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Eun Jin Kim  
*University of Texas*

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# OHIO V. CLARK: THE PRIMARY PURPOSE OF THE MANDATORY REPORTING PROVISIONS & CHILD TESTIMONIAL STATEMENT IN RELATION TO THE CONFRONTATION CLAUSE

*Eun Jin Kim*

## 1. INTRODUCTION

The Confrontation Clause of the Sixth Amendment to the United States Constitution states: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]”<sup>1</sup> Under the pre-*Crawford* rubric of *Ohio v. Roberts*, the United States Supreme Court interpreted the Confrontation Clause to admit a hearsay statement made by an unavailable witness if the statement bore “adequate ‘indicia of reliability.’”<sup>2</sup> In other words, the Court required the out-of-court statement to either “fall[] within a firmly rooted hearsay exception” or contain “particularized guarantees of trustworthiness.”<sup>3</sup>

In 2004, the Supreme Court radically changed its approach to the Clause and overruled the *Roberts* substance-based test.<sup>4</sup> In *Crawford v. Washington*, the Court declared that “the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rath-

er than a substantive guarantee.”<sup>5</sup> The *Roberts* substance-based test allowed a jury to hear an out-of-court statement once a court determined that it was reliable regardless of whether there had been a prior opportunity for cross examination of the witness offering testimony as to the statement.<sup>6</sup> In contrast, the *Crawford* procedure-based test prohibits the admission of a testimonial hearsay statement by a nontestifying witness, unless the witness is unavailable, and a defendant had a prior opportunity to cross-examine the witness.<sup>7</sup> Thus, the *Crawford* test acts irrespective of the statement’s indicia of reliability.

Not all hearsay statements are subject to the Confrontation Clause, but a testimonial statement is subject to the Confrontation Clause.<sup>8</sup> In *Crawford*, although the Court defined “testimony” as “a solemn declaration or affirmation made for the purpose of establishing or proving some fact[.]”<sup>9</sup> it failed to provide a comprehensive definition of a testimonial statement.<sup>10</sup> Two years after *Crawford*, in *Davis*

<sup>1</sup> U.S. Const. amend. VI.

<sup>2</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>3</sup> *Id.*; see also *Lilly v. Virginia*, 527 U.S. 116, 124–25 (1999) (plurality opinion) (citing *Roberts*, 448 U.S. at 66) (“[I]t contains ‘particularized guarantees of trustworthiness’ such that adversarial testing would be expected to add little, if anything, to the statements’ reliability.”); Ann Hetherwick Pumphrey, *Admissibility of Hearsay Statements to Police: Davis v. Washington and Hammon v. Indiana*, *Boston B.J.* 17 (2006) (stating that “the excited utterance exception generally used in domestic violence cases” could be an example of a firmly rooted hearsay exception”).

<sup>4</sup> See *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

<sup>5</sup> *Crawford v. Washington*, 541 U.S. at 61.

<sup>6</sup> Compare *Ohio v. Roberts*, 448 U.S. at 56, with *Crawford v. Washington*, 541 U.S. at 53.

<sup>7</sup> *Id.*

<sup>8</sup> *Crawford v. Washington*, 541 U.S. at 51.

<sup>9</sup> *Id.* (citation omitted).

<sup>10</sup> *Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015) (“Our decision in *Crawford* did not offer an exhaustive definition of “testimonial” statements. Instead, *Crawford* stated that the label “applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”).



*v. Washington* and *Hammon v. Indiana*, the Supreme Court set forth the primary purpose test to further elucidate what it means for a statement to be labeled “testimonial.”<sup>11</sup> The Court explained:

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>12</sup>

The primary purpose test applies solely to a statement given to law enforcement officers; the Supreme Court remained silent on the issue of a similar statement offered to individuals who are not law enforcement officers until its 2015 decision in *Ohio v. Clark*.<sup>13</sup> Moreover, even though the Court had previously attempted to further clarify the primary purpose test by requiring consideration of “all of the relevant circumstances,” it had not explicitly addressed the matter of a declarant’s age in determining a testimonial statement until *Ohio v. Clark*.<sup>14</sup>

The significance of *Ohio v. Clark* is that it clarifies, for the first time, how to consider the primary purpose of a non-law enforcement individual who receives a statement and the age of a victim who made the statement when evaluating a challenged statement.<sup>15</sup> This article first explores *Ohio v. Clark* in light of its background and the Court’s legal analysis. Next, it discusses why *Ohio v. Clark* renders itself significant on the issue of the principal purpose of a non-law enforcement individual’s interview with a child victim, and recommends a possible way to determine a non-law enforcement individual’s purpose in a given interview and assistance provided to a child victim. It then describes what social science research has told us about how a victim’s age affects his or her cognitive and perceptive abilities.

## 2. OHIO V. CLARK

### 2.1. Factual and Procedural Background

Darius Clark lived with his girlfriend who was a mother of two: her three-year-old son, L.P., and her eighteen-month-old daughter, A.T.<sup>16</sup> When his girlfriend went out of state to work as a prostitute, Clark agreed to care for L.P. and A.T.<sup>17</sup>

In March 2010, when the two children were in Clark’s care, one of L.P.’s preschool teachers noticed that his eye was “bloodshot.”<sup>18</sup> When she questioned him about his blood-stained eye, L.P. told his teacher that he fell.<sup>19</sup> When they moved from the lunchroom to a classroom which had better lights, the teach-

<sup>11</sup> See *Davis v. Washington*, 547 U.S. 813 (2006).

<sup>12</sup> *Davis v. Washington*, 547 U.S. at 822.

<sup>13</sup> See *Davis v. Washington*, 547 U.S. 813 (2006); *Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015) (noting that because prior cases involved statements to law enforcement officers, the Court “reserved the question whether similar statements to individuals other than law enforcement officers would raise similar issues under the Confrontation Clause”).

<sup>14</sup> *Michigan v. Bryant*, 562 U.S. 344, 369 (2011).

<sup>15</sup> *Ohio v. Clark*, 135 S. Ct. at 2081–82.

<sup>16</sup> *Id.* at 2178.

<sup>17</sup> *Id.* at 2177–78.

<sup>18</sup> *Id.* at 2178.

<sup>19</sup> *Id.*



er found additional “red marks” on L.P.’s face.<sup>20</sup> After being notified by the teacher, the lead teacher asked L.P. who did it and what happened to him.<sup>21</sup> L.P. replied: “Dee, Dee.”<sup>22</sup> “Dee” turned out to be a nickname by which Clark went.<sup>23</sup> The lead teacher took L.P. to her supervisor.<sup>24</sup> When the supervisor found more bruises and other injuries on L.P.’s body, they called a child abuse hotline to report to authorities the possibility of abuse.<sup>25</sup>

Later, Clark arrived at the preschool to pick up L.P.<sup>26</sup> He denied responsibility of the bruises and injuries on the boy’s body.<sup>27</sup> On further investigation, a social worker took both of Clark’s girlfriend’s children to a hospital where a physician discovered more injuries not only on L.P. but also on his sister.<sup>28</sup>

Before trial, L.P. was ruled incompetent to testify due to his age.<sup>29</sup> Under Ohio law, a witness under ten years old is generally barred from testifying if he or she “appear[s] incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.”<sup>30</sup> In other words, L.P. would be prohibited from testifying unless he showed that he was able to understand the difference between truth and falsity and appreciate his responsibility to be truthful.<sup>31</sup>

At trial, the judge decided that L.P. was not competent to testify. But one of the hearsay exceptions under Ohio Rule of Evidence allows the admission of a child’s out-of-court statement in an abuse case.<sup>32</sup> Consequently, over the defense attorney’s objection, the judge allowed the State to introduce testimony from the teachers who had talked with L.P. and heard his statements about the alleged abuse by Clark.<sup>33</sup>

Clark moved to exclude this evidence under the Confrontation Clause, but the court denied his motion on the ground that L.P.’s hearsay statements were not testimonial and so were not covered by the Clause.<sup>34</sup> The jury found Clark guilty and sentenced him to twenty-eight years’ imprisonment.<sup>35</sup> The state appellate court reversed his conviction on the ground that L.P.’s hearsay statements were testimonial and thus covered by the Sixth Amendment.<sup>36</sup> The Supreme Court of Ohio affirmed.<sup>37</sup> It held that there was no ongoing emergency, and that under the state mandatory reporting law, the teachers were acting as agents of law enforcement.<sup>38</sup> Thus, the court found their primary purpose of questioning was “gather[ing] evidence potentially relevant to a subsequent criminal prosecution.”<sup>39</sup> In reaching its conclusion on the issue of whether this was a testimo-

must consider in determining whether a child witness under ten is competent to testify: “the child’s ability to receive accurate impressions of fact,” “the child’s ability to recollect those impressions,” “the child’s ability to communicate what was observed,” the child’s ability to understand “truth and falsity,” and “the child’s appreciation of his or her responsibility to be truthful”).

<sup>32</sup> See *Ohio v. Clark*, 135 S. Ct. at 2178; OHIO R. EVID. 807.

<sup>33</sup> *Ohio v. Clark*, 135 S. Ct. at 2178.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *State v. Clark*, 137 Ohio St. 3d 346, 347 (Ohio 2013).

<sup>39</sup> *Id.* at 350.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Ohio v. Clark*, 135 S. Ct. at 2177–78.

<sup>24</sup> *Id.* at 2178.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (stating that the boy had “a black eye, belt marks on his back and stomach, and bruises all over his body”; the girl had “two black eyes, a swollen hand, and a large burn on her cheek, and two pigtails had been ripped out at the roots of her hair”).

<sup>29</sup> *Id.*

<sup>30</sup> Ohio R. Evid. 601(A) (Lexis 2015).

<sup>31</sup> See generally *State v. Frazier*, 61 Ohio St. 3d 247, 251 (Ohio 1991) (enumerating five factors that a trial court



nial statement, the court did not consider or mention L.P.'s age and his primary purpose of revealing the abuser's name.<sup>40</sup>

## 2.2. Legal Analysis

The United States Supreme Court held that the trial court's decision to allow the admission of L.P.'s out-of-court statements did not violate the Confrontation Clause.<sup>41</sup> In rendering its judgment under the primary purpose test, the Court considered five factors to determine "whether statements to persons other than law enforcement officers are subject to the Confrontation Clause."<sup>42</sup> In this section, all of the five factors are discussed in the order the Court considered them in its opinion.<sup>43</sup> Following a brief analysis of the five factors, the next two sections offer an in-depth examination of the fifth and third factors, successively.

First of all, the Court concluded that L.P.'s statements were made in the context of an ongoing emergency implicating suspected child abuse.<sup>44</sup> Unlike the Supreme Court of Ohio, which found that there was no ongoing emergency because L.P. did not complain about his injuries, and the nature of the teachers' questions suggested a purpose to establish facts of potential child abusive activities and to identify the abuser, the Court pointed out several facts of the case to explain why it found the existence of the ongoing emergency at the time of L.P.'s statements.<sup>45</sup> The Court said that the teachers' "immediate concern was to protect a vulnerable child" in that they were not

certain if it would be safe to release the boy to Clark, his guardian, at the end of the day; the circumstances were not clear to the teachers; and the teachers' inquiries were meant to identify the abuser to protect L.P. from future attacks.<sup>46</sup> Accordingly, the Court found that the boy's statements were offered in the context of the ongoing emergency.

Second, the Court brought attention to the nature of the conversation between L.P. and his teachers, which was "informal and spontaneous."<sup>47</sup> The Court stated that his teachers queried L.P. about his injuries in the preschool lunchroom and classroom but not in a place like a "formalized station-house."<sup>48</sup> The Court also pointed out that the teachers "did so precisely as any concerned citizen would talk to a child who might be the victim of abuse."<sup>49</sup> Therefore, the nature of the conversation in this case implied that it was held informally rather than formally.<sup>50</sup>

Third, while the Supreme Court of Ohio did not take L.P.'s age into account, the United States Supreme Court viewed L.P.'s age as an indication that neither L.P. nor his teachers had the primary purpose of establishing evidence for the prosecution.<sup>51</sup> Because few preschool students like L.P. appreciate "the details of [the] criminal justice system," the Court found that a three-year-old boy in L.P.'s situation would

<sup>40</sup> See *id.* (never mentioning L.P.'s age in its analysis of the case).

<sup>41</sup> *Ohio v. Clark*, 135 S. Ct. at 2183.

<sup>42</sup> *Id.* at 2181.

<sup>43</sup> See *Id.* at 2181–82.

<sup>44</sup> *Id.* at 2181.

<sup>45</sup> Compare *State v. Clark*, 137 Ohio St. 3d at 352, with *Ohio v. Clark*, 135 S. Ct. at 2181.

<sup>46</sup> *Ohio v. Clark*, 135 S. Ct. at 2181.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Compare *State v. Clark*, 137 Ohio St. 3d at 349–55 (finding that the teachers were acting as agents of law enforcement and that there was lack of an ongoing emergency to support its conclusion that L.P.'s statements were testimonial), with *Ohio v. Clark*, 135 S. Ct. at 2181–82 (2015).



have not intended his answers to his teachers to be “a substitute for trial testimony.”<sup>52</sup>

Fourth, the Court cited common law history.<sup>53</sup> It referred to eighteenth century London, where courts “tolerated flagrant hearsay . . . involving a child victim who was not competent to testify because she was too young to appreciate the significance of her oath.”<sup>54</sup> Because the Court has recognized that the Confrontation Clause does not bar the admission of out-of-court statements that would have been admissible in a criminal case “at the time of the founding,” L.P.’s statements were not prohibited by the Sixth Amendment.<sup>55</sup>

The Court finally gave some guidance to lower courts on the issue of a statement provided to individuals who are not law enforcement officers.<sup>56</sup> The Court ruled that although it would not adopt a categorical rule on this matter, it believed that the identity of the questioner and the relationship between people involved in the challenged conversation is important.<sup>57</sup> Moreover, the Court stated that statements offered to a person who does not have a principal duty to discover potential criminal acts are “significantly less likely to be testimonial than statements given to law enforcement officers.”<sup>58</sup> Hence, as the relationship between L.P. and the questioners was that of student-and-teacher, the Court found that the introduction of L.P.’s hearsay statements into evidence did not violate the Confrontation Clause.<sup>59</sup>

### 3. NON-LAW ENFORCEMENT OFFICIALS WHO HAVE A STATUTORY DUTY TO REPORT<sup>60</sup>

When assessing challenged statements in context, the Supreme Court stated that “part of context is the questioner’s identity,” and concluded that L.P. and the questioners’ rela-

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<sup>60</sup> See generally *Michigan v. Bryant*, 131 S. Ct. 1143, 1162 (2011). (noting that the primary purpose test implicates not only the declarant’s primary purpose in making statements but also the questioner’s primary purpose in asking the declarant queries). The Court admitted that its approach was somewhat complicated, however, the Court justified the complexity of its approach as necessitated by its unwillingness “to sacrifice accuracy for simplicity.” *Id.* Therefore, from the Court’s perspective, in order to enhance the accuracy of the primary purpose assessment, “consulting all relevant information, including the statements and actions of interrogators” is necessary. *Id.* But see *Id.* at 1170 (Scalia, J., dissenting) (stating that “[t]he only virtue of the Court’s approach . . . is that it leaves judges free to reach the ‘fairest’ result under the totality of the circumstances”). Justice Scalia also criticized the majority holding, noting that “[i]f the defendant ‘deserves’ to go to jail, then a court can focus on whatever perspective is necessary to declare damning hearsay nontestimonial. And when all else fails, a court can mix and match perspectives to reach its desired outcome.” *Id.* In *Crawford*, the Court defined a testimonial statement as “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford v. Washington*, 541 U.S. 36, 51. A prima facie reading of the Court’s definition demonstrates that the purpose at issue is that of the individual who made the statement. The author agrees in part with the majority and in part with Justice Scalia. The author believes that because the statement is made by the declarant, his or her primary purpose should be given greater weight than that of the questioner. Nevertheless, the primary purpose of the questioner must be considered in determining the motive of the declarant since the primary purpose test requires consideration of all of the relevant circumstances. Stated differently, the fundamental difference between the Court’s determination of whether a statement is testimonial and that proposed by the author is that under the Court’s approach, the primary purpose of both the declarant and questioner/listener should be considered, and in deciding their primary purpose all the relevant circumstances must be examined, whereas the author’s view is that the declarant’s primary purpose must be weighed more heavily than others and in deciding his or her primary purpose, all the relevant circumstances including the questioner/listener’s primary purpose should be assessed

<sup>52</sup> *Ohio v. Clark*, 135 S. Ct. at 2182.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (citation omitted).

<sup>55</sup> *Id.* at 2176.

<sup>56</sup> See *Id.* at 2182.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See *Id.* (explaining that the identity of the questioner and a student-teacher relationship should be considered as one of the circumstantial factors in determining the primary purpose of the conversation).



tionship was that of a student-and-teacher.<sup>61</sup> In other words, in contrast to a law enforcement officer, a teacher making queries of her student does not have a principal duty to discover and prosecute criminal acts, especially when there was an ongoing emergency and an urgent concern to protect a vulnerable child.<sup>62</sup>

In this evaluation, the Court discussed the teacher's mandatory reporting obligation briefly in rebutting Clark's argument that under Ohio law ("the Safe Havens Law"), the teachers had a duty to report suspected abuse to appropriate authorities, which in turn made them act as agents of state law enforcement, so they should be treated like the police.<sup>63</sup> Clark's position was accepted by the Supreme Court of Ohio:

At the time [the teacher] questioned L.P., she acted as an agent of the state for purposes of law enforcement because at a minimum, teachers act in at least a dual capacity, fulfilling their obligations both as instructors and also as state agents to report suspected child abuse pursuant to [the Safe Havens Law], which exposes them to liability if they fail to fulfill this mandatory duty.<sup>64</sup>

However, the United States Supreme Court ultimately reversed the decision of Ohio's highest court by stating that "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution."<sup>65</sup>

The Court's ruling concurs with the legislative intent of all state statutes that impose a mandatory reporting duty upon certain individuals—professionals and/or other persons—who are not law enforcement officers.<sup>66</sup> None of the fifty states' laws describe the primary policy of mandatory obligation as criminal prosecution; indeed, the purpose of mandatory reporting statutes is and should be considered *child protection*.<sup>67</sup>

Although the Court did not explicitly discuss a legislative scheme of the Safe Havens Law in its decision, looking at the legislative intent would be one of the important ways to address an issue of a testimonial statement under the Confrontation Clause. This approach is consistent with the Court's 2009 decision of *Melendez-Diaz v. Massachusetts*.<sup>68</sup> In *Melendez-Diaz*, the Court held that affidavits of a state laboratory analyst who did not testify at a drug trial violated the accused's right under the Sixth Amendment to confront the witnesses against him in that under the state law "the *sole purpose* of the affidavits was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance."<sup>69</sup> Therefore,

<sup>61</sup> Ohio v. Clark, 135 S. Ct. at 2182.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 2182–83.

<sup>64</sup> State v. Clark, 999 N.E.2d 592, 594 (Oh. 2013). Ohio law requires professionals including teachers and school authorities to report suspected child abuse and neglect to the public children services agency, a municipal, or county peace officer when he or she knows or suspects that a child has suffered mental or physical injury that reasonably indicates abuse or neglect of the child. OHIO REV. CODE ANN. § 2151.421.

<sup>65</sup> Ohio v. Clark, 135 S. Ct. at 2183.

<sup>66</sup> See *infra* notes 75, 80, and text accompanying notes 87–88.

<sup>67</sup> See *infra* notes 75, 80, and text accompanying notes 87–88.

<sup>68</sup> See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009).

<sup>69</sup> *Id.* (citation omitted).



the Court, in *Melendez-Diaz*, explicitly considered and respected the legislative scheme of the state statute in addressing the testimonial nature of challenged statements, in that case an affidavit, under the Confrontation Clause.<sup>70</sup>

As the Court has previously recognized, a legislative policy behind mandatory reporting statutes can serve a crucial role in determining whether an out-of-court statement made pursuant to a state statute is testimonial. Thus, an in-depth analysis of each state law that mandates either professionals or the general public to report suspected child maltreatment is highly relevant in determining whether the purpose of questions made by a teacher is to investigate and gather evidence for prosecution.

All fifty states have adopted mandatory reporting statutes imposing a duty on certain individuals to report possible child abuse to appropriate state authorities if they suspect or have reason to believe that a child has been abused or neglected.<sup>71</sup> Although these statutes vary in who has such an obligation,<sup>72</sup> in the types of state authorities which receive the report and take appropriate action, in procedures as to the time to report and the disclosure of the

reporter's identity,<sup>73</sup> and in standards of making a report such as reporter's suspicion of, knowledge of, or actual observation of latent child abuse,<sup>74</sup> they all share, explicitly or implicitly, the legislative policy of protecting maltreated children.<sup>75</sup> The mandatory reporting statutes of the fifty states can be divided into three categories: (1) states whose explicit primary concern is to protect a child's health, safety, and welfare, (2) states that place child's protection as one of many purposes of the statute, and (3) states which do not explicitly declare their policy.<sup>76</sup>

First, there are twenty-one states that articulate the paramount concern and primary legislative intent of their mandatory reporting statutes as protecting "children whose health and welfare may be adversely affected through abuse and neglect."<sup>77</sup> Like *Ohio v. Clark*, when

<sup>73</sup> See CHILD WELFARE INFORMATION GATEWAY, *supra* note 71, at 4 (explaining that "[a]ll jurisdictions have provisions in statute to maintain the confidentiality of abuse and neglect record," but only thirty-nine states specifically protect the identity of the reporters). Compare ALA. CODE § 26-14-3 and TEX. FAM. CODE § 261.101 (in general, a child abuse mandatory reporting statute requires an immediate report to appropriate authorities), with IDAHO CODE § 16-1605 and VT. ANN. STAT. Tit. 33, § 4911 (requiring a report within twenty-four hours).

<sup>74</sup> See *Child Welfare Information Gateway*, *supra* note 71 at 3.

<sup>75</sup> See *infra* notes 77?, 80, and text accompanying notes 87–88.

<sup>76</sup> See *infra* notes 77?, 80, 87–88.

<sup>77</sup> ALA. CODE § 26-14-2; see also CAL. PEN. CODE § 11164(b) ("The intent and purpose of this article is to protect children from abuse and neglect."); COLO. REV. STAT. § 19-3-302 ("[I]t is the intent of the general assembly to protect the best interests of children of this state and to offer protective services in order to prevent any further harm to a child suffering from abuse."); DEL. CODE ANN. tit. 16, § 901 ("The child welfare policy of this State shall serve to advance the best interests and secure the safety of the child, while preserving the family unit whenever the safety of the child is not jeopardized."); IDAHO CODE § 16-1601 ("At all times the health and safety of the child shall be the primary concern."); IOWA CODE § 232.67 ("It is purpose and policy . . . to provide the greatest possible protection to victims or potential victims of abuse through encouraging the

<sup>70</sup> *Id.*

<sup>71</sup> CHILD WELFARE INFORMATION GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (2014) [hereinafter CHILD WELFARE INFORMATION GATEWAY], <https://www.childwelfare.gov/pubPDFs/manda.pdf> (stating that "[a]ll states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have statutes identifying persons who are required to report suspected child maltreatment . . ." For the purpose of this article, fifty states' statutes are discussed).

<sup>72</sup> See CHILD WELFARE INFORMATION GATEWAY, *supra* note 71 at 1–2 (noting that eighteen states require "any person" to report possible child abuse whereas forty-eight states mandate certain groups of professionals such as social workers, teachers, physicians, or commercial film or photograph processors to report).





the issue is whether a hearsay statement is sub-

increased reporting of suspected cases of abuse . . . .”); KAN. STAT. ANN. § 38-2201(b) (“The code shall be liberally construed to carry out the policies of the state which are to [c]onsider the safety and welfare of a child to be paramount in all proceedings under the code . . . .”); KY. REV. STAT. ANN. §§ 610.101, 620.010 (“The Commonwealth shall direct its efforts to promoting protection of children”); LA. CHILD’S CODE ART. 601 (“The purpose of this Title is to protect children . . . .” and [t]his Title is intended to provide the greatest possible protection as promptly as possible for such children. The health, safety, and best interest of the child shall be the paramount concern . . . .”); ME. REV. STAT. tit. 22, § 4003 (“[T]he health and safety of children must be of paramount concern . . . .”); MASS. ANN. LAWS ch. 119, § 1 (“The health and safety of the child shall be of paramount concern . . . .”); MINN. ANN. STAT. § 626.556, subd. 1. (“[T]he public policy of this state is to protect children . . . .” and “the health and safety of the children shall be of paramount concern.”); NEB. REV. STAT. ANN. § 28-710.01 (“The Legislature declares that the public policy of the State of Nebraska is to protect children whose health or welfare may be jeopardized by abuse or neglect.”); N.H. REV. STAT. ANN. § 169-C:2 (“It is the purpose of this chapter, through the mandatory reporting of suspected instances of child abuse or neglect, to provide protection to children whose life, health or welfare is endangered . . . .”); N.J. STAT. ANN. § 9:6-8:8 (“The purpose of this act is to provide for the protection of children under 18 years of age who have had serious injury inflicted upon them by other than accidental means.”); OHIO REV. CODE ANN. § 2151.01 (“The Section . . . shall be liberally interpreted and construed so as to effectuate the following purposes [] [t]o provide for the case, protection . . . of children . . . .”); S.D. CODIFIED LAWS § 26-8A-1 (“It is the purpose of this chapter to establish an effective state and local system for protection of children from abuse or neglect.”); TENN. CODE ANN. § 37-1-402 (“The purpose of this part is to protect children whose physical or mental health and welfare are adversely affected by brutality, abuse or neglect by requiring reporting of suspected cases by any person having cause to believe that such case exists.”); WASH. REV. CODE § 26.44.010 (“[T]he Washington state legislature hereby provides for the reporting of [child abuse] cases to the appropriate public authorities . . . .” and “[i]t is intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuse, and to safeguard the general welfare of such children.”); Wis. Stat. § 48.01 (“[T]he paramount goal of this chapter is to protect children . . . .”); Wyo. Stat. Ann. § 14-3-201 (“The child’s health, safety and welfare shall be of paramount concern in implementing and enforcing this article.”).

ject to the Confrontation Clause, a court must determine the primary purpose of the teachers’ queries “by objectively evaluating the statements and actions of the parties . . . in light of the circumstances in which the [conversation] occur[red].”<sup>78</sup> As held in *Melendez-Diaz*, one of the numerous circumstances can be the purpose of the statute which creates the duty to report and impose that duty on certain persons.<sup>79</sup>

Therefore, in the twenty-one states where the principal legislative intent is protection of abused children, the statutory mandatory reporting obligation would indeed support the Court’s position that the L.P.’s teachers’ “immediate concern was to protect a vulnerable child who needed help.”<sup>80</sup> This argument is rather strong because the primary purpose test requires a court to examine circumstances *objectively*.<sup>81</sup> Accordingly, if a teacher questions her student in order to clarify if the student has been abused, the teacher is acting pursuant to the relevant statute. From an objective perspective, the teacher’s primary efforts to fulfill her duty are equivalent to acting consistent with the paramount concern and policy of the statute which enforces that duty: Protecting abused children.

Second, twenty-two states and the District of Columbia enumerate numerous purposes simultaneously, including the intent of child’s protection, in their mandatory reporting statutes.<sup>82</sup> For example, Alaska’s law states three purposes:

<sup>78</sup> *Michigan v. Bryant*, 562 U.S. at 370; *see also* *Ohio v. Clark*, 135 S. Ct. at 2182.

<sup>79</sup> *See Melendez-Diaz*, 557 U.S. at 311.

<sup>80</sup> *Ohio v. Clark*, 135 S. Ct. at 2181.

<sup>81</sup> *Davis v. Washington*, 547 U.S. 813, 822 (2009); *See also supra* note 10.

<sup>82</sup> *See* Alaska Stat. § 47.17.010; Ark. Code Ann. § 12-18-102; Conn. Gen. Stat. § 17a-101(a); D.C. Code § 4-1321.01; Fla. Stat. § 39.001(1); Ga. Code Ann. § 19-7-5(a); 325 Ill. Comp. Stat. 5/2(a); Ind. Code Ann. § 31-33-



It is the intent of the legislature that, as a result of these reports, protective services will be made available in an effort to (1) prevent further harm to the child; (2) safeguard and enhance the general well-being of children in this state; and (3) preserve family life unless that effort is likely to result in physical or emotional damage to the child.<sup>83</sup>

Similar to Alaska, many states are concerned with the integrity of family life in addition to their efforts to protect physically or mentally maltreated children.<sup>84</sup> To satisfy this purpose, some states explicitly stress rehabilitation rather than prosecution.<sup>85</sup>

Even though approximately eleven states in the second category announce that—in addition to their intent to protect abused children—it is their legislative intent to “encourage the cooperation of state law enforcement officials” and to “provide effective child services to quickly investigate reports of child abuse or neglect” by requiring reporting of a suspected child abuse case, none of these eleven states explicitly declare prosecution as

their paramount legislative intent.<sup>86</sup> Therefore, these eleven state statutes cannot be read as giving more weight to prosecution over other concerns such as child’s protection and family rehabilitation. Indeed, the legislative intent to facilitate investigation of the reported child abuse is mere acknowledgment by those states that a report may have the natural tendency to result in prosecution of the abuse case.

Finally, while all fifty states have adopted mandatory reporting statute, there are six remaining states where the state legislature did not specifically pronounce its policy behind the obligatory reporting provision.<sup>87</sup> Nonetheless, despite the lack of a stated legislative purpose provision, their intent can be implicitly deduced by the plain language of their mandatory reporting provisions. For instance, the United States District Court for the District of Nevada held that “[t]he plain and unambiguous language of [the mandatory reporting provision] along with the underlying statutory

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1-1; Md. Fam. Law § 5-702; Mich. Comp. Laws Serv. § 722 Note; Mo. Ann. Stat. § 210.115; Mont. Code Ann. § 41-3-101; N.M. Stat. Ann. § 32A-1-3; N.Y. Soc. Serv. Law § 411; N.C. Gen. Stat. § 7B-301; N.D. Cent. Code, § 50-25.1-01; Okla. Stat. tit. 10A, § 1-1-102; Or. Rev. Stat. § 419B.007; 23 Pa. Cons. Stat. § 6302; S.C. Code Ann. § 63-7-10; Utah Code Ann. § 62A-4a-401; Vt. Ann. Stat. tit. 33, § 4911; W. Va. Code § 49-6A-1.

<sup>83</sup> Alaska Stat. § 47.17.010.

<sup>84</sup> See Code Ann. § 12-18-102; D.C. Code § 4-1321.01; Fla. Stat. § 39.001(1); Ga. Code Ann. § 19-7-5(a); 325 Ill. Comp. Stat. 5/2(a); Ind. Code Ann. § 31-33-1-1; Mich. Comp. Laws Serv. § 722 Note; Mont. Code Ann. § 41-3-101; Or. Rev. Stat. § 419B.007; 23 Pa. Cons. Stat. § 6302; Utah Code Ann. § 62A-4a-401; W. Va. Code § 49-6A-1.

<sup>85</sup> See Ind. Code Ann. § 31-33-1-1; Pa. Cons. Stat. § 6302.

<sup>86</sup> Ark. Code Ann. § 12-18-102; Ind. Code Ann. § 31-33-1-1; see also Md. Fam. Law § 5-702; Mich. Comp. Laws Serv. § 722 Note; Mo. Ann. Stat. § 210.115; N.Y. Soc. Serv. Law § 411; Pa. Cons. Stat. § 6302; Utah Code Ann. § 62A-4a-401; Vt. Ann. Stat. Tit. 33, § 4911; W. Va. Code § 49-6A-1. See generally N.M. Stat. Ann. §§ 32A-1-2, 1-3, 4-3. In New Mexico, the duty to report child abuse provision is included in the Child Abuse and Neglect Act, which is Article 4 of the Children’s Code. Although the Child Abuse and Neglect Act itself does not contain its legislative policy, the Children’s Code has the Children’s Code General Provisions Act placed in Article 1 of the Children’s Code that generally applies to every Article in the Children’s Code “unless the context otherwise requires.” *Id.* § 32A-1-2. Two of eight legislative purposes of the Children’s Code General Provisions Act are “to provide for the care, protection and wholesome mental and physical development of children” and “to provide for the cooperation of coordination of the civil and criminal systems for investigation . . . to achieve the best interests of a child victim.” *Id.* § 32A-1-3.

<sup>87</sup> See Ariz. Rev. Stat. § 13-3620; Haw. Rev. Stat. § 350-1.1; Miss. Code Ann. § 43-21-353; Nev. Rev. Stat. § 432B.220; Tex. Fam. Code § 261.101; Va. Code Ann. § 63.2-1500.



schemes, indicates that these sections are designed to protect children from abuse and neglect by reporting instances of such conduct.”<sup>88</sup>

In summation, under the primary purpose test, the inquiry must take into account all of the relevant circumstances that should be deemed objectively.<sup>89</sup> If a teacher, or any persons who have been identified by state law to have a duty to report suspected abuse, acted in a way pursuant to mandatory reporting law, the primary purpose of the teacher’s inquiry must be viewed objectively. A court must look at the very statute which mandates the teacher to question her student and to report the possible abuse to appropriate authorities since the legislative intent of the mandatory reporting statute is the teacher’s primary purpose of her fulfilling the duty from the objective viewpoint.

Therefore, in the first category, it is apparent that the reporter’s paramount concern is to protect a child whose safety and welfare may be adversely affected by abuse and neglect.<sup>90</sup> In the second category, the reporter’s principle intent is to protect the child unless the context otherwise indicates she acted for the different purposes of the statute.<sup>91</sup> Finally, in the third category of six states, the legislative intent can be implied by the plain and unambiguous languages of the statute, and the primary purpose of the reporter can also be presumed by the implied legislative policy unless the context indicates differently otherwise.<sup>92</sup>

#### 4. THE DECLARANT’S AGE AS A CRUCIAL FACTOR UNDER THE PRIMARY PURPOSE TEST

The United States Supreme Court’s consideration of L.P.’s age in its opinion is significant in that lower courts and states’ highest courts have long been split as to how to address hearsay statements given by a very young child, like L.P.<sup>93</sup> Some courts have held that a declarant’s age is pertinent under the primary purpose test because the declarant’s age is one

<sup>88</sup> *Compare* Com. v. Allshouse, 614 Pa. 229, 36 A.3d 163 (2012) (holding that a four-year-old declarant’s statements to the children and youth services caseworker and psychologist were not testimonial; among other circumstances, a declarant’s age is a pertinent characteristic for analysis), State v. Miller, 293 Kan. 535, 264 P.3d 461 (2011) (holding that a four-year-old declarant’s statements in response to the sexual assault nurse examiner’s inquiry about what happened were not testimonial, for Confrontation Clause purposes, under the objective evaluation of the totality of the circumstances because these circumstances include the victim’s age), People v. Stechly, 225 Ill. 2d 246, 302, 870 N.E.2d 333 (2007) (holding that a five-year-old declarant’s statements to her mother concerning defendant’s sexual abuse were not testimonial under the primary purpose test because among other reasons, she would not have anticipated the statement being used in prosecution), and Com. v. DeOliveira, 447 Mass. 56, 65, 849 N.E.2d 218 (2006) (holding that a six-year-old declarant’s statement to an emergency room physician did not indicate that a reasonable person in the victim’s position would have anticipated use of her statements against the abuser in prosecution; the victim’s lack of knowledge or sophistication is attributed to her young age), with State v. Siler, 116 Ohio St.3d 39, 876 N.E.2d 534, 544 (holding that a three-year-old declarant’s statements made in the course of police interrogation were testimonial; “the age of a declarant is not determinative of whether a testimonial statement has been made during a police interrogation”), People v. Vigil, 127 P.3d 916, 926 n. 8 (Colo. 2006) (holding that a seven-year-old declarant’s statement made to “a government agent as part of a police interrogation . . . is testimonial irrespective of the child’s expectations regarding whether the statement will be available for use at a later trial[]”), and State v. Mack, 337 Ore. 586, 588 (Or. 2004) (holding that the victim’s three-year-old brother’s statement to a social worker is testimonial and subject to the Confrontation Clause).

<sup>88</sup> Doe v. State, State Dep’t of Educ., No. 02:03CV01500LRHRJJ, 2006 WL 2583746, at \*5 (D. Nev. Sept. 7, 2006).

<sup>89</sup> Ohio v. Clark, 135 S. Ct. at 2180 (citation omitted).

<sup>90</sup> See *supra* text accompanying notes 75–79.

<sup>91</sup> See *supra* text accompanying notes 80–86.

<sup>92</sup> See *supra* text accompanying notes 87–88.



of the circumstantial factors which determines if a statement is testimonial while others have not even bothered to consider the declarant's age, as did the Supreme Court of Ohio.<sup>94</sup>

Generally, in the current legal system, if a very young child makes a statement to an authority figure depicting a criminal activity against an accused at trial then the result is one of the following: (1) the child may testify at trial;<sup>95</sup> (2) evidence of the child's statement may not be introduced at trial;<sup>96</sup> or (3) the evidence may be admitted as an exception of the hearsay rule.<sup>97</sup> On the other hand, if adults had made the similar statement in a similar situation, it is rather a simple result. Given that they would appreciate gravity of their conduct and, either consciously or unconsciously, intend to establish some facts potentially relevant to later criminal prosecution, that statement would be used in a prosecution of the accused assuming that they testify at trial.<sup>98</sup> If they do not appear before the court, their hearsay statement is likely to be excluded pursuant to the Confrontation Clause upon a finding that it is testimonial.

Because all the circumstances have to be examined in an objective manner, a declarant's age should not be precluded in court's analysis especially in a case where the declarant is very

young.<sup>99</sup> The Court's decision in *Ohio v. Clark*—looking at a victim's age—renders itself consistent with its precedent, *Michigan v. Bryant*, clarifying the need of objective assessment to take *all* of the circumstances into consideration.<sup>100</sup> This approach is also harmonious with social science research.<sup>101</sup>

Since 1980s, a small but growing numbers of scholars have conducted research to examine a child's understanding of the legal system.<sup>102</sup> Typically, the research has been motivated by the need of understanding children's knowledge of their rights in dependency court<sup>103</sup> and their competency to stand at trial as a witness.<sup>104</sup> Results of this research can be nonetheless read broadly to encompass the present issue whether a child's statement concerning a criminal activity made to a non-law enforcement individual would be considered to be testimonial. This approach is appropriate because the primary purpose test inquires

<sup>99</sup> See Allshouse, 614 Pa. 229, 36 A.3d at 181.

<sup>100</sup> See *Michigan v. Bryant*, 562 U.S. at 369.

<sup>101</sup> See *infra* text accompanying notes 102–21.

<sup>102</sup> Alexia Cooper, Allison R. Wallin, Jodi A. Quas, & Thomas D. Lyon, *Maltreated and Nonmaltreated Children's Knowledge of the Juvenile Dependency Court System*, 14(3) *CHILD MALTREATMENT* 255, 255 (2010).

<sup>103</sup> See generally Black's Law Dictionary (10th ed. 2014) ("A court having jurisdiction over matters involving abused and neglected children, foster care, the termination of parental rights, and (sometimes) adoption.")

<sup>104</sup> See Cooper et al., *supra* note 102, at 255, 258 (stating that research of children's understanding of legal system is important because "a lack of knowledge predicts increased distress and perceptions of unfairness of the legal system which not only lead the children to be vulnerable in proceedings but also make them have negative attitude toward the legal system"); Rhona H. Flin, Yvonne Stevenson, & Graham M. Davies, *Children's Knowledge of Court Proceedings*, 80 *BRITISH J. PSYCHOL.* 285, 285 (1989) (stating that "[t]he role of child witnesses in criminal prosecutions and the appropriateness of the legal procedures for gathering and testing their evidence have become a matter of intense public concern" because children who have witnessed a criminal activity or were a victim of physical or sexual abuse may be involved in such court proceedings).

<sup>94</sup> See *Compare* Allshouse, 614 Pa. 229, 36 A.3d 163.

<sup>95</sup> See, e.g., *State v. Cochran*, 2004 ME 138 (Me. 2004) (holding that a five-year-old witness was competent to be a witness under ME. R. EVID. 601(b)).

<sup>96</sup> See, e.g., *State v. Mack*, 337 Ore. 586 (Or. 2004) (holding that because a three-year-old witness was not competent to be a witness at trial, and his hearsay statements were testimonial, the evidence should be excluded).

<sup>97</sup> See, e.g., *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006) (finding that a three-year-old child victim's statements to child protection worker during risk-assessment interview were not testimonial and thus admissible).

<sup>98</sup> Richard D. Friedman & Stephen J. Ceci, Symposium, *The Child Quasi Witness*, 82 U. CHI. L. REV. 89, 90 (2015).



if the young declarants' statements were made to "establish or prove past events potentially relevant to later criminal prosecution."<sup>105</sup> In other words, the primary purpose test asks if the young declarants know the consequences of their statements. In order to answer this, one must first ask if they comprehend the legal system.

Numerous studies, not surprisingly, have revealed that the younger children are, the less understanding of the legal system they have. In these studies, children appear to have little knowledge of the roles and responsibilities of legal professionals.<sup>106</sup> For instance, some researchers conducted a study where they asked eighty-five children aged from seven to ten various questions about the roles of key professionals in legal proceedings.<sup>107</sup> The questionnaire included items such as "What does a judge do?" and "What does a social worker do?"<sup>108</sup> In the study, age was one of six

variables—age, abuse type, ethnicity, referred to criminal court, participation, anxiety—that the researchers considered as possible predictors of the participants' knowledge of the court system.<sup>109</sup> The results revealed that "knowledge was significantly predicted *only* by age" and "increased linearly with increasing age."<sup>110</sup> The researchers also noted that the remaining variables were not significantly associated with children's knowledge "once the effect of age was estimated."<sup>111</sup>

This finding may be attributed to children's limited exposure to legal language.<sup>112</sup> Some linguists noted that children's comprehension of legal terminology is not "an all-or-nothing procedure, but, rather a protracted process."<sup>113</sup> The linguists conducted a study to examine children's understanding of legal terms including "burglary," "police officer," "arrest," "judge," "criminal," "prosecution," "law," "guilty," and "social workers."<sup>114</sup> The young participants were divided into four age-groups: five, seven, eight, and ten.<sup>115</sup> Results of the study indicated that while more than a half of each group understood meanings of "burglary," "police officer" and "criminal," none of them could define "prosecution."<sup>116</sup> More interesting findings of the study were their own primitive definitions of the legal terms offered by the participants: "A court is a sort of jail," "[a judge is] someone who gets money, like at a pet show," and "[arrest] means you're lying down."<sup>117</sup>

<sup>105</sup> *Davis v. Washington*, 547 U.S. at 822.

<sup>106</sup> *See, e.g., Cooper et al., supra* note 104, at 255, 258 (describing research about age differences in maltreated and nonmaltreated children's knowledge of juvenile dependency court vocabulary and proceedings in a study involving young participants whose ages were between four and fourteen); *Flin et al., supra* note 104 at 285, 285 (stating that the study included young children aged six, eight, ten years old, and adults, all of whom were examined by researchers about their knowledge of criminal court procedures and legal vocabulary).

<sup>107</sup> *Stephanie D. Block et al., Abused and Neglected Children in Court: Knowledge and Attitudes*, 34 *CHILD ABUSE & NEGLECT* (2010) 559 (noting that the objective of their study was to assess maltreated children's understanding and attitudes about their court experiences). This study was conducted immediately after the participants attended their dependency court hearings. Although this research focused on the group of children who already had some experience of the court proceeding, it also examined the participant's age difference in understanding the legal system. This study is worth mention here because children's age difference has a strong correlation with their knowledge of the legal system, regardless of their previous exposure to it.

<sup>108</sup> *Block et al., supra* note 106, at 669 app.

<sup>109</sup> *See Block et al., supra* note 106, at 664.

<sup>110</sup> *Block et al., supra* note 106, at 664 (emphasis added).

<sup>111</sup> *Block et al., supra* note 106, at 664.

<sup>112</sup> *See Block et al., supra* note 106, at 660.

<sup>113</sup> *Michelle Aldridge, Kathryn Timmins, & Joanne Wood, Children's Understanding of Legal Terminology: Judges Get Money at Pet Shows, Don't They?*, 6 *CHILD ABUSE REV.* 141, 141 (1997).

<sup>114</sup> *Aldridge et al., supra* note 112, at 142.

<sup>115</sup> *Aldridge et al., supra* note 112, at 142.

<sup>116</sup> *Aldridge et al., supra* note 112, at 142–43.

<sup>117</sup> *Aldridge et al., supra* note 112, at 144–45.



Considering the outcomes of the study, it is nearly impossible to conclude that young children have the same mindset as that of adults when they describe a criminal activity to someone.<sup>118</sup> These results are not unique in children who are raised in the United States; it is rather a universal phenomenon across the world and is likely due to children's incomplete cognitive development.<sup>119</sup>

There is a biological explanation for this finding.<sup>120</sup> The prefrontal cortex of the brain, which governs "so-called executive functions such as monitoring, planning, and impulse control," is not fully developed until late adolescence.<sup>121</sup> This deficit affects "a web

<sup>118</sup> See generally Karen Saywitz, Carol Jaenicke, & Lorinda Camparo, *Children's Knowledge of Legal Terminology*, 14 Law & Hum. Behav. 523 (1990) (explaining that the study assessed children's "age-related patterns in communicative ability relevant to providing testimony" and tested "knowledge of legal terms commonly used with children in court." Sixty participants were divided into three groups for which the mean ages were five, eight, and eleven, respectively. The researchers used a list of thirty-five legal terms, including "evidence," "testify," "attorney," "jury," and "oath," to evaluate the participant's understanding. The study revealed that there was "a significant [age]-related effect).

<sup>119</sup> See, e.g., Anna Emilia Berti & Elisa Ugolini, *Developing Knowledge of the Judicial System: A Domain-Specific Approach*, 159(2) J. of Genetic Psychology 211 (1998) (concluding that Italian children's knowledge of the court system, including roles of judges, lawyers, witnesses and the jury, improves with increasing age. First graders showed poor knowledge whereas eighth graders revealed better understanding); Michele Peterson-Bradali, Rona Abramovitch, & Juiane Duda, *Young children's legal knowledge and reasoning ability*, 39 Canadian J. Criminology 145, 162 (1997) (describing that "[w]hile . . . overall lack of legal knowledge generally applied to both the Canadian younger and the older children in the present study, the older participants did possess a somewhat better sense" than the younger ones).

<sup>120</sup> See Friedman & Ceci, *supra* note 98, at 97.

<sup>121</sup> See Friedman & Ceci, *supra* note 98, at 97. See generally Monica Luciana & Charles A. Nelson, *The Functional Emergence of Prefrontally-Guided Working Memory System in Four- to Eight-Year-Old Children*, 36 Neuropsychologia 273 (1998).

of interrelated psychological abilities that are involved in understanding the mental states of others as well as the effects that one's own actions and statements have on others."<sup>122</sup> Stated differently, a combination of young children's lack of understanding of the legal system with their not-yet-fully-developed pre-frontal cortex of the brain renders them vulnerable in interacting with others, especially in a situation like *Clark v. Ohio*. For instance, when engaging in an interview with L.P., although the teacher might have intended to establish facts for a later prosecution of the abuser, it is highly likely that not only is L.P. incapable of appreciating or even imagining why the teacher wanted to know what happened to him, but also he was unable to consider the significance of his statements against Clark. Indeed, from the true objective perspective based on social science research, very young children lack capacity to offer testimonial statements under the Confrontation Clause.

At least two unsolved problems—concerning the Court's ruling on the issue of L.P.'s age remain here. First, while the Court found it "extremely unlikely" that a child declarant at the age of three intended his statement to be used for trial testimony,<sup>123</sup> it did not provide a bright-line rule as to at what age should a minor's statement be deemed testimonial and thus subject to the Confrontation Clause.<sup>124</sup> Like L.P., there is a group of very immature children who are generally considered to lack an understanding of the gravity of their statement describing a criminal activity. It is hard to imagine that they intend their statement to be used at trial. On the other hand, there is another group of children who are likely to appreciate the legal system and thus may understand

<sup>122</sup> See Friedman & Ceci, *supra* note 98, at 97–98.

<sup>123</sup> *Ohio v. Clark* 135 S. Ct. at 2182.

<sup>124</sup> See *id.*



the significance of their statement implicating the accused with a criminal activity. However, due to the existence of a gray area between the two groups and various factors affecting individuals' knowledge and understanding of the criminal justice system, it seems rather illegitimate to draw a bright-line between the groups and presuppose a group of children younger than a particular age is either capable or incapable of making a testimonial statement.

A possible solution to this problem does not depend on a sole endeavor made by the legal system. Law practitioners and legal scholars must look to results and implications of social science research and derive benefits from their work. And social science researchers must study not only children's understanding of legal vocabulary and court system (indirect way) but also children witnesses' understanding of the consequence of their statements (direct way).

The second unsolved question is why out-of-court statements made by an incompetent witness can be introduced into evidence. Here, L.P. was ruled incompetent to testify because of his age.<sup>125</sup> The trial court found that L.P. appeared incapable of differentiating between truth and falsity.<sup>126</sup> In other words, L.P. was considered too unreliable to testify in court. But the Court held that L.P.'s hearsay statements were not testimonial and thus should be admitted at trial.<sup>127</sup> One of the disturbing aspects of the case is that Clark was convicted based on the hearsay statements of L.P. who was statutorily incompetent to testify at trial.

One possible way to reconcile this discrepancy necessitates a review of the *Craw-*

*ford* case where the Court declared that the Confrontation Clause's fundamental aim is to "ensure reliability of evidence, but it is a *procedural* rather than a substantive guarantee."<sup>128</sup> As aforementioned, not every out-of-court statement is open to being challenged under the Confrontation Clause; rather, the procedural protection against hearsay statements is against testimonial statements made against the accused. Provided that the totality of the circumstances shows the challenged statement is not testimonial, like in *Ohio v. Clark*, there is no confrontation problem so far as the Sixth Amendment is concerned.

This unsolved issue illustrated in the *Clark* case is not solely related to the Confrontation Clause, but it is in fact one of the classic concerns of hearsay exceptions: choice between exclusion of unreliable evidence and inclusion of imperfect evidence. All evidence is imperfect to some extent. Generally out-of-court statements are not admissible because they are neither subject to cross-examination nor made under oath. Further, they raise credibility, accuracy, and confrontation concerns. Nonetheless, some hearsay statements are admissible as long as they are relevant, and the statement's probative value is not substantially outweighed by a danger of unfair prejudice.<sup>129</sup> Once admitted, the substantive reliability and credibility of the evidence must be decided by the trier of fact. Therefore, although the Ohio statute deemed L.P. incompetent due to his age and considered him unreliable to testify in court, the reliability of his out-of-court statement made in his daily life—different from the court setting—must be addressed by the jury. This answer to the second question appears to be consistent with the Court's position.

<sup>125</sup> *Ohio v. Clark*, 135 S. Ct. at 2178.

<sup>126</sup> *See id.*

<sup>127</sup> *See id.* at 2183.

<sup>128</sup> *Crawford v. Washington*, 541 U.S. at 61 (emphasis added)

<sup>129</sup> *See Fed. R. Evid.* 401, 403.



## 5. CONCLUSION

In *Clark v. Ohio*, the United States Supreme Court finally addressed the issue of a statement provided to individuals who are not law enforcement officers and considered a declarant's age to support its holding of the non-testimonial nature of L.P.'s statements.<sup>130</sup>

As to the first issue, the Court disagreed with the Supreme Court of Ohio's finding that the teacher's mandatory reporting duty made them act as agents of the state law enforcement, and stated that "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into communication aimed primarily at gathering evidence for a prosecution."<sup>131</sup> Although the Court declined to adopt a categorical rule on this matter, the legislative scheme of the relevant statute must be considered, especially when the statute provides the *sole* legislative purpose.<sup>132</sup>

This approach—looking to the legislative intent of the statute—is consistent with the Court's decision in *Melendez-Diaz*.<sup>133</sup> Nonetheless, the legislature's declaration of policy must not be treated as a dispositive factor in determining what the reporter's purpose was in questioning a child. As suggested above, it should be considered as one of all the relevant

factors including, but not limited to, the identity of the person who asked the declarant questions, and "the content and tenor of his [or her] questions[.]"<sup>134</sup> Thus, if the content and tenor of the teacher's questions along with the other relevant circumstances—the legislative scheme of the statute—demonstrate that the primary purpose of the teacher's inquiries was to establish or prove past events, the trier of fact could objectively find that the teacher's primary purpose was prosecution—acting as an agent of law enforcement—and not protection.

Concerning the declarant's age, the Court explicitly stated that statements made by very young children like L.P. will hardly ever implicate the Confrontation Clause.<sup>135</sup> The Court not only acknowledged the implications of research on children's understanding of the judicial system but also found that it is "extremely unlikely" that a three-year-old child would ever intend his statement to be used for trial testimony.<sup>136</sup> As stated above, young children do not have the cognitive capacity that adults have. Therefore, unless the context shows differently, a very young child's statement should not be considered to have testimonial nature due to the very reason that the Court mentioned.

<sup>130</sup> See *Ohio v. Clark*, 135 S. Ct. at 2181–82.

<sup>131</sup> *Ohio v. Clark*, 135 S. Ct. at 2183.

<sup>132</sup> See *id.* at 2182.

<sup>133</sup> See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

<sup>134</sup> *Michigan v. Bryant*, 562 U.S. 344, 369 (stating that "the identity of an interrogator, and the content and tenor of his questions, can illuminate the 'primary purpose of the interrogation[.]'").

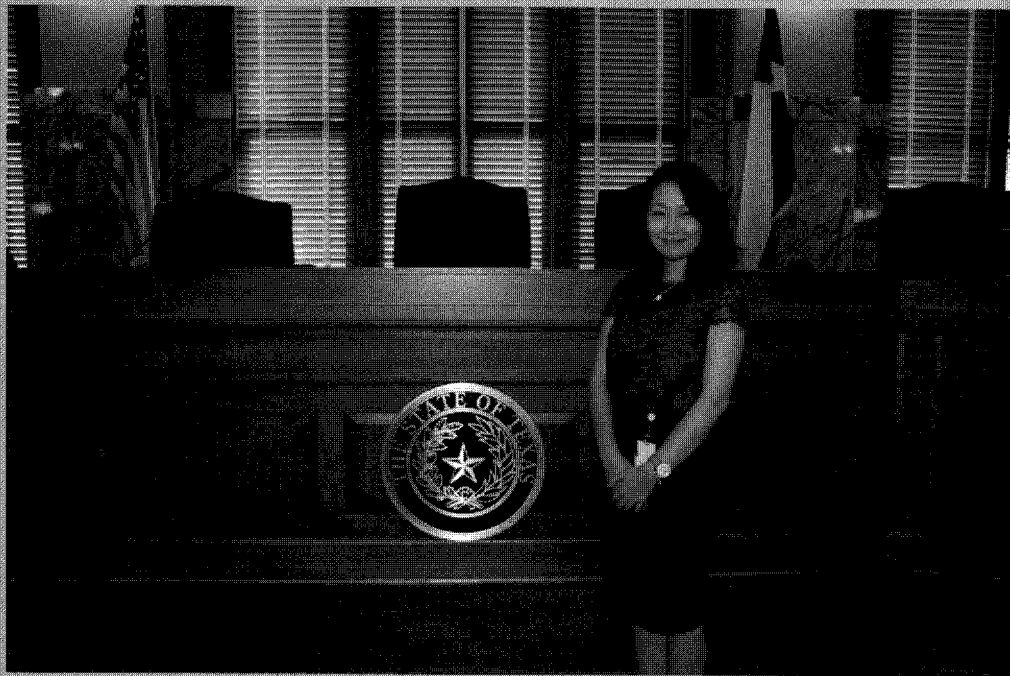
<sup>135</sup> *Ohio v. Clark* 135 S. Ct. at 2182.

<sup>136</sup> *Id.*





## ABOUT THE AUTHOR



Sun Jin Kim is currently a third-year student at The University of Texas School of Law and working at the Equal Justice Center in Austin, Texas, as a legal intern, and she will serve Justice Dan Biles in the Kansas Supreme Court as a research attorney upon her graduation.

Before she started law school, she lived in England, China, and South Korea, and obtained two bachelor's degrees in Korean law (Yonsei University, Wonju, S. Korea) and psychology (Seoul National University, Seoul, S. Korea) and a master's degree in forensic psychology (John Jay College of Criminal Justice, New York City, NY). Her research experience in the master's program is precisely related to criminal law and criminal procedures. Her thesis explored cultural differences in eyewitness identification by comparing the memory reports of East Asians and Westerners about a crime that they witnessed.

During her tenure in law school, she has worked for various legal entities. In the winter of 2013, after she finished her first semester of law school, she worked for Kansas Legal Services in Manhattan, KS and during the 1L spring, she interned at the Advocate for Human Rights in Minneapolis, MN. In the summer of 2014, she worked for U.S. Magistrate Judge T. Lane Wilson at the Northern District of Oklahoma in Tulsa, OK, as a judicial intern, and in the summer of 2015, she also worked for Justice Sharon McCally at the Texas Fourteenth Court of Appeals in Houston, TX. During her 3L year, she was clerking for the Travis County Attorney's Office where she solidified her interest in criminal law even more.

After she began her legal education, she made four publications including this. She is co-author of two development articles published by the Texas Environmental Law Journal in its May and spring 2015 issues. Her third piece was published by the Southern University Law Review in its spring 2016 issue: *The Role of Five Gulf Coast States Under Cooperative Federalism: Allocation of the Gulf Coast Restoration Trust Fund Under the RESTORE Act & State Initiatives for Large-scale Ecosystem Restoration*.