

# Just Don't Say You Heard It From Me: Bridging the *Davis v. Washington* Divide of Indistinguishable Primary-Purpose Statements

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## I. Introduction

“I hate it when they reach into their jackets like that—it makes me think they have a gun,” a woman said to her husband as they briskly walked past the usual crowd of thugs and drug dealers congregated on the seediest stretch of San Francisco’s Market Street. Just moments earlier, as they approached the group, they had noticed a struggle ensuing up ahead. They slowed their pace to cautiously watch and wait until the incident subsided. Once the scuffle appeared to have played out, the couple quickly proceeded past the group. One thug walking toward them reached into his jacket just as he passed them and the wife voiced her concern to her husband. Just as the couple passed the small crowd, someone yelled, “He’s got a gun—he’s got a pistol!” Several shots rang out and people on the sidewalk started yelling. Instinctively, the husband threw his wife into the gutter and attempted to shield her body with his own. As they laid face down in filth, someone behind them cried, “Help me! I’ve been shot!”

The couple’s cell-phone calls to 911 yielded only busy signals, but within minutes half a dozen police cars and twice as many officers surrounded them. The gunman had fled on foot and four victims had been shot; police swarmed the area in an attempt to resolve the emergency and locate the perpetrator. Two officers approached the couple, separated them, and asked each a series of questions concerning what had happened. Although it all seemed surreal, they each provided the best description

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possible of the individuals they had seen. Without pause after the last inquiry of each officer's line of questioning, they asked the husband and wife, "Would you like to volunteer your personal contact information?"

Without time for reflection, the wife provided her information, while the husband immediately declined to identify himself. If the gunman in this hypothetical situation were apprehended and charged with shooting the four victims, and the couple's statements were used against him at trial, would the gunman have the constitutional right to confront and cross-examine the couple as to their statements?

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>1</sup> This procedural guarantee<sup>2</sup> is applicable to federal criminal proceedings, as well as their state counterparts, by virtue of the Fourteenth Amendment.<sup>3</sup> While this provision could be taken literally to require all witnesses to testify in court against the accused, the Supreme Court has long taken a more moderate approach holding that not all hearsay witness statements are subject to confrontation in the form of cross-examination in court.<sup>4</sup>

In *Crawford v. Washington*,<sup>5</sup> the Court revamped its Confrontation Clause analysis by placing all hearsay statements into one of two categories: testimonial and non-testimonial.<sup>6</sup> It held that only testimonial statements are subject to confrontation<sup>7</sup> because the declarant has functioned as a witness.<sup>8</sup> Non-testimonial hearsay statements, however, are not subject to Confrontation Clause scrutiny and are admissible into evidence provided they fall under a valid hearsay exception.<sup>9</sup> In its most recent Confrontation Clause case, *Davis v. Washington*,<sup>10</sup> the Supreme

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

2. *Crawford v. Washington*, 541 U.S. 36, 61 (2004). See also Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 246 (2005).

3. See Ariana J. Torchin, Note, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington*, 94 GEO. L.J. 581, 608 n.157 (2006).

4. See *Ohio v. Roberts*, 448 U.S. 56, 62-63 (1980); Geetanjali Malhotra, Note, *Resolving the Ambiguity Behind the Bright-Line Rule: The Effect of Crawford v. Washington on the Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions*, 2006 U. ILL. L. REV. 205, 207 (2006).

5. *Crawford*, 541 U.S. 36.

6. *Id.* at 68.

7. *Id.* at 68-69.

8. Friedman, *supra* note 2, at 246.

9. See *Crawford*, 541 U.S. at 68.

10. *Davis v. Washington*, *From Lexis*: 126 S. Ct. 2266\*, 165 L. Ed. 2d 224, 2006 U.S. LEXIS 4886 (2006) \*All pagination subject to change pending release of the final published version.

Court more clearly defined testimonial and non-testimonial statements based on the purpose for which the statement was made.<sup>11</sup> Testimonial statements are those made with the primary purpose of establishing facts for use in future prosecution, while non-testimonial statements have the primary purpose of assisting in an ongoing emergency.<sup>12</sup> While *Crawford* left the impression,<sup>13</sup> *Davis* explicitly declared that only testimonial statements are subject to Confrontation Clause scrutiny.<sup>14</sup>

Despite the Court articulating a two-pronged standard focused on the extreme ends of the testimonial spectrum, the Court has not provided a sound framework for the middle of the spectrum where hearsay statements made to law enforcement have a mixed or dual purpose<sup>15</sup> and the primary purpose is indiscernible. Therefore, as the case law stands today, there is no clear answer as to whether the hypothetical gunman has a constitutional right to confront the witness couple because the Supreme Court has left a gaping hole in this area of evidence law and criminal procedure.

This note will posit that the litmus test for determining whether a witness hearsay statement is testimonial or non-testimonial, when the primary purpose of the interrogation is indistinguishable, should be whether or not the witness provides his or her personal contact information to law enforcement for future contact. Volunteering or refusing to volunteer such information is indicative of the declarant's primary intent in making statements to police and serves as the circumstantial evidence objectively indicating "the primary purpose of the interrogation"<sup>16</sup> in the *Davis* analysis. Under this proposed "primary intent test," providing contact information indicates a willingness to assist in future (almost certainly prosecutorial) proceedings regarding the incident—yielding a testimonial statement under *Davis*. A refusal to provide contact information indicates a desire to assist solely in the immediate, ongoing emergency and unwillingness to assist in future prosecutorial attempts—resulting in a non-testimonial statement under the *Davis* framework.

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11. See *id.* at 2274 n.1 (indicating that the primary purpose of the interrogation is to be analyzed using the declarant's statements).

12. *Id.* at 2273-74.

13. See *Crawford*, 541 U.S. at 68-69; Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 306 (2006).

14. *Davis*, 126 S. Ct. at 2274-75.

15. Such a statement would be one in which the declarant intends to assist in the resolution of the ongoing emergency *and* to supply law enforcement with statements potentially useful in the prosecution of the assailant.

16. *Davis*, 126 S. Ct. at 2273-74.

## II. Historical Progression of the Confrontation Clause Case Law

A look at Confrontation Clause history is helpful in understanding the current problems facing courts in applying the *Davis* ruling to mixed-purpose statements. Within the last twenty-five years, the case law that pertains to the constitutional right to confrontation has become simultaneously more accurate and more vague. It is more accurate because the focus has shifted from a statement's subjective reliability to the type of statements made,<sup>17</sup> thereby restoring it as a procedural, rather than a substantive, guarantee<sup>18</sup>—the original intention of the Sixth Amendment.<sup>19</sup> However, it is also more vague because while the Supreme Court has brought the confrontation analysis framework into line with its historical purpose, the Court has not yet provided a comprehensive definition of testimonial and non-testimonial statements.<sup>20</sup>

### A. *Ohio v. Roberts*

In 1980, the Supreme Court articulated the requirements for admission of hearsay evidence to meet constitutional guarantees of confrontation.<sup>21</sup> In *Ohio v. Roberts*, a grand jury indicted respondent Herschel Roberts for forgery of a check in the name of Bernard Isaacs and possession of stolen credit cards belonging to Isaacs and his wife.<sup>22</sup> In this preliminary hearing, Roberts tried to get the Isaacs' daughter, Anita, to testify that she gave Roberts her parents' checks and credit cards, without telling him that she was not permitted to use them, while he stayed at her apartment.<sup>23</sup> Although Roberts had stayed at Anita's apartment, she denied giving him the checks and cards.<sup>24</sup>

At Roberts' subsequent trial, Anita was unavailable to testify<sup>25</sup> and the trial court admitted the transcript of her preliminary hearing testimony into evidence.<sup>26</sup> Roberts claimed a violation of his right to confrontation and

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17. See Malhotra, *supra* note 4, at 209-10.

18. See Friedman, *supra* note 2, at 246.

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

20. See Lininger, *supra* note 13, at 280.

21. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

22. *Id.* at 58.

23. *Id.*

24. *Id.*

25. See *id.* at 59-62. The Court held that Anita was constitutionally unavailable because her parents had no idea where to find her and the prosecution had made a good faith effort to obtain her presence at trial. *Id.* at 74-75.

26. *Id.* at 60.

the Ohio Supreme Court affirmed, holding that mere cross-examination at a preliminary hearing was insufficient for confrontation purposes at trial.<sup>27</sup>

On *certiorari*, the U.S. Supreme Court reversed the Ohio Supreme Court's ruling and held that hearsay testimony from a prior preliminary hearing could come in at a criminal proceeding if there was a necessity (the witness was unavailable for the current proceeding) and the prior testimony bore adequate "indicia of reliability."<sup>28</sup> To meet this reliability test, evidence need merely fall under a "firmly rooted hearsay exception"<sup>29</sup> or bear "particularized guarantees of trustworthiness."<sup>30</sup> The Court held that Anita Isaacs' preliminary hearing testimony was admissible because Roberts availed himself of the opportunity to cross-examine that same testimony and the transcript bore sufficient "indicia of reliability."<sup>31</sup>

The focus of *Roberts* was to ensure the truth and reliability of a prior statement.<sup>32</sup> The Court stated that the purpose of the Confrontation Clause is to provide the jury opportunity to determine the veracity of a witness' statements by watching him give such testimony.<sup>33</sup> While the reliability of statements is certainly a central concern, the *Roberts* Court set too low a hurdle for admissibility,<sup>34</sup> reducing the Confrontation Clause to little more than statutory hearsay law in most prosecutions.<sup>35</sup> This watered-down standard missed the mark on the crux of confrontation—cross-examination.<sup>36</sup>

### B. *Crawford v. Washington*

In 2004, the Supreme Court overruled the *Roberts* holding, recognizing its inconsistency and unpredictability.<sup>37</sup> The Court then adjusted the Confrontation Clause requirements to reflect its original

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27. *Id.* at 59-61.

28. *Id.* at 66.

29. *Id.* Firmly rooted hearsay exceptions include agent admissions, excited utterances, statements to treating physicians, dying declarations, prior testimony, public records, and business records. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 4 FEDERAL EVIDENCE § 398 (2d ed. 1994).

30. *Roberts*, 448 U.S. at 66.

31. *Id.* at 73.

32. *Id.* at 65-66.

33. *Id.* at 63-64 (citing *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

34. See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 756-60 (2005) (discussing the weakness of the *Roberts* confrontation requirements).

35. Lininger, *supra* note 13, at 276-77; Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 199-211 (2004).

36. See *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004).

37. *Id.* at 66.

substantive guarantee “that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>38</sup> In *Crawford*, Petitioner Michael Crawford was charged with assault and attempted murder for stabbing a man he claimed attempted to rape his wife.<sup>39</sup> After Crawford’s wife told him about the alleged rape, the two went to the victim’s apartment.<sup>40</sup> A struggle ensued and Crawford claimed he stabbed the victim in self-defense.<sup>41</sup> However, upon questioning by police, Crawford and his wife related differing stories as to what transpired.<sup>42</sup>

The Court overruled the twenty-four-year-old *Roberts* precedent and delineated two categories for all hearsay statements—testimonial and non-testimonial.<sup>43</sup> The Court held that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”<sup>44</sup> When the declarant of the testimonial statement is unavailable, a prior opportunity for cross-examination is required to satisfy Confrontation Clause requirements.<sup>45</sup> The Court said that “testimonial” statements are “at a minimum . . . prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations.”<sup>46</sup> However, states were to decide whether non-testimonial statements were subject to Confrontation Clause scrutiny and admissible under state-law hearsay requirements.<sup>47</sup>

The *Crawford* decision radically transformed the constitutional landscape.<sup>48</sup> Yet despite the delineation between testimonial and non-testimonial statements, the Court explicitly left “for another day any effort to spell out a comprehensive definition of ‘testimonial,’”<sup>49</sup> leaving the rest

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38. *Id.* at 61, 66.

39. *Id.* at 38, 40.

40. *Id.* at 38.

41. *Id.* at 38-40.

42. *Id.*

43. *Id.* at 68.

44. *Id.* at 68-69.

45. *Id.* at 59, 68.

46. *Id.* at 68.

47. *Id.*

48. Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 511 (2005) (asserting that *Crawford* “radically changed Confrontation Clause doctrine . . .”); Deborah Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right to Confrontation*, 85 N.C. L. REV. 1, 20 (2006).

49. *Crawford*, 541 U.S. at 68.

of the judiciary to decipher the Court's "cryptic clues."<sup>50</sup> Lack of a definitive rule confused lower courts and prosecutors in *Crawford* application.<sup>51</sup> Chief Justice Rehnquist predicted such confusion in his *Crawford* concurrence<sup>52</sup> and Justice Scalia, writing for the *Crawford* majority, acknowledged "[t]he Chief Justice's objection that [the Court's] refusal to articulate a comprehensive definition . . . [would] cause interim uncertainty."<sup>53</sup> However, Scalia concluded, "it can hardly be any worse than the status quo."<sup>54</sup>

### C. *Davis v. Washington*

In *Davis*, the Supreme Court attempted to provide some guidance to the "testimonial" definition left open in *Crawford*.<sup>55</sup> The Court granted *certiorari* in two separate cases (*Davis v. Washington*, No. 05-5224, and *Hammon v. Indiana*, No. 05-5705) and consolidated them to illustrate the testimonial/non-testimonial analysis of police interrogations.<sup>56</sup>

In *Davis*, No. 05-5224, Michelle McCottry called 911 to report that her boyfriend, Adrian Davis, was beating her.<sup>57</sup> During McCottry's conversation with the 911 operator, Davis fled the home.<sup>58</sup> Police officers arrived shortly thereafter, finding McCottry injured and shaken.<sup>59</sup> The Supreme Court of Washington upheld Davis' conviction of felony violation of a domestic no-contact order and ruled that McCottry's identification of Davis during the 911 call was non-testimonial and therefore not subject to the Confrontation Clause.<sup>60</sup>

In *Hammon*, No. 05-5705, police responded to a "reported domestic disturbance" at the home of Hershel and Amy Hammon.<sup>61</sup> Officers

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50. Brooks Holland, *Testimonial Statements under Crawford: What Makes Testimony . . . Testimonial?*, 71 BROOK. L. REV. 281, 282 (2005).

51. See Tuerkheimer, *supra* note 48, at 20 ("A survey of the post-*Crawford* case law reflects, to be generous, a state of confusion.").

52. See *Crawford*, 541 U.S. at 75-76 (Rehnquist, C.J., concurring).

53. *Id.* at 68 n.10 (majority opinion) (internal citations omitted).

54. *Id.*

55. *Davis v. Washington*, *From Lexis*: 126 S. Ct. 2266, 2273\*, 165 L. Ed. 2d 224, 237, 2006 U.S. LEXIS 4886, 15 (2006) \*All pagination subject to change pending release of the final published version.

56. See *id.* at 2270-74.

57. *Id.* at 2270-71.

58. *Id.* at 2271.

59. *Id.*

60. *Id.* at 2271-72.

61. *Id.* at 2272.

separated the couple for questioning as to what had occurred.<sup>62</sup> Amy Hammon filled out and signed a battery affidavit, describing Hershel's abusive actions that evening.<sup>63</sup> The Indiana Supreme Court upheld Hershel's conviction of domestic battery and probation violation.<sup>64</sup> The Indiana court ruled that Amy's oral statements were non-testimonial but that the affidavit was testimonial and thus wrongfully admitted.<sup>65</sup> However, the court held the admission of the affidavit without confrontation to be harmless beyond a reasonable doubt.<sup>66</sup>

On *certiorari*, the Supreme Court created the binary rule that statements made in response to police interrogations are non-testimonial when "circumstances objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."<sup>67</sup> Statements are testimonial when the "circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."<sup>68</sup> The Court granted discretion to trial courts in going through the testimonial/non-testimonial analysis.<sup>69</sup>

Under this ambiguous<sup>70</sup> framework of temporal boundaries,<sup>71</sup> the Court held that McCottry's statements to the 911 operator (deemed a law enforcement agent) were non-testimonial because they were made in an effort to assist in the resolution of the ongoing emergency of Davis' abuse.<sup>72</sup> The Court held that Amy Hammon's oral statements to police were testimonial because they were a narrative of past events in response to

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62. *Id.*

63. *Id.*

64. *Id.* at 2272-73.

65. *Id.* at 2273.

66. *Id.*

67. *Id.* See also Tuerkheimer, *supra* note 48, at 27. The *Davis* dichotomy is strikingly similar to the Court's public safety exception to *Miranda* requirements outlined in *New York v. Quarles*, 467 U.S. 649, 658-59 (1984) ("We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.").

68. *Id.* at 2273-74.

69. *Id.* at 2277.

70. See Richard D. Friedman, *Crawford, Davis, and Way Beyond 6* (2006), <http://www-personal.umich.edu/~rdfrdman/brooklyn06.pdf> [hereinafter *Way Beyond*].

71. Lininger, *supra* note 13, at 279.

72. *Davis*, 126 S. Ct. at 2274, 2276-78.



structured police questioning, were made out of her husband's presence, and were given at some time removed from the danger.<sup>73</sup>

The *Davis* holding added flesh to *Crawford*'s bones and could be said to have completely overruled *Roberts*.<sup>74</sup> The *Davis* Court held that the Constitution requires confrontation to ensure reliability when statements are made for the primary purpose of establishing facts relevant to prosecution.<sup>75</sup> The *Davis* case is merely the most recent step in an attempt to return the Confrontation Clause to its original role in criminal procedure. While Confrontation Clause analysis has undergone radical changes over the past few years, "the locus of the ambiguity has simply shifted over time, from the term 'reliable' (in *Roberts*) to the term 'testimonial' (in *Crawford*) to the term 'emergency' (in *Davis*)."<sup>76</sup>

### III. Problem: The Great *Davis* Divide

Despite the fact that *Crawford* delineated the basic framework for Confrontation Clause analysis of hearsay statements, and *Davis* provided a refined definition of "testimonial," the Court left open a wide chasm between the primary purpose of future prosecution and the primary purpose of resolving an ongoing emergency. Such legal construction paints the Confrontation world in two colors—black and white—with no guidance in maneuvering through the various shades of gray found in *Davis*'s real-world application.

These gray areas specifically involve common situations, such as the hypothetical shooting scenario, where witness statements to police have a mixed purpose of both helping to resolve an emergency *and* providing information for future prosecution. In such cases, how can any court apply the *Crawford-Davis* framework to determine whether or not a hearsay statement is testimonial and subject to confrontation or non-testimonial and admissible against the accused merely by falling under a valid hearsay exception? In the hypothetical scenario, the *Crawford-Davis* framework provides no means of determining whether or not the couple's statements would require confrontation.

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73. *Id.* at 2278-79.

74. Lininger, *supra* note 13, at 280.

75. *See Davis*, 126 S. Ct. at 2273-74; *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

76. Lininger, *supra* note 13, at 280.

#### IV. Proposed Solution for Determining the Primary Purpose of Witness Statements

Trial judges are left with the responsibility of making the testimonial/non-testimonial determination.<sup>77</sup> The constitutional right to confrontation is too important to allow ambiguity to govern. Therefore, some method must be devised to provide uniformity and predictability within the judiciary when dealing with mixed-purpose, indistinguishable primary-purpose statements, such as in the hypothetical scenario described above.

The *Davis* Court's testimonial/non-testimonial framework hinges on the objective indication of the primary purpose of a police interrogation derived from the surrounding circumstances.<sup>78</sup> The question remains, however, from whose perspective are the objective circumstances of the interrogation to be seen in order to divine its primary purpose?<sup>79</sup> Should the circumstances be seen from the perspective of the questioning law enforcement agent, the declarant making the statements, or a reasonable, neutral third party?

##### A. Perspective Versus Intent

A reasonable, neutral third party is merely an observer of the circumstances, while the declarant and the questioning officer are active participants in the interrogation. Thus, if the third party's perspective governs, that party will analyze the totality of the circumstances *ex post facto* to determine the primary purpose of the interrogation. However, if the declarant's or the interrogating officer's perspective governs, what they perceived can only be derived from statements they made at the time of the interrogation—body-language analysis would be indeterminate.<sup>80</sup> To avoid a battle of semantics, the nature of statements can only be derived from the intent of either the declarant or the officer in making those statements. Intent must be used in the soft sense—that the declarant or officer intended the natural consequences of their statements.<sup>81</sup> Therefore, when discussing the perspective of either the declarant or the interrogating officer, an examination of perspective is really an analysis of their respective intents.

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77. *Davis*, 126 S. Ct. at 2277; see also Roger C. Park, *Purpose as a Guide to the Interpretation of the Confrontation Clause*, 71 BROOK. L. REV. 297, 302 (2005).

78. *Davis*, 126 S. Ct. at 2273-74.

79. See *Leading Cases*, 120 HARV. L. REV. 125, 218 (2006).

80. See Jason Bloom & Karin Powdermaker, *The Jury Likes Me, the Jury Likes Me Not: Building Rapport in the Courtroom*, 69 TEX. B. J. 540 (2006) (body language does not communicate 100 percent of a person's message).

81. Friedman, *supra* note 2, at 252.

## B. Whose Intent Governs?

There is strong support for the proposition that the declarant's intent should govern the primary purpose analysis. An examination of the three potential perspectives strengthens that argument. Turning first to the reasonable third person (a sort of jurisprudential celebrity), many might argue that the *Davis* rule compels courts to see the circumstances surrounding the interrogation through this objective and neutral lens. Facially, such an approach would seem to remove all subjectivity from the analysis and have the advantage of viewing the totality of the circumstances. However, deeper probing reveals that such an approach would be neither practical nor academically sound.<sup>82</sup> A jury should not be privy to potentially testimonial statements before they have been admitted into evidence and confronted.<sup>83</sup> To allow the jury to represent the reasonable third party in making the testimonial/non-testimonial determination would taint it instantaneously. By default, a judge would be required to assume the role. However, what objective criteria would a judge use in examining the statements? Without a standard of review, a judge's (or anyone else's) "objective" perspective on the subject would be inherently subjective. Such subjectivity and unpredictability were the main *Roberts* vices of which the *Crawford* Court sought to dispose.<sup>84</sup> Therefore, any claimed reasonable, objective, and neutral third party perspective would be nothing more than a subjective opinion on an objective indication. Such a test would be wholly unreliable.

Several commentators have expressed the view that while *Crawford* focused on the subjective intent of the declarant, *Davis* shifted the focus to the intent of the interrogating law enforcement agent.<sup>85</sup> This belief is derived from a myopic reading of the "primary purpose of the

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82. See Torchin, *supra* note 3, at 588-90.

83. See FED. R. EVID. 104(a) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court," as opposed to the jury).

84. See *Crawford v. Washington*, 541 U.S. 36, 62-66 (2004).

85. Lininger, *supra* note 13, at 280; see also Josephine Ross, *After Crawford Double-Speak: "Testimony" Does Not Mean Testimony and "Witness" Does Not Mean "Witness,"* 97 J. CRIM. L. & CRIMINOLOGY 147, 178 (2006) ("[W]hat is testimonial turns on the objective primary intent of the officer gathering the information . . ."); *Leading Cases, supra* note 79, at 218-19; Thomas L. Hudson & Patrick C. Coppen, *Appellate Highlights*, ARIZ. ATT'Y, Dec. 2006, at 46, 47 ("It appears that . . . *Davis* may have shifted its focus of inquiry . . . from the motivations or reasonable expectations of the accuser, to the primary purpose of the interrogation."); Jeffrey A. Zick, *Rethinking Confrontation: A Look at Crawford v. Washington*, ARIZ. ATT'Y, Sept. 2006, at 28, 32 ("Thus, the focus now is on the primary purpose of the interrogation, not necessarily the motivations of the declarant.").

interrogation” language of the *Davis* holding,<sup>86</sup> however, this viewpoint is contradicted by both logic and a comprehensive analysis of the *Davis* opinion.

Reliance on an officer’s perspective would arguably always yield a testimonial statement (or at least a mixed-purpose statement, which creates a problem identical to the one being addressed) because, while law enforcement has the dual purpose of responding to emergencies and gathering evidence to bring perpetrators to justice,<sup>87</sup> the ultimate goal is nearly always the latter.<sup>88</sup> Emergency resolution is merely a necessary step toward that end. With any form of crime, a police officer would be lax in his professional and civic duty if he were not looking toward future prosecution even while attempting to resolve the emergency before him or her.<sup>89</sup> Since assisting in bringing criminals to justice is presumably *always* the ultimate intention of law enforcement, relying exclusively on the interrogator’s perspective would effectively eliminate the existence of non-testimonial statements. The mere distinction between testimonial and non-testimonial statements lends credence to the declarant-centered approach. In his *Davis* dissent, Justice Thomas stated that the Supreme Court has “repeatedly . . . reject[ed] tests dependent on the subjective intentions of police officers.”<sup>90</sup> He said that police officers’ motives are “not reliably discernible”<sup>91</sup> and that attempting to ascertain such would “inevitably be, quite simply, an exercise in fiction.”<sup>92</sup> Moreover, focusing on an interrogating officer’s intent would allow for manipulation of the questioning structure,<sup>93</sup> the very “prosecutorial abuse” the *Crawford* Court named as a danger, “with which the Framers were keenly familiar.”<sup>94</sup>

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86. See *Davis v. Washington*, *From Lexis*: 126 S. Ct. 2266, 2273-74\*, 165 L. Ed. 2d 224, 237, 2006 U.S. LEXIS 4886, 16 (2006) \*All pagination subject to change pending release of the final published version.

87. See *id.* at 2283 (Thomas, J., concurring in the judgment and dissenting in part); Ann Hetherwick Pumphrey, *Admissibility of Hearsay Statements to Police: Davis v. Washington and Hammon v. Indiana*, BOSTON B. J., Nov./Dec. 2006, at 17, 18.

88. The ultimate means of protecting the public is arguably to prosecute and incarcerate offenders so they are unable to further endanger the public.

89. It merits mention that the intent and purpose of a police officer is distinguishable from that of a 911 operator (such as the operator in *Davis* who has the primary objective of dispatching emergency personnel to the scene of an accident, and therefore, is predominantly concerned with emergency resolution).

90. *Davis*, 126 S. Ct. at 2283 (Thomas, J., concurring in the judgment and dissenting in part).

91. *Id.*

92. *Id.*

93. Ross, *supra* note 85, at 183.

94. *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004).

The *Davis* text itself denounces an interrogator-centered approach and supports the declarant-centered proposition. In the footnote to the definition of testimonial statements, Justice Scalia added “it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.”<sup>95</sup> This is a direct repudiation of the Indiana Supreme Court’s ruling that “the motivations of the questioner *and* declarant are the central concerns.”<sup>96</sup>

If we are not to evaluate the interrogator’s questions, there should be no focus on the motivation or primary purpose of the interrogator’s statements in the *Davis* analysis and we are left solely to consider the declarant’s statements. As stated previously, if the sole indication of the objective nature of the circumstances is the declarant’s statements, it logically follows that the primary purpose of the statements can only be deduced from the declarant’s intent. Any other inquiry would result in a battle of semantics.

Professor Richard D. Friedman, an outspoken advocate of the declarant-centered approach,<sup>97</sup> continues to argue, even post-*Davis*, that confrontation analysis should focus on the intent of the declarant in determining whether a statement is testimonial.<sup>98</sup> Bolstering the post-*Davis* validity of the declarant-centered approach, Scalia’s *Davis* opinion cited *Bourjaily*, a *Roberts*-era case, in which the accused was convicted (based on his statements to an undercover FBI agent) of coordinating a cocaine deal for the agent.<sup>99</sup> Scalia suggested that the statements in *Bourjaily* were “clearly non-testimonial” because they were “made unwittingly to a Government informant.”<sup>100</sup> Thus, despite the fact that the agent’s primary purpose in eliciting incriminating information from the accused was to prosecute him, the statements were deemed non-testimonial because the declarant did not, and *could not*, appreciate the nature of the situation.<sup>101</sup>

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95. *Davis*, 126 S. Ct. at 2274 n.1.

96. *Id.* at 2273 (quoting *Hammon v. State*, 829 N.E.2d 444, 457 (Ind. 2005) (emphasis added)).

97. *Torchin*, *supra* note 3, at 595.

98. *See Way Beyond*, *supra* note 70, at 4 (“I have previously stated at length reasons why the witness’s perspective should be the crucial one in determining whether a statement is testimonial.”).

99. *Davis*, 126 S. Ct. at 2275; *Bourjaily v. United States*, 483 U.S. 171, 173-74 (1987).

100. *Davis*, 126 S. Ct. at 2275 (citing *Bourjaily*, 483 U.S. at 181-84).

101. *See People v. Morgan*, 23 Cal. Rptr. 3d 224, 233 (Cal. Ct. App. 2005) (admission did not violate Confrontation Clause because of, among other things, its “unintentional nature”); Friedman, *supra* note 2, at 255-56 (“[I]f the intention of a government agent to gather evidence for use in prosecution is the critical consideration, then such a statement is clearly testimonial, for that is precisely what the agent is trying to do. So what makes the statement non-testimonial? Clearly it is that the *declarant* did not anticipate a prosecutorial use of the statement.”).

Thus, the focus was on the declarant's intent, not the agent's statements or intentions.

Despite misguided suggestions to the contrary, *Davis* did not shift the objective indications of primary purpose from the intent of the declarant to the intent of the interrogator. Although *Davis* refers to the "primary purpose of the interrogation,"<sup>102</sup> the questioning officer's intent and the perspective of a reasonable third person are unworkable in divining that primary purpose. Therefore, the intent of the declarant alone should govern and the pertinent question in the *Davis* analysis becomes, "Did the *declarant's statements* objectively indicate that the primary purpose of the interrogation was to assist in the resolution of an ongoing emergency, or to provide facts pertinent to future prosecution?"

### C. Divining a Primary Purpose From a Mixed-Purpose Statement

In an attempt to work within the *Davis* "primary purpose" framework, how is a court to extract a primary purpose when there is a mixed or dual purpose in the declarant's statement? One might argue that in a mixed-purpose situation, the *dominant* purpose<sup>103</sup> should govern and constitute the *primary* purpose. This begs the question, how does a court determine the dominant purpose? Should a court use a percentage allocation between the declarant's purpose of aiding future prosecution and purpose of assisting in emergency resolution? That seems logical, but what criteria would be used in determining the allocation? Would a fifty-one percent purpose constitute a dominant, and thus primary, purpose? While that is a facially-clean breakdown, a quantitative analysis of qualitative statements is ultimately impractical.

Alternatively, one might argue that because the Court left the analysis in the hands of trial judges,<sup>104</sup> a standard balancing test is sufficient to ascertain the declarant's intent. Judges could merely weigh the strength of the two purposes and decide which is stronger. Yet again, what criteria would be used in the analysis? How would an appellate court review such a finding? It is no secret that balancing tests are easily manipulable<sup>105</sup>—thus increasing the threat of prosecutorial (and judicial) abuse. Moreover, defense attorneys would never sanction a lack of specific criteria.

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102. *Davis*, 126 S. Ct. at 2273-74.

103. Friedman, *supra* note 2, at 252.

104. *Davis*, 126 S. Ct. at 2277.

105. *Crawford v. Washington*, 541 U.S. 36, 67-68 (2004) ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable . . .").

In the end, the most obvious potential methods for primary-purpose determination smack of the subjectivity and unreliability the Court attempted to avoid by overruling *Roberts*.<sup>106</sup> It should be obvious by now that the schizophrenic<sup>107</sup> *Davis* framework is ill-equipped to deal with mixed-purpose situations and another method must be developed for primary-purpose determination.

One step in that direction may be to refine the definition of a statement made with both the purpose to aid in resolving an ongoing emergency *and* to assist in future prosecution. Analyzing hearsay statements as dual- or mixed-purposed may be missing the forest for the trees by encouraging comparisons in line with the binary *Davis* standard.<sup>108</sup> The key may be to classify statements as having an “indistinguishable” primary purpose. This would allow a single indicative factor to demonstrate the primary intent of a declarant’s statements, creating the objective circumstantial evidence that indicates the primary purpose of the interrogation.

#### **D. Divining a Primary Purpose From an Indistinguishable Primary-Purpose Statement**

If the determination of the primary purpose of a police interrogation is based on the intent of the declarant’s statements, what methods might be employed to ascertain such intent? Two possibilities would be a direct inquiry of the declarant or of the interrogating officer. As to the declarant, it seems improper to ask them to state their intent *ex post facto* as time for reflection upon potential negative consequences could cause a change in their story.<sup>109</sup> This would also place entirely too much power in the declarant’s hands to dictate how their statement should be classified. Certainly, the intent of the declarant must be determined at the exact moment the statement was made.<sup>110</sup> As the first three exceptions to the federal hearsay rule<sup>111</sup> require the declarant’s statement to reflect concurrent conditions<sup>112</sup> to establish reliability, the moment of utterance

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106. *See id.* at 62-66 (“The [*Roberts*] framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.” *Id.* at 63.).

107. Lininger, *supra* note 13, at 280.

108. *Cf. Davis*, 126 S. Ct. at 2273-74.

109. Rose Margaret Casey, *Developments in the Law, The Survey of New York Practice*, 68 ST. JOHN’S L. REV. 285, 287 (1994) (“[N]o time for reflection, thus eliminating the likelihood of deliberate fabrication . . .”).

110. *See Friedman, supra* note 2, at 251.

111. FED. R. EVID. 803(1)-(3).

112. *Id.* 803(1) (defining “present sense impression” as “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”); *Id.* 803(2) (defining “excited utterance” as “[a] statement relating to

must be the focal point for an authenticity analysis of the declarant's intent for confrontation purposes. This is especially true if a non-testimonial statement is to be admitted into evidence under one of the first two hearsay exceptions. Additionally, establishing the declarant's intent from any moment other than that of utterance increases the potential for prosecutorial abuse. Police or prosecutors could later influence the declarant to testify as to a testimonial intention in making the statement.

It would also be improper to ask the questioning officer's opinion as to the declarant's intent, for the same reasons it would be erroneous to look to the interrogator's intent in ascertaining primary purpose. Additionally, relying on the interrogator's interpretation would raise concerns regarding the "potential for prosecutorial abuse" against which the *Crawford* Court was so vehemently opposed.<sup>113</sup>

It quickly becomes apparent that any subjective inquiry into the declarant's intent would result in the same reliance issues that led the Supreme Court to overrule *Roberts*.<sup>114</sup> Therefore, by default, an objective standard must be employed to determine intent.<sup>115</sup> While cases may exist in which the declarant specifically informs the interrogator that his or her intent is merely to assist in the resolution of the ongoing emergency and not to provide facts relevant to future prosecution, the average declarant is not so Confrontation Clause conscious. One might argue that the solution is for police officers to simply ask the declarant whether or not they would be willing to assist in the future prosecution of the perpetrators against whom they have just spoken. This would be as objective an indicator as any in assessing intent, but defense attorneys would readily balk that the shock of the question (even without time for reflection) would cause most witnesses to refuse to involve themselves in prosecution. That would result in a greater frequency of non-testimonial statements coming into evidence without confrontation. Defense attorneys would also attack the proposal on grounds that it is too easily manipulable by law enforcement and lends itself to prosecutorial abuse.<sup>116</sup> So with the rare exception of instances where the declarant verbally volunteers his or her intentions, objective indications of a declarant's intent are difficult to ascertain.

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a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."); *Id.* 803(3) (statements of "[t]hen existing mental, emotional, or physical condition" do not include statements of memory).

113. *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004).

114. *See id.* at 62-66.

115. *See Friedman, supra* note 2, at 253-54.

116. *Crawford*, 541 U.S. at 56 n.7.



### E. Personal Contact Information and the “Primary Intent Test”

It is important to reiterate that the scope of this analysis is limited to situations in which a declarant responds to police questioning immediately following a crime where police are still responding to an ongoing emergency and the declarant’s statements have a mixed purpose (with an indistinguishable primary purpose) of both assisting police in resolving the emergency *and* providing information relevant to the future prosecution of the perpetrator.

As discussed above, divining a declarant’s intent presents a formidable challenge to any court using that intent as a reflection of the circumstances objectively indicating the primary purpose of the interrogation under the *Davis* framework.<sup>117</sup> Nevertheless, one probable method to objectively determine the declarant’s intent in indistinguishable primary-purpose situations is to look to whether or not the declarant agreed to provide his or her personal contact information to the interrogating law enforcement officer after answering police questioning. In a majority of police interrogations, this is quite possibly the only objective, outward manifestation of the declarant’s intent.

This “primary intent test” would provide objective circumstantial evidence as to whether the declarant’s principal intent was to assist police exclusively in meeting the emergency at hand or to give law enforcement (and any other government official) the means to contact them in the future regarding the incident, presumably in attempts to prosecute. By providing their personal contact information after responding to police questioning, a declarant implicitly indicates a willingness to assist law enforcement officials post emergency resolution. Such a statement would be classified as testimonial under the *Davis* framework.<sup>118</sup> Conversely, a witness who refuses to provide personal contact information implicitly indicates that they wish only to assist in the resolution of the immediate emergency and not to assist in the future prosecution of the perpetrator(s). Such a statement would be classified as *non-testimonial* under *Davis*.<sup>119</sup>

The objective reliability of this primary intent test requires immediacy on both the part of the interrogator and the declarant. Thus, the request for personal contact information would necessarily be made in the regular flow of questioning, immediately following the last factual inquiry regarding the incident, and with complete impartiality on the officer’s part. The

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117. See *Davis v. Washington*, *From Lexis*: 126 S. Ct. 2266, 2273-74\*, 165 L. Ed. 2d 224, 237, 2006 U.S. LEXIS 4886, 14-16 (2006) \*All pagination subject to change pending release of the final published version.

118. See *id.*

119. *Id.* at 2273.

declarant's response, indicating intent, must be made without excessive time for declarant deliberation,<sup>120</sup> for if the declarant has time for reflection on the potential negative consequences of his or her statements, objectivity would give way to subjectivity. Reflection would also grant the declarant far too much power in the classification of his or her statements. Spontaneity suggests trustworthiness and the purpose of the test is to determine true intent, not provide declarants with a vehicle to evade confrontation. Nevertheless, concerns of prosecutorial abuse based on the timing of the interrogation and/or the partiality of the interrogating officer could be mitigated by allowing the same officer to be cross-examined as to his or her questioning method (to ensure there was no leading or encouragement to withhold personal information, making the statements non-testimonial) and the timing of the declarant's response. In the case of non-testimonial statements, such cross-examination might resolve any remaining doubts as to whether the accused's right to confrontation has been fulfilled.

A valid concern regarding the primary intent test is that declarants might presume they are obligated to provide information to a police officer—a sort of “color of authority” effect.<sup>121</sup> The influence of such a presumed obligation would surely place the interrogation evoking the statements in the risky realm of prosecutorial abuse.<sup>122</sup> This high risk deserves ample attention. In addition to requesting personal information in the regular line of questioning, measures must be taken to ensure against any form of intimidation by police in procuring such information from witnesses.<sup>123</sup> While it may rightfully be assumed that police officers would err on the side of discouraging declarants from offering personal information to enable statements to come into evidence without the burden of confrontation, the validity of the primary intent test requires safeguards on both ends of the spectrum. Therefore, police officers must also not *encourage* declarants to provide personal contact information. The proper regulation would require officers to ask declarants something along the lines of, “Would you like to provide your contact information?” to neutrally indicate that divulgence is not mandatory. Any hesitation on the

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120. See *Booth v. State*, 508 A.2d 976, 981 (Md. 1986) (In a Federal Rules of Evidence 803(1) present sense impression analysis, “[t]he appropriate inquiry is whether, considering the surrounding circumstances, sufficient time elapsed to have permitted reflective thought.”); CHARLES T. MCCORMICK, 2 MCCORMICK ON EVIDENCE § 271 (John William Strong ed., 4th ed. 1992).

121. BLACK'S LAW DICTIONARY 282 (8th ed. 2004) (“The appearance or presumption of authority sanctioning a public officer's actions.”).

122. *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004).

123. See Lininger, *supra* note 13, at 323.

declarant's part may warrant an explanation by the officer that providing information is purely voluntary. As with concerns of prosecutorial abuse, the high stakes and delicate nature of this procedure should grant the accused the right to confront and cross-examine the questioning officer to ensure the officer strictly followed procedure and did not lead or persuade the declarant in any manner.

In summary, the proposed primary intent test posits that a declarant's intent is demonstrated by whether or not the declarant immediately provided their personal contact information in response to police questioning. The officer's request for personal information must be made in the regular line of questioning and the form of interrogation must demonstrate that it is voluntary to supply such information. Because *Davis* states that the analysis should focus on the declarant's statements,<sup>124</sup> the declarant's intent in making those statements becomes the circumstantial evidence that objectively indicates the primary purpose of the interrogation.

Under the primary intent test, providing personal contact information objectively indicates that the primary purpose of the interrogation was to establish facts relevant to future prosecution because the declarant is willing to be contacted by authorities in the future. Opting *not* to provide contact information objectively indicates that the primary purpose of the interrogation was solely to assist in the resolution of the ongoing emergency because the declarant manifested an unwillingness to participate in any future potential prosecution. Combining the primary intent test with the *Davis* framework,<sup>125</sup> a declarant who provides personal contact information yields a testimonial statement; failing to provide such information results in a non-testimonial statement. Disputes as to the method of police questioning may be resolved by allowing the accused to cross-examine the questioning officer.

## V. Application of the "Primary Intent Test" to the Hypothetical Fact Pattern

Applying the proposed primary intent test to the hypothetical fact pattern above demonstrates its functionality and efficiency. Although the first instinct is to analyze witness statements under applicable hearsay rules, declarant statements must first pass through the gate of Confrontation Clause scrutiny before hearsay standards apply.<sup>126</sup>

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124. *Davis v. Washington*, *From Lexis*: 126 S. Ct. 2266, 2274\* n.1, 165 L. Ed. 2d 224, 237 n.1, 2006 U.S. LEXIS 4886, 16 n.1.(2006) \*All pagination subject to change pending release of the final published version.

125. *See id.* at 2273-74.

126. Malhotra, *supra* note 4, at 236.

### A. Wife's Statements

After stating what she saw, heard, and experienced, the wife (without time for reflection) provided her personal contact information at the request of the questioning officer. Her answers to police interrogation provide no additional indication as to whether she intended her statements to be used solely to address the emergency at hand or for use in future prosecution. Moreover, because the emergency was ongoing at the time of questioning, the surrounding circumstances do not provide any definitive hints as to the wife's intent. Therefore, use of the *Davis* framework alone in this circumstance does not indicate whether the wife's statements were testimonial or non-testimonial.

Applying the primary intent test, the wife's offer of contact information demonstrated a strong willingness to assist law enforcement agencies in the future, indicating a *primary* purpose to establish past events relevant to later prosecution.<sup>127</sup> The wife's statements would therefore be testimonial and, because she displayed a willingness to assist, she placed herself in a position to be confronted and cross-examined by the accused gunman at trial.

The wife's statements must also pass through a hearsay analysis to be entered into evidence by the prosecution. Because her statements to a police officer would presumably be offered to prove the truth of the matter asserted, they are hearsay.<sup>128</sup> However, the statements would be admissible into evidence under the Present Sense Impression<sup>129</sup> or Excited Utterance<sup>130</sup> hearsay exceptions because they were made immediately following the incident while still under the stress of the traumatic events.

Therefore, because the wife volunteered her personal contact information, she manifested the intention to assist in future prosecution. That intent provides the objective circumstances that indicate "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution."<sup>131</sup> The wife's statements would be subject to confrontation at trial.

### B. Husband's Statements

For whatever reason, the husband had the exact opposite reaction to the officer's request as his wife and opted to not provide his personal

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127. See *Davis*, 126 S. Ct. at 2273-74.

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

129. *Id.* 803(1).

130. *Id.* 803(2).

131. *Davis*, 126 S. Ct. at 2273-74.

contact information. Neither his statements nor the surrounding circumstance provide any indication as to his intent; therefore, the *Davis* framework similarly does not provide guidance for placing his statements in the testimonial or non-testimonial bucket.

That the husband declined to provide his personal contact information for future contact from police or other government agencies regarding the situation provides a strong indication that while he wished to assist in resolving the ongoing emergency<sup>132</sup> by providing an account of the incident, he did not wish to be implicated beyond that point. Thus, under the primary intent test, the husband's statements should be classified as non-testimonial and admissible under a valid hearsay exception.<sup>133</sup> Just like his wife's statements, the husband's statements would fall under either of the same hearsay exceptions because they were made immediately after and while still under the stress of the incident.<sup>134</sup> Therefore, the husband's statements would be admitted into evidence against the accused without any constitutional requirement of confrontation.

## VI. Public Policy Reasons for Adopting the "Primary Intent Test"

In addition to the textual and logical reasons for using the primary intent test, there are strong public policy reasons for doing so.

### A. Ensure Continued Reporting of Crimes

The *Crawford* and *Davis* holdings increased the probability that declarants will be called upon to testify against a perpetrator or even their abuser. The very thought of such confrontation may deter victims and witnesses from reporting crimes and/or filing police reports.<sup>135</sup> More than mere anxiety of confrontation, openly testifying in the face of the accused may generate a valid fear of reprisal.<sup>136</sup> This is especially true when, but for their testimonial statements, a witness would otherwise have remained

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132. *See id.* at 2273.

133. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004).

134. *See* FED. R. EVID. 803(1)-(2).

135. *Cf. Lininger, supra* note 13, at 285.

136. *See Tom Lininger, Bearing the Cross*, 74 *FORDHAM L. REV.* 1353, 1366 (2005) (Supreme Court's confrontation requirements discourage some victims from reporting crimes); Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 *S. CAL. L. REV.* 213, 241 (2005) (arguing that confrontation requirements will lead to distrust in the criminal justice system and result in fewer victims reporting crimes); Robert Tharp, *Domestic Violence Cases Face New Test: Ruling That Suspects Can Confront Accusers Scares Some Victims from Court*, *DALLAS MORNING NEWS*, July 6, 2004, at A1.

anonymous. The primary intent test provides, when the primary purpose of the interrogation is not clear, some degree of predictability for witnesses as to whether their statements will require confrontation. It ensures that the faceless witness may retain that identity in mixed-purpose interrogations. This preservation of anonymity is crucial to the continued encouragement of the citizenry to report crimes.<sup>137</sup> Too broad an interpretation of the Confrontation Clause would breed a society of fear where intimidation, instead of justice, governs. Providing a degree of predictability and allowing anonymous witnesses to retain their anonymity requires a standard to bridge the *Davis* divide. The primary intent test is that standard.

## B. Preserve Effective Criminal Prosecution

Although its recentness precludes reliance on confirming empirical data, some authors predicted a decline in the number of criminal convictions after *Davis*.<sup>138</sup> The effect is potentially more acute in domestic violence cases as “[a] high proportion of battered women refuse to testify against their assailants.”<sup>139</sup> Even the *Davis* majority acknowledged the criminal “windfall” potential in such situations.<sup>140</sup> Without live witness testimony, prosecutors must rely solely on physical and circumstantial evidence to build their cases.<sup>141</sup> The practical impact of *Davis* is that its asymmetry<sup>142</sup> now requires prosecutors to convince many more declarants to testify at trial. As discussed above, declarant-witnesses of violent crimes have an understandable apprehension of confrontation for fear of reprisal.<sup>143</sup> More exacting prosecution requirements<sup>144</sup> allow criminals to walk, thereby endangering the public at large.

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137. *State v. Wright*, 686 N.W.2d 295, 302 (Minn. Ct. App. 2004) (“[T]he caller wants protection from an immediate danger, not because the 911 caller expects the report to be used later at trial with the caller bearing witness—rather, there is a cloak of anonymity . . . that encourages citizens to make emergency calls and not fear repercussion.”).

138. Lininger, *supra* note 13, at 284. See also David G. Savage, *High Court Limits Domestic Abuse Crime Reports as Trial Testimony*, L.A. TIMES, June 20, 2006, at A8 (discussing the negative impact of *Davis* on domestic abuse prosecutions).

139. Lininger, *supra* note 13, at 272.

140. See *Davis v. Washington*, *From Lexis*: 126 S. Ct. 2266, 2279-80\*, 165 L. Ed. 2d 224, 244, 2006 U.S. LEXIS 4886, 32 (2006) \*All pagination subject to change pending release of the final published version.

141. See Malhotra, *supra* note 4, at 214.

142. Lininger, *supra* note 13, at 274 (“Some argued that *Davis* created a lamentable asymmetry in confrontation law: the right to confront declarants of testimonial hearsay was now too strong, while the right to confront declarants of non-testimonial hearsay was now too weak.”).

143. See *supra* note 136 and accompanying text.

Unpredictability and inconsistency were two major concerns the *Crawford* Court had with the *Roberts* test.<sup>145</sup> The lack of a clear standard in the gray area of *Davis*, as to indistinguishable primary-purpose statements, addresses neither concern. Effective criminal prosecution (and defense for that matter) requires predictability as to how declarant-witness statements will be classified. Moreover, an effective judiciary requires unambiguous and consistent rules of general application. The primary-purpose test creates a clear, consistent, and predictable rule for drawing the lines in testimonial/non-testimonial classification. As such, it serves to combat the vices of *Roberts* left unaddressed by *Crawford* and *Davis*.

## VII. Conclusion

Courts should adopt the proposed primary intent test when the primary purpose of a declarant's statements to interrogating police officers is indistinguishable. The *Davis* opinion left open a wide chasm between testimonial and non-testimonial statements, creating an unpredictable gray area. The primary intent test provides clear guidance to maneuver through that foggy gorge. The focal point in determining the primary purpose of an interrogation is the declarant's intent in making statements to questioning law enforcement officials. Courts should derive intent from the declarant's objective actions, specifically, whether or not the declarant, without time for reflection, gave interrogating officers their personal contact information. Providing information demonstrates the intent to assist in future prosecution, while declining to provide information demonstrates the intent to assist exclusively in the resolution of the immediate and ongoing emergency. Within the *Davis* framework, the declarant's intent becomes the circumstantial evidence that objectively indicates the primary purpose of the interrogation. Therefore, if a declarant provides contact information, the statements made during the interrogation were testimonial and the Constitution entitles the accused to confrontation. If no information was provided, the statements were non-testimonial and the confrontation requirement is waived.

The primary intent test is completely congruent with the Supreme Court's most recent Confrontation Clause rulings. It protects against the abuses the Framers feared and preserves an accused's constitutional right to confrontation when the declarant truly intended his or her statements to be used prosecutorially. The test provides uniformity, predictability, and

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144. See *New York v. Quarles*, 467 U.S. 649, 657 (1984) (referring to strict *Miranda* requirements, the Court admits that "the primary social cost of those added protections is the possibility of fewer convictions . . .").

145. See *Crawford v. Washington*, 541 U.S. 36, 66 (2004).

consistency for prosecutors, defense attorneys, and the judiciary. Moreover, it maintains balance in the criminal justice system by protecting both perpetrators and innocent witnesses. While the Supreme Court may have left a gaping hole in this area of evidence law and criminal procedure, bridges can be built to span the divide.