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§8.84 “Testimonial” Hearsay —Reach and Limits of the *Crawford* Doctrine

Beginning with the landmark opinion in *Crawford* in 2004, the Confrontation Clause requires courts to exclude “testimonial” hearsay, when offered against a defendant in a criminal case.¹ Although *Crawford* represented a fresh start, many older cases would be decided the same way in the new regime. In particular, the Court in *Crawford* took pains to say that the Confrontation Clause is satisfied if the speaker testifies at trial and can be cross-examined then about what he said before. In other words, “deferred” or “later” cross satisfies the clause. *Crawford* also said the Confrontation Clause is satisfied if the speaker is unavailable at trial but was cross-examined at an earlier time. In other words, “prior” cross also satisfies the clause, at least if the speaker is unavailable at trial.²

Crawford displaced *Roberts*

Crawford displaced the approach to confrontation that had coalesced in the *Roberts* case almost 25 years earlier. *Roberts* had adopted a two-pronged approach turning on unavailability of the declarant and indicia of trustworthiness that would justify dispensing with cross-examination at trial. In theory, the unavailability criterion meant that prosecutors had to call available witnesses, but in practice courts applied this criterion to statements offered under the former testimony exception, and generally not elsewhere. In practice, the indicia of trustworthiness required by *Roberts* was satisfied if a statement fit a “firmly rooted” hearsay exception.³ This category embraced most major exceptions, but not the against-interest exception (for statements against “penal” interest), nor the catchall, nor child victim hearsay exceptions, and statements offered under these exceptions required particularized guarantees of trustworthiness.

The *Crawford* facts

In *Crawford*, a man named Michael Crawford was charged with assault in a stabbing incident in which the victim had allegedly tried to rape defendant’s wife Sylvia. Michael and Sylvia were arrested and questioned separately. His account suggested that the victim was armed, but hers could be understood to mean that he was not armed. At trial, Michael Crawford invoked the privilege against adverse spousal testimony, and the state offered Sylvia’s statement to police under the against-interest exception. Although it was defendant’s claim of privilege that kept Sylvia from testifying, the defense also claimed that using her statement violated his confrontation rights. The Court agreed. The reason was that her statement was “testimonial” in nature: She made it while in custody during formal questioning at the police station, where she had been separated from her husband pursuant to standard investigative strategy, and it is just such statements that are

§8.83 1. *Crawford v. Washington*, 541 U.S. 36 (2004).

2. See §§8.87 (prior cross) and 8.88 (later cross), *infra*.

3. *Ohio v. Roberts*, 448 U.S. 56 (1980).

the concern of the Confrontation Clause.

Actual testimony, direct substitutes

Under *Crawford*, “testimonial” statements include two huge categories of important material—actual testimony in trials or other proceedings, direct substitutes for testimony (like affidavits prepared for court proceedings), and most statements to law enforcement officers investigating crimes.

Beyond these categories, the scope of “testimonial” hearsay is harder to describe. *Crawford* said it was unnecessary to define the concept further because statements “taken by police” during “interrogations” (the very facts of the case) are testimonial under “even a narrow” interpretation. But the Court offered three formulations of “testimonial.” One holds that a statement is testimonial if it amounts to “ex parte in-court testimony or its functional equivalent,” such as affidavits, custodial examinations, or pretrial statements that the speaker “would reasonably expect to be used” by prosecutors, and prior testimony that defendant could not cross-examine. Another formulation treats as testimonial any out-of-court statement found in “formalized testimonial materials,” like affidavits, depositions, prior testimony, or confessions. The third formulation treats as testimonial any statement that would “lead an objective witness reasonably to believe” that the statement “would be available for use at a later trial.”⁴

It is this third formulation that has proved problematic.

One reason is that the third formulation, unlike the first two, reaches some statements made in private settings. Professor Friedman, who went further than anyone else to develop the concept of testimonial hearsay adopted in *Crawford*, argues that such statements are often testimonial. He says, for example, that a statement by one “claiming to the victim of a crime and describing the crime” is “usually” testimonial, whether made to a friend or to authorities, although he also thinks a statement “made before the crime is committed” is not testimonial, at least if the later crime spans “a short period of time.”⁵

Troublesome third formulation

A second reason is that the third formulation could qualify the other two, because people speaking to police in exigent situations are sometimes so caught up in the press of the moment that they are unconscious or hardly aware that an investigation might ensue. In such emergency settings, those who talk to police may be seeking aid or trying to solve a pressing problem, and such thoughts might smother any other thoughts or states of mind. In 2006, the Court addressed this matter in the *Davis* case, where it crafted the “emergency exception,” finding that hearsay statements to authorities are admissible after all, so far as the Confrontation Clause is concerned (the hearsay doctrine might still pose an obstacle), if the “primary purpose” was “to enable police assistance to meet an ongoing emergency.”⁶

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

5. Friedman, *Confrontation, The Search for Basic Principles*, 86 *Geo. L. Rev.* 1011, 1040-1043 (1998).

6. *See Davis v. Washington*, 547 U.S. 813 (2006), discussed in §8.85, *infra*.

Emergency exception

Beyond the clear examples of testimonial statements (actual testimony, affidavits and statements to police investigating crimes), it is worth bearing in mind the stress in *Crawford* on the point that statements are testimonial if the speaker is acting as a witness by “bear[ing] testimony” against the accused.

Four factors

This basic idea, and the discussion in *Crawford* and *Davis*, lead to a consideration of four overlapping factors that bear on the question. First is the understanding, expectations, or anticipation of the speaker. Second is the involvement or role of law enforcement or other officials in eliciting or receiving the statement. Third is the effect of privacy—of the impact that being out of official view has on the expectations and understandings of the speaker, which leads to a consideration of the nature of the speaker and the statement (is the speaker a crime victim or an eyewitness? Does the statement describe a crime?). Fourth is the presence or absence of formalities. Was the statement taken in a formal setting, such as a courtroom or police interview room, or somewhere else? Was it recorded, or transcribed by a stenographer, or written down, or was it merely an oral utterance, perhaps given spontaneously or off the cuff?

(1) Speaker’s expectations

The first and most important factor is the speaker’s “expectations” (to use the term found in *Crawford*).⁷ Naturally these are very much a function of the nature of the statement, whether describing a crime (“x pulled the trigger”) or something entirely innocent in itself (“a blue car pulled out of the parking lot”), and also the circumstances in which the speaker finds himself, whether among friends or relatives, or talking to strangers or police. To the extent that the speaker would understand or expect that what he says will be used in investigating or prosecuting crime, such when he reports a crime to authorities, it is likely to be testimonial.⁸ To the extent that he would not expect that, such as when he discusses a crime with a friend, a cellmate, or an undercover police officer, the statement is likely not to be testimonial.⁹

What counts is not the stronger or more focused mental state that we call “purpose” or “intent,”

7. *United States v. Larson*, 460 F.3d 1200, 1213 (9th Cir. 2006) (speaker’s awareness or expectation is determinative); *United States v. Hinton*, 423 F.3d 355, 360 (3d Cir. 2005) (“where an objective witness reasonably anticipates” that his statement will be used at trial, it is “likely to be testimony in the sense that it is offered to establish or prove a fact”).

8. *United States v. Harper*, 514 F.3d 456 (5th Cir. 2008) (accomplice’s statement to law enforcement agents held testimonial).

9. *See, e.g.*, *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004) (accomplice’s statement to an undercover officer not testimonial); *United States v. Jordan*, 509 F.3d 191 (4th Cir. 2007) (accomplice’s statement to roommate not testimonial); *United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007) (statement to cellmate not testimonial).

but a more general notion of expectancy. A statement to police describing a crime can be testimonial even if the speaker was not purposely trying to aid in investigating or preparing for trial, so long as he understood or expected that what he said would be used in this way. This broad standard is appropriate in insuring that the Confrontation Clause has broad coverage, and it differs from the far narrower standard that applies when the question is whether misbehavior by the defendant forfeits his rights under the clause.¹⁰ The standard is necessarily “objective,” meaning that a statement can be testimonial if a reasonable person in the speaker’s position would harbor such expectation. A subjective standard would be hard to administer and would likely produce quixotic results. An objective standard serves the underlying values because it amounts to an estimate or approximation that “gets it right” in most cases (most have the expectation that we think a reasonable person would have).¹¹

The decision in *Davis* did not modify the expectation standard, but added a qualification. *Davis* stressed the “primary purpose” of the 911 call in dealing with an emergency, apparently referring both to police (acting through the 911 operator) and the caller: In effect, *Davis* said that even if a speaker understands or expects that his statement might be used in investigating or prosecuting crime, it is nontestimonial if his primary purpose is to address an ongoing emergency. In other words, a primary purpose to address an emergency overrides in importance any other expectation of the speaker relating to investigating or prosecuting crime, and in this way removes a statement from the testimonial category.¹² Whether *Davis* can be construed to mean that some other “primary purpose” (such as dealing with injuries) can overcome or displace a testimonial expectation remains to be seen, but some modern authority has moved in this direction.¹³

The second factor is the involvement or lack of involvement of police or law enforcement in taking or eliciting a statement. Such involvement suggests strongly that a statement is testimonial, and the absence of such involvement is often important in deciding that a statement is not testimonial.

(2) Involvement of law enforcement

10. See discussion of the forfeiture exception in §8.78, *supra*, and discussion of the *Giles* decision in §8.90, *infra*.

11. *Crawford v. Washington*, 541 U.S. 36, 52 (2004) (referring to circumstances that would lead “an objective witness reasonably to believe” his statement would be available for use at trial); *Jensen v. Pliler*, 439 F.3d 1086 (9th Cir. 2006) (confession to lawyer implicating defendant was not testimonial; lawyer assured him of privilege, said he would never tell anyone; would not expect statement to be used at trial).

12. *Davis v. Washington*, 547 U.S. 813 (2006) (“any reasonable listener” in position of 911 operator would see that caller was facing emergency; caller “was seeking aid”).

13. *Seely v. State*, 282 S.W.3d 778 (Ark. 2008) (admitting statements by three-year-old abuse victim, made in hospital to social service worker; “primary purpose” test can be “modified for use” outside context of police interrogations; primary purpose of speaker and listener count; she had duty to report, but primary purpose of social worker was to define scope of examination and ensure safety) (nontestimonial). *But see State ex rel. Juvenile Dept. of Multnomah County v. S.P.*, 215 P.3d 847, 859 (Or. 2009) (child’s statement to Child Abuse Response Service was testimonial; social worker functioned as agent for law enforcement).

When police or law enforcement officers investigate, and when they and prosecutors prepare for trial, their actions count in two ways. First, the fact of official involvement in gathering statements brings into play the concerns underlying the Bill of Rights in protecting citizens against overreaching government. Second, their involvement makes it more likely that the speaker (a reasonable person in his position) would understand that he is participating in an investigation or prosecution. *Crawford* referred to official involvement in mentioning police “interrogations,” and *Davis* referred to the same thing in saying that the primary purpose of police was “to investigate a possible crime.”¹⁴

The nature of official conduct also counts: If law enforcement officers *elicit* statements while investigating crimes or preparing for trial, the statements are more likely to be testimonial than *volunteered* statements. The more active official role brings into play the concerns underlying the Bill of Rights, and also makes it even more likely that the speaker expects or understands that he is playing a role in the investigative process. *Crawford* used the term interrogation “in its colloquial” sense, embracing any kind of police questioning during an investigation, including informal interviews on the street or in homes or places of work or crime scenes, again pointing toward a broad view of the testimonial category.¹⁵ *Crawford* contrasted this “colloquial” idea against the “technical legal” notion of interrogation, which connotes questioning in an interview room in a stationhouse, where police often ask witnesses to write things down or employ stenographers for this purpose, producing signed statements, or record interviews electronically. Of course formalities help ensure that statements are testimonial (more on this point below), but the *Crawford* majority did not consider them essential, and were stressing the active role of law enforcement as a relevant factor. Justices Thomas and Alito have taken the opposite view, treating formalities as essential, which would narrow the category substantially.¹⁶

Still, active official involvement in eliciting statements is neither *necessary* nor *sufficient*. In *Davis*, the Court took pains to say that statements can be testimonial *without* police questioning. A sufficient reason is that a speaker might not only expect, but actually intend to aid in investigating and prosecuting crime even if he comes to police on his own and speaks without being questioned. *Davis* cited the Walter Raleigh case, where the evidence included “a letter from Lord Cobham that was plainly not the result of sustained questioning.”¹⁷ On the other side of the coin, the whole idea of the “emergency” exception is that statements elicited by police questioning are *not necessarily* testimonial. *Davis* treated the 911 operator as an agent of police, and she called the woman back (she had hung up and the conversation took place when the operator placed a “reverse” call). The operator questioned the woman, eliciting her statements, and still the emergency doctrine applied and the statements were nontestimonial. We can expect the same

14. *Davis v. Washington*, 547 U.S. 813 (2006) (there was no emergency; focus was not “what is happening,” but “what happened”).

15. *Commonwealth v. DeOliveira*, 849 N.E.2d 218 (Mass. 2006) (admitting six-year-old’s statements to doctor describing abuse; police were in building, not in room; no indication that they instructed doctor).

16. *See Davis v. Washington*, 547 U.S. 813 (2006) (Justice Thomas concurrence) and *Giles v. California*, 554 U.S. 353 (2008) (concurring opinions by Justices Thomas and Alito).

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

outcome if, for example, a woman imperiled by domestic abuse hales an officer seeking help instead of calling 911.¹⁸

Statements made to police might not be testimonial for other reasons as well. Professor Friedman points out that coconspirator statements to undercover agents are not testimonial, and argues persuasively that the same is true of lies made to police in order to throw them off the scent (often admitted as nonhearsay false exculpatory statements), and incoming calls intercepted by police at places involved in drug selling or illegal betting (usually admitted as nonhearsay). Such statements are not testimonial because they are ongoing criminal behavior, because the speaker is not trying to make evidence or further an investigation, and because police are not trying to make evidence that sheds light on past events.¹⁹

(3) The privacy factor

The third factor is the degree of privacy surrounding the statement. Neither *Crawford* nor *Davis* dealt with statements in private settings. The Court has commented, however, that such statements are not testimonial, although it has not yet had to decide the point authoritatively.²⁰ Scholars disagree on the significance of this factor: One can read *Crawford* and *Davis* as placing so much emphasis on the combination of speaker expectations and official involvement that purely private statements are not testimonial under a kind of per se rule. But it is also possible to read *Crawford* and *Davis* to mean that speaker expectation is the factor overriding importance, in which case some purely private statements may be testimonial.²¹

Consider an account of a crime given by a victim or bystander to a neighbor over the back fence, or to a spouse or friend, which can function very much like testimony if the speaker asks the listener to contact police, and perhaps even if she does not make this request but expects that the listener will do so, and maybe even if the speaker simply assumes that police will uncover what she is saying. A speaker, particularly if she is a crime victim, may anticipate (or intend or hope) that the listener will call the matter to the attention of authorities. Finally, some private statements describing crimes are blatantly “accusatory,” purposefully charging another with a criminal act,

18. *Id.*

19. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 *Brook. L. Rev.* 241, 253 (2005). *See also* United States v. Alcorta, 853 F.3d 1123 (10th Cir. 2017) (recorded jailhouse conversations among conspirators were not testimonial) (they fit coconspirator exception). On coconspirator statements made to undercover agents, *see* the ensuing discussion, *and see* the discussion of the coconspirator exception in §8.33, *supra*. On incoming drug calls and lies to mislead police, *see* the discussion in §8.22, *supra*.

20. *Giles v. California*, 554 U.S. 353 (2008) (statements about abuse and intimidation, made to “friends and neighbors,” as well as statements to doctors in “course of receiving treatment” would be excluded, “if at all, only by the hearsay rules,” not as testimonial statements under Confrontation Clause).

21. *Compare* Friedman, *Confrontation: The Search for Basic Principles*, 86 *Geo. L.J.* 1011 (1998) (private statement is testimonial if declarant expects it to be used in prosecuting or investigating crime) *with* Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 *Geo. L.J.* 1045 (1998) (limiting testimonial to statements prepared by government to use in court, excluding accusations out of court by one private person to another).

and this factor counts toward calling the statement testimonial.²² Such private statements do seem to fit *Crawford*'s conceptual framework if speaker expectations are treated as decisive.

On the other hand, most private statements are not testimonial, and post-*Crawford* decisions have reached this conclusion in overwhelming numbers.²³ A speaker who recounts the story of a crime in a conversation with a friend or spouse usually does not expect that what he says will go any further.²⁴ Of course most such conversations would not fit hearsay exceptions and would not be admitted, but the point is that admitting them would not likely offend *Crawford*.

Particularly in connection with private conversations, the nature of the speaker bears on the inquiry, mostly for derivative or secondary reasons: Who the speaker is sheds light on what he likely understood when he spoke, and on the function of his statement in investigating or prosecuting crimes. Contrast the cases in which a victim speaks of a crime, and a bystander speaks of the same crime. If a shop is held up by a gunman, and the owner was on the scene and was victimized by being threatened and by incurring personal losses, her statement recounting the crime is more likely to be testimonial than a similar description by a bystander. The victim, more than a bystander, is likely to anticipate (and hope for and intend) that something be done, and his statement is likely to be the single most important datum on which an investigation will proceed.²⁵

Again in private conversations, the nature of the statement bears on the inquiry, mostly for derivative or secondary reasons (it sheds light on the speaker's understanding and the role of the statement in investigating crime or preparing for trial). A statement describing an apparent crime is more likely to be testimonial than one that describes an apparently innocent act. Thus one who tells a friend "it's Jack in there with the gun robbing that shop" is more likely to expect that what he says will be passed along to police than one who says "that guy speeding away from the store is Jack." In terms of the role of such statements in investigating and preparing for trial, either may be critical, but "innocent" statements are less likely to be testimonial because of speaker expectations.²⁶

22. *State v. Shafer*, 128 P.3d 87, 95 (Wash. 2006) (dissent argues that statement to "private individual" may be testimonial, citing parent, teacher, or doctor who suspects abuse and questions child).

23. *See* Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 540 (2005) (statements to family, friends and acquaintances without intent that they be used at trial are usually found to be nontestimonial, even if they incriminate another).

24. *State v. Buda*, 949 A.2d 761 (N.J. 2008) (child's statement to mother saying "Daddy beat me" was nontestimonial); *Pantano v. State*, 138 P.3d 477 (Nev. 2006) (child's statement was not testimonial; parent inquiring about abuse is concerned with "health, safety, and wellbeing" of child, which is not gathering evidence); *State v. Lawson*, 619 S.E.2d 410, 413 (N.C. 2005) (victim's statement to friend en route to hospital were nontestimonial; not thinking of "anything outside the scope of their private conversation").

25. *In re E.H. v. E.H.*, 823 N.E.2d 1029, 1035 (Ill. App. 2005) (child's statement to grandmother alleging sexual assault were testimonial), *app. allowed*, 833 N.E.2d 295 (2005).

26. *State v. Staten*, 610 S.E.2d 823 (S.C. 2005), *vacated*, 374 S.C. 9 (2007) (murder victim's statement to friend that defendant had threatened him with a gun was nontestimonial; objective witness would not think his statement would be available for later use at trial).

Statements made before crimes are committed, that describe past behavior by the defendant that may be threatening or hostile without being criminal (or not seriously criminal), are sometimes admitted as circumstantial evidence that sheds light on defendant's later conduct. Sometimes such a statement fits the state of mind exception because it bears on what the speaker did or did not do later. By its very nature, such a statement is likely not to be testimonial because it does not describe criminality that the speaker expects will lead to investigation or trial, and because private conversations less often give rise to such expectations.²⁷

The fourth factor is the presence or absence of testimonial formalities. Few would disagree with the proposition that the *presence* of such formalities can be decisive: Statements in the witness box under oath in court in proceedings are testimonial (they are what everyone means by testimony), as are direct substitutes (depositions and affidavits made to present facts to a court) and statements to police in formal settings (interview rooms, perhaps recorded or written and signed or taken down by a stenographer). Several times *Crawford* alluded to such points: Thus one who "makes a formal statement to government officers bears testimony" in a way that differs from "a casual remark to an acquaintance," and the Confrontation Clause "reflects an especially acute concern" with such statements. The Court also referred to "formalized testimonial materials, such as affidavits, custodial examinations," and "prior testimony," quoting an earlier concurring opinion in the *White* case.²⁸ In *Davis*, the Court said most cases applying the Confrontation Clause involve "formal" testimonial statements, meaning "sworn testimony in prior judicial proceedings or formal depositions under oath."

(4) Testimonial formalities

More problematic is the effect of *absence* of such formalities: Can statements be testimonial even though some or all of the usual formalities are missing? *Davis* indicates that even minimal formalities count on the testimonial side of the calculus: Thus a police interview with the victim on the scene was testimonial, in part because it was "formal enough" to be "conducted in a separate room, away from her husband."²⁹ Justice Thomas disagreed with the majority in *Davis*, reiterating his view that the Confrontation Clause applies *only* to formalized statements (he had previously pointed toward this conclusion in *Crawford* and *White*), and in the 2008 opinion in *Giles* on the issue of forfeiting confrontation rights, Justice Thomas again set out this view, and Justice Alito agreed.³⁰

Post-*Crawford* decisions usually treat the matter of formalities as a makeweight factor, citing

27. *Griffin v. State*, 631 S.E.2d 671 (Ga. 2006) (in murder trial, applying catchall to admit victim's statement to friend indicating that defendant was "not supposed to know where we live").

28. *White v. Illinois*, 502 U.S. 346, 365 (1992) (Justice Thomas, joined by Justice Scalia, concurring).

29. *Davis v. Washington*, 547 U.S. 813 (2006) (Justice Thomas, dissenting).

30. *Giles v. California*, 554 U.S. 353 (2008) (in concurrence, Thomas adheres to view that only "formalized" statements to police are covered; Alito doubts that statement to police was testimonial).

their presence or absence in support of conclusions resting mostly on other grounds, but the factor definitely counts.³¹

31. *State v. Feliciano*, 901 A.2d 631 (R.I. 2006) (in murder trial, admitting statement by victim to friend the day before, describing prior assault; casual remark was not a solemn declaration or affirmation); *United States v. Danford*, 435 F.3d 682, 687 (7th Cir. 2006) (conversation between employee and manager was “more akin to a casual remark” than testimony); *United States v. Franklin*, 415 F.3d 537, 545 (6th Cir. 2005) (codefendant’s statement saying “we hit a truck,” referring to defendant and made to friend and confidant “by happenstance,” was not testimonial).