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The Confrontation Clause and the Border Patrol: Applying the “Primary Purpose” Test to Multifunction Agencies

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THE CONFRONTATION CLAUSE AND THE BORDER PATROL: APPLYING THE “PRIMARY PURPOSE” TEST TO MULTIFUNCTION AGENCIES

CALEB MASON* & JESSICA BERCH**

The right of criminal defendants to confront the witnesses against them is one of our most cherished constitutional protections. Yet the meaning and scope of the right have never been clearly defined by the Supreme Court. In 2004, the Court rejected earlier interpretations of the Sixth Amendment Confrontation Clause as vague and uncertain. It unmoored the constitutional question from the hearsay exceptions and replaced the old test with a new one, which has turned out to be quite clear in some areas, but maddeningly uncertain in others: A statement will be excluded if it is “testimonial.” In later cases, the Court explained that a statement is testimonial if its “primary purpose” is to assist in gathering facts for use in a future criminal prosecution.

The primary purpose test for determining whether interactions between government agents and hearsay declarants are testimonial has caused confusion for courts, commentators, and law enforcement officers—not to mention provoking perhaps the nastiest dissent in recent memory.¹ Just last year, in 2012, the Supreme Court once again attempted to clarify primary purpose, but only managed to further confuse the doctrine when the Justices’ opinions split 4–1–4.

In this Article, we propose a method for applying the primary purpose test in a law-enforcement context that increasingly includes multifunction agencies whose duties may be only tangentially connected to the investigation and prosecution of crime. We propose that the primary purpose of an interaction should be determined, in part, by a statistical evaluation of the relative likelihood of criminal prosecution among the various possible outcomes of a particular category of agent-

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1. In dissent in *Michigan v. Bryant*, Justice Scalia critically questioned the Court’s decision “to resurrect [the pre-*Crawford* landscape] by a thousand unprincipled distinctions” without explicitly overruling *Crawford*. 131 S. Ct. 1143, 1175 (2011) (Scalia, J., dissenting).

witness interactions. We then demonstrate how this approach would apply in several situations, particularly those involving the United States Border Patrol—the epitome of a modern multifunction agency with mixed civil and criminal enforcement duties.

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I. INTRODUCTION

A United States Border Patrol agent on routine duty encounters two people walking in the desert near the border. He approaches and commands them to stop. The agent then separates the two individuals and asks the first one, “Where are you two from?” Person 1 (P-1) answers, implicating himself and his co-walker, P-2, as being in the country illegally. P-2 is later charged with a crime, such as illegal reentry under 8 U.S.C. § 1326. If P-1 is unavailable at trial, is his answer to the agent’s question admissible against P-2 under the Confrontation Clause?

This is not an idle hypothetical: Immigration-related crimes are the most commonly charged federal crimes, and establishing the nationality and identity of people encountered by the Border Patrol is a critical part of the government’s case.² Putting aside any objections on hearsay or other grounds under the Federal Rules of Evidence, one must ask the question: Does the Constitution permit the prosecution to offer such statements in evidence at trial through the testimony of the agent?

The framework we propose in this Article for answering this question will provide a meaningful template for determining whether the Confrontation Clause bars such statements. The “primary purpose” test for “testimonial” statements, and the application of that test to these informal interactions, is likely to become increasingly significant as the lines between national security, civil regulation, criminal prosecution, and law enforcement continue to blur.³

The Supreme Court’s 2011 decision in *Michigan v. Bryant*⁴ provided

2. See *infra* Part III for discussion of cases in which this situation arises. For discussion of recent federal charging trends, see Caleb E. Mason & Scott M. Lesowitz, *A Rational Post-Booker Proposal for Reform of Federal Sentencing Enhancements for Prior Convictions*, 31 N. ILL. U. L. REV. 339, 340 n.1 (2011).

3. As mentioned in Part III.B.4, *infra*, various other agencies, such as the Environmental Protection Agency (EPA), Food and Drug Administration (FDA), Securities and Exchange Commission (SEC), and Drug Enforcement Administration (DEA), also have multiple functions and may not always be principally concerned with ferreting out and prosecuting crimes.

4. *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011). *But see* *Williams v. Illinois*, 132 S. Ct. 2221, 2242 (2012) (a fractured 4–1–4 Confrontation Clause decision without a majority of Justices agreeing on what primary purpose means). The *Williams* four-Justice plurality requires that the primary purpose relate to the accusation of a particular targeted individual. 132 S.Ct. at 2242. The four-Justice dissent’s approach directs attention to evidence potentially useful in a criminal prosecution. *Id.* at 2266 (Kagan, J., dissenting). In an opinion concurring in the judgment only, Justice Thomas decries any version of the primary purpose test. *Id.* at 2261–62 (Thomas, J., concurring in the judgment). In a case where the statement

some needed clarification of the enigmatic opinions in *Davis*⁵ (precluding statements with a primary purpose of criminal investigation) and *Crawford*⁶ (precluding testimonial statements). It also provided clues as to how the Court may apply the Confrontation Clause in the broader context of multifunction agencies that have missions that include, but are not limited to, investigating crime.

This Article suggests a general approach to analyzing Confrontation Clause claims that arise with respect to multifunction agencies, such as the Border Patrol. We propose that to decide the primary purpose of a given interaction, courts should consider statistical data and agency policies to determine the relative probability of criminal prosecution.⁷ That is, determining whether an interaction has a primary purpose of gathering evidence for a criminal prosecution should be informed by the statistical likelihood (the frequency) of a criminal prosecution resulting from that type of interaction.

II. MODERN CONFRONTATION CLAUSE JURISPRUDENCE

A. *Before Crawford: Confrontation Rights as Hearsay Rights*

The Confrontation Clause of the Sixth Amendment provides that, in criminal cases, the accused has the right to confront the witnesses against him.⁸ For most of its history, the Clause was read as largely coextensive with the hearsay rules, so it provided little independent authority for precluding evidence.⁹ As hearsay law grew more nuanced and sprouted more legislatively created exceptions following the

relates to a previously identified suspect, the primary purpose doctrine will be satisfied regardless of which of the two tests is adopted.

5. *Davis v. Washington*, 547 U.S. 813 (2006). In *Davis*, the eight-member majority adopted the primary purpose test in the following passage: “[Statements] are testimonial when the circumstances objectively indicate . . . that the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* at 822.

6. *Crawford v. Washington*, 541 U.S. 36 (2004).

7. Current law looks at the primary purpose of the interaction from both the officer’s and the declarant’s perspective. See *Bryant*, 131 S. Ct. at 1160; see also *infra* notes 58–59 and accompanying text. But see *Leading Cases*, 126 HARV. L. REV. 266, 274 n.76 (2012) (“The Justices also have not resolved the question of whose primary purpose matters, thereby further fracturing the primary purpose test.”). The test proposed by this Article may either supplement or supplant that inquiry.

8. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

9. See, e.g., *Idaho v. Wright*, 497 U.S. 805, 814 (1990); *California v. Green*, 399 U.S. 149, 155–56 (1970).

adoption of the Federal Rules of Evidence in 1975,¹⁰ the Supreme Court began to separate the right of confrontation under the Constitution from the reliability question addressed by many exceptions to the hearsay rules.

Before that separation began, in *Ohio v. Roberts*, the Supreme Court developed a test for evaluating the admissibility of out-of-court statements against criminal defendants.¹¹ First, the declarant must be unavailable.¹² Next, if the declarant is unavailable, the out-of-court statement offered against the defendant must have adequate “indicia of reliability.”¹³ A statement has adequate “indicia of reliability” if it falls into a “firmly rooted” hearsay exception or bears other “particularized guarantees of trustworthiness.”¹⁴ Hearsay questions, including confrontation claims, thus were resolved by asking whether the challenged testimony fit into a long-established hearsay category or was otherwise trustworthy.¹⁵

B. *The New Doctrine: Crawford*

In 2004, *Crawford v. Washington* changed all that.¹⁶ In that case, the Supreme Court wrestled with whether the Confrontation Clause allowed the use of hearsay statements admitted under the exception for statements against penal interest.¹⁷

In *Crawford*, a husband and wife were alleged to have participated in an assault.¹⁸ They were arrested, Mirandized, and interrogated

10. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 62 (1980) (describing hearsay and its exceptions as “an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists” (quoting Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937))).

11. *Id.* at 65–66.

12. *Id.* at 65.

13. *Id.* at 65–66.

14. *Id.* at 66. The Court noted as follows:

In sum, when 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.

Id.

15. *Id.*

16. *Crawford v. Washington*, 541 U.S. 36 (2004).

17. *Id.* at 38, 42.

18. *Id.* at 38.

separately.¹⁹ The wife made statements incriminating her husband in the assault, and she admitted that she had led her husband to the victim's apartment and told him that the victim had previously assaulted her.²⁰ Because of state marital privilege rules, the prosecution could not call her to testify at her husband's criminal trial for assault, so instead the prosecution sought to admit her statement as a statement against penal interest on the grounds that she had admitted to "facilitat[ing] the assault."²¹ The state courts went back and forth analyzing the answer to the Confrontation Clause question (namely, the reliability of the statement), ultimately admitting the statement.²²

In a sweeping opinion, the Supreme Court rejected the entire *Roberts* framework.²³ The Court held that the Confrontation Clause has nothing to do with reliability, or with rootedness or hearsay exceptions.²⁴ The Confrontation Clause analysis does not simply incorporate the most reliable hearsay exceptions.²⁵ Instead, the Court determined that the Clause provides a categorical rule excluding all, and only, "testimonial" hearsay.²⁶ Out-of-court statements that are "testimonial" are barred even if they fit into a firmly rooted hearsay exception; conversely,

19. *Id.* at 38–39.

20. *Id.*

21. *Id.* at 40.

22. *Id.* at 40–42 (summarizing procedural history).

23. *Id.* at 61, 63–68; *see also, e.g.*, *Williams v. Illinois*, 132 S. Ct. 2221, 2232 (2012) (“[I]n *Crawford*, the Court adopted a fundamentally new interpretation of the confrontation right . . .”).

24. *Crawford*, 541 U.S. at 60–61, 68–69.

25. *Id.* at 60.

26. *Id.* at 53, 68–69. According to the Court, the term testimonial covers, at a minimum, “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.* at 68. The Court also took note of other formulations and definitions of the term “testimonial,” but declined, for purposes of the *Crawford* decision, to expand the term beyond the situations set forth above. *See id.* at 51–52. The Court continued to note,

Various formulations of this core class of “testimonial” statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[;] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[;] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it.

Id. (ellipses in original) (citations omitted) (internal quotation marks omitted).

statements that are not “testimonial” pose no Confrontation Clause problem, irrespective of their admissibility or inadmissibility as hearsay.²⁷ Thus, the question posed in the Border Patrol agent hypothetical becomes whether the elicited statement is “testimonial” within the meaning of *Crawford* and its progeny.

The historical and etymological basis for the majority’s analysis in *Crawford* has been severely criticized,²⁸ and the Court itself has acknowledged that the decision has probably lessened the reliability of admissible hearsay in criminal cases.²⁹ But the basic doctrine is likely here to stay. It has not, however, simplified Confrontation Clause analysis; rather, it has created a new analytical problem for the use of hearsay in criminal cases: *What exactly does “testimonial” mean?*

The Court did not precisely define the term in *Crawford*, but did provide some guidance.³⁰ “Testimonial” statements can be divided into two general categories, one easy to apply and one more difficult. The easy category encompasses trial testimony, affidavits, and depositions: formal statements made and memorialized in actual litigation. The Court clarified the law as to the “easy” category in *Melendez-Diaz* and

27. *Id.* at 68–69.

28. For example, Justice Scalia’s definition of “witness” is actually the fifth of five definitions in the 1828 edition of Webster’s, as Professor Jonakait explains:

Webster did not just give one definition, as *Crawford* implied, but five for the noun “witness.” *Crawford* selected the last of those meanings as the one incorporated into the Confrontation Clause. It states, “One who gives testimony; as, the *witnesses* in court agreed in all essential facts.” *Crawford*, however, simply ignored Webster’s third definition of the noun “witness,” which states, “A person who knows or sees any thing; one personally present; as, he was *witness*; he was an *eye-witness*.” This meaning links with Webster’s first definition of a “witness” as a transitive verb: “To see or know by personal experience. I *witnessed* the ceremonies in New York, with which the ratification of the constitution was celebrated, in 1788.”

Randolph N. Jonakait, “*Witnesses*” in the *Confrontation Clause*: *Crawford v. Washington*, *Noah Webster*, and *Compulsory Process*, 79 TEMP. L. REV. 155, 159 (2006) (emphases in original) (citations omitted).

29. *Whorton v. Bockting*, 549 U.S. 406, 420 (2007) (“[W]hatever improvement in reliability *Crawford* produced [in that respect] must be considered together with *Crawford*’s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. . . . Under *Crawford*, . . . the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.”). In *Williams*, the four-Justice plurality found the DNA report nontestimonial, but, nonetheless, went out of its way to establish the reliability of the report. *Williams v. Illinois*, 132 S. Ct. 2221, 2228, 2238–40 (2012).

30. See *supra* note 26 and accompanying text (defining testimonial).

Bullcoming.³¹ For example, in *Melendez-Diaz*, the Court determined whether state laws permitting hearsay introduction of forensic reports on drug analysis (without the live trial testimony of the chemists) were permissible under the Confrontation Clause.³² As the majority noted, *Melendez-Diaz* is an easy case once you accept that the Court meant what it said in *Crawford*.³³ The forensic reports—formal statements made in preparation for trial—were the very epitome of testimonial evidence.³⁴ If a government chemist, at the request of prosecutors, prepares an affidavit stating that a substance is cocaine then, during the criminal trial, the prosecution must call that chemist. The use of state hearsay exceptions to permit introduction of such affidavits in criminal cases is unconstitutional.³⁵

Formal statements or affidavits present the straightforward case, of course.³⁶ More difficult calls may emerge from the informal verbal interactions between potential witnesses and government actors. To provide guidance, the Court in *Crawford* offered “various formulations” of the “core class of ‘testimonial’ statements.”³⁷ One, which was proposed by the National Association of Criminal Defense Lawyers (NACDL), appeared to cover most, if not all, police–witness interactions: “[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later [criminal] trial.”³⁸ The Court explained that the definition was set forth merely as one of several proposed formulations, and that the Court did not need in that case to announce a definition of “testimonial” because the post-arrest interrogations present in *Crawford* “are testimonial under even a

31. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2717 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–11 (2009).

32. *Melendez-Diaz*, 557 U.S. at 307, 310–11.

33. *Id.* at 310–11.

34. *Id.* at 307, 310.

35. *Id.* at 329; *see also Bullcoming*, 131 S. Ct. at 2717 (holding that a blood alcohol analysis report was testimonial).

36. Or perhaps not so easy. As discussed in more detail *infra* Part II.C.3, the Supreme Court recently struggled with the admissibility of an expert’s reliance on a DNA profile report in *Williams v. Illinois*, 132 S. Ct. 2221 (2012).

37. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

38. *Id.* at 52 (citing Brief for National Association of Criminal Defense Lawyers, et al. as Amici Curiae Supporting Petitioners, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21754961, at *3).

narrow standard.”³⁹ Nonetheless, a number of courts, perhaps frustrated by the lack of a definition, have used versions of the NACDL formula⁴⁰—including the Supreme Court itself in its *Melendez-Diaz* analysis.⁴¹

C. *The Primary Purpose Test: Davis, Bryant, and Williams*

The boundaries of the difficult category—informal interactions between government agents and witnesses—have not been precisely drawn. Instead, in *Davis*, the Court enunciated the primary purpose test for determining when such evidence is “testimonial.”⁴² The test asks whether the primary purpose of the interaction in which the statement was made can reasonably be described as being “to establish or prove past events potentially relevant to later criminal prosecution.”⁴³

1. *Davis v. Washington*

Davis and its companion case, *Hammon v. Indiana*, presented the Court with two variations of witness statements, both from victims in domestic violence cases.⁴⁴ In *Davis*, the statement was the victim’s recorded 911 call.⁴⁵ In response to questions from the operator, she described the contemporaneous behavior of the defendant, in the present tense, as she was observing it.⁴⁶ In *Hammon*, the police arrived at the house in response to a domestic violence call, determined that no one was hurt and no violence was ongoing, and then separated the victim and the defendant and asked the victim what had happened.⁴⁷

The Court held that the 911 call was not testimonial, but the on-

39. *Id.*

40. See J.P. Schnapper-Casteras & David Ellis, *The Trouble with Testimonial: Subjective-Objective Ambiguity and Other Problems with Crawford’s Third Formulation*, 47 CRIM. L. BULL. 1186, 1195–96 (2011) (citing *United States v. Pablo*, 625 F.3d 1285, 1303 (10th Cir. 2010); *United States v. Pursley*, 577 F.3d 1204, 1223 (10th Cir. 2009); *United States v. Jordan*, 509 F.3d 191, 201 (4th Cir. 2007); *United States v. Earle*, 488 F.3d 537, 543 (1st Cir. 2007); *United States v. Ellis*, 460 F.3d 920, 925 (7th Cir. 2006); *United States v. Hinton*, 423 F.3d 355, 360 (3d Cir. 2005); *United States v. Saget*, 377 F.3d 223, 229 (2d Cir. 2004); *United States v. Foerster*, 65 M.J. 120, 123 (C.A.A.F. 2007)).

41. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009).

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

43. *Id.*

44. *Id.* at 817–21.

45. *Id.* at 817–18.

46. *Id.*

47. *Id.* at 819–21 (citing *Hammon v. Indiana*, 829 N.E.2d 444, 446–47 (Ind. 2005)).

scene post-emergency interview was.⁴⁸ In reaching its conclusions, the Court finally announced a definition, of sorts, of “testimonial”:

Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold 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*.⁴⁹

Thus, the inquiry focuses on the primary purpose of the interview.⁵⁰ If the primary purpose is to assist with the response to an ongoing emergency, the statement is nontestimonial.⁵¹ But if the primary purpose is to establish facts for a criminal investigation or prosecution, the statement is testimonial.⁵² Because, in *Hammon*, the officers questioned the victim after they had secured the premises and separated the suspect and the victim,⁵³ her responses were “testimonial.”⁵⁴ On the other hand, in *Davis*, because the 911 call was made during the crisis as part of the victim’s present observation and narration of the suspect’s actions (“He’s here jumpin’ on me again,” etc.), her statements were not “testimonial.”⁵⁵ In sum, a statement made to a 911 operator by a declarant reporting an ongoing emergency is not testimonial (the *Davis* facts),⁵⁶ while the same statement made a few minutes later to investigating officers arriving at the scene “after the events described were over” is testimonial (the *Hammon* facts).⁵⁷

48. *Id.* at 822.

49. *Id.* (emphases added).

50. The question of whose perspective on that purpose controls was left open and finally was answered in *Bryant*. *Michigan v. Bryant*, 131 S. Ct. 1143, 1160 (2011); *see infra* notes 58–59 and accompanying text.

51. *Davis*, 547 U.S. at 828.

52. *Id.* at 830.

53. *Id.* at 820.

54. *Id.* at 830–31.

55. *Id.* at 817, 827–28.

56. *Id.*

57. *Id.* at 830–31.

The *Davis* opinion left uncertain whether the primary purpose should be viewed from the perspective of the declarant or from that of the interrogating police officer. The distinction drawn by the Court—between responding to an ongoing emergency and developing facts for prosecution—seems to view the question from the officer’s perspective.⁵⁸ *Bryant* put the uncertainty to rest by holding that courts must consider both perspectives.⁵⁹

But the question of perspective was not the most serious difficulty with the application of the *Davis* primary purpose test. That difficulty runs deeper, and was anticipated by Justice Thomas: Even in the clearest fact pattern, such as beat cops responding to a 911 call of domestic violence currently in progress, there are often several purposes to the officers’ questions and interactions with witnesses.⁶⁰ As Justice Thomas noted, it will be difficult to create rules that courts can follow to non-arbitrarily assign primacy of purpose in many regularly occurring law enforcement scenarios.⁶¹

2. *Michigan v. Bryant*

The Supreme Court’s 2011 decision in *Michigan v. Bryant* further clarified the primary purpose doctrine.⁶² In *Bryant*, the police responded to a report that a man had been shot.⁶³ They found the victim bleeding on the ground next to his car at a gas station.⁶⁴ They asked him “what had happened, who had shot him, and where the shooting had occurred.”⁶⁵ The conversation lasted “5 to 10 minutes,” until paramedics arrived.⁶⁶ The victim later died at the hospital.⁶⁷ The Court had to

58. *Id.* at 822.

59. *Michigan v. Bryant*, 131 S. Ct. 1143, 1160 (2011) (“[T]he statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.”). Justice Scalia, in dissent, said that only the declarant’s perspective should matter. *Id.* at 1168–69 (Scalia, J., dissenting). Because Justice Scalia authored *Davis*, perhaps he should have been clearer, or tried to create consensus, about whose perspective matters when he wrote that opinion. Had he done so, much of the confusion about the meaning of *Davis*’s primary purpose test could have been averted.

60. *Davis*, 547 U.S. at 839 (Thomas, J., concurring in the judgment and dissenting in part).

61. *Id.* at 838 (complaining that the majority’s primary purpose test “yields no predictable results to police officers and prosecutors attempting to comply with the law”).

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

63. *Id.* at 1150.

64. *Id.*

65. *Id.*

66. *Id.*

articulate the proper constitutional characterization of what the police were doing when they questioned the victim: Were they developing facts for a future prosecution, or were they responding to an ongoing emergency?⁶⁸ If the former, admission of the statements would violate the Confrontation Clause; if the latter, such admission would not violate the Clause.

The Supreme Court held that the police were responding to an ongoing emergency because the shooter was still at large, and his identity and location were unknown.⁶⁹ Thus, the fact that the assault was not ongoing was not dispositive.⁷⁰ An obvious import of *Bryant's* holding, then, is that “emergency response” is a fairly capacious concept, and may extend beyond the actual commission of the crime.⁷¹

But, importantly, for the sake of future application of this doctrine, the Court also finally provided a fairly clear framework for analyzing these recurring fact patterns. First, the Court clarified the problem of perspective: Courts must look from both the declarant’s and interrogator’s perspectives.⁷² Second, the Court clarified that the test is objective, not subjective: The actual intentions of the participants are not dispositive. Instead, they are relevant only insofar as they may inform the court’s analysis of how an objective, reasonable observer would interpret the interaction.⁷³

Finally, the Court recognized (for the first time explicitly in these cases) the possibility of several coexisting purposes in addition to “emergency response” and “criminal investigation”:

But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.

67. *Id.*

68. *Id.* at 1162, 1165. Perhaps portions of the conversation were for the former purpose, and others for the latter. But the Court did not so granularly dissect the conversation.

69. *Id.* at 1164–67.

70. *Id.* at 1160–65.

71. *Id.* at 1158. The plurality takes this to an extreme in *Williams* because even a delay of nine-to-thirteen months may still be part of the ongoing emergency of identifying a suspect. See *Williams v. Illinois*, 132 S. Ct. 2221, 2274 (2012) (Kagan, J., dissenting) (“The police did not send the swabs to Cellmark until November 2008—nine months after L.J.’s rape—and did not receive the results for another four months. That is hardly the typical emergency response.”).

72. *Bryant*, 131 S. Ct. at 1160–61. *But see id.* at 1168 (Scalia, J., dissenting) (“The declarant’s intent is what counts.”).

73. *Id.* at 1160–62.

In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.⁷⁴

Thus, starting with *Bryant*, a fairly clear rule began to emerge: Any interaction in which the objectively determined primary purpose is something other than developing facts for a criminal investigation is nontestimonial (that is, admissible) for Confrontation Clause purposes.⁷⁵

3. *Williams v. Illinois*

The Supreme Court's latest foray into the Confrontation Clause doctrine yielded a badly fractured 4–1–4 decision that raised more questions than it answered.⁷⁶ Five Justices held that the Confrontation Clause does not bar an expert witness from testifying on the basis of a lab report prepared by another analyst who does not testify at trial.⁷⁷ The plurality of four advanced two reasons supporting that result.⁷⁸ First, the expert's testimony was not admitted to prove the truth of the matters asserted in the lab report.⁷⁹ Second, and of importance to this Article, the plurality adopted a modified version of the primary purpose test and explained that, because the forensic report did not have the primary purpose "of accusing a *targeted* individual of engaging in criminal conduct," the report was nontestimonial.⁸⁰ The other five

74. *Id.* at 1155.

75. We leave to the side for purposes of this Article Justice Sotomayor's comment that the reliability of a given category of statements is "relevant" to the primary purpose determination. *Id.* at 1155. That line has drawn fire from Justice Scalia, *see id.* at 1174–75 (Scalia, J., dissenting), applause from Justice Kennedy, *see Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2725 (2011) (Kennedy, J., dissenting), and perplexity from commentators, *see, e.g.*, Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 *FORDHAM L. REV.* 1301, 1310–16 (2011); Jason Widdison, *Michigan v. Bryant: The Ghost of Roberts and the Return of Reliability*, 47 *GONZ. L. REV.* 219, 230–33 (2011).

76. *See Williams*, 132 S. Ct. 2221. The Harvard Law Review described the case this way: "The lack of either a majority opinion or a clear holding, in addition to the internal flaws of the various opinions, deeply muddles Confrontation Clause doctrine, leaving the [C]lause's application to forensic evidence in question." *Leading Cases, supra* note 7, at 267.

77. *Williams*, 132 S. Ct. at 2228.

78. *Id.* at 2235–42.

79. *Id.* at 2235–41.

80. *Id.* at 2242 (emphasis added); *see also id.* at 2243 (finding that the primary purpose of the report was "to catch a dangerous rapist . . . not to obtain evidence for use against [Williams], who was neither in custody nor under suspicion at that time").

Justices disagreed with the plurality's new explication of the primary purpose test.⁸¹ Justice Thomas, writing for himself alone, criticized the old primary purpose test as impractical and the plurality's new formulation of requiring a particular person to be under suspicion as divorced from the text of the Sixth Amendment.⁸² The four dissenters argued that whether the police have a suspect at the time a forensic report is conducted "makes not a whit of difference" for purposes of the Confrontation Clause and advocated for the retention of the *Davis* formulation of primary purpose.⁸³

Thus, the primary purpose doctrine now has two different tests, each supported by four Justices. The plurality's test finds a statement "testimonial" if it has "the primary purpose of accusing a targeted individual of engaging in criminal conduct"⁸⁴ The four dissenting Justices adhere to the prior *Davis* test requiring the statements to have a primary purpose of providing evidence in a criminal case.⁸⁵ Justice Thomas prefers to abandon the primary purpose test entirely.⁸⁶

D. Foreseeability of Prosecution is Not the Test

Given the vague explanation of "testimonial" in *Crawford* and the "muddled" primary purpose test in *Williams*,⁸⁷ it is not surprising that some courts, practitioners, and police officers occasionally have conflated the primary purpose test with the foreseeability of criminal prosecution;⁸⁸ that is, if criminal prosecution is "foreseeable," then the interaction is "testimonial."⁸⁹ That analysis may be tempting—and it is the analysis Justice Scalia argued for in dissent in *Bryant*—but it is not the law.⁹⁰ *Davis* could have announced foreseeability as the test—

81. *Id.* at 2264–74 (Kagan, J., dissenting); *id.* at 2262 (Thomas, J., concurring in the judgment).

82. *Id.* at 2262 (Thomas, J., concurring in the judgment).

83. *Id.* at 2274 (Kagan, J., dissenting).

84. *Id.* at 2242 (plurality opinion).

85. *Id.* at 2273–74 (Kagan, J., dissenting).

86. *Id.* at 2262 (Thomas, J., concurring in the judgment).

87. *Leading Cases*, *supra* note 7, at 272.

88. *See, e.g.*, Schnapper–Casteras & Ellis, *supra* note 40, at 1195–96 (collecting post-*Davis* cases that use the "reasonable foreseeability" formulation).

89. *See, e.g., id.*

90. *See Michigan v. Bryant*, 131 S. Ct. 1143, 1168–69 (Scalia, J., dissenting) (arguing that the right test is whether the speaker understood that his statement "may be used to invoke the coercive machinery of the State against the accused"). That formulation has Professor Friedman's endorsement as well. *See* Richard D. Friedman, *Who Said the Crawford*

“whether a reasonable person in the circumstances would foresee that the statement would be available for use in a criminal prosecution”—but the Court did not do that.⁹¹

The *Davis* test does not turn on the foreseeability of a criminal prosecution; instead, it turns on the primary purpose of the interaction.⁹² No stretch of legal or grammatical imagination can make the two categories entirely symmetrical: If an officer has a primary purpose and two secondary purposes, all of them are foreseeable, but only one is primary. The officer with the primary purpose of saving a shooting victim (or locating the perpetrator and perhaps stopping another crime) when he asks “What happened to you?” also knows, with a certainty well beyond mere foreseeability, that the answer will likely serve as evidence in a criminal prosecution. The officer will preserve the answer by writing it down in his report for later use. In the example, saving the victim is the primary purpose; obtaining the facts to identify a suspect, prepare for criminal prosecution, and potentially forestall a future crime is a secondary purpose; and writing a complete and accurate report is a third purpose.⁹³ A “foreseeability” test would make the interaction “testimonial” every time, but the *Davis* primary purpose analysis would deem such an interaction nontestimonial because the primary purpose is to save the victim.⁹⁴

Revolution Would Be Easy?, CRIM. JUST., Winter 2012, at 14, 19 (“In the long run, I believe that the [C]ourt will adopt a sound view of what is testimonial, based on the reasonable anticipation of a person in the position of the speaker . . .”).

91. See generally *Davis v. Washington*, 547 U.S. 813 (2006) (adopting the primary purpose test, not a foreseeability test). If the Court had made foreseeability, rather than primary purpose, the rubric, contemporaneous 911 calls would be “testimonial” because reasonable people know that 911 calls are recorded and are often used in criminal prosecutions. Of course, the Supreme Court in *Davis* did not provide such a result-oriented explanation for its holding, but such logic may have been a reason why the Court shied away from announcing the foreseeability test.

In fact, foreseeability has not worked particularly well even in the torts field from which it originated. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL & EMOTIONAL HARM § 29 (2010) (“A foreseeability test for negligence cases risks being misunderstood because of uncertainty about what must be foreseen, by whom, and at what time.”). Almost anything remotely related may be considered “foreseeable.” *Id.*; see generally Ryan B. Abbott, *Treating the Health Care Crisis: Complementary and Alternative Medicine for ACA*, 14 DEPAUL J. HEALTH CARE L. 35, 90 (2012) (discussing the role of foreseeability in the torts field).

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

93. On the problem of “multiple concurrent purposes,” see, e.g., Marc McAllister, *Evading Confrontation: From One Amorphous Standard to Another*, 35 SEATTLE U. L. REV. 473, 500–03 (2012).

94. Michael Cicchini proposes that “the term testimonial should be defined as all . . .

1. The Difference Between Foreseeability and Primary Purpose: Illustration in the Caselaw

The Ninth Circuit's post-*Crawford* Confrontation Clause decisions in prosecutions for illegal reentry after deportation under 8 U.S.C. § 1326 illustrate the distinction between foreseeability and primary purpose.⁹⁵ In illegal reentry cases, the government must prove that the defendant-alien (1) was deported and (2) physically removed from the United States and (3) did not receive permission to return, but (4) nonetheless did return.⁹⁶ The second and third elements—previous removal and lack of permission to return—are typically proved by introducing documents from the defendant's Alien File, or "A-File."⁹⁷

The court's analysis in these cases supports two propositions we endorse in this Article. First, the *possibility* of future prosecution is necessary, but not sufficient, to make an interaction testimonial; and second, the *statistical likelihood* of future prosecution among multiple possible outcomes is a significant factor in the primary purpose analysis.

a. Certificate of Non-Existence of Record: Testimonial

In reentry cases, the prosecution proves the defendant's lack of permission to return by presenting a "certificate of non-existence of record" (CNR), which is an affidavit that states that a Department of Homeland Security (DHS) official has reviewed all the applicable records and determined that the defendant has not received permission

hearsay that tends to establish in any way an element of the crime or the identification of the defendant." Cicchini, *supra* note 75, at 1321 (emphasis omitted); see also Michael Cicchini & Vincent Rust, *Confrontation After Crawford v. Washington: Defining "Testimonial,"* 10 LEWIS & CLARK L. REV. 531, 550 n.126 (2006). Cicchini seems to have just defined relevance. If evidence does not tend in any way to establish an element of the crime or the identification of the defendant, then the evidence simply is not relevant. So Cicchini's proposed rule is just a "no hearsay against criminal defendants" rule. Such a rule might make sense if the Court were devising trial rules from scratch or attempting to emulate historical practice. But Cicchini's formulation does not seem useful for predicting the future course of cases in this area.

95. See 8 U.S.C. § 1326 (2006); see, e.g., *United States v. Orozco-Acosta*, 607 F.3d 1156, 1159–67 (9th Cir. 2009); *United States v. Cervantes-Flores*, 421 F.3d 825, 830–34 (9th Cir. 2005), *overruled in part on other grounds by Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

96. 8 U.S.C. § 1326.

97. See News Release, U.S. Citizenship and Immigration Servs., USCIS Begins Transfer of Historical A-Files to National Archives (Jun. 3, 2009), *available at* http://www.uscis.gov/files/article/A-files_3jun09.pdf.

to re-enter.⁹⁸ Because an applicable hearsay rule permits such evidence,⁹⁹ these certificates were, at least before *Melendez-Diaz* and *Bullcoming*, generally introduced through a testifying case agent who usually was not the particular DHS official who conducted the records review.¹⁰⁰ But after *Melendez-Diaz* and *Bullcoming*, courts have uniformly held CNRs to be testimonial because they are only prepared for presentation at trial.¹⁰¹ That is, the primary, or indeed only, reason the search is carried out and the affidavit generated is to create evidence for trial.¹⁰² Thus, under the Supreme Court's tests, the CNR is testimonial, and whoever performed the search must testify at the defendant's criminal trial.¹⁰³

b. Warrant of Removal: Nontestimonial

In an illegal reentry case, the prosecution proves the defendant's previous removal by a document called a "warrant of removal," which memorializes both the deportation order and the physical removal.¹⁰⁴ The different fates of CNRs and warrants of removal after *Melendez-Diaz* and *Bullcoming* illustrate the distinction between primary purpose and foreseeability. The warrant of removal is signed, at the time of physical deportation, by the U.S. Immigration and Customs Enforcement (ICE) Detention and Removal agent who physically witnesses the transportation of the alien across the border.¹⁰⁵ That officer witnesses dozens of deportations every day,¹⁰⁶ so the officer almost certainly lacks a specific memory of any particular alien, especially months or years later; therefore, to prove that this particular defendant was deported, the document itself must be admitted substantively, whether or not the officer who viewed the deportation

98. See, e.g., *Orozco-Acosta*, 607 F.3d at 1159–60.

99. FED. R. EVID. 803(7) (providing a hearsay exception for an absence of information in a record kept in regular course of business).

100. *Cervantes-Flores*, 421 F.3d at 831.

101. *Orozco-Acosta*, 607 F.3d at 1162.

102. See *id.*

103. *Id.*

104. *Id.*

105. See *id.* at 1163; see also *ICE Overview*, U.S. DEP'T OF HOMELAND SEC., www.ice.gov/about/overview (last visited Jan. 17, 2013) (stating that a primary mission of ICE is border enforcement and removal operations).

106. See, e.g., OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 95 (2009) (noting that, in 2008, the number of removals was 358,886, or roughly 1,000 removals per day).

testifies at the illegal reentry trial. If that agent is not a witness, then another agent, the custodian of the A-file, lays the foundation for admission, identifying the document and explaining how it was created and maintained in the file.¹⁰⁷ This testimony poses no problem under the hearsay rules,¹⁰⁸ but after *Crawford*, and especially after *Melendez-Diaz* and *Bullcoming*, defendants have challenged the warrants of removal as violative of the Confrontation Clause.¹⁰⁹

The courts, however, have consistently held that warrants of removal are nontestimonial.¹¹⁰ In *United States v. Orozco-Acosta*, for example, the government introduced the warrant of removal through the testimony of the A-file custodian.¹¹¹ The agent who had physically witnessed the removal and signed the form did not testify; instead, the A-file custodian explained what the form recorded, how it was created, and how it was maintained.¹¹² The defendant objected, arguing that, under *Crawford* and *Melendez-Diaz*, he had a right to confront the agent who personally witnessed his departure.¹¹³ The warrant of removal, he argued, was like the forensic lab report in *Melendez-Diaz*.¹¹⁴ The Ninth Circuit emphatically rejected that argument:

Melendez-Diaz . . . repeatedly emphasized that the certificates of analysis in that case were prepared solely for use at the defendant's trial. Unlike the certificates of analysis in *Melendez-Diaz*, neither a warrant of removal's sole purpose nor even its primary purpose is use at trial. A warrant of removal must be prepared in every case resulting in a final order of removal . . . and nothing in the record or judicially noticeable suggests that more than a small fraction of these warrants ultimately are used in immigration prosecutions.¹¹⁵

Other circuits have treated warrants of removal the same way.¹¹⁶

107. *United States v. Cervantes-Flores*, 421 F.3d 825, 833 (9th Cir. 2005), *overruled in part on other grounds by* *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

108. See FED. R. EVID. 803(8) (public records).

109. *Orozco-Acosta*, 607 F.3d at 1161.

110. See *infra* note 116 and accompanying text (citing cases).

111. *Orozco-Acosta*, 607 F.3d at 1160.

112. *Id.* at 1160–61.

113. *Id.* at 1161.

114. *Id.*

115. *Id.* at 1163–64 (internal citations omitted).

116. *Id.* (“The [warrant of removal’s] primary purpose is to memorialize the deportation, not to prove facts in a potential future criminal prosecution.” (citing *United States v. Burgos*, 539 F.3d 641, 645 (7th Cir. 2008))); *United States v. Torres-Villalobos*, 487 F.3d 607, 613 (8th

Two elements of the Ninth Circuit’s analysis are important here. First is the stark rejection of the “foreseeability” test.¹¹⁷ The court acknowledges that *Crawford* used foreseeability language as one possible formulation of the definition of “testimonial.”¹¹⁸ But the Court in *Crawford* did *not* adopt that formulation as its definition and, in fact, explicitly declined to provide a definition.¹¹⁹ Then, in *Davis*, the Court *did* adopt a definition—the primary purpose test¹²⁰—which is narrower and less inclusive than the foreseeability test. The circuits have thus correctly rejected attempts to make foreseeability of prosecution, and use of the statement in that prosecution, the rubric for admissibility. The second important element is the Ninth Circuit’s endorsement of statistics to inform the primary purpose analysis.

E. The Use of Statistical Evidence to Inform the Primary Purpose Analysis

Primary purpose certainly means more than mere foreseeability. In *Orozco-Acosta*, the Ninth Circuit recognized that statistical evidence might shed light on whether prosecution is likely to occur—and whether prosecution may therefore be considered the primary purpose of the activity.¹²¹ The court dove into statistics: “To illustrate, we take judicial

Cir. 2007) (“Warrants of deportation are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions.”). *Melendez-Diaz* cannot be read to establish that the mere possibility that a warrant of removal—or, for that matter, any business or public record—could be used in a later criminal prosecution renders it testimonial under *Crawford*. See *United States v. Mendez*, 514 F.3d 1035, 1046 (10th Cir. 2008) (“That a piece of evidence may become ‘relevant to later criminal prosecution’ does not automatically place it within the ambit of ‘testimonial.’ . . . [Otherwise,] any piece of evidence which aids the prosecution would be testimonial and subject to Confrontation Clause scrutiny.”).

117. *Orozco-Acosta*, 607 F.3d at 1163–64.

118. *Id.* at 1164.

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

120. *Davis v. Washington*, 547 U.S. 813 (2006).

121. *Orozco-Acosta*, 607 F.3d at 1163–64 (only very few warrants of removal are later used in criminal prosecutions). Primary purpose might mean primacy in frequency or primacy in depth; that is, primacy in terms of quantity (frequency) or quality (depth). *Orozco-Acosta*, and this Article, suggest that primacy in frequency should be taken into account. See *id.* Perhaps quality should also be considered because interactions that lead to prosecutions may be more “impactful” on both the alien and U.S. resources, and in this regard, the ubiquity of plea bargaining may weigh in the analysis, at least to the extent that statements from interactions with a primarily criminal investigatory purpose may never have occasion to be used at a criminal trial in contravention of the Sixth Amendment. However, such analysis regarding quality is beyond the scope of this Article.

notice of the fact that while nearly 281,000 aliens were removed from the United States pursuant to final orders of removal in 2006, just over 17,000 federal prosecutions for immigration offenses were commenced during approximately the same time period.”¹²² Seventeen thousand out of two hundred eighty-one thousand yields a 6% chance that any particular warrant of removal will later end up as evidence in a criminal trial as opposed to simply being part of the civil process of removing a person from this country. And of those 17,000 prosecutions, only approximately two-thirds, or around 12,000, were for reentry after deportation.¹²³

Orozco-Acosta provides a template for determining the primary purpose of an inquiry when dealing with an agency that serves functions other than, or in addition to, pure law enforcement and prosecution: What is the statistical likelihood of the various possible outcomes of the interaction?¹²⁴ Foreseeability does not help because the outcomes are *all* foreseeable. The question is which outcome is *primary*.

As explored further below, Border Patrol field interviews are paradigmatic examples of this dynamic. Agents who detain people in the desert ask the core question, “Where are you from?” As they do so, the agents are always aware that the answers might end up being introduced against the interrogee and others in criminal prosecutions.¹²⁵ But to determine whether obtaining that statement for a criminal prosecution is the *primary* purpose of the interaction, courts should follow the Ninth Circuit’s lead by considering that criminal investigatory purpose in light of the *other*, and likely predominant, purposes that such questioning might serve in Border Patrol interactions, such as referring aliens caught crossing illegally to immigration authorities for removal proceedings.

Removal proceedings do not implicate the Confrontation Clause because they are civil, not criminal.¹²⁶ *Orozco-Acosta* and the other

122. *Id.* at 1164 n.5 (citing 2008 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 106; BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NO. NCJ 225711, FEDERAL JUSTICE STATISTICS 2006—STATISTICAL TABLES 23–24 tbl.4.1 (2006)).

123. See *Immigration Enforcement, Criminal Statutes in DHS-Immigration Convictions, by Court, FY2004*, TRACDHS, <http://trac.syr.edu/tracins/highlights/v04/dhsoffcourt.html> (last visited Jan. 11, 2013) [hereinafter *DHS-Immigration Convictions, by Court, FY2004*].

124. *Orozco-Acosta*, 607 F.3d at 1163–64.

125. See, e.g., *id.* at 1162.

126. An alien would never have a Confrontation Clause claim in a deportation hearing itself because confrontation rights are criminal trial rights. *Crawford v. Washington*, 541 U.S. 36, 50 (2004); see U.S. CONST. amend. VI. An alien has, however, certain due process rights

circuit cases in accord with it either explicitly or implicitly conclude that *creating evidence for civil deportation proceedings* does not implicate the Confrontation Clause in a subsequent criminal trial.¹²⁷ After all, as *Orozco-Acosta* explicitly held, because warrants of deportation are produced for (civil) deportation proceedings, they are not testimonial.¹²⁸

This Article builds on *Orozco-Acosta*, reviews additional data from the Border Patrol, and concludes that criminal prosecution is likely not the primary purpose of interactions between Border Patrol agents and persons they encounter in the desert near the border.

III. MULTIFUNCTION AGENCIES AND RELATIVE LIKELIHOODS OF DIFFERENT TYPES OF FUTURE PROCEEDINGS

Determining the primary purpose of an interaction is difficult even when limited to cases involving police officers responding to reported crimes. Even in those situations, the purpose of a given interaction cannot easily be shoehorned into either “emergency response” or “collecting evidence for prosecution.”¹²⁹ In this section, we add another level of complexity. We ask the *Davis* question in a relatively uncharted but doctrinally revealing context: When a Border Patrol agent first encounters a person in a remote area near the border, the agent’s first questions may well include, “Who are you?” “Where are you from?” and “Do you have permission to be in the United States?” Are the person’s answers testimonial in nature?

Border Patrol interactions provide a useful lens through which to consider the scope of modern Confrontation Clause doctrine because, while Border Patrol agents carry guns and make arrests, the Border Patrol has a principally civil function: immigration enforcement.¹³⁰ Even when investigating past events (as opposed to responding to ongoing emergencies), the legal proceedings flowing from the agents’

at such a hearing. *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”); *see* U.S. CONST. amend. V.

127. *See, e.g., Orozco-Acosta*, 607 F.3d at 1164.

128. *Id.*

129. The Supreme Court has recognized that there are other situations, aside from ongoing emergencies, when statements are not procured for the primary purpose of collecting evidence for prosecution. *See Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011); *supra* text accompanying note 74.

130. *See ICE Overview*, U.S. DEP’T OF HOMELAND SEC., www.ice.gov/about/overview (last visited Jan. 17, 2013); *supra* note 126 and accompanying text.

investigations will likely be civil (deportation), not criminal.¹³¹ How much should this matter for Confrontation Clause purposes? Is P-1 a “witness against” P-2 for purposes of the Clause if P-1 made a statement in response to the officer’s question when the most likely outcome of the interaction was to establish facts for use in a civil deportation proceeding? Recall that primary purpose is determined objectively from both the officer’s and the declarant’s perspectives.¹³² What could be more objective than statistical likelihood? If criminal prosecution is a theoretical possibility, but rarely occurs, how heavily should that weigh in the analysis? How likely do criminal prosecutions have to be in practice, when compared with ubiquitous civil proceedings, to become the primary purpose of the interaction? Does it matter if the particular agent has “an eye toward” criminal prosecution?¹³³

The Border Patrol is a useful heuristic for exploring the numerical aspect of “primacy.” The *Crawford* analysis has always emphasized the “eye toward” prosecution, so we must ask at what point that “eye” becomes “prosecutorial.”¹³⁴ We suggest that the answer comes, at least partially, from statistics.

A. *The Border Patrol: An Ideal Hermeneutic*

The Border Patrol presents an ideal framework for predicting the future course of the Court’s Confrontation Clause doctrine for several reasons. First, the type of statements elicited from interrogees by agents is narrowly circumscribed by context and training.¹³⁵ Second, the answers will be potentially incriminating if the interrogee and his travelling companions are aliens without permission to be in the United States.¹³⁶ Third, asking the questions is a necessary prerequisite to the

131. See *Orozco-Acosta*, 607 F.3d at 1163–64. Recall that the Sixth Amendment applies to criminal proceedings, but not civil cases.

132. *Bryant*, 131 S. Ct. at 1160–62; see *supra* text accompanying notes 58–59, 72.

133. See *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004) (“Involvement of government officers in the production of testimony with an *eye toward trial* presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar.” (emphasis added)).

134. *Id.* Little has changed since *Crawford*, even if the plurality’s opinion in *Williams* further limits the primacy test to specific targeted individuals. See *Williams v. Illinois*, 132 S. Ct. 2221, 2242 (2012).

135. Border Patrol Agents may briefly question people regarding their citizenship and immigration status. See, e.g., 21A AM. JUR. 2D *Criminal Law* § 319 (2008).

136. Illegal entry is a crime, as is reentry after deportation. 8 U.S.C. §§ 1325, 1326 (2006). Thus, potential use in a criminal prosecution inheres in virtually every interview. What makes the question intriguing is that, statistically speaking, very few illegal aliens are

exercise of the agents' statutory authority.¹³⁷ Fourth, the event (whether or not a true "emergency") is ongoing. Fifth, the agency's mission is overwhelmingly civil, and it intersects only infrequently with criminal prosecution.¹³⁸

Every day, Border Patrol agents discover people who the agents reasonably suspect are aliens.¹³⁹ Their suspicion usually is based on proximity to the border and attempts to evade immigration authorities.¹⁴⁰ For example, people found hiding bushes in the desert a mile north of the U.S.–Mexico border along a known smuggling path are circumstantially likely to be aliens.¹⁴¹ People found at a U.S. highway checkpoint on a road heading north from the border are also circumstantially likely to be aliens.¹⁴² The Border Patrol agent then asks two questions of the suspected aliens: "What is your nationality?" and "Do you have legal permission to be in the United States?"¹⁴³

actually prosecuted for entry or reentry. Obviously, in absolute numbers there are many such prosecutions, around 40%–50% of the total federal caseload. DORIS MEISSNER ET AL., *MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY* 7, 94 (2013). But compared to the number of actual apprehensions of illegal aliens by the Border Patrol, the number of prosecutions is small.

137. 8 U.S.C. § 1357 (2006).

138. See *United States v. Orozco-Acosta*, 607 F.3d 1156, 1163–64 (2010); see also *ICE Overview*, U.S. DEP'T OF HOMELAND SEC., www.ice.gov/about/overview (last visited Jan. 17, 2013).

139. See MEISSNER ET AL., *supra* note 136, at 139; *supra* notes 122–23 and accompanying text; see, e.g., Brady McCombs, *A Day in the Desert*, U. N. COLO., <http://www.unco.edu/northernvision/fall2012/border.html> (last visited Feb. 9, 2013) (noting 950–1600 apprehensions a day in Tucson alone).

140. J. Alan Bock, *Validity of Border Searches and Seizures by Customs Officers*, 6 A.L.R. FED. 317 (1971) ("[The] practice of illegal aliens to walk across border or of smugglers to backpack contraband over border in remote desert areas between border checkpoints is well known . . .").

141. *Id.*

142. Cf. *United States v. Rocha-Lopez*, 527 F.2d 476, 477–79 (9th Cir. 1976) (affirming finding of reasonable suspicion for a stop that occurred one-and-one-half miles from the border in an area known for alien smuggling).

143. See, e.g., *United States v. Cervantes-Flores*, 421 F.3d 825, 830 (9th Cir. 2005), *overruled in part on other grounds by Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *United States v. Hudson*, 210 F.3d 1184, 1191–92 (10th Cir. 2000).

Courts have uniformly held that these interactions constitute permissible *Terry* stops (rather than custodial arrests), and thus no *Miranda* warnings are required. See *Hudson*, 210 F.3d at 1190 ("*Miranda* only applies when an individual is subject to 'custodial interrogation.'"). The U.S. Supreme Court held in *Terry v. Ohio* that the Fourth Amendment does not prohibit a police officer from stopping and frisking a suspect in public without probable cause to arrest, as long as the officer has reasonable suspicion to believe that the person is committing or is about to commit a crime and has reasonable belief that the person

Assume the following scenario, which is common along the U.S. border with Mexico:¹⁴⁴ A Border Patrol agent arrests two people in the desert. From his observations, he thinks Person #1 is a guide and is leading Person #2. He detains them both and asks them their names and nationalities. Both admit they are from Mexico. He brings them back to the station for processing. P-1's name produces no "hits" in the immigration database, so P-1 is voluntarily returned to Mexico that evening.

But P-2's name turns up on a coyote watch list. P-2 is charged with alien smuggling under 8 U.S.C. § 1324.¹⁴⁵ Normally, in such cases, P-1 would be kept as a material witness,¹⁴⁶ but in this case P-1 has already returned to Mexico. At P-2's trial, the government seeks to prove P-1's nationality by introducing his admissions through the Border Patrol agent who interviewed him. P-2 objects under the Confrontation Clause. What results?

This occurs not infrequently in the Southwest border districts.¹⁴⁷ As noted, ideally the government figures out whom it will prosecute for a § 1324 violation and detains the smuggled aliens as material witnesses in those cases, either for live testimony or for pre-trial depositions as contemplated by the statute (and which courts have held fulfills the Confrontation Clause's requirements).¹⁴⁸ But the ideal does not always come to pass.¹⁴⁹ Sometimes a material witness who is out on bond absconds;¹⁵⁰ sometimes a defendant in custody for another crime is not

may be armed and dangerous. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The Court in *Miranda v. Arizona* held that a suspect under a custodial arrest must be informed of his right to consult with an attorney and his right to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

144. See, e.g., *United States v. Orozco-Acosta*, 607 F.3d 1156, 1159 (9th Cir. 2010).

145. 8 U.S.C. § 1324 (2006) (bringing in and harboring certain aliens).

146. Caleb E. Mason, *The Use of Immigration Status in Cross-Examination of Witnesses: Scope, Limits, Objections*, 33 AM. J. TRIAL ADVOC. 549, 582 (2010) ("For example, in alien-smuggling prosecutions under 8 U.S.C. § 1324, smuggled aliens are often held as material witnesses.").

147. See, e.g., *Orozco-Acosta*, 607 F.3d at 1159.

148. Mason, *supra* note 146, at 582–83 n.147 ("Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of [the statute] who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence . . ." (alteration in original) (quoting 8 U.S.C. § 1324(d) (2006))). The alien must have been provided an opportunity for cross-examination under the statute. See 8 U.S.C. § 1324(d).

149. Mason, *supra* note 146, at 583.

150. 18 U.S.C. § 3144 (Supp. V 2011) (permitting detention of material witnesses to secure trial testimony).

identified as a guide or coyote until after all the potential witnesses have been removed from the United States.¹⁵¹

If, in the hypothetical above, P-1 answers that he and P-2 are aliens without legal permission to be in the United States, the Border Patrol agent keeps P-1 and P-2 in custody and processes them for deportation.¹⁵² The key question, then, should be: What is the *ex ante* likelihood that a given contact between a Border Patrol agent and a person reasonably suspected of illegal entry will result in the filing of a criminal charge? Is building evidence for use in a criminal prosecution the primary purpose of that interaction? Or is the agent more likely building evidence for civil deportation?

1. Using Statistical Data on Apprehension Outcomes

Bryant makes clear that an objective standard should be used in determining whether a questioner's primary purpose is prosecutorial.¹⁵³ In a field where the goal is to determine an officer's "intent," such objectivity is refreshing. And little is thought to be more objective than statistical data.

To get a sense of how statistical data might inform a given case, we compared the number of Border Patrol apprehensions in the Southwest to the number of immigration prosecutions in the same region.

In Fiscal Year 2008, according to government data, Border Patrol agents apprehended 724,000 people, and the government prosecuted 68,000 cases.¹⁵⁴ Around 85% of all those immigration prosecutions were Border Patrol referrals,¹⁵⁵ meaning that there were approximately 57,800 criminal cases that might require proof at trial of what was said in a field encounter, or just less than 8% of total apprehensions.¹⁵⁶ Thus, in 2008,

151. See, e.g., *United States v. Rivera*, 859 F.2d 1204 (4th Cir. 1988) (discussing material witness in an alien smuggling action who was removed from United States before trial).

152. See 8 U.S.C. § 1227 (2006).

153. *Michigan v. Bryant*, 131 S. Ct. 1143, 1160–62 (2011).

154. Some 48,000 of those were illegal entry cases. *Illegal Reentry Becomes Top Criminal Charge*, TRACIMMIGRATION, <http://trac.syr.edu/immigration/reports/251/> (last visited Feb. 13, 2013); *Immigration Prosecutions at Record Levels in FY 2009*, TRACIMMIGRATION, <http://trac.syr.edu/immigration/reports/218/> (last visited Feb. 13, 2013) [hereinafter *Immigration Prosecutions at Record Levels*].

155. *Immigration Prosecutions at Record Levels*, *supra* note 154 (noting an 84.8% referral rate in 2009); *Surge in Immigration Prosecutions Continues*, TRACIMMIGRATION, <http://trac.syr.edu/immigration/reports/188/> (last visited Feb. 13, 2013) [hereinafter *Surge in Immigration Prosecutions Continues*] (noting an 87% referral rate in 2008).

156. The most recent figures suggest a criminal prosecution rate upwards of 20%.

a Border Patrol agent could reasonably expect that each encounter and arrest carried an 8% likelihood of a resulting a criminal prosecution.

The national numbers are averages from highly variable individual regions. Such variation stems not only from proximity to the border, length of the border, and the degree of border protection, but also from less appreciated causes such as charging policies, which vary significantly from region to region. For example, some regions charge misdemeanor illegal entry in first-crossing cases, while others have a more lenient charging policy.¹⁵⁷ And indeed the greatest policy variation—and thus potentially the broadest and the narrowest charging policies—may well be found in the regions with highest crossing volumes.¹⁵⁸

To further illustrate the point, every reentry case in the Southern District of California that occurred in October 2010 was coded.¹⁵⁹ That District is a high-volume border district that stretches from the coast to the Arizona border and shares the border with two major Mexican cities (Tijuana and Mexicali) as well as including vast stretches of desert and mountain regions that are popular crossing routes.¹⁶⁰ The data showed that 180 illegal reentry criminal cases were filed.¹⁶¹ Of those, 121 were

MEISSNER ET AL., *supra* note 136, at 94. These statistics show that numbers of criminal prosecutions are on the rise vis-à-vis numbers of apprehensions. At some point, as the percentage of prosecutions continues to rise, encounters between aliens and Border Patrol agents will take on a primary purpose of criminal investigation. Has that tipping point already been reached at the 20% level? Certainly, we are edging ever closer.

157. MEISSNER ET AL., *supra* note 136, at 97 (describing the rigid charging policies involved in certain regions that are not present in other regions).

158. Border districts differ greatly in prosecution strategies. One obvious example is “Operation Streamline,” in which as many apprehended aliens as possible are charged with misdemeanor § 1325 illegal entry. See *Southwest Border Security Operations*, NATIONAL IMMIGRATION FORUM 1, 8 (2010), <http://www.immigrationforum.org/images/uploads/SouthwestBorderSecurityOperations.pdf>. Arizona and Texas have experimented with this program, but it is difficult to administer because of sheer numbers. *Id.* Moreover, the procedural shortcuts—for example, mass meetings with a single attorney, mass plea colloquies, immediate mass sentencing—may present due process problems that other districts do not want to risk. The Southern District of California, for example, has never adopted streamlining policies, which no doubt accounts for its lower prosecution likelihood. *Id.* at 1.

159. Primary data on file with co-author Caleb Mason. Each case was coded for the following categories: district, case number, case name, filing date, agency, encounter type, whether statements were elicited, the number of aliens encountered, the location of the encounter, and a miscellaneous box for other comments. The initial charge in these cases was illegal reentry because this region generally does not file criminal charges for a first entry absent some unusual circumstances.

160. *Federal Judicial Districts, California*, FEDSTATS (Jan. 17, 2013), www.fedstats.gov/mapstats/fjd/06fjd.html.

161. Primary data on file with co-author Caleb Mason.

Border Patrol desert cases in which an agent would have had an interaction with the alien and would ask questions such as, “Where are you from?”¹⁶²

In determining the likelihood of a criminal prosecution, we must divide the number of Border Patrol cases by the total number of Border Patrol apprehensions in that region during the same time period. Thus, the numerator is 121. Border Patrol agents in the two sectors in the Southern District (San Diego Sector and El Centro Sector) apprehended 6543 individuals in October 2010, making the denominator 6543.¹⁶³ So out of 6543 Border Patrol apprehensions, there were 121 criminal prosecutions.¹⁶⁴ That means that only 1.8% of apprehensions resulted in criminal cases.

The Southern District of California sample thus indicates that a reasonable Border Patrol agent there would have a subjective expectation that only 1.8% of apprehensions would result in criminal charges. To perhaps put the matter more starkly, a reasonable agent would have a 98.2% certainty that, for any particular arrest, there would be no criminal charges.

And, as we look backwards, the likelihood of prosecution decreases significantly. In the past three years, prosecutions have generally been up while apprehensions have been dropping,¹⁶⁵ making the likelihood of criminal prosecution higher today than ever before (or, conversely, the likelihood of prosecution lower in the past than it is today).¹⁶⁶ In 1996, for example, apprehensions numbered 1.6 million, and total immigration prosecutions numbered a mere 8000.¹⁶⁷ And the 85% referral rate from

162. The rest were ICE jail sweeps, referrals from local law enforcement, or port-of-entry apprehensions. The data suggests that, as a rule of thumb, at least for the Southern District of California, we can look at the number of reported immigration prosecutions and take two-thirds of that as the number of cases originating with the Border Patrol. Primary data on file with co-author Caleb Mason.

163. Primary data on file with co-author Caleb Mason. In fact, 2010 was a low year for apprehensions nationwide—the lowest in decades—down from highs of almost 1.7 million earlier in the decade. MEISSNER ET AL., *supra* note 136, at 3.

164. See *supra* notes 162–64 and accompanying text.

165. *Decline in Federal Criminal Immigration Prosecution*, TRAC IMMIGRATION, available at <http://trac.syr.edu/immigration/reports/283/>; see also Julia Preston, *Arizona Border Quiets after Gains in Security*, N.Y. TIMES, Mar. 16, 2013, at A1 (noting a 78% decline in apprehensions along the Arizona border from 2005 to present).

166. See *supra* note 165 and accompanying text.

167. U.S. CUSTOMS & BORDER PROT., U.S. DEP’T OF HOMELAND SEC., UNITED STATES BORDER PATROL: NATIONWIDE ILLEGAL ALIEN APPREHENSIONS FISCAL YEARS 1925–2011 (2011) (documenting nearly 1.6 million apprehensions in 1996); *DHS-Immigration*

2008 likely cannot be used because the Border Patrol in 1996 was less than one-half its 2008 size.¹⁶⁸ But even assuming that the 85% rate could apply, that would generate 6800 prosecutions from 1.6 million apprehensions.¹⁶⁹ The result is just *four tenths of one percent*. In other words, for any given arrest, the Border Patrol agent in 1996 would have had a reasonable belief that there was a 99.6% chance that criminal charges would not be filed. How, in such circumstances, could questioning reasonably be held to have been done “with an eye toward [criminal prosecution]”?¹⁷⁰

So, in short, depending on the temporal and geographical breadth of the framing analysis, the statistics show a range of less than 1% to as much as 20%, as a reasonable *ex ante* expectation of the likelihood that a given apprehension will result in a criminal prosecution.¹⁷¹ The highest percentage the statistics currently permit is 20%, unless a particular district has a higher prosecution rate. In such a district, obviously, defendants would have a stronger claim that statements elicited from the putative aliens were testimonial.

Assuming for the moment that the 20% figure is aberrant (the result of having high numbers of prosecutions as holdovers from previous charging policies while having low numbers of apprehensions as Border Patrol activities have been scaled back), and taking the 2008 figure of just slightly less than 8%, can one reasonably conclude that an outcome with only an 8% likelihood is the primary purpose of a particular interaction? A gut-level reaction is no, particularly given that substantially more than 8% of the apprehensions will result in civil deportation. Perhaps the answer to the same question for the 20% figure is yes.¹⁷²

Convictions, by Court, FY2004, supra note 123 (documenting approximately 8,000 criminal prosecutions in 1996).

168. U.S. CUSTOMS & BORDER PROT., U.S. DEP'T OF HOMELAND SEC., UNITED STATES BORDER PATROL: BORDER PATROL AGENT STAFFING BY FISCAL YEAR (2011) (noting that from 1996 to 2008 the number of Border Patrol agents increased from 5942 to 17,499).

169. *Immigration Prosecutions at Record Levels, supra* note 154 (noting an 84.8% referral rate in 2009); *Surge in Immigration Prosecutions Continues, supra* note 155 (noting an 87% referral rate in 2008). To determine the 6800 prosecutions, we took 85% (referral rate) of the 8000 total prosecutions.

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

171. See *supra* note 156 for further information regarding the 20% figure.

172. The ability of the framework in this Article to adapt to these new and changing circumstances supplies even more reason to adopt this flexible approach that is rooted in objective fact.

Other factors may complicate the analysis: For example, is there another obvious possible primary purpose candidate? Are there other contexts in which courts have treated an unlikely eventuality as the “primary” purpose of government action?¹⁷³ And most immediately, for litigation, what should be done about the disparity between the national and regional figures? Further, what level of generality should be used?

Which numbers should courts use? A good case can be made that the best numbers will be those from the district itself, and not national numbers. Numbers from, for example, the Southern District of Texas are not intuitively relevant to the Southern District of California—or to a northern border state like North Dakota—especially given that the Southern District of Texas has adopted the streamline program and the Southern District of California has refused to do so.¹⁷⁴ On the other hand, one could argue that, at least to the extent Border Patrol training is uniform and the apprehension methodology taught and practiced by agents is independent of the prosecution strategies developed by U.S. Attorneys’ Offices, the national numbers could be used. A court might also consider it relevant whether agents in the field were aware of the local U.S. Attorney’s Office’s charging policies. Knowledge of charging policies might change the result of the primary purpose inquiry.

And, of course, the whole debate would be merely academic if a court held that even the highest estimate of relative likelihood—20%¹⁷⁵—is, as a matter of law, too low to count as “primary.” A court might well hold that, given that there is another and more predominant purpose, namely, civil deportation, these interactions are not initiated for the primary purpose of securing evidence in a criminal prosecution—even if criminal prosecution results in 20% of the interactions. The Border Patrol’s primary mission is to keep aliens from getting in—not necessarily to prosecute them criminally afterwards.¹⁷⁶ The key doctrinal point is that the Court’s Confrontation Clause test focuses on “primary”

173. This Article does not mean to suggest that qualitative analysis should not be considered in the primary purpose analysis, only that quantitative analysis should substantially inform the inquiry. *See supra* note 121 and accompanying text.

174. Lauren Gambino, *Program Prosecutes Illegal Immigrants Before Deporting Them*, ASU NEWS21, <http://asu.news21.com/2010/prosecuting%20-illegal-immigrants/> (last visited Jan. 17, 2013); *see also supra* note 158 and accompanying text (regarding Operation Streamline).

175. *See, e.g., supra* note 156 and accompanying text.

176. *See About CBP*, U.S. DEP’T OF HOMELAND SEC., <http://www.cbp.gov/xp/cgov/about/> (last visited Jan. 15, 2013).

purpose, not “one among several coexisting purposes.”¹⁷⁷

No one would claim that Border Patrol agents are unaware of the possibility of prosecution. But foreseeability is simply not the Supreme Court’s test.¹⁷⁸ An 8% likelihood of prosecution cannot be the “primary” or predominant outcome. A 20% likelihood moves substantially closer to the “primary” mark.

2. Intake Policies

Finally, much will depend on the nature of the district’s apprehension and, as noted above, intake guidelines. For example, in an unpublished post-*Crawford* decision, the Ninth Circuit analyzed a port-of-entry smuggling case and held that the agent’s interaction with the smuggled alien, after the arrest of the smuggler, was testimonial because of the local U.S. Attorney’s charging policies.¹⁷⁹ Thus, at the driver’s trial the agent could not present the statement from the smuggled alien that he was from Mexico.¹⁸⁰ Such testimony violated the Confrontation Clause because criminal prosecution was likely.¹⁸¹

The court explained:

We conclude that the witness’s statement that he was a citizen of Mexico, made during an interrogation being conducted as part of the investigation immediately following Solorio’s arrest, was testimonial. *See Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 2273, 165 L.Ed.2d 224 (2006) (holding that statements in response to police interrogation are testimonial “when the circumstances [surrounding their giving] objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the investigation is to establish or prove past events potentially relevant to a later criminal prosecution”).¹⁸²

This analysis is probably right, assuming that the interview of the smuggled alien occurred after a reasonable agent would have determined that the smuggling case met the district’s intake guidelines.¹⁸³

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

178. *Id.*; *see supra* note 90 and accompanying text (regarding the differences between foreseeability and primary purpose).

179. *United States v. Solorio-Gonzalez*, 188 Fed. Appx. 631, 634 (9th Cir. 2006).

180. *Id.*

181. *Id.*

182. *Id.* (alteration in original) (omissions in original) (citing *Davis v. Washington*, 547 U.S. 813 (2006)).

183. The fact of arrest is not sufficient because Border Patrol may arrest aliens for civil

If the case had been, for example, a run-of-the-mill trunk case with one or two occupants, then the outcome should change, since these cases are rarely prosecuted as the statistics explored above readily show. In the usual scenario, reasonable agents will know that the trunk case does not meet intake guidelines and thus will not be prosecuted. Therefore, in the usual scenario, the *Solorio-Gonzalez* reasoning for finding a statement testimonial because of the strong likelihood of prosecution should not apply.

Indeed, in the *Miranda* context, the Ninth Circuit has held that custodial questioning on immigration status and nationality by immigration agents is categorically not “interrogation” where the purpose of the questioning is referral for civil deportation.¹⁸⁴ By contrast, where a prosecutorial purpose can be inferred, custodial questioning is “interrogation” for *Miranda* purposes.¹⁸⁵

The *Miranda* test, of course, with respect to its definition of “interrogation,” sweeps much more broadly than the Confrontation Clause test with respect to its definition of “testimonial.” The *Miranda* test asks whether incrimination is “reasonably likely” to result from the custodial interview.¹⁸⁶ But in answering that question, courts do examine “purpose” evidence, which would certainly bear on the Confrontation Clause analysis as well.¹⁸⁷ For example, the Ninth Circuit analyzed one *Miranda* challenge as follows:

The responses elicited from Gonzalez–Sandoval by the [B]order [P]atrol agents were used to help prove the charges of illegal entry and being a deported alien found in the United States. Agent Vasquez had reason to suspect that Gonzalez–Sandoval was in this country illegally and the questions he posed were “reasonably likely” to elicit responses which would substantiate the charge that Gonzalez–Sandoval had violated 8 U.S.C. §

immigration infractions. See 8 U.S.C. § 1357 (2006) (vesting Border Patrol agents with authority “to arrest any alien . . . entering or attempting to enter the United States in violation of any law or regulation made in pursuance of [immigration] law”).

184. *United States v. Salgado*, 292 F.3d 1169, 1174 (9th Cir. 2002).

185. *United States v. Gonzalez–Sandoval*, 894 F.2d 1043, 1046–47 (9th Cir. 1990).

186. *Rhode Island v. Innis*, 446 U.S. 291, 301–02 (1980). Of course, *Miranda* is also narrower than the Confrontation Clause in that it applies only to “custodial” interrogation, while the Confrontation Clause has no such limit. *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

187. *Innis*, 446 U.S. at 305 (Marshall, J., dissenting).

1326.¹⁸⁸

Query what answer might result on the same fact pattern in a Confrontation Clause challenge. Given the statistics for prosecution, it would seem that the fact the agent had “reason to suspect” criminal activity would not suffice to make the statement testimonial,¹⁸⁹ even though it did suffice to render the interaction “interrogation” for *Miranda* purposes. Indeed, the case illustrates the difference between the two doctrines.¹⁹⁰ *Miranda* is an objective test about the likely prosecutorial utility of the information disclosed¹⁹¹ (and about whether a reasonable person in the defendant’s position would have felt free to leave, an inquiry not implicated here), while the Confrontation Clause test, even as refracted through the objective “reasonable observer” lens of the *Bryant* analysis, is about the *primary purpose* of the conversation.¹⁹² The likelihood of an outcome is not commensurate with its primary purpose.¹⁹³

Thus, a reasonable Border Patrol agent who knows the local intake policies may find good reason to tread lightly for both *Miranda* and Confrontation Clause purposes (at least insofar as the agent cares about the admissibility of statements made by the person whom he is questioning). On the *Miranda* side, the bar for interrogation is rather low—whether incrimination is reasonably likely; on the Confrontation Clause side, a case that meets a region’s intake policies is well on its way to criminal prosecution, thereby potentially tripping the primary purpose trigger.

B. Wider Applications

In sum, our proposal regarding the primary purpose test for Confrontation Clause analysis builds on two of the principal holdings from Supreme Court precedent: First, that classification of a government agent’s primary purpose is a practical, fact-intensive inquiry;¹⁹⁴ and second, that there are numerous possible government-

188. *Gonzalez-Sandoval*, 894 F.2d at 1047.

189. *Id.*

190. That is, there will be situations in which a statement taken from a witness will be suppressed as against that witness per *Miranda*, but will be admissible against third parties per *Davis* and *Bryant*.

191. *See Miranda*, 384 U.S. at 478–79.

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

193. *See id.*

194. *Michigan v. Bryant*, 131 S. Ct. 1143, 1162 (2011).

agent purposes for gathering information other than investigation in preparation for prosecution, and that if any of those alternative purposes is primary, then the statement is nontestimonial.¹⁹⁵ We may now consider the statistical likelihood of prosecution, and speculate with some reasonable confidence about other applications of the primary purpose doctrine outside of police emergency response.

1. Community Caretaking

Statements made in “community caretaking” investigations have not been analyzed by any court as a distinct Confrontation Clause modality.¹⁹⁶ Courts have long recognized community caretaking as conceptually distinct from emergencies and investigating past crimes.¹⁹⁷

Forty years ago, in *Cady*, the Supreme Court recognized the “community caretaking” function of police:

Some [police–citizen] contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community *caretaking* functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.¹⁹⁸

Bryant opens up space for the government to argue that statements taken by police in their caretaking function are like those taken in their emergency response function—that is, not investigative and thus not testimonial. It does not appear that any case has yet so held.¹⁹⁹ Indeed, there are more than 1200 state cases discussing the community caretaking function, but only three of them in the same paragraph as “testimonial”—and those are all pre-*Davis*.²⁰⁰

195. *Id.* at 1155.

196. *See infra* note 200 and accompanying text.

197. *See Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

198. *Id.* (emphasis added).

199. An AllFeds in a WestLaw Classic search returned zero results for (caretaking & testimonial & *Bryant*), indicating that no federal court has had yet analyzed the caretaking function in light of *Bryant*. WESTLAW, <http://westlaw.com> (last visited Jan. 28, 2013) (subscription required). An AllStates search yielded one result, but the court was not citing to the U.S. Supreme Court’s Confrontation Clause case. Thus, no court appears to have confronted this issue. *Id.*

200. And all are from Massachusetts. *Commonwealth v. Tang*, 845 N.E.2d 407, 412

2. Drunk Driving Checkpoints

Another example is the drunk-driving checkpoint. In 1990, the Supreme Court held that a State's use of highway sobriety checkpoints does not violate the Fourth Amendment, despite the lack of particularized suspicion for the stops.²⁰¹ The Court's reasoning with respect to the Fourth Amendment may prove instructive regarding the statistical analysis proposed in this Article for determining whether an interaction is "testimonial" under the Sixth Amendment.

In *Michigan Department of State Police v. Sitz*, the Supreme Court concluded that there is a drunk-driving epidemic in the United States, and that, annually, 25,000 people die because of alcohol-related accidents.²⁰² At the particular checkpoint involved in that case, 126 vehicles entered the checkpoint, and only two drivers were arrested.²⁰³ That is, about 1.6% of the drivers were arrested.²⁰⁴ For purposes of the Confrontation Clause, this small number of arrests compared to stops suggests that the primary purpose of the roadblock was not to arrest drivers for a later criminal prosecution for drunk driving, but to prevent drunk driving in the first place.²⁰⁵ Indeed, that is what the Court found with respect to the Fourth Amendment case: The State had a strong interest in "preventing drunken driving,"²⁰⁶ not just in arresting people who were driving drunk.

3. General Crime Control: New York City Stop-and-Frisk Interactions

New York City's "stop-and-frisk" interactions provide another example. Suppose an NYPD officer stops and frisks a young man—something that happens around seven hundred thousand times a year in New York City.²⁰⁷ The officer grabs young Billy, pushes him up against the wall, and pats him down. While doing so, he asks: "Do you have any weapons?" Billy says, "No, but I just saw Johnny hiding a gun under

(Mass. App. Ct. 2006).

201. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

202. *Id.* at 451.

203. *Id.* at 454.

204. *Id.* at 455.

205. Moreover, even if the motivation was to catch drunk drivers, primary purpose is determined objectively (not subjectively), and, this Article suggests, that determination should be informed, at least in part, by statistical evidence of likelihood of outcome. The very low likelihood of arrest belies a primary purpose of criminal investigation.

206. *Sitz*, 496 U.S. at 455.

207. *Stop and Frisk Data*, NYCLU, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Jan. 11, 2013).

that trash can when you came walking up.” Johnny, it turns out, is a suspect in a murder case. The District Attorney (DA) had a weak circumstantial case against Johnny, but has a better one once the officer recovers the gun and a crime lab matches it to the murder weapon. However, the DA still has no forensic evidence linking the gun to Johnny, so the statement from Billy during the stop-and-frisk becomes a crucial link in the evidentiary chain at trial. But Billy disappears before Johnny’s trial. May the government have the officer testify to Billy’s statement? The testimony may fit within Federal Rule of Evidence 803(1), present sense impression, or some other exception; if so, there is no hearsay problem.²⁰⁸ But does Billy’s statement nonetheless run afoul of the Confrontation Clause?

The court must look at the primary purpose of the interaction between the officer and Billy.²⁰⁹ Was it the development of facts for criminal prosecution? Does it matter if it was for development of facts for a criminal prosecution in general or the criminal prosecution of Johnny in particular?²¹⁰ Or was the stop-and-frisk for something entirely different from criminal prosecution? As it turns out, the NYPD has had in place, for more than two decades, a policy of widespread stop-and-frisk policing that, statistically, appears to have very little relationship to the prosecution of crimes.²¹¹

According to the most recent data, collected by the NYPD itself, of the approximately 685,000 people stopped and frisked in 2011 in New York, only 12% were arrested or issued summonses.²¹² That percentage has been steady for the full ten-year period for which the department has data.²¹³ And those data are citywide. Some precincts had even lower percentages.²¹⁴ For example, in the Bushwick precinct in Brooklyn, for

208. The rationale underlying the present sense impression exception is the unlikelihood of fabrication; however, when a police officer grabs a person and frisks him, that person may be trying to deceive the officer.

209. *Davis v. Washington*, 547 U.S. 813, 822 (2006). We also have to know whether the *Williams* plurality’s new test for primary purpose becomes the law. In this scenario, Johnny is a murder suspect, but he is not *the* target murder suspect for *the particular gun* about which Billy told the officer. Under at least the plurality’s test, Billy’s statement does not seem to be testimonial even if the purpose of the interaction was to obtain evidence for a future criminal prosecution of someone.

210. The plurality in *Williams* indicates the latter, but only four Justices have adopted that new test. *Williams v. Illinois*, 132 S. Ct. 2221, 2238 (2012).

211. *Stop and Frisk Data*, *supra* note 207.

212. *Id.*

213. *See id.*

214. RAYMOND W. KELLY, NYC POLICE DEP’T STOP QUESTION & FRISK ACTIVITY:

the calendar year 2006, only 2% of stop-and-frisks resulted in arrests and 4% in summonses; thus, for a given stop-and-frisk encounter in Bushwick, there was an *ex ante* 94% likelihood that the encounter would not lead to any criminal proceedings.²¹⁵

As with Border Patrol stops, one has to ask: Does it make sense to label as primary an outcome that happens approximately 10% of the time? If the New York City program were new and experimental, it might make more sense to treat primary purpose differently because statistics on criminal prosecutions would be unknown. But the New York City program is twenty years old and has been dramatically expanded over the past decade. From 2001 to 2011, the total number of stop-and-frisks has risen from around 97,000 to 686,000.²¹⁶ This program can be conceptualized not as criminal investigation, but rather as a “public safety” program,²¹⁷ with the measure of success being guns seized rather than criminal prosecutions initiated.²¹⁸

And considering the perspective of the reasonable person stopped and frisked, as *Bryant* requires, may also lead to an interpretation of the interaction that is not primarily focused on collecting evidence for prosecution. As a number of commentators have pointed out, young black men in high-stop-and-frisk neighborhoods perceive stops-and-frisks as a show of force, a brute demonstration of who is in charge, not

REPORTS PREPARED DURING THE PERIOD JANUARY 1 THROUGH MARCH 31, 2006, at 2 (2006).

215. *Id.*

216. *Stop and Frisk Data*, *supra* note 207. The yearly totals are as follows: 2002: 97,000; 2003: 161,000; 2004: 314,000; 2005: 398,000; 2006: 506,000; 2007: 472,000; 2008: 540,000; 2009: 581,000; 2010: 601,000; 2011: 685,000. *Id.*

217. See Caleb Mason, *The Police-Prosecutor Relationship and the No-Contact Rule: Conflicting Incentives After Montejo v. Louisiana and Maryland v. Shatzer*, 58 CLEV. ST. L. REV. 747, 770–71 (2010).

218. That is, if the goal is simply to seize guns rather than to convict defendants, then the actual stop-and-frisk practices make more sense. See, e.g., David Kocieniewski, *Success of Elite Police Unit Exacts a Toll on the Streets*, N.Y. TIMES, Feb. 15, 1999, at A1.

Some street crimes officers also said they felt pressured by the department’s emphasis on crime statistics, and that they are forced to adhere to an unwritten quota system that demands that each officer seize at least one gun a month. “There are guys who are willing to toss anyone who’s walking with his hands in his pockets,” said an officer, who spoke on the condition of anonymity. “We frisk 20, maybe 30 people a day. Are they all by the book? Of course not; it’s safer and easier to just toss people. And if it’s the 25th of the month and you haven’t got your gun yet? Things can get a little desperate.”

Id.

as a method of gaining evidence for prosecution.²¹⁹ That interpretation of the interaction—while not one the government is likely to publicly endorse—is certainly not “establish[ing] or prov[ing] past events potentially relevant to a later criminal prosecution.”²²⁰ Indeed, part of the complaint is precisely that the police engaged in stop-and-frisk patrols are *not* particularly focused on investigating crime.²²¹

So for political reasons among others, the government might not want to make the argument that stop-and-frisk interactions are nontestimonial on the grounds that criminal prosecution is such an unlikely eventuality. But the argument is there to be made, and the statistics amply support it.

4. Other Potential Applications

Nor has the existing case law addressed the general methodological question about applying the primary purpose analysis to any of the big multifunction agencies. The framework suggested in this Article may be applied outside Border Patrol contexts to other agencies’ interactions as well. For example, Central Intelligence Agency interrogations later introduced as evidence against third parties; statements taken by “intelligence” units within the Federal Bureau of Investigation that do not generally refer cases for prosecution; statements taken by military personnel, especially in places in which the military has worked closely with both intelligence services and U.S. law enforcement, and where some in-country detainees have ultimately been charged and tried in the United States;²²² statements taken by officers of various regulatory agencies (such as EPA, FDA, SEC, and DEA) while the agents are serving a regulatory function; school security encounters with students;

219. Tovah Renee Calderon, *Race-Based Policing from Terry to Wardlow: Steps Down the Totalitarian Path*, 44 HOW. L.J. 73, 79–80 (2000) (discussing the racially discriminatory use of the stop-and-frisk and its perception by the black community in New York City); see also Joseph Goldstein, *A Focus on 3 Encounters in a Stop-and-Frisk Trial*, N.Y. TIMES, Mar. 15, 2013, at A15, available at <http://www.nytimes.com/2013/03/19/nyregion/focus-on-3-encounters-as-trial-begins-on-stop-and-frisk-tactic.html> (discussing a class action lawsuit regarding the NYPD’s policy of “stopping hundreds of thousands, or even millions, of black and Hispanic men and boys in the street”).

220. *Davis v. Washington*, 547 U.S. 813 (2006).

221. See *Stop and Frisk Facts*, NYCLU, <http://www.nyclu.org/node/1598> (last visited Jan. 11, 2013).

222. *Foreign Cooperative Investigations*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/ops/fci.shtml> (last visited Jan. 11, 2013). Most obviously Afghanistan, but also Latin America, where DEA overseas “rapid response” paramilitary task-forces work closely with local governments. *Id.*

Transportation Security Administration airport encounters; the list goes on and on.

Or, for a chilling example, assume the 24²²³-type example: Jack Bauer has two terrorist suspects in custody. There is a ticking time bomb in New York City. Jack beats one of the suspects until he confesses that the two suspects did plant a bomb, and he tells the agents where they hid the bomb. The agents deactivate the bomb and save the City. The suspect who confessed dies, and in the prosecution of the surviving suspect, the agents testify about the co-conspirator's statements. Does this violate the Confrontation Clause?²²⁴ Does it matter if Jack would testify that he questioned the suspects to save the City, not to acquire evidence for their eventual criminal prosecution (although he certainly was aware of the possibility)? In none of these areas has any Confrontation Clause case law yet developed. But this Article suggests a fruitful framework for analyzing these and other cases.

IV. CONCLUSION

What factors make a statement “testimonial” for Confrontation Clause purposes? What factors should courts examine to determine when criminal prosecution is the primary purpose of a potential defendant's interactions with an agent? In *Bryant*, the Court recognized that government agents serve a variety of missions, many of which are not aimed primarily at obtaining evidence for criminal prosecution. *Bryant* further teaches that the proper inquiry is a pragmatic assessment of the actual practices, policies, and working conditions of the government agents at issue, viewed from an objective standpoint.

Williams, which had been expected to clarify matters, unfortunately added a layer of complexity by unsettling the definition of primary purpose. But the muddling of what it means for a statement to have a particular primary purpose only underscores the need for a clearer test, such as the one proposed by this Article.

Determining whether an interaction has the primary purpose of gathering evidence for a criminal prosecution should include statistical analysis of the probability of future prosecution among the possible outcomes of a particular class of interactions performed by agencies that

223. 24 (Imagine Entertainment, 20th Century Fox Television, 2000–2010). This hypothetical is not taken from the show, but is of the type that might have been presented on it.

224. There may be an evidentiary issue as well. *See, e.g.*, FED. R. EVID. 801(d)(2)(E).

serve multiple functions, not all of which are prosecutorial. With such data, courts can attempt, in reasonably predictable and objective ways, to squeeze the square peg of multipurpose agencies into the round hole of the primary purpose test.