example, in *In re T.T.*, an Illinois court found statements to a pediatrician were not testimonial.¹³⁶ Acting on a hotline tip, a Department of Children and Family Services investigator interviewed the child victim.¹³⁷ The court found “child protective services investigators [were not] a prosecutorial arm of the State simply by virtue of their [investigatory] mandate.”¹³⁸ But because this investigator intended to assist the prosecution, she functioned as its agent.¹³⁹ She referred the victim to the physician based on her account of sexual abuse, but the court held testimonial only the child’s statements to the physician identifying the defendant as the perpetrator.¹⁴⁰ The doctor, who led her hospital’s child abuse protection unit, “had previously testified as an expert witness in child abuse cases.”¹⁴¹ She examined the victim for diagnostic purposes “six months after the alleged assault” on a referral from an agent of the prosecution.¹⁴² Her purpose—trial preparation—should have been

135. Raeder, *supra* note 108, at 381 (quoting OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, LAW ENFORCEMENT RESPONSE TO CHILD ABUSE 3 (reprint 2001) (1997)); *see also* Mosteller, *supra* note 129, at 602 (“If testimonial statements are broadly defined, . . . statements received by doctors who are part of investigative teams after the case has been identified as suspect should be considered testimonial . . .”). *But see* Phillips, *supra* note 12, at 21 (concluding that a victim’s statements to a health care provider “who is primarily or exclusively working with a governmental [multidisciplinary team]” are likely testimonial only where the “provider does not engage in diagnosis or treatment of the victim”).

136. *In re T.T.*, 815 N.E.2d 789, 794, 803 (Ill. App. Ct. 2004), *followed by In re Rolandis G.*, 817 N.E.2d 183, 188 (Ill. App. Ct. 2004) (finding that statements obtained by a child advocacy center worker who interviewed a victim while an officer watched through a two-way mirror were testimonial).

137. *In re T.T.*, 815 N.E.2d at 793.

138. *Id.* at 801. State law required the investigator to refer reports of “alleged child sexual abuse to the police and State’s Attorney for consideration of a criminal investigation” and authorized her to assist with these efforts. *Id.*

139. *Id.* at 801; *see also* State v. Mack, 101 P.3d 349, 352 (Or. 2004) (finding that a victim’s statements to a Department of Human Services caseworker were testimonial because she “was serving as a proxy for the police”).

140. *In re T.T.*, 815 N.E.2d at 803.

141. *Id.*

142. *Id.*

clear, but the court refused to hold she had “constructively acted as the government’s agent in interrogating [the victim].”¹⁴³

Under *Davis*, such persons are unquestionably police agents. When an expert interviews a victim to prepare reports or testimony for trial, he is no less an agent of the prosecution than the officer who interviews the victim at the crime scene. When he repeats the victim’s words at trial, the victim testifies through him.¹⁴⁴ If testimonial evidence can be admitted through this “middleman” mechanism, then the Confrontation Clause’s renewed vigor post-*Crawford* is a sham. By characterizing experts consulted for trial preparation as police agents, and subjecting their interactions with victims to *Davis*’s test, courts can ensure a defendant’s right to confront those who bear witness against him is not circumvented so easily.

2. Mandatory Reporters

In her 2005 exploration of *Crawford*’s impact on domestic violence and child abuse prosecutions, Professor Myrna Raeder speculated that “[t]o the extent that the doctor has a reporting duty in domestic violence cases, the argument can be made that the statements are testimonial . . . because the doctor is an agent of the police”¹⁴⁵ Under *Davis*, this argument gains strength.

143. *Id.*; see also *People v. Vigil*, 127 P.3d 916, 920, 923-24, 926 (Colo. 2006) (finding that an interview of a victim by a doctor, who “was a member of a child protection team” and who spoke to the police prior to examining the victim, was not “functionally equivalent to formal police interrogation . . . absent a more direct and controlling police presence” because he testified he questioned the victim to ascertain his injuries).

144. See, e.g., *State v. Pitt*, 147 P.3d 940, 945 (Or. Ct. App. 2006) (finding that children’s statements to a Child Advocacy Center worker during an interview arranged and videotaped by police to prepare for trial were testimonial).

145. Raeder, *supra* note 108, at 350. “[W]hen the physician is not part of a prosecutorial forensic team or otherwise motivated to obtain an accusatory statement,” Professor Raeder believes “the nature of the statement,” rather than the existence of a reporting statute, should determine whether that statement is testimonial. *Id.* at 379; cf. Phillips, *supra* note 12, at 26 (suggesting that a health care provider’s duty to report child abuse should render a victim’s identification of the abuser *non*-testimonial because Child Protective Services will need this information in order to act appropriately on the report).

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Thirty-five states and the District of Columbia require reports by medical practitioners who treat specified injuries.¹⁴⁶ Although few states' statutes specifically target domestic violence or abuse, many mandate reporting for intentionally inflicted injuries or injuries resulting from criminal activity, both of which may apply in domestic violence cases.¹⁴⁷ Reports are typically made to local law enforcement.¹⁴⁸ As an example, California's statute applies to any public or private "health practitioner . . . who, in his or her professional capacity or within the scope of his or her employment, provides medical services for a physical condition to a patient whom he or she knows or reasonably suspects" suffers from injuries inflicted by spouse or cohabitant abuse.¹⁴⁹ Failure to comply with the statutory mandate is a misdemeanor punishable by up to six months' imprisonment and/or a \$1,000 fine.¹⁵⁰

Similarly, all fifty states and the District of Columbia have enacted statutes mandating reports of child maltreatment.¹⁵¹ Nearly twenty jurisdictions "require *all* citizens to report suspected abuse or neglect," but most impose the duty only on certain persons.¹⁵² Health care providers are almost always covered, and many states deny the physician-patient privilege in this context.¹⁵³ The duty to report typically arises when the reporter "in his or her official capacity, *suspects or has reasons to believe* that a child has been abused or neglected."¹⁵⁴ Though most states permit anonymous reporting, approximately twenty jurisdictions "require mandatory reporters to provide their

146. See NAT'L HEALTH RES. CTR. ON DOMESTIC VIOLENCE, MANDATORY REPORTING OF DOMESTIC VIOLENCE BY HEALTH CARE PROVIDERS app. IX (2004), available at <http://www.endabuse.org/health/mandatoryreporting/tables1.pdf>.

147. *Id.*

148. See, e.g., CAL. PENAL CODE § 11160(b) (West 2000 & Supp. 2007); COLO. REV. STAT. § 12-36-135 (2006).

149. CAL. PENAL CODE § 11160 (West 2000 & Supp. 2007).

150. CAL. PENAL CODE § 11162 (West 2000 & Supp. 2007).

151. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (2005), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf.

152. *Id.* at 1-2, 3 (emphasis added).

153. *Id.* at 2-3.

154. *Id.* at 3.

names and contact information.”¹⁵⁵ Typically, states designate child protective services agencies to receive and investigate reports, but some also direct reports to law enforcement.¹⁵⁶ States enforce these duties through penalties variable in their severity; though Massachusetts, for example, prescribes a fine of up to \$1000,¹⁵⁷ in California, failure to report is a misdemeanor punishable by up to six months’ imprisonment and/or a \$1000 fine.¹⁵⁸

These statutes, for both domestic violence and child abuse, effectively deputize all medical practitioners. A legal agency would require designated reporters’ assent,¹⁵⁹ but such formalism is unnecessary to create police interrogation in a merely “colloquial” sense. Concededly, reporting statutes’ notional purposes are salutary and prophylactic as well as punitive—mandatory child abuse reporting seeks to protect vulnerable children from further harm.¹⁶⁰ This is certainly relevant to *Davis*’s third element, the primary purpose determination. But where reports must be made to law enforcement, the legislature has conscripted reporters to aid police.¹⁶¹ Indeed, failure to perform this duty

155. *Id.* at 4.

156. Child Welfare Info. Gateway, U.S. Dep’t of Health & Human Servs., *Child Abuse Reporting Numbers*, http://www.childwelfare.gov/pubs/rseslist/r1_dsp.cfm?rs_id=5&rate_chno=11-11172 (last visited Mar. 29, 2007).

157. MASS. GEN. LAWS ch. 119, § 51A (West 2003 & Supp. 2006).

158. CAL. PENAL CODE § 11166(c) (West Supp. 2007).

159. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

160. See Child Welfare Info. Gateway, U.S. Dep’t of Health & Human Servs., *Responding to Child Abuse & Neglect, Overview*, <http://www.childwelfare.gov/responding/overview.cfm> (last visited Mar. 29, 2007) (“Responding to child abuse and neglect involves protecting children from harm and supporting families to reduce the risk of future harm to children.”).

161. See *State v. Krasky*, 721 N.W.2d 916 (Minn. Ct. App. 2006). The court’s observations on Minnesota’s child abuse reporting statute make this distinction:

Under the analysis presented in *Davis*, the statutory policy for a mandatory “investigation” of child-abuse reports takes on added importance . . . [I]n light of the analysis in *Davis*, the non-criminal purpose inherent in child-abuse reporting is not significant to the Confrontation Clause analysis when the child’s health and welfare are no longer at risk and the nature of the interview is an “investigation into possibly criminal past conduct,” an investigation into past events—and the overriding purpose under *Davis*, for Confrontation Clause purposes, is to obtain evidence for a criminal prosecution.

Id. at 922 (citations omitted) (emphasis added).

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carries a penalty—in some states, a criminal one. Hence, when a designated reporter questions a patient concerning injuries he suspects must be reported, he acts as a police agent, in fulfillment of his statutory duty.¹⁶² Any rational mandatory reporter aware of his legal obligation must be presumed to act with knowledge of its potential consequences, and this knowledge transforms his inquiries of a domestic or child abuse victim into police interrogation under *Davis*.

3. Sexual Assault Nurse Examiners

Like mandatory reporters, Sexual Assault Nurse Examiners (SANEs) should categorically be treated as police agents. “A SANE is a registered nurse who has advanced educational and clinical preparation in forensic examination of sexual assault victims.”¹⁶³ The U.S. Department of Justice provides guidance to states and localities on implementing SANE programs.¹⁶⁴ One national registry lists well over 300 programs in all 50 states and the District of Columbia.¹⁶⁵ Identified benefits of such programs include “more effective investigations and better prosecutions” because during their examinations SANEs collect forensic evidence for police.¹⁶⁶ “SANEs release evidence to law enforcement agencies only with the victim’s consent in cases where the victim has agreed to report or has already reported the crime,” but release is mandatory in many circumstances.¹⁶⁷ Their in-

162. *But cf.* *State v. Slater*, 908 A.2d 1097, 1108 (Conn. App. Ct. 2006) (“[S]tatutory imperative [to collect sexual assault evidence with the victim’s consent] alone does not transform medical professionals from physicians to prosecutors.”); Phillips, *supra* note 12, at 19-20, 21 (noting that under *Crawford*, victims’ statements to SANEs may be deemed testimonial, but arguing that this outcome is only appropriate where the SANE “does not diagnose and/or provide treatment to a patient and is primarily duty-bound to collect evidence for law enforcement”).

163. KRISTIN LITTEL, U.S. DEP’T OF JUSTICE OFFICE FOR VICTIMS OF CRIMES, SEXUAL ASSAULT NURSE EXAMINER (SANE) PROGRAMS: IMPROVING THE COMMUNITY RESPONSE TO SEXUAL ASSAULT VICTIMS 1 (2001), available at http://www.ojp.usdoj.gov/ovc/publications/bulletins/sane_4_2001/186366.pdf.

164. *Id.* at 1-2.

165. See Sexual Assault Resource Service Sexual Assault Response Team, <http://www.sane-sart.com/staticpages/index.php?page=20031023141144274> (last visited Mar. 29, 2007).

166. LITTEL, *supra* note 163, at 1.

167. *Id.* at 4.

volvement in the criminal process does not end there. “They view testifying as an integral part of their job” and often “communicate with prosecutors” beforehand.¹⁶⁸ Hence, though they also perform some clinical functions, SANEs, by training and in practice, are evidence gatherers and expert witnesses.

Some courts recognized the significance of these latter roles even before *Davis*.¹⁶⁹ Yet others stubbornly refused to acknowledge SANEs’ law enforcement function.¹⁷⁰

168. *Id.*

169. *See, e.g., Medina v. State*, 143 P.3d 471 (Nev. 2006), *cert. denied*, 75 U.S.L.W. 3437 (2007). Where a SANE interviewed a rape victim the day after her assault, the Nevada Supreme Court held the victim’s statements were testimonial. *Id.* at 473-74, 476. Recognizing that SANEs are specially trained “to gather evidence for possible criminal prosecution in cases of alleged sexual assault,” the court reasoned the circumstances of the interview “would lead an objective witness to reasonably believe [the victim’s statements] would be available for use at a later trial.” *Id.* at 473, 476.

170. *See, e.g., State v. Stahl*, No. 22261, 2005 WL 602687 (Ohio Ct. App. Mar. 16, 2005), *aff’d*, 855 N.E.2d 834 (Ohio 2006). Finding a rape victim’s statements to a SANE non-testimonial, an Ohio appellate court cited “two common sense bases.” *Id.* at *5. First, having already given a statement to the police, the victim could reasonably have viewed the nurse’s role as a strictly salutary one—she could have described the assault due to her trust in the nurse without expecting it might be used for prosecution. *Id.* at *6-7. Second, the court found the victim could reasonably have believed the SANE’s interview was “for the purpose of providing physical evidence, without necessarily understanding that she was also providing testimonial evidence.” *Id.* at *6. Recently, and despite the benefit of the U.S. Supreme Court’s opinion in *Davis*, the Ohio Supreme Court compounded this error. *State v. Stahl*, 855 N.E.2d 834 (Ohio 2006). It distinguished *Davis* and *Hammon* because Stahl’s victim’s statements were “made to a medical professional at a medical facility,” and settling on an “objective witness test” rather than an interrogator-focused inquiry, it determined the primary purpose of the SANE’s interrogation was to administer “proper medical treatment.” *Id.* at 841, 844. It rejected Stahl’s contention that the victim should reasonably have expected her statements might be used to prosecute him because she signed a form consenting to the release of evidence to police. *Id.* at 845-46. Because the form described types of physical evidence that would be released, without expressly mentioning *statements*, the court held a reasonable person would believe the questioning “serve[d] a primarily health-care-related function.” *Id.* at 846. As translated by Professor Friedman, “The bad guy is going to get off here unless this statement is characterized as non-testimonial, so it will be.” Richard D. Friedman, Manipulation of the “Objective Witness” Standard, The Confrontation Blog, http://confrontationright.blogspot.com/2006_11_01_archive.html (Nov. 10, 2006, 13:17 EST).

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Under *Davis*, however, SANEs are indisputably police agents, as one Idaho court recognized in *State v. Hooper*.¹⁷¹ Hooper was tried for molesting his six-year-old daughter after she admitted the abuse to her mother, who contacted police.¹⁷² An officer responded, and after an initial investigation, he “arranged for [the girl] and her mother to go to a Sexual Trauma Abuse Response (STAR) Center for an examination and further interview.”¹⁷³ The trial court admitted a videotape of the interview because the girl was too frightened to testify.¹⁷⁴ The appellate court held the SANE was acting as an agent of the police—she was a self-described “forensic interviewer,” and police sent the victim to the center and supervised her visit.¹⁷⁵ The SANE testified the interview’s purpose was to prepare for trial, and nothing indicated it “had a diagnostic, therapeutic or medical purpose.”¹⁷⁶ Applying *Davis*, the court noted the interview’s nonemergency timing—“several hours after the alleged criminal event”—and its focus on establishing past events.¹⁷⁷ The court concluded the victim’s statement “was precisely the kind of statement that a witness would give on direct examination at trial.”¹⁷⁸

Notably, the SANE in *Hooper* was also an expert consulted to prepare for trial—this, alone, would render her a police agent—but her forensic training influenced the Idaho court’s decision. Even in a hospital, before police are directly involved, when a SANE employs that forensic training to question a victim and gather physical evidence, she acts as an agent of police.

171. *State v. Hooper*, No. 31025, 2006 WL 2328233, at *4 (Idaho Ct. App. Aug. 11, 2006); cf. *State v. Blue*, 717 N.W.2d 558 (N.D. 2006) (finding, in analogous factual circumstances, Child Advocacy Center forensic interviewer was an agent of police because her “purpose was undoubtedly to prepare for trial”).

172. *Hooper*, 2006 WL 2328233, at *1.

173. *Id.*

174. *Id.*

175. *Id.* at *4. Further, “[t]oward the end of the interview, the nurse inquired of the officer whether all the questions that the officer desired had been asked, and then returned to the interview room with several additional queries, apparently at the officer’s instruction.” *Id.*

176. *Id.*

177. *Id.* at *3.

178. *Id.*

4. *Other State-Connected Persons*

Davis may extend even further to nominally private actors with some connection to law enforcement. This embraces health care providers who treat the declarant on police referral or who are aware the declarant is involved in a police investigation.¹⁷⁹ As in the *Davis* test's second prong, purpose is key, but this Comment suggests investigatory or evidence-gathering purpose, whether "primary" or otherwise, should determine police agency.

a. *Referrals*

When a health care professional interviews a victim whom police have referred, he should often be considered a police agent. The provider knows the victim has consulted him at the behest of police engaged in an ongoing criminal investigation. Even if the consultation does not occur explicitly for trial preparation, the *Davis* test should apply when the provider seeks to repeat the victim's statements to him at a later trial. In *State v. Krasky*, a Minnesota appellate court agreed.¹⁸⁰ There, a nurse practitioner at a Children's Resource Center interviewed a child sexual abuse victim after the investigating police officer "'decided that [it was] the best way to proceed with the investigation.'"¹⁸¹ A child-protection worker involved in the investigation observed the interview, and the police officer viewed a videotape of the interview before completing his report.¹⁸² Emphasizing that the of-

179. At least one commentator has suggested *Crawford* and *Davis* have little impact on statements to private parties. See Meier, *supra* note 59, at 25 (asserting that statements to private parties, "which often provide critical evidence in adult and child abuse cases, . . . remain relatively unconstrained by *Crawford* and *Davis*"); cf. Mosteller, *supra* note 54, at 7 (noting that whether the Confrontation Clause "will extend to problematic hearsay in . . . child sexual abuse cases is quite possible, but undetermined"). Relying on "omissions from the Supreme Court's two most recent Confrontation Clause opinions," Professor Mosteller speculates that Justice Scalia's failure to reference *Idaho v. Wright*, 497 U.S. 805 (1990), may indicate that it survives *Crawford* and *Davis*. *Id.* at 10. Though "the statement in *Wright*[. . . had strong investigative features, . . . it might be excluded [under *Davis*] because it was not a statement to a government officer and certainly not to a police officer where falsehoods are criminal." *Id.*

180. *State v. Krasky*, 721 N.W.2d 916 (Minn. Ct. App. 2006).

181. *Id.* at 923 (quoting the police report).

182. *Id.*

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ficer arranged the interview, the court found the nurse had acted “in concert with police.”¹⁸³ Hence, medical professionals who interview victims referred by police should often be classified as police agents under *Davis*.

b. *Knowing Assistants*

When medical personnel knowingly aid a criminal investigation, they act as police agents. Knowing assistance may take many forms, but two are of particular concern. First, a health care professional who questions a patient delivered to the hospital by police, with police present, must reasonably know that a crime is suspected and that his dialogue with the victim will be used to investigate it. The provider’s primary purpose may be to diagnose, but his questions may also unearth evidence critical to the listening officer’s investigation. In these circumstances, the doctor functions as a “strawman.”¹⁸⁴ If the officer were to ask the questions himself, this would constitute police interrogation. Mere insertion of a third party questioner—when the questioner and victim know the officer is present—should not alter this result.

Second, a medical provider who collects and preserves forensic evidence when he examines and interviews a purported crime victim also acts as a police agent. That evidence is provided to police only with the victim’s consent is irrelevant: the provider gathers evidence for a possible criminal investigation. Since *Davis*, a Connecticut court has declined to apply this analysis.¹⁸⁵ In *State v. Slater*, the court refused to characterize an emergency room doctor and nurse as police agents and found a sexual assault victim’s statements to them non-testimonial.¹⁸⁶ Because questioning occurred ““for a diagnostic purpose”” and ““was the byproduct of substantive medical activity,”” it was held to be non-testimonial.¹⁸⁷ The court observed that the victim

183. *Id.*

184. Black’s Law Dictionary defines a strawman as “[a] third party used in some transactions as a temporary transferee to allow the principal parties to accomplish something that is otherwise impermissible.” BLACK’S LAW DICTIONARY 1461 (8th ed. 2004).

185. *State v. Slater*, 908 A.2d 1097 (Conn. App. Ct. 2006).

186. *Id.* at 1108.

187. *Id.* at 1106 (quoting *State v. Kirby*, 908 A.2d 506, 527 (Conn. 2006)).

made no effort to identify her attacker, the doctor and nurse did not consult police before interviewing the victim, and the police were not present in the emergency room.¹⁸⁸ But it casually dismissed one additional, glaring fact: the doctor and nurse prepared a rape kit “that later would be used in a criminal prosecution.”¹⁸⁹ Indeed, a rape kit has no other significant purpose.¹⁹⁰ The court should have deemed the doctor and nurse police agents because they knowingly gathered evidence.¹⁹¹

Though this result may seem extreme, it must be considered in context. Once a health care professional’s questions are characterized as police interrogation, two additional elements must be satisfied to render a victim’s responses testimonial.¹⁹²

B. Ongoing Emergency

Where a declarant makes a statement “for purposes of medical diagnosis or treatment,” the medical condition he or she describes could satisfy the *Davis* test’s ongoing emergency element. But what defines an ongoing *medical* emergency? Courts confronting this issue could rely on established medical authorities or expert testimony in making evidentiary rulings. But even if medical science can readily define the term “ongoing emergency,” it must still comport with the Court’s post-*Davis* GVR¹⁹³ orders. In a memorandum to Professor Friedman’s *Crawford*-inspired blog that analyzed these cases,¹⁹⁴ the District of Columbia’s Public Defender Service (PDS) offered two observations related to *Davis*’s “ongoing emergency” prong.

First, the PDS believes that to qualify as “an emergency-resolving nontestimonial statement to law enforcement officers” under *Davis*, the emergency must be “ongoing and actual, not past, future, or theo-

188. *Id.* at 1107-08.

189. *Id.* at 1108.

190. *See generally* Linda M. Petter & David L. Whitehill, *Management of Female Sexual Assault*, 58 AM. FAM. PHYSICIAN 920 (1998).

191. *But see* Phillips, *supra* note 12, at 20-21 (asserting that health care providers who “are required to collect evidence and statements from victims as part of a law enforcement investigation” should only be treated as police agents if their questions and actions serve no diagnosis or treatment purpose).

192. *See Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006).

193. *See supra* note 124.

194. *See* Friedman, *supra* note 170.

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retical.”¹⁹⁵ An ongoing medical emergency must then be one that presently threatens the victim’s life or long-term health, such as gushing blood or a broken bone. Regardless of lingering emotional trauma, more superficial injuries might not qualify.

The lower courts’ opinions in the GVR cases largely support the PDS’s analysis, but not entirely. The PDS asserts that a credible threat of future danger is not an ongoing emergency based on two cases, *State v. Warsame* and *State v. Wright*.¹⁹⁶ But this reliance is misplaced. First, in *Warsame*, the defendant remained at large while the declarant, a domestic violence victim, spoke to a police officer; the lower court held that her initial statements were non-testimonial.¹⁹⁷ The PDS assumes *Warsame* posed a continuing threat to the victim.¹⁹⁸ But though *Warsame* was not in police custody, the officer-victim dialogue occurred face-to-face in a public street.¹⁹⁹ Like Amy Hammon,²⁰⁰ the declarant spoke while in the protective presence of a (likely armed) police officer, indicating that all danger to her had subsided.²⁰¹

195. Memorandum, *supra* note 60, at 2 (citing *Anderson v. State*, 111 P.3d 350 (Alaska Ct. App. 2005), *cert. granted, vacated, remanded*, 126 S. Ct. 2983 (2006); *People v. Thomas*, 2005 WL 2093065 (Cal. Ct. App. Aug. 31, 2005), *cert. granted, vacated, remanded*, 126 S. Ct. 2983 (2006); *State v. Wright*, 701 N.W.2d 802 (Minn. 2005), *cert. granted, vacated, remanded*, 126 S. Ct. 2979 (2006); *State v. Warsame*, 701 N.W.2d 305 (Minn. Ct. App. 2005), *cert. granted, vacated, remanded*, 126 S. Ct. 2983 (2006); *State v. Lewis*, 619 S.E.2d 830 (N.C. 2005), *cert. granted, vacated, remanded*, 126 S. Ct. 2983 (2006); *State v. Forrest*, 596 S.E.2d 22 (N.C. Ct. App. 2004), *aff’d*, 611 S.E.2d 833 (N.C. 2005), *cert. granted, vacated, remanded*, 126 S. Ct. 2977 (2006)).

196. Memorandum, *supra* note 60, at 2.

197. *Warsame*, 701 N.W.2d at 307; *cf.* *State v. Warsame*, 723 N.W.2d 637, 241-42 (Minn. 2006) (concluding on remand, *again*, that statements were non-testimonial because “[a]s long as a possible emergency situation, occurring at another location or involving another person, is related to the complainant’s own situation and is one which can be clarified by questioning her, the purpose of the questioning may be considered as for the primary purpose of enabling police assistance to meet an ongoing emergency, making the complainant’s statements non-testimonial”).

198. Memorandum, *supra* note 60, at 2.

199. *Warsame*, 701 N.W.2d at 307.

200. *See supra* text accompanying note 96.

201. *Id.*

Second, *Wright* involved two hearsay statements, either of which could conceivably have led the Court to remand.²⁰² Admission of a 911 call the victim made after *Wright* had left the premises was not necessarily improper. In *Davis*, the Court implied that the ongoing emergency may have ended when *Davis* fled²⁰³—though *Davis*, like *Wright*, remained at large. If the call in *Davis* became testimonial thereafter, the call in *Wright* was likely testimonial from its beginning. But the two cases are distinguishable. Whereas *Wright* departed *before* his victim summoned the police, carrying keys to the apartment and a firearm,²⁰⁴ *Davis* probably fled because he feared arrest, and nothing indicates he had a gun.²⁰⁵ *Wright* was therefore more likely to return before police arrived and could inflict far greater harm if he did. The future danger he posed to his victim was neither abstract nor hypothetical and may have warranted the label “ongoing emergency.”²⁰⁶

This approach would define medical emergencies more broadly so as to include some future threats as ongoing emergencies. Specifically, some conditions posing no *immediate* threat to the victim—such as internal bleeding, infection, or blood clots—could rapidly develop into life-threatening emergencies if left untreated. This category of concrete *future* threats could qualify as “ongoing emergencies” under *Davis*.

The PDS’s second observation concludes that only statements “that provide information critical to resolving the particular emergency presented” will qualify as non-testimonial:

Anderson and *Lewis* can both be read as cases where the unconflicted statements were clearly testimonial because the defendant had left the scene, the crime was over, and there was no ongoing emergency situation. [Even] if the emergency is redefined as the complainants’ need for medical attention, these cases can be read as decisions in which the complainants’ statements to police discuss-

202. *State v. Wright*, 701 N.W.2d 802, 804 (Minn. 2005); *see also* Memorandum, *supra* note 60, at 2.

203. *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006).

204. *Wright*, 701 N.W.2d at 804.

205. *See Davis*, 126 S. Ct. at 2271.

206. *See also* *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006) (finding that an anonymous 911 caller’s statements describing a shooting that had just occurred and the whereabouts of gunman were non-testimonial).

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ing the crime and identifying their assailants—unlike in *Davis* where the ongoing emergency was the assailant’s continued presence at the scene—had no bearing on the resolution of that particular emergency.²⁰⁷

The PDS finds further support among the certiorari denial cases in which lower courts deemed statements non-testimonial when “directly related to the resolution of [an ongoing] emergency.”²⁰⁸ Both *State v. Hembertt* and *State v. Greene*, for instance, strongly imply that statements directed to securing a crime scene are non-testimonial under *Davis*.²⁰⁹

207. Memorandum, *supra* note 60, at 3. In *Anderson*, an officer responding to a 911 call and report of injuries found a man lying on a hotel room floor beneath a blanket, his torso bruised and his breathing impaired. *Anderson v. State*, 111 P.3d 350, 351 (Alaska Ct. App. 2005). When the officer asked what had happened, the victim claimed Anderson had hit him with a pipe. *Id.* In *Lewis*, an officer arrived at a robbery victim’s apartment within hours of the crime. *State v. Lewis*, 619 S.E.2d 830, 832 (N.C. 2005). Because “[the victim’s] face and arms [were] badly bruised and swollen[,] . . . [the officer] spoke with [her] to determine whether she needed assistance and to find out what happened.” *Id.* In response, she described the robbery, which had occurred in the hallway outside the apartment, and her assailant, whom she linked to a resident down the hall. *Id.* Although each declarant in these cases required medical attention, in neither case were the challenged statements directly related to this need.

208. Memorandum, *supra* note 60, at 5 (referencing *United States v. Brito*, 427 F.3d 53 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 2983 (2006); *State v. Greene*, 874 A.2d 750 (Conn. 2005), *cert. denied*, 126 S. Ct. 2981(2006); *State v. Hembertt*, 696 N.W.2d 473 (Neb. 2005), *cert. denied*, 126 S. Ct. 2977 (2006); *State v. Quintero*, No. M2003-02311-CCA-R3-CD, 2005 WL 941004 (Tenn. Crim. App. Apr. 22, 2005), *cert. denied*, 126 S. Ct. 2979 (2006)); *see* *Commonwealth v. Foley*, 833 N.E.2d 130 (Mass. 2005), *cert. denied*, 126 S. Ct. 2980 (2006); *Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005), *cert. denied*, 126 S. Ct. 2980 (2006); *cf.* Memorandum, *supra* note 60, at 4 (observing that in *Foley* and *Gonsalves*, both domestic violence cases, the “lower courts appear[ed] to have properly anticipated the rule of *Davis* and categorized statements to police as nontestimonial and testimonial based on the existence of an ongoing emergency”).

209. *Greene*, 874 A.2d at 775; *Hembertt*, 696 N.W.2d at 483. *Hembertt* involved spontaneous statements made by a domestic violence victim while the assailant remained on the premises armed with a knife. *Hembertt*, 696 N.W.2d at 477. The Nebraska Supreme Court reasoned “the area and suspect were unsecured,” and the victim’s statements “were made to assist in securing the scene.” *Id.* at 483. Similarly, in *Greene*, a bystander superficially wounded during a gang-related shooting approached responding police immediately “to report a possible injury,” and the officer to whom he spoke “ask[ed] questions to ensure that the victim receive[d]

Courts holding that a declarant's need for medical attention constituted an emergency must carefully parse that declarant's statements to determine whether his or her description of how that need arose was "critical to resolving the particular emergency presented."²¹⁰ For example, when asked about the source of her wounds, a bleeding domestic violence victim might explain that her husband had slashed her with a kitchen knife "again." The origin of the abrasions—a kitchen knife, probably not terribly sharp and possibly covered in bacteria—would reasonably be relevant to a physician's approach to treatment. But neither the identification element (that her husband was the perpetrator) nor the medical history element (that this had happened before) would be critical to treating her current wounds. The medical treatment exception encompasses medical history, but unless this information is truly critical to resolving the ongoing emergency, courts must consider it testimonial.

C. Primary Purpose

One could certainly argue that the medical treatment exception, which applies only to statements whose purpose is medical diagnosis or treatment, is by definition non-testimonial. But the Court has rejected this position as to excited utterances; a declarant's excited state of mind does not preclude prosecutorial purpose.²¹¹ Similar logic should apply when a statement is, by definition, "for purposes of medical diagnosis or treatment." This may be a purpose of the statement but not necessarily its *primary* purpose, so *Davis's* purpose inquiry still applies.

proper medical attention and that the crime scene [was] properly secured." *Greene*, 874 A.2d at 775. The Connecticut Supreme Court deemed his statements non-testimonial. *Id.*

210. Memorandum, *supra* note 60, at 3.

211. In *Hammon*, the trial court originally admitted Amy Hammon's testimonial statements as excited utterances. *Hammon v. State*, 829 N.E.2d 444, 447 (Ind. 2005), *cert. granted*, 126 S. Ct. 552 (2005); *see also Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006); *People v. Castellanos*, Nos. B175888, B181286, 2005 WL 1763623 (Cal. App. July 27, 2005), *cert. granted, vacated, remanded*, 126 S. Ct. 2965 (2006). In *Castellanos*, after a police car chase and while the defendant fled on foot, his passenger—dazed, crying, and still in the car—asked an approaching officer what had happened. *Id.* at *2. When the officer explained that the car was stolen, she stated that Castellanos had "tried to hit one of the officers" with the car. *Id.*

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But whose purpose matters? In *State v. Snowden*, a pre-*Davis* decision that relied heavily on the purpose of a social worker's interviews that produced the challenged statements, the Maryland Court of Appeals considered both the interviewer's and the declarants' perspectives.²¹²

[The declarants'] awareness of the prosecutorial purpose of the interviews not only satisfies any objective formulation of what is "testimonial," but, in our opinion, demonstrates that the children *actually* were aware that their statements had the potential to be used against Snowden in an effort to hold him accountable for his conduct. . . . Even if we were inclined to ignore the children's actual awareness of the purpose of the interviews, . . . [it is] undeniable . . . that the express purpose of bringing the children to the facility to be interviewed was to develop their testimony for possible use at trial.²¹³

The court deemed the interviews' therapeutic element "secondary, in terms of proper Confrontation Clause analysis, to the overarching . . . testimonial nature[] of the [children's] statements."²¹⁴

Where, as in *Snowden*, the declarants' and interrogator's purposes coincide, the primary purpose inquiry is a simple one. But *Davis* does not establish for certain whose purpose matters,²¹⁵ and in the medical treatment context, the answer may well be outcome determinative.

1. *Declarant-Focused Inquiry*

If, as *Davis* assures us, "it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate,"²¹⁶ then courts must assess medical treatment statements' primary purpose from a reasonable declarant's perspective. If one ignores or minimizes individual circumstances, the

212. *State v. Snowden*, 867 A.2d 314, 326-27 (2005) (supporting the trial court's finding that "interviews were made for the express purpose of satisfying the requirements of" a statutory hearsay exception analogous to that for medical treatment statements).

213. *Id.* at 326.

214. *Id.* at 330.

215. *See supra* Part III.A.

216. *Davis*, 126 S. Ct. at 2274 n.1.

result is simple. As one commentator observed: “[P]atients do not wish to establish or prove any facts. Patients answer questions and provide information for the sole purpose of facilitating their medical care.”²¹⁷

But patients are human beings with mixed motives. Though it nominally rested its holding on other facts, one pre-*Davis* case recognized this inescapable truth. There, a SANE nurse’s interview with a sexual assault victim occurred three weeks after the assault, and because the victim’s statements did not focus on the attack itself, the court reasoned her purpose was not merely to obtain medical treatment.²¹⁸ In most cases, however, a declarant-focused inquiry will conclude that the statements’ primary purpose is to secure medical aid, not to “prove past events potentially relevant to later criminal prosecution.”²¹⁹

Historical treatment of child abuse victims’ statements to medical personnel indicates this outcome is particularly likely in child abuse cases. In the current version of the Federal Rules of Evidence, the medical treatment exception “extends to statements as to causation, reasonably pertinent to” medical treatment or diagnosis, but ordinarily not to “[s]tatements as to fault.”²²⁰ In *United States v. Renville*, the Eighth Circuit established the principal exception to this restriction.²²¹ Because child abuse involves not only physical injuries but also psychological ones whose nature and gravity depend heavily on the abuser’s identity, this information may determine whether the course of treatment should include removal from the child’s present living conditions.²²² Hence, “[s]tatements by a child abuse victim to a physician during an examination that the abuser is a member of the victim’s

217. Melissa Moody, *A Blow to Domestic Violence Victims: Applying the “Testimonial Statements” Test in Crawford v. Washington*, 11 WM. & MARY J. WOMEN & L. 387, 400 (2005).

218. *State v. Romero*, 133 P.3d 842, 859 (N.M. Ct. App. 2006). The court held that her statements during the interview were testimonial. *Id.* at 858.

219. *Davis*, 126 S. Ct. at 2274.

220. FED. R. EVID. 803(4) advisory committee’s note; *see also* *United States v. Iron Shell*, 633 F.2d 77, 84 (8th Cir. 1980) (observing that when a declarant’s “statements concern[ed] what happened rather than who assaulted her, . . . the latter would seldom, if ever, be sufficiently related [to diagnosis or treatment]”).

221. *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985).

222. *Id.* at 437-38.

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immediate household *are* reasonably pertinent to treatment” and thus admissible under the medical treatment exception.²²³ Courts nationwide have adopted *Renville*’s rationale.²²⁴

Many commentators surmised that *Crawford* would eliminate this practice.²²⁵ One Illinois court recognized the shift, differentiating between a child sexual abuse victim’s statements to a doctor “regarding the nature of the alleged attack, the physical exam, and complaints of pain or injury” and her “accusatory statements identifying . . . the perpetrator.”²²⁶ Yet other courts read *Crawford* in a manner that effectively created a new exception: if a reasonable *child* in the victim’s position might not expect his statements to be later used at trial, they would not be testimonial.²²⁷ This reasoning could justify finding even

223. *Id.* at 436-37.

224. *See, e.g.,* United States v. Tome, 61 F.3d 1446, 1450 (10th Cir. 1995) (finding it “clear” that information contained in a child abuse victim’s statement to a physician, including the abuser’s identity, was “important to [the physician’s] determination of [the victim’s] condition”); United States v. Cherry, 938 F.2d 748, 757 (7th Cir. 1991) (“[T]he task of the physician treating the victim of such an attack requires attention not only to the physical manifestations of trauma but to the psychological ones as well.”).

225. *See, e.g.,* Ralph Ruebner & Timothy Scahill, *Crawford v. Washington, the Confrontation Clause, and Hearsay: A New Paradigm for Illinois Evidence Law*, 36 LOY. U. CHI. L.J. 703, 762 (2005) (“There are clearly some statements made to medical personnel . . . that should rightly be deemed testimonial, such as an out-of-court statement of the victim identifying her abuser.”). For an intriguing proposal relating specifically to child victims, see Staab, *supra* note 129, at 520-22 (arguing that where a child declarant is unavailable because the trial court has found him incompetent to testify, the child’s hearsay statements are necessarily non-testimonial because an incompetent person would be incapable of reasonably expecting that his statements might later be used at trial).

226. *People v. T.T. (In re. T.T.)*, 815 N.E. 2d 789, 804 (Ill. App. Ct. 2004). *Contra State v. Vaught*, 682 N.W.2d 284, 287 (Neb. 2004) (holding that the victim’s identification statement was admissible because her physician claimed it was necessary to ensure the child’s mental and emotional health and that the child was not released into the perpetrator’s care).

227. *See, e.g.,* Miller v. Fleming, No. C04-1289P, 2006 WL 435466, at *7-8 (W.D. Wash. Feb. 21, 2006) (holding that a child’s statements to an emergency room doctor and nurse were not testimonial because no police were present during the examinations, and “an objective seven-year old would not believe that her statements to medical professionals would be available for use at a later trial”); *People v. Vigil*, 127 P.3d 916, 926 (Colo. 2006) (holding that a child sexual assault victim’s statements were not testimonial because “an objectively reasonable seven-year-old child would expect that a doctor would use his statements to make him feel better

child victims' accusatory statements non-testimonial. A reasonable child might understand, in abstract, that the accused would "get in trouble," but police involvement and trial would be ideas too complex to grasp.

If courts must evaluate primary purpose from the declarant's perspective, they should not apply this child standard. To do so would condition testimonial statements' admission on the declarant's level of sophistication and risk police manipulation.²²⁸ In the medical treatment context, a reasonable declarant standard would align with *Crawford's* vision of the Confrontation Clause²²⁹ and would typically produce victim-friendly results. From the patient's point of view, when consulting a medical professional, his primary purpose must almost always be to secure medical aid, not to "prove past events potentially relevant to later criminal prosecution."²³⁰

2. *Interrogator-Focused Inquiry*

But if, as the *Davis* Court's language suggests and some commentators contend, the inquiry targets the interrogator, then primary purpose becomes far more difficult to discern. Justice Thomas identified this dilemma in his *Davis* dissent, observing that police officers interview crime victims "both to respond to the emergency situation and to gather evidence."²³¹ The medical treatment exception requires that a statement's purpose be medical treatment or diagnosis, but this need

and to formulate a medical diagnosis . . . [but] would not foresee the statements being used in a later trial"); *Commonwealth v. DeOliveira*, 849 N.E.2d 218, 226 (Mass. 2006) (concluding that a child victim's statements were non-testimonial because there was no evidence that she "even recognized the criminality of the defendant's sexual contacts with her," and "a reasonable person in [her] position, and armed with her knowledge, could not have anticipated that her statements might be used in a prosecution").

228. *Cf. Lininger*, *supra* note 60, at 30 (suggesting that the new focus on an interrogator's purpose will deter police from "contriv[ing] circumstances in which a plain-clothes interlocutor speaks with a child for investigative purposes[] while the child . . . may not believe that he or she is providing information for prosecutorial use").

229. *See Crawford v. Washington*, 541 U.S. 36, 51-52 (2004) (discussing an objective/reasonable witness standard).

230. *Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006).

231. *Id.* at 2283 (Thomas, J., dissenting).

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not be its sole or even primary purpose. Further, the hearsay exception focuses on the declarant—if, in a police interrogation, the interrogator’s purpose determines whether responses to his or her questions are testimonial, then medical treatment statements could easily qualify. Where the interrogator is an expert consulted to prepare for trial—a mandatory reporter, a SANE, or a health care provider otherwise connected with law enforcement—one purpose of questioning may be clinical, but other motives may also intrude.

One pre-*Davis* commentator concluded that when medical personnel conduct forensic interviews of child abuse victims, “[m]ixed motives, such as arranging for services or protection for the child, do not render these testimonial statements non-testimonial.”²³² But courts applying *Crawford* anticipated *Davis*’s focus on primary purpose. In holding non-testimonial a child sexual abuse victim’s statements to a hospital child protection team member, despite substantial police involvement, the Colorado Supreme Court emphasized the doctor’s principal purpose was to ascertain the child’s physical condition.²³³

Indeed, this focus on the interrogating health care provider’s *primary* purpose will likely save medical treatment statements from exclusion in many cases. But because surrounding circumstances, viewed objectively, determine this purpose, courts must engage in close factual evaluation.²³⁴ Even where the provider asks inarguably

232. Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in Crawford v. Washington*, 50 S.D. L. REV. 41, 70 (2005).

233. *People v. Vigil*, 127 P.3d 916, 922-26 (Colo. 2006); see also *State v. Bobadilla*, 709 N.W.2d 243, 254-55 (Minn. 2006) (holding that a child sexual abuse victim’s statements to a child-protection worker were not testimonial because the interview’s primary purpose was to ascertain whether the child had been harmed or was in danger).

234. Confronting this problem days after *Davis* in *State v. Mechling*, the West Virginia Supreme Court remanded a case in which a neighbor intervened in a domestic dispute occurring outdoors across the street. *State v. Mechling*, 633 S.E.2d 311, 314-15 (W. Va. 2006). Though the neighbor did not witness any physical contact and Mechling fled at his approach, the victim declared Mechling had hit her in the head. *Id.* at 315. Appealing his domestic battery conviction, Mechling asserted this hearsay statement’s admission through the neighbor’s testimony violated the Confrontation Clause. *Id.* at 323. Noting the U.S. Supreme Court’s citation to *King v. Brasier*, the West Virginia court read *Davis* as implying that statements to a private citizen would be testimonial if they “related ‘what happened’” as opposed to what *was happening*. *Id.* at 323-24. Deeming the factual record insufficiently de-

legitimate medical questions, if he is a police agent and no ongoing medical emergency exists, then the primary purpose of those questions may be “to prove past events” the provider knows are “potentially relevant to later criminal prosecution.”²³⁵

V. CONCLUSION

This Comment argues that under the test articulated in *Davis v. Washington*, medical experts consulted to prepare for trial, medical providers who have a statutory duty to report certain injuries, Sexual Assault Nurse Examiners, and other state-connected health care professionals act as police agents when they question crime victims. Where this is so, absent unavailability and prior cross-examination, victims’ responses will be inadmissible in victimless prosecutions unless the victim’s medical condition qualifies as an emergency and the dialogue’s primary purpose is to resolve that emergency.²³⁶

Viewed broadly, admission of victims’ hearsay statements in victimless prosecutions involves tension between competing values of paramount social importance. The U.S. Constitution guarantees threshold protections to a citizen accused of a crime,²³⁷ ensuring that the majority’s zeal to punish those who offend moral norms cannot override fundamental fairness. But if the measure of a just society is how well it protects its weakest members, then those moral norms carry heightened force when applied to harms to the most vulnerable, such as abused children. *Crawford* and *Davis* rebalanced the scales of justice in favor of the former value.

But they did not wholly ignore the latter concern. By emphasizing the continued vitality of the rule of forfeiture by wrongdoing, the Court assured the Confrontation Clause will not reward intimidation of victims.²³⁸ “[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from . . . victims, the Sixth

tailed, the court remanded for development of “a thorough record of the circumstances surrounding [the witness’s] admirable intervention.” *Id.* at 324.

235. *Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006).

236. *See id.* at 2273-74.

237. *See* U.S. CONST. amends. V, VI, VIII.

238. *See Davis*, 126 S. Ct. at 2279-80; *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

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Amendment does not require courts to acquiesce.”²³⁹ The Court implicitly encouraged lower courts “to utilize liberal burdens of proof and evidentiary standards in making forfeiture determinations.”²⁴⁰ But courts should exercise this discretion carefully lest they resurrect *Roberts*’s critical flaw in new guise. In domestic violence and child abuse cases, forfeiture determinations will almost always rely on evidence concerning the charged offense—for example, proving that a woman’s abuser has intimidated her almost certainly requires explaining her susceptibility to such intimidation. When the defendant stands accused of murder, this problem is magnified. A forfeiture hearing should not become a mini-trial at which the judge effectively adjudicates the defendant’s guilt under a lesser standard of proof. If “allow[ing] a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability” was bad,²⁴¹ allowing the jury to hear such evidence based on a judicial predetermination of guilt would be far worse. This outcome would “replace[] the constitutionally prescribed method of assessing [guilt in a criminal trial] with a wholly foreign one.”²⁴² In closing one door to unfronted testimony in criminal trials, this Comment hopes the Court has opened a window—not knocked down a wall.

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239. *Davis*, 126 S. Ct. at 2280.

240. Meier, *supra* note 60, at 24; *see Davis*, 126 S. Ct. at 2280-81.

241. *Crawford*, 541 U.S. at 62.

242. *Id.*; *see* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed”) (emphasis added).

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