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NOTE

OHIO v. CLARK: THE SUPREME COURT’S FAILURE TO CONFRONT KEY ISSUES INVOLVING THE APPLICATION OF THE CONFRONTATION CLAUSE FRAMEWORK

Meagan E. White†

ABSTRACT

This Note focuses on the history of the Confrontation Clause and the problems the Supreme Court of the United States has created through its lack of instruction and clarity in defining the factors of the "primary purpose test.” This Note analyzes the Court’s decision in Ohio v. Clark where the novel question presented was the application of the primary purpose test to a questioner who was not a member of law enforcement. While the Court declined to make a bright-line rule that all persons who are not law enforcement are outside of the Confrontation Clause, its decision that a questioning school teacher was outside of the Sixth Amendment will set precedent for future cases. In addition, the lack of clarity involving the factors used to reach this conclusion will create confusion in applying the test.

There are four major topics the Court did not adequately address that left ambiguities for lower courts. The remaining issues are (1) whether the Court is signaling a return to the Ohio v. Roberts “reliability” Confrontation Clause framework of yesteryear; (2) what the Court meant when it said that “statements by ‘very young child’ will rarely if ever implicate the Confrontation Clause”; (3) whether the intent of the declarant or the questioner should be given more weight in determining the primary purpose of the statement in question; and (4) whether a civilian mandatory reporter questioning the declarant is equated to law enforcement in determining the questioner’s intent.

These questions should have been addressed with clarity by the Court in Clark. As written, the Court’s opinion leaves lower courts with a pending

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struggle to define the answers. The Court will likely be faced with one, if not all, of these issues on the docket in the near future. In the meantime, this Note provides how the Court should answer all of the preceding questions when the time comes to answer them.

I. INTRODUCTION

The Confrontation Clause of the Sixth Amendment to the United States Constitution states, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” This short phrase has led to much debate, many Supreme Court decisions, and extensive scholarship regarding its application. “The right to confront one’s accusers is a concept that dates back to Roman times.” The life of the Confrontation Clause in American jurisprudence, however, developed more directly and recently from England’s common law. In the early 16th century, magistrates interviewed the accused and any other persons connected with the crime prior to trial. Those interviews were recorded and then read as depositions to the court in lieu of in-court testimony by witnesses. This led to defendants demanding to have their accusers brought before them to confront them face-to-face. The trial of Sir Walter Raleigh in 1603 is the clearest picture of this unjust system. He was on trial for treason, and the Crown’s primary evidence against him was the confession of an alleged co-conspirator. However, “the confession was repudiated before trial and probably had been obtained by torture . . . .” A common law right for the accused to have his accusers brought before him in court developed as a result of similar abuses. The Sixth Amendment codified

1. U.S. Const. amend. VI.
4. White v. Illinois, 502 U.S. 346, 361 (1992) (Thomas, J., concurring); see Salinger v. United States, 272 U.S. 542, 548 (1926) (“The right of confrontation did not originate with the provision in the Sixth Amendment but was a common-law right having recognized exceptions.”).
5. White, 502 U.S. at 361.
6. Id.
7. Id.
8. Id.
9. White, 502 U.S. at 361 (citations omitted).
10. Id.
this common law right.\textsuperscript{11} In \textit{Mattox v. United States}, the first decision by the Supreme Court to consider the applicability of the Confrontation Clause, the majority stated its primary object as prevent[ing] depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.\textsuperscript{12}

After \textit{Mattox}, over a period of years, the Supreme Court attempted to create a test to determine when out-of-court statements should be admitted when the speaker is not available to testify in court. Part II of this Note will briefly describe the test built by the Supreme Court decisions in \textit{Ohio v. Roberts, White v. Illinois, Crawford v. Washington, Davis v. Washington}, and \textit{Michigan v. Bryant}. Part III will discuss the Court's decision \textit{Ohio v. Clark}. Part IV will reveal several key questions the Court did not address in its decision and how these unanswered questions will affect the lower courts' application of this rule. Finally, Part V will suggest how the Court should answer the questions set out in Part IV when it is presented with these issues in the future.

\section*{II. Background: The Modern-Day Confrontation Clause Framework}

The first line of cases on Confrontation Clause issues developed the \textit{Ohio v. Roberts} test. This test centered on whether the evidence presented had sufficient indicia of reliability. The Court overruled this test and created the \textit{Crawford} test in \textit{Crawford v. Washington}. Every Confrontation Clause decision post-\textit{Crawford} develops and clarifies the \textit{Crawford} test.

\textsuperscript{11} \textit{Id.} (citing 3 \textsc{Joseph Story, Commentaries on the Constitution of the United States} 662 (1833)).

\textsuperscript{12} \textit{Mattox v. United States}, 156 U.S. 237, 242-43 (1895).
A. Ohio v. Roberts

In Ohio v. Roberts, the grand jury charged Herschel Roberts with forgery and possession of stolen credit cards that belonged to the Isaacs family.\textsuperscript{13} In a preliminary hearing, the Isaacs' daughter, Anita, was the only witness for the defense.\textsuperscript{14} The defense questioned her at length, attempting to get her to testify that she gave the checks and the credit cards to the defendant without telling him that she had no authority to use them.\textsuperscript{15} She admitted that she knew the defendant and that she had allowed him to use her apartment for several days.\textsuperscript{16} However, she denied giving him the checks or the credit cards that belonged to her parents.\textsuperscript{17} When the case went to trial, Anita did not answer her subpoena to appear in court.\textsuperscript{18} The defendant took the stand and testified that Anita had given him the checks and the credit cards with the understanding that he could use them.\textsuperscript{19}

The State relied on Ohio Rev. Code Ann. § 2945.49 (1975), which "permit[ted] the use of preliminary examination testimony of a witness who 'cannot for any reason be produced at the trial,'" to read Anita's testimony given at the preliminary hearing.\textsuperscript{20} The defense objected, stating the admission of Anita's prior testimony was a violation of the Confrontation Clause.\textsuperscript{21} The trial court admitted the testimony over the objection, and the jury convicted the defendant.\textsuperscript{22} The defendant appealed on the issue of whether Anita Isaacs's prior testimony at the preliminary hearing was a violation of the defendant's right to be confronted with the accusers against him—more specifically, whether Anita Isaacs's testimony bore sufficient "indicia of reliability."\textsuperscript{23} In answering this question, the Court stated the two ways the Confrontation Clause restricts the range of admissible hearsay: the rule of necessity and the rule of trustworthiness.\textsuperscript{24} The rule of necessity requires that "the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the

\begin{itemize}
  \item \textsuperscript{13} Ohio v. Roberts, 448 U.S. 56, 58 (1980).
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Roberts, 448 U.S. at 59.
  \item \textsuperscript{24} Id. at 65.
\end{itemize}
The rule of trustworthiness demands that the Confrontation Clause only permits hearsay that is "marked with such trustworthiness that there is no material departure from the reason of the general rule."25 The rule that the Court explicitly communicated in this case is two-fold:

[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.26

In this case, the prosecution offered proof of a good faith effort to locate Anita Isaacs to obtain her testimony at trial and that she was unavailable to testify because they could not find her.27 The Court determined that her statement was admissible, because the defendant had an adequate opportunity to cross-examine Anita when she made the statement.28 That meant the evidence "bore sufficient indicia of reliability" giving the trier of fact "a satisfactory basis for evaluating the truth of the prior statement."29

B. White v. Illinois

In White v. Illinois, the Court addressed the issue of whether the prosecution must either produce the declarant at trial, or the trial court must find that the declarant is unavailable before admitting testimony under the "spontaneous declaration" and "medical examination" exceptions to hearsay.30 The facts of White centered on the sexual assault of a four-year-old girl.31 The prosecution tried calling the victim to the stand twice, but both times the child became overwhelmed and was unable to testify.32 The defense did not ask the trial court to make a finding that the victim was

25. Id.
26. Id. (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)).
27. Id. at 66.
28. Roberts, 448 U.S. at 75.
29. Id. at 73.
30. Id. (internal quotations omitted).
32. Id. at 349.
33. Id. at 350.
unavailable to testify. The judge permitted several witnesses to testify about the victim’s statements regarding the assault. The judge allowed three of the witnesses to testify pursuant to an Illinois hearsay exception for spontaneous declarations. The Court admitted other relevant testimony under the hearsay exception for statements made in the course of securing medical treatment.

The defendant appealed his conviction, alleging the trial court abridged his right to confrontation by allowing the victim’s statements into evidence. He relied on the Court’s language in Roberts that a declarant must either be produced at trial or be found unavailable before his statement can be admitted. The Court stated that Roberts must be limited to the question it presented. Therefore, the unavailability of a declarant is only a necessary determination when the “challenged out-of-court statements were made in the course of a prior judicial proceeding.” The Court ruled that statements that fall under “firmly rooted hearsay exceptions” do not violate the Confrontation Clause because of the “evidentiary value of such statements, their reliability, and [because] establishing a generally applicable unavailability rule would have few practical benefits while imposing pointless litigation costs . . . .

C. Crawford v. Washington

Crawford is important to the modern framework of analyzing Confrontation Clause issues, because the Court articulated the modern line between testimonial and non-testimonial out-of-court statements. In Crawford, the defendant was on trial for stabbing a man who allegedly tried to rape the defendant’s wife. The defendant’s wife did not testify pursuant to the state marital privilege, which bars the testimony of a spouse unless

34. Id.
35. Id.
37. Id.
38. Id.
39. Id.
40. Id. at 354.
41. White, 502 U.S. at 354.
42. Id. at 357 (internal quotations omitted).
43. Id.
45. Id. at 38.
the other spouse gives permission to testify.\textsuperscript{46} In Washington, this privilege does not include a spouse’s out-of-court statements,\textsuperscript{47} so the prosecution played a tape-recording of the wife’s statement to the police describing the stabbing.\textsuperscript{48} The trial court admitted the statement by using the guidelines in \textit{Roberts}, stating that her recording bore “particularized guarantees of trustworthiness.”\textsuperscript{49} On appeal, the Supreme Court took a completely different approach, overruling \textit{Roberts}.\textsuperscript{50}

Justice Scalia, writing for the Court, stated that the Framers would have drawn a line between testimonial and non-testimonial statements before determining whether the defendant’s constitutional rights had been violated.\textsuperscript{51} Testimonial statements would be barred if the witness did not appear at trial unless he was unavailable to testify and the defendant had a prior opportunity to cross-examine him.\textsuperscript{52} Non-testimonial statements are admissible if they were in accordance with the particular state’s hearsay laws.\textsuperscript{53} According to the Court, an interrogation by law enforcement “fall[s] squarely” into the category of testimonial hearsay.\textsuperscript{54} Thus, in \textit{Crawford}, the statement of the defendant’s wife to the police was testimonial and should not have been admitted into evidence unless she was unavailable for trial and the defendant had an opportunity to cross-examine her.\textsuperscript{55} There was no longer a requirement to find any indicia of reliability.\textsuperscript{56} This case gave birth to the dividing line in Confrontation Clause analysis between testimonial and non-testimonial statements, but the Court saved for “another day any effort to spell out a comprehensive definition of ‘testimonial.’”\textsuperscript{57}

D. Davis v. Washington

Two years later, “another day”\textsuperscript{58} arrived.\textsuperscript{59} In \textit{Davis v. Washington}, the victim, McCottry, was involved in a domestic disturbance with Davis, her

\begin{itemize}
  \item \textsuperscript{46} Id. at 40.
  \item \textsuperscript{47} Id.
  \item \textsuperscript{48} Id. at 38.
  \item \textsuperscript{49} \textit{Crawford}, 541 U.S. at 40.
  \item \textsuperscript{50} Id. at 67–69.
  \item \textsuperscript{51} Id. at 59.
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} Id. at 68.
  \item \textsuperscript{54} Id. at 53.
  \item \textsuperscript{55} \textit{Crawford}, 541 U.S. at 68.
  \item \textsuperscript{56} Id.
  \item \textsuperscript{57} Id.
  \item \textsuperscript{58} Id.
  \item \textsuperscript{59} Id.
\end{itemize}
McCottry did not appear to testify at Davis’s trial for violating a domestic no-contact order. The State’s only witnesses were the two police officers who responded to McCottry’s 911 call. The trial court allowed the State to introduce the recording of McCottry’s 911 call into evidence over the defendant’s objections. In deciding the outcome of this case, and *Hammon v. Indiana*, the Court defined testimonial statements and non-testimonial statements as follows:

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.

Four factors led the Court to decide that McCottry’s call was non-testimonial. First, McCottry spoke about events “as they were actually happening,” rather than describing events that had already passed. Second, McCottry faced an “ongoing emergency.” Third, the nature of the questions the 911 operator asked McCottry were necessary to resolve the present emergency, rather than to learn what had happened in the past. Finally, the Court considered the level of formality of the questioning. The Court stated that when the level of formality is low, the statement is more likely to be non-testimonial. Here, the formality of a 911 emergency call

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60. Id. at 817.
61. Id. at 818-19.
62. Id. at 818.
63. Id. at 819.
64. Id. at 819. Using the *Davis* framework, the Court decided that statements made by Hammon to police after a domestic dispute had ended were testimonial. Id. at 830.
65. Davis, 547 U.S. at 822.
66. Id. at 827.
67. Id. (emphasis omitted).
68. Id.
69. Id.
70. Davis, 547 U.S. at 827.
71. Id. at 828.
was very low. Through this decision, the Court created more tests in an
effort to answer the question of whether a statement is testimonial or non-
testimonial.

E. Michigan v. Bryant

The Court further expanded the “primary purpose” test in Bryant. In this
case, before the victim was taken to the hospital, he identified his shooter to
the police; the victim then died at the hospital. When the victim gave the
statement to the police, the shooter was no longer present, and the victim
was not being attacked or harmed. His statement identifying his attacker
was admitted at trial. The Court held that there was an “ongoing
emergency,” which made the primary purpose of the statement non-
testimonial according to the rule laid out in Crawford. Even though there
was no longer an ongoing emergency threatening Bryant directly, the Court
held that there was an ongoing emergency threatening the public generally
because the shooter was still at large. Ultimately, this decision expanded
the scope of an “ongoing emergency.”

The Court laid out several factors to determine whether a statement was
made with the primary purpose of creating a testimonial statement for use
in a criminal prosecution. The factors include the objective circumstances
which surround making a statement, the statements and actions of the
declarant, and the statements and actions of the questioner.

III. Ohio v. Clark

In 2015, the Court granted certiorari to answer the question it refrained
from answering in previous Confrontation Clause cases: whether the same
analysis under Crawford applies to out-of-court statements made to people

72. Id. at 827.
73. Id. at 827-28 (creating the “primary purpose” test and the “ongoing emergency” test
to determine whether a statement is testimonial in nature and thus inadmissible unless the
declarant is unavailable at trial and the defendant had an opportunity to cross-examine the
declarant).
75. Id.
76. Id. at 350.
77. Id. at 358, 374.
78. Id. at 359.
79. Id. at 367.
other than police officers. In Clark, the defendant sent his girlfriend away for several days to engage in prostitution while he remained at home with her two children, a three-year-old boy and an eighteen-month-old girl. When Clark, the defendant, took the boy to preschool, the boy’s teacher noticed that the boy’s eye was bloodshot. When she asked the boy what happened, he told her that he fell. The teacher took him to a different room, and she saw what looked like whip marks on the child’s face.

She recruited the head teacher to help her talk to the boy. The head teacher asked the child who hit him. When he responded, he “seemed kind of bewildered” and “said something like, Dee, Dee.” The teacher asked whether Dee was “big or little” to which the child responded, “Dee is big.” The teacher called a child abuse hotline to alert the police of the suspected child abuse. That afternoon, the defendant came to pick the boy up from preschool and, when confronted, denied having any involvement with the injuries. The following day, a social worker came to the house, removed the children from the home, and took them to a hospital to be examined by a doctor. The boy had a “black eye, belt marks on his back and stomach, and bruises all over his body.” The girl “had two black eyes, a swollen hand, and a large burn on her cheek, and two pigtails had been ripped out at the roots of her hair.”

The grand jury indicted the defendant on five counts of felonious assault, two counts of endangering children, and two counts of domestic violence. In Ohio, children under the age of ten are incompetent to testify if they

81. Id. at 2177.
82. Id. at 2178.
83. Id.
84. Id.
85. Id.
86. Clark, 135 S. Ct. at 2178.
87. Id.
88. Id.
89. Id.
90. Id.
91. Id.
92. Clark, 135 S. Ct. at 2178.
93. Id.
94. Id.
95. Id.
96. Id.
“appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.” 97 The trial court concluded that the boy was incompetent to testify after conducting a pre-trial hearing. 98

Normally, because the child was not available to testify, his statements would be inadmissible hearsay. 99 However, “under Ohio Rule of Evidence 807, which allows the admission of reliable hearsay by child abuse victims, the court ruled that [the child’s] statements to his teachers bore sufficient guarantees of trustworthiness to be admitted as evidence.” 100 The defendant moved to exclude the statements as a violation of his Sixth Amendment rights, but the trial court denied his motion, because the court found the statements were non-testimonial. 101 The jury found the defendant guilty, and the defendant appealed to the state appellate court, which reversed on the grounds that the statements’ admission violated the defendant’s constitutional rights. 102 The State appealed to the Supreme Court of Ohio which affirmed the trial court and held that the boy’s “statements qualified as testimonial because the primary purpose of the teachers’ questioning ‘was not to deal with an existing emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution’.” 103 The Supreme Court granted certiorari 104 and presented the issue on appeal as whether the Sixth Amendment’s Confrontation Clause prohibited prosecutors from introducing [the child’s] statements when the child was not available to be cross-examined. 105

In articulating the decision in this case, the Court started the analysis with a bold conclusion that statements to individuals who are not law enforcement officers “are much less likely to be testimonial than statements to law enforcement officers.” 106 The Court ruled that the child’s statements were clearly not made with the primary purpose of gathering evidence against the defendant. 107 The Court gave several justifications for reaching

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98. Clark, 135 S. Ct. at 2178.
100. Clark, 135 S. Ct. at 2178.
101. Id.
102. Id.
103. Id. (quoting State v. Clark, 999 N.E.2d at 597).
104. Id. at 2179.
105. Id.
106. Clark, 135 S. Ct. at 2181.
107. Id.
this decision. The first was that the primary purpose of both the questions and the answers was to resolve an ongoing emergency. 108 The Court relied on the holding in Bryant to explain that the past acts of child abuse presented an ongoing emergency, 109 because the schoolteachers needed to discover the source of abuse before they could confidently release the child back to the defendant’s custody at the end of the school day. 110 The teacher’s questions targeted the source of harm in order to prevent the child from being harmed again. 111 Another justification the Court offered for its decision was the lack of formality of the circumstances. 112 The teachers asked the child questions in the informal setting of a preschool classroom and lunchroom, not in the formal setting of a police department. 113

The Court also relied on the declarant’s age as a factor. 114 The Court stated, “Statements by very young children will rarely, if ever, implicate the Confrontation Clause.” 115 The Court reasoned that most children have little to no knowledge of the legal system and that a three-year-old child in this position would not have the intention to create evidence against the defendant for trial at a later date. 116 Finally, the Court also justified its decision by examining the relationship between the preschool teachers and the boy—indicating that their communication was non-testimonial. 117 The Court stated that schoolteachers are not charged “with uncovering and prosecuting criminal behavior,” which renders statements made to them significantly less likely to be testimonial than statements made to law enforcement. 118 Although the language in the opinion suggests a bright-line rule, the Court denounced that reasonable conclusion by stating, “[W]e decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment.” 119

108. Id.
109. Id.
110. Id.
111. Id.
112. Clark, 135 S. Ct. at 2181.
113. Id.
114. Id. at 2181-82.
115. Id. at 2182.
116. Id.
117. Id.
118. Clark, 135 S. Ct. at 2182.
119. Id.
IV. THE UNANSWERED QUESTIONS

The Court’s decision in Clark sought to clear up lingering questions concerning when statements made to non-law enforcement will be construed as testimonial under the existing Crawford framework. However, the Court’s vague answers, its refusal to draw a bright-line rule, and its dangerous generalizations stated in dicta leave lower courts with more questions than answers. The lower courts will face the following four questions in applying the Crawford framework.

A. Is the Court Suggesting a Return to Roberts?

The main question that needs to be addressed is whether the Court is signaling a return to the analytical framework of Roberts. The Court followed the framework set out in Roberts for only twenty-four years before overturning that precedent to create the new framework under Crawford. The majority seems to be disillusioned with the primary purpose test created in Crawford and its progeny. Writing for the Court in Clark, Justice Alito stated, “[T]he primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.”120 This statement set Justice Scalia on the warpath to defend his beloved primary purpose test.121 He wrote in his concurring opinion, which Justice Ginsburg joined, that the Court’s “aggressive hostility to precedent that it purports to be applying” was the reason that he could not join the majority opinion.122 Only three justices decided to distance themselves from Justice Alito’s statement in the opinion of the Court.123 Although the statement was made in dicta, Justice Scalia astutely articulated that “[d]icta on legal points, however, can do harm, because though they are not binding they can mislead.”124

Although Justice Thomas wrote separately in Clark, he repeated his sentiments originally stated in Davis that the primary purpose test is “an exercise in fiction . . . disconnected from history.”125 This statement shows his displeasure in the decision to overturn Roberts and create a new test through Crawford and the decisions that followed. A Court that was quick

120. Id. at 2180-81.
122. Clark, 135 S. Ct. at 2185.
123. The three concurring justices were Scalia, Ginsburg, and Thomas. Id. at 2183-85.
124. Id. at 2184.
to overturn twenty-four years of cases decided on the guidelines in Roberts seemed to be signaling its dissatisfaction with Crawford. Could it be that the Court will change its mind again and go back to Roberts? Or create a new test entirely?

B. What is a “Very Young Child” and Should the Court Draw a Line in Terms of a Child’s Reliability to Give Testimony?

Justice Alito’s generalization that “[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause”\(^\text{126}\) begs the question: what age qualifies a child as “very young”? At oral argument, the Court did not address a particular age that makes a child “very young,” but the Court did focus on how a declarant’s competency should be decided. Counsel for Petitioner Clark stated that competency is a creation of the state.\(^\text{127}\) An amicus brief on this issue cited three states that presume children, even young children, are competent to testify.\(^\text{128}\) For example, in Arizona:

For the last thirty years, Arizona law has been that all witnesses who are called by a party are presumed competent, regardless of age, mental capability, mental illness, or any other factor which may affect the ability to testify in court. A party opposing the competency of the witness must challenge it before the witness testifies in front of the jury. Arizona law now trusts in the “crucible” of cross-examination to allow the jury to weigh the credibility, consistency, and weight of child testimony.\(^\text{129}\)

This rule is in stark contrast to the rule that prevails in Ohio. Ohio Evid. \textsection{}601 states, “Every person is competent to be a witness except: (A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.”\(^\text{130}\) In states like Arizona, children are presumed competent to give in-court testimony,

\text{\begin{footnotesize}
126. Clark, 135 S. Ct. at 2182.
129. \textit{id.} at 14.
\end{footnotesize}}
and the challenger must rebut that presumption.\textsuperscript{131} In states such as Ohio, the opposite is true.\textsuperscript{132} Children are presumed incapable of testifying in court, and the proponent of the child’s testimony must rebut this presumption.\textsuperscript{133}

The Court’s broad statement from \textit{Clark} that “[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause”\textsuperscript{134} is problematic for three reasons: (1) it takes away the ability of the States to create their own rules on competency of a child to testify; (2) the Court did not lay out a test or a rule to decide what age or guidelines help determine when a child is young enough to have his statements escape the Confrontation Clause; and (3) if this rule is made by the Court, the potential for the rule to stretch to other kinds of people with diminished mental capacities would create a vast number of out-of-court statements that would now be admissible in court without any opportunity for the defendant to cross-examine the declarant. Justice Kagan voiced the latter concern at oral argument when she stated that logically this rule leads to the conclusion that the Confrontation Clause does not apply to any person with diminished capacity.\textsuperscript{135} That is an extremely dangerous application of the \textit{Crawford} rule to the rights of criminal defendants.

\textbf{C. Whose Perspective Determines Whether the Statement Has a Testimonial Purpose?}

Justice Kagan’s fear that the Confrontation Clause may expand to allow statements made by any person with a diminished mental capacity could be relieved by clearly defining whose perspective determines whether a statement is testimonial. The Court in \textit{Clark} stated that a three-year-old child could not have formed the intent to create a statement for later criminal prosecution when he spoke to his teachers due to a three-year-old’s lack of understanding of the criminal justice system.\textsuperscript{136} However, with no

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{132} \textit{Id}.
\item \textsuperscript{133} \textit{Id}.
\item \textsuperscript{134} \textit{Ohio v. Clark}, 135 S. Ct. 2173, 2182 (2015).
\item \textsuperscript{135} Oral Argument at 06:19, \textit{Ohio v. Clark}, 135 S. Ct. 2173 (2015) (No. 13-1352), https://www.oyez.org/cases/2014/13-1352 (“But -- but that would suggest that there -- the Confrontation Clause just doesn’t come into play at all with respect to any person with diminished capacity, without the capacity to form that kind of legal intent. And that seems -- that seems not right to me.”).
\item \textsuperscript{136} \textit{Clark}, 135 S. Ct. at 2182.
\end{itemize}
\end{footnotesize}
clear definition of a "very young child," and with no cases yet decided on statements made by persons with diminished mental capacity, there is a danger that the Confrontation Clause will no longer protect the criminal defendant's right to confront the witnesses against him in a wide array of factual circumstances.137

The test in Bryant laid out several factors for the Court to determine whether a statement was intended to be testimonial.138 The factors are (1) whether there is an ongoing emergency; (2) the formality of the circumstances surrounding the questioning; and (3) the intent to make a statement that would later be used as a substitute for testimony.139 The intent prong of the test in Bryant is supposed to look at the questions and answers of both the questioner and the declarant to determine the primary purpose of the conversation.140 However, at oral argument, Mr. Meyer, the advocate for petitioner Darius Clark, stated that the primary focus of the Court has historically been the declarant's perspective.141 Furthermore, he stated that the Ohio Supreme Court erred because it focused primarily on the intent of the questioner and on her status as a mandatory reporter.142 The Court's opinion did not clarify this point. The opinion did not state which party's intent should be given more weight.143 Instead, the Court quickly determined the declarant did not have the ability to form the intent

137. There is particular concern in those cases involving persons with diminished mental capacity such as people suffering from mental disorders and the elderly. For example, consider a child who is seven years old, is very intelligent for his age, has a high IQ, and is an avid reader. Assume that child made a similar statement to his teacher as the child in Clark. It is much more likely that this child is competent to testify due to his age, his intelligence, and his general understanding of the world around him than the three-year-old in Clark. The Court's statement concerning "very young" children, without further guidance, could lead a lower court to decide that the child's statements do not implicate the Confrontation Clause. Clark, 135 S. Ct. at 2182. Consider an adult with a mental disability such as Asperger's. If the Court puts no restraints on this statement that persons with no ability to form intent due to their level of mental capacity escape the Confrontation Clause, then any statements uttered by this person, which implicate another would be admissible, without the declarant being subjected to cross-examination. Under the Federal Rules of Evidence, no witness is presumed to be incompetent to testify. Fed. R. Evid. 601. These determinations should be made in a pre-trial motion.

139. Id. at 366, 370, 375.
140. Id. at 360, 381.
142. Id. at 09:19.
to create a testimonial statement due to his age. The focus then shifted to the teacher to analyze her intent in the questions she asked the child. Her intent seemed to be primarily drawn from the informality of the circumstances, however, and not from the content of her questions. Her questions were clearly made to identify the attacker and to protect the child from further abuse. She was a mandatory reporter; however, the Court pointed out that she would have asked these questions whether she was a reporter or not, because they were questions any teacher would pose to a student who exhibited visible signs of abuse.

In this case, the focus of the intent inquiry would make little difference because of the low formality of the questioning, the clear lack of intent of the declarant and the seeming lack of intent of the questioner. Even if the focus were primarily on the intent of the questioner, there is not enough objective evidence pointing to her intent to create a testimonial statement for a future litigation of the suspect. However, other cases may be closer calls. Other cases may have a declarant who is older and has a better understanding of the criminal justice system or a declarant with a diminished mental capacity but who still functions in society, or the circumstances in other cases may be more formalized than the ones here. In those cases, it may be imperative for the lower courts to know exactly whose perspective needs to be examined to determine the primary purpose of the statement and how much weight should be given to that person’s questions or answers.

D. Does the Fact that the Teacher was a Mandatory Reporter Make her an Administrative Arm of the State?

The Court clearly thinks the fact that the teacher in this case was a mandatory reporter did not change her intent of meeting an ongoing emergency. Justice Alito stated,

The teachers’ pressing concern was to protect L.P. and remove him from harm’s way. Like all good teachers, they undoubtedly would have acted with the same purpose whether or not they had a state-law duty to report abuse. And mandatory reporting

144. Clark, 135 S. Ct. at 2182.
145. Id. at 2181-83.
146. See id. at 2181.
147. See id. at 2181-83.
148. Id. at 2183.
149. See id.
statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution.\textsuperscript{150}

The Court made it abundantly clear that this ruling did not mean that all individuals who are not law enforcement will fall outside of the Confrontation Clause.\textsuperscript{151} However, at oral argument, Justices Scalia and Sotomayor indicated that the primary purpose test applies to all people, regardless of their status as law enforcement or otherwise.\textsuperscript{152} Their statements do not fit the Confrontation Clause precedent because the Crawford framework did not apply to non-law enforcement until Clark was decided.\textsuperscript{153} In Clark, the Court said this type of mandatory reporter was not the equivalent of a law enforcement officer because any good teacher would have responded the way she did, whether the person was a mandatory reporter or not.\textsuperscript{154} That analysis provides no direction to lower courts on how to address statements made to other mandatory reporters in different situations.

Now that Clark has opened the Crawford framework to individuals other than law enforcement, the Court should have defined when, if ever, the fact that a questioner is a mandatory reporter will equate that person to a member of law enforcement for purposes of analyzing the primary purpose of the statement. The Court’s failure to do so will cause problems for the lower courts in future cases involving mandatory reporters who are not teachers.

V. SOLUTIONS TO THE PROBLEMS

A. The Court Should not Return to Roberts nor Should the Court Create a New Test for the Confrontation Clause

The Court should not return to the former Confrontation Clause test in Ohio v. Roberts. When Roberts was king of the Confrontation Clause, there were just as many, if not more, problems with interpreting its meaning and

\textsuperscript{150} Clark, 135 S. Ct. at 2183.

\textsuperscript{151} Id. at 2182.


\textsuperscript{153} Clark, 135 S. Ct. at 2182.

\textsuperscript{154} Id. at 2182-83.
applying its standards as there are today with Crawford.\textsuperscript{155} The Court’s overhaul of the Roberts framework eliminated the question of a statement’s reliability from consideration under the Confrontation Clause. However, since Crawford, “five Justices have embraced a statement’s reliability as one touchstone of its constitutional admissibility.”\textsuperscript{156} In Ohio v. Clark, Clark’s counsel seemed to pick up on the Justices’ inclination to inquire about reliability when he attacked the reliability of the child’s statements in Respondent’s brief and at oral argument in four areas.\textsuperscript{157} Although none of the opinions explicitly mentioned using reliability as a measure of the statement’s admissibility,\textsuperscript{158} the Justices asked several questions regarding the reliability of the child’s statements at oral argument.\textsuperscript{159} On the surface,

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\item[155.] “Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable.” Crawford v. Washington, 541 U.S. 36, 63 (2004).
\item[156.] FISHER, supra note 121, at 524.
\item[157.] Id. at 524-25. Clark’s counsel attacked the reliability of the child’s statement due to the child’s mother’s inclination to hit her children. Brief for Respondent at 8, Ohio v. Clark, 135 S. Ct. 2173 (2015) (No. 13-1352). He stated that she hit the two children on previous occasions and that she hit her other children, who were not mentioned in the case, in the past. Id. He also pointed out that the children had been in their mother’s care on the day prior to Mr. Clark taking the children to school. Id. Counsel for Clark also cast doubt on Clark as the source of the harm when counsel stated that the children’s mother remained in the District of Columbia for five months after she heard what had happened to her children, and she only returned because the court mandated to do so. Id. at 14. Clark’s counsel highlighted the unreliability of the child’s statement further by stating that the questions posed to the child were leading and ambiguous. Id. at 46. Instead of asking open-ended questions that would allow the child to answer with what he knew and wanted to communicate, the teachers asked pointed questions such as “[w]hat did you say? Dee? Dee did this?” Id. The third way that Clark’s counsel hinted at unreliability of the child’s statement was by pointing out that those who witnessed the child’s interview said he “looked uncertain” and “bewildered.” Id. The teachers said they were unsure whether the child understood their questions. Id. Finally, Clark’s counsel pointed to the fact that the trial judge determined the child was incompetent to testify and the Ohio Supreme Court “never explained how a child incapable at the time of trial of receiving and relaying accurate information or understanding the duty to tell the truth could previously have made accusatory statements having ‘particularized guarantees of trustworthiness’ such that cross-examination would be futile.” Id. at 6-7.
\item[158.] FISHER, supra note 121, at 528. Justice Alito did, however, implicitly suggest that Crawford is not always sufficient to answer the question of admissibility. Ohio v. Clark, 135 S. Ct. 2173, 2180-81 (2015).
\item[159.] Justice Kennedy asked, “Isn’t there still a question as to whether or not this is hearsay that is so unreliable that it violates the Confrontation Clause slash -- and/or the Due Process Clause and we remand for that?” Oral Argument at 05:50, Ohio v. Clark, 135 S. Ct. 2173 (2015) (No. 13-1352), https://www.oyez.org/cases/2014/13-1352. Justice Sotomayor stated, “Well, that goes to reliability, and that goes to whatever the finder of fact, whether
the fact that all nine Justices accepted the question presented under the Crawford framework suggests that the future of the Crawford doctrine is bright. However, Justice Alito’s statement that the primary purpose test is a “necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause,”161 and the fact that only three Justices distanced themselves from reasoning so hostile to the precedent that it purports to apply,161 suggests that the seemingly bright future of the Crawford framework is actually dim. Justice Scalia’s statement, that there has never been another time when a categorical overruling of an earlier line of cases has “been described as nothing more than ‘adopt[ing] a different approach’”—as though Crawford is only a matter of . . . preference, and the old, pre–Crawford approach’ remains available,”162 highlights the possibility that maybe the Court has not completely put Roberts to rest. Through the Justices’ questions at oral argument and Justice Alito’s statement, the majority of the Court seemed to be looking longingly to the grass on the other side of Crawford, but whether that means a return to the Roberts test or a new test altogether is unknown.

The Court should be reminded that “the grass is not, in fact, always greener on the other side of the fence. No, not at all. Fences have nothing to do with it. The grass is greenest where it is watered. When crossing over fences, carry water with you and tend the grass wherever you may be.”163 The grass was no greener during the Roberts era164 than it is now under Crawford. The Court has been “watering” the grass of the Crawford decision for eleven years now, and with each opinion written, the Court gives a

160. Clark, 135 S. Ct. at 2181.
161. Id. at 2183, 2185 (Justices Scalia, Ginsburg, and Thomas, concurring only in the judgment).
162. Id. at 2184 (citation omitted).
164. Michael D. Cicchini, Dead Again: The Last Demise of the Confrontation Clause, 80 Fordham L. Rev. 1301, 1306-07 (2011). Four specific problems with the Roberts framework explained by Cicchini are: (1) the test intermingles the Constitution with evidence rules, specifically the rule against hearsay and all of its exceptions; (2) it allowed prosecutors to use untested hearsay so long as the judge found the hearsay to be reliable; (3) the test’s results were wildly unpredictable because there are so many factors that give rise to reliability and different judges gave weight to different factors; and (4) it gave too much power to the judiciary. Id.
clearer picture of when a statement is testimonial.165 The test used by the Court is vital to the outcome of whether an out-of-court statement will be admitted without cross-examination. For example, under the Crawford framework, the child’s statements in Clark were admissible without giving the defense the opportunity to cross-examine the child.166 The Court reasoned that the statements were admissible by looking at several factors.167 The child’s age of three years old demonstrated that he would not have knowledge of the criminal justice system and therefore lacked the intent to create a statement for the purpose of aiding in a later criminal prosecution.168 The circumstances surrounding the statements were informal.169 The statements were made in a classroom with just the teachers and the child present.170 The teacher was concerned for the safety of her student, and the Court found that her primary purpose in asking the questions was to end an on-going emergency.171 She could not send the child home with his potential abuser at the end of the school day. All of these factors contributed to the Court’s decision that under Crawford’s primary purpose test, the statement was non-testimonial and therefore is admissible in court without the live testimony of the declarant.

However, the same statement analyzed under the Roberts framework would likely lead to the opposite result. Out-of-court statements made by unavailable declarants were admissible under Roberts only if the statement bore “adequate indicia of reliability.”172 Reliability could be inferred if the evidence fell within “a firmly rooted hearsay exception.”173 If the child in Clark had made a statement about his abuse to a doctor for purposes of medical treatment, or as an excited utterance following the harm, it would be admissible without cross-examination.174 Ohio Rule of Evidence 807(A) provides a hearsay exception for statements made by children under the age of twelve concerning physical abuse if certain criteria are met.175 However,

165. Justice Alito stated in Clark that “[o]ur more recent cases have labored to flesh out what it means for a statement to be ‘testimonial.’” Clark, 135 S. Ct. at 2179.
166. Id. at 2183.
167. Id. at 2181-82.
168. Id.
169. Id. at 2181.
170. Id.
171. Id.
173. Id.
175. Ohio R. Evid. 807(A).
under Roberts, this exception is not “firmly rooted.” Ohio’s evidence rules
alone would not make the statement reliable under Roberts. Combining this
with the child’s young age, the fact that his mother had been found guilty of
hitting her other children in the past, and the fact that his mother did not
return home for five months after learning what happened to her children,
the reliability of the child’s statements is not strong enough to pass the
threshold of Roberts and would be excluded without the child undergoing
cross-examination. Under the Roberts doctrine, a child’s out-of-court
statements that did not fall within a firmly rooted exception to hearsay were
“presumptively unreliable and inadmissible for Confrontation Clause
purposes . . . .”176 The Crawford result is completely different and is
beneficial for children who are being abused and detrimental to criminal
defendants. The test that the Court applies to determine admissibility of
out-of-court statements matters a great deal to the outcome of a case. With
people’s lives and reputations on the line, the Court needs to clearly define

(A) An out-of-court statement made by a child who is under twelve years of age
at the time of trial or hearing describing any sexual act performed by, with, or
on the child or describing any act of physical violence directed against the child
is not excluded as hearsay under Evid. R. 802 if all of the following apply:
(1) The court finds that the totality of the circumstances surrounding the
making of the statement provides particularized guarantees of trustworthiness
that make the statement at least as reliable as statements admitted pursuant to
Evid. R. 803 and 804. The circumstances must establish that the child was
particularly likely to be telling the truth when the statement was made and that
the test of cross-examination would add little to the reliability of the statement.
In making its determination of the reliability of the statement, the court shall
consider all of the circumstances surrounding the making of the statement,
including but not limited to spontaneity, the internal consistency of the
statement, the mental state of the child, the child’s motive or lack of motive to
fabricate, the child’s use of terminology unexpected of a child of similar age, the
means by which the statement was elicited, and the lapse of time between the
act and the statement. In making this determination, the court shall not
consider whether there is independent proof of the sexual act or act of physical
violence.
(2) The child’s testimony is not reasonably obtainable by the proponent of the
statement.
(3) There is independent proof of the sexual act or act of physical violence.
(4) At least ten days before the trial or hearing, a proponent of the statement
has notified all other parties in writing of the content of the statement, the time
and place at which the statement was made, the identity of the witness who is to
testify about the statement, and the circumstances surrounding the statement
that are claimed to indicate its trustworthiness.

Id.

the test and its parameters so there is no guesswork for courts in applying the test consistently.

Both the Roberts framework and the Crawford framework attempt to create a workable standard for courts to implement that is true to the original intent of the Confrontation Clause. The problem with both attempts is that "[t]here is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean."177 A new test may become necessary in the future if the Court continues to stretch the test in Crawford to lengths that eradicate the rights of criminal defendants. However, the Crawford test could still be saved if the Court restrains the reach of the primary purpose test.

B. The Court Should not Define "Very Young Child"

The Court should not define what a "very young child" is because the Court should not have said that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause."178 In its opinion in Michigan v. Bryant, the Court made it clear that the intent of the declarant is a factor in deciding whether a statement is testimonial, and the age of the declarant can be relevant to determine intent.179 However, the majority's statement in Clark steps too far by changing a balancing test to almost a bright-line rule in the case of a child's out-of-court statement.180 What was once presumptively unreliable and inadmissible under Roberts is now presumptively admissible under Crawford.181 Finding a person incompetent to testify should be a last resort. The rights of a criminal defendant should not be skirted by admitting an out-of-court statement implicating the defendant without exhausting other methods to make the declarant available. Having children testify in court is challenging for every person involved, but unless the child is truly incompetent to testify, the challenges presented should not force a defendant to lose his right to confront the witnesses against him.

180. Fisher, supra note 121, at 520. Although the Court was careful to state that their decision in Clark is not a bright-line rule, the logical extension of the idea that statements made by very young children will rarely, if ever, implicate the Confrontation Clause practically creates a bright-line rule or, at the very least, a presumption that statements made by very young children will rarely be testimonial. Clark, 131 S. Ct at 2182.
181. See supra Part V.
There are several steps courts can take prior to concluding that a child is incompetent to testify and, therefore, unavailable under the Confrontation Clause framework. First, courts should follow the Federal Rule of Evidence 601 standard which assumes that every person is competent to be a witness unless the rules provide otherwise. This presumption of competence requires courts to put a process in place to have a pre-trial determination of whether the child is in fact incompetent to testify. This type of process should put the burden on the challenger to prove the child does not know right from wrong or the truth from a lie. The burden should be on the party seeking to prevent live testimony because the purpose of the Confrontation Clause is to protect criminal defendants’ right to cross-examination of the witnesses against them. Any decisions made should take this purpose into consideration and make close calls in favor of preserving the right to cross-examination. Third, if the concern over the child’s testimony is due to his inability to communicate with the jury, the court has several options under Maryland v. Craig. Alternative measures such as closed circuit or screening devices, if used effectively, “can improve a child’s competency level by enhancing the child’s ability to communicate with the jury . . . .” Fourth, courts should make an effort to have pre-trial hearings that afford the defendant an opportunity to cross examine the child. If courts follow these rules, it is far more likely that children’s out-of-court statements will be admissible under the Confrontation Clause without forsaking the rights of the defendant.

The danger of the blanket statement that very young children will rarely implicate the Confrontation Clause is that the Court could expand its view on incompetency of witnesses to include those with mental disabilities or the elderly. This is apparent through Justice Kagan’s statement at oral argument in Clark that relying on age to determine the declarant’s intent in making a statement would mean that the Confrontation Clause would no longer include those with mental disabilities. According to the National

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182. “Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness’s competency regarding a claim or defense for which state law supplies the rule of decision.” FED. R. EVID. 601.


184. ld.

185. ld.

186. ld. at 147.

Alliance on Mental Illness, one in five adults suffers from some form of mental illness in a given year.\textsuperscript{188} If the Court makes a rule that children of a very young age are incapable of forming the intent to give a testimonial statement due to their mental capacity, then cases may flood in with declarants of various mental disabilities who also have lower mental capacity. Once the Court adopts one of those mental disabilities as enough to render a declarant incapable of having the intent to make a testimonial statement, then the Pandora’s box of mental illnesses will be opened. Soon enough, statements made by all children and one in five adults in America could be admissible in court without the defendant having any opportunity to cross-examine the declarant. This little statement made by Justice Alito presents huge policy considerations for the future of the Confrontation Clause. The Court should not make such overbroad statements, even in dicta, because that dicta may be misleading to lower courts which have to make these decisions every day.

C. The Court Should Rely on both the Declarant and the Questioner’s Perspectives in Determining the Primary Purpose of the Statement

The Court has not resolved the issue of whose perspective matters in determining whether a statement is testimonial. The Court stated in Clark that neither the child nor his teacher had the primary purpose of creating testimony for a later prosecution.\textsuperscript{189} In saying that, the Court sidestepped the issue of whose perspective is the determining factor.\textsuperscript{190} There are three options available for the Court regarding perspective of speakers. One view is Justices Scalia’s and Ginsburg’s view that the declarant’s purpose in speaking is the only one that matters to decide if a statement is testimonial.\textsuperscript{191} Another option is that the questioner’s purpose is the only one that matters in determining the primary purpose of the statement.\textsuperscript{192} Finally, the third view is one that examines both participants’ perspectives.

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\item Confrontation Clause just doesn’t come into play at all with respect to any people with diminished capacity, without the capacity to form that kind of legal intent. And that seems . . . that seems not right to me.”)
\item \textsuperscript{188} Mental Health By The Numbers, National Alliance on Mental Illness, https://www.nami.org/Learn-More/Mental-Health-By-the-Numbers (last visited Sept. 13, 2016).
\item \textsuperscript{189} Clark v. Ohio, 135 S. Ct. 2173, 2181 (2015).
\item \textsuperscript{190} FISHER, supra note 121, at 522.
\item \textsuperscript{191} Clark, 135 S. Ct. at 2184.
\item \textsuperscript{192} FISHER, supra note 121, at 522.
\end{itemize}
and weighs them as factors along with the formality of the circumstances.\textsuperscript{193} The last view is compatible with the Court’s decision in \textit{Michigan v. Bryant} and the most consistent with the purpose of protecting a defendant’s rights to cross-examine the witnesses against him.\textsuperscript{194}

In order to preserve the right of defendants to confront the witnesses against them, courts should engage in a more involved and detailed evaluation of the primary purpose of the statement at issue. In cases that have been decided, the Court has looked holistically to the statement and the surrounding circumstances before deciding whether a statement was testimonial in nature.\textsuperscript{195} However, the purpose of a statement, from the questioner’s or the declarant’s perspectives, can change during the course of a conversation. For example, a person who goes to see a doctor after being attacked has the primary purpose of seeking medical treatment for any resulting injuries. The doctor’s primary purpose in asking the victim questions is to find and heal any injuries suffered. However, when the doctor begins asking the victim who was the attacker, or if the victim begins divulging this information unsolicited, the primary purpose of the statement has changed to a purpose of identifying the attacker. The entire statement does not need to be excluded because of this shift in purpose, and the entire statement certainly should not be included with such an obvious purpose of identifying the attacker. “By and large, cases seem reluctant to look at individual details like these, and decline to parse particular statements or parts of statements to determine their individual purpose, but rather choose to characterize the whole interview, as primarily either medical or law enforcement . . . .”\textsuperscript{196} However, courts can look objectively to all the surrounding circumstances and the perspectives of both speakers throughout the course of the statement. If the purpose changes to one that is testimonial in nature, then courts should strike those sections and find the statements inadmissible.

For example, consider the same facts as those present in \textit{Clark}, except that the declarant is an older child with a higher capacity for understanding so there is no question of his ability to understand what is going on and what the criminal justice system entails. Imagine that the child’s teacher notices bruises on the child’s face and asks to talk to the child in private. The teacher, concerned for the safety of her student because the end of the


\textsuperscript{194} Id.

\textsuperscript{195} See generally Michigan v. Bryant, 562 U.S. 344, 349 (2011); Crawford v. Washington, 541 U.S. 36, 68 (2004);

\textsuperscript{196} Paul F. Rothstein, \textit{Ambiguous-Purpose Statements of Children and Other Victims of Abuse Under the Confrontation Clause}, 44 SW. L. REV. 508, 546 (2015).
day is approaching and she cannot send the child home with a potential abuser, asks non-leading or suggestive questions about the source of his bruises. The child answers that he received the bruises from his mother’s boyfriend. The child’s purpose in answering the question is still not likely to implicate his mother’s boyfriend in a future criminal trial. The teacher’s questions, which are clearly directed toward locating the source of the harm and keeping the child safe, also demonstrate a primary purpose not related to creating testimony for future criminal prosecution. However, if the teacher pulls out a tape recorder and begins recording the conversation or a pad and pen and transcribes the conversation while asking more detailed questions such as “how long has he done this to you?” or “how exactly did he hurt you?” or anything else that goes beyond ending an on-going emergency, then the teacher’s primary purpose crosses the line from protecting the child to creating a statement for a future criminal investigation and possibly prosecution. Such a purpose must play a vital role in the analysis of the Crawford test. If the intent of the questioner is not analyzed at all, or not given enough weight in analyzing all the relevant factors of the primary purpose test, then there is great potential for questioners to take advantage of declarants, particularly if they are familiar with this area of the law.

D. Mandatory Reporters Should Be Equivalent to Law Enforcement Officers in Deciding the Primary Purpose of the Statement

The Court in Clark stated that the teacher’s status as a mandatory reporter for the state of Ohio did not change her primary purpose in identifying the source of the child’s harm and getting the child to safety.\textsuperscript{197} The Court reasoned that her purpose did not change because any teacher, whether mandated to report or not, would report such activity to the police.\textsuperscript{198} Although that was likely true in Clark, the more general question of the primary purpose of all mandatory reporters should be addressed. All states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have laws mandating different professionals to report child abuse to the police.\textsuperscript{199} The prominent professions that are required to report child abuse include social workers, teachers, principals, physicians, nurses, counselors, therapists, and

\textsuperscript{197} Clark, 135 S.Ct. at 2183.

\textsuperscript{198} Id.

childcare providers.\textsuperscript{200} Eighteen states and Puerto Rico mandate all adults to report suspected child abuse.\textsuperscript{201} The wide array of people mandated by their states to report suspected child abuse\textsuperscript{202} makes the question of their primary purpose in questioning a child of the utmost importance under the Confrontation Clause. If the Court determines an individual’s status as a mandatory reporter does not affect his purpose in getting statements about child abuse from victims, then the children’s statements will have a greater likelihood of being admissible in court without cross-examination. However, if the Court determines that a mandatory reporter’s purpose can be affected by his status, then a child’s statement will more likely be testimonial in nature and therefore inadmissible without cross-examination. Now that the Court has opened up the \textit{Crawford} test to apply to more than strictly law enforcement officers, the question of a mandatory reporter’s status is highly relevant.\textsuperscript{203}

In \textit{Michigan v. Bryant}, the Court indicated that a statement would be testimonial if made in situations “in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.”\textsuperscript{204} This language hinted at the Court’s inclination to apply the \textit{Crawford} framework to groups of people outside of law enforcement prior to the decision in \textit{Clark}. The use of the phrase “state actor” is also important because it included more than just state law enforcement officers.

“Individuals who are required to report suspected cases of child abuse or

\textsuperscript{200} Id. at 2.
\textsuperscript{201} Id. at 2. The eighteen states are: Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wyoming. \textit{Id.}

Contemporary child protection laws require the reporting of cases of physical abuse, sexual abuse, and neglect of varying types—physical, medical and psychological. Similarly, there has been an expansion of the professions that must report concerns that a child has been abused or neglected with some states’ mandated reporting statutes containing a laundry list of professionals who must report suspected cases of maltreatment to child protection agencies. Eighteen states and Puerto Rico have opted for universal reporting, subject to only a few, specifically described limitations which usually include attorneys.

\textit{Id.} “Additionally, state legislatures have required expanded education and training for mandated reporters, increased penalties for failure to report, prohibited employers from retaliating against employees who report suspected abuse, and increased coordination of investigations for cases of suspected child maltreatment.” \textit{Id.}
neglect under state mandatory reporting statutes should be included in the category of individuals to whom testimonial statements can be made, because they would likely be considered state actors under prevailing civil rights litigation jurisprudence.\textsuperscript{205} Ohio’s mandatory reporting statute states:

No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division.\textsuperscript{206}

The number of different professions that this mandate applies to in Ohio is astounding.\textsuperscript{207} The people who fall into the categories of mandatory reporting include:

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  \item Divisions (A)(1)(a) of this section applies to any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist; practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other health care professional; licensed psychologist; licensed school psychologist; independent marriage and family therapist or marriage and family therapist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp, child day camp, or private, nonprofit therapeutic wilderness camp; administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; person engaged in social work or the practice of professional counseling; agent of a county humane society; person, other than a cleric, rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion; employee of a county department of job and family services who is a professional and who works with children and families; superintendent or regional administrator employed by the department of youth services; superintendent, board member, or employee of a county board of developmental disabilities; investigative agent contracted with by a county board of developmental disabilities; investigative agent contracted with by a county board of developmental disabilities.
\end{itemize}

\textsuperscript{205} Paruch, supra note 184, at 135; see also 42 U.S.C. § 1983 (2006) (defining a state actor for purposes of civil rights claims).

\textsuperscript{206} OHIO REV. CODE ANN. § 2151.421.

\textsuperscript{207} Id.
reporters are liable for compensatory and exemplary damages in a civil lawsuit if they do not report information regarding child abuse.\textsuperscript{208} Other states prescribe criminal sanctions for failure to comply with statutes.\textsuperscript{209} With punishment this severe, any person who is a mandatory reporter will likely report the information to law enforcement, even if he or she is not solely trying to protect the child from harm as the Court in \textit{Clark} believed the teacher was. “Therefore, the actions of these private persons, in reporting suspected cases of child abuse and neglect pursuant to these statutes, are state action and the individuals involved are state actors.”\textsuperscript{210}

In \textit{Clark}, even if the Court had determined that the teacher’s status as a mandatory reporter changed her purpose in gathering information from the child, the outcome would likely be the same. The circumstances of the interview were still very informal; the teacher’s primary purpose based on the structure and content of her questions was to find the source of the child’s harm and to get the child out of harm’s way. Even if the Court found that the mandatory reporter’s status changed her purpose in asking questions to the child, the child’s purpose in speaking was still relevant to the determination of primary purpose. It is unlikely that a three-year-old child understood what a mandatory reporter was or that his teacher was

\begin{quote}
board of developmental disabilities; employee of the department of developmental disabilities; employee of a facility or home that provides respite care in accordance with section 5123.171 of the Revised Code; employee of a home health agency; employee of an entity that provides homemaker services; a person performing the duties of an assessor pursuant to Chapter 3107, or 5103 of the Revised Code; third party employed by a public children services agency to assist in providing child or family related services; court appointed special advocate; or guardian ad litem.
\end{quote}

\textit{Id.}

\textsuperscript{208} \textit{Id.}

(M) Whoever violates division (A) of this section is liable for compensatory and exemplary damages to the child who would have been the subject of the report that was not made. A person who brings a civil action or proceeding pursuant to this division against a person who is alleged to have violated division (A)(1) of this section may use in the action or proceeding reports of other incidents of known or suspected abuse or neglect, provided that any information in a report that would identify the child who is the subject of the report or the maker of the report, if the maker is not the defendant or an agent or employee of the defendant, has been redacted.

\textit{Id.}

\textsuperscript{209} Paruch, \textit{supra} note 184, at 138. One example is Michigan’s failure to report law which says any adult who fails to report suspected child abuse is guilty of a misdemeanor “punishable by imprisonment not more than 93 days” M.C.L. § 722.633 (2011).

\textsuperscript{210} Paruch, \textit{supra} note 184, at 138.
one. Using a balancing test and all the relevant factors of the primary purpose analysis would lead to the same conclusion in Clark.

However, there may be cases in the future where the questioner’s status as a mandatory reporter could make the difference in determining whether a statement is testimonial in nature. The mandatory reporting statute in Ohio covers all children under the age of eighteen. If the same facts were presented as in Clark, but the declarant was sixteen rather than three, it is much more likely that the child would know what a mandatory reporter is and he would know that whatever he said about his parents would be reported to the police. If the child knowingly went to a mandatory reporter rather than the police and has knowledge of what a mandatory reporter is, then the child’s purpose in speaking is without a doubt to create testimony to aid in a criminal investigation or prosecution. The Court only reasoned that this teacher’s mandatory reporter status did not change the Confrontation Clause analysis because she would have reported the abuse anyway. While that probably is true, it will not be true for all mandated reporters at all times. Not every mandatory reporter will a teacher-student relationship with the person who is speaking to them. The teacher-student relationship with a young child would naturally make people want to protect the child from any harm. However, another type of mandatory reporter who does not have the same type of relationship with the declarant, may not possess the same primary purpose in asking questions.

In those situations, the fact that the questioner is a mandatory reporter plays a huge role in determining the questioner’s intent. The Court’s decision regarding when a mandatory reporter’s purpose changes Confrontation Clause analysis could also change the outcome of another case that does not involve a child as young as the one in Clark. Because mandatory reporters are effectively arms of the government, any questioner’s status as a mandatory reporter is relevant to the Confrontation Clause analysis.

VI. CONCLUSION

Cross-examining children in child abuse cases is neither a fun nor an easy task. Although the Court reached a good decision in Clark that should be celebrated as a victory for the rights of children, the future of the Confrontation Clause analysis is encroaching on the constitutional rights of criminal defendants. In a country where every person is innocent until proven guilty, it is of the utmost importance that the rights of the accused

remain intact. The right to confrontation is a procedural right, not a substantive one. The Sixth Amendment does not guarantee a perfect cross-examination, but it does promise the opportunity to cross-examine. This opportunity should only be taken away in extremely limited circumstances.

The Court's decision in Clark began a new line of Confrontation Clause cases that now includes more than just law enforcement officers. The Court is continually answering the central questions to ensure consistent application of the Confrontation Clause framework under Crawford. However, the Court's fuzzy or non-existent answers to four key questions will cause problems for the lower courts to apply the Crawford test uniformly. When presented with these issues in the future, the Court should be clear in articulating four answers: Crawford is still the test for the Confrontation Clause; there is no presumption of a child's incompetence to testify under the federal rules; both the questioner and the declarant's purposes should be scrutinized in detail to determine the primary purpose of the statement; and mandatory reporters are administrative arms of the state and should therefore be an important factor in determining the primary purpose of the statement. Clearly defining the answers to these issues will lead to a more uniform application of the Confrontation Clause in the future and ensure that the accused enjoys the right to confront the witnesses against him.