RECENT CASE

OHIO V. CLARK

Supreme Court Holds Out-of-Court Statements Made by Child to Preschool Teacher Were Not "Testimonial" Statements

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INTRODUCTION

Cross-examination has long been considered a vital aspect of a fair trial.[1] In fact, the Sixth Amendment's provision that criminal defendants "be confronted with the witnesses against [them]" has been held to guarantee an opportunity for cross-examination in criminal trials.[2] Even in cases where the Court has admitted out-of-court statements without cross-examination, it has adhered closely to the view of cross-examination as a core protection of defendants' rights.[3] The fundamental issue regarding the relationship between hearsay evidence and the Constitution's right of confrontation is whether and to what extent they pursue similar objectives. In *Ohio v. Roberts*, the Court collapsed any distinction between the Confrontation Clause and the federal and state hearsay evidence rules,

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1 *See, e.g.*, Mattox v. United States, 156 U.S. 237, 244 (1895) (explaining that "[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination"); *see also* 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940) (declaring cross-examination "the greatest legal engine ever invented for the discovery of truth").

2 U.S. CONST. amend. VI; *see, e.g.*, Faretta v. California, 422 U.S. 806, 818 (1975) (finding that the Sixth Amendment guarantees the right of cross-examination in criminal trials); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (same).

3 This was at the core of the Court's holding in *Ohio v. Roberts*, which conditioned its admission of hearsay evidence by an unavailable declarant on the "indicia of reliability" that rendered cross-examination unnecessary. 448 U.S. 56, 65–66 (1980).

holding that the right of confrontation was not offended so long as the statements bore sufficient "indicia of reliability."[4] After nearly a quarter-century of this reliability analysis, the Court changed course, as *Roberts* often admitted hearsay evidence that the Confrontation Clause intended to exclude.[5] Instead of looking for "indicia of reliability," the Court now considers whether out-of-court statements by an unavailable declarant "bear testimony" against the accused—if so, admission of the hearsay evidence violates the right of confrontation unless there was a prior opportunity for cross-examination.[6]

Rather than providing an exhaustive definition of "testimonial" statements, *Crawford v. Washington* left the resolution of that issue to future cases,[7] and the development of an analytical framework for testimonial statements has been uneven.[8] In an effort to provide clarity to the testimonial inquiry, the Court announced in *Davis v. Washington* what has come to be known as the "primary purpose" test, which requires an objective inquiry into the purposes of the out-of-court statements being offered as evidence.[9] However, it is not immediately apparent *whose* primary purpose must be considered,[10] as the articulation of the test can easily be read to require an inquiry into the purposes of the interrogator or the declarant, or both.[11] *Michigan v. Bryant* also added several other considerations to the "primary purpose" inquiry,[12] which risk complicating

4 *Id.*; *see* KENNETH S. BROUN ET AL., EVIDENCE: CASES AND MATERIALS 892 (8th ed. 2014) (noting that "Confrontation Clause analysis under *Roberts* and admission under the hearsay rules . . . merged into a single inquiry").

5 *See* Crawford v. Washington, 541 U.S. 36, 61–63 (2004) (arguing that the right of confrontation was not intended to be subject to "amorphous notions of 'reliability'" and criticizing *Roberts* for admitting "core testimonial statements that the Confrontation Clause plainly meant to exclude").

6 *Id.* at 68; *see id.* at 51 (finding the Confrontation Clause applicable to statements bearing testimony against the accused).

7 *Id.* at 68.

8 *See* David Crump, *Overruling* Crawford v. Washington*: Why and How*, 88 NOTRE DAME L. REV. 115, 136–37 (2012) (arguing that the development of the "testimonial-nontestimonial" distinction from *Crawford* may have been uneven, at least in part, because it attempts to discern the subjective motivation of the declarant through objective factors).

9 *See* 547 U.S. 813, 822 (2006). The Court decided *Davis* and *Hammon v. Indiana* in the same opinion. *Id.* at 813.

10 *See* Michigan v. Bryant, 562 U.S. 344, 368 (2011) (arguing that the problem of mixed motives requires an inquiry into both).

11 *See id.* at 381 (Scalia, J., dissenting) (conceding that neither *Crawford* nor *Davis* addressed whose perspective was relevant to the "primary purpose" inquiry).

12 The Court considered additional factors for determining whether there was an ongoing emergency—such as the presence of a weapon, the injuries suffered by a declarant, whether there was an interrogation, and the formality surrounding the statements, *see id.* at 363–69 (majority opinion)—which has arguably complicated the analysis, *see* Crump, *supra* note 8, at 136.

the analysis of testimonial statements even further. While *Bryant* did not address the question, reserved in *Davis*, regarding the effect of statements made by a declarant to a private party,[13] that situation was squarely presented in *Ohio v. Clark*.[14]

I. CASE FACTS

Darius Clark, or "Dee," lived with his girlfriend and her two children in Cleveland, Ohio.[15] Clark was also his girlfriend's pimp, and he frequently sent her to Washington, D.C. to work as a prostitute.[16] In March 2010, while his girlfriend was on one such trip, Clark was left in charge of her three-year-old son, L.P., and eighteen-month-old daughter, A.T.[17] The following day, L.P.'s teacher noticed that he had a bloodshot eye and red lash marks on his face.[18] L.P.'s preschool teacher, Ramona Whitley, notified the lead teacher, Debra Jones, who asked L.P. about what had happened.[19] After initially saying he had fallen, L.P. eventually answered the questions by saying, "Dee, Dee."[20] Whitley contacted a child abuse hotline regarding the suspected abuse.[21] When Clark came to pick up L.P. from school, "he denied responsibility for the injuries and . . . left with L.P."[22] The next day, a social worker went to the Clark residence and took the two children to the hospital, where a physician discovered additional injuries consistent with child abuse.[23] L.P. had a black eye, several belt marks, and numerous bruises, while A.T. had two black eyes, a burn mark on her cheek, and indications that her pigtails had been ripped out at the base.[24]

The grand jury indicted Clark for five counts of felonious assault, two counts of domestic violence, and two counts of child endangerment.[25] At trial, the State introduced the out-of-court statements made by L.P. as evidence establishing Clark's guilt, but L.P. did not testify as the Ohio trial

13 *Bryant*, 562 U.S. at 357 n.3.
14 135 S. Ct. 2173, 2177 (2015).
15 *Id.*
16 *Id.*
17 *Id.* at 2177–78. The Court noted that it, like the Ohio courts, used initials to refer to Clark's victims. *Id.* at 2177 n.1.
18 *Id.* at 2178.
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*

court found him incompetent to testify.[26] Under Ohio law, children younger than ten years of age are incompetent to testify if they "appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."[27] The Ohio trial court relied on state evidence rules to admit the out-of-court statements made by L.P. to his teacher, finding that they bore adequate indicia of reliability.[28] Clark moved to exclude the statements made by L.P. to his teacher under the Confrontation Clause, but the trial court denied the motion, finding that the statements made by L.P. did not implicate the protections of the Sixth Amendment.[29] The jury found Clark guilty of all but one of the assault counts and sentenced him to twenty-eight years' imprisonment.[30]

On appeal, the state appellate court reversed the conviction on the ground that admission of L.P.'s out-of-court statements violated the Confrontation Clause.[31] The Ohio Supreme Court affirmed the decision of the appellate court, albeit on slightly different grounds.[32] The court determined that L.P.'s statements were testimonial, as the primary purpose of the teacher's questioning was "to gather evidence potentially relevant to a subsequent criminal prosecution" rather than "to deal with an existing emergency."[33] In addition, the court also found that Ohio had a mandatory reporting obligation law, which requires certain professionals, including teachers, to report instances of suspected child abuse to the authorities.[34] In the court's view, the mandatory reporting obligation transformed the teachers into agents of the State, which made the statements they elicited from L.P. "functionally identical to live, in-court testimony."[35]

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26 State v. Clark, No. 96207, 2011 WL 6780456, at *1 (Ohio Ct. App. Dec. 22, 2011), *rev'd*, 135 S. Ct. 2173 (2015). The trial court held a hearing on November 16, 2010, and found L.P.—then four years old—incompetent to testify. *Id.*

27 *Clark*, 135 S. Ct. at 2178 (quoting OHIO R. EVID. 601(A)).

28 *See id.* (citing OHIO R. EVID. 807).

29 *Id.*

30 *Id.*

31 *See Clark*, 2011 WL 6780456, at *2, *11.

32 *See* State v. Clark, 999 N.E.2d 592, 600–01 (Ohio 2013), *rev'd*, 135 S. Ct. 2173. The Ohio Supreme Court found that the primary purpose of both teachers, Jones and Whitley, was to collect evidence to fulfill their duty to report abuse. *See id.* at 600.

33 *Id.* at 597.

34 *See id.* at 596.

35 *Id*. at 600 (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310–11 (2009)).

II. MAJORITY OPINION

It is worth noting that this appeared to be an easy case for the Court.[36] It concluded, somewhat narrowly, that the out-of-court statements by L.P. to his teacher did not implicate the protections of the Confrontation Clause, as the primary purpose of the statements was not testimonial.[37] After curiously referencing *Roberts*' "indicia of reliability" standard,[38] the majority summarized the Court's confrontation precedents—beginning with *Crawford v. Washington* and concluding with *Michigan v. Bryant*.[39] The Court explained that *Crawford* applied the Confrontation Clause to witnesses who bear testimony against the accused, and it defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[40] Having defined "testimonial" statements, *Crawford* held that the Confrontation Clause prohibits the introduction of testimonial evidence by witnesses not testifying in court, unless they were unavailable to testify *and* the defendant had a prior opportunity to cross-examine the witness.[41]

The Court then reviewed its subsequent confrontation cases—in particular *Davis v. Washington*[42] and *Michigan v. Bryant*[43]—which have further developed the requirements for determining when a statement is testimonial.[44] It noted that *Davis* articulated what had come to be known as the "primary purpose" test, defining when statements made to police officers would—and would not—be testimonial.[45] The Court explained:

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36 The Court unanimously found that these statements were not testimonial. *Clark*, 135 S. Ct. at 2183; *id.* at 2183–84 (Scalia, J., concurring in the judgment); *id.* at 2185 (Thomas, J., concurring in the judgment). But there was strong disagreement in the proper reasoning to be applied. *See infra* Part III.

37 *See Clark*, 135 S. Ct. at 2183.

38 *Id.* at 2179 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)). The reference is curious, in part, because the Court's decision in *Crawford* overruled *Roberts*, and the majority opinion referenced *Roberts* in such a way as to suggest that it was still a viable approach. *Compare id.* (describing *Crawford* as a new approach without suggesting that *Roberts* had been overruled), *with* Crawford v. Washington, 541 U.S. 36, 68–69 (2004) (rejecting the *Roberts* approach), *and id.* at 69 (Rehnquist, C.J., concurring in the judgment) ("I dissent from the Court's decision to overrule . . . *Roberts*." (citation omitted)). Moreover, subsequent opinions of the Court have expressly recognized that *Crawford* overruled *Roberts*—it did not simply provide another approach. *See, e.g.*, Michigan v. Bryant, 562 U.S. 344, 353 (2011) (noting that *Crawford* overruled *Roberts*); Whorton v. Bockting, 549 U.S. 406, 413 (2007) (same).

39 *See Clark*, 135 S. Ct. at 2179–80.

40 *Id.* at 2179 (quoting *Crawford*, 541 U.S. at 51).

41 *Id.* (citing *Crawford*, 541 U.S. at 68).

42 547 U.S. 813 (2006).

43 562 U.S. 344.

44 *Clark*, 135 S. Ct. at 2179–80.

45 *Id.* (citing *Davis*, 547 U.S. at 822).

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[46]

According to the Court, *Bryant* determined that the "primary purpose" inquiry required consideration of "all of the relevant circumstances."[47] *Bryant* had reiterated the primary purpose requirements from *Davis*, but it also noted that there might be circumstances beyond those indicating the existence of an ongoing emergency that could objectively indicate that a statement was not made with the primary purpose of establishing facts for future prosecution.[48] The *Bryant* Court considered the existence of an ongoing emergency as simply an additional factor informing the ultimate "primary purpose" inquiry.[49] The Court noted that *Bryant* also viewed the formality of the interrogation as another factor that required consideration, noting that informal "questioning [was] less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused."[50] Finally, the Court observed that the Confrontation Clause was not meant to preclude admission of those out-of-court statements that were understood at the time of the founding to be admissible in criminal trials without cross-examination.[51] Thus, the majority determined "the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause."[52]

While the Court indicated that this case presented the very question that it had reserved in earlier cases—whether out-of-court statements made to private persons implicated the Confrontation Clause—it declined to adopt a categorical rule excluding out-of-court statements made to private persons as beyond the Sixth Amendment's reach.[53] However, the Court

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46 *Id.* (quoting *Davis*, 547 U.S. at 822).

47 *Id.* at 2180 (citing *Bryant*, 562 U.S. at 369).

48 *Id.* (citing *Bryant*, 562 U.S. at 374).

49 *Id.* (quoting *Bryant*, 562 U.S. at 366). *Bryant* considered additional factors that could have a bearing on the inquiry. *See Bryant*, 562 U.S. at 371–75 (considering circumstances, such as a shooting victim found alone in a parking lot without knowledge of the party responsible for the injuries, the fact that the involvement of a gun created an additional danger to the public at large, and the purpose of the officers' questions).

50 *Clark*, 135 S. Ct. at 2180 (quoting *Bryant*, 562 U.S. at 366, 377).

51 *Id.* (citing Giles v. California 554 U.S. 353, 358–59 (2008); Crawford v. Washington, 541 U.S. 36, 56 n.6, 62 (2004)).

52 *Id.* at 2180–81.

53 *See id.* at 2181.

found it highly relevant that L.P. was speaking to his teachers.[54] Comparing the facts and circumstances of the instant case with those present in *Davis*, *Hammon v. Indiana*, and *Bryant*, the Court determined that the primary purpose of the conversation between L.P. and his teacher, similar to the conversations in *Davis* and *Bryant*, was to respond to an ongoing emergency, as opposed to an effort to gather evidence to be used in a future prosecution.[55] The Court also observed that it was incredibly unlikely that a child of his age would ever "intend his statements to be a substitute for trial testimony."[56] Finally, the Court found that statements similar to those at issue in the instant case had been generally admissible at common law.[57]

The Court also rejected Clark's contentions that Ohio's mandatory reporting requirements transformed the statements L.P. made to his teachers into testimonial statements, given the "natural tendency [of these kinds of statements] to result in [the] prosecution [of a defendant]."[58] It dismissed this argument for two reasons. First, the Court found that any good teacher would have acted with the primary purpose of removing the child from harm's way, regardless of any state reporting requirement.[59] Second, the Court found it irrelevant that the mandatory reporting requirement "had the natural tendency to result in Clark's prosecution."[60] It noted that both *Davis* and *Bryant* permitted the introduction of statements that were provided in response to police interrogations, as their purpose was not *primarily* testimonial.[61] The reporting obligation, the Court concluded, "does not change our analysis."[62]

III. CONCURRING OPINIONS

A. Justice Scalia Joined by Justice Ginsburg

Justice Scalia, joined by Justice Ginsburg, agreed with the Court's judgment and with its decision to avoid answering two questions unnecessary to decide the case: (1) whether the Ohio mandatory reporting law transformed private actors into agents of the State for purposes of the

54 *See id.*

55 *See id.* (noting that *Davis* and *Bryant* both involved circumstances that were unclear to the responding officers that required asking questions of the victim to secure their safety, while the victim in *Hammon* had already been separated from her alleged attacker).

56 *Id.* at 2182.

57 *See id.*

58 *Id.* at 2183.

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

Confrontation Clause, and (2) whether a more permissive test for determining whether a statement is testimonial should apply to interrogations by private actors.[63] Applying the "usual test applicable to informal police interrogation," Scalia concluded that L.P.'s statements were not testimonial.[64] In particular, L.P.'s primary purpose in making the statements was "not to invoke the coercive machinery of the State," nor were his teachers attempting to "establish[] facts for later prosecution."[65] Finally, the conversation, viewed as a whole, did not possess the "requisite solemnity…. adequate to impress upon [L.P.] the importance of what he [was] testifying to."[66] This, according to Justice Scalia, was all that was necessary to decide the case.[67]

As the majority opinion went beyond what he believed was necessary to decide the case, Justice Scalia wrote separately to "protest the . . . shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford v. Washington*."[68] He argued that the Court's recent cases, beginning with *Crawford*, sought to bring the application of the Confrontation Clause back in line with its original meaning: testimonial statements by out-of-court witnesses must be excluded unless the witness is unavailable *and* the defendant had a prior opportunity for cross-examination.[69] Scalia took issue with the characterization of *Crawford* as a different approach.[70] While noting that "snide detractions do no harm," Scalia argued that dicta on legal points has a significant potential to mislead.[71] In particular, the suggestion that the

63 *Id.* (Scalia, J., concurring in the judgment). While Scalia expressed relief that the majority declined to employ a more permissive test for interrogations by private persons, there is some reason to believe that in function, if not in form, the Court's opinion would allow just that. Despite declining to hold statements made to persons who are not police officers as categorically beyond the reach of the Confrontation Clause, the Court noted that "[s]tatements made to someone who is not *principally charged* with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial." *Id.* at 2182 (majority opinion) (emphasis added) (citing Giles v. California, 554 U.S. 353, 376 (2008)). Given the suggestion that statements made to persons who are not police officers are unlikely to implicate the Confrontation Clause, it is no stretch to conclude that a more permissive test is a likely consequence of the Court's decision—or a step in that direction.

64 *Id.* at 2183–84 (Scalia, J., concurring in the judgment).

65 *Id.* at 2184.

66 *Id.*

67 *Id.*

68 *Id.*

69 *See id.*

70 *See id.* ("*Crawford* remains the law. But when else has the categorical overruling, the thorough repudiation, of an earlier line of cases been described as nothing more than 'adopt[ing] a different approach,' as though *Crawford* is a matter of twiddle-dum twiddle-dee preference . . . ?" (citation omitted) (quoting *id.* at 2179 (majority opinion))).

71 *Id.*

"primary purpose" test was "necessary, but not always sufficient" had no support in the Court's confrontation case law.[72] Instead, he argued, the "primary purpose" test sorted out interactions with a police officer where an individual was, and was not, acting as a witness.[73] In addition, he referred to the majority's assertion that a party seeking the protection of the Confrontation Clause must provide "evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding."[74] Scalia argued this was backwards, as the Confrontation Clause was a procedural requirement that, once invoked by the defendant, required the prosecution to introduce evidence sufficient to establish a longstanding practice of admitting evidence of this type without the need for cross-examination.[75] The Court's opinion, Scalia suggested, appeared to be "an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause."[76]

B. Justice Thomas

Despite agreeing with much of the majority's analysis, Justice Thomas wrote separately to highlight the missed opportunity to provide guidance on the application of the Confrontation Clause to out-of-court statements made to private persons.[77] Finding the "primary purpose" test inapplicable,[78] Thomas advocated an approach—also advocated in *Davis v. Washington*[79]—that "assess[ed] whether [the] statements [bore] sufficient indicia of solemnity to qualify as testimonial."[80] Thomas argued that the Confrontation Clause was designed to protect against the particular abuses

72 *Id.* at 2184–85 (quoting *id.* at 2180–81 (majority opinion)).

73 *See id.* at 2185. This assumes the Sixth Amendment operates as a procedural rule, as opposed to an evidentiary rule.

74 *Id.* (quoting *id.* at 2182 (majority opinion)).

75 *See id.*

76 *Id.*

77 *See id.* (Thomas, J., concurring in the judgment).

78 *See id.* (arguing that "[t]he primary purpose test . . . is just as much 'an exercise in fiction . . . disconnected from history' for statements made to private persons as it is for statements made to agents of law enforcement, if not more so" (alteration in original) (quoting Michigan v. Bryant, 562 U.S. 344, 379 (2011) (Thomas, J., concurring in the judgment))).

79 547 U.S. 813, 836–37 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part) (advocating an approach to analyze testimonial statements based on sufficient indicia of solemnity).

80 *Clark*, 135 S. Ct. at 2186 (Thomas, J., concurring in the judgment) (citing Crawford v. Washington, 541 U.S. 36, 51 (2004); *Davis*, 547 U.S. at 836–37 (Thomas, J., concurring in the judgment in part and dissenting in part)) (asserting that he would apply "the same test for statements to private persons that I have employed for statements to agents of law enforcement").

that occurred under the English bail and committal statutes—in particular, the "use of *ex parte* examinations as evidence against the accused."[81] Given this history, Thomas asserted that the Confrontation Clause was targeted to confront witnesses who bear testimony against the accused, where testimony is defined as a "*solemn* declaration or affirmation made for the purpose of establishing or proving some fact."[82] Thus, he argued that a confrontation analysis should turn, at least in part, on a solemnity analysis.[83]

IV. FUTURE BATTLEGROUNDS

Given the tenor of the Court's confrontation cases since *Davis* and its recent decision in *Clark*, it is worth considering the potential battlegrounds in future cases attempting to provide needed clarity to the "testimonial" framework. In particular, the Court needs to address (1) the scope of an "ongoing emergency," (2) whose perspective (interrogator or declarant) is relevant to the "primary purpose" inquiry, and (3) whether the testimonial inquiry changes when evaluating statements made to private individuals. *Bryant* offers some preliminary answers to these issues,[84] but they have proven less than desirable for lower courts.[85] *Clark* considered creating a different test to evaluate statements made to private persons for their testimonial or nontestimonial character.[86] Ultimately, the Court declined to provide a categorical rule, likely due to the fact that the "primary purpose" test proved sufficient to resolve the case without resort to an in-depth analysis of the identity of the person to whom the statements were made.[87] Each of the aforementioned problems will be considered in turn.

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81 *Id.* (quoting *Davis*, 547 U.S. at 835 (Thomas, J., concurring in the judgment in part and dissenting in part)).

82 *Id.* (emphasis added) (quoting *Crawford*, 541 U.S. at 51).

83 Justice Thomas referred to certain categories of out-of-court statements that would bear adequate indicia of solemnity, which would thus be excluded under the Confrontation Clause. *See id.* "Statements 'contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions' easily qualify." *Id.* (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)). In addition, he noted that "formalized dialogue" while in police custody, as long as it followed any *Miranda* warnings, could bear adequate indicia of solemnity to qualify as testimonial statements. *Id.* (quoting *Davis*, 547 U.S. at 840 (Thomas, J., concurring in the judgment in part and dissenting in part)).

84 *Bryant* provided a more expansive view of an "ongoing emergency," *see* Michigan v. Bryant, 562 U.S. 344, 359–65 (2011), and concluded that the perspectives of both the interrogator and the declarant were relevant, *see id.* at 367.

85 *See, e.g.*, People v. Fackelman, 802 N.W.2d 552, 573 (Mich. 2011) (attributing a split decision to the difficulty in "synthesiz[ing] several very-difficult-to-synthesize Confrontation Clause decisions of the Supreme Court").

86 *See supra* note 53 and accompanying text.

87 *See supra* notes 53–56 and accompanying text.

A. Ongoing Emergencies and Relevant Perspectives for the Primary Purpose Inquiry

The confrontation jurisprudence in the wake of *Crawford*—particularly in *Bryant*—has not been the model of clarity.[88] While *Clark* did not have occasion to consider the scope of ongoing emergencies or the proper perspective to consider in a primary purpose inquiry, its casual reliance upon the principles from *Bryant*[89] suggests further retrenchment from the categorical overruling of *Roberts*. *Clark* did not engage in much of an analysis regarding the potential reach of ongoing emergencies, yet it found *Bryant* instructive. The teachers were concerned with the safety of a vulnerable child, the identity of the abuser was unknown, and the teachers had no way of knowing whether any other children in their charge might be at risk. Based on these factors, the Court found that the teachers' questions were aimed at resolving an ongoing emergency.[90] The real problem with ongoing emergencies after *Bryant* is overinclusiveness—the broader the conception of "ongoing emergency," the narrower the applicability of the Confrontation Clause.[91] This overinclusiveness could essentially eviscerate the right of confrontation, and it is hard to imagine that "[t]he Framers could . . . have envisioned such a hollow constitutional guarantee."[92] Such a broad view of an ongoing emergency might portend a return to the *Roberts* regime.

In conducting the primary purpose inquiry, the majority considered the perspectives of both the interrogators (L.P.'s preschool teachers) and the declarant (L.P.).[93] Without much difficulty, the Court concluded that the primary purpose of both the teachers and L.P. was to resolve an

88 *See Fackelman*, 802 N.W.2d at 573 (referencing the Court's "tortuous [confrontation] jurisprudence").

89 *See* Ohio v. Clark, 135 S. Ct. 2173, 2181 (2015). The Court concluded that L.P.'s statements occurred in the midst of an ongoing emergency, *see id.*, but it is not clear that this characterization of L.P.'s statements was necessary to the decision. In particular, the existence of an ongoing emergency was not an essential predicate to finding that the statements were nontestimonial. *See id.* at 2180 (citing *Bryant*, 562 U.S. at 374). In addition, the majority considered the perspective of both the declarant and the interrogator, *see id.* at 2181–82, which was the approach suggested in *Bryant*, *see supra* note 84.

90 *See supra* note 89. It is hard to imagine that, in the absence of finding an ongoing emergency, the Court would be forced to conclude that L.P.'s statements were made with the primary purpose of establishing facts for future prosecution. Unnecessarily expanding the scope of an "ongoing emergency," however, carries a very real risk of undermining the right of confrontation in closer cases.

91 *See Bryant*, 562 U.S. at 387–89 (Scalia, J., dissenting) (arguing that the Court's definition of "ongoing emergency" had no real limiting principle).

92 *Id.* at 389; *see also id.* at 388–89 (arguing that the "distorted view" of the Court created an "expansive exception" to the right of confrontation, which would not have been endorsed by the Framers).

93 *See supra* note 89.

ongoing emergency.[94] The Court's evaluation of the perspectives of both the interrogator and the declarant appears to further entrench the approach taken in *Bryant*.[95] Justice Scalia has argued, however, that the only relevant perspective is that of the declarant.[96] The *Bryant* approach created no problems in *Clark* because the motives, at least when viewed through the lens of a reasonable person, were aligned.[97] However, it is not hard to imagine circumstances when a declarant and an interrogator have conflicting motives.[98] While the *Bryant* approach does not propose a direct solution to this issue, it seems likely that the resolution of these cases would be left to the discretion of judges, who would be "free to reach the 'fairest' result under the totality of the circumstances"[99]—an outcome that would be a step back towards *Roberts*.

B. Placing Statements Made to Private Persons Within the "Testimonial" Framework

The Court was unwilling to establish a categorical rule for statements made to private persons, but its approach suggests that these statements are significantly less likely to implicate the Confrontation Clause.[100] In the context of out-of-court statements made to police officers, the "primary purpose" test functions as a binary approach to the testimonial determination. That is, a statement is either determined to be made for the purpose of resolving an ongoing emergency (nontestimonial) or with a view towards prosecution (testimonial).[101] As the "primary purpose" inquiry is an objective one,[102] this makes sense. The police officer stands clothed in the compulsory authority of the State, charged with the duty of investigating crimes. When there is not an ongoing emergency, it is quite reasonable to assume that police interviews, even those of a more informal nature, are likely to be used in future prosecutions. Statements made to private persons, however, are more likely to fall into a hazier middle ground—neither made to resolve an ongoing emergency nor made for the purpose of future prosecution. This appears to be an area with great

94 *See supra* note 89.

95 *See supra* notes 89–90 and accompanying text.

96 *Bryant*, 562 U.S. at 381 (Scalia, J., dissenting).

97 *See* Ohio v. Clark, 135 U.S. 2173, 2181–82 (2015) (finding that the primary purpose of both L.P. and his teachers was to resolve an ongoing emergency).

98 *Bryant*, 562 U.S. at 383 (Scalia, J., dissenting).

99 *Id.*

100 *See supra* notes 53–57 and accompanying text.

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

102 *See id.*

potential for confusion.[103] For the time being, however, it appears that the "primary purpose" inquiry may be sufficient for the task. Clarifying its confrontation jurisprudence should be a point of emphasis for the Court in the near future.

CONCLUSION

The heart of the debate over the purpose of the Confrontation Clause is the manner in which confrontation was intended to secure a defendant's rights—either through procedural fairness or ensuring evidentiary reliability. The eventual direction the Court takes will depend, in large part, on which of these visions of the Confrontation Clause ultimately prevails. *Bryant* marked a potential step in the direction of the *Roberts* vision, and *Clark* does not appear to have departed from the course set in *Bryant*. Thus, while *Crawford* marked a sea change in the Court's confrontation jurisprudence, the Court's recent decisions—including *Clark*—appear to have chipped away at *Crawford*'s categorical holding: testimonial statements offered by an unavailable declarant are inadmissible unless the defendant has had a prior opportunity for cross-examination. It remains to be seen how much of *Crawford*'s holding will ultimately survive.

103 In this respect, the approach advocated by Justice Thomas is commendable, as it would likely make the "testimonial" inquiry much clearer. *See supra* notes 77–83 and accompanying text.