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NOTE

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INTRODUCTION

Three-year-old Nathan Siler told Detective Larry Martin that he wanted to see his mother who, Nathan claimed, was "sleeping standing" in the garage.[1] Tragically, Nathan's mother was dead, hanging from a "yellow cord tied to the track of the overhead garage door."[2] Nathan told Martin that he had seen his father, Brian Siler, and mother fight in the garage the night before and that his father had placed a "yellow thing" around his mother's neck.[3] But Nathan apparently did not understand his mother was dead.

1. State v. Siler, 116 Ohio St. 3d 39, 2007-Ohio-5637, 876 N.E.2d 534, at ¶ 8, *cert. denied*, 128 S. Ct. 1709 (2008) (internal quotation marks omitted).

2. *Id.* at ¶ 6.

3. *Id.* at ¶ 13.

Because Nathan did not testify at Brian's murder trial and the trial court admitted Nathan's statements as evidence without Brian's counsel ever cross-examining Nathan, Brian claimed that the trial court had violated his Sixth Amendment right to confront the witnesses against him.[4] The Sixth Amendment of the U.S. Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[5] In *Crawford v. Washington*, the U.S. Supreme Court held that a "witness[] against" the accused was one "who bear[s] testimony."[6] According to the Court, the Confrontation Clause was primarily concerned with "testimonial hearsay."[7] Thus a witness is a person who makes a statement that is "testimonial" by nature. Based on this definition, the Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[8] Brian claimed that his son, Nathan, was such a witness.

In *Davis v. Washington*,[9] the Court further clarified the meaning of testimonial. The Court held that:

> [s]tatements 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.[10]

Commentators have referred to this standard as the primary-purpose test.

Following the *Davis* primary-purpose test, the Ohio Supreme Court ruled that Nathan's age and limited understanding were irrelevant when deciding whether Nathan's statements to Martin were testimonial.[11] The court concluded that because Martin's primary purpose in questioning Nathan was to "establish past events possibly relevant to a criminal prosecution,"[12] Nathan's statements were testimonial. In other words, Nathan was acting as a witness. Because Nathan did not testify at Brian Siler's trial, the Ohio Supreme Court held that the trial court violated Brian Siler's "right . . . to be confronted with the witnesses against him."[13]

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4. *See id.* at ¶ 16.
5. U.S. CONST. amend. VI.
6. 541 U.S. 36, 51 (2004) (internal quotation marks omitted).
7. *Id.* at 53.
8. *Id.* at 53-54.
9. 547 U.S. 813 (2006).
10. *Id.* at 822.
11. *See* State v. Siler, 116 Ohio St. 3d 39, 2007-Ohio-5637, 876 N.E.2d 534, at ¶¶ 38-42.
12. *Id.* at ¶ 44.
13. U.S. CONST. amend. VI; *see also Siler* at ¶¶ 1-2.

The Ohio Supreme Court's decision in *State v. Siler* frames two key issues: First, under the U.S. Supreme Court's interpretation of the Confrontation Clause in *Crawford* and *Davis*, can a court consider a declarant's perspective when determining whether an out-of-court statement to a law enforcement official is testimonial? Second, if the declarant is a child, can a court consider subjective factors such as a child's age, intelligence, and experience or only consider out-of-court statements from a purely objective witness's perspective?

A majority of state courts have interpreted *Davis* just as the Ohio Supreme Court has, holding that because a declarant's perspective is irrelevant under the primary-purpose test, it need not consider whether a child's age, intelligence, or experience should factor into its calculus. To these courts, the controlling question is whether the declarant makes statements during an ongoing emergency and whether the law enforcement official or law enforcement agent's primary purpose was "to establish or prove past events potentially relevant to later criminal prosecution."[14]

As courts have applied *Davis* to child declarants, they have not adequately considered a rationale and line of precedent noted in *Crawford* that more aptly applies to young children—*Bourjaily v. United States*.[15] The *Crawford* Court stated that certain statements were "by their nature . . . not testimonial," such as "statements in furtherance of a conspiracy."[16] This conclusion seemed so obvious that the Court did not explain the rationale. Instead of a rationale, the Court simply cited *Bourjaily* as an example of a nontestimonial statement made in furtherance of a conspiracy.[17] Several federal courts of appeals have spelled out what seemed to strike the Court as obvious: a statement made in furtherance of a conspiracy is typically not testimonial because a coconspirator "would not anticipate his statements being used against the accused in investigating and prosecuting the crime."[18] Even after *Davis*, this rationale is still alive. The *Davis* Court stated, "[O]f course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate."[19] Similar to a coconspirator, children who do not understand that they are reporting wrongful conduct cannot understand that they are making statements that could have negative consequences for a suspect. Without that understanding, a child declarant is making a statement that, "by [its] nature,"[20] is not testimonial.

In contrast to state courts' rigid application of *Davis*, the federal courts of appeals's interpretation of *Bourjaily* accounts for the core characteristic of a

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

15. 483 U.S. 171 (1987).

16. Crawford v. Washington, 541 U.S. 36, 56 (2004).

17. *See id.* at 58.

18. United States v. Martinez, 430 F.3d 317, 329 (6th Cir. 2005), *cert. denied*, 547 U.S. 1034 (2006); *see also* cases and authorities cited *infra* note 138.

19. *Davis*, 547 U.S. at 823 n.1.

20. *Crawford*, 541 U.S. at 56.

testimonial statement—a statement's accusatory nature. That same rationale should extend to child declarants. To determine whether a child declarant's statement is testimonial, courts should both evaluate an out-of-court statement from a declarant's perspective and account for the subjective factors of a child's age, intelligence, and experience. At the same time, courts should recognize that a child can make an accusation and can anticipate that her statements could be relevant to a criminal investigation. Therefore, a statement should be testimonial when a reasonable child of like age, intelligence, and experience would understand that her statement is an accusation that will adversely affect the perpetrator or that the information is relevant to an investigation. This approach to testimonial hearsay will better preserve the American ideal that when someone "accuses you, he must come up in front. He cannot hide behind the shadow."[21] The state courts' inflexible interpretation of *Davis* has diluted this ideal by placing the onus of confronting the accused on children who have not made an accusation.

This Note advocates a reasonable-child approach to child declarants under the Confrontation Clause. As further explained in Part III.A, a reasonable-child approach is superior to the primary-purpose test and a purely objective- or purely subjective-witness test because it better (1) comports with the Court's coconspirator jurisprudence; (2) reflects that the Confrontation Clause protects against admitting accusations and statements relevant to a criminal investigation; (3) accounts for the responsibility Americans expect of witnesses; and (4) avoids the unreliability of a purely subjective standard. The Note borrows the reasonable-child approach from tort law, including considerations of age, intelligence, and experience.[22] Accordingly, this approach to the Confrontation Clause uses an objective standard that considers subjective factors to account for a child's perspective.[23] And though the reasonable-child approach is an objective standard, this Note advocates a position different from Professor Richard Friedman, who has argued in favor of a purely objective standard that would exclude some very young children with limited understanding from the ambit of the Confrontation Clause.[24] However,

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21. Coy v. Iowa, 487 U.S. 1012, 1018 (1988) (quoting Press Release, President Dwight Eisenhower, Remarks to the B'nai B'rith Anti-Defamation League (Nov. 23, 1953), *quoted in* Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 381 (1959)).

22. *See* RESTATEMENT (SECOND) OF TORTS § 283A (1965).

23. Though some people might find it misleading to refer to a child as reasonable, this Note will use the term "reasonable child" to underscore the direct parallel to tort law, which consistently uses the term "reasonable child." The term itself prompts the reader to consider how a reasonable person at the child's age would understand his situation.

24. *See* Richard D. Friedman, *Grappling with the Meaning of "Testimonial*," 71 BROOK. L. REV. 241, 243 (2005); The Confrontation Blog, http://confrontationright.blogspot.com/2008/01/children-and-forensic-interviews.html (Jan. 7, 2008, 14:50 EST). Professor Friedman has recognized that some young children may be so undeveloped that their statements are not testimonial. He has stated that the Confrontation Clause should not cover such children's statements. Aside from those very young children,

this Note will draw upon some of Friedman's arguments in favor of viewing the Confrontation Clause from the declarant's perspective. In addition, the Note will offer an original argument based on *Bourjaily* and a detailed exposition of how a reasonable-child approach would apply to recent cases.

The discussion below will demonstrate why recognizing the child declarant's perspective is preferable. In Part I, the Note will describe how the Court has recently changed the Confrontation Clause doctrine to emphasize the Clause's procedural mandate and testimonial statements. In Part II, the Note will summarize how state and federal courts have applied *Crawford* and *Davis* to child declarants and why a majority of state courts have adopted an approach inconsistent with the Court's recasting of *Bourjaily*. In Part III, the Note will explain the reasonable-child-declarant approach in detail and provide four reasons why a test should both evaluate out-of-court statements from a declarant's perspective and account for the subjective factors of a child's age, intelligence, and experience. In Part IV, the Note will rebut counter arguments to a reasonable-child approach. And finally, in Part V, the Note will analyze two recent cases in which reasonable child declarants may not have understood they were reporting wrongful conduct.

I. THE U.S. SUPREME COURT SHIFTED FROM FOCUSING ON RELIABILITY TO FOCUSING ON TESTIMONIAL HEARSAY

The U.S. Supreme Court's Confrontation Clause jurisprudence has changed dramatically in the past five years. Under the Court's previous jurisprudence, the Court largely interpreted the Confrontation Clause to protect against admitting *unreliable* hearsay. Consequently, a Confrontation Clause challenge lived or died based on the exception to hearsay a trial court used to admit an out-of-court statement. In *Crawford*, the Court shifted from focusing on the substantive reliability of a hearsay statement to focusing on the main procedural safeguard in the text of the Clause—the defendant's right to confront witnesses against him. Instead of viewing the Confrontation Clause as protecting the same values as the rule against hearsay, the Court now focuses on which declarants function as a "witness against" the accused. Under *Crawford*, the most important question is who functions as a witness, thus overruling the *Ohio v. Roberts* two-prong test. The *Roberts* Court had held that a court could admit a hearsay statement without violating the Confrontation Clause if the prosecutor could demonstrate that the declarant was unavailable to testify and that the statement was reliable.[25]

Though the *Roberts* test is dead, several of the Court's cases under *Roberts* remain good law and are still relevant to how the Confrontation Clause applies

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he advocates evaluating out-of-court statements from a purely objective adult perspective without the declarant's age taken into account. *See infra* notes 118-19 and accompanying text.

25. *See* discussion *infra* Part I.A.

to a child declarant. One cannot understand the arguments for or against a reasonable-child-declarant approach without understanding how the Court applied *Roberts* to statements made in the furtherance of a conspiracy and statements by child declarants. Below is a brief summary of the relevant cases under *Roberts* and the Court's current jurisprudence to preface the argument in favor of a reasonable-child-declarant approach.

A. *In* Ohio v. Roberts, *the Court Created Its Two Prongs of Unavailability and Reliability*

The Court first outlined its previous Confrontation Clause doctrine in *Ohio v. Roberts*.[26] In *Roberts*, the State of Ohio charged Herschel Roberts with forging a check in Bernard Isaacs's name and possession of the Isaacs' stolen credit cards.[27] At trial, Herschel claimed that Anita Roberts, the Isaacs's daughter, had given him permission to use her parents' checkbook and credit cards.[28] Under an Ohio hearsay exception for unavailable witnesses, the State offered a transcript of Anita's preliminary hearing testimony in which Anita refused to corroborate Herschel's story.[29] Crediting Anita's testimony, the jury convicted Herschel.

On appeal, Herschel argued that admitting Anita's testimony violated his confrontation rights because Anita was unavailable at trial. The U.S. Supreme Court disagreed.[30] In holding that the trial court properly admitted Anita's out-of-court statements, the *Roberts* Court established a two-prong test to determine if admission of hearsay evidence violated the Confrontation Clause. First, the Court required the prosecution to "either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."[31] This Note will refer to this first prong as the *Roberts* unavailability prong. Second, when the declarant is unavailable, the statement "is admissible only if it bears adequate 'indicia of reliability.'"[32] The Court explained that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception," or through "a showing of particularized guarantees of trustworthiness."[33] This Note will refer to this second prong as the *Roberts* reliability prong. The Court concluded that Anita's statements satisfied both the unavailability and reliability prongs because even the Isaacs did not know of their daughters' whereabouts and Herschel's

26. 448 U.S. 56 (1980).
27. *See id.* at 58.
28. *See id.* at 58-59.
29. *See id.*
30. *See id.* at 77.
31. *Id.* at 65.
32. *Id.* at 66.
33. *Id.*

attorney had "tested Anita's testimony with . . . significant cross-examination."[34]

B. *In* Bourjaily v. United States *and* White v. Illinois, *the Court Only Required that Trial Courts Admit Coconspirator Statements and Spontaneous Declarations Under Firmly Rooted Hearsay Exceptions*

The Court's treatment of statements made in the furtherance of a conspiracy and statements from child declarants demonstrate how critical reliability became for Confrontation Clause challenges. The Court first applied *Roberts* by holding that the unavailability prong was inapplicable to statements made in the furtherance of a conspiracy,[35] and then in *Bourjaily v. United States*,[36] the Court held that statements made in the furtherance of a conspiracy satisfied the *Roberts* reliability prong because the hearsay exception for coconspirator statements was "firmly enough rooted."[37]

In *Bourjaily*, the district court admitted a coconspirator's tape-recorded statement against William John Bourjaily during his trial for conspiracy to distribute cocaine and possession of cocaine with intent to distribute.[38] In tape-recorded telephone conversations with a FBI informant, the coconspirator stated that he had a "gentleman friend" who had some questions about the informant's cocaine and then later arranged by telephone to purchase the cocaine and place it in his friend's car.[39] The coconspirator's "gentleman friend" turned out to be Bourjaily. On appeal, Bourjaily argued that the district court violated his confrontation rights by admitting the coconspirator's out-of-court statements because he had no opportunity to cross-examine the coconspirator.[40] The Court disagreed. In support of its holding that the coconspirator exception was firmly rooted, the Court noted that it had first approved of admitting coconspirator statements as res gestae over a century and

34. *Id.* at 70; *see also id.* at 70-75.

35. *See* United States v. Inadi, 475 U.S. 387 (1986). In *Inadi*, the Court stated that a prosecutor need not "show that a nontestifying co-conspirator is unavailable to testify, as a condition for admission of that co-conspirator's out-of-court statements." *Id.* at 388. The Court provided two main reasons for its holding. First, because the coconspirator's statements "are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court." *Id.* at 395. Second, because the declarant and the defendant's relationship changes from partners to suspects in a criminal investigation, the declarant may be unwilling to repeat the earlier statement. *Id.* Hence, the *Inadi* Court implied that a statement made in furtherance of a conspiracy was more reliable than a coconspirator's in-court testimony.

36. 483 U.S. 171 (1987).

37. *Id.* at 183.

38. *See id.* at 174.

39. *Id.* at 173-74 (internal quotation marks omitted).

40. *See id.* at 174.

a half ago and had repeatedly affirmed the hearsay exception ever since.[41] Because the Court had previously held that the *Roberts* unavailability prong was unnecessary and now held that the coconspirator exception was firmly rooted, the Court concluded that the requirements for admission under Federal Rule of Evidence 801(d)(2)(E) were identical to the requirements of the Confrontation Clause.[42]

Bourjaily also demonstrated that a coconspirator's statements need not actually further the conspiracy to survive a Confrontation Clause challenge. Because the *Bourjaily* coconspirator made statements to an FBI informant, neither the Confrontation Clause nor Rule 801(d)(2)(E) barred admission of mere *attempts* to further a conspiracy, even if the statement actually undermined the conspiracy.[43]

The Court's holding in *Bourjaily* foreshadowed how it would treat statements by child declarants. In *White v. Illinois*,[44] a four-year-old girl claimed that Randall White snuck into her bedroom at night, put his hand on her mouth, threatened to whip her if she screamed, and then touched her in the vaginal area.[45] A jury found White guilty of, inter alia, sexual assault.[46] On appeal, the Court addressed whether the *Roberts* unavailability prong applied to the girl's complaints of sexual abuse to five different people: the girl's baby sitter, her mother, a police officer, an emergency room nurse, and a doctor. The state trial court had admitted the little girl's first three statements under the spontaneous declaration hearsay exception because she made the statements minutes after Randall White's alleged sexual assault.[47] The trial court admitted the statements to the nurse and doctor under the medical treatment hearsay exception.[48]

Just as the Court had eliminated the unavailability prong for coconspirator's statements,[49] the Court held that a trial court need not find a declarant unavailable in *White* because of the substantial reliability of the child declarant's statements. The Court opined that because a declarant would offer a spontaneous statement without the opportunity to reflect, the statement may

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41. *Id.* at 183 (citing United States v. Gooding, 25 U.S. (12 Wheat.) 460 (1827)).

42. *Id*. at 183-84.

43. There is one common situation in which one might argue that coconspirator statements *are* testimonial . . . that is the case where a conspirator unwittingly talks to an undercover agent or informant whose purpose is to gather evidence to further an investigation or bring criminal charges. The coconspirator exception does apply to such statements, on the theory that the subjective purpose of the speaker . . . is all that counts. Hence such statements can be *attempts* to further a conspiracy even though in fact they undermine it.

4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8.27 (3d ed. 2007).

44. 502 U.S. 346 (1992).

45. *Id.* at 349.

46. *Id.*

47. *See id.* at 350.

48. *See id.* at 350-51.

49. *See* United States v. Inadi, 475 U.S. 387, 400 (1986).

actually be more trustworthy than a statement offered later in the calm setting of a court.[50] Similarly, because a false statement to medical professionals may cause misdiagnosis or mistreatment, in-court testimony could not recapture the circumstances that make the statement trustworthy.[51] Accordingly, the Court limited the *Roberts* unavailability prong to apply only to "challenged out-of-court statements [that] were made in the course of a prior judicial proceeding."[52]

As a prelude to *Crawford*, Justice Thomas wrote a concurrence discussing the original purpose of the Confrontation Clause. Joined by Justice Scalia, Justice Thomas opined that "[n]either the language of the Clause nor the historical evidence appears to support the notion that the Confrontation Clause was intended to constitutionalize the hearsay rule and its exceptions."[53] Justice Thomas would have limited the Confrontation Clause to cover "any witness who actually testifies at trial, . . . [and] is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[54] Even statements made to police officers would not automatically be subject to the confrontation right.[55] Justice Thomas noted that while statements to police officers "might be considered the functional equivalent of in-court testimony because [they] were made in contemplation of legal proceedings," analyzing whether the declarant contemplated legal proceedings would "entangle the courts in a multitude of difficulties."[56] Some of Justice Thomas's views found their way into the *Crawford* opinion, where the Court overruled *Roberts* and changed course.

C. *In* Crawford v. Washington *and* Davis v. Washington, *the Court Shifted Its Focus from Reliability to Testimonial Hearsay*

Fourteen years after *Roberts*, the Court departed from its emphasis on reliability.[57] "[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[58] To determine which declarants must be tested by cross-examination, the *Crawford* Court concentrated on whom exactly was a witness within the meaning of the Clause. The Court opined that

50. *White*, 502 U.S. at 356.
51. *Id.*
52. *Id.* at 354.
53. *Id.* at 366 (Thomas, J., concurring).
54. *Id.* at 365.
55. *Id.* at 364.
56. *Id.*
57. *See* Crawford v. Washington, 541 U.S. 36 (2004).
58. *Id.* at 61.

a "witness" against the accused was one "who 'bear[s] testimony.'"[59] Therefore, the Clause was primarily concerned with "testimonial hearsay."[60]

The Court refrained from defining the term "testimonial statements," but it offered three possible formulations.[61] The Court explained that testimonial statements could be (1) "*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"; (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; or (3) "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."[62] Lower courts and commentators have referred to this third definition as the objective-witness test.

The Court did not place its imprimatur on any of these formulations because it concluded that the statements at issue in *Crawford* were testimonial under any one of them. Instead of adopting a definition, the Court provided some straightforward examples of testimonial statements. Several "statements that by their nature were not testimonial," included "casual remark[s] to an acquaintance,"[63] and "business records or statements in furtherance of a conspiracy."[64] Without much explanation, the Court cited *Bourjaily* as an example of a nontestimonial coconspirator's statement.[65]

With these examples in mind, the Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[66] The Court opined that this holding was largely consistent with its previous case law,[67] with one notable exception. The Court mentioned twice that the ban on testimonial hearsay cast doubt on the four-year-old declarant's statements to a police officer admitted in *White*.[68]

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59. *Id.* at 51.
60. *Id.* at 53.
61. *See id.* at 51-52.
62. *Id.* (internal quotation marks omitted).
63. *Id.* at 51.
64. *Id.* at 56.
65. *Id.* at 58.
66. *Id.* at 53-54.
67. *See id.* at 57-58.
68. *See id.* at 58 n.8 ("One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois*, which involved, inter alia, statements of a child victim to an investigating police officer admitted as spontaneous declarations." (citation omitted)); *id.* at 61 ("[O]ur analysis in this case casts doubt on [*White*], [but] we need not definitively resolve whether it survives our decision today . . . .").

After explaining the testimonial concept and linking it to examples from its previous case law, the Court applied its new doctrine to the statements at issue: Sylvia Crawford's statements during a police interrogation. The State of Washington charged Michael Crawford with assault and attempted murder for stabbing a man who had allegedly raped his wife, Sylvia.[69] At Michael's trial, Sylvia did not testify because of the state marital privilege, but the State offered Sylvia's statements made to police during interrogation to counter Michael's claim of self-defense under a hearsay exception for statements against penal interest.[70] After the police gave Sylvia a *Miranda* warning, she described how Michael assaulted the alleged rapist.[71] But unlike Michael's version of the story, Sylvia stated that the victim did not have anything in his hands when Michael attacked, contradicting Michael's theory of self-defense.[72]

The Court held that Sylvia's statements in response to police interrogation were "testimonial under any definition,"[73] even a narrow one. The Court explained that the Confrontation Clause provided a defendant with special protection against statements made in response to police interrogation because of the inherent risk of government abuse. This was the same risk, the Court noted, that infected Lord Cobham's unsworn accusations of conspiracy in the trial of Sir Walter Raleigh and the extrajudicial examinations decried by the American colonists.[74] Because Sylvia did not testify at trial and her defendant-husband never cross-examined her, the Court ruled that admitting her testimonial statement violated the Confrontation Clause.

After *Crawford*, state courts and lower federal courts struggled to fill out the boundaries of the new doctrine. Without much guidance from the court on the definition of testimonial, judges were forced to choose among the possible definitions offered in *Crawford*. Domestic violence cases proved particularly difficult because the prosecution would often need to base its case on hearsay statements from a spouse who was either unwilling or unavailable to testify.[75] To clarify the testimonial doctrine, the Court granted certiorari on two domestic-violence cases, *Davis v. Washington* and *Hammon v. Indiana*.[76]

In *Davis*, the Court addressed Michelle McCottry's statements to a 911 operator. While on the phone with the operator, McCottry identified her

69. *Id.* at 38, 40.

70. *See id.* at 40.

71. *Id.* at 38-40.

72. *Id.* at 39-40.

73. *Id.* at 61.

74. *Id.* at 52.

75. *See* Robert Tharp, *Domestic Violence Cases Face New Test: Ruling That Suspects Can Confront Accusers Scares Some Victims from Court*, DALLAS MORNING NEWS, July 6, 2004, at 1A ("Each day, up to one-half of all domestic-violence cases set for trial in Dallas County are thrown out because of a recent U.S. Supreme Court ruling reasserting a suspect's right to confront his accuser in court.").

76. Davis v. Washington, 546 U.S. 975 (2005).

attacker and described her location immediately after the assault.[77] In *Hammon*, the Court addressed Amy Hammon's statements to police officers. Hammon made statements to officers after they arrived in response to a complaint of domestic violence.[78] Neither victim testified at trial. To determine whether the victims' statements were testimonial, the Court focused on the questioner's purpose:

> 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.[79]

Commentators have referred to this standard as the primary-purpose test. Based on this test, the Court distinguished between the two statements at issue: McCottry made statements during an ongoing emergency and described events as they actually happened.[80] Hammon made statements during a criminal investigation and described past events.[81] Consequently, the Court held that the trial court properly admitted McCottry's statements, but the court that admitted Hammon's statements violated the Confrontation Clause.

In the Court's opinion, the primary-purpose test both clearly distinguished and adequately addressed the two domestic violence victims' statements to government officials. But the *Davis* Court cautioned that this test was "not an 'exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation,' but rather a resolution of the cases before us and those like them."[82] The Court noted that "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate."[83] The Court's reference to the declarant's statements was not mere rhetoric. The *Davis* Court itself often analyzed the confrontation right based on the declarant's perspective.[84]

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77. 547 U.S. 813, 817-18 (2006).

78. *Id.* at 819.

79. *Id.* at 822.

80. *Id.* at 827.

81. *Id.* at 830.

82. *Id.* at 831 n.5 (citation omitted).

83. *Id.* at 823 n.1.

84. *See, e.g.*, *id.* at 827 ("McCottry's call was plainly a call for help against bona fide physical threat."); *id.* at 830 (discussing factors that "strengthened the statements' testimonial aspect—made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events"); *id.* at 831 ("She was seeking aid, not telling a story about the past."); *see also* Richard D. Friedman, Crawford, Davis, *and Way Beyond*, 15 J.L. & POL'Y 553, 562 (2007) ("[I]n Davis the Court slipped easily into speaking about the call from the viewpoint of the declarant.").

II. STATE AND FEDERAL COURTS HAVE APPLIED *CRAWFORD* AND *DAVIS* TO CHILD DECLARANTS BY FOCUSING ON THE QUESTIONER'S PURPOSE

State courts have not put much stock in the *Davis* Court's footnotes and references to the declarant's perspective. Instead, courts have focused on the broad implications of the primary-purpose test and ignored the test's limited applicability. Unfortunately for child-abuse victims, a majority of state courts have found that the primary-purpose test does not account for the child's limited perspective.

Subparts II.A through II.C below describe how state courts have applied *Crawford* and *Davis* to child declarants' statements made in response to government interrogation and how the majority's approach is inconsistent with the Court's recasting of *Bourjaily*.

State courts have made a major doctrinal shift. Before *Davis*, a majority of state courts evaluated out-of-court statements made to police and their agents both from an objective declarant's perspective and with a child's age and understanding in mind. In other words, a majority of state courts both favored *Crawford*'s objective-witness test and interpreted the test to allow courts to consider subjective factors such as a child declarant's age or intelligence. After *Davis*, courts have largely ignored a declarant's perspective altogether when determining whether the declarant's statement to the police or their agent is testimonial. Consequently, a court's most important decision often proves to be whether the questioner acted as an agent of law enforcement.[85] Such a rigid interpretation of *Davis* is inconsistent with how *Crawford* recast *Bourjaily*. As the *Davis* Court noted, the primary-purpose test should not necessarily apply to "all conceivable statements in response to police interrogation."[86] *Bourjaily* suggests that state courts have misapplied *Davis* by completely ignoring a declarant's perspective when evaluating statements made in response to police interrogation.

A. *Before* Davis, *a Majority of State and Federal Courts Focused on the Declarant's Perspective*

Before *Davis*, courts were more willing to consider both whether statements should be considered from the declarant's perspective and whether *Crawford*'s objective-witness test should be subjectified down to consider a child declarant's age and cognitive ability. Leading up to *Davis*, a majority of

85. Note, however, that there is no per se rule that statements must be to a government officer to be testimonial. *See Davis*, 547 U.S. at 823 n.2 ("[O]ur holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'"); Crawford v. Washington, 541 U.S. 36, 68 (2004) (opining that the term "testimonial" applies "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations"); Friedman, *supra* note 24, at 262.

86. *Davis*, 547 U.S. at 830 n.5.

state courts concluded that courts should evaluate a child declarant's statement from an objective declarant's perspective, even when the statement is in response to police interrogation.[87] Though courts almost uniformly held statements in response to police interrogation were testimonial,[88] some state courts took an additional step in evaluating out-of-court statements from the declarant's perspective. These courts further considered a child declarant's age and cognitive limitations, asking whether a reasonable child of the same age would have understood the implications of her statement.[89] Three state courts

87. *See* cases cited *infra* notes 89-91.

88. *See, e.g.*, *California*: People v. Sisavath, 13 Cal. Rptr. 3d 753, 754, 757-58 (Ct. App. 2004) (holding that a four-year-old sexual abuse victim's statements to a police officer and "forensic interview specialist" were testimonial); *Colorado*: People *ex rel.* R.A.S., 111 P.3d 487, 488, 490 (Colo. App. 2004) (holding that a four-year-old sexual abuse victim's videotaped statements to a police officer were testimonial); People v. Vigil, 104 P.3d 258, 261-63 (Colo. App. 2004) (holding that a seven-year-old's statement to a police officer was testimonial and rejecting argument that a seven-year-old would not "reasonably expect [his statements] to be used prosecutorially" because child stated the defendant should go to jail and officer explained the district attorney would try to put defendant in jail for a long time), *rev'd on other grounds*, 127 P.3d 916, 929-30 (Colo. 2006), *abrogated on different grounds by* People v. Ramirez, 155 P.3d 371 (Colo. 2007); *Hawaii*: State v. Grace, 111 P.3d 28, 31, 38 (Haw. Ct. App. 2005) (holding that ten- and eleven-year-olds' statements to a police officer were testimonial based on objective witness definition of testimonial); *Illinois*: *In re* T.T., 815 N.E.2d 789, 792, 801 (Ill. App. Ct. 2004) (holding that a seven-year-old sexual abuse victim's statements to a police detective were testimonial), *vacated by* 866 N.E.2d 1174 (Ill. 2007), *substituted by* No. 1-03-0551, 2007 WL 2579869 (Ill. App. Ct. Sept. 7, 2007); *In re* Rolandis G., 817 N.E.2d 183, 188 (Ill. App. Ct. 2004) (holding that a six-year-old sexual assault victim's statements to a police detective and a children's center child advocate were testimonial), *rev'd on other grounds*, No. 99581, 2008 WL 4943446 (Ill. Nov. 20, 2008); *Indiana*: Purvis v. State, 829 N.E.2d 572, 575, 577, 580 (Ind. Ct. App. 2005) (holding that a ten-year-old child molestation victim's statements to a police officer two hours after incident were testimonial); *Maryland*: State v. Snowden, 867 A.2d 314, 325-26 (Md. 2005) (holding that the statements of two ten-year-old and one eight-year-old sexual abuse victims to a police officer and a sexual abuse investigator were testimonial as the "functional equivalent of . . . formal police questioning"); *Nevada*: Flores v. State, 120 P.3d 1170, 1179 (Nev. 2005) (holding that a five-year-old's statements to a child abuse investigator and protective services investigator were testimonial because both investigators were "either police operatives" or "tasked with reporting instances of child abuse for prosecution"); *Oregon*: State v. Mack, 101 P.3d 349, 352 (Or. 2004) (holding that a three-year-old's statements to a human services caseworker with police officers in the room were testimonial).

89. *See, e.g.*, People v. Vigil, 127 P.3d 916, 925 (Colo. 2006) ("[W]e find the holding in *Summers*—namely that 'a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime'—persuasive." (quoting United States v. Summers, 414 F.3d 1287, 1302 (10th Cir. 2005)); *id.* at 925-26 (noting that a court should consider a child's age as a "pertinent characteristic for analysis" and asking what an "objectively reasonable child" would understand); State v. Bobadilla, 709 N.W.2d 243 (Minn. 2006) (holding that a three-year-old sexual abuse victim's statements to a child-protection worker were not testimonial even though a police detective was present for the interview); *id.* at 255-56 ("[G]iven [the child's] very young age, it is doubtful that he was even capable of understanding that his statements would be used at a trial. As amicus American Prosecutors Research Institute makes clear, children of [this child's] age are simply unable to understand the legal system

not only held that the declarant's perspective was determinative, but implied that the subjective considerations of a child declarant's age and limited understanding would be *dispositive* in evaluating a child's out-of-court statements to government officials or their agents.[90] In contrast, three other state courts rejected the idea that a court should take into account a child's age and understanding *regardless of who was asking the child questions*.[91] But even this latter group of courts held that courts should evaluate statements from an objective declarant's perspective.[92] Outside the police interrogation context, state courts followed the same trend and favored some form of the objective-witness test articulated in *Crawford*.[93] A majority of state courts considered the child declarant's age and understanding relevant, regardless of who was asking the declarant questions.[94]

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and the consequences of statements made during the legal process."); Lagunas v. State, 187 S.W.3d 503, 519-20 (Tex. App. 2005) (holding that a four-year-old's statements to a police officer were not testimonial); *id.* at 519 ("We decide only that [the child's] age and her emotional state are factors strongly suggesting that her statements to Officer Sullivan were non-testimonial. Considering the context, [the child's] statements amounted to a small child's expressions of fear arising from her mother's absence. [The child's] reaction was of one seeking comfort and information concerning her mother, a reaction to be expected from a frightened child approached by a police officer under such circumstances in the middle of the night."); *In re* D.L., 8th Dist. No. 84643, 2005-Ohio-2320, at ¶ 20 ("[The appellant] 'must show . . . that the circumstances surrounding the contested statements led the three-year-old to reasonably believe her disclosures would be available for use at a later trial, or that the circumstances would lead a reasonable child of her age to have that expectation.'" (quoting State v. Scacchetti, 690 N.W.2d 393, 396 (Minn. Ct. App. 2005)). *But see Lagunas*, 187 S.W.3d at 519 ("We need not decide now whether, as a general rule, statements by children are inherently non-testimonial or whether [the child's] age alone renders her statements non-testimonial."); *id.* at 520 (analyzing the officer's questions and concluding the questions were "sought to clarify [the child's] spontaneous statement" and that there "was not time to formulate careful, structured questioning").

90. *See Bobadilla*, 709 N.W.2d at 255-56; *Lagunas*, 187 S.W.3d at 519; In re *D.L.* at ¶ 20.

> 91. Conceivably, [*Crawford*'s] reference to an "objective witness" should be taken to mean an objective witness in the same category of persons as the actual witness—here, an objective four year old. But we do not think so. It is more likely that the Supreme Court meant simply that if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer, then the statement is testimonial.

Sisavath, 13 Cal. Rptr. 3d at 758 n.3; *Snowden*, 867 A.2d at 329 ("[W]e are satisfied that an objective test, using an objective person, rather than an objective child of that age, is the appropriate test for determining whether a statement is testimonial in nature."); *Grace*, 111 P.3d at 38 (citing *Sisavath*, 13 Cal. Rptr. 3d at 758 n.3).

92. *See* cases cited *supra* note 91.

93. *See* Crawford v. Washington, 541 U.S. 36, 52 (2004) (stating that testimonial statements could be "'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'" (quoting Brief for Nat'l Ass'n of Criminal Def. Lawyers et al. as Amici Curiae Supporting Petitioner at 3, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410))).

> 94. [A]n assessment of whether or not a reasonable person in the position of the declarant would believe a statement would be available for use at a later trial involves an analysis of the expectations of a reasonable person in the position of the declarant. Expectations derive

Like the state courts, a majority of federal courts of appeals held that a court should evaluate out-of-court statements from an objective declarant's perspective. The Sixth and Tenth Circuits opined that a declarant's objective perspective was *always* dispositive,[95] apparently regardless of context. But neither circuit addressed whether courts should consider a child's age and cognitive ability in an objective test because the declarants in both cases were adults. The Second Circuit stated in dicta that "*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial."[96] But like the Sixth and Tenth Circuits, the Second Circuit only considered statements from an adult declarant. Leading up to *Davis*, the only federal court of appeals to apply *Crawford* to a child declarant did not address whether *Crawford*'s formulation of the objective-witness test allowed a court to consider the subjective factors such as a child's age or understanding. Like the *Crawford* Court, the Eighth Circuit did not adopt a definition of testimonial.[97] But the court's omission of any reference to the child declarant's age or cognitive ability suggests that it did not consider a child's age or understanding relevant in its testimonial analysis.[98] The court, however, has yet to address the issue.

> from circumstances, and, among other circumstances, a person's age is a pertinent characteristic for analysis.

Vigil, 127 P.3d at 925; *Bobadilla*, 709 N.W.2d at 256 (Minn. 2006) (holding that a three-year-old sexual abuse victim's statements to a child-protection worker were not testimonial in part because the three-year-old victim was "simply unable to understand the legal system and the consequences of statements made during the legal process"); State v. Brigman, 615 S.E.2d 21, 25-26 (N.C. Ct. App. 2005) (noting that the five-year-old declarant would unlikely understand his statements to his mother would be used in a criminal prosecution and that he made the statements innocently); In re *D.L.* at ¶ 20; *Lagunas*, 187 S.W.3d at 519.

95. *See* United States v. Summers, 414 F.3d 1287, 1302 (10th Cir. 2005) ("[W]e hold that a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime."); United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004) ("The proper inquiry . . . is whether the declarant intends to bear testimony against the accused. That intent . . . may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.").

96. United States v. Saget, 377 F.3d 223, 228 (2d Cir. 2004).

97. *See* United States v. Peneaux, 432 F.3d 882, 895-96 (8th Cir. 2005) (focusing on the purpose of a two-year-old child's interview with a physician, but not addressing specifically whether statements should be evaluated from the declarant's perspective or the questioner's perspective); United States v. Bordeaux, 400 F.3d 548, 555-57 (8th Cir. 2005) (considering the formality, level of government involvement, and purpose of the questioner in holding that a child's statements to a "forensic interview[er]" were testimonial).

98. *See Peneaux*, 432 F.3d at 887, 895-96 (mentioning the *Crawford* Court's reference to the objective-witness test, but making no mention of the two-year-old declarant's age or understanding when characterizing the child's out-of-court statements to a physician as nontestimonial); *Bordeaux*, 400 F.3d at 555-57 (characterizing female child's statement to a "forensic interview[er]" as testimonial without discussion of child's age or understanding).

B. *After* Davis, *Courts Have Viewed the Questioner's Perspective as Dispositive Under the Primary-Purpose Test*

After *Davis*, state courts altered their emphasis on the declarant's perspective to account for the primary-purpose test. In general, if a court decided that the primary-purpose test applied to a child declarant's statement, the child's statement would almost always be testimonial because child abuse victims rarely, if ever, made statements during an ongoing emergency to law enforcement officials or their agents. The majority of courts' focus on the questioner's purpose and apparent disregard for the declarant's perspective strongly implies that state courts do not consider a child declarant's age or understanding relevant at all for the primary-purpose test. If all that matters is the questioner's primary purpose, it makes little sense for a court to consider whether *Crawford*'s objective-witness test allows a court to subjectify down the test to account for a child's immaturity. This shift to emphasize the questioner's perspective made it nearly impossible for the prosecution to admit a child declarant's statement to a police officer when the child did not testify. After *Davis*, all state courts have applied the primary-purpose test to statements by a child declarant to law enforcement officials or law enforcement agents rather than apply a version of the previously favored objective-witness test.[99] The

99. *See, e.g.*, *California*: People v. Cage, 155 P.3d 205, 217-18 (Cal.) (holding that a fifteen-year-old's statements to police in hospital emergency room were testimonial under *Davis* primary-purpose test), *cert. denied*, 128 S. Ct. 612 (2007); *Colorado*: People v. Sharp, 155 P.3d 577, 581-82 (Colo. App. 2006) (holding that a five-year-old's statements to a forensic interviewer during a visit arranged by police were testimonial under the *Davis* primary-purpose test), *overruling* People v. Sharp, 143 P.3d 1047, 1049, 1052-53 (Colo. App. 2005) (holding that "the test in determining whether the child's statement is testimonial depends on whether an objective person in the child's position would believe her statements would lead to punishment of defendant" and holding that the five-year-old's statement to forensic interview was not testimonial); *Florida*: State v. Contreras, 979 So. 2d 896, 899, 905 (Fla. 2008) (holding that an eleven-year-old's statements to a Child Protection Team (CPT) coordinator, with police listening and communicating to the interviewer electronically, were testimonial because "the primary, if not the sole, purpose of the CPT interview was to investigate whether the crime of child sexual abuse had occurred, and to establish facts potentially relevant to a later criminal prosecution"); Hernandez v. State, 946 So. 2d 1270, 1280-82 (Fla. Dist. Ct. App. 2007) (holding that statements made by a child of unknown age to a CPT nurse were testimonial under the *Davis* primary-purpose test); *Idaho*: State v. Hooper, 176 P.3d 911 (Idaho 2007) (holding that a six-year-old's statements to sexual trauma personnel during a visit arranged and observed by police were testimonial under the *Davis* primary-purpose test); *Illinois*: *In re* Rolandis G., No. 99581, 2008 WL 4943446, at *1-2, *9 (Ill. Nov. 20, 2008) (holding that a six-year-old's statements to a children's center child advocate were testimonial under the *Davis* primary-purpose test); People v. Stechly, 870 N.E.2d 333, 364-66 (Ill. 2007) (plurality opinion) (holding that a five-year-old's statements to personnel required to report sexual abuse by law, including a clinical specialist who was the head of a hospital child abuse team and a school social worker, were testimonial under the *Davis* primary-purpose test); *Iowa*: State v. Bentley, 739 N.W.2d 296, 297, 300 (Iowa 2007) (holding that a ten-year-old's videotaped statements to a child protection center counselor during an interview at the request of and observed by police were testimonial under the *Davis* primary-purpose test); *Kansas*: State v. Henderson,

only federal court of appeals to address a Confrontation Clause challenge to a child declarant's out-of-court statement took a slightly different approach. The U.S. Court of Appeals for the Armed Forces applied a multifactor test to determine whether a five-year-old girl's statements to a sexual assault nurse examiner were testimonial, including one factor that accounts for the *Davis* primary-purpose test.[100] Though the court's explicit goal was to "determine if the statement was *made* or elicited to preserve past facts for a criminal trial,"[101] the court only examined the child's interview from the nurse's perspective.[102]

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160 P.3d 776, 782-92 (Kan. 2007) (holding that a three-year-old's statements to police and a child protective services worker were testimonial under the *Davis* primary-purpose test); *Missouri*: State v. Justus, 205 S.W.3d 872 (Mo. 2006) (holding that a three-year-old's statements to division of family services and Children's Advocacy Center investigators were testimonial under the *Davis* primary-purpose test); *New Jersey*: State v. Nyhammer, 932 A.2d 33, 36, 42 (N.J. Super. Ct. App. Div. 2007) (holding that a nine-year-old's video taped statements to police investigators were testimonial because the interviews' "purpose [was] to establish the identity or collect evidence against the perpetrator of a crime"), *cert. granted*, 940 A.2d 1219 (N.J. 2008); State v. Buda, 912 A.2d 735, 743-46 (N.J. Super. Ct. App. Div. 2006) (holding that a three-year-old's statements to a Division of Youth and Family Services (DYFS) worker with responsibility to report to police were testimonial under the *Davis* primary-purpose test), *aff'd in part and rev'd in part*, 949 A.2d 761, 778-80 (N.J. 2008) (reversing and holding that the same child's statement to the DYFS worker were not testimonial under the *Davis* primary-purpose test because the worker was "gathering data . . . to assure a child's future well-being"); *New Mexico*: State v. Ortega, 2008-NMCA-001, ¶¶ 2, 32-33, 143 N.M. 261, 175 P.3d 929 (holding that an eight-year-old's statements to a sexual assault nurse examiner were testimonial under the *Davis* primary-purpose test); *North Dakota*: State v. Blue, 2006 ND 134, ¶¶ 16-18, 717 N.W.2d 558, 564-65 (holding that a four-year-old's statements to forensic interviewer in advocacy center with police observing were testimonial); *Ohio*: State v. Siler, 116 Ohio St. 3d 39, 2007-Ohio-5637, 876 N.E.2d 534 (holding that a three-year-old's statements to a police officer were testimonial under the *Davis* primary-purpose test), *cert. denied*, 128 S. Ct. 1709 (2008); *Oregon*: State v. Pitt, 147 P.3d 940, 942, 945 (Or. Ct. App. 2006) (holding that a four- and five-year-old's statements to a director of a child advocacy center recorded by a police officer were testimonial under the *Davis* primary-purpose test); *Pennsylvania*: *In re* S.R., 2007 PA Super. 79, ¶¶ 8-9, 21-22 (holding that a four-year-old's statements to a forensic interview specialist were testimonial), *cert. granted*, 941 A.2d 671 (Pa. 2007); *Texas*: Rangel v. State, 199 S.W.3d 523, 534-35 (Tex. App. 2006) (holding that a four-year-old's statements to Child Protective Services (CPS) were testimonial under the *Davis* primary-purpose test, but that the defendant waived his claim that the trial court violated his confrontation right); *Washington*: State v. Hopkins, 154 P.3d 250, 255, 257-58 (Wash. Ct. App. 2007) (holding that a two-and-one-half-year-old's statements to a child protective services social worker were testimonial under the *Davis* primary-purpose test).

100. United States v. Gardinier, 65 M.J. 60, 61-62, 65 (C.A.A.F. 2007) (listing three factors to determine whether a statement is testimonial, including "(1) was the statement elicited by or made in response to law enforcement or prosecutorial inquiry?; (2) did the statement involve more than a routine and objective cataloging of unambiguous factual matters?; and (3) was the primary purpose for making, or eliciting, the statement the production of evidence with an eye toward trial?").

101. *Id.* at 65 (emphasis added).

102. *See id.* at 65-66 (holding that a five-year-old's statement to a sexual assault nurse examiner were testimonial because the nurse "performed a forensic medical exam on [the child] at the behest of law enforcement with the forensic needs of law enforcement and prosecution in mind").

This uniform shift among state and federal courts has prompted several courts to state explicitly that a child's age and understanding are improper grounds for determining whether a statement is testimonial when the primary-purpose test applies.[103] Only one state court has taken the minority view. The Kansas Supreme Court still considers a child declarant's cognitive ability a relevant factor in determining whether a child's out-of-court statement to government officials is testimonial.[104]

The Minnesota Supreme Court's shift exemplifies the larger trend. Though the court previously viewed the child's age and understanding as relevant when the questioner had an obligation to report to police, the court has backed away from its earlier rhetoric and adopted the primary-purpose test as determinative. In two opinions issued after *Crawford* but before *Davis*, the court strongly suggested that a young child who could not understand the purpose of an interview could unlikely make testimonial statements.[105] In an opinion after *Davis*, the court relegated discussion of the child declarant's age and understanding to a footnote.[106]

Notwithstanding state courts' doctrinal shift on child statements made in response to police interrogation, state courts take a very different approach to out-of-court statements outside the police interrogation context. If the child

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103. *See, e.g.*, *Stechly*, 870 N.E.2d at 357 ("It is clear . . . that when the statements under consideration are the product of questioning by the police (or those whose 'acts [are] acts of the police,' we must focus on the intent of the questioner in eliciting the statement.") (internal citation omitted)); *Bentley*, 739 N.W.2d at 300 ("[A]n analysis of the purpose of the statements from the [ten-year-old] declarant's perspective is unnecessary under the circumstances presented here."); *Siler* at ¶ 33 ("[*Davis*] does not focus on the expectations of the declarant in order to determine whether statements are testimonial; rather, the test set forth in *Davis* centers on the statements and the objective circumstances indicating the primary purpose of the interrogation. In this way, the argument by the state and [American Prosecutors Research Institute] that we should focus on the cognitive limitations of a child who made the statements to police is inconsistent with the primary-purpose test." (internal citation omitted)).

104. A young victim's awareness, or lack thereof, that her statement would be used to prosecute, is not dispositive of whether her statement is testimonial. Rather, it is but one factor to consider in light of *Davis*' guidance after *Crawford*. Until we receive further guidance from the United States Supreme Court, our test is an 'objective, totality of the circumstances' test to determine the primary purpose of the interview, as discussed and seemingly applied in *Davis*.

Henderson, 160 P.3d at 785; *see also Justus*, 205 S.W.3d at 880 (noting that the four-year-old child stated to interviewer that she would "tell a judge what her father had done").

105. *See* State v. Scacchetti, 711 N.W.2d 508, 510, 513, 516 (Minn. 2006) (concluding that it was not clear whether three-and-one-half-year-old victim "knew or understood the purpose of the statements she made" to a pediatric nurse as part of an eight-factor weighing test to determine whether a statement is testimonial); State v. Bobadilla, 709 N.W.2d 243, 255-56 (Minn. 2006) (noting that a three-year-old sexual abuse victim's age made it doubtful the child understood his statements to a child-protection worker would later be used at trial).

106. *See* State v. Krasky, 736 N.W.2d 636, 641-43 & n.6 (Minn. 2007) (applying the primary-purpose test to six-year-old sexual abuse victim's statement to a Children's Resource Center nurse and relegating discussion about child's understanding of statements later used at trial to a footnote).

declarant makes statements to someone other than a government official or agent, a majority of courts still evaluate out-of-court statements both from an objective declarant's perspective and with a child's age and understanding in mind.[107] Unsurprisingly, if the court determines the primary-purpose test is inapplicable (i.e., the questioner is neither a law enforcement official nor an agent), courts are much more likely to find a child declarant's statement was not testimonial. For example, with few exceptions, courts have held that a child's statements to private individuals such as parents, family members, and friends are not testimonial.[108] In contrast, courts have split over how to deal with situations in which the interviewer's status as a police agent is ambiguous, such as forensic interviewers conducting recorded medical interviews in the presence of police.[109]

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107. *See Stechly*, 870 N.E.2d at 359 ("We believe that [outside the context of police interrogation] the only proper focus is on the declarant's intent: Would the objective circumstances have led a reasonable person to conclude that their statement could be used against the defendant?"); *id.* at 363 ("In accordance with the weight of authority, . . . we believe that the better view is to treat the child's age as one of the objective circumstances to be taken into account in determining whether a reasonable person in his or her circumstances would have understood that their statement would be available for use at a later trial."). *But see, e.g.*, Seely v. State, No. CR 07-1063, 2008 WL 963516, at *8-10 (Ark. Apr. 10, 2008) (holding that a three-year-old's statements to her mother and a children's hospital social worker were not testimonial under the *Davis* primary-purpose test); State v. Spencer, 2007 MT 245, ¶¶ 6-8, 22-25, 339 Mont. 227, ¶¶ 6-8, 22-25, 169 P.3d 384, ¶¶ 6-8, 22-25 (holding that a three-and-a-half-year-old's statements to her foster parent and a licensed clinical counselor about sexual abuse were not testimonial under the *Davis* primary-purpose test because the parent and counselor's primary purpose were parenting and counseling, respectively, even though both had a statutory obligation to report child abuse); Bush v. State, 2008 WY 108, ¶¶ 10, 39, 193 P.3d 203 (Wyo. 2008) (holding in the alternative that the same child's statements at three, four, and five years old to a professional counselor and psychiatrist were not testimonial under the *Davis* primary-purpose test because the "primary purpose of the statements was for treatment and diagnosis").

108. *See, e.g.*, *Seely*, 2008 WL 963516, at *8 (holding that a three-year-old's statements to her mother were not testimonial under the *Davis* primary-purpose test); Bishop v. State, 2006-CA-01957-SCT (¶¶ 11-14) (Miss. 2008) (holding that a four-year-old child's statement to her mother and therapist were not testimonial); State v. Ladner, 644 S.E.2d 684, 686, 689-90 (S.C. 2007) (holding that a two-and-a-half-year-old's statements about sexual abuse to her caretakers were not testimonial); Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 944-48 (2007). Professor Robert Mosteller explains that courts have so held apparently because there is less of a chance that the government will be involved to create testimony and because many of the statements are spontaneous from the child's perspective. *See id.*; *cf.* Giles v. California, 128 S. Ct. 2678, 2692-93 (2008) ("Statements [of domestic violence victims] to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules . . . .").

109. *Compare* State v. Arroyo, 935 A.2d 975, 995-99 (Conn. 2007) (holding that a child's statements to a forensic interviewer in a hospital sexual abuse clinic were not testimonial because the primary purpose of the interview "was not to build a case against the defendant, but to provide the victim with . . . medical and mental health treatment," even though police officers observed the interview from behind a one-way mirror and obtained a video tape of the recording afterwards), *with* State v. Blue, 2006 ND 134, ¶¶ 16-18, 717

C. *State Courts' Reasons for Ignoring the Declarant's Perspective Are Inconsistent with* Bourjaily

Given state courts' preference for some version of the objective-witness test prior to *Davis*, the uniform shift to focusing on the questioner's perspective may come as a surprise. But the *Davis* Court arguably created that surprise. Some of the Court's statements in *Crawford* and *Davis* provide justifiable reasons for state courts to apply uniformly the primary-purpose test. First, the primary-purpose test focuses on the questioner's perspective. Consequently, some courts view a focus on "the cognitive limitations of a child" as "inconsistent with the primary-purpose test."[110] As the Ohio Supreme Court opined, "[*Davis*] does not focus on the expectations of the declarant in order to determine whether statements are testimonial; rather, the test set forth in *Davis* centers on the statements and the objective circumstances indicating the primary purpose of the interrogation."[111] Second, the *Crawford* Court strongly suggested that aspects of *White* were incorrect: the four-year-old girl's statements to the police officer could not have been admitted without violating the Confrontation Clause.[112] This suggestion created doubt as to whether courts should consider a very young child's age and understanding in a testimonial analysis at all.[113] *Davis*'s primary-purpose test reinforced that suggestion. Third, the *Davis* Court suggested that a young rape victim's statements to her mother in an Old Bailey case, *King v. Brasier*, were testimonial.[114] Because police officers most often question a child after an emergency has passed, the Court's reference to *Brasier* suggests that a child declarant's statements to a police officer would also be testimonial.[115]

N.W.2d 558 (holding that a four-year-old's statements to a forensic interviewer in an advocacy center with police observing were testimonial).

110. State v. Siler, 116 Ohio St. 3d 39, 2007-Ohio-5637, 876 N.E.2d 534, at ¶ 33, *cert. denied*, 128 S. Ct. 1709 (2008).

111. *Id.*

112. *See supra* note 68 and accompanying text.

113. Mosteller, *supra* note 108, at 979-84; *see also id.* at 950 ("The circumstances of the statement in *White* were completely typical in terms of intent of the child, age (four) and understanding, and formality of the procedure (interviewed in the family home). Thus, Scalia's suggestion that an error likely occurred in *White* in the treatment of the child's statement to the police officer suggested broad applicability.").

114. *See* Davis v. Washington, 547 U.S. 813, 828 (2006) ("In *King v. Brasier*, for example, a young rape victim, 'immediately on her coming home, told all the circumstances of the injury' to her mother. The case would be helpful to Davis if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of past events." (citations omitted)).

115. The Court has yet to grant certiorari on a case involving a child declarant's statements after *Crawford* or *Davis*. There may be a good reason why the court has not granted certiorari: in many of the cases that have reached state appellate courts with child declarants, the courts' decisions would have come out the same way under an objective-witness test instead of the primary-purpose test. Even at the state level, the reason why most state courts have not considered a child declarant's perspective dispositive may be because

These reasons *might* explain why state courts almost uniformly construe the *Davis* primary-purpose test to apply to child declarants, but they do not explain why state courts have ignored a puzzling inconsistency. Because *Crawford* requires courts to admit the kind of coconspirator statements from *Bourjaily* based on the declarant's perspective, the primary-purpose test is not applicable to all statements made in response to law enforcement interrogation. Yet state courts continue to apply one definition of testimonial to coconspirators and another to child declarants. Courts need not perpetuate this inconsistent approach. Recall that *Crawford* "use[d] the term 'interrogation' in its colloquial, rather than any technical legal, sense."[116] Interrogation, therefore, includes the question and response between law enforcement agents and coconspirators as well as conversations between law enforcement agents and child witnesses. The Court's recasting of *Bourjaily* points towards a more coherent approach to child declarants.

III. COURTS SHOULD ADOPT A REASONABLE-CHILD-DECLARANT APPROACH, CONSIDERING THE CHILD'S AGE, INTELLIGENCE, AND EXPERIENCE

Courts need not look far to find a more coherent approach to child declarants. Recall that before *Davis*, a majority of state courts evaluated children's out-of-court statements made to police and their agents both from an objective declarant's perspective and with a child's age and understanding in mind. A majority of state courts still apply this approach to child declarants outside the police interrogation context. This approach better reflects the Confrontation Clause's protections, comports with the Court's coconspirator jurisprudence, and accounts for the responsibility Americans expect of witnesses. Courts should revert to a reasonable-child approach. This Note proposes that courts adopt a more carefully defined version of the reasonable-child approach. For child declarants, a statement should be testimonial when a reasonable child of like age, intelligence, and experience would understand that her statement is an accusation that will adversely affect the perpetrator or that the information is relevant to an investigation. Only a test that accounts for both the declarant's perspective and the limited understanding of a child declarant can accurately reflect that some statements are "by their nature . . . not testimonial," such as "statements in furtherance of a conspiracy."[117]

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there are very few cases in which the child declarant herself is not making an accusation. In the state cases cited above, *see supra* notes 88 and 99, the child declarants' own statements demonstrate that, for the most part, they understand that they are accusing the defendant of wrongdoing. While there are clearly situations in which a child makes statements to private parties in which a child *could* understand her statement would be used against the accused, there are some situations in which a child declarant *cannot* understand she is reporting wrongful conduct. A coherent definition of testimonial should account for both situations.

116. Crawford v. Washington, 541 U.S. 36, 53 n.4 (2004).

117. *Id.* at 56.

A reasonable-child approach differs from Professor Richard Friedman's bifurcated standard for child declarants. A reasonable-child approach considers the subjective factors of age, intelligence, and experience. In contrast, Friedman would apply "a reasonable adult [standard],"[118] but would carve out an exception for very young children. He argues that "some very young children should be considered incapable of being witnesses for Confrontation Clause purposes."[119] Friedman recognizes that this "'one size fits all' notion of the reasonable declarant" is controversial.[120] He notes that "there is something a little odd about asking, with respect to a statement by a young child, what the anticipation of a reasonable adult would be."[121]

Though the *Crawford* Court largely adopted Friedman's theory that the Confrontation Clause only bars testimonial hearsay, most academics, as well as federal and state courts, have rejected his approach to child declarants for statements to law enforcement officials and their agents.[122] In rejecting Friedman's approach, courts have rejected a sensible standard.

Yet a reasonable-child approach would provide a more coherent definition of testimonial statements. Subparts III.A.1 through III.A.4 below explain why courts should evaluate children's out-of-court statements made to police and their agents both from an objective declarant's perspective and with a child's age and understanding in mind. These Subparts also explain why this Note's definition of testimonial statements works best for child declarants. In short, a reasonable-child approach is superior to the primary-purpose test and a purely objective- or purely subjective-witness test because it better (1) comports with the Court's coconspirator jurisprudence; (2) reflects that the Confrontation Clause protects against admitting accusations and statements relevant to a criminal investigation; (3) accounts for the responsibility Americans expect of

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118. The Confrontation Blog, *supra* note 24.

119. Friedman, *supra* note 24, at 272; *see also* Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 249-52 (2002) [hereinafter Friedman, *Conundrum*]; Friedman, *supra* note 84, at 573-74; The Confrontation Blog, *supra* note 24; The Confrontation Blog, http://confrontationright.blogspot.com/2007/10/further-developments-and-thoughts-on.html (Oct. 26, 2007, 15:29 EST); The Confrontation Blog, http://confrontationright.blogspot.com/2007/09/child-witnesses-on-academic-and.html (Sept. 7, 2007, 17:10 EST).

120. *See* The Confrontation Blog, *supra* note 24.

121. Friedman, *supra* note 24, at 273.

122. *See, e.g.*, Mosteller, *supra* note 108, at 975 n.210. In *Stechly*, a plurality of the Illinois Supreme Court mischaracterized Friedman's position on child declarants. *See* People v. Stechly, 870 N.E.2d 333, 363 (Ill. 2007) (plurality opinion) ("In accordance with the weight of authority, as well as Professor Friedman's analysis, we believe that the better view is to treat the child's age as one of the objective circumstances to be taken into account . . . ." (referring to Friedman, *Conundrum*, *supra* note 119, at 251-52)). If Friedman favored an approach in which a child's age was taken into account as part of an objective analysis when he wrote *The Conundrum of Children, Confrontation, and Hearsay*, he certainly does not advocate such a position now. Friedman advocates a "'one size fits all' notion of the reasonable declarant." The Confrontation Blog, *supra* note 24.

witnesses; and (4) avoids the unreliability of a purely subjective standard. Note that any justification for an objective-witness test necessarily supports evaluating out-of-court statements from a declarant's perspective because an objective-witness test evaluates statements from a particular kind of declarant's perspective—an objective declarant. Note also that any justification for an objective-witness test also supports a reasonable-child approach because the reasonable-child approach evaluates statements from an objective child's perspective. Subpart III.B explains in more detail how a court might account for a child's age, intelligence, and experience.

A. *Four Reasons in Favor of a Reasonable-Child-Declarant Test*

1. *A child declarant is the cognitive inverse of both a coconspirator making a statement in the furtherance of a crime and an unsuspecting caller*

An objective-witness test is more consistent with the Court's recasting of *Bourjaily* than the primary-purpose test because an objective-witness test more accurately accounts for the testimonial nature of a declarant's statement. And a test accounting for a child's age, intelligence, and experience better accounts for the nature of a child's statement than a purely objective-witness test because a test focused on a child's perspective recognizes that a child may lack internal indicators that the reported conduct is wrongful or that the information is relevant to a criminal investigation or prosecution.

The *Crawford* Court stated that certain statements were "by their nature . . . not testimonial," such as "statements in furtherance of a conspiracy."[123] Yet the Court offered no rationale for this conclusion. Interestingly, the Court favorably cited *Bourjaily* as an example of a nontestimonial statement made in furtherance of a conspiracy.[124] Given the Court's jurisprudence at the time, the *Crawford* Court's citation to *Bourjaily* was hardly self-explanatory. The *Roberts*-based rationale offered in *Bourjaily* would not pass muster today because the Court has definitively overruled *Roberts*.[125] Therefore, the Court must be relying on another explanation to conclude summarily that statements made in the furtherance of a conspiracy are not testimonial.

An objective-witness test most logically explains why coconspirator statements are not testimonial. Out of the three possible testimonial

123. Crawford v. Washington, 541 U.S. 36, 56 (2004).

124. *See id.* at 58.

125. *See* Whorton v. Bockting, 549 U.S. 406, 416 (2007) ("The *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled."); *id.* at 420 ("Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.").

formulations suggested in *Crawford*[126] and the *Davis* primary-purpose test, only tests that the Court has not rejected and that account for the declarant's reasonable expectations can still definitively show that a coconspirator's statement is not testimonial. Only an objective-witness test qualifies.

The second *Crawford* formulation fails because the *Davis* Court rejected it as overly rigid. This formulation comes from Justice Thomas,[127] who dissented in *Davis*. In his dissent, Justice Thomas reiterated his position from *White* in the following words: "[T]he statements regulated by the Confrontation Clause must include 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'"[128] The *Davis* Court rejected this formulation when it pronounced the primary-purpose test over Justice Thomas's dissent.[129] Under Justice Thomas's approach, Amy Hammon's statements to the police officer would not have been testimonial because the statement was not in the form of "formalized testimonial material[]."[130]

The primary-purpose test does not explain the Court's treatment of coconspirator statements because it does not account for a declarant's reasonable expectations. A court applying the primary-purpose test could not definitively characterize a statement made in the furtherance of a conspiracy as nontestimonial. When a coconspirator has made a statement to an undercover agent or informant, the coconspirator's statement is hardly a "[s]tatement[] . . . 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,"[131] making the statement testimonial. In many conspiracy situations, an objective observer would not have a clue that the questioner's primary purpose was to "to establish or prove past events potentially relevant to later criminal prosecution."[132] Additionally, a coconspirator statement is not a statement "made . . . under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,"[133] thereby making the statement nontestimonial. In short, the primary-purpose test would be inconclusive. Yet the *Crawford* Court used a coconspirator's statement as a clear example of a nontestimonial statement.

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126. *See supra* note 62 and accompanying text.

127. *See Crawford*, 541 U.S. at 51-52 (citing White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

128. Davis v. Washington, 547 U.S. 813, 836 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part) (citing *White*, 502 U.S. at 365 (Thomas, J., concurring)).

129. *See id.*

130. *Id.*

131. *Id.* at 822.

132. *Id.*

133. *Id.*

With Justice Thomas's approach rejected and the primary-purpose test inconclusive, only the first and third formulations from *Crawford* can account for the declarant's reasonable expectations.[134] The first formulation defines testimonial statements as "'*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, . . . or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.'"[135] Under the first formulation, a coconspirator's statement would most certainly be nontestimonial. But the third formulation more closely resembles the federal courts of appeal's explanation of coconspirator statements.[136] The third formulation defines testimonial statements as "'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.'"[137] Both formulations rely on the rationale that the declarants anticipated the government could us the statements in a criminal investigation or prosecution. As the federal courts of appeals have recognized, the third formulation best explains why coconspirator statements are, "by nature," not testimonial.

Several federal courts of appeal have spelled out what seemed to strike the Court as obvious: a statement made in furtherance of a conspiracy is typically not testimonial because a coconspirator "would not anticipate his statements being used against the accused in investigating and prosecuting the crime."[138] Though the classic coconspirator almost certainly recognizes that some conduct

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134. *See* Friedman, *supra* note 84, at 561.

135. Crawford v. Washington, 541 U.S. 36, 51 (2004) (quoting Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21939940).

136. *See* cases cited *infra* note 138.

137. *Crawford*, 541 U.S. at 52 (quoting Brief of the Nat'l Ass'n of Criminal Def. Lawyers et al. as Amici Curiae in Support of Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02-9410)).

138. United States v. Martinez, 430 F.3d 317, 329 (6th Cir. 2005), *cert. denied*, 547 U.S. 1034 (2006); *see also* United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004) (deciding a case involving statements made to confidential informants and determining, in dicta, that "[t]he proper inquiry . . . is whether the declarant intends to bear testimony against the accused"); United States v. Saget, 377 F.3d 223, 228-29 (2d Cir. 2004) (deciding that statements made to undercover officers were not testimonial, and speculating that "the Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony"), *cert. denied*, 543 U.S. 1079 (2005); Jones v. State, 940 A.2d 1, 12 (Del. 2007) ("[U]nder *Crawford* and *Davis*, a statement is testimonial and implicates the Confrontation Clause where it is given in non-emergency circumstances and the declarant would recognize that his statements could be used against him in subsequent formal proceedings. By contrast, 'a casual remark to an acquaintance' is a nontestimonial statement. Similarly, . . . statements made in furtherance of a conspiracy are nontestimonial." (footnote omitted)); 4 MUELLER & KIRKPATRICK, *supra* note 43, § 8.27 ("Since the exception for coconspirator statements, in its most common formulations, reaches only statements made during and in furtherance of the conspiracy, it makes sense to say that the speaker is not trying to make evidence or bear witness, and certainly has no purpose to advance an investigation by law enforcement officers.").

is wrongful or illegal,[139] a coconspirator neither accuses anyone with the understanding that the government could use the statement against the perpetrator nor understands the government could use her information in a criminal investigation or prosecution.

Coconspirators are not the only declarants who might speak to police officers without understanding the consequences of their statements. Any declarant who would unlikely understand the consequences of his statements can make nontestimonial statements. For example, in *People v. Morgan*,[140] a police officer answered the phone while executing a search warrant for methamphetamines in Frances Morgan and Roy Brown's home.[141] Not knowing that a police officer was on the other end of the call, the caller said that he needed some drugs and unwittingly asked the officer if he had any.[142] At Morgan and Brown's trial for the sale of methamphetamines, the court admitted the phone caller's statements even though the caller did not testify.[143] The appellate court held that the trial court did not violate the defendants' confrontation right because the caller's statement could not be defined as testimonial under any of the three definitions offered in *Crawford*.[144] Common sense dictates the same conclusion: the caller was not bearing testimony because he neither understood he was talking to the police nor the consequences of his statements. Thus, *Crawford*'s formulation of the objective-witness test fully explains the court's result in *Morgan*.

The federal courts' explanation of *Bourjaily* and the result in *Morgan* are more consistent with an objective-witness test than the primary-purpose test because the best explanation in both cases *is* an objective-witness test. Neither the conspirator nor the unsuspecting caller would have understood that the government could use their statements in a criminal investigation. Thus focusing on the declarant's perspective is a better fit than focusing on the interrogator's perspective when police are questioning an unsuspecting declarant.

This same logic should extend to unsuspecting child declarants. Any declarant who unlikely understands he is reporting wrongful conduct or is

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139. A classic coconspirator is one who makes a statement "unwittingly to a confidential government informant, or . . . casually to a partner-in-crime." United States v. Holmes, 406 F.3d 337, 349 (5th Cir. 2005) (footnote omitted). In contrast, the less typical coconspirator may make statements to law enforcement officials with clear understanding that her statements could be used at trial. *See, e.g.*, United States v. Stewart, 433 F.3d 273, 292-93 (2d Cir. 2006) (holding that coconspirator statements made to investigating law enforcement officers to further a conspiracy to obstruct justice were not testimonial; truthful parts of statements made in effort to conceal and obstruct, "albeit spoken in a testimonial setting" with the anticipation that statements would be used at trial, are admissible).

140. 23 Cal. Rptr. 3d 224 (Ct. App. 2005).

141. *See id.* at 225-26.

142. *See id.* at 226.

143. *See id.* at 227.

144. *See id.* at 232.

making statements relevant to a criminal investigation is not a "witness against" the accused. The coconspirator and unsuspecting caller perceive no *external indicators* that the listener will communicate the information to law enforcement officials. A young child who does not recognize certain conduct as wrong has the inverse problem. When a small child makes a statement incriminating a defendant, the child may lack *internal indicators* that the reported conduct is wrongful or that the information is relevant to a criminal investigation or prosecution. Regardless of whether external or internal indicators are at play, the bottom line is the same: a reasonable declarant would not understand the consequences of her statements. Because a purely objective-witness test would ignore a child's internal indicators, a test accounting for a child's age, intelligence, and experience better reflects the nature of the statement. Only a reasonable-child approach or a purely subjective approach could determine when a child likely made an accusation of wrongful behavior or a statement that the child understood as relevant to a criminal investigation. Subpart III.A.4 will explain why a reasonable-child approach is superior to a purely subjective approach. But first, Subpart III.A.2 will explain why the Confrontation Clause's text and *Crawford*'s reasons for overruling *Roberts*, support an objective-witness test.

2. *A child who cannot understand she is making an accusation or making statements relevant to a criminal investigation is not a "witness against" the accused*

An objective-witness test more accurately accounts for the two types of statements covered by the Confrontation Clause than the primary-purpose test. As shown below, the Confrontation Clause ensures that defendants can confront declarants who make accusations against them and make statements that a reasonable person would understand are relevant to a criminal investigation. A purely objective test would erroneously include statements that a reasonable child would not understand as an accusation or as relevant to a criminal investigation. A test accounting for a child's age, intelligence, and experience better accounts for when children act as a witness than a purely objective-witness test.

Accusations that establish or prove some fact lie at the core of the Confrontation Clause. The Confrontation Clause states that "[i]n all criminal prosecutions, the *accused* shall enjoy the right . . . to be confronted with the witnesses against him."[145] This text suggests that a witness typically makes some kind of accusation before the confrontation right attaches. In other words, accusations are at the core of the Confrontation Clause. The Sixth Amendment's text also begs the following question: which declarants are acting as a witness? The Court uses the term "testimonial" to describe what the

145. U.S. CONST. amend. VI (emphasis added).

Confrontation Clause refers to as a statement from a "witness[] against [the accused]."[146] The *Crawford* Court explained that a "witness[] against" is one "who 'bear[s] testimony.'"[147] "'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[148]

The Court's definition of testimony and the Sixth Amendment's text triggers the following logical chain: If "witnesses against [the accused]" make statements to establish or prove a fact, then even children need to understand the implications of a fact before they can act as a witness. If a child does not understand the grave implications of a certain fact, the child cannot make a "solemn declaration or affirmation" to establish something seemingly unimportant. And if a child reports only seemingly unimportant facts, the child is not accusing the perpetrator.[149] Without making an accusation, a child's out-of-court statements lie outside the core of the Confrontation Clause.

Of course, the Clause covers more than just accusatory statements. It also covers statements that a reasonable declarant would understand as relevant to a criminal investigation or prosecution. The *Crawford* Court stated that "[w]hatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[150] In all of these contexts, declarants make statements to government officials with the anticipation that their statements are relevant to a criminal investigation or trial—even when those statements are not accusatory. In fact, the most seemingly inconsequential statements to police officers can be testimonial. Friedman's colloquy with Justice Alito during the *Hammon* oral argument demonstrates why.

At oral argument, Friedman offered the following hypothetical: If a declarant says to an officer in a donut shop that "I just saw Jack, he's back in town, with no clear relation to any . . . crime, that's presumably just chatter and . . . wouldn't be testimonial even if it . . . later becomes relevant."[151] Justice Alito then asks, "But if it's relevant that Jack is back in town, then that's testimonial."[152] To which Friedman answers, "[I]f at the moment that [the statement is] made, the declarant understands that Jack being back in town might be useful in an investigation, or if a reasonable person in the position of

146. *Id.*

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

148. *Id.* (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (alteration in original).

149. To accuse means "[t]o charge with a fault; to find fault with, blame, censure." 1 OXFORD ENGLISH DICTIONARY 93 (2d ed. 1989).

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

151. Transcript of Oral Argument at 8, Hammon v. Indiana, 547 U.S. 813 (2006) (No. 05-5705).

152. *Id.*

the declarant would understand it, that would be testimonial."[153] Friedman's hypothetical example demonstrates why almost all statements to police officers or to grand juries are testimonial—a reasonable declarant understands that even seemingly unimportant facts could be relevant to a criminal investigation or prosecution.

Accounting for both the above concepts, a definition of a testimonial statement must capture both accusatory statements and statements made when a reasonable declarant would understand that the information could be relevant in a criminal investigation. The primary-purpose test is overinclusive because it does not directly address either concept. If a court rigidly applies *Davis*, it could categorize a statement as testimonial even when a declarant had no idea she was making an accusation or reporting information relevant to a criminal investigation. In contrast, Friedman's reasonable-adult standard accounts for both concepts. Recall that Friedman advocates a purely objective-witness test. According to Friedman, a statement should be testimonial when a reasonable declarant would anticipate that the government would use the statement in prosecuting or investigating a crime.[154] By definition, Friedman's approach accounts for statements that a reasonable declarant would understand could be relevant in a criminal investigation. And because any reasonable adult would understand that an accusation of criminal conduct is relevant to a criminal investigation, the reasonable-adult standard also accounts for accusations.

A strict reasonable-adult standard, however, is also overinclusive because it ignores situations in which a child has no idea she is reporting information relevant to a criminal investigation. Only a jurisprudence that reflects a child's perspective can accurately determine when a child acts as a witness. And only a reasonable-child approach or a purely subjective approach could determine when a child likely made an accusation of wrongful behavior or a statement that the child understood as relevant to a criminal investigation.

3. *Ignorant children should not shoulder the adult-like responsibility of confronting a defendant unless their statement is testimonial*

An objective-witness test accounts for the American value that accusers should confront the accused better than the primary-purpose test. And a test considering a child's age, intelligence, and experience better accounts for when children are making an accusation than a purely objective-witness test.

A deep-rooted American value counsels against courts placing the responsibility to testify on children who are unlikely to understand that they have reported wrongful conduct. Professor Sherman Clark has argued that the Confrontation Clause should not solely be understood as a defendant's right,

153. *Id.*

154. *See* Friedman, *supra* note 24, at 243.

but also as an obligation imposed on accusers.[155] "Americans want to think of ourselves as people who will not stab a man in the back, even—and this is key—even if we are fully convinced that he deserves to be stabbed."[156] Bolstering his view, Clark notes several quotations Justice Scalia used in his *Coy v. Iowa* majority opinion,[157] including a statement from President Dwight Eisenhower: "'In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.'"[158] Based on these values, Clark questions whether courts should require children to shoulder an adult-like responsibility and literally confront their abusers.[159]

An objective-witness test is more faithful to Americans' concept of accuser responsibility because it places the burden of bearing testimony on the person in the best position to know whether they are making an accusation—the accuser, not the questioner. As noted above, the primary-purpose test's focus on the questioner's perspective will not explain why a coconspirator or unsuspecting caller is not making a testimonial statement.

Clark's accuser-based approach has special force when applied to children. A child who states seemingly innocent facts has not sought to accuse the perpetrator from behind a shadow. Requiring such a child to confront a defendant she has not accused under a purely objective-witness test or primary-purpose test would cause children to shoulder an adult-like responsibility inconsistent with this traditional American value.

Even when a child would understand that she is accusing someone of wrongdoing with the understanding that the defendant will suffer consequences, Clark's accuser-based approach to the Confrontation Clause may suggest that children who are too traumatized to testify should not have the responsibility to literally look their abuser in the eye and accuse them face-to-face. In *Maryland v. Craig*, the Court issued an opinion consistent with Clark's view, holding that states do not violate the Confrontation Clause when their trial courts permit those children suffering "serious emotional distress such that the child cannot reasonably communicate" to testify through one-way closed-circuit television.[160]

The arguments in Subparts III.A.1 through III.A.3 have all shown why an objective-witness test is superior to the primary-purpose test and why a reasonable-child approach is superior to a purely objective-witness test for

155. *See* Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1261 (2003).

156. *Id.* at 1263.

157. *Id.* at 1264-65; *see* Coy v. Iowa, 487 U.S. 1012 (1988) (holding that the trial court violated the defendant's confrontation right by allowing two children to testify from behind a screen that shielded the defendant from their view).

158. *Coy*, 487 U.S. at 1018 (quoting Press Release, President Dwight Eisenhower, *supra* note 21).

159. *See* Clark, *supra* note 155, at 1283-84.

160. *See* Maryland v. Craig, 497 U.S. 836, 860 (1990).

child declarants. But these arguments have not explained why an objective test is superior to a purely subjective test. Subpart III.A.4 will now show why an objective test avoids the unreliability of a purely subjective test for child declarants.

4. *An objective approach to child declarants is more reliable than a purely subjective approach*

An objective, reasonable-child approach is superior to a purely subjective test because it is more reliable and creates a better incentive structure for interviewers when questioning child declarants. An objective test is more reliable in two ways.

First, a judge can always rely on using an objective test by evaluating out-of-court statements in the abstract whereas a judge may not have enough evidence in the record to determine a declarant's actual thought process for a purely subjective test. For a subjective test, courts may not have enough evidence to conclude that an actual declarant knew he was making an accusation or understood the information he reported was relevant to a criminal investigation. Consequently, a purely subjective test would inevitably lead to some guesswork. Particularly when the declarant is not available for testimony, an incomplete record may be the only evidence upon which a judge using a purely subjective test could base his conclusion.

Second, an objective test will not need to rely on a young child's counterfactual statements created by the interviewer's suggestions to determine whether a very young child had testimonial capacity. Even if a judge had the relevant information on a child declarant, the evidence would be much less reliable than it would be for adult declarants. Top child psychologists disagree on children's overall susceptibility to an interviewer's false suggestions.[161] But

161. *Compare* Gail S. Goodman & Rebecca S. Reed, *Age Differences in Eyewitness Testimony*, 10 LAW & HUM. BEHAV. 317, 324-25 (1986), *and* Gail S. Goodman et al., *Child Sexual and Physical Abuse: Children's Testimony*, *in* CHILDREN'S EYEWITNESS MEMORY 1, 17 (Stephen J. Ceci et al. eds., 1987) (finding that children between three and six tended only to omit details instead of fabricating information in responses to questions), *and* Gail S. Goodman et al., *The Child Victim's Testimony*, *in* NEW ISSUES FOR CHILD ADVOCATES 167 (Ann M. Haralambie ed., 1986) [hereinafter Goodman et al., *Victim's Testimony*], *with* STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY 219 (1995) (finding that 58% of the preschool children questioned produced false narratives in response to leading questions for at least one fictitious event), *and* Maggie Bruck et al., *Reliability and Credibility of Young Children's Reports*, 53 AM. PSYCHOL. 136, 143 (1998) (finding that after a series of three interviews a majority of the children interviewed assented to "all true and false events"), *and* Michelle D. Leichtman & Stephen J. Ceci, *The Effects of Stereotypes and Suggestions on Preschoolers' Reports*, 31 DEVELOPMENTAL PSYCHOL. 568, 572-73 (1995) (disagreeing with Goodman and finding that children are much more susceptible to interviewer suggestions). *See generally* Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004, 1042-45 (1999) (comparing the above studies).

even these experts that disagree on children's overall suggestibility *agree* that preschool aged children are particularly susceptible to confirming an interviewer's false suggestion.[162] Even if a preschool-aged child made statements to an interviewer that suggested she understood that she was making an accusation or did not know she was reporting wrongful behavior, those statements may in fact represent the interviewer's suggestions rather than the child's actual understanding. With such high susceptibility, a child declarant could simply feed an interviewer the answers that the interviewer is hoping to elicit, whether the interviewer hoped to confirm that the child understood she was making an accusation or hoped the child was clueless. Because preschool-aged children would be the most likely to *not* know that they are making an accusation or to report unknowingly information relevant to a criminal investigation, a purely subjective test would, overall, produce unreliable results. Assuming a judge can access reliable research on a child's understanding of the underlying crime, an objective approach will be more reliable.

In addition to the unreliability of a purely subjective test, an objective test will create a better incentive structure for interviewers. A purely subjective test would provide interviewers with the perverse incentive to ask leading questions and to drop hints in hopes of eliciting the desired response from a child. Under an objective test, an interviewer will not necessarily have the incentive to suggest responses that show a child has testimonial capacity.

Note that under an objective-witness test, an interviewer will still have the incentive to elicit statements about an alleged crime from a child declarant to match her personal agenda. That incentive may ultimately produce unreliable testimony from a child because the interviewer asked particularly coercive questions. But recall that after *Crawford*, the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[163] In other words, the Confrontation Clause does not ensure that the *substance* of a declarant's testimony is reliable. But the Clause still ensures that a court will reliably identify statements that are "*by their nature* . . . not testimonial."[164]

Accounting for all the arguments in Part III.A, a reasonable-child approach is superior to the primary-purpose test and to a purely objective- or purely subjective-witness test because it better (1) comports with the Court's

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162. *See e.g.*, Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 PSYCHOL. BULL. 403, 432 (1993) (arguing that Goodman ignored the fact that her data showed "the youngest preschoolers [were] disproportionately more suggestible than older children"); Goodman et al., *Victim's Testimony*, *supra* note 161, at 173 (noting that three-year-olds were particularly likely to confirm an interviewer's false leading question); Thomas D. Lyon, *Let's Not Exaggerate the Suggestibility of Children*, CT. REV., Fall 2001, at 12, 13 ("I am struck by how many experts appear to overlook the truism that just as preschoolers are much more suggestible than school-age children, school-age children are much less suggestible than preschoolers.").

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

164. *Id.* at 56 (emphasis added).

coconspirator jurisprudence; (2) reflects that the Confrontation Clause protects against admitting accusations and statements relevant to a criminal investigation; (3) accounts for the responsibility Americans expect of witnesses; and (4) avoids the unreliability of a purely subjective standard. Therefore, a statement should be testimonial when a reasonable child of like age, intelligence, and experience would understand that her statement is an accusation that will adversely affect the perpetrator or that the information is relevant to an investigation. When a reasonable child declarant would neither make an accusation nor understand that she is reporting information relevant to a criminal investigation, she "simply [is] not acting as a *witness*; she [is] not *testifying*."[165]

B. *Courts Should Consider a Child's Age, Intelligence, and Experience*

Determining what a reasonable child of like age, intelligence, and experience would think will undoubtedly be a difficult question for a judge, but not an unfamiliar one. In tort law, "[i]f the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances."[166] Though states vary on the age at which a child can first be negligent, all states use a variation of the *Restatement of Torts* as the standard of care for children.[167] A judge should not have a problem transferring this same concept into a criminal context. Recent state court decisions involving child declarants suggest that the reasonable-child-declarant standard would effectively distinguish between testimonial and nontestimonial statements.

1. *The child's age*

Neither a legislature nor a court can foresee all the different factual scenarios in which a child could be a declarant. While a reasonable three-year-old child may understand that battery is wrong, she may not understand that certain forms of sexual abuse are forbidden. Because nobody could set a clear age limit above which all child declarants are capable of making testimonial

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165. Davis v. Washington, 547 U.S. 813, 828 (referring to Michelle McCottry's responses to a 911 operator).

166. RESTATEMENT (SECOND) OF TORTS § 283A (1965); *see also* Mathis v. Mass. Elec. Co., 565 N.E.2d 1180, 1184-85 (Mass. 1991) (noting that a child's actions are "judged by the standard of behavior expected from a child of like age, intelligence, and experience"); Standard v. Shine, 295 S.E.2d 786, 787 (S.C. 1982) ("[A] minor's conduct should be judged by the standard of behavior to be expected of a child of like age, intelligence, and experience under like circumstances."); Carson v. LeBlanc, 427 S.E.2d 189, 192 (Va. 1993) ("The standard of care required of such a person is to exercise 'that degree of care expected of a child of like age, intelligence and experience under the same or similar circumstances.'" (quoting Grant v. Mays, 129 S.E.2d 10, 13 (Va. 1963))).

167. *See* RESTATEMENT (SECOND) OF TORTS § 283A Reporter's Notes (2007).

statements in all situations, evidence rules should not set a clear cut-off line. Rather, a court should determine the testimonial nature of statements on a case-by-case basis. In contrast, most state tort laws have a minimum age below which a child cannot be negligent.[168] In this one respect, courts should depart from the reasonable-person tort standard to account for the possibility that even very young children could make testimonial statements.

The younger the child, the less likely the child will be able to make testimonial statements. For example, it would be difficult to believe that a reasonable eighteen-month-old girl could make a testimonial statement when saying "Ow bum daddy" to explain why her buttocks hurt after a bath.[169] Nevertheless, years before *Crawford*, the Utah Supreme Court recognized that this small child was not a witness against her father in his criminal trial for aggravated sexual assault. The court opined that her statements did "not constitute an accusation against defendant of the elements of the crime of child abuse."[170] On the other hand, an eight-year-old girl is likely capable of making a testimonial statement when she informs her foster mother that her father had touched her and that she hated her father.[171]

2. *The child's intelligence*

If a reasonable child could not understand the consequences or implications of the perpetrator's actions, then the child may not understand that anything wrong has occurred. Recall three-year-old Nathan in the *Siler* case who probably did not understand that his father had killed his mother; after claiming that his mother was "sleep standing" in the garage, the three-year-old asked to see his mother.[172] A reasonable three-year-old may not understand that his mother was dead after seeing her hanging from a rope. A small child might not understand less-violent crimes such as poisoning, child pornography, or other forms of sexual abuse. On the other hand, even the smallest child probably understands the basic cause and effect of a fistfight.

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168. *See* 1 DAN B. DOBBS, THE LAW OF TORTS § 126, at 297 (2001) ("Perhaps as many as ten or twelve states still use the rule of sevens in some form [fixing the minimum age for negligence] . . . ."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 180 (5th ed. 1984) ("Most courts have attempted to fix a minimum age, below which the child is held to be incapable of all negligence.").

169. *See* Friedman, *Conundrum*, *supra* note 119, at 250 & n.28 (explaining how in *State v. Webb*, 779 P.2d 1108, 1109 (Utah 1989), "[a]n eighteen-month-old girl, on being lowered into the bath, said, 'Ow bum,' and then after the bath, while her mother was examining her, 'Ow bum daddy'").

170. *Webb*, 779 P.2d at 1115.

171. *Cf.* State v. Tester, 2006 VT 24, ¶ 2-3, 179 Vt. 627, 895 A.2d 215 (noting that the trial court admitted an eight-year-old's out-of-court statements to her foster mother in which the child said she hated her biological father for asking whether her foster parents "touched" her and admitted that her biological father had touched her in a bad way).

172. State v. Siler, 116 Ohio St. 3d 39, 2007-Ohio-5637, 876 N.E.2d 534, at ¶ 8, *cert. denied*, 128 S. Ct. 1709 (2008).

Note that under the torts standard, courts adjust for the child's mental capacity. A court will adjust the standard downward for a child of unusually low intelligence and upwards for a child of unusually high intelligence.[173] Likewise, a court evaluating a child's out-of-court statement should account for a child with either unusually low or high intelligence.

3. *The child's experience*

A child's experience and education should inform a court's testimonial analysis. A child who has received some kind of sex education or warnings about sexual abuse at school is much more likely to recognize that sexual abuse is wrong compared to a child who has not received such education.

The child's experience should include known statements to the child. If the questioner or someone else has informed the child before she makes her statements that the reported conduct is wrong and that the perpetrator will be punished, the child's statements are more likely to be testimonial. For example, if a police officer informs a seven-year-old boy that the district attorney will try his best to put his alleged sexual assailant in jail for a long time, a reasonable seven-year-old will probably understand that his statements will serve as grounds for punishing the perpetrator.[174] But an adult's open-ended questions to a child describing sexual abuse might not signal to the child that the conduct was wrong.[175] Note, however, that for an interviewer's statements to be part of a child's education, the child would need to have the mental capacity to understand an interviewer's explicit suggestions. Recall that in contrast to a purely subjective standard, a court would not give weight to a child's statement made during the interview or later about the interview.

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173. 1 DOBBS, *supra* note 168, § 124, at 295 ("The child with mental limitations is not expected to conduct himself with the care of the ordinary child, but only with the care his mental abilities and experience permit. Conversely, a child whose intelligence and experience give him the capacities of an adult will be expected to act with the same care as a reasonable person." (footnote omitted)).

174. *See* People v. Vigil, 104 P.3d 258, 261-63 (Colo. App. 2004); *see also* State v. Henderson, 160 P.3d 776, 779 (Kan. 2007) (noting that the child-protective-services worker asked the three-year-old sexual abuse victim if she knew "that girls have three parts that nobody should touch?"); Rangel v. State, 199 S.W.3d 523, 535 (Tex. Ct. App. 2006) (under either an objective or subjective standard, a four-year-old informed by a Child Protective Services investigator that she needed answers to her questions to ensure abuse would never happen again could perceive her words would be used to establish a fact).

175. *See* State v. Brigman, 615 S.E.2d 21, 25-26 (N.C. Ct. App. 2005).

C. *Courts Should Presume a Child Has Testimonial Capacity Unless a Prosecutor Shows Otherwise by a Preponderance of the Evidence*

As Professor Clark noted,[176] the Confrontation Clause is primarily the defendant's right. In recognition of this right, courts should presume that a child declarant has the capacity to understand that the reported conduct is wrongful and that her statements would have adverse consequences on the defendant. This presumption places the burden of proof on the prosecution to show that a reasonable child would not have understood that her statements would incriminate the defendant or be relevant to a criminal investigation or prosecution.

To carry that burden, prosecutors must be able to establish by a preponderance of the evidence that a reasonable child of like age, intelligence, and experience would not understand that her statement is an accusation that will adversely affect the perpetrator or that the information is relevant to an investigation. This is the same evidentiary standard that the *Bourjaily* Court established to determine whether a statement purportedly made in the furtherance of a conspiracy should be admitted under Federal Rule of Evidence 104(a).[177]

IV. REBUTTING COUNTER ARGUMENTS TO A REASONABLE-CHILD-DECLARANT APPROACH

Critics have many reasons to argue that courts should not apply a reasonable-child approach. But the Court has left hints strongly suggesting that an objective-witness test survives *Davis* when the declarants' perspective does not depend on or account for the questioner's purpose. *Bourjaily* itself suggests this very conclusion. As shown above, courts do not consider coconspirators' statements testimonial because of the declarants' viewpoint. Below is a point-counterpoint discussion demonstrating why a reasonable-child approach should apply to child declarants in all contexts.

A. *A Reasonable-Child-Declarant Approach Is Not Contrary to the* Davis *Primary-Purpose Test*

One could argue that the *Davis* primary-purpose test forecloses accounting for any declarant's perspective. Unlike a coconspirator's remark to an undercover police officer, an objective observer would be able to determine that a police officer questioning a child is asking questions to preserve a record

176. *See supra* text accompanying notes 155-59.

177. *See* FED. R. EVID. 104(a) (stating the standard for admissibility generally); Bourjaily v. United States, 483 U.S. 171, 176 (1987) ("[W]hen the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by a preponderance of the evidence.").

for prosecution. But the *Davis* Court cautioned that the primary-purpose test was "not an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation, but rather a resolution of the cases before us and those like them."[178] Because a child declarant has limited cognitive ability and may have no idea that she is speaking to a law enforcement official, a child-declarant fact pattern is significantly different from the facts in *Davis* and *Hammon*. A small child could be more like the coconspirator in *Bourjaily* than the domestic violence victims in *Davis* and *Hammon*. The *Davis* Court also stated that "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate,"[179] leaving room to consider the declarant's perspective.

B. *A Reasonable-Child-Declarant Approach Is Objective*

Some may argue that *Crawford* and *Davis* require a purely objective test and that a reasonable-child-declarant approach would not pass muster because it is too subjective. Undoubtedly, grafting torts' reasonable-person standard onto a Confrontation Clause analysis will require courts to consider the subjective factors of age, intelligence, and experience. But a consideration of subjective factors does not violate the Confrontation Clause. First, the Sixth Amendment certainly contains no prohibition against considering a declarant's subjective attributes. Second, just like the torts standard, a reasonable-child-declarant standard is in fact an objective-witness standard because the court is ultimately asking what a reasonable person would have thought, not what the actual declarant subjectively thought.[180] Third, as noted above, if a court fails

178. Davis v. Washington, 547 U.S. 813, 830 n.5 (2006) (citations and internal quotation marks omitted).

179. *Id.* at 822 n.1.

180. Several legal commentators equivocate on the actual nature of the standard of care for children. Some commentators refer to the standard as truly subjective. *See* 1 DOBBS, *supra* note 168, § 124, at 294-95 ("[T]he standard is subjective in that it ultimately refers back to the individual child himself. He is to act as a person with all of his own important qualities . . . . In other words, in spite of its form, the standard is quite literally subjective."); 3 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 16.8, at 514 (3d ed. 2007) ("While a child driver should be held to an objective (adult) standard of care when sued as a defendant whose activities had exposed others to injury, he should . . . benefit [from] a *subjective standard of care* in protecting himself against hazard." (emphasis added)). But all commentators acknowledge that the standard of care for children is not purely subjective, but has an objective component. *See* 1 DOBBS, *supra* note 168, § 124, at 295 ("In the absence of evidence that the child suffers special disabilities or enjoys special talents, perhaps courts and juries are in fact following a kind of reasonable child standard rather than the fully subjective standard that courts articulate."); 3 HARPER ET AL., *supra*, § 16.8, at 485-86 ("But even [when a child is injured] the test is not entirely individualized. The child is to be held, typically, 'to the exercise of the degree of care which ordinary children of his age, intelligence, and experience . . . ordinarily exercise under similar circumstances,' or to a similar standard." (quoting Harry Shulman, *The Standard of Care*

to consider a child's age, intelligence, and experience, the court may fail to consider the nature of the statement.

C. *The Confrontation Clause No Longer Depends on How Reliable the Hearsay Exception May Be*

In some cases, one might argue that eliminating a constitutional bar to child declarants' statements would enable evidence to come from children that the court deems incompetent to be a witness at trial. Courts often find children incompetent to serve as a witness because the child either does not understand the obligation to tell the truth or lacks the ability to communicate to the jury. Admitting statements from such an unreliable source could be very problematic. But removing the constitutional bar would not affect other state and federal hearsay evidence rules that test the reliability of hearsay statements. Many states enacted hearsay exceptions for child abuse victims' out-of-court statements to satisfy the "particularized guarantees of trustworthiness"[181] requirement from *Roberts*.[182] Such states often require that other evidence substantially corroborate the hearsay statement before a court can properly admit the statement under the hearsay exception.[183] These laws are still in effect. Remember that the *Crawford* Court opined, "[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[184]

Required of Children, 37 YALE L.J. 618, 622 (1927)); KEETON ET AL., *supra* note 168, § 32, at 180 ("But the standard is still not entirely subjective, and if the conclusion is that the conduct of the child was unreasonable in view of his estimated capacity, the child may still be found negligent, even as a matter of law." (footnote omitted)).

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

182. *See, e.g.*, CAL. EVID. CODE § 1360(a)(2) (West 2008) (allowing a hearsay exception for child abuse and neglect victim's hearsay statements when, inter alia, "[t]he court finds . . . that the time, content, and circumstances of the statement provide sufficient indicia of reliability"); FLA. STAT. § 90.803(23) (2007) (allowing a hearsay exception for child victims when, inter alia, "[t]he court finds . . . that the time, content, and circumstances of the statement provide sufficient safeguards of reliability"). The Florida hearsay exception includes a list of factors for the judge to consider. *See id.* ("In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate. . . ."); State v. Spencer, 2007 MT 245, ¶ 30, 339 Mont. 227, ¶ 30, 169 P.3d 384, ¶ 30 (noting that Montana trial courts must determine whether a child-victim's hearsay statements in a criminal case has, inter alia, circumstantial guarantees of trustworthiness under *Montana Code Annotated* § 46-16-220 to admit the statement as an exception to the rule against hearsay).

183. *See, e.g.*, People v. Brodit, 72 Cal. Rptr. 2d 154, 164 (Ct. App. 1998) (listing whether the statements are consistent and whether the statements demonstrate a knowledge of sexual matters beyond that normally expected of children of declarant's age among a group of factors a judge must consider to admit statements under California Evidence Code § 1360).

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

Arguments attacking the reliability of an admitted out-of-court statement are, therefore, no longer relevant to a Confrontation Clause analysis.

D. *A Reasonable-Child Approach Better Curbs Government Abuse than the Primary-Purpose Test*

Some might argue that applying any type of an objective-witness test to child declarants will foment more government abuse. The *Crawford* Court opined that one of the biggest concerns motivating the Framers to establish a confrontation right was the prospect of government abuse.[185] "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . ."[186] If a child declarant's perspective becomes relevant, government officials might have added incentive to misrepresent their conversations with children.

For example, the Illinois Supreme Court stated that an "exclusive focus on the declarant's intent . . . could lend itself to abuse by the State, by increasing use of statements gathered without the declarant's knowledge—for instance undercover interviews of witnesses."[187] The Illinois Supreme Court's concerns are legitimate. A police officer might pose as a counselor from child protective services and deceive the child by stating he will not use the child's statements to prosecute the perpetrator, all the while intending to use the statements as evidence. This kind of deceit is a valid concern, but certainly not unique to an objective-witness approach: the primary-purpose test is just as susceptible. The objective primary purpose of the deceitful child-protective-services interviewer above would be to protect the child's emotional and physical health. In fact, an objective-witness test guards against this deceit better than the primary-purpose test. Government officials can easily manipulate the primary purpose by "recit[ing] a formula that will give a friendly court cover for concluding that the questioner's primary purpose was not forensic."[188] A court could try to deter such behavior by estopping the prosecution from using statements that the government deliberately elicited to create admissible testimony.[189]

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185. *Id.* at 67 ("[The Framers] knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people . . . .").

186. *Id.* at 56 n.7.

187. People v. Stechly, 870 N.E.2d 333, 356 (Ill. 2007) (plurality opinion).

188. Friedman, *supra* note 84, at 560 n.27.

189. *Cf.* State v. Snowden, 867 A.2d 314, 316, 329 (Md. 2005) (holding that the questioner's intentions should be taken into account when police officer directed a social worker to interview two suspected child abuse victims because the social worker qualified as a professional who could relate hearsay under a special "tender years" statute).

E. *Statements in Response to Police Questioning Are Not Per Se Testimonial*

Some courts view statements in response to police questioning as per se testimonial with a few exceptions.[190] No doubt, courts should presume that statements in response to police questioning are testimonial. The *Crawford* Court stated that the Confrontation Clause's primary object is to protect against admitting testimonial hearsay, "and interrogations by law enforcement officers fall squarely within that class."[191] But the Court follows that statement immediately with a footnote, stating that it "use[s] the term 'interrogation' in its colloquial, rather than any technical legal, sense."[192] Given such a broad definition, an undercover police officer could certainly "interrogate" a coconspirator to obtain nontestimonial statements or an unsuspecting phone caller. Literally excluding all statements in response to police questioning would, therefore, include classifying some statements that by their nature are not testimonial. As argued above, the logic behind the coconspirator exception under *Crawford* and *Morgan*, the California Court of Appeal case, suggests that courts do not consider child declarants' statements testimonial when a reasonable child would not understand that she is reporting wrongful conduct or when she would not know that the information could be relevant to a criminal investigation. In short, not all responses to police questioning are testimonial.

F. *The Court's Condemnation of* White *and Reference to* Brasier *Did Not Reject a Reasonable-Child Approach*

Some critics will point to the *Crawford* Court's apparent condemnation of *White* as evidence that a child's perspective is not relevant in testimonial analysis. But the *Crawford* Court never explained why admitting the child's statements to a police officer in *White* would have violated the Confrontation Clause. A court applying a reasonable-child test would have also concluded that the four-year-old victim's statements in *White* were testimonial. Any reasonable four-year-old would understand that Randall White had done something wrong by sneaking into the victim's bedroom at night, putting his

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190. *See* Commonwealth v. DeOliveira, 849 N.E.2d 218, 224-25 (Mass. 2006) ("'[S]tatements made in response to questioning by law enforcement agents are per se testimonial, except when the questioning is meant to secure a volatile scene or to establish the need for or provide medical care.'" (quoting Commonwealth v. Gonsalves, 833 N.E.2d 549, 551 (Mass. 2005))); *id.* at 225 ("If the *Crawford* inquiry were dependent on a very young declarant's knowledge of trial procedure, even under an objective reasonableness standard, that inquiry would lead, in every case, to a determination that statements are nontestimonial and result in the admissibility . . . of every out-of-court statement by a young child to another (except those made in response to police questioning and, therefore, per se testimonial).").

191. *Crawford*, 541 U.S. at 53.

192. *Id.* at 53 n.4.

hand over her mouth, threatening to whip her if she screams, and touching her vaginal area.[193] Even if a reasonable four-year-old would not have understood the sexual connotations of the touching, a reasonable child would have understood that the threats and midnight sneaking were wrong.

Some might misconstrue the *Davis* Court's reference to *Brasier* as a suggestion that a child's age is not relevant in a testimonial analysis. But the *Davis* Court's reference to *Brasier* merely suggests that a child "under seven years of age" could make a testimonial statement.[194] In the version of *Brasier* cited by the Court, the judges only concluded that a child could take an oath to testify in court depending "upon the sense and reason they entertain of the danger and impiety of falsehood."[195] But the court in *Brasier* held that if a child was incompetent to take an oath, she could not testify.[196] *Brasier* does not suggest that a child's perspective is irrelevant. On the contrary, it demonstrates that a child's understanding is relevant to the child's ability to testify.

V. RECENT STATE CASES DEMONSTRATE THE NEED FOR A REASONABLE-CHILD-DECLARANT APPROACH

For courts considering a child declarant's response to police questioning, a reasonable-child-declarant approach is not a mere academic point. Some cases after *Crawford* demonstrate that child declarants may not be aware that they are reporting wrongful conduct. Below are two recent cases in which a reasonable child declarant arguably would not have understood that they were reporting anything wrong. The details of these cases are grisly and perverse. I provide an in-depth summary only because the details themselves convey the gravity of the crimes and punctuate that child witnesses sometimes do not appreciate the horrifying nature of the crimes they witness. I do not include the details for shock value, but for pedagogical purposes.

A. *Sexual Abuse*—State v. Brigman

In *State v. Brigman*,[197] the Rowan County Child Protective Services removed five-year-old J.B. and his four-year-old brother A.B. from Richard and Kimberly Brigman's home.[198] The agency placed the two children with

193. *See* White v. Illinois, 502 U.S. 346, 349 (1992).

194. *See* Davis v. Washington, 547 U.S. 813, 828 (2006); King v. Brasier, (1779) 168 Eng. Rep. 202 (K.B.).

195. *Brasier*, 168 Eng. Rep. at 203.

196. *Id.*

197. 615 S.E.2d 21 (N.C. Ct. App. 2005).

198. *See* State v. Brigman, 632 S.E.2d 498, 501 (N.C. Ct. App. 2006); *Brigman*, 615 S.E.2d at 22.

foster parents Tammy and Michael McClarty.[199] At Kimberly and Richard's trials for first-degree sex offenses and indecent liberties with minors, Tammy testified that about two months after arriving at the McClarty's home, she heard J.B. screaming from another room, "Lick me, lick me."[200] After entering the room, Tammy saw A.B. lying on top of J.B. while J.B. screamed into A.B.'s face, "Lick me, lick me."[201] Tammy asked the boys what they were doing. J.B. said that they were playing the "puppy game."[202] J.B. further explained that the boys had played the "puppy game" with Richard and Kimberly and that the game involved licking each other's genitalia.[203] After asking her husband to continue making dinner without her, Tammy returned to the room to find J.B. on top of A.B., "humping" him.[204] Tammy again asked what the boys were doing, and J.B. replied that they were "getting ready to play the picture game."[205] J.B. explained that the "picture game" involved the boys posing while Richard and Kimberly took pictures.[206] The boys then demonstrated sexually explicit poses.[207] When Tammy asked how the boys were dressed for the "picture game," J.B. said that they were naked.[208] Tammy testified that J.B. seemed surprised that she did not know the boys were naked while playing the "picture game."[209]

Tammy immediately called the Rowan County Department of Social Services (DSS) and informed the agency that she thought "there was more going on with the boys other than just neglect."[210] After hanging up the phone, Tammy turned on a tape recorder and continued to speak with the boys.[211] The boys then explained that Richard and Kimberly would start the "picture game," and "the winner of the game got to do all the licking, and that they all ended up being winners."[212] Though the tape turned out inaudible, Tammy made notes of the conversation immediately afterwards.[213] Tammy then provided the

199. *Brigman*, 632 S.E.2d at 501; *Brigman*, 615 S.E.2d at 22.

200. *Brigman*, 632 S.E.2d at 501 (internal quotation marks omitted); *Brigman*, 615 S.E.2d at 22.

201. *Brigman*, 632 S.E.2d at 501 (internal quotation marks omitted); *Brigman*, 615 S.E.2d at 22.

202. *Brigman*, 632 S.E.2d at 501; *Brigman*, 615 S.E.2d at 22 (internal quotation marks omitted).

203. *Brigman*, 615 S.E.2d at 22 (internal quotation marks omitted).

204. *Id.* (internal quotation marks omitted).

205. *Brigman*, 632 S.E.2d at 501; *id.* (internal quotation marks omitted).

206. *Brigman*, 632 S.E.2d at 501; *Brigman*, 615 S.E.2d at 22.

207. *Brigman*, 632 S.E.2d at 501; *Brigman*, 615 S.E.2d at 22.

208. *Brigman*, 615 S.E.2d at 22 (internal quotation marks omitted).

209. *Id.* at 26 (internal quotation marks omitted).

210. *Id.* at 22 (internal quotation marks omitted).

211. *Id.*

212. *Id.* (internal quotation marks omitted).

213. *Id.*

information to DSS and the police.[214] At trial, though the court found A.B. available as a witness, the court determined J.B. was unavailable and allowed Tammy to relate J.B.'s statements during her testimony.[215]

Tammy's testimony is haunting because J.B. gave no indication that he actually considered the sexually explicit games wrong. A reasonable five-year-old child of like intelligence and experience might not understand that society considers these games a form of child abuse. In contrast to other forms of sexual abuse, the games did not appear to physically harm the two boys, and the participants were always rewarded with a prize. Additionally, Tammy's open-ended questions would not have indicated to the boys that the games were inappropriate. In a reasonable child's mind, these could have merely been "games," not crimes.

Tammy's interview with J.B. also suggests that a reasonable five-year-old might not understand that his statements would be relevant to a criminal investigation. Though the state removed the boys from their biological mother's home for extreme neglect,[216] the court mentions no evidence indicating that the boys knew why DSS relocated them to a different home. At the time of Tammy's interview with J.B., the police were not investigating the parents for sexual abuse. Consequently, a reasonable five-year-old would have been unlikely to have understood that their games would be relevant to a criminal investigation.

A court could reach a different conclusion based on the *Brigman* facts depending on whether it applied the primary-purpose test or a reasonable-child-declarant test. The *Brigman* court rejected Kimberly Brigman's argument that Tammy was functioning as a law-enforcement agent.[217] But another court could have decided that Tammy was acting as an agent because she was attempting to preserve J.B.'s statements for a criminal investigation.[218] Tammy's notes and attempted tape recording strongly suggest she tried to preserve J.B.'s statements for this exact purpose: Tammy turned her notes over to both DSS and the police. If a court applied the primary-purpose test, J.B.'s statements would almost certainly be testimonial. By contrast, a court applying a reasonable-child-declarant test would unlikely characterize J.B.'s statements as testimonial. Like a coconspirator, a reasonable five-year-old "would not

214. *Id.* at 23.

215. *Id.* at 23-24.

216. *See id.* at 21-22 (noting that the state found J.B. and his two brothers playing unattended in the streets and that the state discovered the boys lived in a filthy home that reeked of urine).

217. *See id.* at 25 (rejecting the defendant's theory because the court did not find J.B.'s statements to be the kind of "formal testimonial statements envisioned by the [*Crawford* Court]").

218. *But see* United States v. Peneaux, 432 F.3d 882, 896 (8th Cir. 2005) (noting that several federal courts generally do not consider foster parents agents of the state).

anticipate his statements being used against [his parents] in investigating and prosecuting the crime."[219]

B. *Murder*—State v. Siler

The *Siler* facts present a more difficult question because a reasonable three-year-old child would arguably understand only some of the behavior Nathan reported as wrong. In *Siler*, Detective Martin testified that he arrived at the Silers' home in plain clothes shortly after some uniformed police officers arrived.[220] The other officers had found Barbara Siler's body hanging from a yellow cord in the garage.[221] After one officer discovered Nathan asleep in his bedroom, he carried Nathan out to his grandfather, shielding Nathan from viewing his mother hanging in the garage.[222] While Nathan sat on his grandfather's lap, Martin lay nearby on the ground to talk with Nathan.[223] Though Nathan asked to see his mother and to go inside, Martin continued speaking with him.[224] Martin testified that Nathan said his mother was in the garage "sleep standing."[225] In response to Martin's questions, Nathan further explained that his father, Brian Siler, had scared him by banging on the door and that his parents had fought in the garage.[226] Martin asked Nathan if anyone "was hurting mommy."[227] Nathan responded, "Daddy did."[228] When Martin asked Nathan to demonstrate how daddy hurt mommy, Nathan did not respond.[229] Instead, Martin began demonstrating different holds on another police officer who was clothed in uniform, asking Nathan whether this was "how daddy was hurting mommy."[230] After Martin placed his arm around the other officer's shoulders from behind, Nathan told Martin to move his arms up until Martin's arms demonstrated a choke hold.[231] Nathan said yes when Martin again asked if this was how daddy hurt mommy, causing Nathan to cry.[232] In response to Martin's next question, Nathan said that his father placed a "yellow thing" around his mother's neck.[233] Martin testified that Nathan did

219. United States v. Martinez, 430 F.3d 317, 329 (6th Cir. 2005).

220. State v. Siler, 116 Ohio St. 3d 39, 2007-Ohio-5637, 876 N.E.2d 534, at ¶ 8, *cert. denied*, 128 S. Ct. 1709 (2008).

221. *Id.* at ¶ 6.

222. *Id.* at ¶ 7.

223. *Id.* at ¶ 8.

224. *Id.*

225. *Id.* (internal quotation marks omitted).

226. *Id.*

227. *Id.* at ¶ 13 (internal quotation marks omitted).

228. *Id.* (internal quotation marks omitted).

229. *Id.*

230. *Id.* (internal quotation marks omitted).

231. *Id.*

232. *Id.*

233. *Id.* (internal quotation marks omitted).

not seem "nervous, upset, or in any distress," until he demonstrated the choke hold.[234]

Siler presents a difficult case emotionally because Nathan was unlikely to have understood that his mother was dead. But even a child that cannot understand his mother is dead can have testimonial capacity.

Under either a primary-purpose test or reasonable-child approach, Nathan's statements were likely testimonial. In applying the primary-purpose test, the Ohio Supreme Court easily concluded that Nathan's statements were testimonial because Detective Martin asked Nathan questions to "establish past events possibly relevant to a criminal prosecution."[235] A reasonable-child approach would likely yield the same outcome, but it is a closer call. On the one hand, a reasonable three-year-old may not have understood that he was reporting information relevant to a criminal investigation: Nathan responded to questions from a plain-clothes detective. On the other hand, a reasonable three-year-old would have sensed that his father was in trouble because of the presence of other uniformed police officers and Martin's demonstration of the choke hold. Ultimately, the choke hold demonstration shows that Nathan's statements were testimonial. Unlike the sexual games in *Brigman*, even a reasonable three-year-old likely understands that fighting is wrong.

CONCLUSION

State courts' interpretation of *Davis* and *Crawford* has created an illogical distinction: A coconspirator who makes a statement in the furtherance of a conspiracy does not make a testimonial statement because he has no idea that his statements will have an adverse impact on a future defendant. Without any understanding that a prosecutor could use his statements against someone, the coconspirator simply is not acting as a "witness against" the accused. But when a reasonable child would have no idea she is reporting wrongful conduct and does not understand that her statements will adversely affect the person about whom she reports, courts have interpreted *Davis* to largely ignore the child's perspective if a policeman or agent is asking the child questions.

To resolve this inconsistency, courts should apply a reasonable-child-declarant test to a child's out-of-court statements in all contexts. Sometimes children make accusations that entitle the alleged perpetrator to confront and cross-examine the child witness. Only when the child has acted as a "witness[] against [the accused]"[236] should the law mandate that she bear the adult responsibility of testifying. Sometimes children are "so undeveloped that their words ought to be considered more like the bark of a bloodhound than like the

234. *Id.* (internal quotation marks omitted).

235. *Id.* at ¶¶ 44, 47.

236. U.S. CONST. amend. VI.

testimony of an adult witness."[237] A court that requires an undeveloped child to confront the accused will further the Confrontation Clause's truth-seeking purpose about as much as requiring a canine from a narcotics unit to confront the accused because the dog sniffed and barked.

237. Friedman, *supra* note 24, at 272.