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# The Road to Understanding the Confrontation Clause: Ohio v. Clark Makes a U-Turn

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# The Road to Understanding the Confrontation Clause: *Ohio v. Clark* Makes a U-Turn

## INTRODUCTION

A police officer, a psychologist, and an emergency room doctor walked into a bar. The three took their seats near the back of the bar, where the front area was no longer visible. While waiting for their first round, a man burst into the bar, mugged a patron, and ran out the door. Although none of the three saw the mugger or the victim, they heard the mugging and reacted. All three rushed to the front of the bar and saw the victim standing in shock. The patron clutched his chest and began to have a heart attack. The officer, doctor, and psychologist all asked the patron, "What happened?" With his dying breath the patron said, "John Johnson." Later, the police arrested John Johnson after determining that not only was John in the area that night, but the patron owed him a large debt. No witnesses saw John mug the patron. The only direct evidence that linked the arrestee to the crime was the patron's dying statement: "John Johnson." Before determining whether this out-of-court statement is admissible under a hearsay exception, it must first meet the scrutinizing standards of the Confrontation Clause.[1]

The United States Supreme Court held in *Ohio v. Clark* that the primary purpose of a statement determines whether said statement is testimonial, which in turn determines whether under the Confrontation Clause it enters into evidence at trial.[2] The purpose of the questioner and the speaker in an interrogation are both relevant.[3] If the primary purpose of the questioning was to create a substitute for in-court testimony, then the statement cannot enter into trial without the presence of the declarant or a prior opportunity to cross-examine him or her.[4]

Looking to the purpose of the three patrons' conversation with the victim, the doctor likely wanted to render medical assistance to a person clutching his chest, not elicit statements that would lead to prosecution.

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1. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him . . . ."). The focus of this Comment is on the admissibility of statements under the Confrontation Clause, not whether a statement meets a hearsay exception or the consequences of hearsay statements.
2. Ohio v. Clark, 135 S. Ct. 2173 (2015). Assuming the statement also meets one of the hearsay exceptions and meets the Confrontation Clause's requirements, it will enter into evidence.
3. Michigan v. Bryant, 562 U.S. 344, 367–68 (2011).
4. *See* discussion *infra* Part I.C.1.

The psychologist could have been asking the victim what happened to him for a multitude of reasons. The officer's purpose could have been one of two possible reasons: to assist in the ongoing emergency of the patron's heart attack or to identify the perpetrator. Although the mugger's freedom to move freely and commit future crimes could be a threat to the public, rendering this emergency ongoing, police officers have a duty to investigate and arrest criminals, which points to a prosecutorial purpose.[5]

Since *Crawford v. Washington*,[6] lower courts have struggled to apply the testimonial standard and the Supreme Court has attempted to clarify its interpretation of what statements are testimonial.[7] Most of the Court's rulings reference only certain principles in *Crawford* applicable to the circumstances of the case without referencing the other jurisprudence available. Lower courts have interpreted these selective holdings to mean that the Supreme Court prioritized one aspect of the *Crawford* ruling and purposefully omitted other parts of the ruling from the analysis.[8]

In 2015, in *Ohio v. Clark*, the Supreme Court addressed some of these issues arising from *Crawford* and subsequent cases.[9] Although the Court attempted to provide clarity, its most recent ruling created more complexity and vagueness in the analysis of testimonial statements. A clearer analysis is needed to mitigate the interpretive problems that courts confront under the Confrontation Clause.

Part I of this Comment discusses the Confrontation Clause and summarizes the state of the law before *Ohio v. Clark*. Part II explains the holding and reasoning of the Court's decision in *Ohio v. Clark*. Part III analyzes the problems that the decision caused and how these problems affect the admissibility of statements into evidence. Part IV proposes a two-part test to be applied under the Confrontation Clause, eliminating confusion and providing a clear analysis for lower courts to adopt.

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5. *See* discussion *infra* Part I.C.1.

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

7. Andrew W. Eichner, *The Failures of* Melendez-Diaz v. Massachusetts *and the Unstable Confrontation Clause*, 38 AM. J. CRIM. L. 437, 441 (2011). The Supreme Court declined to articulate an all-encompassing definition of "testimonial." *See Crawford*, 541 U.S. at 68.

8. *See* Clark v. State, 199 P.3d 1203, 1208 (Alaska Ct. App. 2009) (stating that the objective witness test was improper to use based on a recent Supreme Court ruling).

9. Ohio v. Clark, 135 S. Ct. 2173 (2015).

## I. BACKGROUND: EVOLUTION OF THE CONFRONTATION CLAUSE

The Sixth Amendment, which contains the Confrontation Clause, provides important rights to defendants in criminal trials. The Sixth Amendment provides the following:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his [defense].[10]

The procedural protection "to be confronted with the witnesses against him" is known as the Confrontation Clause[11] and applies to criminal cases in both federal and state court.[12] The underlying purpose of the Confrontation Clause is to allow a criminal defendant to cross-examine a witness testifying against him.[13] The right to cross-examine the prosecution's witness during a criminal case guarantees the defendant's fundamental life and liberty[14] and is an essential safeguard of a fair trial.[15]

### *A. The Confrontation Clause and Hearsay Exceptions*

Initially, the Confrontation Clause was not controversial.[16] The Clause applied only to federal matters because the Bill of Rights was not

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10. U.S. CONST. amend. VI (emphasis added).

11. *Id.;* Ohio v. Roberts, 448 U.S. 56, 62–63 (1980), *abrogated by Crawford*, 541 U.S. 36.

12. *Crawford*, 541 U.S. at 42 (citing Pointer v. Texas, 380 U.S. 400, 406 (1965)); *see also Roberts*, 448 U.S. at 62 (stating that the Fourteenth Amendment renders the Confrontation Clause applicable to the states).

13. *Pointer*, 380 U.S. at 406–07. The right to confront a witness is fundamental, and "certainly no one . . . would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Id.* at 404.

14. *See* discussion *infra* Part I.A.

15. *Pointer*, 380 U.S. at 410 (Goldberg, J., concurring) (first citing Kirby v. United States, 174 U.S. 47, 55 (1899); and then citing Alford v. United States, 282 U.S. 687, 692 (1931)).

16. Richard D. Friedman, Crawford*,* Davis*, and Way Beyond*, 15 J.L. & POL'Y 553, 553 (2007).

applicable to the states until Congress passed the Fourteenth Amendment and the Supreme Court ruled in *Pointer v. Texas* to incorporate the Sixth Amendment.[17] Initially, the Supreme Court and lower courts struggled to detail the extent of the Clause's protections because numerous out-of-court statements were already allowed to enter into evidence without the witness's presence, such as a deceased witness's statement, even before the Amendment's incorporation to the states.[18] For the last 50 years, the Supreme Court has repeatedly addressed the application of the Clause to out-of-court statements, evolving the application with each new decision.

A literal reading of the Confrontation Clause's text effectively bars any statements[19] introduced in court without the presence of the speaker in court for cross-examination.[20] Early decisions called for a stricter interpretation that conformed more closely with a literal reading of the Clause, which barred the admissibility of certain out-of-court statements into evidence that qualify as hearsay.[21] Since these early decisions, however, the Supreme Court has held that reading the Confrontation Clause too strictly would abrogate every hearsay exception, a result the Court considered too extreme.[22] Courts slowly began to relax their

17. *Pointer*, 380 U.S. at 407.

18. Friedman, *supra* note 16, at 554. *See, e.g.*, Mattox v. United States, 156 U.S. 237, 241 (1895) (noting that admissibility of testimony was favored when the defendant was present at the examination of a deceased witness when either before a magistrate or at a former trial); United States v. Macomb, 26 F. Cas. 1132, 1134 (C.C.D. Ill. 1851) (No. 15,702) (ruling that if the defendant confronted and cross-examined the witness under oath and the witness then dies, the testimony may be admitted); State v. Jordan, 34 La. Ann. 1219, 1219 (1882) ("The deposition of a witness taken on the preliminary examination before a magistrate, is not admissible on the trial before the jury, if the State or prosecutor can, by due diligence, bring the witness into court."); State v. McO'Blenis, 24 Mo. 402, 433 (1857) (finding no issue with the admissibility of dying declarations).

19. *See* FED. R. EVID. 801(a) (defining a statement as a person's oral or written assertion).

20. Ohio v. Roberts, 448 U.S. 56, 63 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

21. *See Crawford*, 541 U.S. at 49 (first citing State v. Atkins, 1 Tenn. (1 Overt.) 229 (1807) (holding that a witness's previous testimony at a different trial was not admissible against the defendant at another trial); and then citing Finn v. Commonwealth, 26 Va. (1 Rand.) 701, 708 (1827) (holding that in a criminal case, former trial testimony—even with cross-examination occurring at that trial—could not be introduced into evidence at a later trial even when the witness was deceased or otherwise unavailable)).

22. *Roberts*, 448 U.S. at 63.

standards on barring out-of-court statements.[23] In 1975, the Federal Rules of Evidence were promulgated, which codified many common-law hearsay exceptions along with adding new ones.[24]

The Federal Rules of Evidence define hearsay as a statement made by a declarant[25] outside the current trial being offered in court for the truth of the matter that it asserts.[26] In other words, when hearsay statements are offered into evidence, they are offered not only to show that such a statement was in fact made or that the person who conveys the statement believes the content to be true, but also that the statement itself is evidence of the existence in fact of its content.[27] Hearsay is inadmissible in court unless a federal statute, the Federal Rules of Evidence, or other rules provided by the Supreme Court state otherwise.[28] Hearsay statements are excluded because they are generally considered unreliable in that they lack the protective devices of judicial proceedings.[29] These protective devices include placing declarants under oath, having declarants physically present so that the trier of fact can observe their demeanors, and subjecting declarants to cross-examination.[30]

The oath administered in court requires witnesses to declare that they will tell the whole truth and nothing but the truth.[31] To do otherwise could lead to criminal charges of perjury against the witness.[32] When witnesses are in the presence of the trier of fact, the trier of fact can personally observe them, look them "in the eye," and evaluate their demeanors to determine the truth of their statements.[33] Cross-examination has been

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23. *See supra* note 18.

24. Friedman, *supra* note 16, at 553–54.

25. A "declarant" is the person who made the statement. FED. R. EVID. 801(b).

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

27. *See* Colin Miller, *Contents May Have Shifted: Disentangling the Best Evidence Rule from the Rule Against Hearsay*, 71 WASH. & LEE L. REV. ONLINE 186, 190 (2014).

28. FED. R. EVID. 802.

29. Andrew R. Keller, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159, 160 (1983).

30. *Id.* at 161; *see also* David S. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1378 (1972).

31. The oath "must be in a form designed to impress that duty on the witness's conscience." FED. R. EVID. 603.

32. *See* 18 U.S.C. § 1621 (1994).

33. *See* Mattox v. United States, 156 U.S. 237, 242 (1895); CAL. EVID. CODE ANN. § 780 (West 2016) (listing demeanor as a factor in determining the credibility of a witness).

viewed as the most important protection offered by judicial proceedings.[34] Cross-examination allows the judge and jury to evaluate witnesses' perceptions and memories.[35] Cross-examination also increases the likelihood that the jury will understand the language used by the witness "in the manner he or she intended it to be understood."[36] Despite the general prohibition on hearsay statements, hearsay evidence sometimes contains sufficient reliability to be introduced into evidence.[37]

### *B. Evolving Standards for Admitting Statements Outside the Confrontation Clause: From Indicia of Reliability to Testimonial*

Although the Confrontation Clause and the hearsay rules uphold similar standards, they do not overlap completely.[38] The Supreme Court has stated, "Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception."[39] The lack of a complete overlap requires the statements to satisfy both the rules of hearsay and the unique rules of the Confrontation Clause in criminal trials. Historically, the Confrontation Clause was meant to exclude some, but not all, hearsay.[40] The test used to determine what hearsay the Confrontation Clause should not exclude has evolved over the years.[41] The initial test the Supreme Court adopted was the indicia of reliability doctrine, but since the Court's decision in

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34. Davenport, *supra* note 30, at 1378.

35. Keller, *supra* note 29, at 161 (citing Davenport, *supra* note 30, at 1378; Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 177–78 (1948)).

36. *Id.*

37. *Id. See* FED. R. EVID. 803 (stating 23 exceptions to evidence that are considered hearsay regardless of the witness's availability to attend trial); *see also* FED. R. EVID. 804 (stating exceptions that are applicable when the witness is unavailable for trial).

38. *See* discussion *supra* Part I.A.; California v. Green, 399 U.S. 149, 155 (1970) (stating that deeming the Confrontation Clause a mere codification of the rules of hearsay would go too far and that hearsay exceptions exist at common law).

39. *Id.* at 155–56 (1970) (first citing Barber v. Page, 390 U.S. 719 (1968); and then citing Pointer v. Texas, 380 U.S. 400 (1965)).

40. Ohio v. Roberts, 448 U.S. 56, 63 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

41. *See* David H. Kwasniewski, *Confrontation Clause Violations as Structural Defects*, 96 CORNELL L. REV. 397, 398–99 (2011).

*Crawford*, the test's substantive scope has increased, leading to a more complicated and vague test.[42]

*1. The Old Rule: Indicia of Reliability*

The Court held in *Ohio v. Roberts* that the proper test for deciding if a statement introduced under a hearsay exception survived the Confrontation Clause was whether the statement contained an "indicia of reliability."[43] Applying this test, courts would admit out-of-court statements if the statement fell firmly within an established hearsay exception and if the party seeking admission could show a particular guarantee of trustworthiness.[44] This rule stressed the need to test the accuracy and reliability of testimony, reasoning that the purpose of the Confrontation Clause was to allow the criminal defendant to evaluate the reliability of the statement while looking the witness in the eye.[45] Indicia of reliability was based on the idea that the Confrontation Clause restricts admissible hearsay to situations in which the statement is necessary as a means of proof and in which the statement is trustworthy.[46] For the restriction of necessity to apply, the prosecution must demonstrate the unavailability of the declarant. Once the unavailability has been shown, the evidence must be marked with such trustworthiness that no departure from the general rule has occurred.[47]

*2.* Crawford v. Washington*: Out with the Old, in with Primary Purpose, Objective Witness, and Formalized Statement Tests*

Over 20 years after *Ohio v. Roberts*, the Court changed the proper test and rationale to use when deciding whether a hearsay statement, introduced without its declarant at trial, violates the Sixth Amendment.[48] The Court in *Crawford v. Washington* found that the indicia of reliability test departed from the historical principals of the Confrontation Clause.[49] The Court ultimately held that the conclusions in previous decisions were correct, but the rationales for these decisions were flawed.[50]

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42. *Id.*
43. *Roberts*, 448 U.S. at 65.
44. *Id.* at 66.
45. *Id.* at 63–64.
46. *Id.* at 65.
47. *Id.*
48. Crawford v. Washington, 541 U.S. 36 (2004).
49. *Id.* at 60.
50. *Id.*

Although the ultimate goal of the Clause was to ensure the reliability of evidence, the protection was meant to be procedural, not substantive.[51] According to the Court in *Crawford*, the proper test does not require the evidence to be reliable, but rather requires reliability to be tested in a particular manner, namely "in the crucible of cross-examination."[52] The Court held that the rule for determining whether the inclusion of certain hearsay evidence violates the Sixth Amendment must be based on whether the statements were testimonial in nature.[53] To admit testimonial evidence when the declarant is not present at trial, the admitting party must prove the unavailability of the declarant and the defendant's previous opportunity to cross-examine the declarant.[54]

*Crawford* marked a pivotal change in the law because it rejected the notion that a judge may independently deem certain testimony reliable.[55] Additionally, the decision made testimonial status the determining factor for the admissibility of hearsay in criminal trials even if the testimony meets one of the hearsay exceptions.[56] Although the Court declined to articulate a comprehensive definition of "testimonial," the *Crawford* opinion provides some guidance.[57] This guidance can be broken into three tests applied by lower courts: the primary purpose test, the objective witness test, and the formalized statement test.[58]

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51. *Id.* at 61.

52. *Id.*

53. *Id.* at 68.

54. *Id.*

55. Pilar G. Kraman, *Divining the U.S. Supreme Court's Intent: Applying* Crawford *and* Davis *to Multipurpose Interrogations by Non-Law Enforcement Personnel*, 23 CRIM. JUST. 30, 30 (2009) (noting that this discretionary ability to deem certain testimony reliable independently played an important role when facing very young and vulnerable witnesses).

56. *Id.*

57. *Crawford*, 541 U.S. at 68. The Court did use language from various sources to illustrate classifying testimonial evidence in particular: "[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 52 (citing Brief for National Association of Criminal Defense Lawyers at 3, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754961, at *3).

58. Although then Chief Justice Rehnquist criticized the *Crawford* ruling, Justice Scalia countered by arguing that the ruling could not be any worse than the indicia of reliability test in *Roberts*, which was "*inherently*, and therefore *permanently*, unpredictable." *Id.* at 68 n.10.

*C. Courts Interpret "Testimonial"*

After *Crawford*, lower courts struggled to decipher what qualified as a testimonial statement. The lack of a precise, consensus definition of "testimonial statements" in *Crawford* allowed subsequent Supreme Court decisions to divide the language of *Crawford,* using only certain principles from the case without an acknowledgement of the continued relevance of the rest of the ruling. This fragmented interpretation caused multiple tests to emerge among the lower courts, which led to confusion about which test was appropriate.[59]

*1.* Davis v. Washington: *Primary Purpose and Ongoing Emergencies*

The Court in *Crawford* stated that "[t]estimony . . . is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[60] When the Court began to give examples of the "core class" of testimonial material, it began with "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[61] Although the Court did not formulate a test from this language until *Davis v. Washington*, the language illustrates the Court's early reasoning that eventually led to the primary purpose test.

In *Davis v. Washington*,[62] the Court consolidated two cases: *State v. Davis*[63] and *Hammon v. State*.[64] The Court determined whether statements made to law enforcement during a 911 call or statements made at a crime scene were testimonial.[65] In *Davis*, McCotrry was involved in a domestic

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59. *See* Tom Harbinson, Crawford v. Washington *and* Davis v. Washington*'s Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians are Nontestimonial and Admissible as an Exception to the Confrontation Clause*, 58 MERCER L. REV. 569, 596 n.92 (2007).

60. *Crawford*, 541 U.S. at 51.

61. *Id.* at 51 (citing Brief for Petitioner at 23, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21939940, at *23).

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

63. State v. Davis, 111 P.3d 844 (Wash. 2005), *aff'd*, 547 U.S. 813 (2006).

64. Hammon v. State, 829 N.E.2d 444 (Ind. 2005), *rev'd and remanded sub nom*., *Davis*, 547 U.S. 813. Within this Comment, on occasion the *Hammon* half of the case will be referred to separately from the *Davis* portion. When the *Hammon* portion of the case is being referred to for its facts "*Hammon*" will be used.

65. *Davis*, 547 U.S. at 817.

disturbance with her former boyfriend, Davis.[66] McCotrry called 911 and reported that Davis hit her.[67] The State charged Davis with a felony violation of a domestic no-contact order, but the only available witnesses were the police officers, who arrived on the scene after the 911 call and who were unable to testify about the cause of McCotrry's injuries.[68] Because McCottry did not appear in court, the prosecution offered the 911 call into evidence as proof of how the injuries occurred, and Davis was convicted by a jury.[69]

In *Hammon*, police went to the home of Hershel and Amy Hammon in response to a reported domestic disturbance.[70] Although both Hershel and Amy initially stated that nothing happened, despite evidence of bodily and physical property damage, the police separated Amy from Hershel and questioned her.[71] Amy then signed an affidavit alleging Hershel committed a battery on her.[72] The State charged Hershel with battery and subpoenaed Amy.[73] When she did not appear at trial, the State called to the stand the officer who responded to the report of domestic disturbance to recount what Amy told him and to authenticate the affidavit she signed.[74] The trial judge found Hershel guilty.[75]

The Court in *Davis* determined that statements made in the course of a police interrogation, where the circumstances indicated that the objective purpose of the interrogation was to assist the police in an ongoing emergency, were not testimonial.[76] The Court clarified in *Davis* that interrogations directed solely at establishing facts of a past crime to identify a perpetrator would create testimonial statements.[77] Thus, statements made to the police in the course of an ongoing emergency are admissible under a hearsay exception during a criminal trial—even if the declarant is unavailable—because the primary purpose of the statement was not to create a substitute for in-court testimony.

Because McCotrry's statements were non-testimonial, the Court found that the Confrontation Clause did not prevent their introduction,

66. *Id.*
67. *Id.* at 817–18.
68. *Id.* at 818–19.
69. *Id.* at 819.
70. *Id.*
71. *Id.*
72. *Id.* at 819–20.
73. *Id.* at 820.
74. *Id.*
75. *Id.* at 821.
76. *Id.* at 822.
77. *Id.* at 826.

despite Davis not having the opportunity to cross-examine McCotrry.[78] The Court reasoned that McCottry's primary purpose in making the statements in the 911 call was to enable the police to respond to an ongoing emergency, not to act as a witness for the purpose of prosecution.[79] Therefore, the Court affirmed the decision of the Washington Supreme Court, which held that the statements were not testimonial.[80]

In *Hammon*, however, the Court found that the police interrogation was clearly meant to investigate the possibility of past criminal conduct.[81] No emergency was in progress when the officers arrived at the Hammons' residence, nor was any immediate threat to Amy's person in existence.[82] The police officer's questioning of Amy, particularly when the police separated her from her husband, elicited statements to determine what had happened, not what was happening.[83] Because the statements were made for the sole purpose of investigating a crime, Amy's statements were deemed testimonial.[84] Therefore, introducing Amy's statements at trial violated the Confrontation Clause because Amy was not present at trial and the defendant had no previous opportunity to cross-examine her.[85] However, the Court rejected the Illinois Supreme Court's implication that all statements made at crime scenes are testimonial, and instead narrowly held that Amy's affidavit must be excluded.[86]

The ongoing-emergency test was later expanded in *Michigan v. Bryant*, in which the Court ruled that a victim of a gunshot wound was in a state of an ongoing emergency when police arrived.[87] The Court found that the situation was an ongoing emergency because the victim was severely injured and the police did not know why the victim had been shot, where or when the shooting occurred, or the location of the shooter. Thus,

78. *Id.* at 827. The ongoing emergency exception was further expanded when the Court ruled that a victim of a gunshot wound, once found by the police, is in a state of an ongoing emergency. *See* Michigan v. Bryant, 562 U.S. 344, 375 (2011).

79. *Davis*, 547 U.S. at 828 (noting that the statements were not a substitute for live testimony in the court room) ("No 'witness' goes into court to proclaim an emergency and seek help."); *see also Bryant*, 562 U.S. at 381.

80. *Davis*, 547 U.S. at 829.

81. *Id.*

82. *Id.* at 830.

83. *Id.*

84. *Id.*

85. *Id.* at 834.

86. *Id.* at 832, 834.

87. Michigan v. Bryant, 562 U.S. 344, 375 (2011).

the purpose of the police's questioning was merely to assess an ongoing emergency rather than conduct an investigation.[88]

Both the *Crawford* and *Davis* decisions failed to address under the Confrontation Clause analysis whether a court should consider both the declarant's and the listener's primary purpose in making the statements or only the declarant's primary purpose.[89] However, Justice Scalia addressed this subject in his dissent in *Michigan v. Bryant*, in which he argued that only the declarant's purpose should be relevant in determining whether a statement is testimonial.[90] A witness's testimony at trial is not only a reiteration of past events but also a solemn declaration.[91] Therefore, "the declarant . . . must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused."[92] Justice Scalia stated that considering the motives of the listener would only make the process more difficult by forcing courts to sift through two sets of mixed intentions to determine the primary purpose of the interrogation.[93]

The majority in *Michigan v. Bryant* explained that the statements and actions of both the interrogator and the speaker are relevant to determining the purpose of the interrogation.[94] The focus of the inquiry is the purpose of the speaker, according to what a reasonable speaker would intend under the surrounding circumstances.[95] The Court also stated that the actions and statements of the listeners, or interrogators, are parts of those circumstances.[96] Even after *Crawford*, questions remain regarding the primary purpose test. This test, however, was not the only test to come out of *Crawford*.

*2. Objective Witness Test*

The objective witness test is another test formulated under the principles articulated by the Supreme Court in *Crawford* to determine whether a

88. *Id.* at 376–77. The police needed to determine whether there was a present threat to the safety of the officers, the victim, and the public. *Id.* at 376. The Court also factored in the informality of the questions, comparing them to the 911 call in *Davis*. *Id.* at 377.

89. *Id.* at 381 (Scalia, J., dissenting).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 383.

94. *Id.* at 367 (majority opinion).

95. *Id.* at 369.

96. *Id.* at 369–71.

statement is testimonial.[97] The test categorizes testimonial statements as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[98]

Not only does this test apply a less subjective analysis than the primary purpose test, it also avoids the opaque analysis of discerning between the mixed motives of the declarant and the interrogator.[99] Despite this test's easier application, most courts have failed to adopt it.[100] Courts may be reluctant to adopt this test because it operates at a lower threshold of analysis than the primary purpose test, making more statements testimonial and requiring more declarants to appear in court for the statements to enter into evidence at trial.[101]

Some courts have stated that the Supreme Court's ruling in *Davis* chose the primary purpose test as the proper test to determine whether statements are testimonial.[102] However, three years after *Davis* in *Melendez-Diaz v. Massachusetts*, the Court used the objective witness test, not the primary purpose test.[103] The Court held that affidavits made under circumstances that would lead an objective witness to reasonably believe that the statements would be available for use at a later trial, such as lab reports confirming a substance as cocaine, would be testimonial.[104] Although no decision has explicitly overruled the objective witness test, the viability of the test may be in question after *Clark*.

*3. Formalized Statement Test*

Another test that courts have adopted in furtherance of the Confrontation Clause analysis is the formalized statement test. This test deems "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"

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97. Clark v. State, 199 P.3d 1203, 1208 (Alaska Ct. App. 2009).

98. Crawford v. Washington, 541 U.S. 36, 52 (2004) (citing Brief for National Association of Criminal Defense Lawyers at 3, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754961, at *3).

99. Adam A. Field, *Beyond* Michigan v. Bryant*: A Practicable Approach to Testimonial Hearsay and Ongoing Emergencies*, 2012 U. ILL. L. REV. 1265, 1289 (2012) (referring to this test as the "functionalist approach").

100. *Id.* at 1290.

101. *Id.*

102. *Clark*, 199 P.3d at 1208.

103. 557 U.S. 305 (2009).

104. *Id.* at 310–11 (the Court also stated that the sole purpose of the affidavit was for use at trial).

to be testimonial.[105] Justice Thomas reasoned that the statements in affidavits, depositions, prior testimony, or confessions are testimonial because the statements are all made and taken through a formalized process.[106] Most of the justifications for this test are based on historical applications dating back to English common law.[107]

The formalized statement test is relatively straightforward compared to the primary purpose and objective witness tests.[108] Instead of predicting the purpose of declarants in making statements or judging their expectations as compared to a standard reasonable declarant, the court merely compares the statement's characteristics with historically introduced hearsay statements.[109] The predictability of this test, however, is its greatest weakness.[110] Interrogators could purposely circumvent Confrontation Clause protections by taking statements in an informal manner to avoid the classification of an interrogation or statement as testimonial.[111]

Before *Ohio v. Clark*, many questions circulated among the lower courts. First, the Supreme Court used different parts of *Crawford* in different cases with little overlap.[112] This selectiveness caused confusion in the lower courts as to what the proper test for evaluating testimonial statements should be—some even declined to use certain parts of *Crawford*.[113] Second, neither the Supreme Court's ruling in *Crawford* nor its subsequent ruling in *Davis* provided clear guidance on how to treat out-

105. Crawford v. Washington, 541 U.S. 36, 51–52 (2004) (citing White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas and Scalia, J., concurring in part and concurring in judgment)).

106. Davis v. Washington, 547 U.S. 813, 836–37 (2006) (Thomas, J., dissenting).

107. *Id.* at 835–36.

108. *See* Field, *supra* note 99, at 1288.

109. *Id.*

110. *Id.*

111. *Id.* (citing *Davis*, 547 U.S. at 830 n.5). However, the test has been used within the last five years. *See, e.g.*, *Bullcoming v. New Mexico*, 564 U.S. 647, 665 (2011) ("In sum, the formalities attending the 'report of blood alcohol analysis' are more than adequate to qualify [the declarant's] assertions as testimonial.").

112. *See, e.g.*, *Davis*, 547 U.S. 813 (using the primary purpose test only); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (discussing both the formalized statement and objective witness tests but not mentioning the primary purpose test); *Bullcoming*, 564 U.S. 647 (using the formalized statement test only).

113. Clark v. State, 199 P.3d 1203, 1209 (Alaska Ct. App. 2009) ("Indeed, a few pre-*Davis* decisions declined to follow the 'objective witness' formulation of the test for 'testimonial' hearsay articulated in *Crawford*. Instead, these courts—anticipat[ed] the Supreme Court's approach in *Davis* . . . .").

of-court statements that were made to non-law enforcement personnel.[114] While the Supreme Court addressed some of these lingering issues in *Clark*, the Court's guidance brought more confusion than clarity.

## II. THE CASE: *OHIO V. CLARK*

The *Clark* opinion addressed an issue that the Supreme Court had not previously addressed: how to handle statements made to mandatory reporters[115] who were not law enforcement personnel.[116] When considering the circumstances of this particular case, the *Clark* Court ultimately held that the statements in question were not made for the primary purpose of creating a substitute for in-court testimony; however, the admission of at least some statements made to individuals who are not law enforcement could raise Confrontation Clause concerns.[117]

### *A. Relevant Facts*

The defendant, Darius "Dee" Clark, lived in Cleveland, Ohio with his girlfriend T.T. and her two children, L.P. and A.T.[118] Clark regularly sent T.T. to Washington, D.C. to work as a prostitute.[119] In March of 2010, Clark sent T.T. on such a trip while he watched her children.[120] The day after T.T. left, Clark dropped off L.P. at preschool.[121] One of L.P.'s teachers noticed that L.P.'s left eye appeared bloodshot.[122] She inquired into what had occurred, but L.P. did not respond.[123] He eventually stated that he had fallen.[124] L.P. was moved into a classroom with brighter lights, and the teacher noticed whip marks on his face.[125]

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114. *Id.* at 1214–15 (Coats, C.J., dissenting).

115. Mandatory reporters bear a legal obligation, usually under criminal sanctions, to report certain information to law enforcement as required by statute. *See, e.g.*, LA. CHILD. CODE art. 603 (2016); OHIO REV. CODE ANN. § 2151.421 (West 2016); CAL. WELF. & INST. CODE § 15634 (West 2016).

116. Ohio v. Clark, 135 S. Ct. 2173, 2181 (2015).

117. *Id.*

118. *Id.* at 2177.

119. *Id.*

120. *Id.* at 2177–78.

121. *Id.*

122. *Id.* at 2178.

123. *Id.* (specifically, the teacher asked "[w]hat happened?").

124. *Id.*

125. *Id.*

The primary teacher was notified and pressed L.P. about what happened, asking, "Who did this? What happened to you?"[126] According to the teacher, L.P. seemed "bewildered" and responded, "Dee, Dee."[127] The teachers asked whether Dee was big or little, and L.P. responded that Dee was big.[128] The primary teacher brought L.P. to the supervising school official, who discovered more injuries upon lifting the boy's shirt.[129] Through a child-abuse hotline, the teachers alerted the authorities about the suspected abuse.[130] Clark arrived later to pick up L.P., denied any responsibility for the injuries, and quickly left with the child.[131] The next day a social worker found both children at Clark's mother's house and brought them to the hospital.[132] The doctor found additional injuries on the children that suggested child abuse.[133]

*B. Procedural History*

Clark and T.T. were charged with five counts of felony assault, two counts of endangering children, and two counts of domestic violence.[134] The State of Ohio introduced the statements made by L.P. to the teachers as evidence of Clark's guilt; however, L.P. did not testify in court.[135] The court considered L.P. incompetent to testify under Ohio law because he was under ten years old and "appear[ed] incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."[136] Although L.P. was an unavailable witness, Ohio's rules of evidence allow the admission of reliable hearsay evidence from child abuse victims.[137] Clark, however, moved to exclude

126. *Id.* (citing State v. Clark, 999 N.E.2d 592, 595 (Ohio 2013)).
127. *Id.*
128. *Id.* at 2178.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. State v. Clark, No. 96207, 2011 WL 6780456, at *1 (Ohio Ct. App. Dec. 22, 2011), *aff'd*, 999 N.E.2d 592 (Ohio 2013), *rev'd and remanded*, 135 S. Ct. 2173 (2015). T.T. pled guilty and her sentencing was postponed until after Clark's trial. *Id.*
135. The trial court found that L.P. was incompetent to testify. *Id.* at *2.
136. *Clark*, 135 S. Ct. at 2178 (citing OHIO EVID. R. 601(A) (Lexis 2010)).
137. *Id*. Ohio Rules of Evidence provide that "[a]n out-of-court statement made by a child who is under twelve years of age at the time of trial . . . describing any act of physical violence directed against the child is not excluded as hearsay under Evid. R. 802 if all of the following apply:" under the totality of the circumstances

the statements under the Confrontation Clause.[138] The trial court denied the motion, ruling that the statements were not testimonial and therefore not a violation of the Sixth Amendment.[139] The jury found Clark guilty, and he was sentenced to 28 years in prison.[140]

Clark appealed his conviction, arguing that the Confrontation Clause barred the trial court from admitting L.P.'s statements into evidence.[141] The Court of Appeals of Ohio stated the test to be used when determining whether the statements are testimonial varies based on the circumstances surrounding the statements.[142] When the statements are made in the course of a police interrogation, courts should use the primary purpose test.[143] However, when the individual questioning the child is not a law enforcement member, courts should apply the objective witness test.[144] Child advocates work in a "dual capacity" in which certain questions could produce testimonial and non-testimonial statements.[145] Looking at the statements made to the teachers as a matter of first impression, the court concluded under both the primary purpose and objective witness tests that the statements to the teachers were testimonial.[146] The appellate court found that the primary purpose of the teachers' questioning of L.P. was to report the child abuse to law enforcement.[147] Because the obligation to report child abuse is mandatory, the appellate court reasoned that a reasonable and objective witness would expect that his or her statements made to a teacher might be used at trial.[148]

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the statements provide a "particularized guarantee[] of trustworthiness;" "[t]he child's testimony is not reasonably obtainable by the proponent of the statement;" independent proof of the physical violence exists; and ten days before the hearing the proponent notifies all parties of the content of the statement, the time it occurred, the identity of the witness, and the circumstances surrounding the statement that indicate its trustworthiness. OHIO EVID. R. 807(A).

138. *Clark*, 135 S. Ct. at 2178.

139. *Id.*

140. *Id.*

141. State v. Clark, No. 96207, 2011 WL 6780456, at *2 (Ohio Ct. App. Dec. 22, 2011), *aff'd*, 999 N.E.2d 592 (Ohio 2013), *rev'd and remanded*, 135 S. Ct. 2173 (2015). Clark appealed his conviction on multiple grounds; the most significant was a claim under the Confrontation Clause. *Id.*

142. *Id.* at *3.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at *6.

147. *Id.*

148. *Id.*

Thus, the appellate court found that the statements were testimonial and subject to Confrontation Clause protections.[149]

The State appealed the decision, and the Supreme Court of Ohio granted writ to consider whether the introduction of L.P.'s statements at trial violated Clark's constitutional right to confront a witness against him.[150] The Supreme Court of Ohio in a four-three decision affirmed the decision of the appellate court, holding that L.P.'s statements were testimonial because the primary purpose of the teachers' questions was to gather evidence that was potentially relevant to a subsequent criminal prosecution and not to deal with an ongoing emergency.[151] No ongoing emergency existed because L.P. was not complaining about his injuries and did not need urgent medical care.[152] Furthermore, under the mandatory reporting law of Ohio, teachers acted as agents of the state by eliciting statements that functioned identically to live in-court testimony.[153] Ultimately, an appeal was made to the Supreme Court of the United States.

### *C. The Supreme Court's Holding and Reasoning*

The Supreme Court of the United States granted writ of certiorari to decide whether the Confrontation Clause prohibits the use of a child's statements to convict a defendant of child abuse when the child is not available to be cross-examined in court.[154] Justice Alito led the majority, which held that "L.P.'s statements clearly were not made with the primary purpose of creating evidence for Clark's prosecution."[155]

#### *1. Application of Ongoing Emergency*

The Court reasoned that L.P. made his statements in the context of an ongoing emergency that involved suspected child abuse.[156] The teachers saw L.P.'s injuries and had to decide whether it was safe to release the child to his guardian.[157] Thus, the Court found that "the immediate concern

149. *Id.*
150. State v. Clark, 999 N.E.2d 592, 594 (Ohio 2013), *rev'd and remanded*, 135 S. Ct. 2173 (2015).
151. Ohio v. Clark, 135 S. Ct. 2173, 2178–79 (2015).
152. *Clark*, 999 N.E.2d at 597.
153. *Clark*, 135 S. Ct. at 2178–79.
154. *Id*. at 2177.
155. *Id.* at 2181.
156. *Id.*
157. *Id.*

was to protect a vulnerable child who needed help."[158] According to the Court, the teachers merely evaluated whether the child was at further risk.[159] The teachers' questions were aimed at identifying the abuser to protect the victim from future abuse.[160] The Court distinguished this situation from *Hammon* because the identity of the assailant was unknown and L.P. was unshielded from potential harm.[161] L.P. never indicated that he knew that his statements would be used to arrest and prosecute the potential abusers, nor did the teachers tell L.P. that such an outcome would occur.[162] The questioning was informal and similar to interrogations performed at the station house in *Hammon*.[163] The Court also stated that L.P.'s age fortified its conclusion that his statements were non-testimonial.[164] Children have very little understanding of the legal system and prosecution, and L.P. likely just wanted the abuse to stop.[165] Furthermore, similar statements made in the context of abuse have been historically admissible at common law.[166]

*2. Mandatory Reporting Laws of Ohio: Inconsequential*

Although the Court did not categorically exclude statements made to third parties as outside the restrictions of the Confrontation Clause, the questioners' roles as teachers remained highly relevant to the Court.[167] Statements made to those who are not principally charged to uncover and prosecute criminal behavior are significantly less likely to produce testimonial statements than statements made to law enforcement personnel.[168] Clark argued that Ohio's mandatory reporting laws effectively paralleled the questioning of L.P.'s teachers with an interrogation of police officers.[169] However, the Court rejected this comparison reasoning that regardless of whether the law was in place, the teachers would have likely acted with the same purpose to protect the child from future abuse.[170] Standing alone, mandatory reporting

158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 2181.
164. *Id.* at 2181–82.
165. *Id.* at 2182.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 2182–83.
170. *Id.* at 2183.

statutes cannot convert a conversation between teacher and student into a police interrogation.[171] Although the teachers' questioning of L.P. and their duty to report the abuse had a natural tendency to result in Clark's prosecution, the Court stated that this tendency was irrelevant.[172] The Court ended its analysis by stating that the determination of whether statements are testimonial does not involve whether a jury would view the out-of-court statements as equivalent to in-court testimony.[173]

## III. COMPLEXITIES IN USING A SUBSTANTIVE COMPONENT IN A CATEGORICAL TEST

Regardless of the ultimate conclusion of the case, the Court applied the wrong rationale in *Ohio v. Clark*. The opinion used problematic language that ultimately led to an analysis that considers the totality of circumstances, making it substantive in nature. However, the test also appears to contain categorical generalities that seem to be conclusive, regardless of surrounding circumstances. These generalities make the analysis look more like a bright-line rule than a totality-of-circumstances test. This conflicting guidance results in a clumsier and more complex analysis for lower courts to follow.

The Court's analysis is clumsy for two reasons. First, the Court has solidified that statements to third parties are testimonial only when law enforcement influenced the third party in some way. While the Court stated that it was not categorically ruling out third parties,[174] the facts of *Clark* imply that generally third-party statements will be deemed non-testimonial, unless the exception of law enforcement influence applies. Second, the Court's rationale appears inconsistent with previous rulings. The Court first blends the primary purpose and objective witness tests, effectively removing the objective witness test from the analysis altogether and largely focusing on the primary purpose of the individual. Furthermore, disregarding mandatory reporters as a relevant factor for deciding a statement's testimonial value is inconsistent with the Court's own statement that the primary purpose test considers the question of testimonial "in light of all the circumstances."[175] The Court has also appeared to switch the focus of the primary purpose test to mainly concern the listener's purpose rather than the declarant's purpose. Finally, the Court expanded the ongoing emergency exception to encompass future

171. *Id.*
172. *Id.*
173. *Id.*
174. *Id*. at 2182.
175. *Id*. at 2180.

harm where it previously only considered imminent harm.[176] This expansion leaves questions as to the true boundaries of the ongoing emergency exception.

### *A.* Ohio v. Clark *Solidifies that Only Law Enforcement Influence Creates Testimonial Statements*

The Court specified in *Clark* that its holding did not create a categorical rule that excluded the applicability of the Sixth Amendment to statements made to non-law enforcement.[177] However, there do not appear to be any circumstances, except for the direct influence or involvement of law enforcement with that third party, which would make such statements testimonial. Mandatory reporters bear a legal obligation, usually under criminal sanctions, to report certain information to law enforcement as required by statute.[178] Of all parties or non-law enforcement influenced parties, the group most likely to come across testimonial evidence outside the influence of law enforcement would be mandatory reporters. This category includes not only teachers, but also social workers, psychologists, and medical personnel.[179]

Thus, there appears to be no situation where a statement to a third party could be considered testimonial without police involvement. A recent circuit court case illustrates this potential new application of the Confrontation Clause. In *U.S. v. Esparaza*, an opinion decided after *Clark*, the Ninth Circuit ruled that a Notice of Transfer/Release of Liability form, which the witness turned into the DMV to show the transfer of car ownership, was testimonial.[180] The court held the notice was testimonial because, prior to sending the notice, U.S. Customs and Border Protection ("CBP") notified the witness that her car was seized while being used to smuggle 50 kilograms of marijuana.[181] CBP only sent the notice because the seizure of the car was for a serious criminal violation.[182] Therefore, the

176. *Compare id*. at 2181 (reasoning that the statements occurred in the context of an ongoing emergency because there was potential for future harm), *with* Davis v. Washington, 547 U.S. 813, 830 (2006) (reasoning that there was no ongoing emergency because "there was no immediate threat to [Amy's] person").

177. *Clark*, 135 S. Ct. at 2183.

178. *See, e.g.*, LA. CHILD. CODE art. 603 (2016); OHIO REV. CODE ANN. § 2151.421 (West 2016); CAL. WELF. & INST. CODE § 15634 (West 2016).

179. *See, e.g.*, LA. CHILD. CODE art. 603 (2016); OHIO REV. CODE ANN. § 2151.421 (West 2016); CAL. WELF. & INST. CODE § 15634 (West 2016).

180. United States v. Esparza, 791 F.3d 1067, 1072–73 (9th Cir. 2015).

181. *Id*. at 1073.

182. *Id.*

witness knew of a pending investigation, and the witness created the statement for non-routine administrative paperwork of the DMV. Although this case describes a situation where a third-party statement was deemed testimonial, the influence of the police was the key feature that made this statement testimonial.[183] This influence also occurred prior to any statements being made,[184] which reveals that the statements of third parties become testimonial only after police involvement.

Finding that influence by law enforcement alone can create a testimonial statement likely deviates from previous interpretations of circuit courts. *People v. Stechly* illustrates this discrepancy.[185] In that case, the Supreme Court of Illinois held that certain statements made to hospital administrators were testimonial based on the fact that the administrators did nothing else with the information except inform the authorities of what happened.[186] The sole purpose of the interview with the hospital administrators was to gather information to be used for prosecutorial reasons.[187] Thus, the interviewers were essentially acting as agents of the police.[188]

However, the court would likely have ruled differently had this case been adjudicated after *Clark*. The *Clark* and *Stechly* cases have similar facts. In both cases, the child was away from the abusive environment, a mandatory reporter questioned that child, and the reporter informed authorities immediately after questioning. On the other hand, *Stechly* could be distinguished from *Clark*, as the hospital administrators called the police, but the teachers in *Clark* called social services. Despite this small difference, *Stechly* and *Clark* have very similar fact patterns. If *Clark* had been adjudicated first, the statements in *Stechly* would have likely been encompassed in the expanded ongoing emergency doctrine, making the statements non-testimonial.[189]

The Supreme Court expressed that statements made to mandatory reporters, standing alone, are insufficient to create testimonial statements.[190]

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183. State v. Arnold, 933 N.E.2d 775, 791 (Ohio 2010) (Pfeifer, J., dissenting) (citing at least nine other state supreme court decisions where third-party interviews were considered testimonial because of police influences when interviewing child abuse victims).

184. *See Esparza*, 791 F.3d 1067 at 1073.

185. 870 N.E.2d 333 (Ill. 2007).

186. *Id.* at 365.

187. *Id.*

188. *Id.*

189. *See* discussion *infra* Part. III.B.4 (discussing the expansion of the ongoing emergency exception).

190. Ohio v. Clark, 135 S. Ct. 2173, 2183 (2015).

However, when considering *Clark*'s similarity with *Stechly* and the minimal law enforcement influence in *Esparaza*—enough for the court to consider the statement in *Esparaza* as testimonial—the involvement of law enforcement appears necessary to identify statements as testimonial while other factors are merely sufficient.

This outcome is problematic, considering that the lower courts are receiving mixed messages. The Court presents the test as one that depends on surrounding circumstances; in application, however, the test appears to be a bright-line rule.[191] Lower courts have effectively been told that it is still possible for statements to third parties to be testimonial, but these courts are required to work under a framework that renders third-party statements non-testimonial without law enforcement involvement. This sounds more like a clear exception to a general rule that statements to third parties are not testimonial. Ultimately, this makes the analysis clumsy and unclear for lower courts to follow.

### *B. Inconsistencies of* Ohio v. Clark *with Previous Rulings and Questions Left Open*

The Court's decision in *Clark* contains some inconsistencies with its previous decisions, considering the holding did not explicitly overrule or abrogate any previous cases. The Court seems to implicitly do away with the objective witness and formalized statement tests, and its treatment of mandatory reporters seems to ignore the implications surrounding their legal obligation. Also, the focus of the primary purpose test has shifted to the interrogators, and the expansion of ongoing emergency exception appears unchecked or at best undeterminable until the Supreme Court rules on the facts of a particular case. These changes are inconsistent with previous rulings and do not provide the lower courts with a clear standard to apply.

#### *1. Loss of the Objective Witness and Formalized Statement Tests*

The *Clark* decision implies that aspects of *Crawford* and subsequent cases interpreting the Confrontation Clause are irrelevant when determining the testimonial value of certain hearsay statements. Most prominently, the Court's statement that the natural tendency of the teachers' questioning and the reporting of the abuse is irrelevant appears to remove the objective witness test and formalized statement test from the analysis.[192] Moreover, the Court

191. *Id.* at 2180.

192. *Compare Clark*, 135 S. Ct. at 2183 (using the phrase "natural tendency" tends to indicate that a reasonable belief in the statement being used for a later

states that the ultimate question is "whether in light of all the circumstances viewed objectively" the primary purpose of the "conversation" was to create a substitute for trial testimony.[193] This language appears to fuse the primary purpose and objective witness test; however, the focus is still on the primary purpose of the declarant.

Even with the added language of the circumstances viewed objectively, this blending of the tests effectively renders the objective witness test irrelevant, as the analysis only focuses on the purpose of conversation, not on whether the circumstances would lead an objective witness to believe the statements would be used at trial.[194] This outcome is inconsistent with previous rulings where each test had its own distinct language, separate from one another.[195] Now, the primary purpose test effectively stands alone with the objective witness and formalized statement tests blended into it. However, the primary purpose test's original scope did not fully overlap with the objective witness or formalized statement test. This limits the courts' ability to determine testimonial value without expanding the primary purpose test to encompass new situations. The wording of the primary purpose test was only meant to cover situations where the purpose of the declaration was to establish or prove a fact.[196] By expanding the primary purpose test to situations that the objective witness test may have previously covered, the Court created a more generalized rule that will not exclude statements that would have previously been excluded from evidence. This expansion moves outside the normal plain reading of the test. One court even went so far as to say that the ultimate question in determining if a statement is testimonial is whether, in light of all circumstances, viewed objectively, the "primary purpose" of the conversation was to "creat[e] an

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trial would be present), *with* United States v. Gaudin, 515 U.S. 506, 509 (1995) (stating that a statement is "material" if it has a "natural tendency" to influence or is capable of influencing the decision of the decision-making body addressed).

193. *Clark*, 135 S. Ct. at 2180.

194. *See supra* Part I.C.1, Part I.C.2 for a discussion of the primary purpose and objective witness tests.

195. *See, e.g.*, Davis v. Washington, 547 U.S. 813 (2006) (using the primary purpose test only); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (using both the formalized statement and objective witness tests but keeping the tests separated); Bullcoming v. New Mexico, 564 U.S. 647 (2011) (using the formalized statement test only).

196. *See* Crawford v. Washington, 541 U.S. 36, 52 (2004) (presenting three core class examples of testimonial statements implying that more than one type of situation exists that would create a testimonial statement) ("Various formulations of this core class of 'testimonial' statements exist.").

out-of-court substitute for trial testimony."[197] In stating that the conversation's primary purpose is the ultimate question, this court signaled that the other testimonial tests no longer play a role in the analysis after *Clark*.

The *Clark* ruling, like previous Supreme Court decisions, did not address all the tests that are available when making an evaluation of the testimonial status of out-of-court statements. The Supreme Court has used all three of the different tests at different times when making a Confrontation Clause determination. When the Court fails to rely on its own precedent, the identification of testimonial statements is hampered. The lower courts will likely read this opinion as an abrogation of the objective witness and the formalized statement tests, especially considering the language in *Clark* that stated that the natural tendency of a statement to lead to prosecution does not matter.[198] The *Clark* opinion will again lead to confusion among the lower courts, as the Supreme Court's opinions appear to conflict with one another. Overruling and phasing out these tests is contrary to the principles in *Crawford* which made a point to describe various formulations in which testimonial evidence exists.[199]

*2. Mandatory Reporters*

The Court in *Clark* stated that the fact that the teachers are mandatory reporters was "irrelevant" when analyzing the testimonial nature of L.P.'s statements, even with the acknowledgement that the duty under the statute would naturally lead to Clark's prosecution.[200] The Court previously stated that affidavits or declarations are "statements . . . made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," making the statements inadmissible without the presence of their declarant.[201] The Court erred in ignoring the significance of the connection between the teachers' statements and the resulting prosecution because this connection is relevant in classifying the statements as testimonial under prior case law.[202]

In *Stechly*, the court held that the statements made to the hospital administrators—who were subject to a similar mandatory reporting

197. Roots v. Virga, No. 13-01707, 2015 WL 4042096, at *7 (E.D. Cal. July 1, 2015) (citing Michigan v. Bryant, 562 U.S. 344, 358 (2011)).

198. *Clark*, 135 S. Ct. at 2183.

199. *Crawford*, 541 U.S. at 51.

200. *Clark*, 135 S. Ct. at 2183.

201. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009) (citing *Crawford*, 541 U.S. at 52).

202. *Clark*, 135 S. Ct. at 2183.

statute—were testimonial.[203] Although the court did not base its ruling solely on the administrators' status as mandatory reporters, the court stated that it was significant in supporting its conclusion.[204] The court observed that the interviewers, by virtue of their position, had a legal obligation under a criminal penalty to report abuse.[205] The reporters were also required to testify fully in any subsequent judicial proceedings that resulted from the abuse they reported.[206]

The *Clark* decision effectively renders a person's status as a mandatory reporter irrelevant, even though the Court stated that the rule was not categorical.[207] Although the particular reporting laws of the state may influence such a rule, the Ohio laws align with a prosecutorial focus. The Ohio Supreme Court interpreted the mandatory reporting laws of Ohio to make those obligated to report under it agents of the state.[208] Furthermore, the Ohio Supreme Court acknowledged that the primary purpose of the statute was to protect minors through the prosecution and punishment of abusers.[209] The only further, and unrealistic, step that could increase the appearance of teachers' enforcement power in Ohio would be to give them badges and guns. This expansive holding will have broad implications because the teachers in *Clark* were considered agents of the state. With such a high threshold, it becomes difficult to envision a situation where a reporter's questioning would create testimonial statements—without direct involvement of law enforcement.

Failing to consider mandatory reporters as a relevant factor when evaluating testimonial statements creates an opportunity for more statements to be admissible in court over Confrontation Clause objections. Although this opening allows the trier of fact to see and hear more evidence, it lessens the protections that the Constitution affords to defendants. Mandatory reporters must, under threat of criminal penalties, report crimes or certain suspected crimes.[210] These reports generally contain information that would be considered deeply personal and sensitive to the victim. Unless the victim is

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203. People v. Stechly, 870 N.E.2d 333, 365 (Ill. 2007).
204. *Id.*
205. *Id.*
206. *Id.*
207. *Clark*, 135 S. Ct. at 2182.
208. State v. Clark, 999 N.E.2d 592, 600 (Ohio 2013), *rev'd and remanded*, 135 S. Ct. 2173 (2015).
209. *Id.* at 596 (citing Yates v. Mansfield Bd. of Educ., 808 N.E.2d 861, 865 (Ohio 2004)) ("It is clear that the General Assembly considered identification and/or prosecution of the perpetrator to be a necessary and appropriate adjunct in providing such protection." (emphasis omitted)).
210. *Id.* at 365.

willing to testify at trial, the reports may be the only source of factual evidence of the crime. These reports, containing statements made by declarants outside of court and then introduced in court because the declarant is unavailable, serve precisely the same purpose as in-court testimony. The protections of the Confrontation Clause are meant to protect defendants from the inaccuracies of out-of-court statements and to subject statements to the crucible of cross-examination. There should not be a source of out-of-court statements where the obligation to report is present and the statements are not considered testimonial. Allowing this practice enables mandatory reports to be admissible at trial, assuming a hearsay exception is met, without a constitutional objection because the non-testimonial statements contained in the report are outside the purview of the Sixth Amendment. Although the mandatory reporter status of a declarant should not be a determinative factor, it should at least play a role in deciding whether the statement is testimonial.

Although the Supreme Court did not categorically rule out third party statements as covered by the Confrontation Clause,[211] there are essentially no situations where the statements of third parties would be testimonial without police involvement.[212] The Court has stated that mandatory reporter status, standing alone, does not cause a statement to be testimonial.[213] The Court implied that it may still be possible for statements to mandatory reporters to be considered testimonial. However, the teachers in *Clark* could not have done much more than contact child services, other than call the police. Considering the facts of *Clark*, statements to mandatory reporters are not testimonial without law enforcement influence or involvement. *Clark* has brought even more confusion to the analysis surrounding out-of-court statements.

### *3. Switching from the Purpose of the Speaker to the Purpose of the Interrogator*

Although courts previously applying the primary purpose test stated that the declarant's intentions are the main focus of the analysis and the listener's intentions play a supporting role,[214] the Court in *Clark* appears to have reversed this analysis. The Court spent a majority of the opinion focusing on the purpose behind the teacher's statements and then used L.P.'s intentions to support this argument[215]—cases like *Bryant* do the

211. *Clark*, 135 S. Ct. at 2182.
212. *See* discussion *infra* Part III.A.
213. *Clark*, 135 S. Ct. at 2183.
214. *See* discussion *supra* Part I.C.1.
215. *Clark*, 135 S. Ct. at 2181–82 ("L.P.'s age fortifies our conclusion.").

exact opposite.[216] The Court's manipulation of the primary purpose test to evaluate either the declarants' or the listeners' intentions is indicative of the unreliability of this analysis.

*4. Ongoing Emergency Has Become the Indicia of Reliability Test*

Another significant problem with the reliability of the primary purpose test as the only mechanism of evaluating the testimonial value of a statement is the dispositive ongoing emergency exception. This exception can be stretched to fit many situations especially in light of the *Clark* decision. In *Clark*, L.P. was arguably not in an imminent emergency situation because he was at school under the care of teachers and a social worker; however, he was subject to probable future harm.[217] Just like in *Hammon*, the abusive attack in *Clark* had ceased by the time the questions were asked and the statements made.[218] Applying *Clark*, the statements made in *Hammon* should have been deemed non-testimonial because the threat of abuse from the declarant's husband persisted. The police in *Hammon* also did not know whether the husband was still a threat to the wife's safety, yet her statements were considered testimonial.[219] The Supreme Court contemplated immediate threats to the potential victim when creating the ongoing emergency test, but now future or potential threats are brought into the analysis where the victim is presently in a safe environment when making statements.[220]

One of the primary goals of the *Crawford* case was to move the Confrontation Clause analysis away from a substantive test to one that is procedural.[221] Deciding whether a situation is an ongoing emergency is a substantive determination, much like the indicia of reliability test before *Crawford*. In *Crawford*, Justice Scalia expressed his concern with the substantive test in that it is inherently unreliable because of its unpredictable nature.[222] Statements become testimonial or non-testimonial based on the courts' consideration of a totality of circumstances surrounding the

216. Michigan v. Bryant, 562 U.S. 344, 369–70 (2011). In *Bryant*, the majority stressed that the declarant's statements must pass the tests of the Sixth Amendment. *Id.* The majority also stated that the inquiry still focuses on understanding the purpose of the victim and that the intent of the interrogator is merely a relevant circumstance to consider but not the focus of the test. *Id.*

217. *Clark*, 135 S. Ct. at 2178.

218. *See id.* at 2178; Davis v. Washington, 547 U.S. 813, 830 (2006).

219. *Davis*, 547 U.S. at 830.

220. *See* discussion *supra* Part I.C.1.

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

222. *See id.* at 68 n.10.

statements, which can often be manipulated to reach a desired result. When the Court stated that L.P. was still in an ongoing emergency, he was in the presence of teachers and shielded by their care.[223] L.P. was clearly not in the presence of any immediate danger, but the Court appeared to contemplate the inclusion of potential future harm to the child when evaluating an ongoing emergency within the primary purpose test.[224] This future speculative element was not present in *Hammon*, which also involved abuse.[225] The inclusion of additional factors demonstrates that courts can consider various factors to reach desired conclusions under the primary purpose test. The ongoing emergency exception is unpredictable, as the testimonial evaluation is presented as categorical but also has a substantively applied exception. Therefore, it is unreliable. The test for deciding what statements are testimonial cannot be procedurally or categorically sound if the analysis changes based upon substantive matters, such as the age and status of individuals.

Although L.P. was likely still in danger because his abuser was not in the custody of law enforcement personnel, the solution for solving the issue of child abuse does not require weakening the constitutional protections of cross-examination afforded to criminal defendants. The weakness post-*Clark* lies in the confusing and chaotic application of the current test of deciding whether a statement is testimonial. The defendants should be afforded clearer protections against out-of-court statements made by individuals the defendant has not cross-examined.

## IV. A MULTI-STEP TEST FOR DECIDING TESTIMONIAL STATEMENTS

The Supreme Court has created various ways to test whether out-of-court statements are testimonial; however, the Court has selectively applied parts of the *Crawford* decision while omitting aspects of the other tests it previously endorsed.[226] Although this is problematic for lower courts, the principles articulated by the Court in the three tests are paramount to the Confrontation Clause analysis. None of the three tests—the primary purpose test, the objective witness test, and the formality test—should be overruled completely. When evaluating whether a

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

224. *See id.*

225. *Davis*, 547 U.S. at 830.

226. *See, e.g.*, *Davis*, 547 U.S. 813 (using the primary purpose test only); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (discussing both the formalized statement and objective witness tests but not mentioning the primary purpose test); Bullcoming v. New Mexico, 564 U.S. 647 (2011) (using the formalized statement test only).

statement is testimonial, courts should apply a two-factor test based on the three tests from *Crawford* and subsequent cases. If found to be testimonial, then the statement is inadmissible without the presence of the declarant in court or a prior opportunity to cross-examine the declarant.

In order to be considered non-testimonial, the statement must pass two factors. First, the primary purpose of the listener or the declarant must be evaluated, depending on the situation. If the statement was given for the purpose of an investigation, the analysis ends because the statement is testimonial. This statement is barred unless the declarant is present in court or the defendant was given a prior opportunity to cross-examine the declarant. Second, if the statement was given for a non-testimonial primary purpose, the court must then evaluate whether the statement would have a natural tendency to lead to prosecution. If the statement has a natural tendency to lead to prosecution, it will be deemed testimonial. If the statement does not have a natural tendency to lead to prosecution, the court may consider the statement to be non-testimonial and thus admissible, if allowed under the hearsay doctrine.

*A. Primary Purpose of the Statements*

One of the main problems with the primary purpose test is mixing the intentions of the interrogator and declarant.[227] An easier and more effective method of analyzing the primary purpose would be to analyze the relevant person's intent in isolation. If the declarant offers the statement voluntarily without any elicitation, then the primary purpose of the declarant must be evaluated. This follows the logic set forth by Justice Scalia in his dissent in *Bryant*.[228] Since the declarant's statement is being entered into trial, his or her intention to offer or not offer that statement as a substitute for live testimony in court gives the statement its testimonial value. The majority in *Bryant*[229] made an accurate observation that the listener's—or interrogator's—purpose also matters. The Court made the mistake, however, of evaluating the intentions of the listener together with the intentions of the declarant.[230] These intentions should be analyzed in isolation. The analysis will focus on either the listener or interrogator, depending on the circumstances, but not both.

If the declarant is being actively questioned—where the statements are elicited in some way—the questioner's primary purpose should be

227. 562 U.S. 344, 383 (2011) (Scalia, J., dissenting) ("[A]dding in the mixed motives of the police only compounds the problem.").

228. *See* discussion *supra* Part I.C.1.a.

229. *See* discussion *supra* Part I.C.1.a.

230. *See* discussion *supra* Part I.C.1.a.

evaluated, rather than the declarant's purpose. This shift should occur because the statement's utterance is due to the direct interaction with the interrogator, rather than on the declarant's own accord. The interrogator's motivation should then take priority in the evaluation. By looking at the interrogator's purpose, separate from the declarant's purpose, and prioritizing it under certain circumstances, a clearer analysis can be achieved. However, there are additional factors pertinent to the primary purpose analysis. The formality of the questioning should be considered as well as the identity of the listener in order to determine the primary purpose. Whether an ongoing emergency exists should be considered only when medical personnel are involved in the solicitation of statements.

*1. Formality*

The Supreme Court has stated that formality is essential to testimonial utterances.[231] Considering whether the statement was given under certain formal processes aids in determining which statements are testimonial, because it separates casual conversations from interrogations. The common mistake of courts is to give the situation too much weight and ignore other circumstances surrounding the questioning.[232] The goal of this evaluation is to distinguish casual conversations from interrogations.[233] The type of formality that would lead to testimonial statements generally involves an investigative environment with structured questions or a courtroom setting.[234] For example, an investigative environment could exist when a private employer sits with an employee to conduct an investigation of a violation in the workplace that may also carry possible criminal sanctions if reported to authorities. Contextual factors to be considered under the formality analysis should include: whether an

231. *Davis*, 547 U.S. at 830 n.5; *see also* Joëlle Anne Moreno, *Finding Nino: Justice Scalia's Confrontation Clause Legacy from its (Glorious) Beginning to (Bitter) End*, 44 AKRON L. REV. 1211, 1230 (2011).

232. Friedman, *supra* note 16, at 567 ("Some lower courts took this language for more than it was worth, by treating formality as a prerequisite for a statement to be considered testimonial.").

233. *See, e.g.*, United States v. Smalls, 605 F.3d 765, 783 (10th Cir. 2010) (holding that the casual conversation between prisoners was not testimonial); United States v. Saget, 377 F.3d 223, 229 (2d Cir.), *supp'd*, 108 Fed. Appx. 667 (2d Cir. 2004) (ruling that statements made to a confidential informant connected to investigators was not testimonial because the speaker believed he was having a casual conversation). The formality of the police station should always be an indicator when evaluating the statements of an absent declarant to decide their testimonial value. Crawford v. Washington, 541 U.S. 36, 52 (2004).

234. *See Saget*, 377 F.3d at 228.

investigation is ongoing, whether the witness knows of pending litigation, and whether the witness is in a particular position to know that litigation will likely follow the elicitation of the statement.

*2. Ongoing Emergency*

*Clark*'s application creates a broad ongoing emergency rule that encompasses a wide range of criminal situations. The discretionary application of the rule with its ability to define statements as non-testimonial justifies diminishing the effect of an ongoing emergency. When the ongoing emergency doctrine was first introduced in *Bryant*, the Court stressed that an ongoing emergency was important, but that it was just one factor to evaluate when deciding if a statement was testimonial.[235] The Confrontation Clause is rooted in concerns over the crucible of cross-examination, not the crucible of an ongoing emergency.

The Supreme Court has stated that the existence of an ongoing emergency is relevant because statements are given to receive medical attention or other help, not to prove the existence of past events in a criminal trial.[236] The Court, however, has applied the ongoing emergency exception to statements elicited by law enforcement whose primary mission is aimed at gathering evidence for prosecution.[237] Therefore, the ongoing emergency doctrine should be applied to non-law enforcement personnel, especially those who are primarily charged with rendering medical assistance.

Most medical personnel are bound by rules that require the mandatory reporting of certain injuries and situations.[238] In an emergency situation, medical personnel are operating with the primary intention of saving someone's life, and while the possible report to the police of a gunshot wound may eventually lead to the arrest of the individual, medical personnel create the report for an entirely different purpose—to treat injuries and to save lives. However, when the patient is stable and no longer in a state of an emergency, questions that aim to reveal details related to a perpetrator's past crime have an investigative air, and thus statements are testimonial. The ongoing emergency exception should

235. Mark S. Coven & James F. Comerford, *What's Going On? The Right to Confrontation*, 45 SUFFOLK U. L. REV. 269, 275–76 (2012).

236. Robert H. Humphrey & Kimberly A. Petta, *6th Amendment's Confrontation Clause Evolution*, 61 R.I.B.J. 5, 7 (2013) (citing Michigan v. Bryant, 562 U.S. 344, 361 (2011)).

237. *See* Ohio v. Clark, 135 S. Ct. 2173, 2183 (2015).

238. *See, e.g.*, DEL. CODE ANN. tit. 24, § 1762 (West 2016); WASH. REV. CODE ANN. § 18.73.270 (West 2016).

therefore encompass situations of imminent harm and active medical diagnosis, not expansive probable situations. The presence of an actual emergency when the statements are elicited justifies the existence of an ongoing emergency exception.

### *B. Natural Tendency to Lead to Prosecution*

If the statement has a non-testimonial purpose, only then should the court consider the second factor: whether the statement has a natural tendency to lead to prosecution. This factor combines both the objective witness test and the formalized statement test. Although the Supreme Court in *Clark* found that the teachers' duty to report abuse to a child abuse hotline was irrelevant, even when it had a "natural tendency" to lead to prosecution,[239] consideration of a statement's tendency to lead to prosecution is rooted in language from *Crawford*. In *Crawford*, the Court found it was important to consider the formality of statements and whether an objective witness would believe the statements could be used for trial; this analysis is analogous to asking whether the statements had a natural tendency to lead to prosecution.[240] Formalized statements carry, by their nature, a likelihood to lead to prosecution. The signing of an affidavit or the sworn testimony given in a deposition inherently alerts the declarant that statements are extracted for the purpose of future litigation. Furthermore, asking whether an objective witness believes statements could be used for trial is essentially the same as asking whether the statements had a natural tendency to lead to prosecution.

Combining the objective witness test and the formalized statement test under the "natural tendency" question provides clear guidance for when courts should deem statements testimonial. The natural tendency factor is broad enough to encompass new situations that the courts may encounter, yet narrow enough to prevent classifying every statement as testimonial.

## CONCLUSION

The United States Supreme Court has a storied history in deciphering the extent of the protections the Confrontation Clause provides to criminal defendants. The interpretation of which out-of-court statements should enter into evidence when the original declarant is not in court has evolved as the Court has continued to search for the correct interpretation. Although the *Crawford* decision may have started the courts on the correct path, subsequent decisions have caused lower courts to veer in different

239. *Clark*, 135 S. Ct. at 2177.

240. Crawford v. Washington, 541 U.S. 36, 51–52 (2004); *Clark*, 135 S. Ct. at 2183.

directions. *Ohio v. Clark* was no exception and raised more questions than answers in classifying statements as testimonial. *Clark* deviated from previous rulings by isolating the primary purpose test as the sole test to use when evaluating testimonial statements.[241] Standing alone, the primary purpose test is too limited to evaluate testimonial nature, and with its expansion, it has become substantive in its use rather than procedural. Instead, courts should consolidate the *Crawford* principles into a two-factor test that considers the primary purpose of the declarant or interrogator and whether the statement has a natural tendency to lead to prosecution. This test provides a clearer analysis that uses established jurisprudence and requires less arbitrary, unreliable decision-making.

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241. *Clark*, 135 S. Ct. at 2180.

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