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## The "Primary Purpose" of Children's Advocacy Centers: How Ohio v. Clark Revolutionized Children's Hearsay

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# The “Primary Purpose” of Children’s Advocacy Centers: How *Ohio v. Clark* Revolutionized Children’s Hearsay

Andrew Lentz\*

## INTRODUCTION

Will never doubted that what his three-year-old daughter was telling him was true.<sup>1</sup> He asked her questions again and again—careful not to volunteer any leading information—hoping Ashley’s story would change. Will hoped he was wrong, that it was a mistake, and he had simply misheard Ashley. Then all he would have to do is ask one more time, and Will and his wife, Stephanie, would realize they misunderstood Ashley, and it would be over. It would be a weird way to end the day, but that was all, nothing more sinister. But Ashley’s words did not change, and they could not be taken back.

Over several months’ time, Ashley had begun exhibiting regressive behaviors. This was unusual, but not alarming in itself. During the car ride home from Will’s parents’ home (Papi and Nana), Ashley put into words what she had been saying for the past several months. Will was driving when Ashley voiced her displeasure with Papi.

“I don’t like it when Papi hugs and kisses me.”

Stephanie responded, “Why not?”

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\* Candidate for J.D., Roger Williams University School of Law, 2018. For my wife and partner in all things, Sara Lentz. I am grateful for the many sacrifices you made throughout this process. For some reason, you always believe in me. My soul sings when I am with you.

<sup>1</sup> This is a true story as told by Will. Both parents gave the author permission to re-tell their story here. Pseudonyms are used to protect the privacy of those involved in the story.

“He touched my bottom and it hurts on the inside.”

“Where did he touch your bottom?”

“In the front.”

“Where were you when your bottom was hurt?”

“In [Ashley’s uncle]’s room, in the big bed.”

“Who touched your bottom?” Will attempted to clarify.

“Papi did, and it bleeds.”

“Where were you?”

“In [Ashley’s uncle]’s room, and I asked for my brown blanket.”

Periodically, as the night went on, Will and Stephanie asked Ashley more about the details of what happened. Despite their hopes that Ashley’s story would change into some innocent mistake, she remained consistent. Throughout the night, they asked her about five times what happened. Ashley reiterated, “Papi touches my bottom, I bleed.” At one point, Ashley volunteered that she had been wearing her Little Mermaid panties, and she fetched them for Will and Stephanie.

Will woke up the next morning wondering if the next phone call he made would tear his family apart, and effectively sever his relationship with his dad. His call to the police turned into a referral to the local Children’s Advocacy Center (CAC). Things moved quickly, but soon became disappointing. Ashley met with a forensic interviewer, but did not disclose any abuse during her interview. A forensic medical examination was conducted on-site, but despite the expertise of the Sexual Assault Nurse Examiner (SANE), the exam was a horrendous experience for Ashley. Unfortunately, the medical exam did not produce any evidence about whether or not Ashley was assaulted. The investigators met with Will and Stephanie and told them that without a statement from Ashley to the forensic interviewer, there was very little that they could do. The investigators attempted to use the other tools they had available to them. For instance, a “controlled call”<sup>2</sup> between Will and his father proved fruitless, and they tried to conduct a polygraph examination on Papi, but he refused. Soon thereafter, Will received a call from the investigators who told him that, without more evidence, they would have to put his case “on

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2. A controlled call is when a participant agrees to call the suspect while an officer listens and records the conversation.

delay.”<sup>3</sup>

Unlike the criminal justice system, there is not an option to put real life “on delay.”<sup>4</sup> The purpose of sharing Will’s family story is not to tug at heartstrings; in the realm of child sexual abuse, his family’s story is not particularly heinous. The purpose is to illustrate how allegations of sexual abuse have almost intrinsic power to pull close relationships apart.<sup>5</sup> Sexual abuse allegations by young children are almost as likely to be against a family member as anyone else.<sup>6</sup> But the consequences for a parent to listen to his or her child and believe him or her are staggering. A parent is faced with a decision to either ignore the report of abuse—potentially increasing the chance that his or her child will be re-victimized—or report the abuse and face lasting relational consequences. The only guidance offered to parents in this situation is that reporting abuse is the “right thing to do.” But even if a parent reports the abuse to the authorities, obtaining justice in criminal court is especially difficult because there is often little evidence beyond the child’s initial statement, and courts are inherently not child-friendly.<sup>7</sup> For example, a criminal trial can take a great deal of time; thus, a witness may have to wait for multiple days at the courthouse before giving his or her testimony. Trials can also be confusing; there are a lot of important people there, and some people just sit and watch everything you say. Testifying at trial is difficult, even for adults. For children, it can be especially paralyzing. Ultimately, a caregiver’s option to report abuse feels like a futile exercise that requires a public statement about a private, humiliating

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3. No new information has come to light in the intervening years, so the case remains “on delay.”

4. In the aftermath, Will’s siblings distanced themselves from Papi, and within a year Will’s parents had divorced. The family has not had a great deal of contact with Papi following the incident. Will and Stephanie have since had a son together, and he has never met Papi.

5. See HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000) (finding that 86% of offenders of sexual abuse knew the victims before the abuse as either a family member or an acquaintance).

6. *Id.* (49% of offenders of children under the age of six are family members).

7. See GEORGE FISHER, EVIDENCE 683 (Foundation Press, 3d ed. 2013).

experience for their entire family.<sup>8</sup>

Unfortunately, recent case law has restricted the alternative evidentiary methods that were designed to make children's statements admissible at trial.<sup>9</sup> In an attempt to refine its interpretation of the Sixth Amendment, the Supreme Court has significantly narrowed the kinds of child abuse cases that may be prosecuted.<sup>10</sup>

But questions abound, such as: Is the Sixth Amendment working as intended, and does our current system reflect the rules as they existed when they were written? Is there any light at the end of the tunnel for reticent children who are victims of abuse? In Part I of this Comment, I will discuss the concept of "testimonial evidence," and where it originated from. Then I will present how the meaning of "testimonial evidence" has evolved since *Crawford v. Washington*<sup>11</sup> up until *Ohio v. Clark*.<sup>12</sup> I will discuss *Clark*, and how a few courts have examined evidence in child abuse cases post-*Clark*. In Part II, I will explore an exception to the Sixth Amendment for evidence that was admissible at the time of the founding. I will then provide examples of out-of-court statements made by children around the time of the founding. Next, I will compare those statements with our current understanding of "testimonial evidence." In Part III, I will apply *Clark's* revised test for "testimonial evidence" to frontline workers at CACs. I will analyze how the recent iteration of the "primary purpose" test will affect how frontline workers receive information from the children they serve. In short, this Comment aims to look through the lens of recent opinions about testimonial evidence and provide advice to frontline workers about evidence they may come across in the course of their duties. As a result of recent case law, CACs may play a key role in the future for obtaining evidence that is admissible at trial. The purpose of this Comment is to educate workers whose jobs involve working

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8. The term "caregiver" is used throughout this Comment to refer to an adult who provides support for the daily living of another.

9. See, e.g., *Crawford v. Washington*, 541 U.S. 36 (2004).

10. When the Supreme Court declares a procedural requirement for all accusations as "a crucible," it is unsurprising that it disproportionately affects children. See *Crawford*, 541 U.S. at 61. Few crucibles are child-friendly.

11. 541 U.S. 36 (2004).

12. 135 S. Ct. 2173 (2015).

with suspected victims of child maltreatment about recent cases that will influence the performance of their jobs, and to demonstrate that many statements, although made by a child, might not violate the Confrontation Clause.

## I. HISTORY OF TESTIMONIAL EVIDENCE

### A. *Introducing “Testimonial Evidence” (Crawford, Davis, and Bryant)*

In 2004, the landscape of the Sixth Amendment shifted considerably. The Sixth Amendment’s Confrontation Clause states “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>13</sup> Prior to 2004, *Ohio v. Roberts* admitted out-of-court statements made by an unavailable witness if those statements showed an “adequate ‘indicia of reliability.’”<sup>14</sup> While *Roberts* was the standard for twenty-four years, it often granted serenity at the cost of consistency.<sup>15</sup>

In an effort to return the Amendment back to its original purpose, the Supreme Court adopted a different approach<sup>16</sup> in *Crawford v. Washington*.<sup>17</sup> *Crawford* declared that “witnesses” are those “who ‘bear testimony,’” and “testimony” is a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>18</sup> *Crawford* held that testimonial evidence was excluded unless the witness was “unavailable to testify, and

13. U.S. CONST. amend. VI.

14. 448 U.S. 56, 66 (1980).

15. *Id.* at 66; compare *United States v. Photogrammetric Data Servs.*, 259 F.3d 229, 245 (2001) (where the Fourth Circuit found an incriminating statement more reliable because it was “fleeting”), with *People v. Farrell*, 34 P.3d 401, 406–07 (Colo. 2001) (where the Colorado Supreme Court applied an eight-factor test and found a statement that incriminated the defendant more reliable because it was “detailed”), and *Nowlin v. Commonwealth*, 579 S.E.2d 367, 371–72 (Va. Ct. App. 2003) (where the court considered a statement to be more reliable because the witness was charged with a crime and in custody), with *State v. Bintz*, 650 N.W.2d 913, 918 (Wis. Ct. App. 2002) (where the court found a statement to be more reliable because the witness was neither a suspect nor charged with a crime).

16. *Ohio v. Clark*, 135 S. Ct. 2173, 2184 (2015) (Scalia, J., concurring). That phrase may sound mild, but this new approach marked a significant change in the law of evidence.

17. 541 U.S. 36 (2004).

18. *Id.* at 51 (citation omitted).

the defendant had a prior opportunity for cross-examination.”<sup>19</sup> While *Crawford* explained the basis for the new test, it did precious little to offer guidance on how to determine if statements are “testimonial” beyond including, at a minimum, “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”<sup>20</sup>

Just two years later, the Supreme Court revisited “testimonial” statements when it considered two consolidated cases, *Davis v. Washington* and *Hammon v. Indiana*.<sup>21</sup> In an effort to clarify what “testimonial” meant, the Court announced:

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.<sup>22</sup>

But while the Court refined our understanding of “testimonial” evidence in *Davis*, the Court’s analysis was imperfect.<sup>23</sup> The focus was supposed to be on the “primary purpose” test, but the Court must have felt that there was too

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19. *Id.* at 54.

20. *See id.* at 62, 68.

21. *See* 547 U.S. 813 (2006).

22. *Id.* at 822 (footnote omitted). The Court reasoned that statements made to a 911 operator while a victim was under attack were nontestimonial, but verbal and written statements to a police officer after a victim suffered a violent attack from her boyfriend were testimonial, and thus inadmissible. Notably, there was no consideration of whether the victim in *Hammon* was still in an emergency situation. *See id.* at 829–30. The majority reasoned that the attack was over by the time the officer arrived, so there was “no immediate threat to [the victim’s] person.” *Id.* Only Justice Thomas called into question whether the attacker posed an ongoing threat to his wife. *Id.* at 841 (Thomas, J., concurring in judgment in part and dissenting in part). This suggestion seemed to gain traction in *Ohio v. Clark* because whether the child would be safe in the home with the attacker played an important role in the Court’s decision. *See* 135 S. Ct. 2173, 2181 (2015). One wonders if the victim’s statements to the police in *Hammon* would still be considered testimonial after *Clark*.

23. *See* 547 U.S. 813 (2006).

much discussion about “ongoing emergency” because the Court accepted *Michigan v. Bryant* five years later.<sup>24</sup> In an effort to refocus the analysis on the primary purpose of the out-of-court statements, the Court in *Bryant* ruled, “the existence *vel non* of an ongoing emergency is *not* the touchstone of the testimonial inquiry.”<sup>25</sup> The Court stressed that an ongoing emergency is “simply one factor” when evaluating the “primary purpose” and that the inquiry must consider “all of the relevant circumstances.”<sup>26</sup> The relevant circumstances that the Court considered in *Bryant* included the formality of the questioning and whether the statements would conform to any of the standard rules of hearsay, which are “designed to identify some statements as reliable.”<sup>27</sup> For the Court, the ultimate question was “whether, in light of all the circumstances, viewed objectively, the ‘primary purpose’ of the conversation was to ‘creat[e] an out-of-court substitute for trial testimony.’”<sup>28</sup> Therefore, the primary purpose test is objective.

The Supreme Court has also recognized other exceptions to the Confrontation Clause separate from the “primary purpose” test. *Crawford v. Washington* held that the Confrontation Clause would not hold up to exceptions that were “established at the time of the founding.”<sup>29</sup> The Court explores this further in *Giles v. California*, spending nearly as much time analyzing English common law as modern law.<sup>30</sup> One of the exceptions the Court discusses is forfeiture by wrongdoing, where the witness is absent because the defendant engaged in conduct to prevent the witness from testifying.<sup>31</sup> The other exception is a dying declaration, “when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most

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24. See 562 U.S. 344, 374 (2011) (second emphasis added).

25. *Id.* (emphasis added).

26. *Id.* at 366, 369.

27. *Id.* at 377, 358–59.

28. *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015) (quoting *Bryant*, 562 U.S. at 358) (alteration in original). Unsurprisingly, the Court found that the statements made to responding police officers were “nontestimonial” when made by a victim dying of a gunshot wound in a gas station parking lot. See *Bryant*, 562 U.S. at 378.

29. See 541 U.S. 36, 54 (2004).

30. See 554 U.S. 353, 362–64 (2008).

31. See *id.* at 359.



powerful considerations to speak the truth.”<sup>32</sup> The Court ultimately decided not to admit the State’s evidence explicitly because it was “not an exception established at the time of the founding.”<sup>33</sup> Therefore, there are at least two ways in which out-of-court statements will not violate the Sixth Amendment and thus may be admitted post-*Crawford*. First, the statements can be admitted if they are deemed nontestimonial.<sup>34</sup> Second, the statements may be admitted if they fit into exceptions that are “established at the time of the founding.”<sup>35</sup>

*B. Children and Testimonial Evidence: Clark’s Impact on the Sixth Amendment*

Up to this point, all of the statements that the Court examined for their testimonial value were made to law enforcement officers, while potentially testimonial statements made to private individuals were never considered before the scrutiny of the Supreme Court.<sup>36</sup> This changed when the Court heard *Ohio v. Clark*.<sup>37</sup> A three-year-old boy went to preschool with a left eye that appeared bloodshot.<sup>38</sup> His teacher asked the child what happened and the child did not respond initially.<sup>39</sup> Under closer inspection, the teacher noticed red marks on the boy’s face and called over the lead teacher.<sup>40</sup> The lead teacher asked the child, “Who did this? What happened to you?”<sup>41</sup> The child responded with something that sounded like “Dee, Dee.”<sup>42</sup> The teacher further inquired whether Dee was “big or little,” and

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32. *Id.* at 397 (citations omitted).

33. *Id.* at 366 (quotations omitted).

34. *See* 541 U.S. at 50–53.

35. *Id.* at 54.

36. *See, e.g.,* Michigan v. Bryant, 562 U.S. 344 (2011); Davis v. Washington, 547 U.S. 813 (2006); *Crawford*, 541 U.S. 36. While the 911 operator in *Davis* might not have been the police, the Court considered the operator to be an agent of the police for the purposes of the opinion; without deciding whether she was considered law enforcement. *See* 547 U.S. at 823 n.2.

37. *See* 135 S. Ct. 2173, 2181 (2015).

38. *Id.* at 2178.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

the child answered that “Dee is big.”<sup>43</sup> The teacher called the child abuse hotline when she found more injuries under the child’s shirt.<sup>44</sup> The child’s caretaker—who went by the nickname “Dee”—arrived at the school later to pick up the child and denied causing the injuries.<sup>45</sup> Dee quickly took the child and left the school, but a social worker tracked them down the next day.<sup>46</sup> The child and his sister were examined, and a physician at a nearby hospital discovered multiple injuries on the young boy and his sister, suggesting child abuse.<sup>47</sup> Dee was indicted for five counts of felonious assault, two counts of endangering children, and two counts of domestic violence.<sup>48</sup> At trial, the child victim did not testify, but the State introduced the statements made to his teachers as evidence of the defendant’s guilt.<sup>49</sup> The defendant moved to exclude the out-of-court statements, but the trial court denied the motion and the jury found the defendant guilty on all but one count.<sup>50</sup>

The Supreme Court determined that, while statements to individuals who are not law enforcement officers are not categorically excluded from the Sixth Amendment’s reach, “such statements are much less likely to be testimonial than statements to law enforcement officers.”<sup>51</sup> The Court separated private individuals from law enforcement officers because they are “someone who is not principally charged with uncovering and prosecuting criminal behavior.”<sup>52</sup>

The Court found that the questions about what happened were asked by the teacher to determine to whom it was safe to release the abused child; therefore, the statement was made during an ongoing emergency.<sup>53</sup> The Court specifically dismissed

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. The jury found Clark not guilty on only one of the assault counts related to A.T. *Id.*

51. *Id.* at 2181.

52. *Id.* at 2182.

53. *Id.* at 2181–82. *Contra* Davis v. Washington, 547 U.S. 813, 822 (2006).

an argument that the intention to report the abuse—or the fact that the information could be used in future prosecution—should cause the statements to be considered “testimonial.”<sup>54</sup> The Court also found that the conversation between the child and his teachers was an informal, spontaneous conversation; and that the child’s age nearly precluded the possibility that his statements could be testimonial.<sup>55</sup> Therefore, from an objective perspective, the primary purpose of the child’s statements were not to provide evidence for future litigation.<sup>56</sup> Every Justice agreed in judgment, and six Justices joined in the opinion of the Court.<sup>57</sup> Further, the Court went out of its way to express support for a historical argument that similar statements would have been admissible at common law.<sup>58</sup> The Court’s inclusion of dicta supporting another theory about how this kind of testimony does not violate the Confrontation Clause shows the Court’s confidence in allowing this kind of evidence.<sup>59</sup> Significantly, Justice Scalia not only agreed with the majority’s analysis of the primary purpose, common law acceptance, testimonial purpose of a very young child, and analysis of the effect of mandated reporting laws on private individuals, but also wrote a concurring opinion emphasizing his agreement.<sup>60</sup>

### C. *Post-Clark Decisions: Ward and Barker*

Since announcing the decision in *Clark*, there have been few appellate decisions across the country that have applied *Clark* in cases involving domestic violence. These cases provide a

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54. *Clark*, 135 S. Ct. at 2183 (finding that mandated reporting laws alone did not turn a teacher into an agent of the state, and that any good teacher would have acted in the same way without mandated reporting laws in place).

55. *See id.* at 2181–82.

56. *See id.* at 2182.

57. *See id.* at 2177.

58. *See id.* at 2182 (citing Thomas D. Lyon & Raymond LaMagna, *The History of Children’s Hearsay: From Old Bailey to Post-Davis*, 82 IND. L. J. 1029, 1030 (2007)). Because the Court found the statement nontestimonial under the “primary purpose” test, it was not necessary to explore the common law argument.

59. *See Clark*, 135 S. Ct. at 2182 (citations omitted).

60. *See id.* at 2183–84 (Scalia, J., concurring). While a concurring opinion is not authoritative, it is hard to overstate the power of a concurring opinion from the progenitor of the analytical framework that will be changed.

particularly clear perspective into how the courts will view testimonial evidence involving child abuse in the future. An analysis of post-*Clark* decisions proves particularly interesting in cases involving forensic nurses because of the ambiguity present in the performance of their job. Two cases serve as a barometer for how *Clark* will be interpreted in the future: *Ward v. State*<sup>61</sup> and *United States v. Barker*.<sup>62</sup> *Ward* involved a victim of domestic violence who was dropped off at her parents' home by her abuser.<sup>63</sup> The victim's parents called emergency services after they saw the extent of her injuries.<sup>64</sup> When the paramedic arrived, the responding police officer left the room and the victim disclosed that her boyfriend caused the injuries.<sup>65</sup> The victim was transported to the hospital and evaluated by a forensic nurse who asked her what had happened.<sup>66</sup> The victim reported that it was her boyfriend, the defendant, who beat her multiple times with a belt.<sup>67</sup> The Indiana Supreme Court found that the statements to the paramedic and the forensic nurse were both nontestimonial.<sup>68</sup> *Barker* involved a SANE nurse who testified about a four and a half year old's disclosure of sexual abuse to her during a medical exam.<sup>69</sup> The court determined that the child's statements to the nurse were also nontestimonial and admissible.<sup>70</sup>

While both courts decided that the statements made to forensic nurses were nontestimonial, they arrived at those conclusions in different ways.<sup>71</sup> Both courts evaluated the questioners' roles and the medical relevancy of the questions.<sup>72</sup> However, the similarities end there. While both discuss "ongoing emergency" as a factor,<sup>73</sup> *Ward* dismisses an argument that the emergency was over because the assault occurred hours before

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61. 50 N.E.3d 752 (Ind. 2016).

62. 820 F.3d 167 (5th Cir. 2016).

63. 50 N.E.3d at 754.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* (internal quotations omitted).

68. *Id.* at 764.

69. *United States v. Barker*, 820 F.3d 167, 169 (5th Cir. 2016). *See infra* note 131.

70. *Id.* at 172.

71. *See id.* at 171–72; *Ward*, 50 N.E.3d at 753.

72. *See Barker*, 820 F.3d at 171–72; *Ward*, 50 N.E.3d at 761–62.

73. *See Barker*, 820 F.3d at 171; *Ward*, 50 N.E.3d at 758.

medical treatment was obtained.<sup>74</sup> Instead, *Ward* sidesteps the issue as nonessential to deciding the case,<sup>75</sup> and *Barker* finds an ongoing emergency.<sup>76</sup> *Ward* interprets *Bryant* to mean that because there may be other circumstances, besides an ongoing emergency, where a statement is made without the primary purpose of creating an out-of-court substitute for testimony, an ongoing emergency is unnecessary.<sup>77</sup> *Ward* looks to other factors, like the condition of the victim and the formality of the conversation, to determine the primary purpose.<sup>78</sup> *Barker* also distinguishes the hospital room setting from a formal location, such as a law enforcement interrogation.<sup>79</sup> Moreover, *Barker* considers, but dismisses, any argument that the principal purpose for the nurse's questions was evidence collection.<sup>80</sup> *Ward* finds the nurse's questions satisfied the "primary purpose" test because they were useful for diagnosis and safety planning.<sup>81</sup> Notably, *Ward* is not dissuaded by the fact that the nurse acquired informed consent from the victim—in writing—which permitted, but did not compel, her to disclose the information to law enforcement if requested.<sup>82</sup>

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74. See *Ward*, 50 N.E.3d at 760 n.2.

75. See *id.* at 760 ("[T]here may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011))).

76. *Barker*, 820 F.3d at 171.

77. See *Ward*, 50 N.E.3d at 760.

78. See *id.*

79. See *Barker*, 820 F.3d at 172. More analysis on this point by the court would have been greatly appreciated. There are formal elements to a hospital, such as that appointments are made there, highly educated people work there, and security personnel are employed there. However, there are also informal aspects, such as the absence of a dress code and that appointments are nonessential for certain departments. Instead, the court nakedly finds that "a hospital emergency room . . . [is] a more formal environment than a preschool lunchroom." *Id.*

80. *Id.*

81. See 50 N.E.3d at 762–63. The court finds these questions consistent with the hospital's primary goal; "a hospital's duty of care to a patient who presents observable signs of domestic abuse includes some reasonable measures to address the patient's risk." *Id.* at 763 (quoting *McSwane v. Bloomington Hosp. & Healthcare Sys.*, 916 N.E.2d 906, 910 (Ind. 2009)).

82. *Id.* at 763. Up until this point, the biggest difference between *Hammon v. Indiana* and the other cases is that the emergency was over, and a written statement was taken. See 547 U.S. 813, 814–15 (2006). In *Ward*, the forensic nurse obtained consent in writing, and the assault had occurred

What emerge as key factors in both cases are the identity of the questioner, as well as some rational connection between the questions and a non-prosecutorial purpose.<sup>83</sup> Both cases demonstrate testimonial analysis post-*Clark*, and can serve as a predictor for how courts may interpret *Clark* in the future.<sup>84</sup> However, the Supreme Court also mentions a possibility for allowing evidence that has its roots grounded in the past.<sup>85</sup>

## II. CHILD ABUSE HEARSAY DOES NOT VIOLATE THE CONFRONTATION CLAUSE

The Supreme Court has recognized that the Confrontation Clause “does not prohibit the introduction of out-of-court statements that would have been admissible in a criminal case at the time of the founding.”<sup>86</sup> *Clark* applies *Giles* to carve out a special exception to the Confrontation Clause for children’s statements about child abuse that ordinarily would be deemed hearsay.<sup>87</sup> Importantly, both the *Clark* majority and concurring opinion cite with approval to an article analyzing the common law approach to hearsay regarding child abuse allegations.<sup>88</sup> However, the majority goes further.<sup>89</sup> In dicta, the Court opines that the statements made by the victim likely would have been admissible at common law, and that “[i]t is thus highly doubtful that statements like [the victim]’s ever would have been understood to raise Confrontation Clause concerns.”<sup>90</sup> The

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hours before. See 50 N.E.3d at 763. According to this analysis, the main difference in *Hammon* was the identity of the questioner, or simply the testimonial analysis has changed. See 547 U.S. at 815. Little else seems substantially different.

83. See *Barker*, 820 F.3d at 172; *Ward*, 50 N.E.3d at 763.

84. See *Barker*, 820 F.3d at 172; *Ward*, 50 N.E.3d at 763.

85. See *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015) (citing *Giles v. California*, 554 U.S. 353, 358–59 (2008)).

86. See *id.*

87. See *id.* at 2182.

88. See *id.* at 2181; *id.* at 2184 (Scalia, J., concurring); Lyon & LaMagna, *supra* note 58, at 1029.

89. *Clark*, 135 S. Ct. at 2181 (opining in dicta that no previous case law has amounted to an assertion that defendants must provide “evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding.”).

90. *Id.* at 2182.

Supreme Court cites approvingly to *King v. Brasier*, in which an English court ruled that a child's statements to her mother should have been excluded—not because the statements were inadmissible—but because the child was competent to testify, yet she did not.<sup>91</sup> Therefore, *Brasier* stands to mean that if a child was unavailable to testify, then his or her statements *could* be heard.<sup>92</sup> Thus, the statements were not considered a violation of the hearsay rules. The Old Bailey Session Papers (OBSP) shed more light on trial practice in England in the eighteenth century.<sup>93</sup> For instance, in *Ketteridge* a child was unable to testify, so her mother was sworn in.<sup>94</sup> The mother was allowed to testify about what her daughter disclosed to her about the defendant's identity, actions, and about the child's statements made in an initial court appearance.<sup>95</sup> Importantly, *Ketteridge* was adjudicated in September, while *Brasier* was decided in April, only a few months prior.<sup>96</sup> Therefore, even though *Brasier* excluded some testimony by a parent about her child's statements concerning abuse, it did not categorically exclude hearsay testimony by parents.<sup>97</sup> Additionally, in 1775, in a different child abuse trial, the court allowed an alleged victim's mother to testify extensively about her child's statements without the child testifying.<sup>98</sup> The mother testified as to what the child told her, specifically how the defendant allegedly sexually abused the child, where the alleged abuse occurred, how many times, and when it happened.<sup>99</sup> The defendant objected to the mother's testimony as

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91. *See id.* at 2182 (citing *King v. Brasier* (1779) 168 Eng. Rep. 202 (K.B.)).

92. *Brasier*, 168 Eng. Rep. at 203.

93. The OBSP are a collection of 197,745 criminal trials held in a court in London spanning from 1674 to 1913. THE OLD BAILEY PROCEEDINGS ONLINE, 1674–1913, <https://www.oldbaileyonline.org/> (last visited Sep. 17, 2017).

94. *Trial of Charles Ketteridge*, THE OLD BAILEY PROCEEDINGS ONLINE, 1674–1913, <https://www.oldbaileyonline.org/> (last visited Sep. 17, 2017) (search reference number t17790915-18 in “search the proceedings” engine).

95. *Id.*

96. *Brasier*, 168 Eng. Rep. at 202; *Trial of Charles Ketteridge*, *supra* note 94.

97. *See Brasier*, 168 Eng. Rep. at 202.

98. *See Lyon & LaMagna*, *supra* note 58, at 1036–37 (citing *Rex v. Powell* (1775) 168 Eng. Rep. 157 (K.B.)).

99. *See id.*

unreliable because the statements were not taken under oath.<sup>100</sup> However, the court ruled against the defendant's objection and admitted the hearsay from the mother.<sup>101</sup> Nevertheless, these are just two cases among many others from that time.<sup>102</sup> They show that out-of-court statements by children about abuse were routinely admitted in criminal cases in eighteenth century English courts. Therefore, statements like these fit the narrow category discussed in *Giles*.<sup>103</sup> So, even if statements like these were considered testimonial under the "primary purpose" test, there is evidence that the Court believes such statements should still be admitted as evidence because they are simply immune to the Confrontation Clause.<sup>104</sup> Thus, *Clark* stands for allowing statements from children to another regarding abuse as not testimonial through the primary purpose test and also because they may not violate the Confrontation Clause.<sup>105</sup> The only remaining obstacle is hearsay. To better understand the impact that all of this will have on child abuse investigations, understanding CACs and their role in investigations is imperative. Therefore, a general explanation of CACs is important to understand how testimonial evidence fits in child abuse investigations, and how *Clark* has fundamentally changed the landscape of child abuse investigations and prosecution.

### III. TESTIMONIAL EVIDENCE AND THE ROLE OF THE CHILDREN'S ADVOCACY CENTER

The problems are legion when attempting to prosecute a sexual abuse case involving a minor.<sup>106</sup> In fact, it is hard to imagine a more difficult evidentiary scenario than the generic

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100. *Id.*

101. *Id.*

102. *See, e.g., Trial of Joseph Fyson*, THE OLD BAILEY PROCEEDINGS ONLINE, 1674–1913, <https://www.oldbaileyonline.org/> (last visited Sep. 17, 2017).

103. *See Giles v. California*, 554 U.S. 353, 358–59 (2008).

104. *See Crawford v. Washington*, 541 U.S. 36, 54 (2004).

105. *See Ohio v. Clark*, 135 S. Ct. 2173, 2180–81 (2015).

106. *See, e.g., Laurie Shanks, Child Sexual Abuse: Moving Toward a Balanced and Rational Approach to the Cases Everyone Abhors*, 34 AM. J. TRIAL ADVOC. 517, 522–23 (2011); Dione Marie Enea, *Justice for Our Children: New Jersey Addresses Evidentiary Problems Inherent in Child Sexual Abuse Cases*, 24 SETON HALL L. REV. 2030, 2031 (1994).



child sexual abuse case. Typically, the abuse happens in private, and the offender requires no extra equipment or tools to commit the crime. Often, there is no documentation, paper trail, online activity, phone tower pings, or any other trackable activity, and no other witness besides the victim.<sup>107</sup> Evidence of trauma to the victim or other medical findings are rare,<sup>108</sup> and evidence at the scene of the crime can be easily cleaned up without suspicion. Evidence at trial may be only the perpetrator's story against the victim's. Victims of sexual abuse are often not ideal witnesses because they are more likely to suffer from high anxiety, post-traumatic stress disorder (PTSD), poor self-esteem, and behavioral issues.<sup>109</sup> Moreover, it can take several years for a case to go to trial. The long wait affects children more significantly than adults because a two-year wait is a proportionately shorter time for a thirty-year-old than a ten-year-old.<sup>110</sup> The myriad of agencies involved in child abuse investigations further complicate the process. An investigation can involve schools, pediatricians, mental health professionals, local law enforcement, child welfare organizations, and a prosecutor's office. All these organizations have their own competing interests and goals.<sup>111</sup>

To combat the problems inherent in a child abuse investigation, Bud Cramer—a prosecutor from Alabama—founded

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107. See Enea, *supra* note 106, at 2031.

108. WORLD HEALTH ORG., GUIDELINES FOR MEDICO-LEGAL CARE FOR VICTIMS OF SEXUAL VIOLENCE: CHILD SEXUAL ABUSE 78–80 (2003), [http://www.who.int/violence\\_injury\\_prevention/resources/publications/en/guidelines\\_chap7.pdf](http://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap7.pdf).

109. See Kathleen A. Kendall-Tackett, Linda Meyer Williams, & David Finklehor, *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 AM. PSYCHOL. STUD. PSYCHOL. BULL. 164, 165–67 (1993).

110. A two-year wait is only one-fifteenth of the lifetime of a thirty-year-old, while that same wait is one-fifth of the life of a ten-year-old. Further, an adult has finished development, while a child is still developing emotionally, cognitively, and physically. Therefore, two years covers much more ground for a ten-year-old than a thirty-year-old.

111. For instance, a school will want the child back in class, while law enforcement may need the child for investigatory purposes. The Department of Human Services will work toward reunification of the family, while the prosecutor, pediatrician, and law enforcement may want to keep the family apart.

the first multi-disciplinary team (MDT) and CAC in 1985.<sup>112</sup> An MDT is a group of professionals who agree to work alongside each other on child abuse cases. Typically, cases involving child abuse involve multiple agencies such as: the Department of Justice, the Department of Human Services, law enforcement, mental health providers, victim advocates, and others. To reduce needlessly duplicative work and re-interviewing of victims and witnesses, agencies formed MDTs to encourage greater efficiency for their cases and to improve the family's experience throughout the investigation process.<sup>113</sup> Importantly, these agencies work together even though their goals might be different. One agency might be focused on reunifying the family, while another might believe keeping the family apart is best.

From that first CAC established in Alabama, an entire model was developed for these centers, and now there are 822 CACs nationwide who served 324,602 children in 2016.<sup>114</sup> CACs are child-friendly facilities that bring all the agencies involved with child abuse cases under one roof.<sup>115</sup> CACs work with children and families who were exposed to violence by offering services such as: child advocacy, forensic interviewing, medical treatment, and therapeutic services.<sup>116</sup> By providing services to families and investigative agencies, CACs serve as neutral, third-party organizations that offer support to the community. While the CAC model was developed by a prosecutor and most CACs share information with prosecutors, CACs are not investigatory agencies and do not conduct investigations of their own.<sup>117</sup>

Generally, the CAC becomes involved in situations where abuse is suspected early in the process.<sup>118</sup> The first step in a child

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112. NAT'L CHILD.'S ADVOC. CTR., <http://www.nationalcac.org/history/> (last visited Sep. 17, 2017).

113. See NAT'L CHILD.'S ALL., STANDARDS FOR ACCREDITED MEMBERS 12 (2017), <http://www.nationalchildrensalliance.org/sites/default/files/downloads/NCA-Standards-for-Accredited-Members-2017.pdf>.

114. NAT'L CHILD.'S ALL., <http://www.nationalchildrensalliance.org/> (last visited Sep. 17, 2017).

115. NAT'L CHILD.'S ALL., SNAPSHOT 2017: ADVOCACY, EFFICACY, AND FUNDING IN CACS 3-4 (2016), <http://www.nationalchildrensalliance.org/sites/default/files/downloads/Snapshot-2017.pdf>.

116. *Id.*

117. *See id.*

118. The following information about the early response process is a generalization of a nationwide process that the author learned about during

abuse investigation is the initial report. This happens in many ways, but reports of abuse either from a teacher, police officer, or otherwise somehow eventually find their way to a child abuse hotline. If the report is accepted for investigation, the information will be sent to either child protective services, law enforcement, or both, and an investigation will be initiated. At this point, the investigators refer the child and his or her caregivers to the CAC, and set up an appointment for whatever services are appropriate. Those services might be a forensic interview, child advocacy, medical examination, crisis intervention, or something else depending on each individual CAC. After the visit to the CAC, the investigation continues, and the child may never return to the CAC again.<sup>119</sup> Because the CAC's role begins so early in the investigation process, the events that brought the child there are relatively fresh. The purpose of discussing the ways in which CAC staff members may be able to acquire forensic evidence is not to change the focus of their jobs. But CAC employees should be aware of ways in which they may come across evidence that may be nontestimonial—or even not excluded by the hearsay rule—while they go about the usual requirements of their jobs.

#### A. *Child Advocates*

Like any advocate, a child advocate's job is somewhat amorphous. Advocates are asked to support the child or family in many different ways, which is largely dictated by the needs of those specific people. With that in mind, a guide is helpful to explain the duties of an advocate and the other roles at CACs. The National Children's Alliance (NCA) is the body that establishes accreditation standards for all CACs across the country, which are used to understand the requirements of each position.<sup>120</sup> The purpose of the child advocate is to provide support to the child or caregiver by coordinating services through the CAC or outside agencies and to provide up-to-date information

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his experience working for a CAC. A visual depiction of the investigation process is available at: <http://www.nationalchildrensalliance.org/cac-model>.

119. See, e.g., DAY ONE R.I., CHILD'S ADVOC. CTR., MULTI-DISCIPLINARY TEAM (MDT) PROTOCOL 5-6 (2012), <https://www.dayoneri.org/sites/default/files/site-content/pdfs/MDT%20Protocol%202012%20-%20FINAL.pdf>.

120. STANDARDS FOR ACCREDITED MEMBERS, *supra* note 113, at 6, 20.

on the investigation.<sup>121</sup> Child advocates provide—among other services—crisis intervention, risk assessment, safety planning, education, and courtroom support, if necessary.<sup>122</sup> While interacting with clients at the CAC, advocates can be the recipients of spontaneous disclosures of abuse, but advocates can also elicit disclosures from their clients. However, using the “primary purpose” test demonstrates that neither of those disclosures should be considered testimonial evidence.<sup>123</sup>

Under the “primary purpose” test, evidence is testimonial if “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>124</sup> A child advocate may need to ask the child questions that could lead to statements about abuse in order to provide services like safety planning, risk assessment, or referrals to outside agencies. For instance, the advocate may ask about familial relationships at home in an effort to understand family dynamics or to determine appropriate therapeutic referrals. If the child makes a subsequent disclosure of abuse by one of those family members, that does not change the primary purpose of the question by the advocate. Further, “all relevant circumstances” must be considered to determine the primary purpose of the statements, and the informality of the situation or the presence of an ongoing emergency are some of the pertinent factors.<sup>125</sup> A child advocate’s meeting with the child or caregivers at the CAC is a casual conversation.<sup>126</sup> The CAC building itself is child-friendly and informal, and the conversation is not video or audio recorded.<sup>127</sup> There are no specific requirements for those conversations.<sup>128</sup> Further, a child advocate is not a law enforcement officer, so statements to an advocate are “much less likely to be testimonial.”<sup>129</sup> Determining whether an ongoing emergency exists will be case specific because sometimes children are rushed

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121. *See id.* at 25.

122. *See id.* at 26–27.

123. *See Ohio v. Clark*, 135 S. Ct. 2173, 2180–81 (2015).

124. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

125. *See Clark*, 135 S. Ct. at 2180 (2015).

126. *Id.*

127. *Id.*

128. *See* STANDARDS FOR ACCREDITED MEMBERS, *supra* note 113, at 15, 25–28.

129. *Clark*, 135 S. Ct. at 2181.

to the CAC within hours of the abuse, though in some cases, a child comes to a CAC years after the abuse. Thus, looking at these factors together, a conversation between a child, his or her caregivers, and an advocate—even if that advocate asks questions that cause disclosures of abuse from the child—is not primarily for “creating an out-of-court substitute for trial testimony.”<sup>130</sup> Therefore, advocates should feel free to ask questions that are related to the goals of their job, knowing that the information provided by victims is nontestimonial.

### B. SANE Nurses<sup>131</sup>

Given that nurses are more ubiquitous than other CAC positions, their primary role is more easily understood. Moreover, nurses who also obtain evidence during the course of their treatment have been examined by a few courts after *Clark* and survived scrutiny.<sup>132</sup> In *Barker*, the court determined “[t]he primary purpose of the conversation between [the SANE nurse] and [the victim] was to medically evaluate and treat the young girl.”<sup>133</sup> Therefore, the circumstances of the abuse were relevant for the nurse’s questioning for determining if the child would be discharged into the child abuser’s custody.<sup>134</sup> The court found that a hospital emergency room had some formality associated with it, but did not rise to the level of a police interrogation.<sup>135</sup> Furthermore, the court found a nurse/patient relationship differed significantly from a citizen/police relationship.<sup>136</sup> Ultimately, the court ruled that the “[nurse’s] SANE certification did not convert the essential purpose of her conversation with [victim] from medical evaluation and treatment to evidence collection, though it may have tended to lead to Barker’s prosecution.”<sup>137</sup> In *Ward*, the

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130. See *id.* at 2180 (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

131. For clarity sake, SANE nurses are a specific type of forensic nurse. There is little difference in this context, so the terms should be read interchangeably.

132. See *United States v. Barker*, 820 F.3d 167, 172 (2016); *Ward v. State*, 50 N.E.3d 752, 760–61 (2016).

133. *Barker*, 820 F.3d at 171.

134. *Id.*

135. See *id.* at 172.

136. See *id.*

137. *Id.*

court ruled that a forensic nurse's auxiliary purpose of finding evidence did not make the victim's statements to her nurse testimonial.<sup>138</sup> A forensic nurse at a CAC is no different. However, *Ward* has one admonition about testimonial hearsay and interviews with forensic nurses.<sup>139</sup> *Ward* warns against strategically using a medical interview as a "pretext[]" and "backdoor for admitting what is really testimonial hearsay."<sup>140</sup> This seems like an obvious point, but the application may be easier said than done.

Consider *State v. McLaughlin*, where a fifteen-year-old boy made allegations of sexual abuse against a family friend.<sup>141</sup> The child went to a local CAC and had a medical interview and evaluation with a registered nurse before having a medical examination with a doctor.<sup>142</sup> The initial medical interview was video and audio recorded, and the child disclosed, among other things, details of his sexual abuse, the identity of the abuser, and places where the abuse occurred.<sup>143</sup> The recording of the interview was later introduced into evidence.<sup>144</sup> Over objections based on the Confrontation Clause, the trial court admitted the evidence and the appellate court upheld the ruling.<sup>145</sup> In examining the surrounding circumstances, the appellate court found that the age of the child—fifteen—did not mean that he would reasonably know that his statements might be later used at trial.<sup>146</sup> Moreover, the primary purpose of the nurse's questions was the victim's physical health, mental health, and safety.<sup>147</sup>

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138. *Ward v. State*, 50 N.E.3d 752, 760 (2016) ("medically relevant information is not transformed into 'testimony' when it is reported to a forensic nurse instead of a paramedic.").

139. *See id.* at 764.

140. *Id.*

141. *See* 786 S.E.2d 269, 273–74 (N.C. App. 2016).

142. *See id.* at 274.

143. *See id.*

144. *See id.* at 275.

145. *See id.* at 283.

146. *See id.* at 281; *see also* *State v. Brigman*, 632 S.E.2d 498, 506–07 (N.C. App. 2006) (holding that a reasonable child under the age of three "would [not] know or should [not] know that his statements might later be used at trial.").

147. *McLaughlin*, 786 S.E.2d at 281. The court held that knowing what had happened was useful to "make sure [the victim] did not have any diseases or other issues that could affect him for the rest of his life." *Id.*

Questions posed by the nurse that were not pertinent to medical diagnosis were admitted because they were useful for establishing rapport and the importance of honest answers to sensitive questions.<sup>148</sup> Importantly, the court invoked the Supreme Court's broad definition of an "ongoing emergency" in *Clark* and deemed the nurse's questions as necessary to determine, among other things, how to protect someone else from child sexual abuse.<sup>149</sup> Because the questions were asked during an ongoing emergency and were primarily about protecting a child, they were considered nontestimonial.<sup>150</sup> As such, under this interpretation of testimonial evidence, a nurse's questions are admissible under two circumstances: first, if the questions are related to the physical and mental well-being of a child, and second, if the questions are not medically related, but are important for establishing a rapport with the victim.<sup>151</sup> It is not even determinative that the nurse knew her interview would be turned over to law enforcement because the "primary purpose" test turns on whether the interviewer's primary purpose was to create a substitute for in-court testimony.<sup>152</sup> Moreover, a nurse's primary function is not to collect evidence.<sup>153</sup> A forensic nurse is not assigned to uncover and prosecute criminal behavior; therefore, statements made to her are "significantly less likely to be testimonial."<sup>154</sup> This language gives wide latitude to nurses in North Carolina, and ammunition to prosecutors everywhere. No matter where a nurse practices, the initial post-*Clark* judicial responses strongly indicate victim statements made to a medical professional are likely to be considered nontestimonial. Prosecutors should not be concerned about the admissibility of statements made by patients of SANE nurses at CACs, even if a nurse asks detailed questions about abuse.

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148. *See id.* at 281.

149. *See id.*

150. *See id.* Further, it was not hearsay, but hearsay is not the focus of this Comment. *Id.*

151. *Id.*

152. *See id.* at 282.

153. *See* INT'L ASS'N OF FORENSIC NURSES, <http://www.forensicnurses.org/?page=whatisfn> (last visited Sep. 17, 2017) ("Forensic nurses are *nurses* first and foremost.").

154. *Ohio v. Clark*, 135 S. Ct. 2173, 2182 (2015).

### C. Forensic Interviewers

A forensic interviewer is someone who talks to a suspected child abuse victim. Forensic interviewers have specialized training for how to question children in ways that are non-leading and developmentally appropriate. Depending on the jurisdiction, forensic interviewers might have an advanced degree or a bachelor's degree, and may work as an interviewer full or part time. Forensic interviews tend to be conversational, meaning they are not scripted. When it comes to eliciting nontestimonial evidence, forensic interviewers have not fared as well as SANE nurses post-*Clark*.<sup>155</sup> And forensic interviews certainly were not welcomed by the courts with open arms before *Clark*.<sup>156</sup> There are two main reasons why forensic interviews have typically produced statements that courts have categorized as testimonial. First, many decisions about interviews came before *Clark* and second, courts often misunderstood the role of forensic interviewers. *Clark* changed the formulation for determining if evidence is testimonial, and it reduced what information is considered testimonial.<sup>157</sup> Therefore, guidelines for what constitutes nontestimonial evidence was stricter before *Clark*. Second, a misunderstanding of forensic interviewers' roles is an understandable mistake. Forensic interviewing is an esoteric job. Even within interviewing, different interviewers may have different ideas about how to best fulfill their duties. Within any occupation, workers may believe, correctly or not, that certain responsibilities are more important than others. For instance, in *State v. Bentley*, a child asked a forensic interviewer if she could stop the interview.<sup>158</sup> The interviewer refused, and told the child,

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155. See *In the Interest of J.C.*, 877 N.W.2d 447, 458 (Iowa 2016) (where the Iowa Supreme Court assumed that a forensic interview violated the defendant's Confrontation Clause rights because it was called a "forensic interview," the referral came from law enforcement, and the interview was recorded).

156. See, e.g., *People v. Sharp*, 155 P.3d 577, 579 (Colo. App. 2006) (videotaped interview with forensic interview deemed testimonial); *State v. Bentley*, 739 N.W.2d 296, 299 (Iowa 2007) (interview by counselor observed by law enforcement ruled testimonial); *State v. Blue*, 717 N.W.2d 558, 564 (N.D. 2006) (statements to private forensic interviewer who was working with police were testimonial).

157. See 135 S. Ct. 2173.

158. 739 N.W.2d at 300.



“it’s just really important the police know about everything that happened.”<sup>159</sup> Even worse, the interviewer asked for additional details because the police were “probably going to want to know just a little bit more.”<sup>160</sup> When courts encounter a forensic interviewer who presents her role like the one in *Bentley* did, it is reasonable for the court to conclude that the primary purpose of forensic interviews is to investigate solely on behalf of the police.<sup>161</sup> However, that is not an accurate representation of a forensic interviewer. The NCA explains that a forensic interviewer’s responsibility is “to obtain information from a child about abuse allegations that will support accurate and fair decision making by the MDT within the criminal justice, child protection, and service delivery systems.”<sup>162</sup> Therefore, while it is true that part of the function of an interviewer is investigative, the NCA’s definition supports a broader scope for the job. The NCA’s definition may allow the MDT to make fair and accurate decisions that only pertain to child protection and service delivery for the child. A forensic interviewer can conduct an interview that disregards the criminal justice aspect of the MDT. Further, to have an investigative component to their responsibilities does not mean that forensic interviews should be categorically considered testimonial. As has been the case since *Davis v. Washington*, the “primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>163</sup> Prosecution is not the ultimate goal for a CAC or a forensic interview. The best expression of this main goal is from CornerHouse, one of the premier international organizations assisting CACs.<sup>164</sup> CornerHouse advocates the “Child First Philosophy”: “The child is our first priority. Not the needs of the family. Not the child’s ‘story.’ Not the evidence. Not the needs of the courts. Not the needs of police, child protection, attorneys, etc. The child is our first priority.”<sup>165</sup> Therefore, the forensic interviewer also collects information for service referrals, to determine if the child is safe,

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159. *Id.*

160. *Id.*

161. *Id.*

162. STANDARDS FOR ACCREDITED MEMBERS, *supra* note 113, at 20.

163. 547 U.S. 813, 822 (2006) (emphasis added).

164. CORNERHOUSE, <http://www.cornerhousemn.org/about.html> (last visited Sep. 17, 2017).

165. *Id.*

and whether it is safe to release the child to their guardian. This is substantively the same reasoning the Court used to justify the teachers' questions in *Clark*.<sup>166</sup> That forensic interviewers' questions have a natural tendency to result in prosecutions is "irrelevant."<sup>167</sup> Even though an interviewer knows the information might be used in court, the statements do not become testimonial. Forensic interviewers could be analyzed in the same way as forensic nurses. They both perform functions primarily for the child's wellbeing and their actions may benefit investigators, but neither are principally charged with uncovering and prosecuting criminal behavior. Both have the word "forensic" in their title, but that word only modifies their title, it is not the other way around.<sup>168</sup>

Additionally, forensic interviewers want to support good decision making by the MDT, but are not beholden to the wishes of the MDT. A forensic interviewer is ultimately responsible for the interview that she conducts, so while she may seek advice from observers of the interview, she is not required to ask questions the team may want. Forensic interviewers work for the CAC, not the MDT, not law enforcement, and not the prosecutor's office. Interviewers should take caution to make this distinction clear. Forensic interviewers have their own responsibility to make sure that their interviews adhere to the goals of their own job title and do not stray into impermissible territory. Interviewers should be careful in how they consult their team when an interview is ongoing. Specifically, if the MDT wants the interviewer to ask a question that is inappropriate—for whatever reason—the interviewer is under no obligation to ask that question and should not ask that question. Some interviewers choose to use an earpiece when they are interviewing a child. The earpiece is connected to a microphone in the room where the MDT is observing the interview. This can be helpful for interviews that are detail-rich because an interviewer might miss something that the team would like clarification about later in the interview. But

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166. See *Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015) ("Because the teachers needed to know whether it was safe to release [the child] to his guardian at the end of the day, they needed to determine who might be abusing the child.").

167. See *id.* at 2183.

168. See INT'L ASS'N OF FORENSIC NURSES, *supra* note 153.

interviewers should ensure that they are still screening questions from the MDT appropriately. Earpieces should not turn the interviewer into merely a conduit through which the police ask questions. An interviewer who allows this would destroy the line between a police interview and a forensic interview. Some jurisdictions require the forensic interviewer to administer an oath that the child will tell the truth.<sup>169</sup> These oaths may be necessary in some communities, but they will increase the likelihood that forensic interviews will produce testimonial evidence. Some jurisdictions require law enforcement to be present before an interview is conducted, this would also increase the likelihood that an interview will create testimonial evidence. These jurisdictional choices are not required to conduct a forensic interview; a perfectly competent interview may be conducted without an oath, earpiece, or presence of law enforcement.

An objective examination of the circumstances does not show that a proper forensic interview is conducted primarily to create an out-of-court substitute for testimony. Assuming a forensic interview as primarily investigative because it is recorded and observed by investigators exhibits a superficial understanding of the process. An interview is supposed to support accurate and fair decision making by the team.<sup>170</sup> A forensic interview may be the starting point of the team's investigation, but it is not the entirety of it. It is the investigators' job to corroborate or disprove the allegations made in an interview. The interviewer has no part in any of the future investigation. Her training is to gather information in a developmentally appropriate way. That information may be used in an investigation, but it may also be just as useful to mental health clinicians, medical providers, or support services. Therefore, statements made to forensic interviewers who are part of the CAC—a non-investigative agency—are significantly less likely to be testimonial than statements made to law enforcement.<sup>171</sup>

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169. See, e.g., *State v. Dearing*, 34 A.3d 1031, 1038 (Conn. App. Ct. 2012) (where the victim was administered an oath twice agreeing to tell the truth); *State v. Love*, No. E2015-02297-CCA-R3-CD, 2017 WL 1077062, at \*12 (Tenn. Crim. App. Mar. 21, 2017) (where the child was administered an oath to tell the truth).

170. See *STANDARDS FOR ACCREDITED MEMBERS*, *supra* note 113, at 20.

171. See *Clark*, 135 S. Ct. at 2182.

## CONCLUSION

Think back to Ashley. Try to look at the abuse allegation she made to her parents from a layperson's perspective. As a matter of common sense, her remarks seem appropriate for a jury's consideration. Ultimately, the question is about what information should be admitted in court if the child cannot testify on her own behalf. Under *Crawford*, if Ashley was unable to testify, her statements had no chance of being admitted.<sup>172</sup> *Davis* lends little help to Ashley and her family because the "primary purpose" test is used only during an ongoing emergency.<sup>173</sup> It would be hard to argue that driving home on a Sunday afternoon is the kind of emergency comparable to the attacks of an abusive partner. *Bryant* cracks the door open slightly to allow the examination of "all relevant circumstances."<sup>174</sup> This is the first framework that would even entertain a potential argument for the introduction of Ashley's disclosure. The problem with stopping at *Bryant* and all of the previous "testimonial" cases is that they provide almost no protection or opportunity for justice for Ashley and children like her. A three-year-old is not suited for courtroom testimony, and there are few other ways to establish guilt, which is why convictions are difficult to obtain. Therefore, young children can be easily targeted by those who wish to do them harm because criminal consequences are rare. However, the families are not shielded from the knowledge of the disclosure, so they endure all the pain and familial dysfunction of abuse without a realistic chance to get their day in court. This is an unacceptable position for children and their caregivers. It is easy to overstate what *Clark* accomplished. *Clark* only decided that statements by children to third-parties who are not law enforcement are significantly less likely to be testimonial.<sup>175</sup> *Clark* also reminds us that there is evidence to support that statements by children about child abuse were never intended to violate the Sixth Amendment.<sup>176</sup> But ultimately, *Clark* makes no *per se* rule, it

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172. See *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (her statements appear to be a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." (citation omitted)).

173. See *Davis v. Washington*, 547 U.S. 813, 822 (2006).

174. See *Michigan v. Bryant*, 562 U.S. 344, 369–70 (2011).

175. See *Clark*, 135 S. Ct. at 2181.

176. *Id.* at 2182.

takes no stance on weight, and it says nothing about hearsay. Regardless, *Clark* is an important step to provide more access to justice for a group that can do little on their own. *Clark* empowers others to better support children through the rigorous court process. Sometimes laws create barriers to justice, but in this case, the Supreme Court has formulated a framework that will encourage justice. As a result, children will be better protected for generations to come.