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## NONTESTIMONIAL HEARSAY AFTER *CRAWFORD, DAVIS AND BOCKTING*

*Laird C. Kirkpatrick\**

The 2004 decision of the United States Supreme Court in *Crawford v. Washington*<sup>1</sup> ushered in a new era of confrontation jurisprudence. The ruling greatly strengthened a defendant's Sixth Amendment protection against testimonial hearsay by requiring that it be subject to cross-examination either before or at trial in order to be admitted. What was not made clear was whether criminal defendants have constitutional protection against hearsay offered by the prosecution that is found to be nontestimonial.

Before *Crawford*, the Supreme Court viewed all hearsay offered against a criminal defendant as being subject to the Confrontation Clause. Whether the hearsay was admissible depended on whether it satisfied the two-pronged test of *Ohio v. Roberts*.<sup>2</sup> *Roberts* required a finding that the hearsay was reliable and a showing that the declarant was unavailable. *Roberts* held that reliability could be inferred without further inquiry if the statement fit a "firmly rooted" hearsay exception. As for unavailability, later decisions limited this requirement primarily to former testimony and to hearsay offered under exceptions that were not "firmly rooted."

*Crawford* clearly overruled *Roberts* with respect to testimonial hearsay, holding that such hearsay must be subject to cross-examination regardless of whether a finding of reliability and unavailability has been made. Thus, testimonial hearsay previously admitted under *Roberts* will now be excluded if the cross-examination requirement is not satisfied. However, *Crawford* did not overrule *Roberts* with respect to nontestimonial hearsay, although it hinted that *Roberts*'s days might be numbered. The Court stated: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an

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<sup>1</sup> 541 U.S. 36 (2004).

<sup>2</sup> 448 U.S. 56 (1980).

approach that exempted such statements from Confrontation Clause scrutiny altogether.”<sup>3</sup>

And so the law stood for two years after *Crawford*—testimonial hearsay was governed by *Crawford* and nontestimonial hearsay was governed by *Roberts*.<sup>4</sup> Then came the Supreme Court’s decision in *Davis v. Washington*<sup>5</sup> in 2006. In *Davis*, Justice Scalia, writing for the Court, reached out to address an issue that was not before the Court—the applicability of the Confrontation Clause to nontestimonial hearsay. This issue was not briefed or argued in either *Davis* or the companion case of *Hammon v. Indiana*,<sup>6</sup> nor was it a question the Court had accepted for review. Furthermore, neither *Davis* nor *Hammon* had argued in the courts below that if the hearsay in question was found to be nontestimonial its admission would violate the Confrontation Clause,<sup>7</sup> thus no claim of error on this point was preserved. Nonetheless, Justice Scalia, in language so cryptic that it escaped the attention of many readers of the opinion, including the preparer of the headnotes,<sup>8</sup> signaled his view that nontestimonial hearsay was no longer subject to the Sixth Amendment. After reaffirming that the primary focus of the

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<sup>3</sup> 541 U.S. at 68.

<sup>4</sup> See, e.g., *Summers v. Dretke*, 431 F.3d 861, 877 (5th Cir. 2005) (“With respect to the statements at issue here—nontestimonial out-of-court statements in furtherance of a conspiracy—it is clear that [*Roberts*] continues to control.”); *United States v. Hinton*, 423 F.3d 355, 358 n.1 (3d Cir. 2005) (“[T]he admission of nontestimonial hearsay is still governed by *Roberts*.”); *United States v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005) (applying *Roberts*’s standard to excited utterance); *United States v. Gibson*, 409 F.3d 325, 338 (6th Cir. 2005) (“*Crawford* dealt only with testimonial statements and did not disturb the rule that nontestimonial statements are constitutionally admissible if they bear independent guarantees of trustworthiness.”); *United States v. Saget*, 377 F.3d 223, 227 (2d Cir. 2004) (“*Crawford* leaves the *Roberts* approach untouched with respect to nontestimonial statements.”); *State v. Rivera*, 844 A.2d 191, 202 (Conn. 2004) (“[B]ecause this statement was nontestimonial in nature, application of the *Roberts* test remains appropriate.”).

<sup>5</sup> 126 S. Ct. 2266 (2006).

<sup>6</sup> *Hammon*’s brief does not address the issue. Brief of Petitioner Hershel Hammon, *Hammon v. Indiana*, 126 S. Ct. 2266 (2006) (No. 05-5705), 2005 WL 3597706. Nor does *Davis*’s. Brief for Petitioner, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (No. 05-5224), 2005 WL 3598182.

<sup>7</sup> Neither the Washington Supreme Court nor the Indiana Supreme Court addressed the issue. See *State v. Davis*, 111 P.3d 844, 850–52 (Wash. 2005); *Hammon v. State*, 829 N.E.2d 444, 452 (Ind. 2005) (“[W]hether some nontestimonial statements may be subject to Sixth Amendment limitations is not before us today.”).

<sup>8</sup> James J. Duane, *The Cryptographic Coroner’s Report on Ohio v. Roberts*, CRIM. JUST., Fall 2006, at 37, 38 (“The official syllabus to the *Davis* case prepared by the Reporter of Decisions and the West headnotes to the opinion make no mention of *Roberts* at all, much less any mention that *Roberts* was finally overruled in that case. And the lower courts have thus far been almost completely unable to accurately decipher what *Davis* said on that point.”).

Confrontation Clause is on testimonial hearsay, he stated that “[a] limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core,’ but its perimeter.”<sup>9</sup> Earlier in the opinion he stated that “[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.”<sup>10</sup>

Some lower courts viewed this dictum in *Davis* that appeared to signal the death of *Roberts* as nonbinding,<sup>11</sup> just as other dicta in *Crawford* and *Davis* had been regarded as overly broad.<sup>12</sup> However, eight months later in *Whorton v. Bockting*,<sup>13</sup> a unanimous Supreme Court, again addressing an issue that had not been briefed or

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<sup>9</sup> 126 S. Ct. at 2274. The phrasing in *Crawford* was that testimonial statements were the “primary object” of the Confrontation Clause. In *Davis* Justice Scalia wrote a broader statement that “only” a testimonial statement can “cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause.” *Id.* at 2273.

<sup>10</sup> *Id.*

<sup>11</sup> See the following post-*Davis* cases: *Albrecht v. Horn*, 471 F.3d 435, 468 (3d Cir. 2006) (“Unless and until the Supreme Court holds otherwise, *Roberts* still controls nontestimonial statements.”); *Scott v. Jarog*, No 03-73737, 2006 WL 2811270, at \*9 (E.D. Mich. Sept. 28, 2006) (“With respect to non-testimonial hearsay statements, *Roberts* and its progeny remain the controlling precedents.”). *Cf.* *United States v. Feliz*, 467 F.3d 227, 232 (2d Cir. 2006) (in the context of autopsy reports admitted as public records, stating that regardless of “[w]hether the admissibility of nontestimonial evidence also turns on an analysis of its reliability based on requirements rooted outside the rules of evidence, the particular guarantees of trustworthiness attendant to autopsy reports . . . make it unnecessary to resolve that question in this case”).

On the question when lower courts should view a Supreme Court decision as overruled based on dictum, see *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (“[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”). On the appropriate criteria for identifying dicta, see generally Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005).

<sup>12</sup> For example, the *Crawford* opinion listed business records as an example of hearsay that is nontestimonial. 541 U.S. 36, 56 (2004) (“Most of the hearsay exceptions [in the Framers’ era] covered statements that by their nature were not testimonial—for example business records or statements in furtherance of a conspiracy.”). However, some records of regularly conducted activity fitting Federal Rule of Evidence 803(6) would clearly be testimonial, such as investigative police reports or a store detective’s report of shoplifting offered against a defendant in a shoplifting prosecution. *See, e.g., State v. Crager*, 844 N.E.2d 390, 398–99 (Ohio Ct. App. 2005) (refusing to adopt a per se exclusion of all business records from scrutiny under *Crawford*); *People v. Mitchell*, 32 Cal. Rptr. 3d 613, 621 (Ct. App. 2005) (stating that the *Crawford* Court did not intend that “all documentary evidence which could broadly qualify in some context as a business record . . . automatically be considered non-testimonial”).

<sup>13</sup> 127 S. Ct. 1173 (2007).

argued by the parties,<sup>14</sup> stated that there is no constitutional protection against nontestimonial hearsay. In an opinion by Justice Alito, the Court said:

But whatever improvement in reliability *Crawford* produced . . . must be considered together with *Crawford*'s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.<sup>15</sup>

The manner in which the Supreme Court has approached the question whether criminal defendants have any constitutional protection against nontestimonial hearsay is troubling. The answer to this question has broad ramifications for how criminal cases are tried and affects a large number of cases. According to a recent survey, nearly one-third of the confrontation challenges before the appellate courts have been held to involve nontestimonial hearsay.<sup>16</sup> Yet there has been no briefing or argument on the question whether there should be at least a minimal level of Sixth Amendment scrutiny for some forms of nontestimonial hearsay. The Court has staked out its position on the question, which is apparently to exclude nontestimonial hearsay entirely from the protection of the Sixth Amendment, without hearing argument from any of the litigants who might actually be affected by such a ruling.

It was premature for the Court to resolve the constitutional status of nontestimonial hearsay at a time when the definition of testimonial hearsay is still so unsettled. The term *testimonial* hearsay has not yet been clearly defined by the Court, hence the scope of what is *nontestimonial* hearsay also remains significantly undefined.<sup>17</sup> Since *Crawford*, lower courts have held that the

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<sup>14</sup> The issue before the Court was the retroactivity of the *Crawford* decision, and the Court held that it was not retroactive. The hearsay statements in question had already been held to satisfy *Roberts*.

<sup>15</sup> *Bockting*, 127 S. Ct. at 1183. The Court is in error in this statement. *Crawford* did not hold that the Confrontation Clause has no applicability to nontestimonial hearsay. See *supra* notes 4–5 and accompanying text.

<sup>16</sup> See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 767 (2005) (noting that among approximately 500 published federal and state court opinions applying *Crawford* between March 8 and December 31, 2004, nearly one-third of the courts reaching the merits distinguished *Crawford* on the ground that the statements at issue were nontestimonial).

<sup>17</sup> The Supreme Court has expressly declined to provide a comprehensive definition of the term “testimonial.” *Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006); *Crawford*, 541 U.S. at 68.

following types of hearsay statements are nontestimonial: a child's statements alleging sexual abuse made to family members, such as parents or foster parents,<sup>18</sup> as well as to medical personnel, such as nurses<sup>19</sup> or doctors;<sup>20</sup> an accomplice's statement describing a murder-for-hire scheme to an acquaintance;<sup>21</sup> recorded jailhouse conversations between a defendant's boyfriend and his visitors;<sup>22</sup> private conversations with a friend;<sup>23</sup> statements by a shooting victim to her family at the hospital;<sup>24</sup> domestic business records;<sup>25</sup> foreign business records;<sup>26</sup> autopsy reports;<sup>27</sup> odometer statements by sellers of used cars;<sup>28</sup> a wide range of certifications, such as certifications of the authenticity of public records,<sup>29</sup> certifications of the nonexistence of a public record,<sup>30</sup> certifications attesting to the

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<sup>18</sup> *People v. Virgil*, 104 P.3d 258, 265 (Colo. Ct. App. 2005) (finding that statements to father and father's friend were nontestimonial); *Herrera-Vega v. State*, 888 So. 2d 66, 69 (Fla. Dist. Ct. App. 2004) (admitting child's statements to mother and father reporting sodomy because statements were nontestimonial); *People v. R.F.*, 825 N.E.2d 287, 295 (Ill. App. Ct. 2005) (holding as nontestimonial statements made to mother and grandmother); *In re Rolandis G.*, 817 N.E.2d 186, 189 (Ill. App. Ct. 2004) (finding that statements made to mother were nontestimonial); *State v. Bobadilla*, 690 N.W.2d 345, 350 (Minn. Ct. App. 2004) (finding that statements made to mother were nontestimonial); *Pantano v. State*, 138 P.3d 477, 479 (Nev. 2006) (admitting child's statement to father concerning sexual abuse by another); *State v. Brigman*, 615 S.E.2d 21, 24–25 (N.C. Ct. App. 2005) (admitting child's statement to foster mother because it was nontestimonial); *State v. Walker*, 118 P.3d 935, 942 (Wash. Ct. App. 2005) (finding that statements to mother were nontestimonial).

<sup>19</sup> *State v. Scacchetti*, 711 N.W.2d 508, 514–15 (Minn. 2006); *State v. Krasky*, 696 N.W.2d 816, 819–20 (Minn. Ct. App. 2005) (holding that seven-year-old's statements to nurse practitioner about her father's alleged abuse were nontestimonial).

<sup>20</sup> *United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005); *People v. Cage*, 15 Cal. Rptr. 3d 846, 854–55 (Ct. App. 2004); *State v. Slater*, 908 A.2d 1097, 1107 (Conn. App. Ct. 2006); *Commonwealth v. DeOliveira*, 849 N.E.2d 218, 224 (Mass. 2006); *Foley v. State*, 914 So. 2d 677, 685 (Miss. 2005); *State v. Vaught*, 682 N.W.2d 284, 287–91 (Neb. 2004); *State v. Lee*, No. 22262, 2005 WL 544837 (Ohio Ct. App. 2005).

<sup>21</sup> *Ramirez v. Dretke*, 398 F.3d 691, 695 n.3 (5th Cir. 2005).

<sup>22</sup> *People v. Shepard*, 689 N.W.2d 721, 729 (Mich. Ct. App. 2004).

<sup>23</sup> *Horton v. Allen*, 370 F.3d 75, 83–84 (1st Cir. 2004); *State v. Manuel*, 697 N.W.2d 811, 823–25 (Wis. 2005) (collecting cases).

<sup>24</sup> *State v. Blackstock*, 598 S.E.2d 412, 420 (N.C. Ct. App. 2004).

<sup>25</sup> *United States v. Ellis*, 460 F.3d 920, 927 (7th Cir. 2006).

<sup>26</sup> *United States v. Hagege*, 437 F.3d 943, 958 (9th Cir. 2006).

<sup>27</sup> *United States v. Feliz*, 467 F.3d 227, 233–34 (2d Cir. 2006); *State v. Lackey*, 120 P.3d 332, 348–52 (Kan. 2005); *Rollins v. State*, 866 A.2d 926, 953 (Md. Ct. Spec. App. 2005); *Moreno-Denoso v. State*, 156 S.W.3d 166, 180–82 (Tex. Crim. App. 2005).

<sup>28</sup> *United States v. Gilbertson*, 435 F.3d 790, 796 (7th Cir. 2006).

<sup>29</sup> *United States v. Weiland*, 420 F.3d 1062, 1077 (9th Cir. 2005).

<sup>30</sup> *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005); *United States v. Cervantes-Flores*, 421 F.3d 825, 830–34 (9th Cir. 2004); *State v. N.M.K.*, 118

authenticity of a business record,<sup>31</sup> and certifications of testing devices;<sup>32</sup> and laboratory reports identifying illegal substances or measuring drug or alcohol content in defendant's blood made for use in criminal prosecutions,<sup>33</sup> whether made by public or private laboratories.<sup>34</sup>

It is possible that the Supreme Court may ultimately adopt a definition of *testimonial* that will cover the hearsay in some of these cases. But in the meantime, the constitutional questions raised by these cases are too important and involve too many factual variations to have been properly resolved without careful consideration based upon full briefing and argument by the parties affected.

#### I. CHILD SEXUAL ABUSE PROSECUTIONS

A full briefing and argument on the constitutional status of nontestimonial hearsay would have allowed the Court to consider a number of important questions. The first is whether eliminating nontestimonial hearsay from the scope of the Confrontation Clause will remove a constitutional safeguard that has played a vital role in assuring fairness and balance in child sexual abuse prosecutions. If *Roberts* is overruled in its entirety, this will have a particularly significant impact on child sexual abuse prosecutions for three reasons. First, many statements made by children offered in such prosecutions have been found to be nontestimonial. Although a child's statements to a law enforcement officer, or an agent of law enforcement, are generally considered to be testimonial under *Crawford*,<sup>35</sup> many statements by children alleging sexual abuse are

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P.3d 368, 371–72 (Wash. Ct. App. 2005) (holding that certification that defendant lacks a driver's license was nontestimonial).

<sup>31</sup> *United States v. Ellis*, 460 F.3d 920, 927 (7th Cir. 2006).

<sup>32</sup> *Rackoff v. State*, 621 S.E.2d 841, 845 (Ga. Ct. App. 2005) (finding that certification regarding breathalyzer was not testimonial because not prepared for any particular case).

<sup>33</sup> *Napier v. State*, 827 N.E.2d 565, 569 (Ind. Ct. App. 2005) (demonstrating that a toxicologist certificate was nontestimonial); *Commonwealth v. Verde*, 827 N.E.2d 701, 706 (Mass. 2005) (holding that toxicologist's report on drug type was nontestimonial); *State v. Campbell*, 719 N.W.2d 374, 376–77 (N.D. 2006) (identifying evidence seized as marijuana).

<sup>34</sup> *Ellis*, 460 F.3d 920 (lab test from private hospital); *People v. Meekins*, 828 N.Y.S.2d 83 (App. Div. 2006) (private DNA lab).

<sup>35</sup> *See, e.g., People v. Warner*, 14 Cal. Rptr. 3d 419, 429 (Ct. App. 2004) (holding that statements to police officer and child interview specialist were testimonial); *People v. Virgil*, 104 P.3d 258, 262 (Colo. Ct. App. 2005) (demonstrating that statements to a police officer and physician member of child protection team were testimonial); *Blanton v. State*, 880 So. 2d 798, 800–01 (Fla. Dist. Ct. App. 2004) (requiring Sixth Amendment protection for statements made to a police investigator);

usually made first in private settings to caretakers, family members, friends, teachers, doctors, or nurses. A large number of lower courts have held that such statements made in private settings are nontestimonial.<sup>36</sup>

A second reason why overruling *Roberts* will have a particularly large impact on child sexual abuse prosecutions is that child hearsay is often offered under hearsay exceptions that are not “firmly rooted,” such as the residual exception or new statutory exceptions designed specifically for child hearsay. While *Roberts* accorded a presumption of reliability for hearsay that fits a firmly rooted exception, it generally required a showing of reliability for hearsay that does not fit a firmly rooted exception. Thus, child sexual abuse prosecutions are an area where the reliability requirement of *Roberts* had its greatest force.

Reports by children that are the product of suggestive questioning can be unreliable, as has been demonstrated in a number of nationally publicized cases.<sup>37</sup> With the help of social

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Flores v. State, 120 P.3d 1170, 1178–79 (Nev. 2005) (finding that statements to police and child abuse investigator were testimonial).

<sup>36</sup> See cases cited *supra* notes 18–20.

<sup>37</sup> In 1983 and 1984, more than 350 children claimed to have suffered sexual abuse at McMartin’s preschool in Manhattan Beach, California. After allegations by one parent prompted the investigation, most of the other allegations came after questioning by parents who received a letter from the police advising them that their children might have been abused or by questioning by the Children’s Institute International (CII), a Los Angeles abuse therapy clinic. Some of the allegations made in the case were of a bizarre nature involving Satanic rituals, hot air balloon rides, giraffes, and tunnels. After what is purported to be the longest and most expensive criminal prosecution in United States history, Peggy McMartin Buckey was found not guilty in 1990, and her son was acquitted of a number of charges, the remaining of which were dropped after a hung jury on retrial. For an account of this case, see EDGAR W. BUTLER ET AL., ANATOMY OF THE MCMARTIN CHILD MOLESTATION CASE (2001); ELAINE SHOWALTER, HYSTORIES: HYSTERICAL EPIDEMICS AND MODERN MEDIA (1997); Dorothy Rabinowitz, *From the Mouths of Babes to a Jail Cell: Child Abuse and the Abuse of Justice: A Case Study*, HARPER’S MAGAZINE, May 1990, at 52; Buckey v. County of Los Angeles, 968 F.2d 791 (9th Cir.), *cert. denied*, 506 U.S. 999 (1992) (Peggy McMartin Buckey’s post-acquittal 42 U.S.C. § 1983 claim against the county, county district attorney, child abuse investigation institute, and child abuse investigator).

In East Wenatchee, Washington, based on evidence gathered from unrecorded questioning of sixty children who signed statements after extended periods of interrogation, 27,726 child sexual abuse charges were brought against forty-three adults in 1994. Most of the charges were ultimately dismissed; many of the convictions were overturned on appeal; and other defendants were freed after plea bargaining. Timothy Egan, *Pastor and Wife Are Acquitted on All Charges in Sex-Abuse Case*, N.Y. TIMES, Dec. 12, 1995, at A24; John K. Wiley, *Two Wenatchee Sex Abuse Defendants Released*, SEATTLE POST-INTELLIGENCER, June 8, 2000, <http://seattlepi.nwsourc.com/local/wenaww.shtml>; *The Accused: Over Two Years, 43 People Were Charged with 27,726 Counts of Child Sex Abuse. 17 Were Convicted and Remain in Prison. 4 Were Acquitted*, SEATTLE POST-INTELLIGENCER, Feb. 25, 1998,



science research, the legal system has gained an increased understanding of the factors, particularly the susceptibility of children to suggestive questioning, that bear on the reliability of statements by young children.<sup>38</sup> A leading case applying the *Roberts* reliability requirement is *Idaho v. Wright*,<sup>39</sup> which arose out of a prosecution for child sexual abuse. In *Wright*, the Supreme Court affirmed the Idaho Supreme Court which held that a young child's statements to a doctor alleging sexual abuse of both herself and her sister lacked sufficient indicia of reliability to justify admission under the Confrontation Clause. The Idaho Supreme Court found that the statements lacked trustworthiness because the interviewing physician used "blatantly leading questions," had a "preconceived idea of what [the child] should be disclosing," and the interview lacked procedural safeguards.<sup>40</sup> The physician had apparently drawn a picture during his questioning of the child that was no longer available for inspection, and the Idaho court found that "the

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at A6. Dr. Phillip Esplin, a forensic psychologist for the National Institutes of Health's Child Witness Project and expert witness in two of the Wenatchee trials, commented that "Wenatchee may be the worst example ever of mental health services being abused by a state . . . to control and manage children who have been frightened and coerced into falsely accusing their parents and neighbors of the most heinous of crimes." Andrew Schneider, *Wenatchee Abuses Attacked Nationally*, SEATTLE POST-INTELLIGENCER, May 28, 1998, at B1; see also Mike Barber, *Wenatchee Must Pay Up, Court Rules \$718,000 in Sanctions Over Abuse Case is Confirmed by State Appeals Panel*, SEATTLE POST-INTELLIGENCER, Aug. 4, 2004, at B1; Debbie Nathan, *Justice in Wenatchee*, N.Y. TIMES, Dec. 19, 1995, at A25.

See also *Maryland v. Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting) (explaining that "[s]ome studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality"); *State v. Michaels*, 642 A.2d 1372, 1384-85 (N.J. 1994) (reversing conviction of female nursery school teacher on 115 counts of sexual abuse of children in her care on ground that convictions were based almost entirely on statements by young children who had been subjected to sustained leading interrogation); Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 PSYCHOL. BULL. 403 (1993) (examining interviewing practices that can produce false memory in children).

<sup>38</sup> See, e.g., Maggie Bruck & Stephen J. Ceci, *The Suggestibility of Children's Memory*, 50 ANN. REV. PSYCHOL. 419 (1999); Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33 (2000); Jodi A. Quas et al., *Individual Differences in Children's and Adults' Suggestibility and False Event Memory*, 9 LEARNING & INDIVIDUAL DIFFERENCES 359 (1997); Anne M. Ridley et al., *The Effects of State Anxiety on the Suggestibility and Accuracy of Child Eyewitnesses*, 16 APPLIED COGNITIVE PSYCHOL. 547 (2002); Daniel L. Schacter et al., *True and False Memories in Children and Adults: A Cognitive Neuroscience Perspective*, 1 PSYCHOL. PUB. POLY & L. 411 (1995); Amye R. Warren & Dorothy F. Marsil, *Why Children's Suggestibility Remains a Serious Concern*, 65 LAW & CONTEMP. PROBS. 127 (2002); Amye Warren et al., *Inducing Resistance to Suggestibility in Children*, 15 LAW & HUM. BEHAV. 3 (1991).

<sup>39</sup> 497 U.S. 805 (1990).

<sup>40</sup> *State v. Wright*, 775 P.2d 1224, 1227 (Idaho 1980).

circumstances surrounding this interview demonstrate dangers of unreliability which, because the interview was not [audio or video] recorded, can never be fully assessed.”<sup>41</sup>

The Supreme Court agreed that the child’s statements lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause. Writing for the Court, Justice O’Connor stated:

We think the Supreme Court of Idaho properly focused on the presumptive unreliability of the out-of-court statements and on the suggestive manner in which Dr. Jambura conducted the interview. Viewing the totality of the circumstances surrounding the younger daughter’s responses to Dr. Jambura’s questions, we find no special reason for supposing that the incriminating statements were particularly trustworthy.<sup>42</sup>

Lower courts have generally read *Wright* as establishing that the following four factors, along with other surrounding circumstances, are appropriate to consider in determining the reliability of a child’s statement alleging sexual abuse: (1) whether the child had a motive to “make up a story of this nature”; (2) whether, given the child’s age, the statements are of a type “that one would expect a child to fabricate”; (3) whether the interview of the child was conducted in a suggestive manner; and (4) the degree to which the child’s statement was spontaneous, although noting that “[i]f there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness.”<sup>43</sup>

The Court rejected the “apparently dispositive weight” placed by the Idaho Supreme Court on the lack of procedural safeguards at the interview. While acknowledging that videotaping the child’s interview and avoiding leading questions “may well enhance the reliability of out-of-court statements of children regarding sexual abuse,” the Court declined “to read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant.”<sup>44</sup>

Nonetheless, the message was not lost on prosecutor’s offices and child advocacy centers throughout the country—children’s out-of-court statements are much more likely to be admitted under *Wright* if they are videotaped and if the persons involved in interviewing children who may be victims of child abuse are trained to avoid overly leading, repetitious, or suggestive questioning. *Wright*

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<sup>41</sup> *Id.* at 1230.

<sup>42</sup> *Wright*, 497 U.S. at 826.

<sup>43</sup> *Id.*; see also, e.g., *Webb v. Lewis*, 44 F.3d 1387, 1391 (9th Cir. 1994); *Virgin Islands v. Joseph*, 964 F.2d 1380, 1388 (3d Cir. 1992).

<sup>44</sup> *Wright*, 497 U.S. at 826.

has not only had a significant impact in changing the techniques used in cases of suspected child sexual abuse,<sup>45</sup> it has also provided a constitutional safeguard against untrustworthy statements in the thousands of child sexual abuse prosecutions that have been brought since *Wright* was decided.<sup>46</sup>

It is difficult to determine how many times trial judges have excluded hearsay statements as untrustworthy by applying the *Wright/Roberts* standard. Because prosecutors generally cannot appeal, the case reports, for the most part, only reflect cases where the statements were admitted and the defendant challenged that ruling on appeal, not those cases where the hearsay statements were excluded. The case reports also do not reflect how many times prosecutors have refrained from offering hearsay statements of questionable reliability out of concern for violating the *Wright/Roberts* constitutional standard. But there can be little doubt that *Wright* and *Roberts* have played a major role in child sexual abuse prosecutions throughout the United States and have been key precedents regularly taken into account by trial lawyers and judges handling such cases.<sup>47</sup> Yet if *Roberts* is overruled in its entirety, *Wright* is also overruled *sub silentio*.

A third reason why *Roberts* has played a significant role in child sexual abuse prosecutions is that a general consensus exists that it is important to have the child testify when possible, given the nature of the crime and the severity of the penalties. The *Roberts* requirement that the declarant testify when available has generally been interpreted to apply to hearsay offered under the catchall exception as well as under the special child hearsay exceptions.<sup>48</sup>

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<sup>45</sup> See Thomas D. Lyon, *Applying Suggestibility Research to the Real World: The Case of Repeated Questions*, 65 LAW & CONTEMP. PROBS. 97, 126 (2002); Dorothy F. Marsil et al., *Child Witness Policy: Law Interfacing with Social Science*, 65 LAW & CONTEMP. PROBS. 209, 241 (2002).

<sup>46</sup> See generally Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, 65 LAW & CONTEMP. PROBS. 47 (2002) (citing cases).

<sup>47</sup> See generally Ronald J. Allen, *The Expert as Educator: Enhancing the Rationality of Verdicts in Child Sex Abuse Prosecutions*, 1 PSYCHOL. PUB. POL'Y & L. 323 (1995); Allison C. Goodman, *Two Critical Evidentiary Issues in Child Sexual Abuse Cases: Closed-Circuit Testimony by Child Victims and Exceptions to the Hearsay Rule*, 32 AM. CRIM. L. REV. 855 (1995); John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 56–58 (1996).

<sup>48</sup> See, e.g., *United States v. Earles*, 113 F.3d 796, 801 (8th Cir. 1997) (holding that when a hearsay declarant is not present for cross-examination at trial, “the Confrontation Clause normally requires a showing that he is unavailable”); *United States v. Lang*, 904 F.2d 618, 625 (11th Cir. 1990) (citing *Roberts* as requiring unavailability as a prerequisite to admission of hearsay under catchall exception); *United States v. Dorian*, 803 F.2d 1439, 1447 (8th Cir. 1986) (citing *Roberts* as requiring a five-year-old victim’s unavailability, which was shown due to her young

Over the past several decades, evidence law has changed in many ways that makes it easier for children to testify. Age-based competency restrictions have largely been eliminated.<sup>49</sup> States have adopted statutes that authorize the appointment of a special advocate to support the child during the legal process and that sometimes even allow the advocate to sit with the child while his or her testimony is given.<sup>50</sup> In order to assist children with verbal inhibitions, anatomically correct dolls are used to help children describe genitalia or sexual activity.<sup>51</sup> Many states, as well as the federal government, authorize the presentation of a child's testimony by closed-circuit television or a videotaped deposition in situations where testifying in court would be too traumatic or damaging to the child.<sup>52</sup>

The constitutionality of presenting a child's testimony by closed-circuit television, at least in cases where the child would be unduly traumatized by taking the stand, was upheld in *Maryland v. Craig*<sup>53</sup> over a vigorous dissent by Justice Scalia. In his dissent, he stated:

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is

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age and fright, as a prerequisite to admission under catchall hearsay exception in prosecution for child sexual abuse); *Vaska v. State*, 135 P.3d 1011, 1014 n.6 (Alaska 2006) (applying unavailability requirement under state residual hearsay exception in child sexual abuse case); *State v. Allen*, 755 P.2d 1153, 1159 (Ariz. 1988) (same); *State v. Robinson*, 699 N.W.2d 790, 798 (Minn. Ct. App. 2005) (same); *Betzle v. State*, 847 P.2d 1010, 1019 (Wyo. 1993) (same); cf. CAL. EVID. CODE § 1360(a) (West 2004) (providing that "statement[s] made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another" is admissible where statement is reliable and child is unavailable to testify).

<sup>49</sup> See FED. R. EVID. 601; UNIF. R. EVID. 601; see also Nora A. Uehlein, Annotation, *Witnesses: Child Competency Statutes*, 60 A.L.R.4TH 369 (1988).

<sup>50</sup> MICH. COMP. LAWS § 600.2163a(4) (2004) (allowing victim of child abuse "to have a support person sit with, accompany, or be in close proximity to the witness during . . . testimony"); MINN. STAT. § 631.046 (2003) (allowing "parent, guardian, or other supportive person" to accompany child abuse victim at trial); WYO. STAT. ANN. § 7-11-408(b) (2005) (allowing advocate to accompany child sex-crime victim during videotaped deposition).

<sup>51</sup> See Monique K. Cirelli, *Expert Testimony in Child Sexual Abuse Cases: Helpful or Prejudicial?* *People v. Beckley*, 8 T.M. COOLEY L. REV. 425, 426 n.18 (1991) (collecting cases).

<sup>52</sup> In the federal context, 18 U.S.C. § 3509 (2000) permits the use of closed-circuit or videotaped testimony in child sexual abuse cases, codifying the holding of *Maryland v. Craig*, 497 U.S. 836, 857-58 (1990). For state authorities, see *Craig*, 497 U.S. at 853-54 n.3 (collecting state statutes permitting child victim testimony via closed-circuit in sexual abuse cases).

<sup>53</sup> *Id.* at 857-58.

sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, “it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?” Perhaps that is a procedure today’s society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.<sup>54</sup>

However, if a child’s statement in a private setting is considered nontestimonial, a prosecutor could now apparently present the child’s accusatory statement through a third party without calling the child for cross-examination at all, let alone by means of closed-circuit television. Ironically Justice Scalia’s concern about the need for confrontation in *Craig* can be completely circumvented under a regime that simply eliminates the requirement of in-court testimony by an available child when the child’s out-of-court statement is found to be nontestimonial.

There is another point to consider. Almost all the statutory child hearsay exceptions adopted by various states have been drafted with the assumption that *Roberts* set forth the controlling constitutional standard. Therefore they contain reliability and unavailability requirements.<sup>55</sup> If *Roberts* is dead, states would presumably be free to modify these statutes and eliminate the reliability and unavailability requirements from these hearsay exceptions or, for that matter, to repeal the hearsay rule entirely with respect to nontestimonial hearsay.

## II. NEED FOR CROSS-EXAMINATION

A hearing focused on the constitutional status of nontestimonial hearsay would also have allowed the Court to consider the fact that in some cases defendants have a strong need to cross-examine nontestimonial hearsay. Certainly the need to test, and refute if possible, a hearsay statement is generally greater where the statement is testimonial. But this is not always the case. The

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<sup>54</sup> *Id.* at 861 (Scalia, J., dissenting).

<sup>55</sup> *See, e.g.*, ALA. CODE § 15-25-2 (1995) (permitting introduction of hearsay statements made by child sexual abuse victims, with unavailability and reliability requirements); CAL. EVID. CODE § 1360(a) (West Supp. 2007) (providing that a “statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another” is admissible where the statement is reliable and the child is unavailable to testify); OR. REV. STAT. § 40.460(18a)(d) (2005) (allowing a special hearsay exception for children and persons with developmental disabilities who allege sexual abuse, containing reliability and unavailability requirements). The model for many state statutes is UNIF. R. EVID. 807, which establishes a hearsay exception admitting the inherently trustworthy declaration of an unavailable child victim of neglect or physical or sexual abuse.

importance of testing and refutation is not necessarily a function of the distinction adopted in *Crawford*, but turns rather on the content of the statement and its importance and role in the case as evidence. A nontestimonial statement can sometimes be as vital in convicting a defendant as a testimonial statement. Two examples illustrate the point.

The notorious trial of Sir Walter Raleigh in 1603 is an important part of the background of the Confrontation Clause, and was cited repeatedly by Justice Scalia in *Crawford* as well as in *Davis*.<sup>56</sup> Raleigh was convicted of treason and sentenced to death based on the out-of-court statements of an alleged accomplice, Lord Cobham, accusing Raleigh of plotting to overthrow James I. At trial Raleigh pleaded for the court to “let Cobham be here, let him speak it. Call my accuser before my face.” But his request was denied, and Raleigh was convicted and ultimately executed.<sup>57</sup> His trial is frequently cited as a powerful example of the criminal defendant’s need to confront his accuser, and the perceived unfairness of his trial is generally thought to be one of the reasons for the adoption of the Confrontation Clause.<sup>58</sup>

But what if instead of speaking to an examining magistrate, Cobham had spoken to a friend, described a plot that Raleigh had allegedly devised to overthrow the Crown, and stated his intention to “cast his lot with Raleigh.” In such a case, a prosecutor operating in a post-*Crawford* world would likely be able to offer Cobham’s statement through his friend’s testimony as a declaration against penal interest. The statement would presumably not be testimonial, because it was made in a private setting without any intent that it be used as a basis for criminal investigation or prosecution. Yet if such a hearsay statement accusing Raleigh of being the instigator of a treasonous plot had been admitted, it is hard to imagine that Raleigh would not still have made the same demand to “call my accuser before my face.” Raleigh’s need to confront and cross-examine his accuser would be as essential in the hypothetical trial as the actual trial. If Raleigh had been convicted and executed on the basis of such unsworn, out-of-court, uncross-examined evidence, it seems doubtful that his trial would have been perceived as significantly more fair than his actual trial. Yet under the position taken by the

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<sup>56</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006); *Crawford v. Washington*, 541 U.S. 36, 44 (2004).

<sup>57</sup> *The Trial of Sir Walter Raleigh* (1603), in 2 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 1, 1–60 (T.B. Howell ed., London, R. Bagshaw 1809).

<sup>58</sup> One of the judge’s at Raleigh’s trial later commented that “the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.” 1 D. JARDINE, CRIMINAL TRIALS 520 (London, C. Knight 1832).

Court in *Davis* and *Bockting*, the admission of such hearsay would not be considered even to raise a confrontation issue.<sup>59</sup>

A second example where a defendant's need to cross-examine nontestimonial hearsay could be as great as the need to cross-examine testimonial hearsay can be developed from the facts of *Indiana v. Hammon*, the companion case to *Davis*. Police were called to the Hammon's home after Amy Hammon placed a 911 call requesting assistance. After police arrived, her husband Hershel Hammon was placed in a separate room while the police interrogated Amy. She gave a statement to the police that said in essence: "Hershel punched me and shoved me down causing my head to hit the heater." Hershel was arrested and prosecuted for domestic violence. At the time of trial, Amy could not be located, refused to appear, and did not testify. Instead her out-of-court statement made to the police was introduced as an excited utterance through testimony by police officers, and it served as the only direct evidence establishing that Hershel had committed a crime.<sup>60</sup> The Supreme Court reversed Hammon's conviction, holding that his right of confrontation had been violated. The Court held that Amy's statement was "testimonial" because it was made for the primary purpose of assisting a law enforcement investigation or prosecution since the immediate emergency had passed by the time it was made. The Court concluded that his wife was a "witness against" him within the meaning of the Sixth Amendment, and that Hammon was constitutionally entitled to cross-examine her about her accusatory statement.<sup>61</sup>

But what if just before the police arrived Amy Hammon had made an identical statement to her next-door neighbor, and that on a retrial of the case the prosecutor offered the statement made to the neighbor rather than the statement made to the police, again as an excited utterance? Presumably Hammon's attorney would argue that

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<sup>59</sup> Under *Roberts*, nontestimonial declarations against penal interest are subject to constitutional scrutiny and have sometimes been excluded where found to be unreliable. See, e.g., *Sanders v. Moore*, 156 F. Supp. 2d 1301, 1318–19 (M.D. Fla. 2001) (granting petition for writ of habeas corpus because of erroneous admission of husband's out-of-court statement to his wife that defendant had asked him to join a conspiracy to murder defendant's mother; such statement violated defendant's right of confrontation; it failed to fit within a "firmly rooted" hearsay exception and was not supported by particularized guarantees of trustworthiness); see also *Miller v. State*, 98 P.3d 738, 745–46 (Okla. Crim. App. 2004) (applying *Roberts* to exclude nontestimonial hearsay offered as a declaration against penal interest); cf. *People v. Ewell*, 98 P.3d 738, 745–47 (Cal. Ct. App. 2004) (upholding lower court in excluding nontestimonial statement on the grounds that the statement was not sufficiently against speaker's own penal interest, and in any case it lacked guarantees of trustworthiness under *Roberts*).

<sup>60</sup> *Davis*, 126 S. Ct. at 2272–73.

<sup>61</sup> *Id.* at 2278–79.

he had every bit as much need to cross-examine Amy Hammon at the second trial as he had at the first trial (perhaps to suggest that she slipped to the floor rather than being shoved). The fact that the wife's statement is now offered through a neighbor rather than through the police would make no difference in terms of its accusatory impact and would be entirely sufficient to convict Hammon at the second trial. Yet if Hammon were to appeal his second conviction, Hammon's right to confront and cross-examine his accuser, which the Court viewed as having such crucial importance in the first trial, would apparently have no constitutional significance whatsoever in the second trial, assuming that the wife's statement to the neighbor were found to be nontestimonial.<sup>62</sup> As Justice Scalia explained in *Davis*, declarants who provide nontestimonial hearsay are not considered "witnesses against" a defendant within the meaning of the Sixth Amendment.<sup>63</sup> Therefore, the defense attorney would have the somewhat awkward task of explaining to Hammon why his wife was a "witness against" him in the first trial, and hence he was constitutionally entitled to cross-examine her, but that in the second trial she was not a "witness against" him and he had no right to cross-examine her, even though her accusatory words were identical and served as the basis for his conviction in both trials.

It should be noted that in both of these examples and in any other case where nontestimonial hearsay is offered against a criminal defendant, the prosecutor now will apparently have the tactical option, at least as far as the Confrontation Clause is concerned, of introducing the hearsay statement without calling the declarant to testify, even if the declarant is available and willing to take the stand.<sup>64</sup>

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<sup>62</sup> See *id.* at 2274 n.2 (noting that, because victim's statement was made to an agent working in a law enforcement capacity, the Court was not called upon to "consider whether and when statements made to someone other than law enforcement personnel are 'testimonial,'" thus, for the time being, leaving the scope of the confrontation right limited to police interrogation); *id.* at 2278 n.5 (explaining that "formality is indeed essential to testimonial utterance"); *Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). But see Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1042-43 (1998) ("A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to the authorities or not.").

<sup>63</sup> 126 S. Ct. at 2273 (holding that only a testimonial statement can "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause").

<sup>64</sup> Of course apart from *Crawford* and *Davis*, the Supreme Court has already cut back on the unavailability requirement of *Roberts* by holding it inapplicable to hearsay offered under a firmly rooted exception, such as the excited utterance exception. See *White v. Illinois*, 502 U.S. 346 (1992). But this is a decision that could



### III. CONCEPTUAL FRAMEWORK OF *CRAWFORD*

Finally, a hearing focused on the constitutional status of the nontestimonial hearsay issue would have allowed the court to consider whether the conceptual framework adopted in *Crawford* necessarily requires excluding nontestimonial hearsay from any level of constitutional scrutiny. In building the new framework that focuses on testimonial hearsay, the Court relied in part on an 1828 dictionary defining *witness*, and on the limited historical record pertaining to the drafting and adoption of the Confrontation Clause. Arguably both sources were used somewhat selectively.

For example, in *Crawford* the Court stated: “The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’ 2 N. Webster, *An American Dictionary of the English Language* (1828).”<sup>65</sup> However, the definition quoted by the Court is for when *witness* is used as a verb, and in the Confrontation Clause, *witnesses* is used as a noun. As a noun, Webster’s dictionary sets forth the following definitions of *witness*:

1. Testimony; attestation of a fact or event.
2. That which furnishes evidence or proof.
3. A person who knows or sees any thing; one personally present; as, he was *witness*; he was an *eye-witness*.
4. One who sees the execution of an instrument, and subscribes it for the purpose of confirming its authenticity by his testimony.
5. One who gives testimony; as, the *witnesses* in court agreed in all essential facts.<sup>66</sup>

A limitation of *witness* to those who give testimony at trial is too narrow and has been consistently rejected by the Court, including in *Crawford* and *Davis*. Justice Scalia gives no explanation as to why

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be revisited. Some states reject *White* and continue to impose an unavailability requirement as a matter of state constitutional law. *See, e.g.*, *State v. McGriff*, 871 P.2d 782, 790 (Haw. 1994); *State v. Lopez*, 926 P.2d 784, 789 (N.M. Ct. App. 1996); *State v. Moore*, 49 P.3d 785, 792 (Or. 2002). Even where there is no federal or state constitutional unavailability requirement, courts have sometimes been critical of prosecutors who use hearsay statements for tactical advantage in preference to the available testimony of the declarant. *See, e.g.*, *Beach v. State*, 816 N.E.2d 57, 60 (Ind. Ct. App. 2004) (showing that the court gave warning when prosecutor offered nontestimonial hearsay statement of domestic violence victim even though she was available to testify when it stated that “the State would be well-advised to avoid the tactic of introducing hearsay statements without calling the declarant to testify in cases where the declarant is in fact available”). For suggested standards for when the unavailability requirement should apply under *Roberts*, see Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Unavailability Requirement*, 70 MINN. L. REV. 665 (1986) (arguing that whether to require unavailability should turn on the centrality of the statement, its reliability, the likelihood that cross-examination could realistically test it, and the adequacy of alternative means of challenge).

<sup>65</sup> 541 U.S. at 51.

<sup>66</sup> 2 NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 114 (New York, S. Converse 1828).

the Framers of the Confrontation Clause would not have intended the second or third definitions set forth in Webster's—i.e., a person who “furnishes evidence or proof,” or a person “who knows or sees anything.” These are common and widely accepted definitions that would encompass both testimonial and nontestimonial hearsay when out-of-court statements by such “witnesses” are offered against a criminal defendant. Moreover, these broader definitions are more consistent with how the term *witness* has been construed under other constitutional provisions, such as the Compulsory Process Clause.<sup>67</sup>

With respect to the historical record, Justice Scalia's opinion in *Crawford* is a model of originalist interpretation of a constitutional provision. It focuses on the likely intent of the Framers of the Confrontation Clause based on the experiences, practices, and laws of their time, as well as their apparent conception of fairness in court procedures. However, one danger of originalism as a theory of constitutional interpretation is that it may cause a Court to focus too much on the specific issues facing the Framers at the expense of their more general underlying concerns. Certainly in 1791, the primary focus of the Framers was on *ex parte* examination of witnesses, because that was a practice of the era that had generated controversy. But the most difficult confrontation issues facing courts today were not before the courts in 1791, so it is difficult to know what the common law judges who developed the right of confrontation or the Framers of the Sixth Amendment would have thought of them. There were no special hearsay exceptions for child hearsay or statements by domestic violence victims, statements to diagnosing doctors, present sense impressions, declarations against penal interest, and certainly no “catchall exception.”<sup>68</sup> There were no 911 calls, rape crisis centers, or child advocates employed to take statements from suspected child abuse victims.

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<sup>67</sup> See Randolph N. Jonakait, “Witness” in the Confrontation Clause: *Crawford v. Washington*, Noah Webster, and Compulsory Process, 79 TEMP. L. REV. 155 (2006).

<sup>68</sup> See Thomas Y. Davies, Not “the Framers’ Design”: How the Framing-Era Ban Against Hearsay Evidence Refutes the *Crawford*-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Right, 15 J.L. & POL’Y (forthcoming 2007) (“However, how could one logically infer that the Framers would not have applied the Confrontation Clause to “nontestimonial hearsay” if framing-era law did not yet recognize any exceptions under which informal, unsworn hearsay could arguably have constituted admissible evidence in criminal trials in any event?”); Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005). *But see* Thomas D. Lyon & Raymond Lamagna, *Hearsay from Unavailable Child Witnesses: From Old Bailey to Post-Davis*, 82 IND. L.J. (forthcoming 2007) (asserting that child hearsay was sometimes received in English criminal prosecutions during that era).

Surprisingly little material actually exists in the historical record indicating the intent of the Framers themselves with respect to the right of confrontation. Justice Scalia himself acknowledged as much when he joined an opinion twelve years before *Crawford* that stated “[t]here is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean.”<sup>69</sup> His exhaustive historical research in the *Crawford* opinion focused almost entirely on chronicling the evolving practices of English and American courts with respect to *ex parte* examination of witnesses and exploring how the right of cross-examination came to be recognized for such testimonial statements. It contains only two quotes pertinent to the actual adoption of the Confrontation Clause, neither of which shed any light on its possible application to nontestimonial hearsay.<sup>70</sup> Thus while the historical record supports the conclusion that the Framers had a heightened concern about testimonial hearsay, it does not support a conclusion that the Framers neither had nor would have had concerns about other forms of hearsay.<sup>71</sup> Even if it could be shown that nontestimonial hearsay was beyond the contemplation of the Framers, the judicial construction of other provisions of the Bill of Rights has not been limited only to matters contemplated by the Framers at the time of ratification.<sup>72</sup>

Ironically, in *Davis* where Justice Scalia reached out to declare nontestimonial hearsay a matter beyond the historical concern of the Framers, he made the following comment in rejecting Justice Thomas’s narrow interpretation of testimonial hearsay: “Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”<sup>73</sup> This comment is

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<sup>69</sup> *White*, 502 U.S. at 359 (Thomas, J., concurring).

<sup>70</sup> 541 U.S. at 49–50.

<sup>71</sup> *Cf. id.* at 71 (Rehnquist, C.J., concurring) (“As far as I can tell, unsworn testimonial statements were treated no differently at common law than were nontestimonial statements.”).

<sup>72</sup> See, for example, cases construing the protections afforded under the Cruel and Unusual Punishment Clause of the Eighth Amendment, such as *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (“[T]he Eighth Amendment’s proscriptions are not limited to those practices condemned by the common law in 1789. . . . Not bound by the sparing humanitarian concessions of our forebears, the Amendment also recognizes ‘the evolving standards of decency that mark the progress of a maturing society.’” (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958))), and *Weems v. United States*, 217 U.S. 349, 373 (1910) (“Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.”).

<sup>73</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2278 n.5 (2006).

similarly pertinent in assessing the constitutional status of nontestimonial hearsay.

#### IV. CONCLUSION

In *Crawford*, the Court held that the *primary* concern of the Confrontation Clause is testimonial hearsay.<sup>74</sup> In *Davis* and *Bockting*, the Court reformulated this holding to say that the *sole* concern of the Confrontation Clause is testimonial hearsay.<sup>75</sup> Such a reformulation has significant policy implications for future criminal prosecutions, because as the Court acknowledged in *Bockting*, it permits the admission of unreliable hearsay in criminal cases and makes it “unclear whether *Crawford*, on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials.”<sup>76</sup> This reformulation suggests that the Court assumed a constitutional trade-off was required by the reasoning of *Crawford*—enhanced protection against testimonial hearsay and abandonment of any degree of Sixth Amendment protection against nontestimonial hearsay. It is unfortunate that before adopting this view the Court never entertained briefing or argument on whether such a conclusive trade-off is actually *compelled* by either history, policy, or traditional conventions of constitutional interpretation.<sup>77</sup>

In adopting the new testimonial approach to confrontation jurisprudence, the Court in *Crawford* made the point that the new theory was largely consistent with the holdings, as distinguished from the reasoning, of its prior confrontation decisions.<sup>78</sup> Whether that is true will depend on how broadly *testimonial* is ultimately defined and particularly on whether statements made in private settings can ever be testimonial.<sup>79</sup> If the Court adopts a narrow definition of *testimonial*, and if *Ohio v. Roberts* and *Idaho v. Wright* are both indeed overruled, there will be a significant gap in confrontation jurisprudence demanding further consideration by both courts and commentators.

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<sup>74</sup> 541 U.S. at 53 (“In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object . . .”).

<sup>75</sup> See *supra* notes 9–15 and accompanying text.

<sup>76</sup> Whorton v. Bockting, 127 S. Ct. 1173, 1183 (2007).

<sup>77</sup> The *Davis* case in particular seems a sharp departure from the stated philosophy of Chief Justice Roberts, which has guided the Court in other areas, that “[i]f it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more.” *Shrinking Supremes*, THE ECONOMIST, Dec. 16–22, 2006, at 34 (quoting Chief Justice John Roberts).

<sup>78</sup> 541 U.S. at 57 (stating that Supreme Court case law “has been largely consistent” with the testimonial theory adopted in *Crawford*).

<sup>79</sup> See *supra* note 62 and accompanying text.