

“Out of the Mouth[s] of Babes”¹: Can Young Children Even Bear Testimony?

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I. Introduction

One simple word: testimonial,² has taken on a life and persona of its own. She has been elusive in definition, yet powerful in application. She confuses practitioners, yet claims to be transparent. Unapologetically, she complicates the heart of the Sixth Amendment’s confrontation clause³ and for over two and a half years, state and federal courts alike have grappled with her meaning, simply because her creator refused to define her.

The Supreme Court’s decision in *Crawford v. Washington*⁴ significantly altered the landscape⁵ in admitting out-of-court statements in criminal trials. The Court effectively cut a swath through the forest of Sixth Amendment jurisprudence, yet failed to provide adequate direction for trial lawyers who find themselves in the midst of this territory. The Court, attempting to fashion a bright-line rule for out-of-court statements,⁶ created a path of uncertainty when it failed to provide a sufficient definition of testimonial.

Of particular concern to many practitioners is the effect of *Crawford*’s holding on the prosecution of child abuse cases.⁷ *Crawford*’s result renders a child’s testimonial utterance inadmissible in the subsequent prosecution.⁸ Many times in a child abuse prosecution, the main evidence available to prosecutors is the child’s statements. Striking a balance between the accused’s and the accuser’s rights is an arduous task for practitioners. Society has an indelible interest in protecting the defenseless and justice is as important for them as it is for those they accuse. *Crawford*’s intention of safeguarding the accused may result in silencing the voices of their victims. In an effort to strike this delicate balance, this article suggests a framework for analyzing the testimonial nature of children’s statements. Specifically, a rebuttable presumption should exist that, at a certain age, children are incapable of uttering a testimonial statement because of their inability to appreciate its possible and intended use at a future legal proceeding. This method not only keeps true to *Crawford*’s aim of safeguarding the constitutional provisions for the accused, it also ensures society’s interest in protecting young children.

¹ Psalm 8:2.

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² See *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Suggested by the briefs and adopted by the Supreme Court in *Crawford*, this word will appear throughout this article without quotation marks and is sometimes referred to using a female pronoun.

³ The Sixth Amendment states, in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI.

⁴ 541 U.S. 36.

⁵ See Lieutenant Commander Kevin R. O’Neil, Article, Essay & Note: *Navigating the Confrontation Clause Waters after Crawford v. Washington; Where Have We Gone and Where Are We Headed?*, 51 NAVAL L. REV. 175 (2005).

⁶ Without expanding on the definition of testimonial, the Supreme Court provided that, at a minimum it applies to prior ex parte testimony and police interrogations. See *Crawford*, 541 U.S. at 68.

⁷ See, e.g., Victor Vieth, *Keeping the Balance True: Admitting Child Hearsay in the Wake of Crawford v. Washington*, 16 UPDATE EXPRESS 12 (2004); Myrna Raeder, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOKLYN L. REV. 311 (2005). See generally Richard D. Friedman, Features, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4, 10 (2004) (recognizing that children’s statements will test the meaning of “testimonial”). But see Laurie E. Martin, Note: *Child Abuse Witness Protections Confront Crawford v. Washington*, 39 IND. L. REV. 113 (2005) (asserting that *Crawford* is not a barrier to child abuse prosecutions).

⁸ If the only evidence in a child abuse prosecution is the child’s hearsay statement, then determining the statement’s testimonial character will be outcome determinative. See generally Interview with MAJ David Coombs, Professor, Criminal Law Dep’t, TJAGLCS, in Charlottesville, Va. (Feb. 23, 2007).

II. *Crawford v. Washington*

The Supreme Court, in no uncertain terms, stopped the direction of travel of the current hearsay law and changed its course. Through its holding in *Crawford v. Washington*, the Court effectively overruled the *Ohio v. Roberts*⁹ approach to hearsay in the testimonial sense of the word.¹⁰ No longer is “reliability” the litmus test of determining admissibility of hearsay statements. Instead, *Crawford* mandates the exclusion of all testimonial statements, regardless of reliability, where there is a non-testifying declarant and an accused without a prior opportunity to cross-examine.¹¹ The radical departure from two decades of confrontation jurisprudence emerged from the Court’s interpretation of the Framers’ intent when inserting the phrase, “to be confronted with the witnesses against him”¹² into the text of the Sixth Amendment.

A. Overview—Facts and Holding

Michael Crawford appealed his assault and attempted murder conviction claiming the State’s introduction of his wife’s pre-recorded custodial statement violated his Sixth Amendment right to confront the witnesses against him.¹³ Since his wife was a suspect at the time of her interrogation, the State offered her admissions as a statement against penal interest and the court found that it bore sufficient “guarantees of trustworthiness.”¹⁴ Michael Crawford invoked the marital privilege which turned Sylvia Crawford into a non-testifying declarant. This allowed the lower court to admit her station-house statement using the reliability analysis governing at the time.¹⁵ Michael Crawford, then not having an opportunity to cross-examine a key witness, sought redress under the Constitution’s Confrontation Clause.¹⁶ On 8 March 2004, the Supreme Court answered his call and restored the protections provided by the Sixth Amendment by creating a line of demarcation between confrontation jurisprudence and the law of hearsay.¹⁷

The Supreme Court did not simply rule Sylvia Crawford’s statements inadmissible under the hearsay rules. Instead, they clarified how the Confrontation Clause affects hearsay statements in the present day by traveling back in time to the trial of Sir Walter Raleigh.¹⁸ Writing for the majority, Justice Scalia carefully recalled the English and American legal history leading up to the establishment of the Confrontation Clause.¹⁹ Speaking for the Framers, Scalia noted that their primary concern was the “principal evil at which the Confrontation Clause was directed[—]the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”²⁰ Consequently, the Court barred from admission all testimonial statements, regardless of reliability, where the declarant is unavailable, unless the accused had a prior opportunity for cross-examination.²¹

⁹ 448 U.S. 56 (1980). The seminal case at the time, *Roberts* set forth a definite two-step framework to analyze hearsay statements. *See generally id.* First, the declarant must be deemed unavailable at trial. *Id.* at 65. Next, the court examined the hearsay statement through the lens of reliability—admitting the statement if it fell within a firmly rooted hearsay exception or possessed other “indicia of reliability.” *Id.* In the end, unless the statement bore “particularized guarantees of trustworthiness,” the law demanded exclusion. *Id.* at 66.

¹⁰ *See Crawford*, 541 U.S. at 66.

¹¹ *See generally id.* at 59–61.

¹² U.S. CONST. amend. VI.

¹³ *See Crawford*, 541 U.S. at 40.

¹⁴ *See id.* at 38–42.

¹⁵ *See id.* at 40.

¹⁶ *See id.* at 42.

¹⁷ *See generally id.*; *see also* John Robert Knoebber, *Say That to My Face: Applying an Objective Approach to Determine the Meaning of Testimony in Light of Crawford v. Washington*, 51 LOY. L. REV. 497 (Fall 2005).

¹⁸ *See Crawford*, 541 U.S. at 44.

¹⁹ *See id.* at 43–50.

²⁰ *See id.* at 50 (emphasis in original).

²¹ *See id.* at 54. Again, the Court standing in the Framers’ shoes, imputed to them their disapproval of the admission of testimonial statements where defendants were denied the right of confrontation. *Id.* at 53, 58.

B. Testimonial—Elusive by Nature

The Supreme Court in *Crawford* clearly departed from the *Roberts* framework for determining admissibility of out-of-court statements in favor of the testimonial approach.²² Claiming that reliability is an “amorphous”²³ standard that can easily be manipulated providing an “unpredictable”²⁴ framework with “vague standards,”²⁵ the Court exchanged that framework for the simple word: testimonial.²⁶ Unfortunately, the Court failed to define *their* meaning of the word testimonial, and unapologetically did so with the knowledge of the uncertainty it created.²⁷ Although it failed to articulate an analytical framework for determining what is testimonial, the Court explicitly stated that it applied “at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”²⁸ Recognizing that “[v]arious formulations of [the] core class of ‘testimonial’ statements” exist,²⁹ the Court declined to adopt any of them; effectively leaving it up to the lower courts to decide how to define and ultimately apply testimonial. As a result, judges and scholars have struggled with which “core class” to utilize as the gatekeeper: is it the one proffered by the Petitioner’s Brief,³⁰ the one found in Justice Thomas’ concurring opinion in *White v. Illinois*,³¹ the one suggested by the National Association of Criminal Defense Lawyers Amici Brief,³² a combination of all three, or possibly even one created through the evolution of this new precedent? In order to properly define and apply testimonial in the context of child abuse cases, this article suggests the use of a rebuttable presumption together with a standardized approach as the appropriate framework.

III. Bearing Testimony—The Child Declarant

The Supreme Court’s rationale in *Crawford v. Washington* set forth few definitive standards; however, the Court was certain when explaining that the Confrontation Clause’s main concern governed those who “bore testimony.”³³ The Court rationalized this premise with the Sixth Amendment’s phrase: “witness against.”³⁴ In other words, for a declarant’s utterances to be testimonial, they must bear witness against another. The Court further explained that testimony is “[a]

²² See generally *id.* at 63.

²³ *Id.*

²⁴ *Id.* at 68 n.10.

²⁵ *Id.* at 68.

²⁶ The term testimonial has also proven to be vague, amorphous, and definitionally unpredictable.

²⁷ See generally *Crawford*, 541 U.S. at 68. The Court noted that “our refusal to articulate a comprehensive definition in this case will cause interim uncertainty. But it can hardly be any worse than the status quo.” *Id.* at note 10.

²⁸ See *id.* at 68. The Court further explained that their concept of interrogations is loosely defined, again recognizing that there are other definitions for interrogations as there are for testimonial. *Id.* at 53 n.4.

²⁹ Taking excerpts from three different sources, the Court suggested several examples of testimonial statements:

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

Id. at 51–52 (citations omitted).

³⁰ See *id.* at 51 (citing Brief for Petitioner at 23, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)). The Petitioner’s brief argued for a rule that prohibits the prosecution from introducing “*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” Petitioner’s Brief at 23, *Crawford*, 541 U.S. 36 (No. 02-9410).

³¹ See *Crawford*, 541 U.S. at 52 (citing *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)). In his concurring opinion, Justice Thomas suggested that the “Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” See *White*, 502 U.S. at 365.

³² See *Crawford*, 541 U.S. at 52 (citing Brief of Amici Curiae National Association of Criminal Defense Lawyers at 3, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)). In their analysis of determining when a statement is a testimonial one, amici argues that “[n]ot every statement uttered, and later used at trial, is testimonial . . . [however] an out of court statement is testimonial *only* when the circumstances indicate that a reasonable declarant at the time would understand that the statement would later be available for use at a criminal trial.” Brief of Amici Curiae National Association of Criminal Defense Lawyers at 22, *Crawford*, 541 U.S. 36 (No. 02-9410) (emphasis added).

³³ See *Crawford*, 541 U.S. at 51.

³⁴ U.S. CONST. amend. VI.

solemn declaration or affirmation made *for the purpose of* establishing or proving some fact.”³⁵ Implied in this definition is the relevance of the declarant’s purpose and intent when making the statement. The crucial question is this: is the statement itself testimonial once uttered, or do the circumstances surrounding the statement make it so? This article argues that the label “testimonial” does not attach once the words are spoken, but is created through the attendant circumstances. The declarant must make a “solemn declaration” and *know* that they are “bearing witness”—and in order to be a witness, the declarant must understand the consequences of his utterances.³⁶ A declarant cannot bear witness, unless he is able to appreciate the consequences of his statements and anticipate the intended use of those statements in an adversarial proceeding.³⁷ Consequently, this article proffers that children under five-years-old³⁸ are presumptively incapable of uttering a testimonial statement. This article does not argue for a categorical exclusion of all children’s statements from the requirements of the Confrontation Clause; doing so is violative not only of *Crawford*’s holding, but of the Constitution as well.³⁹ Rather, this article suggests that a presumption should exist at which point the burden shifts to the party seeking exclusion of the statement to show the testimonial nature of the statement. Specifically, the presumption may be rebutted by considering the following eleven factors: (1) the declarant’s age; (2) the declarant’s mental capacity; (3) the declarant’s understanding and intent when making the statement; (4) whether the statement was elicited or volunteered; (5) the recipient’s status; (6) the recipient’s role; (7) the recipient’s prior knowledge of allegations and facts contained therein; (8) the recipient’s manner of questioning (open-ended/leading); (9) the recipient’s contact with law enforcement personnel; (10) the presence of law enforcement personnel during the taking of the statement; and (11) the primary purpose for making the statement.⁴⁰ If the opposing party fails to meet the burden, the statement is not testimonial and is therefore admissible, subject to evidentiary restrictions. In order to understand why young children are incapable of making testimonial statements, it is necessary to first examine what factors make a statement testimonial.

IV. Factors Determining Testimonial Hearsay

The Supreme Court’s decision in *Crawford* is monumental not only for what it articulated but also for the areas on which it remained silent. Allowing lower courts to interpret the meaning of testimonial encouraged liberal analysis which eventually led to the inconsistent interpretation and application of the term.⁴¹ Lower courts consider a variety of factors when determining the testimonial character of hearsay statements. Although the Supreme Court declined to provide a clear definition of testimonial when deciding the statement’s testimonial nature, lower courts examine the nature of the statement, the recipient’s status and role when procuring the statement, and the purpose behind making the statement. It is clear that a single factor alone cannot determine the testimonial character of a declarant’s statement. This is particularly important when examining utterances from a child declarant. Lower courts should resist the temptation to simply rely on one of the Court’s

³⁵ *Crawford*, 541 U.S. at 51 (emphasis added) (citing 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

³⁶ See generally Friedman, *supra* note 7. Friedman proffers that if the declarant does not realize that they are “creating evidence,” then sometimes, even the attendant circumstances, do not turn the statement into a testimonial one. *Id.* By way of example, he explains that the government’s surreptitious recording of two “criminal confederates” does not turn their words into testimonial statements because they did not expect their statements to fall in the hands of law enforcement. *Id.*

³⁷ See *id.* Friedman argues that a certain amount of knowledge of the consequences is a necessary predicate to becoming a witness, in the testimonial sense of the word. *Id.* Additionally, he explains that even though young children may not be able to comprehend the precise nature of the legal system, their words may be testimonial if they understand that their statement may lead to adverse consequences. *Id.*

³⁸ See generally John R. Christiansen, *Washington Survey: The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705 (1987) (citing multiple studies on children’s cognitive abilities that state most cognitive skills in memory and recall develop between the ages of five and ten); see also State v. Johnson, 2006 Ohio 5195, at *10 (Ohio Ct. App. 2006) (children over ten are presumed competent to testify), *remanded for resentencing hearing*, 116 Ohio St. 3d 541 (Ohio 2008).

³⁹ See also Daniel E. Monnat & Paige A. Nichols, *The Kid Gloves Are Off: Child Hearsay after Crawford v. Washington*, 30 CHAMPION 18, 20 (Jan./Feb. 2006) (cautioning courts from establishing any policy-based child-hearsay exceptions to *Crawford*). See generally Commonwealth v. DeOliveria, 849 N.E.2d 218, 225–26 (Mass. 2006) (declining to adopt a per se rule that exempts children’s statements to medical personnel from testimonial analysis).

⁴⁰ The primary purpose of the statement should be interpreted consistently with the holdings in *Davis v. Washington*, 547 U.S. 813 (2006) and *United States v. Rankin*, 63 M.J. 348 (2007). The primary purpose test encompasses the recipient’s purpose for eliciting the statement as well as the declarant’s purpose for making the statement; see also discussion *infra* Part VI.B.3.

⁴¹ See generally *e.g.*, *People v. E.H. (In re E.H.)*, 823 N.E.2d 1029, 1036 (Ill. App. Ct. 2005) (focused on accusatory nature of K.R.’s statement), *rev’d and remanded*, 2007 Ill. App. LEXIS 724 (Ill. App. Ct. 2007) (after appellate court was directed to decide nonconstitutional issues first, the court ruled that B.R.’s statements were inadmissible hearsay); *State v. Snowden*, 867 A.2d 314, 325 (Md. 2005) (using the objective witness approach); *State v. Scacchetti*, 711 N.W.2d 508, 514 (Minn. 2006) (beginning the analysis examining the status and purpose of the questioner); *State v. Blue*, 717 N.W.2d 558, 564 (N.D. 2006) (looking to the purpose of the questioner in determining the statement’s testimonial composition); *Rangel v. State*, 199 S.W.3d 523, 535 (Tex. App. 2006) (determining four-year-old child’s statement to be testimonial based on *Davis* test—that the declarant was able to perceive that her words would be used to establish or prove some fact); *Lagunas v. State*, 187 S.W.3d 503, 519 (Tex. App. 2005) (beginning their testimonial analysis considering the declarant’s age and sophistication).

suggested formulations before labeling the hearsay as testimonial; however, many fail to first inquire as to whether the child declarant is capable of making a testimonial statement.

A. Nature of the Statement

If a child declarant utters an accusatory statement, that fact alone is insufficient to transform the statement into a testimonial one. Accusations made by children, without more, should not be interpreted as “bearing testimony.”⁴² Relying solely on the accusatory nature of the statement to guide the decision of determining its testimonial content and ignoring other relevant factors has led to inconsistent, and sometimes illogical, conclusions.⁴³

If a child identifies someone as the alleged abuser during a conversation with a caregiver or an examination by a medical professional, the statement is not instantly transformed into a testimonial one simply because it is accusatory. One appellate court examining two separate cases arrived at opposite conclusions when they examined the accusatory nature of the statement. In *In re E.H.*⁴⁴ and *People v. R.F.*,⁴⁵ the First Division of the Illinois appellate court examined statements that two young children made to their family members. The court in *In re E.H.* focused only on the nature of the statement when attaching a label to the children’s hearsay statements.⁴⁶ There, the grandmother overheard her granddaughters talking, at which time the grandmother inquired into the substance of their conversation.⁴⁷ Without further prompting, the granddaughters stated that they were talking about how the defendant made them lick her “front behind” and “back behind.”⁴⁸ Moving for the statement’s admissibility, the State argued that the declarant must be aware that they are “bearing witness” before the statement is considered testimonial.⁴⁹ However, adopting an accusatory approach, the appellate court dismissed the State’s argument, and also discounted the relevance of the listener’s status.⁵⁰ Finding the granddaughters’ statements to their grandmother testimonial, the Illinois court disregarded *Crawford’s* position on casual statements that are off-handed or overheard.⁵¹ The court specifically held that “it is the nature of the testimony rather than the official or unofficial nature of the person testifying that determines the applicability of *Crawford* and the *confrontation clause*.”⁵²

Less than one week later, the same appellate court decided the case of *People v. R.F.*⁵³ This time, the Illinois appellate court did not take such a bold position in their ruling and seemed to step away from their reliance on the accusatory nature of the statement as a dispositive factor.⁵⁴ Here, the court found the three-year-old’s statement to her mother and grandmother

⁴² *But see* Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 544 (2005) (suggesting that when a statement is accusatory and intended to be conveyed beyond those who would be expected to keep it confidential—it should be considered testimonial).

⁴³ *See, e.g., In re E.H.*, 823 N.E.2d at 1037 (children’s statement to grandmother held testimonial because the statement concerned the “fault and identity” of the perpetrator, and therefore accusatory), *rev’d and remanded*, 2007 Ill. App. LEXIS 724 (after appellate court was directed to decide nonconstitutional issues first, the court ruled that B.R.’s statements were inadmissible hearsay); *DeOliveria*, 849 N.E.2d at 224 (conceding that the portion of the child’s statement to the treating physician that identifies the perpetrator should be redacted). *But see* *People v. Vigil*, 127 P.3d 916, 925 (Colo. 2006) (child’s statement to father identifying the perpetrator held nontestimonial); *Scacchetti*, 711 N.W.2d 508 (statements from three-year-old to nurse practitioner with the Midwest Children’s Resource Center, identifying perpetrator held nontestimonial because made for the purposes of treatment); *State v. Vaught*, 682 N.W.2d 284, 326 (Neb. 2004) (holding child’s statement to physician was nontestimonial even when it identified the perpetrator); *State v. Fisher*, 108 P.3d 1262, 1269 (Wash. Ct. App. 2005) (child’s statements to physician identifying perpetrator held nontestimonial and made in the course of treatment).

⁴⁴ 823 N.E.2d 1029 (Ill. App. Ct. 2005), *rev’d and remanded as to B.R.*, 2007 Ill. App. LEXIS 724 (Ill. App. Ct. 2007).

⁴⁵ 825 N.E.2d 287 (Ill. App. Ct. 2005).

⁴⁶ *See In re E.H.*, 823 N.E.2d at 1037.

⁴⁷ *Id.* at 1031.

⁴⁸ *Id.* The children’s conversation with the grandmother occurred approximately one year after the alleged incident with the delay being attributed to a threat from the perpetrator. *Id.*

⁴⁹ *See id.* at 1034.

⁵⁰ *See generally id.* at 1041–44 (Quinn, J., dissenting) (expressing his concern that the majority fails to consider the recipient’s status in the testimonial equation).

⁵¹ The court in *In re E.H.* ignored *Crawford’s* position that one who makes a “casual remark to an acquaintance” is not “bearing witness.” *See generally In re E.H.*, 823 N.E.2d 1029, 1031; *see also infra* text accompanying note 65. Multiple jurisdictions have relied on that phrase from *Crawford* of “off hand, overheard remarks” to hold that most statements to family members and friends are generally nontestimonial in nature. *See, e.g., United States v. Franklin*, 415 F.3d 537 (6th Cir. 2005); *United States v. Manfre*, 368 F.3d 832, 838 (8th Cir. 2004).

⁵² *In re E.H.*, 823 N.E.2d at 1037 (emphasis in original).

⁵³ 825 N.E.2d 287 (Ill. App. Ct. 2005).

⁵⁴ *Id.* at 295.

identifying her father as the alleged perpetrator, to be nontestimonial.⁵⁵ Almost in direct contradiction to their previous ruling, the Illinois court emphasized the fact that the child's statements were made to family members and "were not 'testimonial' under *Crawford*."⁵⁶ The court was conspicuously silent as to the statement's accusatory nature and instead focused on the recipient's status. The First Division of the Illinois appellate court reached contradictory conclusions on these cases with similar facts when they placed different weight on the statement's accusatory character.

Another court acknowledged the accusatory nature argument, yet quickly dismissed it in favor of a broader analysis. In *State v. Mizenko*, the Montana Supreme Court noted that appellant's desire to categorize all substantive and accusatorial hearsay as testimonial, "would require courts to exclude more evidence than the Sixth Amendment requires."⁵⁷ Instead, the court considered other factors in addition to the statement's nature, when deciding which label to attach.⁵⁸ Holding the statement nontestimonial, the *Mizenko* court relied on whether or not the declarant had "reason to believe that her statement would be used prosecutorially."⁵⁹ Although the declarant made an accusatory statement identifying her attacker, that alone, did not morph her hearsay statement into a testimonial one.

Without sufficient direction, courts will continue to rely on their own vague and amorphous definitions of testimonial statements, inevitably resulting in inconsistent rulings. If a child declarant's statement is neither accusatory nor substantive, then the prosecution would rarely seek its admission. Courts must resist the seemingly simplistic accusatory-nature approach to test the testimonial composition of statements. When children utter something accusatory it does not necessarily mean that they are "bearing testimony."⁶⁰ As this paper suggests, certain children are incapable of making testimonial statements, even when they make accusatory ones.

B. Circumstances Surrounding the Statement

Since the Supreme Court decided to allow lower courts to search for definitions of testimonial, many courts have examined the attendant circumstances of the particular hearsay statement to assist in their analysis. Without concrete guidance, judges attempt to fit the circumstances into one of the formulations *Crawford* suggests.⁶¹ This method, as applied to child declarants, fails to recognize a child's inability to make testimonial statements, regardless of the circumstances. Nonetheless, courts persist in seeking shelter under the shoddy framework set out in *Crawford v. Washington*. The Supreme Court's reference to "involvement of government officers"⁶² causes judges and scholars to attach undue significance to that factor. Albeit an important consideration when determining whether a declarant "bears testimony," utilizing it as the sole barometer invites abuse.⁶³ The Court declined to definitively state that involvement of Government officers creates a per se testimonial statement, inferring that it is not the sole determining factor.⁶⁴ Therefore, most jurisdictions examine the statement's attendant circumstances to guide them in their quest towards an appropriate definition of testimonial. When courts analyze the circumstances surrounding the statement, they often examine to whom the statement was made, the purpose for making the statement and the presence of Government involvement in creating the statement.

⁵⁵ *Id.*

⁵⁶ *Id.* In their opinion, the majority affirmatively states, "*Crawford* does not apply to statements made to nongovernmental personnel, such as family members or physicians." *Id.*

⁵⁷ 127 P.3d 458, 461 (Mont. 2006) (noting that the Supreme Court in *Crawford* recognized situations where a casual remark, although accusatory, is not testimonial) (citing *Crawford v. Washington*, 541 U.S. 36 (2004)).

⁵⁸ See generally *id.* at 467 n.7 (adopting the reasonable declarant approach).

⁵⁹ *Id.* at 465.

⁶⁰ See generally *United States v. Saget*, 377 F.3d 223, 227 (2d Cir. 2004) (interpreting *Crawford* to suggest that whether a person "bears testimony" is determined by their awareness of the potential prosecutorial use of such statement).

⁶¹ See *Crawford*, 541 U.S. at 51–52; see also *supra* note 29.

⁶² *Crawford*, 541 U.S. at 53.

⁶³ Nevertheless, the Supreme Court stated in the affirmative, that the "[i]nvolvement of government officers in the in the production of testimony with an eye toward trial presents *unique potential* for prosecutorial abuse." *Id.* at 56 n.7 (emphasis added).

⁶⁴ However, several courts have used the recipient's status as a *nongovernmental* officer as a dispositive factor in their testimonial analysis. See, e.g., *United States v. Manfre*, 368 F.3d 832, 838 (8th Cir. 2004) (holding statements to loved ones nontestimonial and inapplicable under *Crawford v. Washington*); *People v. R.F.*, 825 N.E.2d 287, 295 (Ill. App. Ct. 2005) (holding that statements made to family members were nontestimonial under *Crawford*); *People v. Rolandis G.*, 817 N.E.2d 183, 189 (Ill. App. Ct. 2004) (statements from seven-year-old to mother nontestimonial); *State v. Krasky*, 736 N.W.2d 636, 643 (Minn. 2007) (statement from sexual assault victim to nurse practitioner held nontestimonial); *State v. Williams*, 2006 Tenn. Crim. App. LEXIS 920, at *40 (2006) (statement from four-year-old to mother nontestimonial); *State v. Walker*, 118 P.3d 935, 942 (Wash. Ct. App. 2005) (statement of sexual assault victim to mother identifying the perpetrator held nontestimonial).

1. Recipient's Status and Role

Currently, many courts examine the recipient's status and role when determining the testimonial nature of the declarant's statement, rather than first inquiring whether a child declarant is able to become a "witness against" the alleged perpetrator. In the post-*Crawford* era, courts generally consider child declarants' statements made to specific categories of individuals to be of a nontestimonial nature.⁶⁵

a. Statements to Family Members

Children may disclose allegations of abuse to family members, close relatives, and sometimes to friends. As a result, family members take the child to medical practitioners who, in turn, may refer them to social workers or family advocacy centers. Meanwhile, the child declarant makes multiple statements to various other individuals. *Crawford* distinguishes between statements made to Government officers and "casual remarks to acquaintance[s]" by definitively stating that the latter is not "bear[ing] testimony."⁶⁶ Children often seek comfort or refuge when disclosing to family members, and do not intend to "bear testimony."⁶⁷ Parents, when talking to their children about unusual behavior that may be indicators of abuse, are concerned about their child's health and well-being, and are not intent on securing testimony for a potential prosecution.⁶⁸ The child, when responding to their concerned parent, is not making a "solemn declaration or affirmation."⁶⁹ The child is simply explaining what happened or describing the source of pain or injury. Consequently, a majority of courts conclude that statements to family members or friends are nontestimonial.⁷⁰

Sometimes children cannot fully understand the adverse consequences of their statements—they only know they are relaying information to a loved one or caregiver. This type of statement to family members is inherently nontestimonial. Some courts fail to recognize the statement for what it is: a statement to mom, dad, grandmother, or a friend describing fear, pain or injury. Instead, these courts blindly adhere to one of *Crawford*'s formulations to reach their desired conclusions about the statement's testimonial character. These courts often overlook the abilities or inabilities of a child to even understand the consequences of their statements. The court in *In re E.H.*, determined a two-year-old's statement to her grandmother to be testimonial because it identified the perpetrator.⁷¹ The Illinois court's analysis disregarded not only the recipient's status and role, but also the crucial question of whether the young child was even capable of understanding the nature and consequence of her statement. Failure to understand the reasons behind the child declarant's statement to a family member or other non-governmental person, results in illogical conclusions.

b. Statements to Medical Personnel and Other Nongovernmental Individuals

A majority of jurisdictions examining statements made to other nongovernmental actors, such as medical practitioners and other private agents, generally hold such statements to be nontestimonial.⁷² In conducting their testimonial analysis,

⁶⁵ See cases cited *supra* note 64.

⁶⁶ See *Crawford*, 541 U.S. at 51.

⁶⁷ See, e.g., *People v. Vigil*, 127 P.3d 916, 925 (Colo. 2006) (stating that "[a]n objectively reasonable seven-year-old child would foresee his father and his father's friend using his statements to comfort and protect him."); *Walker*, 118 P.3d at 942 (describing that the "exchange between [mother] and [daughter] was that of a conversation between a concerned parent and an upset child, nothing more.")

⁶⁸ See *Pantano v. State*, 138 P.3d 477, 483 (Nev. 2006).

⁶⁹ See *Crawford*, 541 U.S. at 51.

⁷⁰ See *supra* note 64; see also *United States v. Coulter*, 62 M.J. 520, 528 (N-M. Ct. Crim. App. 2005) (two-year-old's statement to parents nontestimonial); *Vigil*, 127 P.3d at 925 (seven-year-old's statement to father and father's friend nontestimonial); *People v. R.F.*, 825 N.E.2d 287, 295 (Ill. App. Ct. 2005) (three-year-old's statement to mother and grandmother held nontestimonial); *State v. Mizenko*, 127 P.3d 458, 467 (Mont. 2006) (citing cases in numerous jurisdictions holding statements to family members, friends and other nongovernmental actors nontestimonial); *State v. Spencer*, 169 P.3d 384 (Mont. 2007) (three-year-old child abuse victim's statement to school counselor and foster mother nontestimonial); *State v. Shafer*, 128 P.3d 87 (Wash. 2006) (child's statements to mother and mother's friend held nontestimonial).

⁷¹ See generally *In re E.H.*, 823 N.E.2d 1029 (Ill. Ct. App. 2005); see also *supra* text accompanying notes 44–52 discussing the court's analysis in *In re E.H.*

⁷² See, e.g., *United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005) (holding that statements made to physician seeking to give aid or treatment are presumptively nontestimonial); *People v. Cage*, 155 P.3d 205, 218–20 (Cal. 2007) (child's statement to physician in emergency room lacked solemnity and formality and held nontestimonial); *Vigil*, 127 P.3d at 925 (child's statement to physician held nontestimonial); *State v. Scacchetti*, 711 N.W.2d 508, 516 (Minn. 2006) (statements from three-year-old to nurse practitioner with the Midwest Children's Resource Center, held nontestimonial because made for the purposes of treatment); *State v. Krasky*, 736 N.W.2d 636, 641–43 (Minn. 2007) (statement from sexual assault victim to nurse practitioner held

courts examine the recipient's role in receiving or procuring the statement. Some of the roles include conducting medical examinations, ascertaining the health and safety of children, and investigating an alleged crime. If the recipient's role is to aid in treatment and not to participate in the investigation, courts view the resulting statements as nontestimonial.⁷³

In both *State v. Johnson*,⁷⁴ and *People v. Cage*,⁷⁵ the two courts examined a physician's role in procuring the statement and recognized it was to assist in the child's treatment and was not part of the investigative process. In *Johnson*, the prosecution sought introduction of the nine-year-old's statements contained in medical records.⁷⁶ Admitting the statements, the court articulated that "statements made by child abuse victims to medical providers are not testimonial in nature."⁷⁷ Further, the court reasoned that the child made the statements to the medical staff to aid in her treatment and not to investigate the acts she alleged.⁷⁸ Similarly, the court in *People v. Cage*, considered the doctor's various roles and duties in conducting examinations concerning suspected child abuse.⁷⁹ Specifically, the court noted that the treating physician was under a statutory duty to report child abuse allegations.⁸⁰ The court acknowledged that a reporting statute did not obligate the doctor to investigate the allegations.⁸¹ Instead, the doctor's role was to examine and treat the patient. The mandatory reporting statute did not transform the physician's role into an investigative agent of law enforcement.⁸²

The court in *Lollis v. State*,⁸³ examined the roles of a nongovernmental actor in procuring statements from three young children.⁸⁴ Despite defendant's argument that the licensed therapist received over 70% of her cases from a government agency, Child Protective Services (CPS), the court did not consider the therapist's role to be an agent of the government.⁸⁵ Rather, the court recognized that the therapist's primary obligation was to treat the patients and "to play the role of a friend, rather than an imposing governmental figure."⁸⁶

Sometimes, when courts solely rely on the recipient's role, they largely ignore the declarant's ability to understand that role. Consequently, courts have reached inconsistent results when using the recipient's role as the determinative factor.⁸⁷ A doctor, whose *role* it is to conduct medical examinations, may then be required to report any allegation or finding of child sexual abuse to the authorities. This secondary role does not suddenly transform the declarant's statement from nontestimonial to testimonial, even when it contains Government involvement.⁸⁸ In *People v. Vigil*,⁸⁹ a seven-year-old child gave statements to a doctor alleging sexual abuse. The appellate court noted that the physician was a member of a child

nontestimonial); *State v. Vaught*, 682 N.W.2d 284, 291 (Neb. 2004) (holding child's statement to physician was nontestimonial); *State v. Fisher*, 108 P.3d 1262, 1269 (Wash. Ct. App. 2005) (child's statements to physician identifying perpetrator held nontestimonial and made in the course of treatment).

⁷³ See *State v. Johnson*, 2006 Ohio 5195 (Ohio Ct. App. 2006); *Cage*, 155 P.3d 205; see also cases cited *supra* note 72.

⁷⁴ 2006 Ohio 5195, *remanded for resentencing hearing*, 2008 Ohio 69 (Ohio 2008).

⁷⁵ 155 P.3d 205.

⁷⁶ See *Johnson*, 2006 Ohio 5195, at *21.

⁷⁷ *Id.* (citing *State v. Sheppard*, 842 N.E.2d 561, 567 (Ohio Ct. App. 2005)).

⁷⁸ See *id.*

⁷⁹ See *Cage*, 155 P.3d 205.

⁸⁰ *Id.* at 219–20.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 232 S.W.3d 803 (Tex. App. 2007).

⁸⁴ *Id.* at 808.

⁸⁵ *Id.*

⁸⁶ *Id.* The court acknowledged that the statements were made in the absence of an emergency, but found that fact alone does not turn the statements into testimonial ones. *Id.* The court noted the relationship between the children and therapist was primarily one of counseling rather than trial preparation. *Id.* at 809.

⁸⁷ See generally *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 (Cal. Ct. App. 2004) (four-year-old's statement to Multi Disciplinary Interview Center forensic interviewer held testimonial); *People v. Vigil*, 104 P.3d 258 (Colo. Ct. App. 2004), *aff'd in part, rev'd in part*, 127 P.3d 916 (Colo. 2006), *cert. denied* 2006 LEXIS 6532 (Oct. 2, 2006) (child's statement to physician who was a member of a child protection team held nontestimonial); *State v. Snowden*, 867 A.2d 314, 329 (Md. 2005) (eight- and ten-year-olds' statements to social worker testimonial).

⁸⁸ See generally *State v. Scacchetti*, 711 N.W.2d 508, 515 (Minn. 2006). The court noted that the fact that the nurse may be subsequently required to testify regarding the sexual abuse examination conducted does not "transform the medical purpose of the assessments into a prosecutorial purpose."

⁸⁹ 104 P.3d 258, *aff'd in part, rev'd in part*, 127 P.3d 916 (Colo. 2006), *cert. denied* 2006 LEXIS 6532 (Oct. 2, 2006).

protection team, he routinely examined children alleging sexual abuse, he often testified as an expert in child abuse cases, was asked to conduct a “forensic sexual abuse examination,” and he spoke with the police prior to the examination.⁹⁰ Although the court recognized the recipient’s status was a nongovernmental officer, it emphasized his secondary role and relied on his association with the police officer immediately prior to the examination.⁹¹ Consequently, the appellate court found the child’s statement to the physician was testimonial and remanded the case for a new trial.⁹² Reversing the appellate court’s decision, the Colorado Supreme Court not only recognized the physician’s status, role, and purpose in conducting the examination, it went on to consider the child’s level of appreciation of the potential use of the statement at a later proceeding.⁹³ The court explicitly stated, “[t]he fact that the doctor was a member of a child protection team does not, in and of itself, make him a government official absent a more direct and controlling police presence.”⁹⁴ The Colorado Supreme Court recognized that the physician’s duties may associate him with Government actors, but found that fact unpersuasive—whereas the appellate court’s shortsightedness led it to an incorrect conclusion. In *Vigil*, the state appellate and supreme courts examined one statement to the same recipient, but reached opposite conclusions based on the importance they placed on the recipient’s role. Courts examine the roles of the parties, the circumstances surrounding the statement, and the level of Government involvement, yet they reach inconsistent conclusions as a result of emphasizing one factor while ignoring others. Courts reach equally incompatible conclusions when they attribute more importance to Government involvement surrounding the declarant’s statement than they do other relevant factors.⁹⁵

c. Presence of Government Involvement

In the post-*Crawford* era, courts carefully scrutinize statements made in connection with Government individuals, sometimes disregarding the recipient’s status and the declarant’s intent. In *People v. Sisavath*,⁹⁶ the court found unpersuasive the recipient’s status as a private, nongovernmental entity and focused primarily on the level of Government participation in eliciting the hearsay statement. In *Sisavath*, a four-year-old spoke to a trained forensic interviewer at a private center, unaffiliated with any Government agency.⁹⁷ The prosecutor and an investigator with the district attorney’s office observed the interview.⁹⁸ In finding the statement testimonial, the court dismissed the State’s argument that the interview was conducted at a neutral location, by a private individual, and not for a prosecutorial purpose, and instead, relied on the level of Government involvement surrounding the child’s statements.⁹⁹

Similarly, if the recipient’s role involves some form of Government participation then some courts find the resulting statements to be testimonial.¹⁰⁰ This analysis clearly disregards the child’s age or ability to understand the situation and the prosecutorial consequences of their statements. In *State v. Blue*,¹⁰¹ the recipient’s role was to conduct a forensic interview of

⁹⁰ See *Vigil*, 104 P.3d at 265.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *People v. Vigil*, 127 P.3d 916, 924 (Colo. 2006).

⁹⁴ See *id.* at 923–24.

⁹⁵ See, e.g., *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 (Cal. Ct. App. 2004) (four-year-old’s statement to Multi Disciplinary Interview Center forensic interviewer held testimonial); *State v. Snowden*, 867 A.2d 314, 329 (Md. 2005) (eight- and ten-year-olds’ statements to social worker testimonial); *State v. Blue*, 717 N.W.2d 558, 564 (N.D. 2006) (four-year-old child’s statement to forensic interviewer held testimonial); *Rangel v. State*, 199 S.W.3d 523, 535 (Tex. App. 2006) (four-year-old’s statement to child protective services worker held testimonial). But see *Commonwealth v. DeOliveria*, 849 N.E.2d 218, 224 (Mass. 2006) (six-year-old’s statement to social worker nontestimonial); *State v. Bobadilla*, 709 N.W.2d 243, 255 (Minn. 2006) (three-year-old’s statement to forensic interviewer nontestimonial).

⁹⁶ 13 Cal. Rptr. 3d 753.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* Without expounding, the court fell back on the formulaic phrase: “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.* (citing *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004)). Choosing to rely on this formulation, the court ignored the other proffered formula, “pretrial statements that declarants would reasonably expect to be used prosecutorially.” See generally *Crawford*, 541 U.S. at 51–52 (emphasis added).

¹⁰⁰ See, e.g., *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005), *reh’g en banc denied*, 2005 U.S. App. LEXIS 9866 (8th Cir. May 27, 2005); *Snowden*, 867 A.2d 314; *State v. Mack*, 101 P.3d 349 (Or. 2004). Most courts when reaching this conclusion rely heavily on *Crawford*’s assertion that “[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.” *Crawford*, 541 U.S. at 52. But see *Bobadilla*, 709 N.W.2d 243; *People v. Geno*, 683 N.W.2d 687 (Mich. Ct. App. 2004), *rev. denied*, 471 Mich. 921 (Mich. 2004).

¹⁰¹ 717 N.W.2d 558 (N.D. 2006).

a child witness. Here, the four-year-old's mother took her to the local Child Advocacy Center where a nongovernmental employee conducted a videotaped forensic interview. In holding that the statement was testimonial, the North Dakota Supreme Court considered the level of Government involvement in procuring the statement.¹⁰² In reaching their conclusion, the court relied on *Crawford*'s concerns over Government involvement in the production of testimony and held that "[s]tatements made to non-government questioners acting in concert with or as an agent of the government are likely to be testimonial."¹⁰³ The court failed to consider whether the four-year-old was even capable of understanding the nature of the interview or the adverse consequences of the statements.¹⁰⁴ When courts focus solely on the presence of governmental involvement they reach narrowly tailored results that do not accurately reflect whether the child understands the situation or the purpose in making the statement.¹⁰⁵ Courts continue to flounder in the aftermath of *Crawford*, emphasizing the need for more specific guidance, especially involving young child declarants.

Whether the statement is to a family member, doctor, social worker, private agent or even a forensic interviewer, courts are unable to employ structured analysis in determining the testimonial aspects of statements. The recipient's status and role are relevant factors when determining the testimonial nature of a child's statement. However, when the equation fails to account for the declarant's maturity and ability to understand the recipient's status or role, the testimonial calculation is incomplete. The previous cases involve statements to nongovernmental personnel with little or no Government involvement and those with significant Government participation, yet the courts are unable to agree on the importance of the governmental role.¹⁰⁶ They are equally perplexed on the relevance of the recipient's role.¹⁰⁷ The confusion displayed by the courts is a result of their failure to consider a crucial part of the equation: the child declarant's abilities to foresee the potential use of their statements.¹⁰⁸

2. Primary Purpose

Prior to the Supreme Court's additional guidance provided in *Davis v. Washington* and *Indiana v. Hammon*, setting out the "primary purpose" test,¹⁰⁹ lower courts inconsistently and haphazardly analyzed the recipient's purpose in procuring the statement.¹¹⁰ In doing so, these courts minimized the declarant's intent. It is necessary to consider the declarant's purpose in

¹⁰² *Id.* at 561.

¹⁰³ *Id.* at 564. The Supreme Court in *Crawford* noted that those types of statements present a "unique potential for prosecutorial abuse," yet never affirmatively ruled them to be testimonial. See generally *Crawford*, 541 U.S. at 56 n.7 (emphasis added). In support of their conclusion, the Supreme Court of North Dakota listed several other jurisdictions where courts have found statements to be testimonial when procured during similar interviews. See *Blue*, 717 N.W.2d at 564.

¹⁰⁴ *But see Bobadilla*, 709 N.W.2d 243. In *Bobadilla*, the Minnesota Supreme Court similarly examined a young child's statement to a forensic interviewer. Here, the court actually recognized that a child of such a young age would not "understand the legal system and the consequences of statements made during the legal process." *Id.* at 256. The three-year-old child disclosed allegations of abuse to his mother who, in turn, took him to the emergency room for an examination. *Id.* at 246-47. A police officer arrived at the hospital, met with the parents, and eventually forwarded his report to the Kandiyohi County Family Service Department. *Id.* As a result, a child-protection worker met and interviewed the child at the law enforcement center. In examining the recipient's role, the court found that the interviewer was not acting "to a substantial degree in order to produce a statement for trial." *Id.* at 256. Rather, the court relied on the governing statutory purpose of protecting the health and welfare of the child, and found this was an overriding factor in the testimonial analysis. *Id.* at 255. In *Bobadilla*, the facts indicated more government involvement than in the *Blue* case. However, the courts reached different conclusions based on the significance they placed on the level of government involvement.

¹⁰⁵ See, e.g., *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 (Cal. Ct. App. 2004) (four-year-old's statement to forensic interview specialist at the local county's Multidisciplinary Interview Center was held testimonial where both the prosecuting attorney and an investigator from the district attorney's office were present); *People ex rel. R.A.S.*, 111 P.3d 487, 490 (Colo. Ct. App. 2004) (four-year-old child's videotaped statement to a police investigator held testimonial "even [under] the narrowest formulation under the Court's definition of the term."); *Snowden*, 867 A.2d at 325-26 (eight- and ten-year-olds' statements to social worker held testimonial who had previously received a police report concerning the allegations).

¹⁰⁶ See also *Snowden*, 867 A.2d at 316. This case involved two children ages eight and ten who made allegations of sexual abuse. A licensed social worker with Child Protective Services Division interviewed the children pursuant to Maryland practice in cases involving allegations of sexual abuse. *Id.* At the time of the interview, an investigation into the allegations was currently underway. The appellate court deemed the amount of government involvement a "weighty factor" in determining the testimonial nature of the statement. *Id.* at 327 n.17.

¹⁰⁷ See, e.g., *Blue*, 717 N.W.2d 558; *Bobadilla*, 709 N.W.2d 243.

¹⁰⁸ See generally *Sisavath*, 13 Cal. Rptr. 3d 753. The court mentioned in passing, the declarant's ability to understand the potential prosecutorial purpose of the statement. The court declined to consider whether a four-year-old would anticipate the potential consequences of the statement in favor of the "objective observer." *Id.* at 758 n.3.

¹⁰⁹ See generally *Davis v. Washington*, 547 U.S. 813 (2006). The primary purpose test examines the interview from both the recipient's and declarant's perspectives. See discussion *infra* Part IV.B.3. *But see State v. Siler*, 116 Ohio St. 3d 39, 47 (Ohio 2007) (analyzing *Davis*'s holding to mean that the declarant's expectations are irrelevant).

¹¹⁰ See *supra* notes 95, 100.

making the statement, as it provides additional guidance in the testimonial calculation. This is not to say that the recipient's purpose in taking the statement is to be minimized or ignored. There are times where the recipient may either subconsciously or consciously manipulate the declarant's words or thoughts to support the desired outcome.¹¹¹ Thus, it is conceivable where a young child declarant, completely unaware of the potential prosecutorial use of his statement, is also unaware of the recipient's motives in procuring the statement. Judges must be vigilant and give appropriate consideration to the true purpose behind the statement's existence when analyzing the testimonial character of a child declarant's statement.

When the recipient's purpose is to develop testimony for trial, courts uniformly find the declarant's statement testimonial, regardless of the declarant's purpose in making the statement.¹¹² In *State v. Blue* and *State v. Snowden*, the courts determined that the interviewer's purpose in eliciting the statements was to develop testimony for trial.¹¹³ In *Blue*, the court relied on Merriam-Webster's definition of "forensic" when determining the questioner's purpose in interviewing the child.¹¹⁴ In *Snowden*, the court examined the Maryland statute that allows the State to substitute the child's testimony for that of another.¹¹⁵ Both courts arrived at the same conclusion: the children's statements were testimonial because they were prepared in anticipation for trial.¹¹⁶ However, the *Blue* court ignored the feasibility of the four-year-old declarant's purpose in making the statement. Whereas the *Snowden* court actually considered the likelihood of the eight- and ten-year-old's objective and subjective awareness of the situation and factored it into their testimonial calculation.¹¹⁷ Had the court in *Blue* decided to acknowledge the mental capacity of its four-year-old declarant and not simply rely on Webster's definition of "forensic," the result may have been decidedly different.

If the purpose in making or procuring the statement is for medical treatment, courts usually conclude the statement is nontestimonial.¹¹⁸ In *State v. Scacchetti*, the court examined the child declarant's statement to the nurse during a medical assessment interview and held the statement nontestimonial.¹¹⁹ Considering the recipient's status and statement's purpose, and that the nurse was not a Government agent, the court concluded the statement was nontestimonial.¹²⁰

More importantly, courts acknowledge that medical personnel and social workers are sometimes involved in providing testimony in the resulting prosecution.¹²¹ These courts remain steadfast in recognizing the original purpose surrounding the statement rather than allowing subsequent events to transform the inherent nontestimonial quality of the statement. Unambiguous, the *Scacchetti* opinion addressed the effect, if any, of a secondary purpose noting that:

[T]he record here indicates that [the nurse's] purpose in interviewing and examining [the child] was to assess her medical condition

. . . .

. . . Moreover, the mere fact that [the nurse] may be called to testify in court regarding sexual abuse cases does not transform the medical purpose of the assessments into a prosecutorial purpose Thus, even if we were to conclude that [the nurse's] assessments of [the child] had, as a secondary purpose,

¹¹¹ See generally Mosteller, *supra* note 42, at 569 (noting concern over possible governmental manipulation of the witness in creating the evidence).

¹¹² See, e.g., *Blue*, 717 N.W.2d 558; *State v. Snowden*, 867 A.2d 314 (Md. 2005).

¹¹³ See *Blue*, 717 N.W.2d at 564; *Snowden*, 867 A.2d at 329.

¹¹⁴ See *Blue*, 717 N.W.2d at 564. *But see* *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006).

¹¹⁵ See *Snowden*, 867 A.2d at 330.

¹¹⁶ See *Blue*, 717 N.W.2d at 564; *Snowden*, 867 A.2d at 329.

¹¹⁷ See *Snowden*, 867 A.2d at 326. Briefly, the court mentioned that the capacity of young children to comprehend the situation is a factor for consideration. *Id.* at 328. The court declined to accept it as a dispositive factor. *Id.*

¹¹⁸ See e.g., *United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005) (holding statements given to pediatrician for diagnosis and treatment are "presumptively nontestimonial."); *Ohio v. Muttart*, 875 N.E.2d 944, 957 (Ohio 2007) (holding that statements to medical personnel that are made for purposes of diagnosis or treatment are nontestimonial "because they are not even remotely related to the evils which the Confrontation Clause was designed to avoid."); see also cases cited *supra* note 72.

¹¹⁹ See 711 N.W.2d 508 (Minn. 2006) (three and a half-year-old child abuse victim).

¹²⁰ See *id.* at 516 (citing *Peneaux*, 432 F.3d at 896). In *Peneaux*, the foster parents took the child to a pediatrician about marks they noticed on his body. *Peneaux*, 432 F.3d at 896. The pediatrician testified regarding the child's statements and the court found no Confrontation Clause violation because the interview lacked substantial government involvement. *Id.*; see also *State v. Vaught*, 682 N.W.2d 284, 326 (Neb. 2004) (finding no government involvement in procuring the child's statement to the emergency room physician, the court held the statement nontestimonial and admissible).

¹²¹ See, e.g., *Scacchetti*, 711 N.W.2d at 515; *People v. Vigil*, 127 P.3d 916, 923-24 (Colo. 2006).

the preservation of testimony for trial, [the child's] statement would still not be testimonial. Because the broad purpose of [the nurse's] assessments was [the child's] medical health, any subsequent testimony that [the nurse] was required to give did not change her assessment purpose.¹²²

Here, the *Scacchetti* court used the eight factors proffered in *State v. Wright*,¹²³ and emphasized the original purpose of the nurse's interview.¹²⁴ The court did not elaborate on the declarant's purpose for making the statement, however, it stated that one of the central considerations is "the purpose of the statements from the perspective of the declarant and from the perspective of the government questioner."¹²⁵ If more courts factored the declarant's purpose into the testimonial equation, they may enjoy more accurate and consistent findings.

Regardless of a prevailing medical purpose surrounding the statement, some courts disregard this purpose and find the resulting statement to be testimonial relying on the statement's accusatory nature or the presence of Government involvement.¹²⁶ In *Commonwealth v. DeOliveria* the court recognized the child declarant's statements were made to medical personnel seeking to diagnose and treat.¹²⁷ The court acknowledged that patients have a self interest in their own treatment that motivates them to relay accurate information during the examination.¹²⁸ Logical analysis concludes that since the patient is motivated by self interest, they cannot *also* be concerned with potential prosecutorial uses of their statements. However, this court did not take a logical approach in testing the nature of the children's statements. The court redacted the portion of the statement identifying the perpetrator and stuck on it a testimonial label.¹²⁹ In its testimonial equation this jurisdiction confused *testimonial* with *accusatory*, which yielded an illogical and inaccurate result.

Not surprisingly, other courts place less weight on the accusatory nature of the child's statement when the purpose of the examination was for medical diagnosis and treatment.¹³⁰ In *State v. Vaught*, the court held that the four-year-old's statement identifying the perpetrator was made during the course of treatment and not in the development of testimony and was therefore, nontestimonial.¹³¹ It is incongruent to conclude that a young child uttering a single sentence, "Daddy hurt me in my bottom," is capable of recognizing the potential prosecutorial use of only a few words out of the entire sentence. Judges must scrutinize the recipient's role when procuring the statement but also consider the declarant's purpose and understanding when making the statement.

¹²² *Scacchetti*, 711 N.W.2d at 515 (citing *Bobadillia*, 709 N.W.2d at 255).

¹²³ 701 N.W.2d 802 (Minn. 2005), *vacated and remanded*, 126 S. Ct. 2979 (2006). In *Wright*, the Minnesota Supreme Court's first post-*Crawford* (yet pre-*Davis*) case, the court delineated eight factors to assist them in analyzing a 911 call: (1) whether the declarant was a victim or observer; (2) the declarant's purpose in speaking with the officer; (3) whether it was the police or the declarant who initiated the conversation; (4) the location where the statements were made; (5) the declarant's emotional state when the statements were made; (6) the level of formality and structure of the conversation between the declarant and officer; (7) the officer's purpose in speaking with the declarant; and (8) if and how the statements were recorded. *Wright*, 701 N.W.2d at 812-13. Using those factors, the *Wright* court found the 911 call nontestimonial. The recent *Krasky* decision utilized the *Wright* factors when examining the testimonial character of a child's statement to a sexual assault nurse. *See State v. Krasky*, 736 N.W.2d 636, 641 (Minn. 2007).

¹²⁴ *Scacchetti*, 711 N.W.2d at 515-16.

¹²⁵ *See id.* at 513 (quoting *Bobadillia*, 709 N.W.2d at 250) (noting that neither the declarant's nor the nurse's purpose was to produce a statement for trial). *But see, e.g., State v. Blue*, 717 N.W.2d 558 (N.D. 2006); *State v. Snowden*, 867 A.2d 314 (Md. 2005).

¹²⁶ *See Commonwealth v. DeOliveria*, 849 N.E.2d 218, 224 (Mass. 2006) (accusatory portion of statement to physician testimonial). *But see United States v. Rodriguez-Rivera*, 63 M.J. 372, 381 (2006) (although not deciding a testimonial issue under *Crawford*, the court determined that the presence of government involvement did not change the medical purpose of the interview under Military Rules of Evidence 803(4)).

¹²⁷ *See DeOliveria*, 849 N.E.2d at 224.

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See, e.g., Scacchetti*, 711 N.W.2d at 516 (accusatory statements from three-year-old to nurse practitioner with the Midwest Children's Resource Center, held nontestimonial because made for the purposes of treatment); *State v. Vaught*, 682 N.W.2d 284, 326 (Neb. 2004); *State v. Fisher*, 108 P.3d 1262, 1269 (Wash. Ct. App. 2005) (child's statements to physician identifying perpetrator held nontestimonial and made in the course of treatment).

¹³¹ *See Vaught*, 682 N.W.2d at 326.

3. Reconciling the Recipient's Role and the Statement's Purpose

In *Davis v. Washington*¹³² and *Hammon v. Indiana*,¹³³ the Supreme Court attempted to clarify the relevance of the recipient's role in procuring the statement and the declarant's purpose in making the statements. The *Davis* cases were the first cases issued by the Supreme Court after *Crawford* to interpret statements made to law enforcement officials and they also addressed excited utterances made to 911 operators.¹³⁴ In *Davis*, the Supreme Court held that a witness's statement identifying the perpetrator during a 911 call was a nontestimonial statement.¹³⁵ In the companion case, *Hammon*, the Court held a victim's affidavit to police officers who responded to a domestic disturbance call was a testimonial statement.¹³⁶ The Supreme Court focused on the purpose, timing and nature of the two hearsay statements and specifically limited its ruling to situations involving police interrogations.¹³⁷ Again, the Court declined to elaborate on their definition and interpretation of testimonial. However, the Court did proffer that when determining whether a person is bearing witness, it is necessary to examine the statement's surrounding circumstances such as the level of formality governing the statement as well as the statement's nature and purpose.¹³⁸ In deciding whether statements to law enforcement qualify as testimonial or nontestimonial, the Court specifically held:

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.¹³⁹

The Court acknowledged that their holding does not address situations involving statements made to persons other than law enforcement personnel.¹⁴⁰ Interestingly, in dicta, the Court noted that the Confrontation Clause requires analysis of the declarant's statements rather than the interrogator's questions.¹⁴¹ The facts of *Davis* did not lend themselves to consideration of whether the declarants anticipated the prosecutorial use of their statements. However, the Court's "primary purpose" test places more emphasis on the declarant than the questioner.¹⁴² If the declarant's purpose is to report an immediate emergency in order to seek relief or assistance, then it is not reasonable to assume that they are simultaneously appreciating the potential prosecutorial consequences of the statement.

Davis's "primary purpose" analysis incorporates the declarant's intent when making the statement.¹⁴³ This ruling clarifies the role of law enforcement in an attempt to address lower courts' rigid and inconsistent interpretation of police interrogation. The Supreme Court's opinion emphasizes the relevance of the declarant's viewpoint and the importance of factoring the declarant's intent into the testimonial equation.¹⁴⁴

¹³² 547 U.S. 813 (2006).

¹³³ *Id.*

¹³⁴ *See id.*

¹³⁵ *Id.* at 828.

¹³⁶ *Id.* at 833.

¹³⁷ *See id.* at 822 n.1.

¹³⁸ *See id.* at 827.

¹³⁹ *Id.* at 822 (emphasis added).

¹⁴⁰ *See id.* at 822 n.1. Similarly, a recent Ohio supreme court case made a narrow ruling regarding a child declarant's statement to law enforcement personnel. *See State v. Siler*, 116 Ohio St. 3d 39, 47 (Ohio 2007). The Ohio court narrowly held that a child's statements elicited during a police interrogation are testimonial, regardless of the child declarant's age, understanding, or cognitive abilities. *Id.* at 41.

¹⁴¹ *See Davis*, 547 U.S. at 822 n.1. When the Court noted that the testimonial analysis should focus more on the declarant's statements rather than the interrogator's questions, they acknowledged the importance of the declarant's perspective. The Court also recognized that statements made where interrogation was lacking, could be deemed testimonial because the "Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation." *Id.*

¹⁴² *See id.*; *see also* text accompanying note 141

¹⁴³ *Davis*, 547 U.S. at 822 n.1. When the Court noted that the declarant's statements, rather than the interrogator's questions, were key to examining the testimonial character of the statement, they acknowledged the importance of the declarant's perspective and intent. *But see Siler*, 116 Ohio St. 3d at 47 (analyzing *Davis*'s holding to mean that the declarant's expectations are irrelevant).

¹⁴⁴ Another court that carefully examined the purpose of the interview as well as the declarant's ability to understand the statement was *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006). *See supra* note 104 for a brief discussion of the *Bobadilla* case. As previously discussed, the *Bobadilla* court held that a three-year-old's statement during a forensic interviewer was nontestimonial. *Id.* at 256. Although the *Bobadilla* decision predates *Davis* by four months, it

At first glance, the Supreme Court appears to have issued dichotomous opinions in *Crawford* and *Davis*. A more careful analysis reveals that *Crawford*'s emphasis on the declarant's ability to foresee a prosecution and *Davis*'s "primary purpose" test are not mutually exclusive. The Supreme Court's opinion never wavered on the fact that the defendant "shall enjoy the right . . . to be confronted with witnesses against him," and that witnesses within the meaning of the Sixth Amendment are those who "bear testimony."¹⁴⁵ However, the Court stopped short of fully articulating a method to assist lower courts in determining when a declarant is bearing testimony.

C. Determining the Standard

The Supreme Court failed to adopt any of its proffered formulations of the "core class" of testimonial statements, leaving courts to construct their own framework. In analyzing the testimonial nature of a non-testifying child declarant's statement, it is essential to examine the declarant's understanding when making the statement. Did the child possess the requisite knowledge that the statement may be used in a potential prosecution? The answer must employ both an objective and a subjective test. If the *child* does not understand the resulting consequences of the statement, i.e., that it will cause an investigation into the alleged misconduct that results in eventual prosecution, then the statement should not be considered testimonial.¹⁴⁶ In order to "bear testimony" or be a witness against the accused, the child declarant must have some ability to comprehend how the statement will be used and the consequences of such statements. The child's age, maturity, and cognitive development are all factors in making this determination. A framework is necessary to adequately and appropriately analyze the testimonial composition of child declarants' statements.

The following two formulations proffered by the Supreme Court in *Crawford* have caused lower courts to inconsistently and inappropriately apply them to child abuse cases resulting in inaccurate outcomes: "similar pretrial statements that declarants would reasonably expect to be used prosecutorially"¹⁴⁷ and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."¹⁴⁸ The Supreme Court in *Crawford* did not outline a particular method to determine whose perspective is controlling: the one making the statement, the one eliciting the statement, or the objective observer. Consequently, courts and commentators alike tend to devise and apply their own interpretations of *Crawford*'s suggested formulations.¹⁴⁹ In one formulation, the Court seems to suggest that the declarant's understanding is a relevant factor; however, the next one makes reference to an "objective witness." Consequently, many courts have picked one, blended the two, or ignored them altogether.¹⁵⁰ The different approaches courts and scholars use when examining the testimonial nature of children's statements include: declarant-centric; objective witness; and objective child in the declarant's position.¹⁵¹ Not all courts apply those standards when deciding the testimonial quality of the statement. Some courts avoid the decision altogether and base their conclusion on the other suggested methods.¹⁵²

shows that some courts have attempted to reconcile the recipient's role with the declarant's intent in making the statement; *see also supra* text accompanying notes 119–20.

¹⁴⁵ *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 51 (2004); *Davis*, 547 U.S. 813 (citing U.S. CONST. amend. VI).

¹⁴⁶ *See generally* Richard D. Friedman, *Children As Victims and Witnesses in the Criminal Trial Process: The Conundrum of Children, Confrontation and Hearsay*, 65 L. & CONTEMP. PROB 243, 249–52 (2002) (discussing the differences when children provide information versus knowingly reporting misconduct).

¹⁴⁷ *Crawford*, 541 U.S. at 51 (Brief for Petitioner at 23) (emphasis added)

¹⁴⁸ *Id.* at 52 (Brief for Petitioner at 23) (emphasis added) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)).

¹⁴⁹ *See generally* Matthew M. Staab, *Child's Play: Avoiding the Pitfalls of Crawford v. Washington in Child Abuse Prosecution*, 108 W. VA L. REV. 501, 522 (Winter 2005) (proposing combining *Crawford*'s first and third suggested formulations); *see also* *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 759 (Cal. Ct. App. 2004) (adopting an objective observer/bystander approach).

¹⁵⁰ *See, e.g.*, *Sisavath*, 13 Cal. Rptr. 3d 753, at 757 n.3 (preferring the objective-observer approach, the court recognized that some may interpret the Supreme Court's reference to mean an objective witness in the *same* category as the declarant – "here, an objective four year old. But we do not think so."); *People v. Vigil*, 127 P.3d 916, 926 (Colo. 2006) (reasoning that an objective seven-year-old child would reasonably be interested in feeling better and that would not be able to anticipate their statements to the doctor may be used prosecutorially); *State v. Snowden*, 867 A.2d 314, 329 (Md. 2005) (preferring the objective-witness standard, the court stated, "we are satisfied that an objective test, using an objective person, rather than an objective child of that age is the appropriate test . . ."); *State v. Brigman*, 632 S.E.2d 498, 506 (N.C. Ct. App. 2006) (concluding that a reasonable child under three years of age would not be able to know that their statement might be used prosecutorially); *State v. Blount*, 2005 N.C. App. LEXIS 2606, at *11 (Dec. 6, 2005) (holding that under the circumstances, a reasonable child in the victim's position would not have any reason to know or believe that their statements may be used prosecutorially).

¹⁵¹ *See* cases cited *supra* note 150.

¹⁵² *See generally* *Rangel v. State*, 199 S.W.3d 523, 535 (Tex. App. 2006) (finding the four-year-old's statements testimonial by using the analysis in *Davis v. Washington*, and stating, "we need not decide what the appropriate standard should be because we determine that [the child's] statement was testimonial on other grounds.").

1. Declarant-Centric

The declarant-centric approach emphasizes what the actual declarant knew or should have known at the time he was making the statement.¹⁵³ In other words, the approach encompasses whether or not the actual declarant had reason to believe that his statement might be used in a future prosecution.¹⁵⁴ This standard originated from the Supreme Court's own words: "statements that *declarants* would reasonably expect to be used prosecutorially."¹⁵⁵ Attractive for its simplicity, this subjective approach, however, requires judges to ascertain the actual child's thought process on a particular occasion. Through their opinion, the Court inferred in its formulations that the declarant's expectation is relevant. Yet, in dicta, the Court mentioned that cross-examination was the only appropriate tool with which to test the declarant's perception.¹⁵⁶ With these conflicting thoughts it is not surprising why lower courts are struggling to fashion an appropriate standard to measure testimonial statements. Several scholars and judges criticize the declarant-centric approach and claim it is too vague and manipulable.¹⁵⁷ Therefore, the declarant-centric approach is most often subsumed in the third standard: the objective child in the declarant's position.¹⁵⁸ Some courts have undeniably disregarded *Crawford*'s reference to the declarant's expectation in favor of the objective witness approach.¹⁵⁹

2. Objective Adult

Some jurisdictions ignore the specific child declarant's intent in favor a broader, more objective approach when analyzing hearsay statements.¹⁶⁰ In *State v. Snowden* and *People v. Sisavath*, the two courts minimized, if not discounted, any effect of the declarant's understanding in reaching their decision regarding the statements' testimonial nature.¹⁶¹ The court in *Snowden* examined the statements from two children, aged eight- and ten-years-old, to a state social worker.¹⁶² In the opinion, the court essentially equated the social worker to a police investigator and stated:

[I]n the context of 'police interrogations,' we are directed by *Crawford* to conclude that the proper standard to apply to determine whether a statement is testimonial is whether the statements were made under circumstances that would lead an objective declarant reasonably to believe that the statement would be available for use at a later trial.¹⁶³

¹⁵³ See e.g., *Vigil*, 127 P.3d 916; *Brigman*, 632 S.E.2d at 506; *State v. Muttart*, 2006 Ohio 2506 (Ohio Ct. App. 2006), *aff'd in part, rev'd on other grounds*, 875 N.E.2d 944 (Ohio 2007).

¹⁵⁴ See generally *United States v. Scheurer*, 62 M.J. 100 (2005). In *Scheurer*, the court examined a hearsay statement from an adult declarant to an acquaintance who was wearing a monitoring device. *Id.* at 102. The court determined that the statements were not testimonial since the declarant did not anticipate their use at a later trial when making them. *Id.* at 105 (citing *United States v. Hendricks*, 395 F.3d 173 (3d Cir. 2005)); see also cases cited *infra* note 158.

¹⁵⁵ *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (emphasis added).

¹⁵⁶ *Id.* at 66.

¹⁵⁷ See generally Stephanie McMahon, Note: *The Turbulent Aftermath of Crawford v. Washington: Where Do Child Abuse Victims' Statements Stand?*, 33 HASTINGS CONST. L.Q. 361, 385 (2006) (listing three potential problems with a "declarant-centric" approach).

¹⁵⁸ See, e.g., *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007) (court considered what the actual seven-year-old declarant thought); *State v. Blount*, 2005 N.C. App. LEXIS 2606, at *11 (Dec. 6, 2005) (applied a reasonable child in the victim's position approach); *State v. Johnson*, 2006 Ohio 5195, at *22 (Ohio Ct. App. 2006) (unreasonable for the declarant to realize statements available for use at later trial), *remanded for resentencing hearing*, 116 Ohio St. 3d 541 (Ohio 2008); *Muttart*, 2006 Ohio 2506, at *20 (court considered that a five- and six-year-old child would not expect their statements to physicians to be used in a later prosecution), *aff'd in part rev'd on other grounds*, 875 N.E.2d 944 (Ohio 2007); *State v. Dezee*, 2005 Wash. App. LEXIS 104, at *12 (Wash. Ct. App. 2005) (concluding that the nine-year-old child could not reasonably believe that her statements would be used in a later trial).

¹⁵⁹ See, e.g., *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 n.3 (Cal. Ct. App. 2004) (deciding to employ an objective observer standard and not one standing in the child's shoes); *State v. Snowden*, 867 A.2d 314, 325 (Md. 2005) (using the objective witness approach).

¹⁶⁰ See, e.g., *Snowden*, 867 A.2d 314; see also *United States v. Coulter*, 62 M.J. 520, 527 (N-M. Ct. Crim. App. 2005) (holding that the circumstances "would not lead an objective witness to reasonably believe that the statements would be available for use at a later trial."). *But see* *United States v. Scheurer*, 62 M.J. 100, 105 (2005).

¹⁶¹ *Snowden*, 867 A.2d at 325; *Sisavath*, 13 Cal. Rptr. 3d at 758 n.3.

¹⁶² *Snowden*, 867 A.2d at 325. The court noted that "[u]sing these *objective* standards in the present case, it is clear that an *ordinary* person in the position of any of the declarants would have anticipated the sense that her statements to the sexual abuse investigator potentially would have been used to 'prosecute' Snowden." *Id.* (emphasis added).

¹⁶³ *Id.* (citing *Crawford v. Washington*, 541 U.S. 36 (2004)). In passing, the court noted that the eight- and ten-year-old declarants were aware of the purpose of the questions, and, in the court's opinion, were *actually* aware of their statement's prosecutorial potential. See *id.* at 326.

Similarly, the court in *Sisavath* strictly relied on the “objective witness” language from *Crawford*, and refused to factor the declarant’s expectations into the testimonial equation.¹⁶⁴ In a footnote, the court recognized that Supreme Court’s “objective witness” language may be interpreted to mean “an objective witness in the same category of persons as the actual witness—here, an objective four year old.”¹⁶⁵ However, the court declined to accept that interpretation and devised their own “objective observer” standard.¹⁶⁶ In both *Snowden* and *Sisavath*, the two courts ignored the declarant-expectation formulation the Supreme Court suggested.¹⁶⁷ If courts are not employing the objective adult standard, they sometimes merge it with the declarant-centric approach and create a hybrid: an objective child in the declarant’s position.

3. Objective Child

Relying on the objective adult approach ignores the specific cognitive abilities or inabilities of a child declarant. Yet, courts continue to struggle with whether *Crawford*’s “objective person” language refers to the declarant, an objective witness, or a completely unrelated bystander. Several jurisdictions interpret *Crawford*’s formulation to mean an objective child in the declarant’s position.¹⁶⁸ A child’s reasonable expectations when providing statements to a social worker or school counselor are vastly different than adults’ expectations. When judges consider whether a similarly situated child witness in the declarant’s position could reasonably anticipate the prosecutorial use of their statements, they remain faithful to *Crawford*’s consideration of the declarant’s expectations when making the statement.

The court in *State v. Blount* analyzed a four-year-old declarant’s statement to a counselor and therapist using the objective child approach.¹⁶⁹ Relying on their supreme court’s interpretation of *Crawford*, the opinion in *Blount* held that “a reasonable child in the victim’s position would have no reason to know or believe her statements would be used in a subsequent trial.”¹⁷⁰ Similarly, the appellate court in *State v. Scacchetti*, considered what a young child in the declarant’s position would understand when talking to a pediatric nurse at a children’s clinic.¹⁷¹ On appeal, the defense argued that the child’s statements fell under the scrutiny of *Crawford*’s broadest suggested formulations.¹⁷² Dismissing that argument, the appellate court noted that in order for the statement to be testimonial, the appellant must show that a reasonable child of the declarant’s age would anticipate the use of her statements in a future prosecution.¹⁷³ Not all jurisdictions apply a purely objective child approach. Some courts refer to the standard as the objective witness approach, yet in their analysis, apply the objective child reasoning.¹⁷⁴

The court in *In re D.L.*¹⁷⁵ blended the objective witness language with the objective child analysis in its testimonial calculation. Initially, in *In re D.L.*, the court used the “objective witness” language, but in its holding noted that “there were no circumstances to indicate the victim, or a reasonable child of her age, would have believed her statements were for anything other than medical treatment.”¹⁷⁶ Similarly, in *People v. Vigil*,¹⁷⁷ the court examined the testimonial character of a

¹⁶⁴ *Sisavath*, 13 Cal. Rptr. 3d at 758.

¹⁶⁵ *Id.* at note 3.

¹⁶⁶ *Id.* at 758.

¹⁶⁷ See generally *Crawford*, 541 U.S. at 51 (suggesting that testimonial statements may be those where the declarant would reasonably expect them to be used prosecutorially).

¹⁶⁸ See, e.g., *State v. Blount*, 2005 N.C. App. LEXIS 2606, at *11 (Dec. 6 2005). However, as previously discussed, a few courts devise their own interpretations and consider whether an objective observer, not the actual child declarant, would reasonably foresee a subsequent prosecution. See, e.g., *Sisavath*, 13 Cal. Rptr. 3d at 758 n.3 (deciding to employ an objective observer standard and not one standing in the child’s shoes); *Snowden*, 867 A.2d at 325 (using the objective witness approach).

¹⁶⁹ *Blount*, 2005 N.C. App. LEXIS 2606, at *11.

¹⁷⁰ *Id.*

¹⁷¹ See generally *State v. Scacchetti*, 690 N.W.2d 393 (Minn. Ct. App. 2005) (citing with approval the appellate court’s use of the reasonable child standard), *aff’d*, 711 N.W.2d 508 (Minn. 2006).

¹⁷² *Id.* at 396 (referencing *Crawford*’s suggestion that statements are testimonial when they would lead an objective witness to foresee their use at trial).

¹⁷³ *Id.*

¹⁷⁴ See *infra* text accompanying notes 175–80; see also *Lollis v. State*, 232 S.W.3d 803, 806 (Tex. App. 2007) (using the standard of an objectively reasonable declarant standing in the shoes of the actual declarant); *Lagunas v. State*, 187 S.W.3d 503, 520 (Tx. App. 2005) (using the perspective of an objective declarant considering the age and state of mind of actual declarant).

¹⁷⁵ 2005 Ohio 2320 (Ohio Ct. App. 2005).

¹⁷⁶ *Id.* at *10 (emphasis added).

hearsay statement through a reasonable child's perspective. The Colorado supreme court considered the testimonial nature of a seven-year-old's statements to the examining physician. In finding the statements were nontestimonial the court held:

[No] objective witness in the position of the child would believe that his statements to the doctor would be used at trial. Rather, an objective seven-year-old child would reasonably be interested in feeling better and would intend his statements to describe the source of his pain and symptoms. In addition, an objectively reasonable seven-year-old child would expect that a doctor would use his statements to make him feel better and to formulate a medical diagnosis. He would not foresee the statements being used in a later trial.¹⁷⁸

The court used an objective approach when considering the child declarant's perspective.¹⁷⁹ Utilizing the objective child approach appropriately considers the reasonable expectations of a child while safeguarding the rights of the accused.¹⁸⁰ In order for a child to "bear witness" in a testimonial sense, they must understand and comprehend the statement's future prosecutorial use. Nevertheless, there are other courts who, without regard to the declarant's understanding or perspective, find statements testimonial on other grounds.

4. Other Grounds

A few courts have completely doffed *Crawford's* postulated formulations and donned the *Davis* approach.¹⁸¹ The courts in *State v. Blue*¹⁸² and *Rangel v. State*,¹⁸³ considered statements from four-year-olds to a forensic interviewer and a child protective services worker, respectively. Acknowledging *Crawford's* "objective witness" language, the court in *Blue* considered the forensic interviewer's purpose in eliciting the statement.¹⁸⁴ Without addressing whether the four-year-old was able to anticipate the statement's adversarial use, the court simply noted that the interviewer's purpose was to prepare for trial.¹⁸⁵ The court awkwardly threw in the *Davis's* language regarding an "ongoing emergency" but failed to specifically apply it to the facts of the case.

The court in *Rangel*¹⁸⁶ acknowledged that many courts have struggled in their application of *Crawford's* formulations and *Davis's* "primary purpose" test,¹⁸⁷ and recognized *Vigil's* application of the objective witness standard.¹⁸⁸ Refusing to consider whether an objective person in the child's position could foresee the statement's adverse consequences, the court decided the statement was testimonial by applying the *Davis* analysis to 911 calls.¹⁸⁹ Specifically, the court noted that the four-year-old was describing past events and that she would also be able to understand that her statement may be used to prove some event.¹⁹⁰ The court imputed more knowledge onto this four-year-old than would ordinarily be expected of a child

¹⁷⁷ 127 P.3d 916 (Colo. 2006).

¹⁷⁸ *Id.* at 926.

¹⁷⁹ *See id.*

¹⁸⁰ *Id.* at 925 (citing *United States v. Summers*, 414 F.3d 1287 (10th Cir. 2005)).

¹⁸¹ *See supra* Part IV.B.3 for a discussion of the *Davis* approach.

¹⁸² 717 N.W.2d 558 (N.D. 2006).

¹⁸³ 199 S.W.3d 523 (Tx. Ct. App. 2006).

¹⁸⁴ *See Blue*, 717 N.W.2d at 564.

¹⁸⁵ *See id.* at 565.

¹⁸⁶ 199 S.W.3d 523.

¹⁸⁷ *See id.* at 534–35.

¹⁸⁸ *See id.* at 533. The court acknowledged *Vigil's* use of the objective person standard, but declined to utilize that approach and stated, "we need not decide what the appropriate standard should be because we determine that [the child's] statement was testimonial on other grounds." *Id.* at 533–34.

¹⁸⁹ *See id.* at 534–35.

¹⁹⁰ *See id.* at 535. The court stated:

[W]e believe, either under a subjective standard or an objective standard, that a four-year-old child would be able to perceive this as meaning that her words would be used to establish or prove some fact—i.e., that he sexually assaulted her—and that the establishment of that fact was necessary so that a person in authority, whether the investigator or someone else, would make appellant stop.

Id.

of that age. Simply because the child declarant described past events, does not transform her statement into a testimonial one. Except for present sense impressions relayed during an event, every other hearsay statement will inevitably describe past events. The court in *Rangel*, in its desire to pioneer a new standard for determining the testimonial ability of child declarants, misapplied the *Davis* holding and established incorrect precedent.

When lower courts misapply standards or create new ones, they establish bad precedent through inconsistent results. Conflicting and illogical application of the disparate analytical standards emphasize the need to adhere to a single, workable solution. A standardized approach is necessary to assist courts in their treacherous travels toward understanding the statement's true testimonial nature. Appropriate analysis in the testimonial calculation considers not only the Confrontation Clause's concerns but the declarant's expectations as well. The desired end is an applicable formula that incorporates all relevant and determinative factors. Whether or not the child declarant was able to reasonably foresee the statement's prosecutorial use, must be viewed from the perspective of a child and not an adult. It is important to examine what a similarly situated child reasonably believed at the time of the utterance.

The objective child in the declarant's position approach incorporates the child's expectations.¹⁹¹ In other words, it is not what a reasonable adult would understand in the child's position. That approach is illogical and does not accurately reflect a child declarant's perspective. To analyze a child's statement from the adult's perspective incorrectly warps the true meaning and purpose of the utterance. Rather, the appropriate standard is whether a reasonable *child* in the declarant's position has reason to believe or anticipate that their statement could be used prosecutorially. When young children are unable to appreciate the statement's adverse consequences, they are incapable of uttering testimonial declarations. However, blindly adhering to this approach without considering the statement's surrounding circumstances may present a "unique potential for prosecutorial abuse."¹⁹² For example statements that are clearly testimonial in nature—i.e., those carefully elicited through interrogations, or with substantial Government involvement, with an eye toward trial, may be erroneously deemed nontestimonial because a very young child lacked the ability to clearly appreciate the potential consequences of their allegations. Therefore, courts must accurately apply the correct standard while considering all dispositive factors present in the surrounding circumstances.¹⁹³

VI. The Rebuttable Presumption

Some young children are incapable of making testimonial statements because they either lack the competency or capacity to "bear testimony." It is imperative to determine the child's competency—not only in their ability to testify as a witness, but also in their capacity to understand their statement's possible adverse consequences. A child declarant who "bears testimony" and thus, becomes a "witness against" in a constitutional sense, should be able to appreciate the intended use of their statements, at the time of utterance. The child's cognitive and mental development is also a determining factor when assessing the testimonial character of their statements.¹⁹⁴ Competency as a witness and testimonial capacity seem interrelated. However, they are two distinct concepts. Competency refers to the child's cognitive ability to understand the difference between a truth and a lie and the resulting consequences of uttering falsehoods at the time of trial.¹⁹⁵ Testimonial capacity refers to a child's ability to anticipate their statement's adverse consequences at the time the statement was made. Although separate concepts, competency and capacity sometimes collide, further complicating the testimonial analysis. One of the components of the testimonial equation is the declarant's ability to understand and comprehend the future adversarial use of his statements. Therefore, a child who lacks the competence to testify at trial, most likely lacks the capacity to utter testimonial statements. One commentator succinctly stated that

¹⁹¹ See generally *State v. Blount*, 2005 N.C. App. LEXIS 2606, at *11 (Dec. 6 2005) (reasonable child in the victim's position).

¹⁹² See *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004).

¹⁹³ See, e.g., *Lollis v. State*, 232 S.W.3d 803, 807 (Tex. App. 2007) (utilizing ten factors to assist in determining the testimonial character of a statement).

¹⁹⁴ See generally *McMahon*, *supra* note 157, at 386–87 (briefly acknowledging that children's cognitive and mental abilities are a factor in determining the testimonial nature of their statements).

¹⁹⁵ See generally *Thomas D. Lyon, Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017. A judge examining a child's competency prior to allowing their testimony will consider their ability to tell the truth, adequately express their thoughts, and understand the consequences of telling lies. *Id.* at 1029. The judge then determines whether the child possesses the appropriate level of mental and psychological characteristics required to accurately understand and recall the events that comprise the subject of their testimony. *Id.* at 1045. Based on these factors, if the judge determines the child lacks the requisite competence, the child declarant is prevented from testifying. Under the Military Rules of Evidence, competency determination is left to the discretion of the military judge. See *MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 601* (2008) [hereinafter MCM].

[b]ecause the objective, reasonable declarant and a competent individual likely possess the same characteristics, it is doubtful whether a trial court could find, on one hand, that a child is incompetent to testify at trial but, on the other hand, that the same child at an earlier time could make a testimonial statement which he reasonably believed could be used at a future trial.¹⁹⁶

It is in these rare cases where the concept of competency and capacity overlap that gives rise to the need to adequately understand the differences while appreciating the similarities.

Although other scholars and courts either discount or disregard the relevance of the specific declarant's state of mind,¹⁹⁷ it is an essential fact in determining whether the declarant is capable of bearing testimony. An overly literal translation of the objective-child-declarant approach may result in a categorical determination that *all* children's statements are nontestimonial, since young children do not fully comprehend the prosecutorial process. The accurate and realistic measure of a child's capacity to understand the *prosecutorial use* of their statements, is whether or not they know and understand that they are *telling on someone*, and as a result, that person may *get in trouble* because of their telling.¹⁹⁸ Therefore, a determinative factor in a child declarant's capacity to "bear testimony," is their awareness of the potential adverse results of their statements.¹⁹⁹ The child's age, cognitive and mental development, and level of understanding may render them incapable of uttering testimonial statements.

The Confrontation Clause applies to "witnesses against" the accused.²⁰⁰ To be a "witness against," one must "bear testimony."²⁰¹ In deciding whether a child declarant intended to "bear testimony," courts must determine if a reasonable child in the declarant's position was aware of the statement's adverse consequences. The declarant's understanding, expectations, and intent are relevant factors in the testimonial equation. In *People v. Vigil*, the court noted that "[e]xpectations derive from circumstances, and among other circumstances, a person's *age* is a pertinent characteristic for analysis."²⁰² Children under five years old have limited cognitive abilities that prevent them from comprehending the relevant facts of a given situation.²⁰³ Consequently, they cannot fully appreciate and understand all the circumstances surrounding the statement, as could an older child or an adult. These young children, lacking in the capacity to foresee an adverse use of their statements, are presumptively unable to make testimonial statements.²⁰⁴ However, the same characteristics that prohibit them from comprehending the consequences of their statements also make them easily susceptible to manipulation.²⁰⁵ In other words, a child declarant may be blissfully unaware of the interviewer's motive to develop their testimony for use at a later trial. The child's age and cognitive inability to comprehend those motives does not and should not automatically render their resulting statements nontestimonial. An accused does not forfeit his constitutional

¹⁹⁶ See *Staab*, *supra* note 149, at 522; see also *State v. Krasky*, 736 N.W.2d 636, 642 n.6 (Minn. 2007) (noting that it would be "an odd outcome" to find the child not competent to testify as a result of her age and understanding, yet to find the resulting statements testimonial).

¹⁹⁷ See generally *Monnat & Nichols*, *supra* note 39, at 20–21; *State v. Snowden*, 867 A.2d 314, 325 (Md. 2005). But see *Friedman*, *supra* note 7, at 10 (noting that the declarant's understanding is relevant to the testimonial analysis).

¹⁹⁸ See generally *Friedman*, *supra* note 7, at 10. One of the authors in the National Association of Criminal Defense Lawyers' amicus brief in *Crawford*, Professor Friedman proffered the phrase used as *Crawford's* third formulation: "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." See generally *Crawford v. Washington*, 541 U.S. 36, 52 (2004). Professor Friedman also recognizes that sometimes children communicate their situation with little or no understanding of the consequences—but in order to be a "witness" in the Confrontation sense, they must have some capacity to anticipate their statement's eventual use. *Friedman*, *supra* note 7, at 10. *Friedman* suggests that a child, without any understanding of the legal system, can still bear testimony, if they knew that by "telling a police officer about a bad thing that a person did would likely cause that person to be punished." *Id.*

¹⁹⁹ See *People v. Vigil*, 127 P.3d 916, 925 (Colo. 2006) (citing *United States v. Summers*, 414 F.3d 1287 (10th Cir. 2005)).

²⁰⁰ See generally U.S. CONST. amend. VI.

²⁰¹ See generally *Crawford*, 541 U.S. at 51; *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004) (stating that "[t]he proper inquiry . . . is whether the declarant intended to bear testimony against the accused."); *Lagunas v. State*, 187 S.W.3d 503, 514 (Tx. App. 2005) (stating that "[t]he Confrontation Clause applies to those who 'bear testimony'").

²⁰² See, e.g., *Vigil*, 127 P.3d at 925 (emphasis added) (citing *Lagunas*, 187 S.W.3d 503); *State v. Scacchetti*, 711 N.W.2d 508, 515–16 (Minn. 2006) (finding no reasonable three-year-old would anticipate the use of the statements in a future trial).

²⁰³ See, e.g., *McMahon*, *supra* note 157, at 386–87; *Christiansen*, *supra* note 38.

²⁰⁴ See *supra* notes 37, 195; *supra* text accompanying note 196. If a child is ruled incompetent to testify based on their inability to understand the importance of taking an oath and the resulting adverse consequences for testifying falsely, then it stands to reason that the same child would not understand or anticipate the potential prosecutorial use of their statements.

²⁰⁵ Dissenting in the Supreme Court's ruling in *Maryland v. Craig*, that testifying through closed-circuit television was not violative of the Confrontation Clause, Justice Scalia noted several studies on children's vulnerability to suggestions and stated, "[t]he 'special' reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by 'special' reasons for being particularly insistent upon it in the case of children's testimony." 497 U.S. 836, 868 (1990) (Scalia, J., dissenting).

rights solely based on his accuser's mental capacity, or lack thereof. This article does not argue for a categorical exclusion of all young children's statements from the testimonial equation.²⁰⁶ Rather, it proffers that the child's age and cognitive abilities place the burden on the opposing party to expose improper motives through a thorough examination into the statement's attendant circumstances.²⁰⁷

Accepting the presumption that young children are powerless to utter testimonial statements, does not, in itself, create a per se rule that eviscerates the need for testimonial analysis. Some courts are reluctant to create a rule where excited utterances and statements made for medical treatment are inherently nontestimonial.²⁰⁸ However, they are not equally hesitant when treating statements made to law enforcement officers as testimonial.²⁰⁹ A per se rule is similar to a categorical exclusion in that they both fail to consider the circumstances surrounding the statement. At least one court expressed a concern in treating all statements from child declarants as per se nontestimonial.²¹⁰ Courts do not have to "conclude as a matter of law"²¹¹ that a young child's statement may *never* be testimonial. Instead, a court may employ the rebuttable presumption analysis. A rebuttable presumption establishes a rule *and* creates avenues for exceptions to the rule.

Using the rebuttable presumption that young children lack testimonial capacity not only addresses public policy concerns about subjecting children to additional traumatic events, it also maintains adequate protections for the accused.²¹² When a child is so young that they are incapable of understanding their statement's adverse consequences, then it follows that they are unable to "bear testimony." It is in those situations that the Confrontation Clause is not implicated.

After the presumption is established, the burden shifts to the opposing party to prove that the statement is testimonial.²¹³ The critical determinative factors incorporate the declarant's and recipient's status, roles and intent. The opposing party must examine the circumstances surrounding the statement using the eleven factors:²¹⁴ (1) the declarant's age; (2) the declarant's

²⁰⁶ See also Monnat & Nichols, *supra* note 39, at 20–21 (counseling against a per se exclusion of children's statements from the Confrontation Clause analysis); Knoebber, *supra* note 17, at 520 (criticizing the categorical approach to testimonial determinations). See generally *State v. Snowden*, 867 A.2d 314, 328–29 (Md. 2005) (refusing to create a per se rule that children are incapable of making testimonial statements).

²⁰⁷ The concept of rebuttable presumption is not foreign to military justice. For example, in *United States v. Trani*, 3 C.M.R. 27 (C.M.A. 1952), the court concluded that it is a "long-standing principle of military law that the command of a superior officer is clothed with a presumption of legality, and that the burden of establishing the converse devolves upon the defense." *Id.* at 30. The defense can overcome the presumption by showing through clear and convincing evidence that the order was illegal. *Id.*; see also Captain Frederic L. Borch, III, *The Lawfulness of Military Orders* ARMY LAW., Dec. 1986, at 47. In addition to the presumption of lawfulness of military orders, there are presumptions that exist in the voluntariness of confessions. Once the government makes an affirmative showing that the accused's statement is voluntary, the accused may then rebut the presumption and challenge its admissibility by showing factors indicating involuntariness. See MCM, *supra* note 195, MIL. R. EVID. 304.

²⁰⁸ See generally *Commonwealth v. DeOliveria*, 849 N.E.2d 218, 226 (Mass. 2006). The court acknowledged the argument that young children's statement to medical professionals should not be deemed testimonial. *Id.* They declined to adopt such a broad rule. *Id.* at n.10. However, they considered the child's age a determinative factor in the testimonial analysis. In finding the six-year-old child's statement was nontestimonial, the court stated, "[l]ogic informs that a six year old child can have little or no comprehension of a criminal prosecution in which the child's words might be introduced as evidence against another person in a court of law." *Id.* at 225; see also *Lagunas v. State*, 187 S.W.3d 503, 514 (Tx. App. 2005) (we need not decide now whether, as a general rule, statements by children are inherently non-testimonial). But see *United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005) (statements to medical practitioners presumptively nontestimonial).

²⁰⁹ See, e.g., *United States v. Coulter*, 62 M.J. 520, 527–28 (N-M. Ct. Crim. App. 2005) (noting that statements derived from police interrogation present a risk of abuse) (citing *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004)); *People ex rel. R.A.S.*, 111 P.3d 487, 490 (Colo. Ct. App. 2004) (four year-old child's videotaped statement to a police investigator held testimonial "even [under] the narrowest formulation under the Court's definition of the term."); *State v. Siler*, 116 Ohio St. 3d 39, 50 (Ohio 2007) (holding child declarant's statement made during police interrogation is testimonial regardless of age or cognitive abilities); see also cases cited *supra* note 95. But see *Davis v. Washington*, 547 U.S. 813, 827–28 (2006). The Supreme Court considered whether a statement made to a 911 operator could be considered nontestimonial. The holding did not establish an *exception*, rather it established a rule that statements made during an ongoing emergency are plainly nontestimonial. See *id.*

²¹⁰ See generally *State v. Snowden*, 867 A.2d 314, 328–29 (Md. 2005). The court acknowledged and commented on the research conducted by The American Prosecutor's Research Institute on young children's limited cognitive and developmental skills. *Id.* Additionally, they recognized that there may be certain situations where a child's age and maturity level may render them unable to understand the testimonial nature of their statements. *Id.* In dicta, the court stated, "we are unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants." *Id.* However, the court noted that the circumstances revealed that the eight- and ten-year-old children were *actually* aware of the nature of their statements. *Id.* at 326.

²¹¹ See *id.* at 328.

²¹² But see *id.* at 329 (stating that giving too much consideration to the child's age "overlooks the fundamental principles underlying the *Confrontation Clause*").

²¹³ See *supra* note 207. The opposing party may challenge the voluntariness or admissibility of a confession by showing that the circumstances surrounding the statement made it an involuntary one. Likewise, the defense can use the eleven factors identified by the author in Parts III and this section, to show that the young child's statement was testimonial.

²¹⁴ The eleven factors proffered in this paper are derived from researching the various approaches courts utilized when analyzing the testimonial capacity of children's statements.

mental capacity; (3) the declarant's understanding and intent when making the statement; (4) whether the statement was elicited or volunteered; (5) the recipient's status; (6) the recipient's role; (7) the recipient's prior knowledge of allegations and facts contained therein; (8) the recipient's manner of questioning (open-ended/leading); (9) the recipient's contact with law enforcement personnel; (10) the presence of law enforcement personnel during the taking of the statement; and (11) the primary purpose for making the statement. A careful analysis using these eleven factors will appropriately safeguard any constitutional concerns governing testimonial statements. Appropriate application of the eleven factors will assist the opposing party in exposing improper motives and agendas affecting the child's statement. Even where the child's youth and cognitive abilities prevent them from appreciating the adverse consequences, situations exist that may give rise to testimonial statements. These factors will aid in revealing the underlying testimonial nature of a *seemingly* typical interview. The rebuttable presumption adequately addresses concerns befalling the accused as well as the accuser. Utilizing the rebuttable presumption approach will promote consistency in analysis and results and aid in defining the elusive nature of a testimonial statement.

VII. Conclusion

She eludes our understanding, escapes our grasp and is so detrimental if applied improperly. Defining testimonial is sometimes a seemingly unattainable goal. The Supreme Court's failure to adopt any of their three suggested formulations of testimonial statements has left scholars and courts to their own devising.²¹⁵ Lower courts have become stuck in the quagmire that the Supreme Court's opinion in *Crawford v. Washington* created. Therefore, it is imperative when analyzing the testimonial nature of child declarants' statements, that courts emerge from the quicksand and review the true meaning of the phrase "bearing testimony." Lower courts' inconsistent interpretations of the Supreme Court's opinion in *Crawford*, and their potential misapplication of the Court's rule in *Davis*, emphasize the need for a clear, workable, and analytical approach.

First, when analyzing a child declarant's testimonial capacity, it is imperative to examine the child's age, cognitive development, and ability to understand the potential adverse consequences of their statements. As an aid in assessing the declarant's awareness of the attendant circumstances, courts should adopt the following standard: a reasonable child in the declarant's position. For a child declarant to become a testimonial witness, the child must first understand and appreciate the potential prosecutorial use of their statement. The child declarant need not understand the exact nature of prosecutorial proceedings, however, it is sufficient that they are aware of and intend some adverse results when making their statements. If the child declarant is too young and their limited cognitive development prevents them from appreciating their statement's adverse consequences, their statements are presumptively nontestimonial. By applying the eleven factors,²¹⁶ the opposing party may rebut the presumption through an adequate showing that the statement possesses all the requisite qualities of being testimonial. This structured approach enables courts to balance the accused's constitutional rights and society's need to protect the safety, health, and welfare of children. The Supreme Court in *Crawford* left "for another day"²¹⁷ the unenviable and difficult task of defining testimonial. Until it can be defined for all situations, today is the day it can be defined for those involving children.

²¹⁵ See, e.g., Ariana J. Torchin, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington*, 94 GEO. L.J. 581 (January 2006); Mosteller, *supra* note 42; Staab, *supra* note 149; see also *State v. Mizenko*, 127 P.3d 458, 471 (Mont. 2006) (Nelson, J. dissenting) (arguing, in his nearly-150 page dissent, why the majority's approach to testimonial analysis was flawed).

²¹⁶ See discussion *supra* Parts III, VI, identifying the eleven factors.

²¹⁷ *Crawford v. Washington*, 541 U.S. 36, 68 (2004) ("[W]e leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").