

# Evading Confrontation: From One Amorphous Standard to Another

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## I. INTRODUCTION

The Sixth Amendment's Confrontation Clause provides an accused the right "to be confronted with the witnesses against him."<sup>1</sup> As interpreted by the United States Supreme Court, the right of confrontation assures criminal defendants the opportunity to cross-examine individuals who present testimony against them.<sup>2</sup>

The confrontation right applies not only to testimony captured at trial but also to similar out-of-court statements.<sup>3</sup> For nearly twenty-five

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1. U.S. CONST. amend. VI.

2. See *Crawford v. Washington*, 541 U.S. 36, 68 (2004) ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."). While the *Crawford* Court focused on cross-examination as the core of the confrontation right, the constitutional phrase "confronted with" is subject to interpretation. Many judges have interpreted the phrase to guarantee both "cross-examination" of an accusing witness and a "face-to-face" meeting between accuser and accused. See, e.g., *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) (interpreting the Confrontation Clause as requiring both cross-examination and face-to-face confrontation). More modern courts often emphasize one right over the other. Compare *Crawford*, 541 U.S. at 55-57 (stating that "a prior opportunity to cross-examine" the adverse witness is "dispositive," and limiting *Mattox*'s holding to "an adequate opportunity to confront the witness"), with *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring) ("Simply as a matter of English, [the Confrontation Clause] may be read to confer nothing more than a right to meet face to face all those who appear and give evidence at trial."), and *Maryland v. Craig*, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting) ("'[T]o confront' plainly means to encounter face to face, whatever else it may mean in addition.").

3. See *Crawford*, 541 U.S. at 50-51. These issues are governed by different tests. *Craig* governs the manner in which in-court testimony may be taken, whereas *Crawford* and its progeny

years, courts adhered to the 1980 United States Supreme Court decision in *Ohio v. Roberts*,<sup>4</sup> which allowed out-of-court statements to be admitted when those statements fell within a “firmly-rooted hearsay exception” or were otherwise deemed “reliable.”<sup>5</sup> Under the *Roberts* standard, prosecutors were often able to admit evidence against an accused in the absence of actual confrontation—meaning there was no opportunity for cross-examination.<sup>6</sup>

Over time, the *Roberts* standard proved easily manipulable by courts<sup>7</sup> and “often fail[ed] to protect against paradigmatic confrontation violations.”<sup>8</sup> To correct the problem of unbridled judicial discretion and to better ensure the confrontation right, the Court replaced the *Roberts* test with a rigid cross-examination requirement<sup>9</sup> in its 2004 decision, *Crawford v. Washington*.<sup>10</sup>

In overruling *Roberts*, the *Crawford* Court’s goals were to prevent testimonial evidence from reaching the factfinder absent adversarial testing,<sup>11</sup> and to remove the judicial discretion that had permitted such core confrontation violations.<sup>12</sup> *Crawford* stated each of these goals explicitly. For example, the *Crawford* Court declared that its goal was to prevent “open-ended [confrontation] exceptions . . . [being] developed by the courts.”<sup>13</sup> Further emphasizing the Court’s desire to limit judicial discretion, *Crawford* declared, “[The Framers] . . . knew that judges . . . could not always be trusted to safeguard the rights of the people . . . . They were loath to leave too much discretion in judicial hands.”<sup>14</sup>

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determine what out-of-court statements are subject to the confrontation right. *See generally* *Craig*, 497 U.S. 836.

4. *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36.

5. *Id.* at 66.

6. *See Crawford*, 541 U.S. at 61 (“[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

7. *Id.* at 63 (“The [*Roberts*] framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations. Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable . . .”).

8. *Id.* at 60.

9. *Id.* at 61.

10. *Id.*

11. *Id.* at 63 (“The unpardonable vice of the *Roberts* test . . . is . . . its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”).

12. *Id.* at 62 (“The *Roberts* test allows a jury to hear evidence . . . based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability [i.e., actual confrontation] with a wholly foreign one [i.e., admission of testimonial evidence despite no actual confrontation].”).

13. *Id.* at 54.

14. *Id.* at 67–68.

Despite the intentions in *Crawford*, only seven years later, the very deficiencies of the *Roberts* rule have been revived.<sup>15</sup> The erosion of *Crawford* has occurred through the Court's distinction between testimonial hearsay, which requires confrontation,<sup>16</sup> and nontestimonial hearsay, which does not.<sup>17</sup> Although this distinction appears to create a bright-line rule, the testimonial/nontestimonial framework is just as manipulable as the *Roberts* rule.

While the potential problem of malleability existed not long after *Crawford*,<sup>18</sup> the Court's most recent decision, *Michigan v. Bryant*,<sup>19</sup> sig-

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15. Justice Scalia openly criticized this aspect of the Court's present jurisprudence in his dissent in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011). Justice Scalia noted, "[*Bryant*] recedes from *Crawford* [by] requir[ing] judges to conduct 'open-ended balancing tests' and 'amorphous, if not entirely subjective,' inquiries into the totality of the circumstances . . ." *Id.* at 1175 (Scalia, J., dissenting) (quoting *Crawford*, 541 U.S. at 63, 68). Yet, "[the Court rejected] multifactor balancing for reliability in *Crawford* [as against the Framers' design] . . . It was judges' open-ended determination of what was reliable that violated the trial rights of Englishmen in the political trials of the 16th and 17th centuries." *Id.* at 1176 (citing *Crawford*, 541 U.S. at 68). According to Scalia, "The Framers placed the Confrontation Clause in the Bill of Rights to ensure that those abuses . . . would not be repeated in this country." *Id.*

16. See *Davis v. Washington*, 547 U.S. 813, 823–26 (2006) (answering affirmatively the question of "whether the Confrontation Clause applies only to testimonial hearsay").

17. *Bryant*, 131 S. Ct. at 1155 ("Where [a statement is deemed nontestimonial], the admissibility of [the] statement is the concern of state and federal rules of evidence, not the Confrontation Clause."); see also *id.* at 1162 n.13 ("[T]he Confrontation Clause is not the only bar to admissibility of hearsay statements at trial. State and federal rules of evidence prohibit the introduction of hearsay, subject to exceptions. Consistent with those rules, the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence." (citations omitted)).

18. Two years after the decision in *Crawford*, the Supreme Court attempted to clarify the differences between testimonial and nontestimonial hearsay in cases involving police interrogation. *Davis*, 547 U.S. at 817. In the first of two consolidated cases, the *Davis* Court deemed nontestimonial a recording of a 911 call made during an ongoing emergency, making the statement admissible in the absence of confrontation. *Id.* at 828–29. In the second of two consolidated cases, the Court deemed testimonial statements taken by police after they had secured the scene and had separated the declarant from the assailant. *Id.* at 829–30.

Although *Bryant* has magnified the problem, even *Davis* employed what many courts interpreted as a totality-of-the-circumstances test. See, e.g., *People v. Cage*, 155 P.3d 205, 217 (Cal. 2007) (noting that under *Davis*, "the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation"); *Harkins v. State*, 143 P.3d 706, 714 (Nev. 2006) ("Together, *Crawford*, *Davis*, and *Hammon* demonstrate that when determining whether a statement is testimonial, it is necessary to look at the totality of the circumstances surrounding the statement."); *State v. Camarena*, 145 P.3d 267, 274 (Or. Ct. App. 2006) ("Under *Davis*, the proper inquiry is whether the totality of the 'circumstances objectively indicat[e] that the primary purpose of the interrogation [was] to enable police assistance to meet an ongoing emergency.'" (quoting *Davis*, 547 U.S. at 822)); *State v. Lewis*, 235 S.W.3d 136, 142–43 (Tenn. 2007) (describing Tennessee's "non-exhaustive list of factors to aid in the determination of whether a particular statement is testimonial," including eight numbered factors).

In 2008, Michael D. Cicchini observed, "The new *Davis* test, much like the *Roberts* test, is in practice nothing more than a manipulable, open-ended balancing test that *Crawford* condemned . . ." [T]he multiple factors for determining whether a statement is testimonial invite a lack

nificantly magnified the problem. Under *Roberts*, courts employed a host of factors to determine whether a particular hearsay statement was sufficiently reliable<sup>20</sup> and invoked the same factors to justify opposite outcomes, even with nearly identical facts.<sup>21</sup> Reminiscent of *Roberts*, *Bryant* notes more than ten factors courts should use to distinguish testimonial statements from nontestimonial statements.<sup>22</sup> Exacerbating the problem, *Bryant* instructs courts to consider “all relevant information” and to decide each individual case in context,<sup>23</sup> further increasing the likelihood of judicial manipulation.<sup>24</sup>

Despite *Crawford*'s aims, *Bryant* assures a return to “open-ended [confrontation] exceptions”<sup>25</sup>—exactly what the *Crawford* Court sought to prevent.<sup>26</sup> To restore the promise of *Crawford*, this Article proposes a bright-line test to replace *Bryant*'s totality-of-the-circumstances test, one that particularly governs out-of-court statements. Under my proposed test, any statements obtained from a would-be witness during the crime's

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of uniformity in applying the new test.” Michael D. Cicchini, *Judicial (In)Discretion: How Courts Circumvent the Confrontation Clause Under Crawford and Davis*, 75 TENN. L. REV. 753, 779 (2008) (quoting Josephine Ross, *After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 193 (2006)). *Davis* is discussed further in Part II.

19. *Bryant*, 131 S. Ct. 1143.

20. See, e.g., *Crawford*, 541 U.S. at 41 (applying a nine-factor reliability test); see also *Snowden v. State*, 846 A.2d 36, 43–44 (Md. Ct. Spec. App. 2004) (summarizing Maryland law under *Roberts* as requiring a court to evaluate thirteen separate factors to determine whether an out-of-court hearsay statement “bears ‘particularized guarantees of trustworthiness’” (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. 36)).

21. *Crawford* itself is illustrative. In that case, Michael Crawford stabbed a man who allegedly tried to rape his wife Sylvia. *Crawford*, 541 U.S. at 38. At Crawford's attempted murder trial, the State sought to introduce a tape-recorded statement made by Sylvia to the police in which she described the stabbing in a manner contrary to Michael's self-defense claim. *Id.* at 38–40. Finding Sylvia's statement reliable under the *Roberts* test, the trial court admitted the statement, *id.* at 40, and Michael was convicted, *id.* at 41. Illustrating the malleability of the *Roberts* test, the Washington Court of Appeals reversed, finding Sylvia's statement unreliable due to critical differences between Michael and Sylvia's versions of events. *Id.* In particular, the court found it significant that, among other things, Sylvia and Michael's statements differed on whether Michael's victim actually had something in his hand when he was stabbed. *Id.* Again reversing, a unanimous Washington Supreme Court deemed Sylvia's statement reliable because it was nearly identical to Michael's version of the events. See *id.*

22. *Bryant*, 131 S. Ct. at 1158–62; see also *infra* notes 93–105 and accompanying text.

23. *Bryant*, 131 S. Ct. at 1162 (“[C]ourts making a ‘primary purpose’ assessment should not be unjustifiably restrained from consulting all relevant information . . .”).

24. *Id.* at 1174–76 (Scalia, J., dissenting) (noting the ease in which the *Bryant* test can be manipulated to reach desired outcomes). Just as they did under *Davis*, courts are sure to develop additional factors under *Bryant*. See, e.g., *State v. Warsame*, 735 N.W.2d 684, 695 (Minn. 2007) (applying *Davis* and finding it significant that the interrogating officer did not take detailed notes while questioning the victim of a recent assault).

25. *Crawford*, 541 U.S. at 54.

26. See *infra* Part III.

*res gestae*,<sup>27</sup> whether volunteered or the result of interrogation,<sup>28</sup> would be deemed nontestimonial and therefore exempt from confrontation. On the other hand, statements obtained from a would-be witness outside the *res gestae* of the crime would be deemed testimonial and therefore inadmissible in the absence of confrontation.

This proposed rule rests on the presumption that questioning and corresponding statements made during a crime's *res gestae* are usually intended to resolve the crime and prevent the criminal from successfully escaping. While a crime is still occurring and the suspect is still on the loose, a declarant and interrogator are typically focused on assessing the situation, dealing with potential threats, and apprehending a perpetrator. The intent to record evidence for later use might be a factor at this time but generally is not the primary objective until the situation has been secured.

Alternatively, by the time the *res gestae* has ended, statements of a would-be witness, whether volunteered or made in response to structured questioning, would be deemed testimonial by most courts. This presumption is supported by recent cases, many of which have deemed testimonial a victim's statements to police after the assailant's arrest or separation from the declarant.<sup>29</sup>

To preserve its bright-line nature, my proposed rule would apply to statements made to police and nonpolice interrogators. Regardless of the interrogator's identity, accusatory statements made after a crime has been committed and after the assailant no longer poses a threat "do precisely what a witness does on direct examination," thereby triggering the same

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27. As discussed in Part V, the proposed *res gestae* limitation would encompass a timeframe that begins with preparations for the crime and ends only when the assailant is either in custody or has reached a position of temporary safety. See *infra* notes 345–46 and accompanying text.

28. Although the issue is unresolved, the Supreme Court has suggested that volunteered statements not made in response to interrogation might also be testimonial. See *Davis v. Washington*, 547 U.S. 813, 822 n.1 (2006) ("Our holding refers to interrogations because . . . the statements in the cases presently before us are the products of interrogations . . . . This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation."); see also *Bryant*, 131 S. Ct. at 1169 (Scalia, J., dissenting) ("The Clause applies to volunteered testimony as well as statements solicited through police interrogation." (citing *Davis*, 547 U.S. at 822 n.1)).

29. See, e.g., *Davis*, 547 U.S. at 829–30 (deeming testimonial a victim's statements to officers responding to a domestic violence complaint after police had secured the scene and had separated the abusive husband from declarant); *State v. Fry*, 926 N.E.2d 1239, 1260–61 (Ohio 2010) (deeming testimonial a victim's statements to officers responding to a domestic violence complaint because defendant had already been arrested and removed from the premises); *Henderson v. Commonwealth*, 710 S.E.2d 482, 493–95 (Va. Ct. App. 2011) (applying *Bryant* and deeming testimonial robbery victims' statements to a detective that were made four days after one alleged robbery and several hours after another because "there was no evidence of any immediate threat to either the witnesses or the detective").

confrontation concerns and making the accusation ripe for cross-examination.<sup>30</sup>

Before outlining the details of my proposed test, Part II of this Article summarizes the Supreme Court cases that establish the existing Confrontation Clause framework, particularly those that govern statements made in response to interrogation: *Crawford*, *Davis v. Washington*, *Hammon v. Indiana*,<sup>31</sup> and *Bryant*. This Part examines how the meaning of “testimonial” in Sixth Amendment jurisprudence has evolved to its current manipulable status after *Bryant*.

Part III examines the primary method for evading confrontation—manipulation of the testimonial/nontestimonial distinction, which is just one method of evasion among many.<sup>32</sup> This Part summarizes the specific means courts have employed to manipulate the “primary-purpose” test, the overarching *Bryant* standard that determines whether a statement is testimonial.<sup>33</sup> Methods of evasion discussed within this Part include selective or inconsistent application of the factors discussed in *Bryant*, iso-

30. *Davis*, 547 U.S. at 830 (emphasis omitted).

31. *Hammon* is a companion case to *Davis*. See discussion *infra* notes 52–58 and accompanying text.

32. My review of post-*Crawford* case law has uncovered at least seven methods courts have employed to evade confrontation. One additional method of evasion not discussed in this Article is the “not for the truth end run around,” under which a hearsay statement is admitted not for the truth of what it asserted but for some other purpose. See *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009). This potential “end run around *Crawford*” was summarized well in *Johnson*. There, the court explained:

*Crawford* forbids the introduction of testimonial hearsay as evidence in itself, but it in no way prevents expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence.

An expert witness’s reliance on evidence that *Crawford* would bar if offered directly only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation. Allowing a witness simply to parrot “out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of expert opinion” would provide an end run around *Crawford*.

*Id.* (quoting *United States v. Lombardo*, 491 F.3d 61, 72 (2d Cir. 2007)). The Supreme Court recently granted certiorari in a case involving this issue. *People v. Williams*, 939 N.E.2d 268 (Ill. 2010), *cert. granted*, 131 S. Ct. 3090 (2011) (mem.). The *Bryant* Court also addressed this issue. *Bryant*, 131 S. Ct. at 1160 n.11 (“[T]he Confrontation Clause is not implicated when statements are offered ‘for purposes other than establishing the truth of the matter asserted.’” (quoting *Crawford v. Washington*, 541 U.S. 36, 60 n.9 (2004))). Another method of evading the confrontation right is through liberal application of harmless error analysis. See, e.g., *People v. Hudnall-Johnson*, No. A119004, 2009 WL 499151, at \*14 (Cal. Dist. Ct. App. Feb. 27, 2009) (deeming assault victim’s statements to police testimonial and thus improperly admitted at trial, but finding the error harmless beyond a reasonable doubt).

33. See *Bryant*, 131 S. Ct. at 1155 (suggesting that the primary-purpose test will determine whether a statement is testimonial or nontestimonial, even in cases not involving ongoing emergencies).

lating one purpose among many concurrent purposes, and disregarding the testimonial nature of interrogations conducted by nonstate actors.

Part IV details the ongoing expansion of the Confrontation Clause's primary exceptions, forfeiture by wrongdoing and dying declarations. Forfeiture by wrongdoing is emphasized because, as compared to dying declarations, it is still subject to a great deal of ambiguity despite the Court's attempt at clarification in *Giles v. California*.<sup>34</sup>

Part V details my proposed bright-line substitute for *Bryant*'s totality-of-the-circumstances test, one more consistent with *Crawford* and less malleable than the *Bryant* test. Part VI concludes.

## II. THE TESTIMONIAL/NONTESTIMONIAL DISTINCTION

This Part examines how the Court came to the current testimonial/nontestimonial distinction. *Crawford* revolutionized Confrontation Clause jurisprudence by establishing the testimonial/nontestimonial distinction, an improvement over the manipulable *Roberts* standard. Two years later, *Davis* clarified the meaning of "testimonial," but it also proved to be somewhat manipulable. *Bryant*, the Court's most recent decision in this area, has fully revived the flaws of *Roberts*.

The Confrontation Clause assures the right of an accused "to be confronted with the witnesses against him."<sup>35</sup> As the text suggests, the confrontation right prevents a prosecutor from admitting into evidence the "unconfronted" statements of witnesses.<sup>36</sup> The term "witnesses," according to *Crawford*, includes "those who 'bear testimony.'"<sup>37</sup> The phrase "confronted with" requires at least an opportunity to cross-examine the accusing witness.<sup>38</sup>

According to the Court, because the term "witnesses" encompasses those who bear testimony, the Confrontation Clause governs only testi-

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34. *Giles v. California*, 554 U.S. 353 (2008).

35. U.S. CONST. amend. VI.

36. See *Crawford*, 541 U.S. at 50–51.

37. *Id.* at 51 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). The *Crawford* Court explained that the text of the Confrontation Clause applies to "witnesses" against the accused—in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." [Under this formulation,] [a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

*Id.* (citations omitted). According to *Crawford*, "The constitutional text . . . thus reflects an especially acute concern with a specific type of out-of-court statement." *Id.*

38. *Id.* at 59 ("Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.").

monial statements.<sup>39</sup> If a hearsay statement is nontestimonial, the Confrontation Clause does not apply, and the statement will be admitted if governing hearsay law permits its introduction.<sup>40</sup> On the other hand, if a statement is testimonial, the Sixth Amendment requires either (1) opportunity for cross-examination of the hearsay declarant in court, or (2) in the case of a declarant who is unavailable to testify, some prior opportunity for cross-examination of that declarant.<sup>41</sup> Once actual confrontation is assured, governing hearsay law determines whether the testimonial statement is admissible.<sup>42</sup> Even testimonial statements may be admitted in the absence of confrontation under two Founding-era exceptions, which will be addressed in Part IV.

Under this framework, when a prosecutor seeks to admit a hearsay statement against a criminal defendant, a court must first determine whether the statement is testimonial or nontestimonial.<sup>43</sup> While *Crawford* did not provide a comprehensive definition of testimonial, the decision did contrast “a formal statement to government officers,” which would be testimonial,<sup>44</sup> with “a casual remark to an acquaintance,” which would not.<sup>45</sup> More broadly, *Crawford* noted that testimonial statements are those “made under circumstances which would lead an objective witness

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39. *Davis v. Washington*, 547 U.S. 813, 821 (2006) (“Only [testimonial] statements . . . cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.” (citation omitted)).

40. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011).

41. *Crawford*, 541 U.S. at 59 (“Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”).

42. *Id.* at 59 n.9. State courts often conduct state hearsay analysis before reaching a Confrontation Clause issue, either as a routine or in order to prevent wasting time on federal constitutional issues when the case could be resolved on state-law grounds. *See, e.g.*, *State v. Jones*, 197 P.3d 815, 819 (Kan. 2008) (reordering the issues from how they were argued); *State ex rel. Juvenile Dep’t v. S.P.*, 215 P.3d 847, 852 (Or. 2009) (en banc).

43. *See State v. Lewis*, 235 S.W.3d 136, 142–43 (Tenn. 2007) (“[A]fter *Crawford*, the threshold question in any Confrontation Clause case is whether a challenged statement is testimonial or nontestimonial.” (quoting *State v. Maclin*, 183 S.W.3d 335, 345 (Tenn. 2006))).

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

45. *Id.* The *Crawford* Court also included “business records or statements in furtherance of a conspiracy” within its list of nontestimonial statements, *id.* at 56, but that statement should be read as a general rule only, as some business records could indeed qualify as testimonial, *see Bryant*, 131 S. Ct. at 1175 (Scalia, J., dissenting). As Justice Scalia explains,

Hearsay law exempts business records . . . because businesses have a financial incentive to keep reliable records. The Sixth Amendment also generally admits business records into evidence, but not because the records are reliable or because hearsay law says so . . . . The reliability logic of the business-record exception would extend to records maintained by neutral parties providing litigation-support services, such as evidence testing. The Confrontation Clause is not so forgiving. Business records prepared specifically for use at a criminal trial are testimonial and require confrontation.

*Id.* (citation omitted).

reasonably to believe that the statement would be available for use at a later trial.”<sup>46</sup> Because a witness bears testimony by providing “[a] solemn declaration . . . for the purpose of establishing or proving some fact,”<sup>47</sup> “[t]he Confrontation Clause protects defendants only from hearsay statements that do the same.”<sup>48</sup>

While *Crawford* explained that “[s]tatements taken by police officers in the course of interrogations are . . . testimonial,”<sup>49</sup> the Court did not distinguish among different types of police interrogation. *Crawford* involved structured police questioning of an out-of-court declarant while in police custody<sup>50</sup>—a scenario bearing modern day resemblance to the core class of testimonial statements thought to be in the minds of the Sixth Amendment’s drafters.<sup>51</sup> Just two years later, in *Davis*, the Court addressed more informal police interrogations.<sup>52</sup>

In *Davis*, the Court considered statements made by an assault victim to a 911 dispatcher.<sup>53</sup> In the companion case *Hammon*,<sup>54</sup> the Court analyzed the admissibility of a victim’s statements made in response to police questioning at the scene of a recent domestic battery.<sup>55</sup>

The Court deemed the statements nontestimonial in *Davis*,<sup>56</sup> but it reached the opposite result in *Hammon*.<sup>57</sup> In justifying that distinction,

46. *Crawford*, 541 U.S. at 52 (citations omitted) (quoting Brief for the Nat’l Ass’n of Criminal Def. Lawyers et al. as Amici Curiae Supporting Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02-9410)).

47. *Id.* at 71 (quoting 2 WEBSTER, *supra* note 37) (internal quotation marks omitted).

48. *Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting) (citing *Davis v. Washington*, 547 U.S. 813, 823–24 (2006)). As the *Davis* Court declared, “Only [testimonial] statements . . . cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay . . . .” *Davis*, 547 U.S. at 821 (citation omitted).

49. *Crawford*, 541 U.S. at 52. According to the Court, “Police interrogations bear a striking resemblance to examinations by justices of the peace in England, . . . yet [such examinations] ha[ve] long been . . . a paradigmatic confrontation violation.” *Id.* (citations omitted).

50. *See Davis*, 547 U.S. at 822.

51. *Crawford*, 541 U.S. at 50 (“[T]he principal evil at which the Confrontation Clause was directed was the . . . use of ex parte examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like [Sir Walter] Raleigh’s; that the Marian statutes invited; that English law’s assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.”).

52. *Davis*, 547 U.S. at 822.

53. *Id.* at 826. Collectively, in these cases, the Court determined that “statements made to law enforcement personnel during a 911 call or at a crime scene are ‘testimonial’ and thus subject to the requirements of the Sixth Amendment’s Confrontation Clause.” *Id.* at 817.

54. *Id.* at 813.

55. *See id.* at 819–21. In that case, an officer who interviewed a domestic battery victim, who did not appear at the defendant’s trial, testified as to what the victim told him and authenticated an affidavit the victim prepared. *Id.* at 820.

56. *Id.* at 828–29. In reaching this result, the Court contrasted the purpose of the structured interrogation in *Crawford*, an interrogation “solely directed at establishing the facts of a past crime,”

the *Davis* Court adopted the primary-purpose test, a test *Bryant* ratified and extended to other types of hearsay statements.<sup>58</sup> According to *Davis*, “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.”<sup>59</sup> In contrast, statements are testimonial when “there is no such ongoing emergency, and . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>60</sup> The theory underlying this distinction is that “[w]hen . . . the primary purpose of an interrogation is to respond to an ‘ongoing emergency,’ its purpose is not to create a record for trial and thus is not within the scope of the Clause.”<sup>61</sup>

While *Davis* helped clarify the meaning of “testimonial” in the context of police interrogation, the opinion left ambiguity in its wake.<sup>62</sup> First, while *Crawford*’s “objective-witness” test focused on the declarant’s state of mind,<sup>63</sup> *Davis*’s primary-purpose test seems to focus on the interrogator’s intent.<sup>64</sup> Second, the Court’s dichotomy between statements

with that of the 911 call in *Davis*, an event “ordinarily not designed primarily to ‘establish or prove’ some past fact, but to describe current circumstances requiring police assistance.” *Id.* at 826, 827.

57. *Id.* at 829–30.

58. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) (suggesting that the primary-purpose test will continue to determine whether a statement is testimonial or nontestimonial, even in cases not involving ongoing emergencies).

59. *Davis*, 547 U.S. at 822.

60. *Id.*

61. *Bryant*, 131 S. Ct. at 1155.

62. *See, e.g., State ex rel. Juvenile Dep’t v. S.P.*, 178 P.3d 318, 325 (Or. Ct. App. 2008) (“[The *Davis* rule] indicates that . . . the Court was looking to the purpose of the interrogator in asking the questions rather than the purpose of the declarant in making the statements. However, the Court’s further particularized observations about the circumstances in *Davis* and *Hammon* suggest that the inquiry is not so straightforward as simply discerning the intent of the questioner . . . . [Rather,] the Court referred to both the declarant’s and the questioner’s circumstances in comparing the circumstances in *Davis* and *Hammon* with those in *Crawford* . . . .”).

63. *See Crawford v. Washington*, 541 U.S. 36, 52 (2004) (broadly defining testimonial statements as “[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” (quoting Brief for the Nat’l Ass’n of Criminal Def. Lawyers et al. as Amici Curiae Supporting Petitioner, *supra* note 46, at 3)).

64. *Davis*, 547 U.S. at 822 n.1. Perhaps recognizing this ambiguity, the *Davis* Court explained in a footnote that “when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.” *Id.* While this passage of *Davis* appears to mandate a declarant-based primary-purpose inquiry, the *Bryant* Court disagreed. There, the Court declared:

*Davis*’[s] language indicating that a statement’s testimonial or nontestimonial nature derives from “the primary purpose of the interrogation” could be read to suggest that the relevant purpose is that of the interrogator. In contrast, footnote 1 in *Davis* explains, “[I]t is in the final analysis the declarant’s statements . . . that the Confrontation Clause requires us to evaluate.” *Bryant* draws on the footnote to argue that the primary purpose inquiry

made for the purpose of addressing an ongoing emergency versus statements made for the purpose of establishing past events potentially relevant to prosecution does not account for other potential purposes,<sup>65</sup> nor does it resolve how to classify statements made with mixed purposes or questions posed with multiple motives. Finally, as in *Crawford*, the *Davis* Court did not provide “an exhaustive classification of all [testimonial] statements.”<sup>66</sup> For example, the *Davis* Court indicated in dicta that volunteered statements not made in response to interrogation might also be testimonial.<sup>67</sup>

With so much left unresolved by *Davis*, elaboration of the testimonial/nontestimonial distinction has continued on a case-by-case basis. Lower courts post-*Davis* sometimes expanded the concept of “ongoing emergency”<sup>68</sup> or otherwise distorted the primary-purpose test in a manner often leading to pro-prosecution outcomes.<sup>69</sup>

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must be conducted solely from the perspective of the declarant . . . . But this statement in footnote 1 of *Davis* merely acknowledges that the Confrontation Clause is not implicated when statements are offered “for purposes other than establishing the truth of the matter asserted.” . . . The language in the footnote was not meant to determine how the courts are to assess the nature of the declarant’s purpose, but merely to remind readers that it is the statements, and not the questions, that must be evaluated under the Sixth Amendment.

*Bryant*, 131 S. Ct. at 1160 n.11 (emphasis omitted) (citations omitted) (quoting *Davis*, 547 U.S. at 822 & n.1).

65. For example, an eyewitness to a crime might tell the police what she knows, and might provide very few details about the crime, for the sole purpose of ending her encounter with the police as soon as possible. Presumably, a statement made for any purpose other than that of establishing past events potentially relevant to prosecution would be deemed nontestimonial. *See, e.g.*, *Pantano v. State*, 138 P.3d 477, 483 (Nev. 2006) (deeming nontestimonial statements of a child sexual assault victim to her father because the father was “inquiring into the health, safety, and well-being of the child,” not gathering evidence for purposes of litigation).

66. *Davis*, 547 U.S. at 822.

67. *Id.* at 822 n.1 (“The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.”).

68. Under *Davis*, an ongoing emergency presumably does not exist when the defendant has left the scene and the alleged victim calls the police to report past events. *Id.* at 828 (suggesting that the emergency ends when the defendant drives “away from the premises”). Ignoring this aspect of *Davis*, some courts have found an ongoing emergency to exist in cases where the suspect had long since left the premises. *See, e.g.*, *State v. Warsame*, 723 N.W.2d 637, 641–42 (Minn. Ct. App. 2006), *aff’d in pertinent part*, 735 N.W.2d 684 (Minn. 2007). In *Warsame*, the court concluded that an ongoing emergency under *Davis* “need not be limited to the [911] complainant’s predicament or the location where she is questioned by the police.” *Id.* at 641. Instead, the court reasoned,

As long as a possible emergency situation, occurring at another location or involving another person, is related to the complainant’s own situation and is one which can be clarified by questioning her, the purpose of the questioning may be considered as for the primary purpose of enabling police assistance to meet an ongoing emergency.

*Id.* at 641–42. In *State v. Camarena*, 145 P.3d 267 (Or. Ct. App. 2006), the court applied the *Davis* totality-of-the-circumstances test and concluded that statements to a 911 operator that described an assault occurring about one minute earlier were nontestimonial. Although the declarant “did not call 9-1-1 as the assault was taking place” and “was referring to ‘past’ events, the danger of a renewal of

In the wake of *Davis*, courts of different states often reached opposite results on similar facts,<sup>70</sup> causing the right of confrontation to vary by jurisdiction. *Bryant*—the Court’s most recent ruling on this issue—significantly aggravates the problem.

In *Bryant*, the Court addressed whether statements of a shooting victim, Anthony Covington, were testimonial or nontestimonial.<sup>71</sup> In that case, Detroit police responded to a call reporting that a man had been shot.<sup>72</sup> When police arrived, approximately twenty-five minutes after the shooting,<sup>73</sup> they found Covington lying on the ground with a gunshot wound to his abdomen.<sup>74</sup>

The police asked Covington “what had happened, who had shot him, and where the shooting had occurred”<sup>75</sup>—questions relating to past events and thus seemingly subject to confrontation under *Davis*.<sup>76</sup> In re-

the domestic assault had not necessarily or fully abated” because the “[d]efendant had just left” and “he could easily have returned before the police could arrive.” *Id.* at 274–75.

69. See Cicchini, *supra* note 18, at 771–74 (describing cases in which post-*Davis* courts distorted the primary-purpose test).

70. See *infra* Part III.A. Compare *People v. Romero*, 187 P.3d 56, 81 (Cal. 2008) (deeming nontestimonial an assault victim’s statements that described having been attacked by two men with a hammer-sized ax, when those statements occurred after the men had fled the scene and were subsequently found hiding in bushes down the street; reasoning that “[t]he statements provided . . . information necessary for [police] to assess and deal with the situation, including . . . evaluat[ing] potential threats to others and . . . apprehend[ing] the perpetrators,” and that they “were not made primarily for the purpose of producing evidence for a later trial”), with *State v. Lewis*, 235 S.W.3d 136, 147 (Tenn. 2007) (deeming testimonial statements of a store owner who had just been robbed and shot in the chest that he “knew” that “the lady with the vases” was involved in the crime; reasoning that “[t]he assailant had left the store,” “[t]he 911 call had already been made” after the victim had spoken with a neighboring store owner, and “even though the victim was in a state of distress from his wounds, his comments did not describe an ‘ongoing emergency’ . . . and were instead descriptions of recent, but past, criminal activity”).

71. *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011).

72. *Id.*

73. *Id.* at 1166.

74. *Id.* at 1150.

75. *People v. Bryant*, 768 N.W.2d 65, 71 (Mich. 2009), *vacated and remanded by Bryant*, 131 S. Ct. 1143.

76. *Davis v. Washington*, 547 U.S. 813, 822 (2006); see also *id.* at 827 (distinguishing statements “designed primarily to ‘establis[h] or prov[e]’ some past fact” and those meant “to describe current circumstances requiring police assistance”). In its assessment of the merits, the *Davis* Court further highlighted the distinction between past and present events. *Id.* In distinguishing the interrogation that had occurred in *Davis* (which led to nontestimonial statements) and the one in *Crawford* (which led to testimonial statements), the Court reasoned: (1) in *Davis*, the 911 caller “was speaking about events as they were actually happening, rather than ‘describ[ing] past events.’” *Id.* (quoting *Lilly v. Virginia*, 527 U.S. 116, 137 (1999)). “Sylvia Crawford’s interrogation, on the other hand, took place hours after the events she described had occurred.” *Id.* (2) “[A]ny reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency . . . McCottry’s call was plainly a call for help against bona fide physical threat.” *Id.* (3) “[T]he [questions] asked and answered in *Davis* [objectively indicated] that the elicited statements were necessary . . . to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator’s effort to establish the identity of the assai-

sponse, Covington stated that “Rick” (defendant Bryant) had shot him.<sup>77</sup> Further implicating Bryant, Covington revealed that he had spoken with Bryant through the back door of Bryant’s house and that Bryant had shot him when he turned to leave.<sup>78</sup> Police then traveled to Bryant’s house, where they found evidence tending to confirm Covington’s story.<sup>79</sup>

Covington died shortly after this exchange.<sup>80</sup> At Bryant’s trial, the officers who spoke with Covington recounted Covington’s statements under oath.<sup>81</sup> The jury then found Bryant guilty of second-degree murder and related charges,<sup>82</sup> and the Michigan Court of Appeals affirmed.<sup>83</sup>

After a series of appeals, the Supreme Court of Michigan reversed.<sup>84</sup> Applying *Davis*, the court found that “the ‘primary purpose’ of the questioning was to establish the facts of an event that had *already* occurred[,] . . . not to enable police assistance to meet an ongoing emergency.”<sup>85</sup> Because Covington described past events, the court felt that “his primary purpose in making these statements . . . was . . . to tell the police who had committed the crime,” information that would be used prosecutorially.<sup>86</sup> Accordingly, the Michigan Supreme Court deemed the statements testimonial and held that Covington’s statements should have been excluded.<sup>87</sup>

The United States Supreme Court reversed.<sup>88</sup> Employing a broad view of ongoing emergency, one which “extends beyond an initial victim

lant.” *Id.* And (4) “Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry’s frantic answers were provided over the phone, in an environment that was not tranquil, or even . . . safe.” *Id.*

77. *Bryant*, 131 S. Ct. at 1150.

78. *Id.*

79. *Id.* In particular, police found blood and a bullet on the back porch and an apparent bullet hole in the back door. *Id.* Police also discovered Covington’s wallet and identification outside the Bryant home. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *People v. Bryant*, No. 247039, 2004 WL 1882661, at \*1 (Mich. Ct. App. Aug. 24, 2004) (per curiam).

84. *People v. Bryant*, 768 N.W.2d 65, 67 (Mich. 2009), *vacated and remanded by Bryant*, 131 S. Ct. 1143.

85. *Id.* at 71. Applying the *Davis* distinctions, the Michigan Supreme Court deemed Covington’s statements testimonial. *Id.* According to the Michigan Supreme Court, “The circumstances . . . clearly indicate that the ‘primary purpose’ of the questioning was to establish the facts of an event that had *already* occurred; the ‘primary purpose’ was not to enable police assistance to meet an ongoing emergency.” *Id.* The court came to this conclusion because “[t]he crime had been completed about 30 minutes earlier and six blocks from where the police questioned the victim,” and because “[t]he police asked the victim what had happened in the past, not what was currently happening.” *Id.*

86. *Id.*

87. *Id.* at 75.

88. *See Michigan v. Bryant*, 131 S. Ct. 1143, 1166–67 (2011).

to a potential threat to the responding police and the public at large,<sup>89</sup> an approach that vastly expands the category of nontestimonial hearsay,<sup>90</sup> the *Bryant* Court deemed Covington's statements nontestimonial.<sup>91</sup>

Along the way, the *Bryant* Court clarified how courts should distinguish testimonial from nontestimonial statements. The Court explained: (1) the primary-purpose test broadly governs the testimonial/nontestimonial distinction, even in cases not involving an ongoing emergency;<sup>92</sup> (2) when applying the primary-purpose test, courts must objectively evaluate<sup>93</sup> two overarching variables, "[t]he circumstances in which the encounter occurs" and "[t]he statements and actions of [both] parties";<sup>94</sup> (3) under this analysis, an objective evaluation<sup>95</sup> of whether an ongoing emergency exists at the time of the declarant's statements is one of "the most important circumstances" to consider;<sup>96</sup> and (4) courts

89. *Id.* at 1156.

90. See Cicchini, *supra* note 18, at 779; see also *Bryant*, 131 S. Ct. at 1173 (Scalia, J., dissenting) (arguing that the majority's "distorted view [of the nature of an ongoing emergency] creates an expansive exception to the Confrontation Clause for violent crimes").

91. *Bryant*, 131 S. Ct. at 1167.

92. *Id.* at 1155 (suggesting that the primary-purpose test will determine whether a statement is testimonial or nontestimonial, even in cases not involving ongoing emergencies); *Philpot v. State*, 709 S.E.2d 831, 835 (Ga. Ct. App. 2011) ("*Bryant* . . . substantially alters and expands the framework for analyzing whether an out-of-court statement being challenged on Confrontation Clause grounds is testimonial or nontestimonial . . ." (citation omitted)); see also Richard D. Friedman, *Statements Made in the Absence of Interrogation*, CONFRONTATION BLOG (Mar. 28, 2011, 12:22 PM), [http://confrontationright.blogspot.com/2011\\_03\\_01\\_archive.html](http://confrontationright.blogspot.com/2011_03_01_archive.html) ("*Bryant* does appear to expand on *Davis v. Washington* by creating a general principle that 'primary purpose' is determinative in all circumstances of whether a statement is testimonial."). For an example of a recent case applying the primary-purpose test in the absence of an emergency, see *State v. Bulger*, Nos. 94665, 94666, 94667, 2011 WL 3359861, at \*3 n.5 (Ohio Ct. App. Aug. 4, 2011) (noting *Bryant* is "distinguishable because the instant case is not being viewed as an emergency to which police responded," but deeming the objectionable hearsay statement nontestimonial under the primary purpose test).

93. According to the Court, the relevant inquiry focuses not on the actual purpose of the individuals involved "but rather the purpose that reasonable participants would have had" in such an encounter. *Bryant*, 131 S. Ct. at 1156.

94. *Id.* The *Bryant* court also noted that *Davis* uses the word "objective" or "objectively" at least eight times when describing the relevant inquiry. *Id.* (citation omitted).

95. As the Court explained in a footnote:

The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight. If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause. The emergency is relevant to the "primary purpose of the interrogation" because of the effect it has on the parties' purpose, not because of its actual existence.

*Id.* at 1157 n.8.

96. *Id.* at 1162. According to the *Bryant* Court, "The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than 'proving past events potentially relevant to later criminal prosecution.' Rather, it focuses them on 'end[ing] a threatening situation.'" *Id.* at 1157 (quoting *Davis v. Washington*, 547 U.S. 813, 822, 832 (2006)). In a statement reminiscent of the "reliability" view of

should ultimately consider the entire context,<sup>97</sup> including a variety of specific factors provided in the opinion.<sup>98</sup>

As under *Roberts*, where courts often employed up to ten factors in a given case,<sup>99</sup> *Bryant* noted a variety of factors courts should consider when determining the primary purpose of an out-of-court statement.<sup>100</sup> According to *Bryant*, courts are to consider the following factors relating to “the circumstances of [the] encounter”:<sup>101</sup> (1) “the type of weapon employed” by any alleged assailant;<sup>102</sup> (2) “the medical condition of a declarant”;<sup>103</sup> (3) the formality or informality of the encounter;<sup>104</sup> (4) whether the encounter appears disorganized;<sup>105</sup> and (5) the location of the encounter.<sup>106</sup> In the overall analysis, courts must also consider the “statements and actions of the parties,”<sup>107</sup> including more specific factors relating to (6) the declarant’s statements, particularly those regarding the nature of

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the confrontation right that existed under *Roberts*, the Court explained “that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.” *Id.*

97. *Id.* at 1158.

98. *Id.* at 1158–62.

99. In *Crawford*, for example, the Washington Court of Appeals applied a nine-factor reliability test. *Crawford v. Washington*, 541 U.S. 36, 41 (2004); *see also* *Snowden v. State*, 846 A.2d 36, 43–44 (Md. Ct. Spec. App. 2004) (summarizing Maryland law under *Roberts* as requiring a court to evaluate thirteen separate factors to determine whether an out-of-court hearsay statement bore “particularized guarantees of trustworthiness” (citations omitted)).

100. *Bryant*, 131 S. Ct. at 1158–62. In dissent, Justice Scalia summarized the factors noted by the majority as including (1) “the type of weapon the defendant wielded”; (2) “the type of crime the defendant committed”; (3) “the medical condition of the declarant”; (4) “whether paramedics have arrived on the scene”; (5) “whether the encounter takes place in an ‘exposed public area’”; (6) “whether the encounter appears disorganized”; (7) “whether the declarant is capable of forming a purpose”; (8) “whether the police have secured the scene of the crime”; (9) “the formality of the statement”; and (10) “whether the statement strikes [the court] as reliable.” *Id.* at 1175–76 (Scalia, J., dissenting) (citations omitted).

101. *Id.* at 1156 (majority opinion).

102. *Id.* at 1158 (noting that the nature and duration of an emergency might change depending on the particular weapon employed, and drawing a distinction between assailants who use their fists and assailants who employ guns).

103. *Id.* at 1159. As the Court explained, the severity of a declarant’s injuries may shed light on the declarant’s purpose, if any, and may enable first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public. *Id.*

104. *Id.* at 1160. As in *Crawford*, “formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to [generate testimonial evidence].” *Id.* (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006)). Informality, however, “does not necessarily indicate the presence of an emergency or the lack of testimonial intent.” *Id.* (citing *Davis*, 547 U.S. at 826).

105. *See id.*

106. *See id.* at 1156. On this factor, the Court here noted a distinction between interrogation “at or near the scene of the crime versus at a police station.” *Id.* Presumably, a “formal station-house interrogation,” as in *Crawford*, *id.* at 1160, is more likely to render a statement testimonial in nature.

107. *Id.* at 1162.

the potential emergency;<sup>108</sup> (7) the types of questions posed by the interrogators;<sup>109</sup> (8) whether a “reasonable victim in the circumstances of the actual victim” would envision prosecution, would instead be motivated by ending the threat from the assailant, both, or neither;<sup>110</sup> (9) whether the parties might “have mixed motives” (which could require the court to determine which purpose was primary);<sup>111</sup> (10) “[t]he identity of [the] interrogator”<sup>112</sup> (a factor that becomes critical in cases involving questioning by medical personnel and potential police agents); and (11) a catch-all factor consisting of “all relevant information” bearing upon “whether a declarant’s statements are testimonial,”<sup>113</sup> a mandate sure to lead to development of additional factors not identified in *Bryant*.<sup>114</sup>

In analyzing the merits of Bryant’s case, the Court applied as many as six factors, including what the police knew when they arrived at the scene, the specific questions they asked, the particular information Covington conveyed, the weapon involved, Covington’s medical condition, and the relative informality of the situation.<sup>115</sup> Ultimately, the Court held that Covington’s statements were nontestimonial because their primary purpose was to enable police to meet an ongoing emergency,<sup>116</sup> one that involved “a threat potentially to the police and the public.”<sup>117</sup> As a result, the Confrontation Clause did not bar their admission.<sup>118</sup>

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108. *Id.* at 1159. As the Court explained, it is possible, for example, for “a declarant [to] provide[] police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute,” thereby presumably altering the “primary purpose” of the interrogation. *Id.*

109. *Id.* at 1161. According to the Court, “*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator.” *Id.* at 1160. That inquiry includes examination of the words exchanged. *Id.* at 1160–61. When considering the statements of both parties, courts should examine “the contents of both the questions and the answers.” *Id.* at 1161. As an example, “if the police say to a victim, ‘Tell us who did this to you so that we can arrest and prosecute them,’ the victim’s response that ‘Rick did it,’” would appear testimonial, as the conversation has a clear prosecutorial focus. *Id.*

110. *Id.* at 1161–62 (elaborating on these possibilities).

111. *Id.* at 1161.

112. *Id.* at 1162.

113. *Id.*

114. Just as they did under *Davis*, courts are sure to develop additional factors under *Bryant*. See, e.g., *State v. Warsame*, 735 N.W.2d 684, 695 (Minn. 2007) (finding it significant that the interrogating officer did not take detailed notes while questioning the victim of a recent assault).

115. *Bryant*, 131 S. Ct. at 1163–67.

116. *Id.* at 1163–64.

117. *Id.* at 1164. The Court declared, “At bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington.” *Id.*

118. *Id.* at 1167.

Justice Thomas concurred in the result but wrote separately to highlight the flaws in the primary-purpose test.<sup>119</sup> Rather than attempt to divine the unknowable primary purpose of each party, Justice Thomas focused on “the extent to which the interrogation resembles those historical practices that the Confrontation Clause addressed.”<sup>120</sup> Emphasizing the lack of formality in the exchange between Covington and the police, Justice Thomas concluded—like the majority—that admission of Covington’s statements did not implicate the Confrontation Clause.<sup>121</sup>

Justice Scalia, the author of *Crawford*, was one of only two dissenters.<sup>122</sup> Justice Scalia’s dissent both criticized the majority’s decision on the merits and bemoaned the opinion’s influence on Confrontation Clause jurisprudence, which he described as “distort[ed]” and “in a shambles.”<sup>123</sup> His dissent insightfully shows how a purpose-based framework can lead to inconsistent results and other undesirable outcomes, such as an expansive violent crimes exception.

Before addressing the merits of Bryant’s case, Justice Scalia scolded the majority for considering the interrogator’s intent.<sup>124</sup> According to Scalia, “The inquiry under *Crawford* turns in part on the actions and statements of a declarant’s audience only because they shape the declarant’s perception of why his audience is listening and therefore influence *his purpose* in making the declaration.”<sup>125</sup> As Scalia rightly noted, only an approach that focuses on the declarant’s intent “would work in every fact pattern implicating the Confrontation Clause”<sup>126</sup> because not all hearsay statements are made in response to actual interrogation.<sup>127</sup> Further, examining the purposes of both the declarant and the

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119. *Id.* (Thomas, J., concurring) (“I have criticized the primary-purpose test as ‘an exercise in fiction’ that is ‘disconnected from history’ and ‘yields no predictable results.’ Rather than attempting to reconstruct the ‘primary purpose’ of the participants, I would consider the extent to which the interrogation resembles those historical practices that the Confrontation Clause addressed.” (citations omitted)).

120. *Id.*

121. *Id.* at 1167–68.

122. *Id.* at 1168–76 (Scalia, J., dissenting).

123. *Id.* at 1168.

124. *Id.* at 1168–69.

125. *Id.* at 1169.

126. *Id.* As Justice Scalia argues, “An inquiry into an officer’s purposes would make no sense when a declarant blurts out ‘Rick shot me’ as soon as the officer arrives on the scene. I see no reason to adopt a different test—one that accounts for an officer’s intent—when the officer asks ‘what happened’ before the declarant makes his accusation.” *Id.*

127. *Id.* (“The [Confrontation] Clause applies to volunteered testimony as well as statements solicited through police interrogation.” (citing *Davis v. Washington*, 547 U.S. 813, 822 n.1 (2006))); see also *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530 (2009) (deeming testimonial statements contained in a certificate “reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine” even though statements were not made in response to interrogation).

interrogator “only compounds the problem,” as “[n]ow courts [might] have to sort through two sets of mixed motives.”<sup>128</sup>

Justice Scalia also noted the ease with which the majority’s standards could be manipulated to reach desired outcomes and argued the following:

If the dastardly police trick a declarant into giving an incriminating statement against a sympathetic defendant, a court can focus on the police’s intent and declare the statement testimonial. If 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. Unfortunately, under this malleable approach “the guarantee of confrontation is no guarantee at all.”<sup>129</sup>

After noting other troubling aspects of the majority’s framework,<sup>130</sup> Justice Scalia addressed the merits of Bryant’s case, which he called “an absurdly easy” one.<sup>131</sup> Focusing on the intent of the declarant,<sup>132</sup> Scalia argued that from Covington’s perspective, “his statements had little value except to ensure the arrest and eventual prosecution of Richard

128. *Bryant*, 131 S. Ct. at 1170 (Scalia, J., dissenting).

129. *Id.* (quoting *Giles v. California*, 554 U.S. 353, 375 (2008)).

130. Justice Scalia also worried that one passage in the majority opinion might resurrect the very concepts of “reliability” rejected in *Crawford*. *Id.* at 1174–76. As the majority described the governing analysis, other circumstances “aside from ongoing emergencies” might exist where “a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony”; in those situations, the majority wrote, “standard rules of hearsay, designed to identify some statements as reliable, will be relevant.” *Id.* at 1155 (majority opinion). As Justice Scalia interpreted this passage, “The Court announces . . . it will look to ‘standard rules of hearsay, designed to identify some statements as reliable,’ when deciding whether a statement is testimonial.” *Id.* at 1174 (Scalia, J., dissenting). Yet, this was the very aspect of the *Roberts* test that was overruled in *Crawford*. *Id.* While this particular aspect of Justice Scalia’s critique is likely overstated, in that the majority’s reference to “reliability” was made in regards to the *Crawford* framework and its testimonial/nontestimonial distinction, *see id.* at 1155 (majority opinion), time will tell whether lower courts incorporate notions of reliability back into confrontation analysis. There is already some indication that courts will do so. *See, e.g.*, *Philpot v. State*, 709 S.E.2d 831, 836 (Ga. Ct. App. 2011) (“The new analytical framework for assessing whether an out-of-court statement implicates the Confrontation Clause [as clarified in *Bryant*] is still one that seeks to discern the primary purpose behind that statement, but which also recognizes that ‘standard rules of hearsay,’ and their respective indicia of reliability, are relevant to a court’s primary-purpose inquiry.” (citation omitted)); *State v. Bulger*, Nos. 94665, 94666, 94667, 2011 WL 3359861, at \*4 (Ohio. Ct. App. Aug. 4, 2011) (Gallagher, J., concurring) (“Appellant’s counsel is concerned that this case will stand for the proposition that the ‘reliability’ of so-called nontestimonial statements will begin to rule the day over the preferred standard of ‘confrontation’ outlined under *Crawford*. It is a legitimate concern, but one not likely to be resolved by an intermediate appellate court.”).

131. *Bryant*, 131 S. Ct. at 1170 (Scalia, J., dissenting).

132. In Part I.C. of his opinion, Justice Scalia argued that “this is an absurdly easy case even if one (erroneously) takes the interrogating officers’ purpose into account.” *Id.* at 1171.

Bryant.”<sup>133</sup> When Covington made his statements, Covington knew his encounter with Bryant had ended twenty-five minutes earlier and that even if Bryant had pursued him, which was unlikely, it was entirely implausible that Bryant would again confront Covington while surrounded by five armed police officers.<sup>134</sup> Moreover, because Covington knew Bryant was “not a spree killer who might randomly threaten others,” he had no reason to believe an ongoing emergency existed.<sup>135</sup>

Drawing an opposite inference from Covington’s dire medical condition (and illustrating the malleability of the majority’s multifactor test), Justice Scalia further argued that “Covington’s pressing medical needs do not suggest that he was responding to an emergency, but to the contrary reinforce the testimonial character of his statements.”<sup>136</sup> According to Justice Scalia, Covington “understood the police were focused on investigating a past crime, not his medical needs,” as the officers did not meaningfully “attempt to assess the severity of his wounds.”<sup>137</sup>

Finally, Justice Scalia argued that Covington’s statements, and indeed the entire colloquy, “would have been a routine direct examination” at trial.<sup>138</sup> Like a witness, Covington recounted the details of a past criminal event, and like a prosecutor, the police elicited those details through structured questioning.<sup>139</sup> According to Scalia, “Preventing the admission of ‘weaker substitutes for live testimony at trial’ such as this . . . is precisely what motivated the Framers to adopt the Confrontation Clause and what motivated our decision[] in *Crawford*.”<sup>140</sup>

Addressing the broader impact of the decision, Justice Scalia worried that the majority’s “distorted view [of the concept of an ongoing emergency] creates an expansive exception to the Confrontation Clause for violent crimes.”<sup>141</sup> As Scalia argued, if prosecutors can plausibly claim that a potential threat to the police or the public persisted through the first few hours after a violent act, as they did in *Bryant*, then defendants will effectively lose the right to cross-examine all such witnesses.<sup>142</sup> This in turn creates a potentially vast expansion of the category

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133. *Id.* at 1170.

134. *Id.*

135. *Id.*

136. *Id.* at 1171.

137. *Id.*

138. *Id.* (citation omitted).

139. *Id.*

140. *Id.* (citation omitted).

141. *Id.* at 1173.

142. *Id.*; see also *People v. Bryant*, 768 N.W.2d 65, 73 (Mich. 2009) (“The prosecutor argues that the primary purpose of the interrogation was to enable police assistance to meet an ‘ongoing emergency’—to find and apprehend a criminal before he injured somebody else. This argument is unpersuasive because an ‘ongoing emergency’ in this sense would almost always exist while the

of nontestimonial hearsay and threatens to make the right of confrontation “a hollow constitutional guarantee.”<sup>143</sup>

### III. EVADING CONFRONTATION THROUGH THE TESTIMONIAL/NONTESTIMONIAL DISTINCTION

*Bryant*'s framework, which requires consideration of countless factors, is strikingly reminiscent of the discredited *Roberts* framework. Like the *Roberts* test, the *Bryant* test makes case results unpredictable<sup>144</sup> and provides easy means for courts to dispense with actual confrontation.

#### A. Manipulating the Bryant Factors Test

The lack of predictable results under the *Bryant* test is reflected in lower court rulings applying the *Bryant* framework. *People v. Clay*,<sup>145</sup> for example, illustrates how slight changes in an interrogator's questions can alter the outcome, allowing for easy evasion of the confrontation right.

In *Clay*, New York's intermediate appellate court admitted statements of shooting victim, Igol Isaacs, which identified Thomas Clay as the shooter.<sup>146</sup> Shortly after Isaacs was shot,<sup>147</sup> Police Captain Brian McGee responded to the call, where he discovered several officers surrounding Isaacs, who was lying face-up on a public sidewalk.<sup>148</sup> Without speaking with the other officers, “McGee knelt down beside [Isaacs] and asked ‘Who shot you?’”<sup>149</sup> “Receiving no response, McGee then stated to Isaacs: ‘I don't think you're going to make it. Who shot you?’”<sup>150</sup>

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police are investigating alleged crimes. That is, to adopt the prosecutor's argument would effectively render non-testimonial all statements made before the offender was placed behind bars. This is clearly inconsistent with the commands of the Supreme Court.” (citations omitted), *vacated and remanded by Bryant*, 131 S. Ct. 1143.

143. *Bryant*, 131 S. Ct. at 1173 (Scalia, J., dissenting); see also Cicchini, *supra* note 18, at 770 (“If situations can be upgraded to ongoing emergencies simply because a defendant might commit an unspecified crime at some unspecified time in the future against an unspecified victim, then every situation will be automatically transformed into an ongoing emergency. In that case . . . no statement could ever be classified as testimonial.”).

144. *Bryant*, 131 S. Ct. at 1167 (Thomas, J., concurring).

145. *People v. Clay*, 926 N.Y.S.2d 598 (App. Div. 2011).

146. *Id.* at 607–11 (holding that the declarant's statement identifying his assailant was testimonial, but admitting the statement as a dying declaration, which the court recognized as an exception to the Confrontation Clause).

147. According to the court, “Isaacs was shot six times. Three of the bullets entered Isaacs's abdomen, the right side of his back, and the left side of his back, . . . fractured two vertebrae and the spinal cord, and passed into his chest cavity, perforating [his right lung].” *Id.* at 610. At the time Isaacs identified his shooter, he struggled to breathe and was informed by McGee that he would probably not live. *Id.* Under these circumstances, the court admitted Isaacs's statement, “Tom shot me,” as a dying declaration. *Id.* at 611.

148. *Id.* at 600.

149. *Id.*

150. *Id.*

Isaacs then apparently responded, “Todd shot me.”<sup>151</sup> “When McGee sought to confirm ‘Todd shot you,’ the victim stated, ‘[N]o. No. Tom shot me. Tom. Tom.’”<sup>152</sup> McGee then asked, “Tom who?”<sup>153</sup> At that point, Isaacs became unable to speak and died shortly thereafter.<sup>154</sup>

Clay was subsequently tried for second-degree murder.<sup>155</sup> At trial, McGee testified and described the incriminatory statements made by Isaacs.<sup>156</sup> Clay was convicted on the strength of this and other evidence.<sup>157</sup>

On appeal, Clay argued that McGee’s testimony violated his right to confront Isaacs.<sup>158</sup> The appellate court agreed that Isaacs’s statements were testimonial but admitted the statements under the dying-declarations exception.<sup>159</sup> In summarizing *Bryant*,<sup>160</sup> the court emphasized *Bryant*’s totality-of-the-circumstances approach, describing the *Bryant* inquiry as “a fact-based question that must necessarily be answered on a case-by-case basis.”<sup>161</sup>

On the merits, the court found significant factual distinctions between Clay’s case and *Bryant*’s.<sup>162</sup> Unlike the questioner in *Bryant*, McGee was not the first officer on the scene.<sup>163</sup> Thus, the court speculated, “It stands to reason that the other officers would have already endeavored to determine the nature of any emergency that may have existed . . . .”<sup>164</sup> Moreover, unlike the responding officer in *Bryant*, whose initial question to the victim was a “general inquiry as to what had happened,” McGee’s initial question was, “Who shot you?”<sup>165</sup> McGee’s question was therefore “designed only to learn the identity of the perpetrator.”<sup>166</sup> According to the court, while efforts were also made to establish the identity of the assailant in *Bryant*, “such questions were merely

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151. *Id.* at 600–01.

152. *Id.* at 601.

153. *Id.*

154. *Id.* at 600.

155. *Id.* at 601.

156. *Id.*

157. *Id.* On the night of the shooting, Yvette Clay, who claimed to have witnessed the shooting, identified the killers as her estranged husband Thomas Clay and another man, Sidor Fletcher. *Id.* In addition to McGee’s testimony, the prosecution presented the testimony of Yvette Clay, along with the testimony of another eyewitness who had been talking to Isaacs when the shooting occurred. *Id.* Each of these witnesses identified Clay as one of two shooters. *Id.*

158. *Id.*

159. *Id.* at 607–11.

160. *Id.* at 604–05.

161. *Id.* at 605 (quoting *People v. Nieves-Andino*, 872 N.E.2d 1188, 1190 (N.Y. 2007)).

162. *Id.* at 605–07.

163. *Id.* at 605.

164. *Id.*

165. *Id.* at 606.

166. *Id.* (citation omitted).

part of a general battery of questions” aimed at “‘assess[ing] the situation’ and the potential threat to public safety.”<sup>167</sup> In *Clay*, however, “[McGee’s] ‘evident reason’ for asking ‘who shot you’ was not ‘to deal with an emergency’ but to give Isaacs what might have been . . . his final opportunity to bear witness against his assailants.”<sup>168</sup> Thus, unlike in *Bryant*, the court found the statements in *Clay* testimonial, which would have made the statements inadmissible had the court not invoked a confrontation exception.<sup>169</sup>

While the court’s logic is sound, it ignores the striking similarities between *Bryant* and *Clay*. In both cases, police responded to the call of a man who was recently shot. In both cases, police discovered the man in dire medical condition lying in public. In both cases, the shooting victim died shortly after speaking with the police. Yet, the *Clay* court distinguished *Bryant* based on the nature of the questions asked and ignored other factors highlighted in *Bryant*. For example, the *Clay* court downplayed the informality of the encounter between McGee and Isaacs by relegating it to a footnote,<sup>170</sup> a factor the *Bryant* Court found significant in a factually similar scenario.<sup>171</sup>

The ability to distinguish *Bryant* based simply on the wording of the questions asked<sup>172</sup> shows how very slight differences in an interrogator’s wording can change the Sixth Amendment outcome. Presumably, had Officer McGee simply asked Isaacs “a general battery of questions,” even ones aimed at discovering the assailant’s identity, as in *Bryant*, Isaacs’s response would become magically nontestimonial. By the same token, the *Clay* court would presumably reach the opposite result as *Bryant* in a case identical to *Bryant* if the interrogating officer simply added, “I don’t think you are going to make it.” Phrasing questions diffe-

167. *Id.* (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1166 (2011)).

168. *Id.* (quoting *People v. Bradley*, 862 N.E.2d 79, 79 (N.Y. 2006)) The court also emphasized that “upon learning the identity of the shooter, McGee next set out to ‘preserve the crime scene.’ McGee [later] explained that the purpose of this activity was to locate and secure evidence, and to locate any witnesses to the crime.” *Id.*

169. *Id.* at 607.

170. *Id.* at 604 n.1 (“Another relevant circumstance identified by the [*Bryant*] Court was the formality or informality of the encounter. However, the Court acknowledged that ‘informality does not necessarily indicate . . . the lack of testimonial intent’ and recognized that the right to confrontation cannot be evaded by deliberately keeping an interrogation informal.” (quoting *Bryant*, 131 S. Ct. at 1160)).

171. *Bryant*, 131 S. Ct. at 1160.

172. On this point, the *Clay* court reasoned,

[T]he inquiry “Who shot you? I don’t think you are going to make it. Who shot you?” is closer to “‘Tell us who did this to you so that we can arrest and prosecute them,’” than it is to a general inquiry beginning with “what happened?” In other words, “the victim’s response . . . appears purely accusatory . . . by virtue of the phrasing of the question.”

*Clay*, 926 N.Y.S.2d at 606 (citation omitted).

rently, such as “What happened?” rather than “Who shot you?” or posing questions about the identity of the assailant within “a general battery of questions” is an incredibly easy distinction to manipulate. The Constitution should not turn on these trivialities.

Courts have reached the opposite outcome in cases involving interrogations nearly identical to *Clay*. For example, in *State v. Calhoun*,<sup>173</sup> a pre-*Bryant* case, the court deemed nontestimonial the statements of a shooting victim identifying his assailant.<sup>174</sup> As in *Clay*, the declarant in *Calhoun* was found motionless after he was shot, and the interrogator asked just one question: Who shot him?<sup>175</sup> In response, the declarant stated it was “Chico” and “Worm.”<sup>176</sup> The declarant was then asked to “squeeze [the interrogator’s] hand to confirm that ‘Chico’ and ‘Worm’ were the shooters, and [the declarant] did so.”<sup>177</sup> While this was the extent of the interrogation, the court found the statements nontestimonial.<sup>178</sup> Presumably, the *Clay* court would have disagreed, as the officer’s sole question in *Clay*, “Who shot you?” was nearly identical to the sole question in *Calhoun*.<sup>179</sup>

As *Clay* and *Calhoun* reveal, a declarant’s primary purpose in describing one’s assailant is often difficult to determine. This difficulty has led to inconsistent rulings in additional similar cases. In *Davis*, for example, the Court analyzed the 911 dispatcher’s questions and concluded that the identity of the assailant was necessary to attend to an ongoing emergency “so that the dispatched officers might know whether they would be encountering a violent felon.”<sup>180</sup> Likewise, in *Harkins v. State*,<sup>181</sup> the court found that a shooting victim’s statement made to a 911 operator was testimonial when he identified his assailant by declaring, “Jerry shot me and he was paid to do it.”<sup>182</sup> Echoing *Davis*, the court reasoned that “[a]lthough the assailant’s name was not likely necessary to assist [the declarant] medically, that information could be used by police to prevent further harm.”<sup>183</sup>

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173. *State v. Calhoun*, 657 S.E.2d 424 (N.C. Ct. App. 2008).

174. *Id.* at 425.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 427.

179. *Id.* (“Among the acceptable purposes of the interrogation is to ‘establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon.’ There being such an emergency here, we hold that [the shooting victim’s] statements were non-testimonial on this ground as well.” (quoting *Davis v. Washington*, 547 U.S. 813, 827 (2006))).

180. *Davis*, 547 U.S. at 827 (citation omitted).

181. *Harkins v. State*, 143 P.3d 706 (Nev. 2006).

182. *Id.* at 709.

183. *Id.* at 715. The court believed that

In *State v. Jones*, the Kansas Supreme Court reached the opposite result when considering similar statements of a shooting victim who identified his assailant, and characterized the nature of the emergency in a way that contradicted *Harkins* and *Davis*. In *Jones*, the court held that a shooting victim's statements identifying his assailant were testimonial when they were made to paramedics during transit to a hospital.<sup>184</sup> According to the court, "Although [the victim] was in the midst of a medical emergency, the paramedics' questions . . . were not designed to deal with the immediate danger. Rather, the questions about the identity of the shooter related to past events and sought information above and beyond what was necessary to administer medical care."<sup>185</sup> As a result, the court deemed the declarant's statements identifying his assailant testimonial.<sup>186</sup>

The courts in both *Jones* and *Harkins* agreed that information regarding the assailant was not needed to assist the declarant medically, but the courts reached opposite outcomes on similar facts. In its primary-purpose analysis, *Jones* focused on the medical emergency of the declarant, whereas *Harkins* ignored that aspect of the case and focused instead on the potential threat posed by the assailant to others.

As this comparison reveals, sometimes details regarding an assailant's identity are necessary to assess the nature of a potential ongoing emergency, but sometimes they are not. When courts are required to speculate whether such details were truly necessary to resolve an ongoing emergency, courts are bound to create inconsistent outcomes and hairsplitting distinctions.

*Graure v. United States*,<sup>187</sup> a case from the District of Columbia, further illustrates the malleability of the *Bryant* test. In that case, defendant Vasile Graure was prosecuted for having set fire to a strip club. Club employee Vladimir Djordjevic, the out-of-court declarant, confronted Graure as he entered the club carrying gasoline and a lighter. As the two struggled, Graure was able to pour and ignite the gasoline, and Djordjevic was "completely covered in flames."<sup>188</sup>

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[s]imilarly, the information that "he was paid to do it" was not relevant in assisting [the declarant] medically, but that information could also be used by police to determine the extent of the danger at the scene, i.e., the seriousness of [the assailant's] intent to kill [the declarant] and whether he might return to the scene to ensure the job was completed.

*Id.* Moreover, the court found it significant that "Deriso made that portion of the statement spontaneously, not in response to the dispatcher's question." *Id.*

184. *State v. Jones*, 197 P.3d 815, 820 (Kan. 2008).

185. *Id.*

186. *Id.* Moreover, "the fire department paramedic acknowledged that the information obtained through their questioning often helps the police where the patient has been transported from the scene quickly," and the police had not yet had an opportunity to interrogate him. *Id.*

187. *Graure v. United States*, 18 A.3d 743 (D.C. 2011).

188. *Id.* at 751 (internal quotation marks omitted).

Minutes later, club manager Kathleen Lazorchack saw Djordjevic emerge from the building. According to Lazorchack, Djordjevic was “[c]harred from [ ] head to toe.”<sup>189</sup> Indicating a concern for his own welfare, rather than some hypothetical desire to address an ongoing emergency, Djordjevic told Lazorchack not to touch him.<sup>190</sup> At this point, Lazorchack asked, “How did this happen?”<sup>191</sup> Djordjevic responded, “I saw that man coming back with a can and I tried to stop him.”<sup>192</sup> Another club employee, Ali Talebnejad, then asked Djordjevic, “What happened?”<sup>193</sup> Djordjevic explained that “the guy came back to the club and tried to burn it,” and that Djordjevic had tried to stop him.<sup>194</sup> Witnesses later described Djordjevic as “very frantic” and “in shock.”<sup>195</sup>

Djordjevic was still in the hospital at the time of Graure’s trial,<sup>196</sup> and the trial court introduced the statements Djordjevic made after exiting the club.<sup>197</sup> The District of Columbia Court of Appeals affirmed.<sup>198</sup> Analyzing Graure’s Sixth Amendment claim, the court focused on “the primary purpose of the interrogation.”<sup>199</sup> After summarizing *Bryant* and noting three *Bryant* factors—those relating to the weapon employed, the victim’s medical condition, and the informality of the situation<sup>200</sup>—the court stated that “all of the factors . . . identified in *Bryant* support a conclusion that [the] statements were not testimonial.”<sup>201</sup> Emphasizing the three *Bryant* factors it had highlighted, the court reasoned:

[W]hat had injured the visibly burned Djordjevic was fire, a weapon that could have continued to pose a threat to those in or near the club. Further, witnesses described the scene as one of confusion and bewilderment; thus, the situation did not involve formal or structured questioning. Finally, Djordjevic’s medical condition obviously was grave, making it likely that Talebnejad’s and Lazorchack’s questions would not have “focused him on the possible future pro-

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189. *Id.* at 752.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 751–52.

195. *Id.* at 755.

196. *Id.* at 752. Djordjevic eventually died from his injuries. *Id.*

197. *See id.* at 754–55.

198. *Id.* at 755.

199. *Id.* at 756–57.

200. *Id.* at 757.

201. *Id.*

secutorial use of his statements,” and that his answers to their questions about what happened were “simply reflexive.”<sup>202</sup>

While the court’s ruling is plausible, Djordjevic likely had no purpose whatsoever in answering the simple questions posed by his superiors. Djordjevic was “in shock” at the time<sup>203</sup> and seemed to be focused on caring for his wounds rather than the danger posed by the defendant. Indeed, it seems that Djordjevic, who acted bravely in attempting to stop the defendant from entering the club, had shifted his focus away from the defendant and toward his own wounds, as would be expected under the circumstances.

One could also question whether Djordjevic’s interrogators had any purpose other than to simply understand what happened. Talebnejad went home about ten minutes after Graure was kicked out of the club and returned to the club after he received a phone call about the fire.<sup>204</sup> Moreover, Talebnejad testified that he asked Djordjevic, “What happened?” simply because he “just wanted to know what happened.”<sup>205</sup> It would be natural for Talebnejad, a manager at the club who did not witness the event,<sup>206</sup> to simply wish to know what occurred. Like a commuter who drives past the scene of an accident, the simple desire to understand what caused the accident is neither a purpose directed toward future prosecution nor one intended to address an ongoing emergency. It is possible—perhaps even likely—that the interrogators here were neither attempting to assess an emergency nor attempting to gather testimony for later prosecution.

*Bryant*, *Clay*, and *Graure* each involve statements of a crime victim made within minutes of the criminal event. The victim’s statements in each case were made in direct response to preliminary investigative questions. In all three cases, the court speculated as to the likely purpose of a “reasonable victim in the circumstances of the actual victim.”<sup>207</sup> In all three cases, it is possible that a similarly situated declarant would envision prosecution, would be motivated by ending the threat from the assai-

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202. *Id.* at 757–58 (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1166, 1161 (2006)). The court also deemed it significant, but not dispositive, that “[t]he questioners were not police officers but . . . acquaintances of Djordjevic.” *Id.* at 757. According to the court, because the questioners “had not been in a position to witness the [struggle], . . . neither questioner knew what had caused the fire or whether whatever or (whoever) had caused the fire continued to pose a risk to workers and patrons or to the club premises.” *Id.* at 757.

203. *Id.* at 755.

204. *Id.* at 752 n.7.

205. *Id.* at 758 n.18.

206. See *id.* at 757 (identifying Talebnejad as the club’s general manager and Lazorchack as a club manager).

207. *Bryant*, 131 S. Ct. at 1161; see also *Graure*, 18 A.3d at 757; *People v. Clay*, 926 N.Y.S.2d 598, 606 (App. Div. 2011).

lant, would have multiple motivations, or would even have no motivation at all.

Faced with the same type of generalized questions deemed significant in *Bryant* and highlighted in *Clay*, the *Graure* court *could have* invoked the nature of the questions posed to support its ruling, but it did not. Rather, the *Graure* court emphasized only three of the *Bryant* factors—the weapon employed, the victim’s medical condition, and the informality of the situation—while ignoring several others but stating that “*all of the factors . . . identified in Bryant support a conclusion that Djordjevic’s statements were not testimonial.*”<sup>208</sup> This analytical method, where the court chooses which factors are relevant in any given case, permits a court to reach whatever result it desires.

The possibility of judicial manipulation under the *Bryant* framework is further illustrated by a comparison of how *Bryant*, *Clay*, and *Graure* treated the dire medical condition of each respective declarant. When analyzing this factor, the *Bryant* majority said, “[W]e cannot say that a person in Covington’s situation would have had a ‘primary purpose’ ‘to establish or prove past events potentially relevant to later criminal prosecution.’”<sup>209</sup> The *Graure* court felt the same, reasoning that the declarant’s “medical condition obviously was grave, making it likely that [the] questions would not have ‘focused him on the possible future prosecutorial use of his statements.’”<sup>210</sup> The *Clay* court drew the opposite inference from nearly identical facts. According to *Clay*, when a declarant’s medical condition is grave, the declarant might instead believe that the situation presents “his final opportunity to bear witness against his assailants,” thereby making his statement testimonial.<sup>211</sup> Justice Scalia made a similar argument in his *Bryant* dissent.<sup>212</sup> Either inference is reasonable.

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208. *Graure*, 18 A.3d at 757 (emphasis added).

209. *Bryant*, 131 S. Ct. at 1165 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)) (“When he made the statements, Covington was lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen . . . He was obviously in considerable pain and had difficulty breathing and talking . . . [W]e cannot say that a person in Covington’s situation would have had a ‘primary purpose’ ‘to establish or prove past events potentially relevant to later criminal prosecution.’” (citations omitted)).

210. *Graure*, 18 A.3d at 758 (quoting *Bryant*, 131 S. Ct. at 1166); *see also* *Commonwealth v. Nesbitt*, 892 N.E.2d 299, 310 (Mass. 2008) (“[T]he gravity of [the declarant-stabbing victim’s] physical injuries, and the immediate threat posed by those injuries, would likely preclude a reasonable person in her position from anticipating any nonimmediate future event, including a police investigation or a prosecution of the perpetrator.”).

211. *People v. Clay*, 926 N.Y.S.2d 598, 606 (App. Div. 2011).

212. In *Bryant*, Justice Scalia argued that “Covington’s pressing medical needs do not suggest that he was responding to an emergency, but to the contrary reinforce the testimonial character of his statements.” *Bryant*, 131 S. Ct. at 1171 (Scalia, J., dissenting). According to Justice Scalia, Covington “understood the police were focused on investigating a past crime, not his medical needs”; in-

As this comparison reveals, a test that hinges on the hidden and empirically unknowable primary purposes of hypothetical similarly situated declarants and interrogators, and which takes a variety of factors into account in making this determination, is no better than one that requires a judge to determine a statement's "reliability." *Crawford* was intended to eliminate the malleability of the *Roberts* totality-of-the-circumstances approach, yet *Bryant* revives that very approach. Replacing a totality-of-the-circumstances test with another totality-of-the-circumstances test threatens to entirely undermine *Crawford*'s aims.

### B. Multiple Concurrent Purposes

The *Bryant* framework can be further manipulated through two unresolved issues. These issues, often related, include whether the Clause applies at all to statements made to nonstate actors, and how to categorize cases of multiple concurrent purposes. Either issue presents an additional means of evading the confrontation right.

This section addresses the inability of the primary-purpose test to account for multiple concurrent purposes, an issue that divided the *Bryant* Court. In that case, the majority rightly noted that people, especially the police and victims of violent crimes, often act with more than one purpose.<sup>213</sup> Moreover, it would be rare for persons involved in such a volatile situation to clearly announce their intent before speaking.<sup>214</sup>

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deed, the officers did not attempt to assess more than superficially the severity of his wounds, but they focused instead on details relating to the past crime. *Id.*

213. *Id.* at 1161 (majority opinion) (conceding that "[p]olice officers in our society function as both first responders and criminal investigators," which "may mean that they act with different motives simultaneously or in quick succession"); see also *id.* ("Victims are also likely to have mixed motives when they make statements to the police. During an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant. A victim may want the attacker to be incapacitated temporarily or rehabilitated. Alternatively, a severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive."); *Davis*, 547 U.S. at 839 (Thomas, J., concurring in judgment in part and dissenting in part) ("In many, if not most, cases where police respond to a report of a crime, . . . the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence.").

214. In the context of forfeiture-by-wrongdoing arguments, courts have recognized that people often commit acts with multiple motives. For example, the United States Court of Appeals for the District of Columbia rejected the defendant's argument that the would-be witness was killed in retaliation for his involvement with the police, rather than to silence him in the event of a future trial. *United States v. Martinez*, 476 F.3d 961, 966 (D.C. Cir. 2007). According to the court, the defendant's "argument is based on a false either-or dichotomy"; "intending *both* to exact revenge *and* to prevent the informant from disclosing further information and testifying" are purposes that "often go hand-in-glove." *Id.* at 966; see also *United States v. Dhinsa*, 243 F.3d 635, 654 (2d Cir. 2001); *Vasquez v. People*, 173 P.3d 1099, 1104-05 (Colo. 2007) (en banc) (holding that preventing the witness's testimony does not have to be the defendant's sole motivation but need only be one reason for the defendant's actions); *State v. Alvarez-Lopez*, 98 P.3d 699, 704-05 (N.M. 2004) ("The State need

Thus, a test that asks a court to divine the primary purpose of a hypothetical similarly situated declarant or interrogator from among potentially several unstated purposes is nothing but “an exercise in fiction.”<sup>215</sup>

*Bryant* and *Clay* are again illustrative. When seeking to uncover the primary purpose of the respective interrogators, the *Bryant* Court believed that “[t]he questions they asked—what had happened, who had shot him, and where the shooting occurred—were the exact type of questions necessary to allow the police to assess the situation.”<sup>216</sup> *Clay*, on the other hand, distinguished *Bryant* despite strong similarities in the overall factual scenarios, reasoning that the officer’s “‘evident reason’ for asking ‘who shot you’ was not ‘to deal with an emergency’ but to give [the declarant] what might have been . . . his final opportunity to bear witness against his assailants.”<sup>217</sup> Despite the very real possibility of multiple concurrent purposes, the *Bryant* majority confidently concluded that the responding officers’ *sole purpose* was to assess the alleged ongoing emergency that existed at the time,<sup>218</sup> even in the absence of any direct evidence of that intent. But this is just one-half of the equation, as *Bryant* also requires courts to consider the declarant’s purpose, an approach that promises to compound the analytical difficulty.<sup>219</sup>

Other courts that applied the primary-purpose test have struggled to determine what multiple purposes should be deemed primary. In *State v. S.P.*,<sup>220</sup> the Oregon Supreme Court considered the admissibility of out-of-court statements made with both prosecutorial and medical purposes.<sup>221</sup> *S.P.* involved hearsay statements a three-year-old sexual abuse victim,

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not . . . show that [Defendant’s] sole motivation was to procure the declarant’s absence; rather, it need only show that the defendant was motivated in part by a desire to silence the witness.” (citations omitted) (internal quotation marks omitted).

215. *Bryant*, 131 S. Ct. at 1167 (Thomas, J., concurring) (citing *Davis*, 547 U.S. at 839 (Thomas, J., concurring in part and dissenting in part)) (internal quotation marks omitted); see also *id.* at 1161 (“The victim’s injuries could be so debilitating as to prevent her from thinking sufficiently clearly to understand whether her statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution.”). See generally Michael L. Birzer & Gwynne Harris Birzer, *Race Matters: A Critical Look at Racial Profiling, It’s a Matter for the Courts*, 34 J. CRIM. JUST. 643, 650 (2006) (“While it is true that in a general sense, a person often intends the consequences of his/her actions, it is virtually impossible to determine by any objectivity what a person is thinking inside of his/her head.”), available at <http://www.sciencedirect.com/science/article/pii/S0047235206000936>.

216. *Bryant*, 131 S. Ct. at 1165–66 (citations omitted) (internal quotation marks omitted).

217. *People v. Clay*, 926 N.Y.S.2d 598, 606 (App. Div. 2011) (citation omitted).

218. See *Bryant*, 131 S. Ct. at 1165–66.

219. See *id.* at 1170 (Scalia, J., dissenting) (“Now courts will have to sort through two sets of mixed motives to determine the primary purpose of an interrogation”; “[*Bryant*] creates a mixed-motive problem where . . . the police and the declarant each have one motive, but those motives conflict.”).

220. *State ex rel. Juvenile Dep’t v. S.P.*, 215 P.3d 847 (Or. 2009) (en banc).

221. *Id.* at 864.

N., made to staff members at a local Child Abuse and Response Service (CARES) location.<sup>222</sup> The CARES evaluation team consisted of a pediatrician, a social worker, two Department of Human Services workers, and a sheriff's deputy.<sup>223</sup> As the deputy observed the evaluation through a one-way mirror, a social worker elicited information from N. that implicated defendant youth in various crimes.<sup>224</sup>

At youth's trial, the juvenile court ruled that most of N.'s statements were nontestimonial.<sup>225</sup> The court of appeals reversed, finding all of N.'s statements testimonial.<sup>226</sup> The appeals court held that the CARES interview served two primary purposes: to obtain information for a medical diagnosis and to preserve evidence for prosecution.<sup>227</sup>

The en banc Oregon Supreme Court affirmed.<sup>228</sup> Like the lower court, the Oregon Supreme Court viewed the case as one involving the "concurrent and coequal" primary purposes of medical diagnosis and preservation of criminal evidence.<sup>229</sup> As a result, the court resolved the case by examining "whether the declarant's statements were the equivalent of 'testimony,'" the court's view of the ultimate inquiry under *Davis*.<sup>230</sup> Under that standard, the court deemed N.'s statements testimonial. According to the court, "[W]itnesses do go into court to describe past sexual misconduct, and that is exactly what N. did at CARES."<sup>231</sup>

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222. *Id.* at 849. The case began when victim, N., reported to his parents that the defendant, youth, had sexually abused him. *Id.* After youth and N. had been alone together in a bedroom, N. stated to his parents, "I don't want to bite [youth's] penis." *Id.* N.'s parents asked N. to repeat what he had said, and N repeated the allegation. *Id.* N. also stated that youth had touched his penis. *Id.* This conversation eventually led to an evaluation with CARES. *Id.*

223. *State ex rel. Juvenile Dep't v. S.P.*, 178 P.3d 318, 329 (Or. Ct. App. 2008).

224. *S.P.*, 215 P.3d at 850. Subsequently, detectives interviewed youth, confronting him with a copy of the CARES evaluation report. *Id.* Youth eventually admitted to touching N. inappropriately. *Id.*

225. *Id.*

226. *S.P.*, 178 P.3d at 331–32.

227. *Id.* at 329–30. This ruling effectively rejected the State's argument that there was a "minimal degree of police involvement here." *Id.* at 327–28. Rather, as the State argued, the primary purpose of the interview was "medical, not . . . prosecutorial" because a careful medical professional would have asked the same questions of N. and, presumably, have elicited the same responses even if the deputy had not been present. *Id.* at 327–28. The court disagreed. In the court's view, "CARES also functions as an informational clearinghouse for police and child welfare authorities, so that they can deal effectively with perpetrators of child sex abuse." *Id.* at 330.

228. *See S.P.*, 215 P.3d at 864–66.

229. *Id.* at 864 (internal quotation marks omitted).

230. *Id.* Notably, in resolving this claim, the court "examin[ed] all the circumstances," including "the knowledge and intentions of all persons involved in the interrogation," a standard consistent with *Bryant*. *Id.* at 865.

231. *Id.* at 864. The court elaborated as follows:

N. made his statements in a formal setting, in response to structured questions about past events with potential serious consequences for youth, as we have noted. From a function-

The *S.P.* case, and cases like it, raises several important and unresolved issues, including (1) whether more than one primary purpose is possible; (2) if not, how to determine whether a forensic or medical diagnosis purpose is the primary one; (3) whether primary-purpose analysis should take into account laws that impose mandatory reporting obligations, and similarly, whether it matters that the interrogating party routinely refers potential criminal matters to law enforcement;<sup>232</sup> and (4) whether the confrontation right should depend on the extent of governmental involvement in interrogations conducted by nonstate actors, an issue addressed in the next section.

### C. Nonstate Interrogators

A threshold question in many Confrontation Clause claims is whether the Clause applies at all to statements made to nonstate actors. If such statements are categorically unprotected, this could create the very type of “open-ended exception[] from the confrontation requirement” that *Crawford* sought to curtail.<sup>233</sup>

The Supreme Court has not explicitly addressed<sup>234</sup> whether and when statements to nonstate actors would be testimonial,<sup>235</sup> but lower courts have often considered the issue and have applied a vast array of approaches. The varied approaches merit discussion as they illustrate just how many different avenues there are for interpretation under current Confrontation Clause jurisprudence.

One group of courts has drawn distinctions based on the precise level of police involvement in the nonpolice interview, thereby differentiating between different types of nonpolice interrogations.<sup>236</sup> Using a

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al standpoint, N.’s examination was similar to the *ex parte* examinations condemned in *Crawford*. N. acted as a witness; he bore testimony against youth.

*Id.*

232. See, e.g., *State ex rel. Juvenile Dep’t v. S.P.*, 178 P.3d 318, 329 (Or. Ct. App. 2008) (noting this factor as one of many factors justifying its decision).

233. See *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (“The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.”).

234. The Court has done so implicitly, however, in *Davis*. See *S.P.*, 215 P.3d at 857 (“[T]he Court in *Davis* was willing to consider statements testimonial when the declarant made them to someone acting as an agent of a law enforcement organization, e.g., a 9-1-1 operator.”).

235. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 n.3 (2011) (“*Davis* explicitly reserved the question of ‘whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’” We have no need to decide that question in this case either because Covington’s statements were made to police officers.” (citation omitted)); see also *id.* at 1169 n.1 (Scalia, J., dissenting) (“I remain agnostic about whether and when statements to nonstate actors are testimonial.” (citing *Davis v. Washington*, 547 U.S. 813, 823, n.2 (2006))).

236. Compare *State v. Mack*, 101 P.3d 349 (Or. 2004) (deeming testimonial statements made by a child-witness to a social worker due to a high level of police involvement in the social worker’s

second approach, another group has employed more of a bright-line rule, treating all statements made to nonpolice interrogators “not testimonial per se,” while treating statements made in response to police interrogation “per se testimonial.”<sup>237</sup> A third group of courts has treated the identity of the interrogator as just one factor among many in the totality of circumstances.<sup>238</sup> A fourth set of courts has entirely ignored the extent to which police were involved in the interrogation, instead distinguishing statements based on their accusatory or nonaccusatory nature.<sup>239</sup> Others have deemed such statements categorically unprotected by the Clause, regardless of the level of police involvement in the interrogation and regardless of the accusatory or nonaccusatory nature of the statements.<sup>240</sup>

*Calhoun* represents an example of the last category. There, the court found it significant that the victim made his accusatory statements (that it was Chico and Worm who shot him) to a nongovernment actor, even though a police officer was present at the time.<sup>241</sup> According to the court, “[The] decedent’s statement was not . . . made to a police officer during the course of an interrogation. Instead, the statement was made to Williams, a private citizen. Thus, the Sixth Amendment is not implicated as the statements were nontestimonial.”<sup>242</sup>

Exemplifying the first-listed approach, Oregon courts examine the nonpolice interrogator’s degree of cooperation with the police. At one end of this spectrum lies substantial police involvement in nonpolice interviews. *State v. Mack*<sup>243</sup> is exemplary. In *Mack*, police unsuccessfully attempted to interview a three-year-old child about a murder he had witnessed.<sup>244</sup> A State Department of Human Services caseworker then ques-

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interview), *with* *State v. Bella*, 220 P.3d 128, 131 (Or. Ct. App. 2009) (deeming nontestimonial statements made by a crime victim to an emergency room physician where there was no evidence of police involvement in the medical interview).

237. *See* *Commonwealth v. Nesbitt*, 892 N.E.2d 299, 306 (Mass. 2008).

238. *See, e.g., Harkins v. State*, 143 P.3d 706, 714 (Nev. 2006) (“Together, *Crawford*, *Davis*, and *Hammon* demonstrate that when determining whether a statement is testimonial, it is necessary to look at the totality of the circumstances surrounding the statement.”). According to the court, one of those factors includes “to whom the statement was made, a government agent or acquaintance.” *Id.*

239. *See, e.g., In re T.T.*, 892 N.E.2d 1163, 1176–77 (Ill. App. Ct. 2008) (distinguishing statements by a sexual abuse victim made to a physician that “describ[ed] the cause of symptoms or pain” from those statements that “identif[ied] respondent as the perpetrator”; reasoning based on the accusatory or nonaccusatory nature of each particular statement, rather than the level of police or prosecutor involvement in the interview).

240. *See, e.g., People v. R.F.*, 825 N.E.2d 287, 295 (Ill. App. Ct. 2005) (“*Crawford* applies only to statements made to governmental officials; *Crawford* does not apply to statements made to nongovernmental personnel, such as family members or physicians.”).

241. *See* *State v. Calhoun*, 657 S.E.2d 424, 425, 427 (N.C. Ct. App. 2008).

242. *Id.* at 427.

243. *State v. Mack*, 101 P.3d 349 (Or. 2004).

244. *Id.* at 350.

tioned the child while police videotaped the interview; the caseworker later explained that “the primary intent during the [] interview . . . was for law enforcement to be able to complete their investigation.”<sup>245</sup> Later, upon police request, the caseworker interviewed the child at his home while police videotaped the conversation.<sup>246</sup> Applying *Crawford*, the Oregon Supreme Court deemed the child’s statements testimonial because, for all intents and purposes, they were made during police interrogation, where the caseworker served “as a proxy for the police.”<sup>247</sup>

More recently, in 2009, the en banc Oregon Supreme Court reaffirmed that health care professionals can become police agents for Confrontation Clause purposes<sup>248</sup> and held that statements made to health care professionals in the course of medical treatment can be testimonial if the professionals are also acting as interrogators.<sup>249</sup> After a thorough evaluation of the case, the court found it significant that “the involvement of law enforcement in CARES is pervasive”;<sup>250</sup> that CARES employees “were inquiring about past conduct that potentially could lead to [criminal convictions], as police officers do when they interview the victims of crime”;<sup>251</sup> and that “a police officer observed the entire process” and later “spoke with [the victim’s] mother about the ‘ongoing investigation.’”<sup>252</sup> Regarding the CARES program as a whole, the court felt that “an interview by CARES staff acts as a *substitute* for an interview with the police.”<sup>253</sup> Courts of other states, including Maryland and California,

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245. *Id.* at 349–50 (internal quotation marks omitted). According to the DHS worker, “[S]he would have asked [the victim] the same questions even if the officers had not [been involved].” *Id.* at 350 n.1. For this first interview, “Snyder [the DHS worker] initially understood that she would be present at the interview as a support for [the child-declarant]” and to “use her expertise interviewing children to facilitate the officers’ interview.” *Id.* at 350. But when the detective was unable to establish a dialogue with the child, Snyder “assumed the primary role” in questioning the child about the crime. *Id.*

246. *Id.* at 350.

247. *Id.* at 352. This ruling affirmed the trial court’s ruling that the statements at issue were testimonial because a government officer, acting as an agent of the police, questioned the child-declarant in a manner structured to obtain information for the State to use in prosecuting the defendant. *Id.* at 350.

248. *See State ex rel. Juvenile Dep’t v. S.P.*, 215 P.3d 847, 857, 862 (Or. 2009) (en banc) (concluding that CARES employees “acted, at least in part, as proxies for the police when they questioned N. about whether youth had abused him”).

249. *See id.* at 863. The court did not address the argument by the state that statements made to medical personnel in the course of receiving treatment are not testimonial because the medical personnel in the case instead acted as proxies of the police. *Id.*

250. *Id.* at 862.

251. *Id.*

252. *Id.*

253. *Id.*

have reached the same result in cases involving statements made to employees of similar organizations.<sup>254</sup>

At the opposite end of the spectrum are cases involving little to no police involvement in the nonpolice interview. Other Oregon cases, including *State v. Bella*<sup>255</sup> and *State v. K.S.*,<sup>256</sup> deemed statements nontestimonial where there is no evidence of police involvement in a medical interview.<sup>257</sup>

In *K.S.*, assault victim J. entered a hospital emergency room complaining of bruises across her body.<sup>258</sup> After examination, the attending nurse prepared a written report in which she noted J.'s statement that she was assaulted by her boyfriend.<sup>259</sup> The hospital reported the incident to local police, as required by law.<sup>260</sup> Two subsequent interviews followed.<sup>261</sup> A police officer first interviewed J. at the hospital; then, after the officer departed, a CARES social worker interviewed J.<sup>262</sup> During this interview, J. identified the defendant, Youth, as the boyfriend she mentioned earlier.<sup>263</sup>

Youth later argued that both the ER record and the social worker summary were testimonial hearsay.<sup>264</sup> Deeming the ER record nontestimonial,<sup>265</sup> the court emphasized that J. "made the out-of-court statements found in the ER record for the purpose of obtaining medical treatment" and that "there was no police or state involvement in the questioning *at that time.*"<sup>266</sup> The court refused to decide whether the social worker's

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254. See, e.g., *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 757 (Ct. App. 2004) (deeming testimonial statements of child victim to investigating officer, as well those made to a nonpolice interviewer, at a facility specially designed to interview suspected victims of child abuse where that interview took place after criminal charges had been filed and where the district attorney who prosecuted the case was present); *Snowden v. State*, 846 A.2d 36, 47 (Md. Ct. Spec. App. 2004) (holding that out-of-court statements describing sexual abuse made by children during an interview with a social services investigator were testimonial because "[t]he children were interviewed for the expressed purpose of developing their testimony by [the social worker], under the relevant Maryland statute that provides for the testimony of certain persons in lieu of a child, in a child sexual abuse case" (internal quotation marks omitted)).

255. *State v. Bella*, 220 P.3d 128 (Or. Ct. App. 2009).

256. *State ex rel. Juvenile Dep't v. K.S.*, 209 P.3d 845 (Or. Ct. App. 2009).

257. See *id.* at 849 (emphasizing the lack of police involvement in the interview conducted by an emergency room nurse); *Bella*, 220 P.3d at 131 (deeming significant the fact that the victim's interaction with the interrogating physician did not include participation by law enforcement and that the physician did not prepare his written report for the purpose of furthering a police investigation).

258. *K.S.*, 209 P.3d at 847.

259. *Id.*

260. *Id.* at 847 n.1 (citing OR. REV. STAT. §§ 419B.005, 419B.010).

261. *Id.* at 847.

262. *Id.*

263. *Id.*

264. *Id.* at 848.

265. *Id.* at 849.

266. *Id.* (emphasis added).

summary was properly admitted,<sup>267</sup> instead holding that “if there was any error, it was harmless.”<sup>268</sup>

Both *S.P.* and *K.S.* involved interviews conducted by CARES, which the Oregon Supreme Court in *S.P.* established as an organization with an institutional dual purpose of medical diagnosis and preservation of criminal evidence.<sup>269</sup> But in *S.P.*, the CARES interview was deemed subject to confrontation, while the CARES interview in *K.S.* was not. Thus, the Oregon cases are inconsistent. Moreover, under the Oregon approach—which examines the level of police involvement in the nonpolice interview—any state could effectively bypass the Constitution by passing a mandatory reporting statute and adopting a practice of deferring police interrogation until after medical personnel have gathered the relevant accusatory information (assuming those medical interviews do not entail substantial police involvement).

In *S.P.*, the investigating personnel were not legally required to report potential crimes, yet the court deemed those statements testimonial largely as the result of substantial police involvement in the medical interview. In *Bella* and in *K.S.*, the investigating personnel, emergency room physicians, were required to report potential crimes to the police, practically ensuring use of the declarant’s accusatory statements at a later criminal trial. Yet, the court in those cases deemed the statements exempt from confrontation.<sup>270</sup> In both sets of cases, however, the declarant did exactly what a witness would do if called to testify, and the prosecutor later used the declarant’s statements for the same purpose: to help convict the defendant by identifying the defendant as the assailant. In both sets of cases, the need for confrontation is the same. For this reason, the identity of the interrogator and the precise level of police involvement in

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267. *Id.*

268. *Id.* at 849–50.

269. *State ex rel. Juvenile Dep’t v. S.P.*, 215 P.3d 847, 859–62 (Or. 2009) (noting that CARES routinely provides law enforcement with the results of its evaluations and that law enforcement, in turn, often sends possible abuse victims to CARES; that it is very common for law enforcement to observe the CARES staff interviewing possible victims by means of one-way mirrors and microphones; that as a routine matter, CARES provides police agencies with complete copies of its evaluation reports; “that CARES evaluations serve a forensic purpose in addition to any diagnostic purpose”; that CARES receives nearly half of its funding from the Department of Justice; and that CARES explicitly deems itself a partner to local police and prosecutors).

270. In *Bella*, the court examined the level of interaction between the local police and an emergency room physician. *State v. Bella*, 220 P.3d 128, 130–31 (Or. Ct. App. 2009). In evaluating hearsay statements made to the physician, the court found it significant that the victim’s interaction with the physician did not include participation by law enforcement, and that the physician did not prepare his written report for the purpose of furthering a police investigation. *Id.* According to the court, the State’s mandatory reporting requirements, which imposed a legal duty to report possible crimes to the police, did not alter the physician’s primary purpose of medical diagnosis and treatment, nor did it make the examining physician an “agent” of the police. *Id.* at 132.

the interrogation should not make the difference between a constitutional violation, on the one hand, and a case that does not even implicate the Constitution, on the other.

The better approach is to focus on the nature of the statements rather than the level of police involvement in the interrogation. This alternative approach is consistent with the rulings of other courts that have addressed this issue. In *People v. Purcell*,<sup>271</sup> for example, an Illinois appeals court considered whether an assault victim's statements to an examining physician at a hospital were testimonial.<sup>272</sup> In resolving that issue, the court distinguished between statements describing the victim's injuries, which the court deemed nontestimonial, and those that identified Purcell as the attacker, which the court deemed testimonial.<sup>273</sup> The court drew this distinction despite no evidence of police involvement in the physician's interview.<sup>274</sup>

Another Illinois case, *In re T.T.*,<sup>275</sup> applied the same approach, drawing distinctions based on the accusatory or nonaccusatory nature of the statements and disregarding whether police were involved in the interview.<sup>276</sup> In *T.T.*, the court considered the admissibility of out-of-court statements made by a seven-year-old victim of sexual abuse, including statements made to her examining physician and to a social worker.<sup>277</sup> Regarding the statements made to the physician, the court distinguished the victim's "statements describing the cause of symptoms or pain"<sup>278</sup> from those "identifying respondent as the perpetrator."<sup>279</sup> According to the court, the accusatory or nonaccusatory nature of each particular statement is the critical distinguishing feature.<sup>280</sup>

Applying a similar rationale to the social worker's interview,<sup>281</sup> the *T.T.* court held that the lack of police or prosecutor involvement in that interview "do[es] nothing to alter the testimonial nature" of the victim's

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271. *People v. Purcell*, 846 N.E.2d 203 (Ill. App. Ct. 2006).

272. *Id.* at 211.

273. *Id.* at 215. According to the court, "*Crawford* [gives] defendant the right to bar [the physician] from testifying to the portion of [the victim's] statements in which she described defendant's attack with the stun gun." *Id.* The court, however, concluded that the *Crawford* error was harmless beyond a reasonable doubt. *Id.* at 215–16.

274. *Id.* at 215.

275. *In re T.T.*, 892 N.E.2d 1163 (Ill. App. Ct. 2008).

276. *See id.* at 1175–76.

277. *See id.* at 1174–78.

278. *Id.* at 1176.

279. *Id.*

280. *Id.* at 1177. As the court declared, "[the victim's] accusatory statements identifying [defendant] as the perpetrator" or those "concern[ing] fault or identity" are ones that "do implicate the core concerns protected by the Confrontation Clause," whereas statements that "do not accuse or identify the perpetrator" do not. *Id.*

281. *See id.* at 1175.

statements.<sup>282</sup> According to the court, the particular statements in this case were the types of accusatory statements that concerned *Crawford*—namely, ones more akin to “formal statement[s] to a government officer,” which are testimonial, rather than “casual remark[s] to an acquaintance,” which are not.<sup>283</sup> Courts of other states have employed a similar approach, focusing on the content of the questions and answers at issue rather than the identity of the interrogator.<sup>284</sup>

In sum, courts have applied different approaches when analyzing whether the Clause applies to statements made to nonstate actors in cases involving structured interviews.<sup>285</sup> Courts in some jurisdictions, including Oregon, have distinguished testimonial from nontestimonial statements by examining the level of police involvement in the nonpolice interview.<sup>286</sup> Illinois courts have approached the issue by examining the

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282. *Id.* at 1175–76. On this issue, the court examined “the extent to which [the social worker] was working to assist the prosecutorial effort” but did not find that factor controlling. *Id.* at 1175. Under that analysis, the court found it significant that in accordance with governing statutes, “DCFS immediately refers reports of alleged child sexual abuse to the police and [prosecutors] for” possible criminal investigation and DCFS investigators routinely interview the people residing in the victim’s home, the alleged perpetrator, and other people who may be helpful in a subsequent criminal investigation. *Id.*

283. *Id.* at 1175, 1174. The *T.T.* court’s reasoning on this issue is somewhat less explicit than in other areas of its opinion. Here, the court declared,

After several unsuccessful attempts to contact G.F. and her mother, Lewis eventually interviewed G.F. in May during an unscheduled visit to their home. Lewis introduced herself to G.F., assessed G.F.’s credibility and then interviewed her utilizing open-ended questions. During this interview, G.F. accused respondent of . . . acts of sexual assault . . . . In the context of a confrontation clause analysis, where the focus is on whether the declarant is bearing witness against a criminal defendant when making a formal statement to a government officer with an eye toward prosecution, G.F.’s statements to Lewis were testimonial.

*Id.* at 1175.

284. *See, e.g., State v. Jones*, 197 P.3d 815 (Kan. 2008) The court deemed testimonial statements a shooting victim made to paramedics as he was being transported to the hospital because though the victim “was in the midst of a medical emergency, the paramedics’ questions . . . were not designed to deal with the immediate danger. Rather, the questions about the identity of the shooter related to past events and sought information above and beyond what was necessary to administer medical care.” *Id.* at 820. Moreover, one of the questioners “acknowledged that the information obtained through their questioning often helps the police where the patient has been transported from the scene quickly.” *Id.* And here, “there was apparently no [prior] opportunity for [the victim] to be interrogated by [police] . . . .” *Id.*

285. The *Crawford* Court also included “business records or statements in furtherance of a conspiracy” within its list of nontestimonial statements, but that statement should be read as a general rule only, as some business records could indeed qualify as testimonial. *Crawford v. Washington*, 541 U.S. 36, 55 (2004); *see also Michigan v. Bryant*, 131 S. Ct. 1143, 1175 (2011) (Scalia, J., dissenting); *supra* note 45 and accompanying text.

286. *Compare State v. Mack*, 101 P.3d 349, 352 (Or. 2004) (applying *Crawford* and deeming declarant’s hearsay statements testimonial because, for all intents and purposes, they were made during police interrogation where the social worker who took the statements served “as a proxy for the police”), *with State ex rel. Juvenile Dep’t v. K.S.*, 209 P.3d 845, 849 (Or. Ct. App. 2009) (deeming hearsay declarant’s statements nontestimonial due to the lack of police involvement in the inter-

content of the victim's statements, finding the involvement of police irrelevant to the analysis.<sup>287</sup> Courts have also applied other various approaches.<sup>288</sup>

As developed more fully in Part V, if a nonpolice interrogator obtains accusatory statements from a would-be witness, whether volunteered or the result of interrogation, and if those statements are taken outside the *res gestae* of the crime, the statements should be deemed testimonial and subject to confrontation. In both types of cases, the out-of-court statements "do precisely what a witness does on direct examination,"<sup>289</sup> thereby triggering the same confrontation concerns and making the accusation ripe for cross-examination.

Even the Supreme Court has suggested that the identity of the interrogator should not be the controlling factor;<sup>290</sup> according to the Court, purely volunteered statements made in the absence of interrogation can qualify as testimonial.<sup>291</sup> Thus, the result should not categorically differ when a nonpolice interrogator asks a question that elicits the same response as one asked by law enforcement.<sup>292</sup> The Sixth Amendment, by its terms, applies to "all criminal prosecutions" and protects all criminal defendants, not just those whose accusers happen to have been questioned by certain individuals.<sup>293</sup>

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view conducted by an emergency room nurse), and *State v. Bella*, 220 P.3d 128, 131 (Or. Ct. App. 2009) (deeming significant the fact that the victim's interaction with the interrogating physician did not include participation by law enforcement).

287. See, e.g., *In re T.T.*, 892 N.E.2d at 1165 (distinguishing hearsay statements based on the accusatory or nonaccusatory nature of the statements, and disregarding whether police were involved in the interview).

288. See, e.g., *Harkins v. State*, 143 P.3d 706, 714 (Nev. 2006) (examining "the totality of the circumstances surrounding the statement," where the interrogator's identity is one of many factors to consider).

289. *Davis v. Washington*, 547 U.S. 813, 830 (2006) (emphasis removed).

290. Responses to structured police questioning are subject to confrontation (as in *Crawford*), as are responses to the less-structured questioning of an agent of the police (as in *Davis*). See *Crawford*, 541 U.S. at 65–66; *Davis*, 547 U.S. at 821–22.

291. The *Davis* Court arguably conceded that statements made in the absence of any interrogation are not necessarily nontestimonial when it declared, "[I]t is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." *Davis*, 547 U.S. at 822 n.1; see also *State v. Warsame*, 735 N.W.2d 684, 692 (Minn. 2007) ("Volunteered statements may be testimonial.").

292. As Justice Scalia has noted, "The Clause applies to volunteered testimony as well as statements solicited through police interrogation." *Michigan v. Bryant*, 131 S. Ct. 1143, 1169 (2011) (Scalia, J., dissenting). For this reason, Justice Scalia argued that "[a] declarant-focused inquiry is . . . the only inquiry that would work in every fact pattern implicating the Confrontation Clause." *Id.*

293. U.S. CONST. amend. VI; cf. *Arizona v. Hicks*, 480 U.S. 321, 329 (1987) ("[T]he Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.").

## IV. THE CONFRONTATION EXCEPTIONS

## A. Forfeiture by Wrongdoing

The leading confrontation exception, forfeiture by wrongdoing (forfeiture exception), provides yet another means of evading confrontation under the *Crawford* framework. Broadly speaking, when the forfeiture exception applies, a defendant loses his right to confront a witness on the theory that the defendant, through his wrongdoing, “has been the instrument of the denial of his own right of cross-examination.”<sup>294</sup> Typical cases include those involving acts of bribery or witness intimidation that cause the witness’s absence from court.<sup>295</sup> Under such a scenario, the witness’s prior testimonial statements become admissible despite no opportunity for cross-examination.<sup>296</sup>

While *Crawford* recognized forfeiture by wrongdoing as an exception to the Sixth Amendment confrontation right,<sup>297</sup> the particular requirements of the exception remained unclear. Between 2004 and 2008, lower courts adopted different views of the exception, one narrow and one broad.<sup>298</sup> According to the broad view, evidence of any wrongdoing that effectively prevents a witness from testifying is sufficient to invoke the exception.<sup>299</sup> The more limited view required not only evidence of wrongdoing but also evidence that the wrongdoing had been committed with the intent to prevent the witness from testifying.<sup>300</sup>

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294. *State v. Langley*, 354 N.W.2d 389, 400 (Minn. 1984).

295. *See Giles v. California*, 554 U.S. 353, 374 (2008) (“The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them . . .”).

296. *See, e.g., United States v. Carlson*, 547 F.2d 1346, 1360 (8th Cir. 1976) (holding that the defendant waived his right to confrontation when he intimidated a witness into not testifying at trial).

297. *See Crawford v. Washington*, 541 U.S. 36, 56 n.6, 62 (2004) (recognizing forfeiture by wrongdoing and dying declarations as exceptions to the *Crawford* rule).

298. *See State v. Romero*, 133 P.3d 842, 850 (N.M. Ct. App. 2006) (“[C]ourts have disagreed over the [applicability of] the intent requirement.”). Unlike a bribe or an act of witness intimidation, where the very actions of the wrongdoer reveal his intent, not all “wrongful acts” that lead to the witness’s absence from trial should necessarily trigger the forfeiture exception. For example, a defendant who negligently collides into a witness’s automobile the evening before trial, causing her to miss her scheduled testimony, would not forfeit his confrontation right. This is true even though the defendant’s negligence is considered “wrongful.” Between these extremes, however, is a plethora of wrongdoing that may or may not trigger the forfeiture exception. For further discussion of forfeiture by wrongdoing and use of a similar example to the one above, see *People v. Giles*, 19 Cal. Rptr. 3d 843, 850–51 (Ct. App. 2004).

299. Many courts had rejected the rule requiring intent to prevent the witness from testifying. *See, e.g., United States v. Garcia-Meza*, 403 F.3d 364, 370–71 (6th Cir. 2005) (applying forfeiture in murder case with facts similar to *Giles*); *People v. Moore*, 117 P.3d 1, 5 (Colo. App. 2004) (same); *State v. Meeks*, 88 P.3d 789, 794–95 (Kan. 2004) (applying forfeiture to admit statements of dying victim in murder case).

300. Pre-*Giles*, many courts had endorsed the intent requirement later adopted by the Supreme Court in *Giles*. *See, e.g., People v. Moreno*, 160 P.3d 242, 247 (Colo. 2007) (ruling defendant’s

The Supreme Court resolved the dispute in *Giles v. California*,<sup>301</sup> opting for the narrow interpretation. According to *Giles*, the forfeiture exception requires proof of two things: (1) an actus reus, consisting of an act of wrongdoing that prevents a witness from testifying; and (2) a mens rea, requiring proof of a specific intent to prevent such testimony.<sup>302</sup>

While *Giles* clarified that forfeiture requires proof of intent to prevent trial testimony,<sup>303</sup> a specific act of cooperation in a criminal investigation, the *Giles* majority seemed to lessen the prosecutor's burden of proof in domestic abuse cases.<sup>304</sup> The Court, in dicta,<sup>305</sup> declared:

The dissent closes by pointing out that a forfeiture rule which ignores *Crawford* would be particularly helpful to women in abusive relationships . . . . [W]e are puzzled by the dissent's [position] . . . . Domestic violence is an intolerable offense . . . . But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.

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wrongful conduct must have been "designed, at least in part, to subvert the criminal justice system by depriving that system of the evidence upon which it depends"); *Commonwealth v. Edwards*, 830 N.E.2d 158, 170 (Mass. 2005) ("Defendant forfeits . . . the right to object to the admission of an unavailable witness's out-of-court statements . . . on finding[] that . . . the defendant acted with the intent to procure the witness's unavailability."); *Romero*, 133 P.3d at 855–56 (requiring intent to silence to invoke the forfeiture doctrine, and rejecting argument that the requisite intent can be inferred).

301. *Giles*, 554 U.S. 353.

302. *Id.* at 361.

303. See *In re Rolandis G.*, 902 N.E.2d 600, 615 (Ill. 2008) ("The [*Giles*] Court held that at common law an uncontroverted testimonial statement could not be admitted without a showing that the defendant intended to prevent the witness from testifying. In other words, according to the Court, for forfeiture by wrongdoing to apply, the evidence had to show that the defendant engaged in witness tampering or some type of conduct designed to prevent the witness from testifying, thwart the judicial process, or procure the witness's absence from trial." (citing *Giles*, 554 U.S. at 359–60)); *Crawford v. Commonwealth*, 686 S.E.2d 557, 564 (Va. Ct. App. 2009) (en banc) ("[T]he Supreme Court made clear in *Giles* that the [forfeiture-by-wrongdoing] doctrine applied only 'when the defendant engaged in conduct designed to prevent the witness from testifying.'" (citing *Giles*, 554 U.S. at 359)).

304. See *Giles*, 554 U.S. at 376–77.

305. While some courts have characterized the disputed *Giles* statements as part of its holding, they are more properly classified as dicta because this portion of the opinion could have easily been deleted without seriously altering the analytical foundations of the holding. See *Sarnoff v. Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986). Courts distinguish dicta from holdings based on this rationale. See *State v. Koput*, 418 N.W.2d 804, 810–11 (Wis. 1988) (overturning the lower appellate court's decision, in part, because "[t]he portion of the opinion . . . on which the court of appeals relied . . . could have been omitted without doing violence to the logic of the opinion" and is therefore "irrelevant to the *ratio decidendi*"); Pierre N. Leval, *Madison Lecture: Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256 (2006) ("If the court's judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition plays no role in explaining why the judgment goes for the winner. It is superfluous to the decision and is dictum.").

The domestic-violence context is, however, relevant for a separate reason. Acts of domestic violence *often are intended* to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers *or* cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—*rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry*, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.<sup>306</sup>

While the first part of the above passage seems to reject the dissent's more lenient standard in cases of domestic abuse, the second part provides multiple avenues for evading the confrontation right.<sup>307</sup> Indeed, this passage could permit a court to infer the requisite *Giles* intent based solely on the fact of the relationship.<sup>308</sup> Yet, it makes little sense to require proof that the defendant purposefully silenced the would-be witness if the requirement can be satisfied by establishing an abusive relationship.<sup>309</sup> This, however, is a reasonable interpretation of the majority's passage.

Moreover, the final sentence of the above passage appears to permit the requisite intent to be inferred from prior interactions between the defendant and witness, even if the particular act of wrongdoing that caused

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306. *Giles*, 554 U.S. at 376–77 (emphasis added).

307. The quoted portion of the *Giles* opinion was written in direct response to the dissent's proposed standard, which would have eased the burden of proving forfeiture in cases of domestic abuse. *Id.* at 376. Moreover, *Giles* itself involved incidents of domestic abuse, and after this passage, the majority directs the lower court to “consider evidence of [Giles's] intent on remand.” *Id.* at 377. So the above passage can reasonably be read as identifying the types of evidence relevant to that inquiry. See *State v. Hubbard*, No. W2007-024820-CCA-R3-CD, 2009 WL 2568200, at \*8 (Tenn. Crim. App. Nov. 3, 2009) (describing the pertinent *Giles* passage as “guidance with respect to the types of evidence that may be available to establish a defendant's intent to prevent testimony in cases involving domestic violence”).

308. In his concurrence, Justice Souter read the *Giles* dictum to mean that the requisite “element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship.” *Giles*, 554 U.S. at 380 (Souter, J., concurring in part). *But see In re Rolandis G.*, 902 N.E.2d at 614 (refusing to presume the requisite *Giles* intent based upon the fact of abuse alone).

309. See *Giles*, 554 U.S. at 404–05 (Breyer, J., dissenting) (“[Justice Souter's concurrence] seems to say that a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim. Doing so when, in fact, the abuser may have had other matters in mind apart from preventing the witness from testifying is in effect not to insist upon a showing of ‘purpose.’”).

the witness's absence involved no such intent.<sup>310</sup> As the final sentence's wording and structure reveal, this evidence is distinct from "evidence of ongoing criminal proceedings at which the victim would have been expected to testify."<sup>311</sup> By loosening the link between the *Giles* actus reus and mens rea requirements, this particular statement provides additional means of invoking the forfeiture exception and is one lower courts have already ratified.<sup>312</sup>

Finally, for cases of domestic abuse, the majority appears to expand its specific intent requirement to encompass not just intent to prevent a witness from testifying, a very specific act of cooperation, but also intent to prevent "cooperat[ion] with a criminal prosecution" more generally.<sup>313</sup> According to the majority, "Where . . . an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine."<sup>314</sup> Intent to prevent a witness from "reporting abuse" or from "cooperating with a criminal prosecution" is much broader in scope, and

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310. See, e.g., *State v. Her*, 781 N.W.2d 869, 874 (Minn. 2010) (remanding for determination of defendant's intent under *Giles*). The *Her* court explained that in a case decided before *Giles*, "we did not require any showing that the defendant intended to prevent his wife from testifying against him," but that "there was evidence in [that case] that, approximately four years before the murder, the defendant had threatened to murder the victim if she reported his abuse to the police." *Id.* "Evidence of this type of threat would be relevant evidence under the standard announced in *Giles*." *Id.*

311. *Giles*, 554 U.S. at 377. This reading is consistent with the court's analysis in *State v. McLaughlin*, 265 S.W.3d 257, 272–73 & n.10 (Mo. 2008) (noting that *Giles* "clarified" "[t]he parameters of the forfeiture by wrongdoing doctrine," and upholding trial court's determination that defendant forfeited his right to confront the murder victim based on (1) the defendant's prior acts of domestic violence committed "during the time that [the victim] was attempting to break from the relationship [with defendant]"; and (2) the fact that defendant murdered his victim within one month after he was formally charged with burglarizing her mobile home).

312. See, e.g., *State v. Baldwin*, 794 N.W.2d 769, 779–80 (Wis. Ct. App. 2010) (rejecting defendant's argument that his past behavior and prior attempts to prevent the witness from testifying were insufficient to prove forfeiture, and holding that "as noted in *Giles*, [the defendant's] past physical violence and threats to [the witness] are 'highly relevant' to a finding of wrongdoing by forfeiture, even if alone such evidence is not sufficient proof of his present intent"). Applying that logic, the *Baldwin* court noted "many examples of highly relevant past physical violence and threats," including an instance where the defendant "had previously intimidated [the witness] from appearing and testifying in an earlier case." *Id.* at 780.

313. See *State v. Jones*, 197 P.3d 815, 821 (Kan. 2008) (interpreting *Giles* as having "clarified that it is insufficient to merely show that the defendant wrongfully caused the absence of a witness in order to admit the witness'[s] unfronted testimony under the forfeiture rule"; rather, "[t]he State must show that the defendant intended to prevent the witness from testifying" (emphasis added)); cf. *Giles*, 554 U.S. at 361 ("The manner in which the [forfeiture-by-wrongdoing] rule was applied [at common law] makes plain that unfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying.").

314. *Giles*, 554 U.S. at 377.

provides more avenues of proof, than intent to prevent trial testimony.<sup>315</sup> Thus, this particular passage appears to broaden the *Giles* requirement from one requiring proof of intent to prevent trial testimony to one permitting proof of intent to prevent other forms of cooperation. This is not a trivial distinction. Often, victims of domestic violence initially report abuse but later choose not to testify.<sup>316</sup> Thus, a defendant who kills his wife as she picks up the phone to call 911 might be deemed to have forfeited his right to confront her earlier out-of-court statements in which she described prior acts of abuse.<sup>317</sup>

Ultimately, the meaning of the majority's passage is open to considerable debate. After all, this passage was written in response to the dissent's proposed standard that would have lessened the burden of proving forfeiture in cases of domestic abuse, and while the first paragraph of the above passage purports to reject the dissent's more lenient standard,<sup>318</sup> the second paragraph goes a long way toward adopting it.

The ambiguity of the *Giles* dictum has led to inconsistent application of the forfeiture exception among lower courts. The Illinois Supreme Court, for example, interpreted the passage narrowly and concluded that *Giles* requires evidence that "the accused was motivated by the desire to prevent the witness from testifying against him at trial."<sup>319</sup> One year later, the California Court of Appeal interpreted the *Giles* dictum more expansively and held that forfeiture applies not only to acts intended to

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315. See, e.g., *People v. Banos*, 100 Cal Rptr. 3d 476, 491 (Ct. App. 2009) (interpreting the *Giles* dictum, and holding that the forfeiture exception applies not only to acts intended to prevent a witness from testifying, as *Giles* held, but also to acts intended to dissuade a witness from cooperating with law enforcement authorities generally, as the *Giles* dictum implied).

316. Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411, 1433 (2010) ("[V]ictims of intimate violence often recant or refuse to testify." For this reason, "[b]efore *Crawford*, many jurisdictions had a . . . victimless prosecution policy that depended on the admissibility of the victim's out-of-court-statements.").

317. In *State v. Warsame*, the prosecution argued that statements of the out-of-court declarant, a woman who had called 911 to report a recent assault by her boyfriend-defendant, should have been admitted under the forfeiture exception because the defendant had cut the phone line in attempt to prevent the victim from calling the police. 723 N.W.2d 637, 643 (Minn. Ct. App. 2006), *aff'd in part and rev'd in part*, 735 N.W.2d 684 (Minn. 2007). The court rejected the argument, reasoning that "the forfeiture-by-wrongdoing referred to in *Davis* is that which arises from a defendant's procuring the witness's absence at trial." *Id.* While arguably correct under *Davis*, this result might change under *Giles*. Under the *Giles* dictum, an abusive husband who kills his wife as she attempts to dial 911 to report his abuse might be deemed to have forfeited his right to confront her prior accusatory statements.

318. Commentators agree. See, e.g., Orenstein, *supra* note 316, at 1437 ("The majority was positively disdainful of a suggestion it attributed to the dissent, that 'a forfeiture rule which ignores *Crawford* would be particularly helpful to women in abusive relationships—or at least particularly helpful in punishing their abusers.'" (quoting *Giles*, 544 U.S. at 376)).

319. *In re Rolandis G.*, 902 N.E.2d 600, 616 (Ill. 2008).

prevent a witness from testifying but also to acts more generally intended to dissuade a witness from cooperating with law enforcement.<sup>320</sup>

In *Crawford v. Commonwealth*, a 2009 decision issued by the en banc Virginia Court of Appeals,<sup>321</sup> the majority characterized the pertinent *Giles* passage as part of the *Giles* “holding.”<sup>322</sup> Treating the *Giles* passage as binding, the majority “left open the possibility that a defendant’s intention to prevent testimony might be inferred from the surrounding circumstances, such as in a case of ongoing domestic violence.”<sup>323</sup>

*Crawford v. Commonwealth*’s dissenting judges interpreted the *Giles* passage far differently. According to the dissent, *Giles* requires proof “that the defendant intended to prevent a witness from testifying.”<sup>324</sup> Rejecting the implication that *Giles* “created a whole new

320. *Banos*, 100 Cal. Rptr. 3d at 491. In *Banos*, defendant Manuel Banos was convicted of killing his ex-girlfriend, Mary Ann Cortez. *Id.* at 485. Banos had been arrested multiple times before Cortez was killed. *Id.* at 479. In the first incident, Cortez called 911 and placed the phone down as she and Banos argued. *Id.* at 480. In the 911 recording, Banos repeatedly makes statements such as “Are you going to speak to the cops . . . or am I going to kill you?” *Id.* Banos later attacked and killed Cortez. *Id.* at 481–82. At Banos’s murder trial, the prosecutor admitted certain out-of-court statements under the forfeiture exception. *Id.* at 482. The California Court of Appeal affirmed. *Id.* at 484. Interpreting *Giles*, the court ruled that forfeiture applies not only to acts intended to prevent a witness from testifying but also to acts intended to dissuade a witness from cooperating with law enforcement authorities more generally. *Id.* at 491. Applying this interpretation, the court found substantial evidence that Banos killed Cortez to prevent her from cooperating with authorities, including Banos’s 911 statements where Banos threatened to kill Cortez if she did not “shut up.” *Id.*

321. *Crawford v. Commonwealth*, 686 S.E.2d 557 (Va. Ct. App. 2009) (en banc). In *Crawford v. Commonwealth*, Anthony Crawford was charged with murdering his wife Sarah. *Id.* at 562. A great deal of evidence linked Crawford to the killing, including DNA and fingerprint evidence recovered from the crime scene. *Id.* Not long before her killing, Sarah had obtained a protective order against the defendant. *Id.* at 560. In a signed affidavit, Sarah recounted incidents in which Crawford abused her and threatened her life. *Id.* At Crawford’s murder trial, the court admitted the affidavit under the forfeiture exception, and Crawford was convicted of the murder. *Id.* at 562. After subsequent appeals, the en banc Virginia Court of Appeals rejected Crawford’s confrontation challenge and affirmed his murder conviction, albeit by deeming the affidavit at issue nontestimonial. *See id.* at 567–69.

322. Because Justice Scalia’s *Giles* opinion was a plurality opinion, the court interpreted the *Giles* holding as encompassing “that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Crawford*, 686 S.E.2d at 564 n.11 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). According to the en banc majority, all but Part II.D.2 of Justice Scalia’s *Giles* opinion “constitutes the holding of *Giles*, as it is the narrowest position of at least five Justices concurring in the result.” *Id.* The *Giles* passage quoted above is contained in Part II.E of Justice Scalia’s *Giles* opinion. The majority later reiterated its broad reading of the *Giles* “holding” in a footnote: “the holding of *Giles* is that the forfeiture doctrine is broader than simply killing a witness to prevent that witness from testifying in a pending case.” *Id.* at 566 n.12. Further, “*Giles* holds that the forfeiture doctrine also applies in domestic violence situations where there is evidence of ‘the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution.’” *Id.* (emphasis removed) (quoting *Giles*, 544 U.S. at 377).

323. *Id.* at 564.

324. *Id.* at 569 (Elder, J., concurring in part and dissenting in part) (quoting *Giles*, 544 U.S. at 361).

test . . . in the domestic context,” the dissent argued that the *Giles* dictum merely restates the methods by which intent is generally inferred.<sup>325</sup> According to the dissent, “[I]n *any* case in which proof of intent is required, intent may . . . be established with circumstantial evidence,”<sup>326</sup> such as “the accused’s statements and conduct . . . .”<sup>327</sup> In the dissent’s view, the *Giles* dictum “hardly breaks new legal ground.”<sup>328</sup>

The following year, the Supreme Court of Minnesota quoted extensively from the *Giles* dictum before remanding the case for an evidentiary hearing on intent to silence, presumably directing the lower court to consider whether to infer intent from the types of evidence provided in *Giles*.<sup>329</sup>

As these cases and others that have applied the exception illustrate,<sup>330</sup> lower courts applying the seemingly strict *Giles* rule, particularly in cases of domestic abuse, have found yet another means to evade confrontation. In this manner, the right of confrontation has become even more manipulable.

### B. Dying Declarations

*Crawford* identified the dying declarations hearsay exception as another potential avenue for testimonial statements to be admitted in the absence of confrontation.<sup>331</sup> While the Supreme Court has explicitly ratified forfeiture by wrongdoing as an exception to the Confrontation Clause,<sup>332</sup> the Court has yet to resolve whether the common law dying

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325. *Id.* at 572.

326. *Crawford*, 686 S.E.2d at 572.

327. *Id.*

328. *Id.*

329. *State v. Her*, 781 N.W.2d 869, 876–77 (Minn. 2010). According to the *Her* court, “[The *Giles*] Court’s emphasis on the relevance of the domestic violence context to the intent requirement should be helpful in making this determination.” *Id.* at 877.

330. *See, e.g., State v. Fry*, 926 N.E.2d 1239, 1262 (Ohio 2010) (interpreting the pertinent *Giles* dictum as holding “that the forfeiture doctrine would apply in many domestic-violence cases where the victim’s statement was introduced after the victim was killed,” and ratifying the jury’s finding that defendant killed his ex-girlfriend to prevent her from testifying against him in a future criminal proceeding).

331. *See Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004) (“Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations.” (citations omitted)).

332. *See Giles v. California*, 128 S. Ct. 2678, 2687–88 (2008) (ratifying forfeiture by wrongdoing as a valid post-*Crawford* exception, and deeming the exception applicable when the defendant has engaged in conduct *specifically designed* to prevent the witness from testifying).

declaration remains an exception as well.<sup>333</sup> For now, the issue lies in the hands of the lower courts.

The common law dying-declaration exception admits out-of-court statements for their truth when (1) the declarant is unavailable; (2) the statement concerns the cause of the declarant's impending death; and (3) the statement is made while the declarant believes death is imminent.<sup>334</sup>

Dying declarations are often testimonial as, for example, when a soon-to-be-deceased person describes the cause of her death to a police officer with the purpose of implicating the accused.<sup>335</sup> Thus, the dying-declaration exception is sometimes the only means of evading an otherwise valid constitutional claim, as in *Clay*.<sup>336</sup> Despite this reality—or perhaps because of it—nearly every lower court that considered the issue post-*Crawford* has recognized and applied the dying-declarations confrontation exception when given the opportunity.<sup>337</sup> With such uniform acceptance, the dying-declaration exception, as it has been applied by the courts, threatens to further undermine *Crawford*'s aims.

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333. Commentators believe, however, that the Court will eventually declare dying declarations admissible as an exception to the Confrontation Clause once the issue is squarely before the Court. See Orenstein, *supra* note 316, at 1414.

334. Commonwealth v. Nesbitt, 892 N.E.2d 299, 312 (Mass. 2008).

335. See, e.g., State v. Lewis, 235 S.W.3d 136, 147 (Tenn. 2007); see also Orenstein, *supra* note 316, at 1445 (“[D]ying declaration [often] forms an outright refutation of *Crawford*'s rule concerning testimonial statements.”).

336. See People v. Clay, 926 N.Y.S.2d 598, 607–11 (App. Div. 2011) (deeming the hearsay statement at issue testimonial, but admitting the evidence under the dying declarations confrontation exception). In contrast to *Bryant*, the *Clay* court had the benefit of a dying declaration argument that had been preserved on appeal. *Id.* at 601. Thus, the *Clay* court, unlike the *Bryant* Court, was able to avoid the potential confrontation problem without employing the concept of ongoing emergency. Cf. Michigan v. Bryant, 131 S. Ct. 1143, 1177 (2011) (Ginsburg, J., dissenting) (“Were the issue properly tendered here, I would take up the question whether the exception for dying declarations survives our recent Confrontation Clause decisions.”).

337. See, e.g., People v. Monterroso, 101 P.3d 956, 972 (Cal. 2004) (discussing the issue at length, and finding that the “dying declarations [exception] poses no conflict with the Sixth Amendment”); Nesbitt, 892 N.E.2d at 310–11 (ratifying the dying-declaration exception as an exception well-established at common law); Harkins v. State, 143 P.3d 706, 711 (Nev. 2006) (“We agree with the states that recognize dying declarations as an exception to the Sixth Amendment confrontation right.”); Clay, 926 N.Y.S.2d at 609 (approving dying declarations as a Confrontation Clause exception, and listing various state court decisions reaching the same result); State v. Beauchamp, 796 N.W.2d 780, 782–85 (Wis. 2011) (approving dying declarations as a Confrontation Clause exception that was “deeply rooted in the common law”); see also Orenstein, *supra* note 316, at 1441 (“With few exceptions, courts post-*Crawford* have held that dying declarations, even when they are testimonial, need not be confronted to be admissible.” (footnote omitted)).

## V. A BRIGHT-LINE PROPOSAL

*Ohio v. Roberts* admitted hearsay statements upon a mere showing of reliability as a substitute for actual confrontation.<sup>338</sup> After *Roberts* proved easily manipulable,<sup>339</sup> *Crawford* replaced the *Roberts* test with a seemingly rigid cross-examination requirement, one designed to ensure actual confrontation.<sup>340</sup> Just seven years later, the Court's Confrontation Clause framework has proven just as manipulable as the *Roberts* rule.

The primary downfall in the current framework lies in its distinction between testimonial and nontestimonial hearsay. While this distinction appears stark, the current test is anything but a bright line. Just as under *Roberts*, where multifactor tests were common, *Bryant* notes more than ten factors courts should use to determine whether a statement is testimonial and further instructs courts to consider "all [other] relevant information,"<sup>341</sup> a classic totality-of-the-circumstances approach sure to yield unpredictable results.

As recent case law reveals, courts can easily evade confrontation through manipulation of the primary-purpose test, which as currently configured, seeks to divine the hidden primary purpose of a similarly situated hypothetical declarant or interrogator through application of countless factors. This standard is nothing but "an exercise in fiction"<sup>342</sup>—a Choose Your Own Adventure story where the outcomes are unclear and always subject to reversal.<sup>343</sup>

To restore the promise of *Crawford*, a bright-line test is needed to replace the current totality-of-the-circumstances test. In designing a replacement test, my goals are (1) to retain *Crawford*'s testimonial/nontestimonial distinction, an improvement over the *Roberts* reliability standard; (2) to avoid the easy means of manipulation inherent in

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338. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *abrogated by* *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

339. *Crawford*, 541 U.S. at 63 ("The [*Roberts*] framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations. Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable.").

340. *Id.* at 61–63.

341. *Bryant*, 131 S. Ct. at 1162.

342. *Id.* at 1167 (Thomas, J., concurring) (quoting *Davis v. Washington*, 547 U.S. 813, 839 (2006) (Thomas, J., concurring in part and dissenting in part)); *see also id.* at 1161 (majority opinion) ("The victim's injuries could be so debilitating as to prevent her from thinking sufficiently clearly to understand whether her statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution.").

343. "Choose Your Own Adventure is a series of children's gamebooks where . . . the reader assum[es] the role of the protagonist and mak[es] choices that determine the main character's actions and the plot's outcome." *Choose Your Own Adventure*, Wikipedia, [http://en.wikipedia.org/wiki/Choose\\_Your\\_Own\\_Adventure](http://en.wikipedia.org/wiki/Choose_Your_Own_Adventure) (last modified Oct. 16, 2011).

*Bryant*'s totality-of-the-circumstances test; and (3) to abandon the primary-purpose charade, a standard full of speculation and guesswork.

My proposed test has two halves. Under the first half of this test, any statements obtained from a would-be witness to a crime during the crime's *res gestae* would be deemed per se nontestimonial, never subject to the confrontation right. Borrowing from the criminal law's *res gestae* concept,<sup>344</sup> this proposed rule would encompass statements made contemporaneous with the criminal incident, a timeframe that begins with preparations for the crime and ends when the defendant is either in police custody or has reached temporary safety.<sup>345</sup>

This bright-line substitute for the *Bryant* test rests on the presumption that questioning occurring during a crime's *res gestae* is, in most cases, intended to resolve the crime and prevent the criminal from successfully escaping, and that statements obtained during that timeframe are made for that same purpose. Presumably, statements made within a crime's *res gestae* would only rarely fit within *Crawford*'s basic definition of testimonial: "A solemn declaration or affirmation made for the purpose of establishing or proving some fact"<sup>346</sup> for later prosecutorial use. At least while a crime is still occurring, or while the suspect is still on the loose and being pursued, the declarant and the interrogator are typically focused on assessing the situation, dealing with potential threats, or apprehending a perpetrator. The intent to record evidence for later use might be partly in mind, but this does not become the primary objective until after the assailant has either been captured or has escaped.

The presumption underlying the first half of my proposed test is largely supported by recent case holdings. For example, in *Bryant*, the Court found an ongoing emergency existed where an armed shooter had fled the scene of the recent shooting and whose whereabouts were still unknown.<sup>347</sup> In *State v. Manigo*,<sup>348</sup> a New Jersey appellate court differentiated between hearsay statements a deceased victim made to police during the initial assessment of the crime, which the court deemed nontesti-

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344. Although the *res gestae* concept itself was embodied in a hearsay exception that existed near the time of the Founding, this Article uses the term *res gestae* in a different sense.

345. For purposes of the felony-murder rule, the *res gestae* period typically begins when the actor has reached the point at which she could be prosecuted for an attempt to commit a crime, and it continues at least until all of the elements of the crime are completed; further, most courts provide that the *res gestae* of a felony continues, even after commission of the crime, during the felon's flight from the scene until he reaches a place of temporary safety. See, e.g., *People v. Salas*, 500 P.2d 7, 15 (Cal. 1972).

346. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (internal quotation marks omitted) (citing WEBSTER, *supra* note 37).

347. *Bryant*, 131 S. Ct. at 1163–67.

348. *State v. Manigo*, No. 06-03-0355, 2011 WL 3241488, at \*10–11, \*5 (N.J. Super. Ct. App. Div. Aug. 1, 2011).

monial, and similar statements made after the defendants had been detained, which the court deemed testimonial. Several additional courts have applied the same logic.<sup>349</sup>

Under the second half of my test, if police obtain incriminating statements from a would-be witness, whether volunteered or in response to structured questioning, and if those statements are taken outside the *res gestae* of the crime, then those statements may not be admitted in the absence of confrontation. The presumption underlying this aspect of the rule is that by the time the *res gestae* has ended, any structured questioning would be deemed testimonial by most courts. This presumption is supported by the holdings of various post-*Davis* cases, many of which have deemed testimonial a victim's statements to police after police had secured the scene and had either arrested the assailant or separated him from the declarant.<sup>350</sup> Once the suspect has been safely secured, it would

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349. See, e.g., *United States v. Arnold*, 486 F.3d 177, 189–92 (6th Cir. 2007) (“While it may often be the case that on-the-scene statements in response to officers’ questions will be testimonial because the presence of the officers will alleviate the emergency, this is not one of those cases” because defendant “was still at large; [defendant] did not know [the victim] had called 911; and for all [the victim] (or the officers) knew [the defendant] remained armed and in the residence immediately in front of them or at least in the nearby vicinity.”); *Commonwealth v. Beatrice*, No. SJC-10657, 2011 WL 3199372, at \*4 (Mass. July 29, 2011) (“Where a woman has [reported that she has] ‘just’ been severely beaten by a boy friend . . . , where the woman remains in a neighboring apartment, and where the assailant is ‘packing his stuff’ . . . , it is reasonable to conclude that the ongoing emergency continues until the police have arrived and secured the scene, or until the assailant has left the scene.”).

350. See, e.g., *Davis v. Washington*, 547 U.S. 813, 829–30 (2006) (deeming testimonial a victim's statements to police officers responding to a domestic-violence complaint after police had secured the scene and had separated the abusive husband from declarant because declarant's statements related to what had happened rather than what was currently happening); *id.* at 828–29 (clarifying that an interrogation that begins for the purpose of determining the need for emergency assistance can evolve into testimonial statements once that purpose has been achieved); *People v. Cage*, 155 P.3d 205, 217 (Cal. 2007) (holding that an assault victim's statements to police were testimonial because the assailant and victim were geographically separated, the incident had been over for more than an hour, and the victim “was in no danger of further violence as to which contemporaneous police intervention might be required”); *Commonwealth v. Galicia*, 857 N.E.2d 463, 470 (Mass. 2006) (holding that the victim's statements to police describing assault that occurred less than five minutes earlier were testimonial because victim and defendant were separated, “the scene was safe,” and “urgency had subsided” (internal quotation marks omitted)); *State v. Wright*, 726 N.W.2d 464, 476 (Minn. 2007) (deeming testimonial victims statements to officers investigating a report of a man who had pointed a gun at the victims because “by the time police interviewed [the two victims], Wright was in police custody”); *State v. Fry*, 926 N.E.2d 1239, 1260–61 (Ohio 2010) (deeming testimonial a victim's statements to police officers responding to a domestic-violence complaint because defendant had already been arrested and removed from the premises, the officer's primary purpose at that time was to investigate a possible crime, and the declarant's statements related to past events rather than what was currently happening); *Zapata v. State*, 232 S.W.3d 254, 260 (Tex. App. 2007) (The victim's statements to police about a recent assault were testimonial because the victim was separated from the defendant, there was no evidence of an “ongoing conflict,” and the interrogating officer admitted that she was “gathering evidence for prosecution” at the time. (internal quotation marks omitted)); *Henderson v. Commonwealth*, 710 S.E.2d 482, 493–95 (Va. Ct. App. 2011)

be virtually impossible for the suspect to pose an ongoing emergency to the declarant or the public at large.<sup>351</sup>

Along with the *res gestae* limitation, my proposed rule would apply to both police and nonpolice interrogators. Under this aspect of the rule, if a nonpolice interrogator obtains accusatory statements from a would-be witness, whether those statements are volunteered or the result of interrogation, and those statements are taken outside the *res gestae* of the crime, the statements would be deemed testimonial and subject to confrontation.

The Sixth Amendment applies to “all criminal prosecutions” and protects all criminal defendants, not just those whose accusers happen to have been questioned by certain individuals.<sup>352</sup> Regardless of the identity of the interrogator, many out-of-court statements “do precisely what a witness does on direct examination,” thereby triggering the same confrontation concerns and making the accusation ripe for cross-examination.<sup>353</sup> Moreover, as set forth in Part III.C., this approach—which focuses on the nature of the statements rather than the official or unofficial status of the listener—is consistent with the rulings of various lower courts that have applied *Crawford*.

My proposed rule has several advantages over the current totality-of-the-circumstances standard. First, unlike the *Bryant* rule, my proposed rule does not require courts to consider countless factors, many of which are themselves malleable. Under this proposed rule, it would not matter whether the assailant is much larger than the declarant, whether the declarant is aware of the particularly violent or unpredictable nature of the assailant, whether the declarant harbors an unusual fear of the assailant, or whether the assailant was armed with a gun at the time of the attack. Indeed, nearly every factor discussed in *Bryant* would be irrelevant under my proposal.<sup>354</sup>

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(applying *Bryant* and deeming testimonial robbery victims’ statements to a detective that were made four days after one alleged robbery and several hours after another because “there was no evidence of any immediate threat to either the witnesses or the detective”).

351. In the Fourth Amendment context, the Supreme Court employed a similar logic in 2009 when it reversed the longstanding rule of *New York v. Belton*. 453 U.S. 454, 462–63 (1981) (determining that items seized in the warrantless search of a passenger compartment of a vehicle incident to a lawful custodial arrest were lawfully seized during the exigencies of the situation and such seizure did not violate the Fourth and Fourteenth Amendments of the Constitution); see *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009) (“[I]n most cases the vehicle’s passenger compartment will not be within the arrestee’s reach at the time of the search.”).

352. U.S. CONST. amend. VI.

353. *Davis*, 547 U.S. at 830 (emphasis removed); see also *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (defining testimonial statements as “*ex parte* in-court testimony or its functional equivalent” (internal quotation marks omitted)).

354. See *supra* notes 96–110 and accompanying text for a list of the factors discussed in *Bryant*.

Second, my proposed rule will no longer require courts to analyze either the declarant's or the interrogator's primary purpose.<sup>355</sup> Rather, my proposed rule is based on presumptions—ones dependent upon the actual status of the assailant at the time of an interrogation and, consequently, the actual nature of any ongoing threat to the declarant. If the assailant has been captured by police, or if the assailant has been separated from the declarant, as in *Davis*, then my proposed rule would *automatically* deem the declarant's statements testimonial. This rule would apply regardless of whether the declarant knew of the assailant's status, and regardless of what a court later believes the declarant may or may not have intended. Likewise, if the assailant has reached a point of safety, this rule would *automatically* deem the declarant's statements testimonial. Thus, it simply would not matter whether any would-be declarant knew or did not know of an assailant's capture. Indeed, courts would not be required to ask what the declarant knew at the time the relevant out-of-court statements were made, as the test hinges on the fact of capture or escape, rather than any individual's apparent purpose. To preserve the bright-line nature of this rule, and to eliminate the unlimited judicial discretion inherent in *Bryant*'s totality-of-the-circumstances test, the proposed *res gestae* limitation must remain free of extraneous considerations such as these.

Third, by relying on the concept of *res gestae*, this rule comes ready-made with a relatively clear set of rules, making results more predictable. The current test employs countless factors and provides no indication as to which way each factor cuts. My proposed rule imposes a more definite line between nontestimonial and testimonial statements. Under my proposal, courts would simply examine evidence relating to precisely when the assailant was either (1) captured by police, thereby ending the threat to the declarant and moving the focus to evidence preservation; or (2) successful in evading the pursuing police, creating an alternative line in the event of noncapture. This analysis, which would usually be resolved by reference to routine police reports, is far simpler than the analysis required by *Bryant*. For example, in the event of arrest, police will usually record the name of the person arrested; the date, time, and place of the arrest; and the offense for which the person was arrested.<sup>356</sup> Similar rules apply to individuals not arrested but taken into

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355. See, e.g., Orenstein, *supra* note 316, at 1438–39 (“Both the definition of testimonial statements and of forfeiture rely on slippery notions of intent, which seems like an odd way to enforce a categorical constitutional right.”).

356. Upon arrest, most suspects are promptly taken to the police station or a jail for “booking.” Pursuant to this process, the arrestee’s name, the time of the arrest or booking, and the offense of arrest are noted in a police “blotter” or “log.” See *Wainwright v. City of New Orleans*, 392 U.S. 598, 605 (1968) (Warren, C.J., dissenting) (recognizing that booking is required in most jurisdictions, and

custody.<sup>357</sup> This evidence would in turn create a clear line for when the *res gestae* has ended—one that can be easily verified by a reviewing court.<sup>358</sup>

Fourth, the time limitations imposed by this proposed rule would prevent the continued expansion of the concept of ongoing emergency, under which virtually any report of a past violent crime in which a suspect is still at large can be deemed nontestimonial.<sup>359</sup> Under existing case law, police can plausibly claim that a potential threat to the police or public persists through the first few hours after a violent act, as was argued in *Bryant*.<sup>360</sup> My proposed rule would curtail this potentially vast expansion of the category of nontestimonial hearsay by eliminating the possibility of an indefinite *res gestae* period, a result consistent with statements of the *Bryant* majority.<sup>361</sup>

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depicting the booking process as “an administrative record of an arrest . . . made on the police arrest book indicating, generally, the name of the person arrested, the date and time of the arrest or booking, the offense or which he was arrested, and other information”). Following booking, arrest information is often subject to public disclosure. See Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, In Need of a Rule*, 64 MD. L. REV. 755, 821–26 (2005) (noting that state open-records statutes generally require public access to arrestee information); see also Gifford v. Freedom of Info. Comm’n, 631 A.2d 252, 258 (Conn. 1993) (noting a statutory disclosure obligation regarding arrest that requires public disclosure of the “name and address of the person arrested, the date, time and place of the arrest and the offense for which the person was arrested”).

357. In the *Miranda* context, “custody” occurs when a suspect has either been arrested or when a reasonable person would believe he has been detained in a manner effectively equivalent to arrest. See *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). Louisiana statutes, typical of many state statutes, require extensive booking processes for all persons taken into custody, whether formally arrested or not. See LA. CODE CRIM. PROC. ANN. art. 201 (2003) (defining “arrest” as “the taking of one person into custody by another,” marked by “an actual restraint of the person”); *id.* art. 228 (setting forth Louisiana’s post-arrest booking requirements, including the “duty of every peace officer making an arrest . . . promptly to conduct the person arrested to the nearest jail or police station and cause him to be booked,” and mandating “an entry, in a book kept for that purpose, showing [the arrestee’s] name and address . . . [and] the date and time of booking,” and noting that “booking information summaries shall always be open for public inspection”).

358. See *Caledonian Record Pub. Co. v. Walton*, 573 A.2d 296, 297–301 (Vt. 1990) (noting a “general consensus” among the states that include arrest records within public disclosure laws, and concluding that both arrest records and records of citations must be disclosed).

359. See, e.g., *State v. Rodriguez*, 722 N.W.2d 136, 147–48 (Wis. Ct. App. 2006) (holding that questioning by police the day following the incident was still part of an ongoing emergency).

360. *Michigan v. Bryant*, 131 S. Ct. 1143, 1164 (2011) (“At no point during the questioning [of the declarant] did either [the declarant] or the police know the location of the shooter. In fact, Bryant was not at home by the time the police searched his house [over two hours later].”); see also *id.* at 1172–73 (Scalia, J., dissenting) (criticizing the majority’s holding, in which the majority effectively interpreted the ongoing emergency to exist until the police had learned of Bryant’s motive and location after the shooting, perhaps even up to two-and-a-half hours later).

361. *Id.* at 1164–65 (“This is not to suggest that the emergency continued until Bryant was arrested in California a year after the shooting. We need not decide precisely when the emergency ended because Covington’s encounter with the police and all of the statements he made during that interaction occurred within the first few minutes of the police officers’ arrival and well before they secured the scene of the shooting—the shooter’s last known location.” (citations omitted)).

Fifth, my proposed rule creates a closer match between trial testimony and out-of-court statements that serve a similar purpose. Testimony taken at trial nearly always occurs when an assailant is in police custody.<sup>362</sup> Statements made by an out-of-court declarant under circumstances similar to those at trial—when the assailant has been captured and no longer poses a threat to the declarant—should be treated no differently than similar testimony taken at trial. In both sets of circumstances, the need for cross-examination is the same. My proposed *res gestae* rule creates the necessary consistency.

Finally, there is precedent to support this proposal. Courts of at least one state have already applied the *res gestae* rule in resolving a Confrontation Clause claim post-*Bryant*. For example, in *Philpot v. State*,<sup>363</sup> (an opinion issued a few weeks after *Bryant*) the Court of Appeals of Georgia held that a prior victim's statements to police, in which she identified defendant Philpot as the burglar of her residence and described his actions in a manner consistent with the current charges against him, were nontestimonial and thus not subject to the Confrontation Clause.<sup>364</sup> In reaching that result, the court found it significant that "the officer responded to the prior victim's 911 call within just a few minutes and found her to still be 'shaken up' . . . as he questioned her in the

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362. Under the Sixth Amendment's Confrontation Clause, criminal defendants have a right to be personally present at trial. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). This right typically includes the right to be present when witnesses testify at trial. *See Maryland v. Craig*, 497 U.S. 836 (1990) ("[T]he Confrontation Clause reflects a preference for face-to-face confrontation at trial,' a preference that 'must occasionally give way to considerations of public policy and the necessities of the case.'" (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980), *abrogated by Crawford v. Washington*, 541 U.S. 36 (2004) and *Mattox v. United States*, 156 U.S. 237, 243 (1895))). A defendant's right to be present at trial is further protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses against him. *United States v. Gagnon*, 470 U.S. 522, 526 (1985). As a result, instances where a criminal defendant is not present for trial testimony are presumably rare. *See People v. Concepcion*, 193 P.3d 1172, 1176–77 (Cal. 2008) (discussing instances in which a defendant may be deemed to have waived his right to be present at trial, including cases of escape before trial and failure to return to trial while on bail).

363. *Philpot v. State*, 709 S.E.2d 831 (Ga. Ct. App. 2011).

364. *Id.* at 838–39.

[T]he officer who investigated the prior burglary testified that on the date in question, he responded within a few minutes to a report that a burglary had occurred only moments before . . . Upon the officer's arrival at the [site of the burglary], [the homeowner] told him that she heard a noise in her kitchen, and that when she went to investigate it, she saw a young man (later identified as Philpot) climbing into her home through the kitchen window while holding a knife.

*Id.* at 838. She further told the officer that "once she began screaming, the young man fled"—facts that were very similar to those in the case at issue in this appeal. *Id.* "After speaking with the officer for a few more minutes, the prior victim looked out her window and exclaimed that the burglar (Philpot) was standing in the back yard of a home across the street." *Id.* The officer then chased and eventually arrested Philpot. *Id.*

home's kitchen."<sup>365</sup> As the court declared, these facts indicate that "the prior victim's statements to the officer were admissible as part of the *res gestae* of the crime (which . . . is a relevant consideration under *Bryant*)."<sup>366</sup> Moreover, at the time of these statements, "the armed perpetrator was still on the loose, and thus continued to pose a serious potential threat to the prior victim and her neighbors," just as in *Bryant*.<sup>367</sup> These facts, according to the court, indicated that the victim's statements were primarily offered to enable police to meet an ongoing emergency, making them nontestimonial.<sup>368</sup>

## VI. CONCLUSION

*Michigan v. Bryant*, which makes constitutionality hinge upon a judge's interpretation of the primary purpose of an out-of-court hearsay statement, has proven just as malleable as the test it replaced. As recent cases reveal, manipulation of the primary-purpose test occurs in many ways, including selective application of the *Bryant* factors, choosing the particular purpose among many concurrent purposes that justifies the desired end, and downplaying the testimonial nature of interrogations conducted by nonstate actors.

As under *Roberts*, where multifactor tests were common, *Bryant* instructs courts to examine "all relevant information" specific to the case and to decide each case "in context," a classic totality-of-the-circumstances approach. Also, post-*Bryant* courts have drawn opposite inferences from the same *Bryant* factors and have made constitutionality turn on trivialities. Thus, like the discredited *Roberts* standard, the primary-purpose test yields unpredictable results and provides easy means to evade the Sixth Amendment's protections.

*Crawford* was intended to eliminate the malleability of the *Roberts* totality-of-the-circumstances approach, yet *Bryant* revives that very approach. To restore the promise of *Crawford* and eliminate the malleability of *Bryant*, a bright-line test is needed. While no replacement test is perfect, my proposal would no longer require courts to consider motives, would make irrelevant most if not all of the *Bryant* factors, and would eliminate the easy means of manipulation within the existing framework.

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365. *Id.* at 838–39.

366. *Id.* at 839.

367. *Id.*

368. *Id.* at 838–39.