

TOWARD A UNIFIED THEORY OF TESTIMONIAL EVIDENCE UNDER THE FIFTH AND SIXTH AMENDMENTS

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There is an obvious parallel between the language of the Self-Incrimination Clause and that of the Confrontation Clause: the former forbids the government from forcing a criminal suspect to become a “witness against himself,” while the latter requires the government to confront a criminal defendant with the “witnesses against him.” The irresistible inference is that the word “witness” means the same thing in both Clauses. And, indeed, the Supreme Court has hinged the question of whether someone is a “witness” in both contexts on whether she has given “testimonial” evidence. Yet, at least at first blush, the Court has used the word “testimonial” in two very different ways. In the Self-Incrimination Clause context, “testimonial” refers to statements of fact or value, as opposed to physical evidence or statements introduced merely to prove how they were made (the “assertion” requirement). Pursuant to the Confrontation Clause, “testimonial” refers to statements made under circumstances objectively indicating some contemplation of later use at trial, as opposed to statements made in response to an ongoing emergency or for some other reason (the “contemplation of litigation” requirement).

But a closer look reveals that the word “testimonial” means much the same in both contexts. That is, there is both an “assertion” requirement and a “contemplation of litigation” requirement in each Clause. We simply emphasize the former in the Self-Incrimination Clause context and the latter in the Confrontation Clause context. In the latter context, we typically proceed on the assumption that the statement in question is hearsay—that is, offered for its truth, thus satisfying the “assertion” requirement—and only if it also satisfies the “contemplation of litigation” requirement do we say the Confrontation Clause is implicated. By contrast, in the Self-Incrimination Clause context, we typically assume that the “contemplation of litigation” requirement has been met—because, after all, the evidence has been taken from one suspected of a crime—and then determine whether the evidence constitutes an assertion.

This emerging unified view of testimonial evidence provides the best explanation thus far for much of the Court’s Fifth Amendment jurisprudence.

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When we see that the Fifth Amendment's assertion requirement parallels the Sixth Amendment's reliance on the definition of hearsay, it becomes clear that the impeachment exception to Miranda is justified on the ground that statements used to impeach are not offered for their truth. The idea that the Self-Incrimination Clause is implicated only where evidence has been created in contemplation of litigation has the benefit of explaining the other exceptions to Miranda—the "public safety," "routine booking question," and "undercover officer" exceptions—as well as the "required records" doctrine.

*This view also demands some minor modifications to both Fifth and Sixth Amendment jurisprudence to bring each in line with the other. First, the definition of "interrogation" pursuant to Miranda should be narrowed to cover only those questions or other words or conduct that, objectively speaking, seek information for use at trial. Second, Miranda should apply only to statements offered for their truth at trial. Third, *New Jersey v. Portash* should be overruled. Finally, statements should be deemed "nontestimonial" for purposes of both Clauses only when: (1) the exchange of information would have taken place even had there been no evidence-gathering motive, and (2) the noninvestigatory motive was a substantial factor in bringing about the exchange of information.*

TABLE OF CONTENTS

INTRODUCTION.....	1137
I. "WITNESS" IN THE SELF-INCRIMINATION AND CONFRONTATION CLAUSES.....	1139
A. "Testimonial" Take One: The Self-Incrimination Clause and the Assertion Requirement.....	1140
B. "Testimonial" Take Two: The Confrontation Clause and the Contemplation-of-Litigation Requirement.....	1142
II. TOWARD A UNIFORM MEANING OF "WITNESS".....	1146
A. <i>Rebutting the Arguments Against a Uniform Meaning of "Witness"</i>	1148
1. The Historical Argument.....	1148
2. The Functional Argument.....	1150
B. <i>The Assertion Requirement</i>	1151
1. The Assertion Requirement in the Confrontation Clause.....	1151
2. The Assertion Requirement in the Self-Incrimination Clause Redux.....	1153
a. <i>The Impeachment Exception to Miranda</i>	1154
b. <i>The "Sixth Birthday" Question and Compelled Psychiatric Examinations</i>	1156
C. <i>The Contemplation-of-Litigation Requirement in the Self-Incrimination Clause</i>	1159
1. The Other Exceptions to <i>Miranda</i>	1160
a. <i>The "Public Safety" Exception</i>	1160
b. <i>The "Routine Booking Question" Exception</i>	1168

2007]	<i>A UNIFIED THEORY OF TESTIMONIAL EVIDENCE</i>	1137
	<i>c. The “Undercover Officer” Exception</i>	1172
	2. Compelled Incrimination Pursuant to a Neutral Regulatory Scheme	1175
III.	SOME IMPLICATIONS OF A UNIFORM MEANING OF “WITNESS”	1185
	A. <i>What the Confrontation Clause Can Teach Us About the Self-Incrimination Clause</i>	1185
	1. Tweaking the Definition of “Interrogation” Pursuant to <i>Miranda</i>	1186
	<i>a. Express Questioning</i>	1187
	<i>b. The Functional Equivalent of Express Questioning</i>	1188
	<i>c. An All-Purpose Definition of Interrogation</i>	1192
	2. Limiting <i>Miranda</i> to Statements Offered for Their Truth	1194
	3. <i>Whither Portash?</i>	1196
	B. <i>The Problem of Mixed Motives</i>	1197
	CONCLUSION	1201

INTRODUCTION

[I]n order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.¹

Statements . . . made in the course of police interrogation . . . are testimonial when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.²

As a teacher of both Criminal Procedure and Evidence, I become frustrated when teaching the Self-Incrimination Clause³ in the former class and the Confrontation Clause⁴ in the latter class. Because many of my Criminal Procedure students have not taken Evidence, and vice versa, I am limited in my ability to explore with my students, and myself, the extent to which the two Clauses inform one another. It is a perfect example of the dissection of the Constitution that Howard Gutman bemoaned some years ago.⁵ The typical law

1. *Doe v. United States*, 487 U.S. 201, 210 (1988) (defining “testimonial” for purposes of Self-Incrimination Clause).

2. *Davis v. Washington*, 126 S. Ct. 2255, 2273-74 (2006) (defining “testimonial” for purposes of Confrontation Clause).

3. “No person shall . . . be compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend. V.

4. “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” *Id.* amend. VI.

5. See generally Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295 (1981) (examining whether use of compartmentalized law school curricula for studying Bill of Rights has broad ramifications on substantive legal development). Similar observations were later made by Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1131-32 (1991), and Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1064-65 (1999).

school curriculum chops up the document into discrete pieces, and each piece is studied in isolation. This pattern typically continues when one undertakes the task of legal scholarship, it finds expression in the practice of law, and it ultimately is reflected in our constitutional doctrine.⁶

This dissection of the Constitution into its constituent parts is particularly problematic when one considers the Self-Incrimination and Confrontation Clauses.⁷ The former forbids the government⁸ from compelling a person “in any criminal case to be a *witness against himself*,”⁹ while the latter requires the government to allow the accused “[i]n all criminal prosecutions . . . to be confronted with the *witnesses against him*.”¹⁰ The parallelism is striking. One has to assume that the word “witness” means the same thing in both places. Thus, Self-Incrimination Clause cases ought to inform our Confrontation Clause jurisprudence as to the meaning of that term, and vice versa.

Yet, on the surface at least, this is not the case. It is true that, in both contexts, the Supreme Court has hinged the determination of what it means to be a “witness against” the accused on whether the evidence provided is “testimonial.” But, at first blush, the Court has used the word “testimonial” in two very different ways. In the Self-Incrimination Clause context, the Court has imposed what can be termed an “assertion” requirement for evidence to be considered testimonial.¹¹ That is, testimonial evidence consists only of assertions of fact or value¹² as opposed to either physical evidence or statements introduced merely to prove *how* they were made. And in the Confrontation Clause context, the Court has imposed what can be termed a “contemplation of litigation” requirement.¹³ That is, “testimonial” evidence consists only of statements made

6. See Gutman, *supra* note 5, at 322-27 (examining effect of compartmentalized law school curriculum and interrelationship among pedagogy, scholarship, and development of substantive legal doctrine).

7. Gutman specifically discusses how treating Confrontation Clause jurisprudence as a field of evidence law rather than of constitutional law has stunted its development. *Id.* at 331-43.

8. Both Clauses have been held to bind the States as well as the federal government via the Due Process Clause of the Fourteenth Amendment. See *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (applying Confrontation Clause to States); *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (applying Self-Incrimination Clause to States). There are compelling arguments why the Clauses should not apply to the States in the same way that they constrain the federal government. *E.g.*, George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 221 (2001) (arguing persuasively that different standards should govern with respect to criminal procedure provisions of Bill of Rights depending on whether federal or state action is at issue). Nonetheless, this Article assumes that the conventional view is correct and that the same constraints equally bind state and federal action.

9. U.S. CONST. amend. V (emphasis added).

10. *Id.* amend. VI (emphasis added).

11. See *infra* Part I.A for a discussion of the term “testimonial” as it is used in the Self-Incrimination Clause context.

12. The term “assertions of fact or value” is borrowed from Kent Greenawalt’s use of the term in a different context. See KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 43 (1989) (“When we think about communications evidently covered by the justifications for freedom of speech, what immediately come to mind are assertions of fact and value.”).

13. See *infra* Part I.B for a discussion of the Confrontation Clause’s “contemplation of litigation”

under circumstances objectively indicating some contemplation of later use at trial as opposed to statements made more casually or in response to an ongoing emergency, or for some other reason.

This Article argues, however, that the Supreme Court has defined the key term “testimonial” in much the same way in both contexts. That is, there is both an “assertion” requirement and a “contemplation of litigation” requirement in order for evidence to be considered testimonial—and for the provider of that evidence to be considered a “witness against” the accused—pursuant to either Clause. Thus, by design or accident, a uniform theory of testimonial evidence is emerging in the Court’s jurisprudence. This view has the benefit of explaining many Self-Incrimination Clause cases better than the Court itself has done. Only when the two Clauses are examined together, for example, do many of the mysteries of the Court’s jurisprudence on custodial interrogation resolve themselves.

Part I discusses the conventional definitions of “testimonial” evidence in the Self-Incrimination Clause and Confrontation Clause contexts. Part II begins by briefly questioning why the Court has used the word “testimonial” in two very different ways to interpret two strikingly similar clauses in neighboring constitutional provisions. This Part then delves into a more searching analysis of the Court’s theory of what renders evidence “testimonial” in both contexts and discovers that the Court’s approach, like the text the Court is interpreting, is strikingly similar in both areas. This Part demonstrates that, irrespective of the language the Court has used, many cases concluding that the Self-Incrimination or Confrontation Clause did not apply can best be explained by the fact that the evidence in those cases lacked one of these two essential attributes of testimonial evidence. Part III discusses some prescriptive implications of the Court’s emerging unified theory of testimonial evidence. First, the definition of interrogation pursuant to *Miranda v. Arizona*¹⁴ should be narrowed to reflect the fact that not all express questioning seeks evidence to be used prosecutorially. Second, the *Miranda* rule should be limited to statements that the prosecution seeks to introduce for their truth at trial. Third, *New Jersey v. Portash*,¹⁵ the only case inconsistent with the Court’s emerging unified theory of testimonial evidence, should be overruled. Finally, a uniform methodology should be developed for ascertaining when testimonial evidence has resulted from official questioning undertaken with mixed motives.

I. “WITNESS” IN THE SELF-INCRIMINATION AND CONFRONTATION CLAUSES

The Supreme Court has read the word “witness” as used in both the Self-Incrimination and Confrontation Clauses as implicating only “testimonial” evidence.¹⁶ Yet the Court has used the word “testimonial” in two very different

requirement.

14. 384 U.S. 436 (1966).

15. 440 U.S. 450 (1979).

16. As Josephine Ross has noted in the Sixth Amendment context, “the concept of testimonial is intrinsically intertwined with the concept of ‘witness.’ . . . Whether a statement was testimonial is the

ways. The touchstone of whether evidence is testimonial within the meaning of the Self-Incrimination Clause is whether the evidence constitutes an assertion of fact or value. By contrast, the touchstone of whether evidence is testimonial within the meaning of the Confrontation Clause is whether the objective circumstances surrounding the gathering of the evidence indicate that the primary purpose of doing so was to secure evidence for use at trial.

A. “*Testimonial*” *Take One: The Self-Incrimination Clause and the Assertion Requirement*

Three elements are essential to a violation of the Self-Incrimination Clause: compulsion, incrimination, and testimony.¹⁷ For close to a century, the Supreme Court has rejected the notion that the Self-Incrimination Clause broadly prohibits the government from compelling any incriminating evidence. Rather, it prohibits the government only from compelling incriminating *testimonial* evidence.¹⁸ In *Holt v. United States*,¹⁹ the prosecutor sought to have the accused don a shirt before the jury, apparently as a way of showing his identity as the perpetrator of the crime.²⁰ The defendant argued that requiring him to demonstrate against his will that the clothing fit him was a violation of the Self-Incrimination Clause.²¹ The U.S. Supreme Court, speaking unanimously through Justice Holmes, tersely rejected the contention: “[T]he prohibition of compelling a man in a criminal court to be [a] witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.”²²

same as asking whether the person who made the statement was a witness against the defendant at the trial.” Josephine Ross, *After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 162 (2006). Michael Pardo aptly observes:

The word *testimony* has become a term of constitutional importance. Indeed, it has become an important doctrinal term in the fields of evidence and criminal procedure. Whether a communication is deemed to be testimonial is the key issue for delineating the scope of both the Confrontation Clause and the privilege against self-incrimination.

Michael S. Pardo, *Testimony*, 82 TUL. L. REV. 119, 165 (2007) (citations omitted).

17. Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 246 (2004); Michael S. Pardo, *Disentangling the Fourth Amendment and the Self-Incrimination Clause*, 90 IOWA L. REV. 1857, 1868 (2005); see also Fisher v. United States, 425 U.S. 391, 408 (1976) (discussing doctrinal requirements for establishing violation of Fifth Amendment).

18. See *Schmerber v. California*, 384 U.S. 757, 761 (1966) (excluding blood analysis from Self-Incrimination Clause protection because it was not testimonial but rather physical evidence); *Holt v. United States*, 218 U.S. 245, 252 (1910) (finding that requiring defendant to try on shirt to demonstrate identity was not compulsion of testimonial evidence in violation of Self-Incrimination Clause); IV JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2264, at 3123 (1905) (“[I]t is not merely compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial compulsion*.”).

19. 218 U.S. 245 (1910).

20. *Holt*, 218 U.S. at 252.

21. *Id.*

22. *Id.* at 252-53.

The modern Court has embraced the distinction between communications and physical evidence. In *Schmerber v. California*,²³ the Court held that the nonconsensual withdrawal of blood from a person suspected of driving while intoxicated, and subsequent trial use of an analysis of the blood alcohol content of the sample, did not offend the Self-Incrimination Clause.²⁴ The Court wrote that that “the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature.”²⁵ The Court recognized a distinction between “testimonial” evidence, which is cognizable by the Self-Incrimination Clause, and “real or physical evidence,” which is not.²⁶ The Court has applied the testimonial/nontestimonial distinction in subsequent cases to determine that the Self-Incrimination Clause does not forbid the compelled production of handwriting²⁷ or voice exemplars²⁸ or the nonconsensual appearance in a pretrial identification procedure.²⁹ The Court has also held that, while documents obviously make assertions, the compelled production of preexisting documents is testimonial only to the extent that the act of production itself communicates an admission that the documents exist, are authentic, or are under the control of the person producing the documents.³⁰

23. 384 U.S. 757 (1966).

24. *Schmerber*, 384 U.S. at 761.

25. *Id.*

26. *Id.* at 764 (internal quotation marks omitted); *accord* *Pennsylvania v. Muniz*, 496 U.S. 582, 591 (1990) (reaffirming distinction between “testimonial” and “real or physical evidence” (internal quotation marks omitted)).

27. *E.g.*, *United States v. Euge*, 444 U.S. 707, 718 (1980) (holding that handwriting exemplars are nontestimonial and therefore not protected by privilege against self-incrimination); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (“A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the] protection [of the Self-Incrimination Clause].”).

28. *E.g.*, *United States v. Dionisio*, 410 U.S. 1, 7 (1973) (“[C]ompelled production of the voice exemplars in this case would [not] violate the Fifth Amendment. The voice recordings were to be used solely to measure the physical properties of the witnesses’ voices, not for the testimonial or communicative content of what was to be said.”).

29. *E.g.*, *United States v. Wade*, 388 U.S. 218, 222 (1967) (“[C]ompelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have.”).

30. *See Doe v. United States*, 487 U.S. 201, 209 (1988) (“[T]he act of production could constitute protected testimonial communication because it might entail implicit statements of fact: by producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.” (citing *United States v. Doe*, 465 U.S. 605, 613 & n.11 (1984); *Fisher v. United States*, 425 U.S. 391, 409-10, 428, 432 (1976)); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1277 (1988) (“[T]he privilege protects only the testimonial aspects of the act of producing [a] document and not the document itself.”). The Court has recognized that the act-of-production doctrine extends to all forms of physical evidence, not just documentary evidence. *See* *Balt. City Dep’t of Soc. Servs. v. Bouknight*, 493 U.S. 549, 554-56 (1990) (acknowledging that court order compelling mother to produce her infant child implicated act-of-production doctrine); Richard A. Nagareda, *Compulsion “To Be a Witness” and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1656 (1999) (discussing Court’s application of act-of-production

The Court has articulated what can be termed an “assertion” requirement for evidence to be testimonial: “[I]n order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.”³¹ Thus, if the probative value of the evidence relies on a person’s “consciousness of the facts [expressed] and the operations of his mind in expressing” them, the evidence is testimonial.³² The same standard applies to evidence of both verbal and nonverbal conduct,³³ for “nonverbal conduct contains a testimonial component whenever the conduct reflects the actor’s communication of his thoughts to another.”³⁴ Thus, irrespective of whether the evidence consists of verbal or nonverbal conduct, the touchstone would seem to be whether the person’s “testimonial capacities [are] implicated”³⁵ in the creation of the evidence.

B. “Testimonial” Take Two: The Confrontation Clause and the Contemplation-of-Litigation Requirement

The Confrontation Clause requires that a criminal defendant have the opportunity, among other things, to cross-examine “the witnesses against him.”³⁶ In the Confrontation Clause context, the Court had struggled to formulate a useable conception of the word “witness” as applied to the admission of hearsay

doctrine to nondocumentary physical evidence).

31. *Doe*, 487 U.S. at 210; *accord Muniz*, 496 U.S. at 590-92 (holding that defendant’s slurred speech was not testimonial and was therefore insufficient for invocation of Fifth Amendment privilege against self-incrimination); *see also* JOHN MACARTHUR MAGUIRE, *EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE* § 2.04, at 22 (1959) (“[N]o actions save those embodied in or equivalent to declarations of fact, opinion, belief, and so on would be deemed self-incriminating.”). The standard for determining whether evidence is “testimonial” for these purposes has been stated in several slightly different ways. *See, e.g.*, Allen & Mace, *supra* note 17, at 247 (“[T]he government may not compel disclosure of the incriminating substantive results of cognition that themselves . . . are the product of state action.”); Michael S. Pardo, *Neuroscience Evidence, Legal Culture, and Criminal Procedure*, 33 AM. J. CRIM. L. 301, 330 (2006) (“[T]he government may not compel for use as evidence the content of a suspect’s propositional attitudes.”). Over and above the core idea that the Self-Incrimination Clause is concerned only with assertions of fact or value, a more precise articulation of the assertion requirement is immaterial to the claims made by this Article.

32. *Doe*, 487 U.S. at 211 (quoting 8 JOHN H. WIGMORE, *EVIDENCE* § 2265, at 385 (1961)).

33. *Muniz*, 496 U.S. at 595 n.9; *see also Doe*, 487 U.S. at 210 n.8 (“Petitioner has articulated no cogent argument as to why the ‘testimonial’ requirement should have one meaning in the context of acts, and another meaning in the context of verbal statements.”).

34. *Muniz*, 496 U.S. at 595 n.9; *see also Doe*, 487 U.S. at 209 (stating that privilege “applies to acts that imply assertions of fact”); B. Michael Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect*, 43 S. CAL. L. REV. 597, 612 (1970) (advocating view that testimonial evidence includes “any non-verbal physical conduct used as a means of conveying ideas”).

35. *Schmerber v. California*, 384 U.S. 757, 765 (1966); *accord Muniz*, 496 U.S. at 591; *see also* EDMUND M. MORGAN, *BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE* 147 (5th Jack B. Weinstein ed. 1976) (suggesting that privilege should apply to all communicative conduct that would result in accused exhibiting qualities of witness before trier of fact); Dann, *supra* note 34, at 609 (“[Schmerber’s] participation . . . did not involve his testimonial capacities.”).

36. U.S. CONST. amend. VI.

statements against a criminal defendant. There appear, at first blush, to be two equally unappealing options as to whether a hearsay declarant becomes a “witness” when her statement is admitted at trial.³⁷

First, a “witness” might simply be a person who testifies at trial.³⁸ The main flaw in this narrow reading of “witness” is manifest: any prosecutor who did not wish her evidence to be challenged by cross-examination could simply have each of her putative witnesses execute an affidavit to be submitted to the court in lieu of live testimony. Because, under this reading of the Clause, the defendant has no right to cross-examine anyone but those who actually testify, the affidavits could be introduced with no opportunity for the defendant to cross-examine anyone but the person authenticating them. As the Court wrote in *Crawford v. Washington*:³⁹ “[W]e . . . reject the view that the Confrontation Clause applies of its own force only to in-court testimony Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.”⁴⁰

Second, the word “witness” could apply to any and all hearsay declarants. On this view, any hearsay declarant becomes a “witness against” the accused when her statement is admitted at trial,⁴¹ giving the defendant the absolute right to cross-examine any hearsay declarant about the out-of-court statement. Again, the main problem with this view is manifest: the carefully wrought hearsay exceptions that courts and legislatures have developed over the centuries would be destroyed. At least in cases where the hearsay declarant does not testify, no hearsay exception would pass constitutional muster. It is extraordinarily unlikely that the Confrontation Clause constitutionalizes the law of evidence in this manner.⁴²

In *Ohio v. Roberts*,⁴³ the Court manufactured a shaky compromise between these extreme views. Adopting in part the broad articulation of the word “witness,” the Court held that any hearsay declarant is a “witness” if her statement is used at trial.⁴⁴ Nevertheless, the Court created a gaping loophole in the Confrontation Clause to preserve the subconstitutional law of evidence. The Court held that the Clause did not guarantee the defendant the right to cross-examine every such “witness.”⁴⁵ If the statement fell into a “firmly rooted

37. See Ross, *supra* note 16, at 160 (observing that language of Clause suggests either that “criminal defendants only have a right to cross-examine those witnesses who actually appear at trial” or that they have right to cross-examine “all hearsay declarants”).

38. *Crawford v. Washington*, 541 U.S. 36, 42-43 (2004).

39. 541 U.S. 36 (2004).

40. *Crawford*, 541 U.S. at 50-51.

41. See *id.* at 42-43 (“One could plausibly read ‘witnesses against’ a defendant to mean . . . those whose statements are offered at trial” (citations omitted)).

42. See *id.* at 51 (noting that not every incidence of hearsay implicates Sixth Amendment).

43. 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36.

44. *Roberts*, 448 U.S. at 63; see also Ross, *supra* note 16, at 160 (noting that strict reading of *Roberts* made any declarant a witness under Sixth Amendment).

45. See Ross, *supra* note 16, at 161 (noting that *Roberts* created no absolute right of defendant to confront accuser).

hearsay exception” or bore other “particularized guarantees of trustworthiness,” cross-examination could be dispensed with, so long as the declarant also was unavailable for trial.⁴⁶

In *Crawford*, the Court rejected the *Roberts* framework in favor of a different way of defining the word “witness.” For the first time in this context, the Court drew a distinction between testimonial hearsay and nontestimonial hearsay.⁴⁷ A “witness,” the Court wrote, is one who gives testimony, and testimony, in turn, is “typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’”⁴⁸ The touchstone of whether a statement qualifies as testimonial appears to be whether, viewing the circumstances objectively, it was contemplated at the time of its making that it would later be used at trial. Thus, the *Crawford* Court wrote that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not,”⁴⁹ because “[i]nvolvement of government officers in the production of testimony *with an eye toward trial* presents unique potential for prosecutorial abuse.”⁵⁰

The Court began to clarify the concept of testimonial evidence pursuant to the Confrontation Clause two years later in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*.⁵¹ *Davis* involved statements made by a 911 caller during and in the immediate aftermath of an attack by her boyfriend.⁵² *Hammon* involved statements made to police after they arrived at a home where a domestic assault allegedly had occurred moments before.⁵³ In holding the statements to be nontestimonial in *Davis* and testimonial in *Hammon*, the Court set forth the “primary purpose” test to be applied, at least, to statements given in response to police questioning:

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.⁵⁴

Though the Court declined to provide an exhaustive test to decide all

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

47. See *Crawford*, 541 U.S. at 72 (Rehnquist, C.J., concurring) (“[W]e have never drawn a distinction between testimonial and nontestimonial statements.”).

48. *Id.* at 51 (majority opinion) (alteration in original) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

49. *Id.*

50. *Id.* at 56 n.7 (emphasis added).

51. 126 S. Ct. 2266 (2006). Except when referring specifically to the facts of one case or the other, this Article refers to these cases collectively as “*Davis*.”

52. *Davis*, 126 S. Ct. at 2270-71.

53. *Id.* at 2272.

54. *Id.* at 2273-74.

potential future cases,⁵⁵ its explication in *Davis* provides some strong hints as to what makes a statement testimonial for purposes of the Sixth Amendment, even in contexts beyond police interrogation in the face of an arguable emergency. First, the Court suggested that the “actual, subjective purpose for the investigation,” on the part of either party to the conversation, is irrelevant.⁵⁶ In adopting an objective standard, *Davis* required “courts [to] consider only the observable circumstances of an incident and determine a reasonable police officer’s purpose on the basis of those observable circumstances.”⁵⁷ This standard tracks Richard Friedman’s pre-*Davis* proposal of an “anticipation” test, focusing on an “understanding of the probable evidentiary use [of the statement], rather than [the] desire for that use,” in large part because “[a]nticipation depends on, and can be proven by, external circumstances” and because “a test framed in terms of anticipation can be applied on an objective basis.”⁵⁸

In addition, it is noteworthy that the Court limited the class of testimonial evidence to those statements provided “when the circumstances objectively indicate that there is no . . . ongoing emergency, *and* that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”⁵⁹ The use of the word “and” in the Court’s explication of testimonial evidence signifies that a statement is testimonial only if its primary purpose, viewed objectively, is to gather evidence for the potential prosecution of a completed crime.⁶⁰ By negative implication, then, a statement is

55. *Id.* at 2273.

56. *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 213, 217 (2006).

57. *Id.* at 219.

58. Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 252-53 (2005) [hereinafter Friedman, *Grappling*]. Following *Davis*, Friedman has noted that “*Davis* is perfectly compatible with a general test based on the anticipation of a reasonable person in the position of the declarant.” Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & POL’Y 553, 561 (2007) [hereinafter Friedman, *Way Beyond*].

59. *Davis*, 126 S. Ct. at 2273-74 (emphasis added).

60. This restriction should probably not be read too strictly. It is true that *Davis* was unclear whether the test “exempts statements when the declarant knows that he is getting someone into trouble with the police but does not realize that the statement will actually be used at trial.” Ross, *supra* note 16, at 179. Yet, given that the test *Davis* posits is an objective one, it makes sense to view the circumstances from the perspective of someone with a basic familiarity of the American criminal justice system in which “getting someone into trouble with the police” is but the first step on the road to a criminal prosecution. *See id.* at 180 (suggesting that most 911 callers at least recognize that their statements will result in summoning of police with purpose of arresting or prosecuting). Moreover, because most criminal cases do not go to trial, it is useful to think about whether the statement was made for purposes of criminal prosecution generally, not simply a criminal trial. *See* Friedman, *Grappling, supra* note 58, at 250 (noting that extensive pretrial criminal procedure may yield evidence that can secure conviction before trial). Thus, Ross correctly notes that the question that should be asked is “whether it is reasonable to expect that the information will be used against the accused in some way by law enforcement.” Ross, *supra* note 16, at 180; *see also* Alexander J. Wilson, Note, *Defining Interrogation Under the Confrontation Clause After Crawford v. Washington*, 39 COLUM. J.L. & SOC. PROBS. 257, 295 (2005) (explaining that only reasonable expectation, not certainty, of trial is required in determining that statement is testimonial).

In addition, it is likely that a statement made in contemplation of *civil* litigation would qualify as

nontestimonial as long as its primary purpose, viewed objectively, is *for any purpose other than* “to establish or prove past events potentially relevant to later criminal prosecution.”⁶¹ For example, it is likely that statements are nontestimonial if they are made under circumstances objectively indicating a primary purpose of obtaining medical treatment on the part of the declarant.⁶² Even if made outside the context of an emergency, such a statement would be nontestimonial because a reasonable person would typically not contemplate that the statement, at the time it was made, would be used in a later litigation.⁶³

In sum, whether a statement is testimonial and its maker a “witness” for purposes of the Confrontation Clause hinges on whether, objectively speaking, the statement was made in contemplation of a future litigation. We can call this the “contemplation of litigation” requirement.

II. TOWARD A UNIFORM MEANING OF “WITNESS”

Seemingly, the U.S. Supreme Court has created two very different meanings for the word “witness,” depending on whether the Court is addressing the Self-Incrimination Clause or the Confrontation Clause. While in both contexts whether a person is a “witness” hinges on whether she has given “testimonial” evidence, the Court has imbued that word with different meanings depending on the context. In the Self-Incrimination Clause context, testimonial evidence must meet the assertion requirement, while in the Confrontation Clause context, testimonial evidence must meet the contemplation-of-litigation requirement.

Although “[f]ew connections in general have been made between these

testimonial. This seems the better view given that the formality and solemnity that attend the giving of information in that context approximates that which attends the provision of testimony in a criminal trial. In addition, the contrary view would render testimony actually *provided* in a civil proceeding nontestimonial for purposes of the Confrontation Clause merely because the objective circumstances did not indicate that the testimony might later be repeated in a criminal proceeding, a result that seems anomalous. Cf. Friedman, *Grappling*, *supra* note 58, at 249-50 n.26 (suggesting rule that statements made in anticipation of civil litigation should generally be considered testimonial, but acknowledging that anticipation of prosecutorial use may also be required). Accordingly, this Article assumes that statements made in contemplation of civil litigation are testimonial within the meaning of *Davis* and thus identifies the requirement from *Davis* as a “contemplation of litigation” requirement, not a “contemplation of prosecution” requirement.

61. *Davis*, 126 S. Ct. at 2274.

62. Tom Harbinson, *Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians Are Nontestimonial and Admissible as an Exception to the Confrontation Clause*, 58 MERCER L. REV. 569, 632 (2007); see also Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 600 (2005) (noting *Crawford* Court's implication that statements made pursuant to solicitation of medical treatment should not be considered testimonial); Elizabeth J. Stevens, Comment, *Deputy-Doctors: The Medical Treatment Exception After Davis v. Washington*, 43 CAL. W. L. REV. 451, 470 (2007) (“[T]he *Davis* test's logic would seem to apply as well to statements whose primary purpose is to seek medical treatment, even where medical personnel are asking questions that also gather investigative details.” (quoting Lisa Kern Griffin, *Circling Around the Confrontation Clause: Redefined Reach but Not a Robust Right*, 105 MICH. L. REV. FIRST IMPRESSIONS 16, 18 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/griffin.pdf>)).

63. Harbinson, *supra* note 62, at 632.

areas,”⁶⁴ the apparent inconsistency has not escaped the eyes of some commentators. Noting the more established use of the word “testimonial” in the Fifth Amendment context, Adam Silberlight has written that “*Crawford* . . . appears to have . . . lead [sic] to a distinction between definitions of the same term as used in conjunction with two constitutional amendments.”⁶⁵ More astutely, Randolph Jonakait observed recently in the pages of this journal: “The concept of ‘testimonial’ in the Fifth Amendment . . . is much different from *Crawford*’s. It encompasses not only statements akin to those in ex parte depositions, but also communications that relate a factual assertion or disclose information”⁶⁶ Thus, Jonakait asserts that “[u]nder this definition, all hearsay declarants have made testimonial statements and are witnesses.”⁶⁷ Purportedly, the meaning of “testimonial” under the Fifth Amendment cannot be squared with the meaning of “testimonial” under the Sixth Amendment. And unless we are to ascribe different meanings to the same word that appears in contiguous constitutional provisions, one of them must be wrong.⁶⁸

On a more searching analysis, however, the Supreme Court has been remarkably consistent in its use of the word “testimonial” and, therefore, in its interpretation of the word “witness.” In the Fifth Amendment context, the assertion requirement states only a necessary, not a sufficient, condition for a statement to be testimonial. Likewise, in the Sixth Amendment context, the contemplation-of-litigation requirement states only a necessary, not a sufficient, condition for a statement to be testimonial. In both contexts, a statement must satisfy *both* requirements before being deemed testimonial: it must both make an assertion of fact or value *and* be made under circumstances objectively indicating the contemplation of its use in subsequent litigation. To understand why, one must delve more deeply into both requirements. First, however, it is appropriate to discuss briefly why the Court has implicitly interpreted the word “witness” the same way in the Self-Incrimination and Confrontation Clauses.

64. Pardo, *supra* note 16, at 177. Pardo’s recent piece is an important exception, one that provides an epistemic account of testimony as a matter of both constitutional and subconstitutional law. Unlike this Article, however, Pardo does not seek to explain current jurisprudence and, instead, argues for significant changes to the law.

A more fleeting attempt to conform the use of the term “testimonial” in the two contexts can be found in *Hübel v. Sixth Judicial District Court*, 542 U.S. 177, 194-95 (2004) (Stevens, J., dissenting). There, Justice Stevens argued that a disclosure of identity, compelled by a police officer, was “testimonial” for purposes of the Fifth Amendment because, pursuant to the Sixth Amendment, the term “applies at a minimum . . . to police interrogations.” *Id.* (omission in original) (quoting *Crawford v. Washington*, 541 U.S. 36, 68 (2004)). This assertion, however, elides the two distinct uses of the term “testimonial” in the two contexts, for a request by a police officer that a suspect roll up his sleeve to disclose whether he has a tattoo matching that of the perpetrator of a crime would call for “testimonial” evidence in the Sixth Amendment sense but not the Fifth Amendment sense.

65. Adam Silberlight, *Confronting a Testimonial Definition in a Post-Crawford Era*, 29 AM. J. TRIAL ADVOC. 65, 69 (2005).

66. Randolph N. Jonakait, “Witnesses” in the Confrontation Clause: *Crawford v. Washington*, *Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155, 169 (2006).

67. *Id.* at 171.

68. *See id.* (arguing that uniformity of meaning of “witness” throughout Constitution would render *Crawford* Court’s Sixth Amendment use of “witness” incorrect).

A. *Rebutting the Arguments Against a Uniform Meaning of “Witness”*

It might seem self-evident to lawyers that when the same term appears eighty-six words apart in the same document—be it a contract, deed, statute, or constitution—it means the same thing in both places.⁶⁹ Yet, after Richard Nagareda’s recent, and compelling, arguments to the contrary,⁷⁰ and the suggestion by Justices Scalia and Thomas that they are inclined to agree,⁷¹ this basic proposition needs defending. Nagareda argues that the Fifth Amendment forbids the government from using against a person *any* evidence, not just “testimonial” evidence, that has been affirmatively provided by that person under compulsion.⁷² That is, Nagareda contends that the word “witness” does not mean the same thing in the Self-Incrimination and Confrontation Clauses.⁷³ To his credit, Nagareda recognizes that he bears a heavy burden of showing that the word “witness” means two different things when used twice in close proximity in the constitutional text.⁷⁴ Though he tries valiantly, he does not carry that burden.

1. The Historical Argument

Nagareda’s main argument is a historical one. He points out that each of the state conventions that debated ratification of the Constitution and that proposed adding a provision forbidding compelled self-incrimination uniformly proposed wording broadly prohibiting the federal government from compelling a person “to give evidence against himself.”⁷⁵ Moreover, this language tracked the

69. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 128-29 (1997) (suggesting that meanings of word “witness” in Self-Incrimination and Confrontation Clauses should be consistent with one another). See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (articulating interpretive technique of comparing Constitution’s use of same and similar language in different places in document).

70. See Nagareda, *supra* note 30, at 1580 (arguing that definition of “witness” in Fifth Amendment context is actually more closely synonymous with someone who “give[s] evidence”).

71. See *United States v. Hubbell*, 530 U.S. 27, 49 (2000) (Thomas, J., joined by Scalia, J., concurring) (noting support for notion that Fifth Amendment privilege protects accused from compelled production of any incriminating evidence). Nevertheless, as Richard Uviller wrote: “[I]t is difficult to imagine that these two venturesome Justices can convince at least three colleagues to overrule *Schmerber* . . .” H. Richard Uviller, *Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell Is Off the Hook*, 91 J. CRIM. L. & CRIMINOLOGY 311, 324 (2001). At the least, they are unlikely to find an ally in the newest member of the Court. See Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 78 (1986) (arguing that Fifth Amendment does not protect against compelled production of documents, even as to act of production).

72. Nagareda, *supra* note 30, at 1605 (arguing that Self-Incrimination Clause phrase “to be a witness” should be interpreted in same way as phrase “to give evidence,” which appeared in contemporaneous sources (internal quotation marks omitted)).

73. *Id.* at 1613 (arguing against “apply[ing] the same definition of the word ‘witness’ for purposes of confrontation and self-incrimination”).

74. *Id.* at 1605-07 (recognizing reasonable reluctance of legal scholars and professionals to equate Fifth Amendment phrase “to be a witness” with the phrase “to give evidence” used in state sources).

75. *Id.* at 1605 (quoting New York, North Carolina, Pennsylvania, Rhode Island, and Virginia ratification proposals); accord *Hubbell*, 530 U.S. at 52-53 (Thomas, J., concurring) (noting that drafts

language of every state constitution to contain a self-incrimination clause.⁷⁶ Of course, the difference in language between these proposals and provisions, on the one hand, and the Self-Incrimination Clause, on the other, might lead one to think that a difference in meaning was intended.⁷⁷ Nagareda, however, turns this received wisdom on its head. He points out that the linguistic uniqueness of the Self-Incrimination Clause attracted no attention at the time, indicating that it was understood to mean exactly the same as its state constitutional forebears.⁷⁸ Yet, as Nagareda himself recognizes, “silence is a slippery tool of interpretation.”⁷⁹ It is especially difficult to gain a toehold in this silence in the face of the clear identity of language of the Self-Incrimination and Confrontation Clauses.

Accordingly, Nagareda’s main argument is that the common-law privilege against self-incrimination as of 1791 extended to physical evidence.⁸⁰ Yet, as he again recognizes, the common-law privilege forms a hazardous basis for construing the Self-Incrimination Clause, for the former clearly permitted a practice that the latter just as clearly forbids: the use at trial of pretrial statements taken from an accused by a committing magistrate.⁸¹ Nagareda cleverly tries to avoid the implications of this ill fit between the common-law

of state proposals for Bill of Rights included wording for provision that would “protect a citizen from ‘be[ing] compelled to give evidence against himself’” (quoting Virginia proposal).

76. Nagareda, *supra* note 30, at 1606 (“[A]t the time of the founding, all of the state constitutions to address the problem of compelled self-incrimination spoke in terms of a right against compulsion either ‘to give evidence’ or, equivalently, ‘to furnish evidence.’” (footnote omitted) (quoting eighteenth-century state constitutions of Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia)); *see also* *Hubbell*, 530 U.S. at 52 (Thomas, J., concurring) (noting that, at time of Constitution’s ratification, numerous States had provisions protecting citizens against “compulsion ‘to give evidence’ or ‘to furnish evidence’” (quoting eighteenth-century state constitutions of Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Vermont)).

77. *See, e.g.*, Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 919 (1995) (asserting that difference in language demonstrates difference in meaning).

78. Nagareda, *supra* note 30, at 1607 (“If contemporary observers had understood [James] Madison’s handiwork to make a substantive change to the proposals uniformly put forward by the state ratifying conventions, one would expect to find at least a peep of objection.”); *see also* *Hubbell*, 530 U.S. at 53 (Thomas, J., concurring) (noting that Madison’s phrasing of Fifth Amendment attracted no state opposition).

79. Nagareda, *supra* note 30, at 1608.

80. *Id.* at 1619; *see also* *Hubbell*, 530 U.S. at 51 (Thomas, J., concurring) (arguing that common law privilege against self-incrimination protected against “compelled production of incriminating physical evidence”).

81. Nagareda, *supra* note 30, at 1617 (noting this “common practice” in England and America beginning in sixteenth century); *see also* John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to Eighteenth Centuries*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 82, 90-92 (1997) (discussing practice in England); Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT*, *supra*, 109, 114-17 (discussing identical procedure used in American colonies, which continued well into eighteenth century); E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 18 (1949) (discussing English practice).

privilege and the Self-Incrimination Clause by suggesting that the latter incorporated at least the protections of the former but was not limited by it.⁸² But Nagareda cannot have it both ways. If the history of the Self-Incrimination Clause trumps its text, then the Clause forbids government use of nontestimonial evidence furnished by a criminal suspect under compulsion, but it does not forbid obligatory pretrial questioning of criminal suspects by magistrates (or the police), and subsequent trial use of their statements. On the other hand, if, as the Court has suggested, the text of the Clause trumps its history, then compelled nontestimonial evidence can be used by the government but the testimonial products of pretrial questioning by magistrates and the police cannot.

2. The Functional Argument

Nagareda also makes what can be called a functional argument to support his thesis.⁸³ He notes that including physical evidence within the ambit of the Confrontation Clause would be nonsensical, because it is impossible to place any physical evidence before the jury other than by “admit[ting] such material in the form of exhibits in open court,” thereby “enabling the defense to see it.”⁸⁴ On the other hand, physical evidence obviously can be compelled from a criminal defendant.

Yet hiding behind this superficial distinction is a deeper connection between the two Clauses. Physical evidence, no matter what the source, does not admit itself into evidence at trial. It requires testimony both to authenticate or identify it—that is, to show the jury that it is what the proponent purports it to be⁸⁵—and to describe it in a way that makes it relevant to the proceedings. With respect to physical evidence, the two Clauses again work in tandem: the Confrontation Clause demands that the defendant be able to cross-examine those who would authenticate and describe such evidence, and the Self-Incrimination Clause, thanks in part to the act-of-production doctrine,⁸⁶ forbids the government from ever using the defendant for these purposes. Thus, it is entirely logical to interpret the word “witness” in both Clauses in the same way. While the Confrontation Clause allows a defendant to confront only those who offer assertions of fact or value, some of which may be used to authenticate and describe physical evidence,⁸⁷ the Self-Incrimination Clause prohibits the

82. See Nagareda, *supra* note 30, at 1616 (warning against limiting Fifth Amendment protections to those existing in eighteenth century).

83. See *id.* at 1613-14 (arguing that use of same definition of “witness” in both Confrontation and Self-Incrimination Clauses would yield absurd results).

84. *Id.* at 1614.

85. See, e.g., FED. R. EVID. 901(a) (“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”).

86. See *supra* note 30 and accompanying text for a discussion of the act-of-production doctrine.

87. The Confrontation Clause ensures that the defendant is permitted not only a formal but also a substantive right to conduct cross-examination. See *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986) (holding that Confrontation Clause was violated when court prohibited defense from conducting entire line of inquiry on cross-examination). Accordingly, the Confrontation Clause

government from requiring the defendant to offer assertions of fact or value, even those needed to authenticate and describe physical evidence.⁸⁸ In short, Nagareda's functional approach, like his historical argument, fails to rebut the heavy presumption that "witness" means "witness."

B. The Assertion Requirement

The Supreme Court has imposed an assertion requirement for a statement to be testimonial for purposes of both the Confrontation and Self-Incrimination Clauses. The Court has held that the Confrontation Clause is implicated only when the prosecutor seeks to introduce hearsay, that is, a statement whose asserted probative value relates to the truth of its contents. In turn, looking at the conventional assertion requirement in Self-Incrimination Clause jurisprudence through the lens of the traditional understanding of hearsay helps clarify the meaning of "testimonial" evidence for purposes of that Clause.

1. The Assertion Requirement in the Confrontation Clause

One need go no further than *Tennessee v. Street*⁸⁹ to recognize that the Confrontation Clause's use of the term "witness" also encompasses an assertion component. In *Street*, the defendant testified at trial that the confession introduced against him was coerced and that the police simply forced him to repeat the incriminating statements his codefendant had already made.⁹⁰ In rebuttal, the prosecution introduced the nontestifying codefendant's confession implicating both himself and the defendant but differing in some details from the defendant's own confession.⁹¹ The jury was carefully instructed not to consider the codefendant's statement for its truth but only to evaluate the credibility of the defendant's claim that his own confession was simply a forced reiteration of the codefendant's.⁹²

The Court held that the Confrontation Clause was not offended because the out-of-court statement was admitted for a nonhearsay purpose.⁹³ The conventional definition of hearsay, reflected, for example, in the Federal Rules of Evidence, is an out-of-court statement "offered in evidence to prove the truth

undoubtedly includes some right to inspect physical evidence prior to trial. See AMAR, *supra* note 69, at 95 ("The confrontation clause says that the accused has a right to observe and examine the government's witnesses, but surely the accused must also have a right to observe and examine the government's physical evidence . . ."). What is critical, however, is that there is no independent right to "confront" physical evidence but only a right to do so that is ancillary to the core Confrontation Clause right to confront the testimonial evidence that accompanies physical evidence into the record at trial.

88. See Pardo, *supra* note 17, at 1889 (equating use of act of production against criminal defendant to using contents of defendant's mind, which constitutes compelled self-incrimination).

89. 471 U.S. 409 (1985).

90. *Street*, 471 U.S. at 411.

91. *Id.* at 411-12.

92. *Id.* at 412.

93. *Id.* at 413-14.

of the matter asserted” in the statement.⁹⁴ But the statement in *Street* was offered for a reason other than to prove the truth of the matter asserted therein; it was introduced only to show that it had been made.⁹⁵ The Court wrote: “The nonhearsay aspect of [the codefendant’s] confession . . . raises no Confrontation Clause concerns.”⁹⁶ The Court reaffirmed this reading of the Confrontation Clause in *Crawford* when it wrote: “The Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”⁹⁷

Street thus stands for the proposition that, to the extent that the Confrontation Clause prohibits the introduction of out-of-court statements against a criminal defendant, it forbids only the introduction of hearsay.⁹⁸ Only

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

95. See Jerome C. Latimer, *Confrontation After Crawford: The Decision’s Impact on How Hearsay Is Analyzed Under the Confrontation Clause*, 36 SETON HALL L. REV. 327, 339 (2006) (“When a prosecutor uses a testimonial statement for non-hearsay purposes, it is the fact of the utterance that gives it its probative value, not its truth.”).

96. *Street*, 471 U.S. at 414 (emphasis omitted).

97. *Crawford v. Washington*, 541 U.S. 36, 60 n.9 (2004); see also Latimer, *supra* note 95, at 338 (“The Confrontation Clause does not preclude non-hearsay uses of testimonial statements against an accused.”); Mosteller, *supra* note 62, at 516 (“[T]he Confrontation Clause does not bar the use of statements, even if testimonial, if they are used for purposes other than establishing the truth of the matter asserted.”); cf. Pardo, *supra* note 16, at 176 (disagreeing with *Davis* Court’s “suggest[ion] that testimonial statements may . . . be a subset of hearsay statements”). According to the view set forth in this Article, the language used in *Crawford* and by some of the commentators is technically imprecise: if a statement is offered and used for purposes other than establishing the truth of the matter asserted, it is by definition *not* “testimonial.”

98. Student commentator Stephen Aslett has recently argued that *Street* does not “broadly hold[] that all nonhearsay is exempt from the Confrontation Clause” but only that “when a defendant refers to otherwise inadmissible out-of-court statements, he waives his Confrontation Clause rights and ‘opens the door’ for the state to introduce the out-of-court statements for rebuttal purposes.” Stephen Aslett, Comment, *Crawford’s Curious Dictum: Why Testimonial “Nonhearsay” Implicates the Confrontation Clause*, 82 TUL. L. REV. 297, 325-36 (2007). While Aslett makes an interesting point, I believe he is incorrect. First, he points to Justice Brennan’s concurring opinion, joined by Justice Marshall, that appears to limit the Court’s holding in the way Aslett describes. *Id.* at 325 (citing *Street*, 471 U.S. at 417-18 (Brennan, J., concurring)). Nevertheless, the concurrence commanded the votes of only two Justices, and the Court nowhere responds to Justice Brennan’s characterization of the Court’s holding, a silence that is insolubly ambiguous. In addition, Aslett places *Street* in the category of cases in which “a criminal defendant’s confrontation rights can be waived on equitable grounds.” *Id.* at 326. *Street* is not a good fit for this category, though, for when a defendant waives (or, more typically, forfeits) his Confrontation Clause rights, testimonial evidence can be introduced against him for any purpose, while the *Street* Court relied heavily on the fact that the evidence was admitted only for a nonhearsay purpose. Aslett also notes that “Tennessee even argued in its brief . . . that *Street* was an ‘opening the door’ case.” *Id.* Yet, this was a secondary argument Tennessee made. Brief for the Petitioner at 18-20, *Street*, 471 U.S. 409 (No. 83-2143), 1984 WL 565901. Its primary argument was that, as the Court ultimately held, nonhearsay does not implicate the Confrontation Clause because the testimonial capacities of the declarant are not at issue:

Because the wording and contents of the confession, and not its truth, had become the relevant inquiry, there would have been no utility in cross-examining [the co-defendant] on the confession’s reliability. Even if the confession had been shown to be completely false or involuntarily made, its relevance and evidentiary weight would have been just as strong on the issue of whether *Street* was forced to imitate it at the time of his own statement.

when a statement is introduced for its truth does its maker become a “witness” within the meaning of the Clause. To the extent that the Confrontation Clause ensures a criminal defendant’s ability to cross-examine his accusers, that ability is meaningful only when the testimonial capacities—the perception, memory, sincerity, and clarity—of the speaker can be questioned.⁹⁹ This is true only when the speaker’s words are introduced to prove whatever fact, if any, they assert. Where, by contrast, the speaker’s words are introduced merely to show that they were spoken, the statement becomes just like any other physical act, and the only testimonial capacities that are at issue are those of the person relaying information regarding that act.¹⁰⁰ This distinction is the foundation for both the hearsay rule and the Confrontation Clause.¹⁰¹

2. The Assertion Requirement in the Self-Incrimination Clause Redux

Although the assertion requirement emerged in the Self-Incrimination Clause context, it has both suffered from a lack of clarity and failed to achieve its full potential in explaining some of the Court’s decisions on the scope of that Clause. Critically, one must borrow concepts from the Confrontation Clause context, and its reliance on conventional notions of hearsay, to understand fully the assertion requirement in the Self-Incrimination Clause context. What constitutes an assertion in the former context sheds much light on what constitutes an assertion in the latter. This more-or-less uniform assertion requirement explains both the impeachment exception to *Miranda v. Arizona*,¹⁰² first enunciated in *Harris v. New York*,¹⁰³ and the “sixth birthday” question issue

Id. at 17. Furthermore, though some lower courts may have characterized *Street*, prior to *Crawford*, as an “opening the door” case, Aslett, *supra*, at 326, in *Crawford*, the Supreme Court itself, albeit in dictum, characterized *Street* as broadly holding that nonhearsay does not implicate the Confrontation Clause at all, *Crawford*, 541 U.S. at 59 n.9. Finally, Aslett relies heavily on the argument that the category of hearsay in 1791 included all out-of-court statements, not just those offered to prove their truth. Aslett, *supra*, at 311-21. Nonetheless, his historical analysis is weakened greatly by his failure to cite even a single case, from the framing period or otherwise, in which a statement that we would consider nonhearsay was excluded from evidence on hearsay grounds. Though a historical analysis of the evolution of hearsay is beyond this Article’s scope, it appears more likely that an assertion requirement for hearsay was implicit in the definition in 1791 and that the contemporary sources Aslett cites were imprecise in their language because of the widely shared assumption that statements not offered for their truth were not considered hearsay.

99. James W. Jennings, Note, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U. PA. L. REV. 741, 747 (1965).

100. See Alfredo Garcia, *The Winding Path of Bruton v. United States: A Case of Doctrinal Inconsistency*, 26 AM. CRIM. L. REV. 401, 432 (1988) (asserting that Street’s ability to cross-examine sheriff who took codefendant’s confession provided to Street all the Confrontation Clause required); Latimer, *supra* note 95, at 340 (noting that probative value of nonhearsay statement hinges on credibility of person reporting statement “who is in court and available for cross-examination”).

101. See, e.g., Jennings, *supra* note 99, at 747 (“Both the right to confrontation and the hearsay rule reflect the belief that some evidence which might be of probative value should not be admitted unless the declarant has actually appeared in court and has been cross-examined with regard to his sincerity, memory, perception, and ability to communicate.”).

102. 384 U.S. 436 (1966).

103. 401 U.S. 222 (1971).

of *Pennsylvania v. Muniz*.¹⁰⁴

a. *The Impeachment Exception to Miranda*

Once one recognizes that the assertion requirement in the Self-Incrimination Clause context mirrors that in the Confrontation Clause context, which in turn uses the same assertion requirement found in the conventional definition of hearsay, the impeachment exception to *Miranda* follows almost inexorably from *Tennessee v. Street*.¹⁰⁵

Miranda dictated that any incriminating testimonial responses to custodial interrogation were presumptively “compelled” within the meaning of the Self-Incrimination Clause.¹⁰⁶ Thus, to secure the admissibility of such responses in evidence at trial, the Court held, the police must dissipate the coercion inherent in custodial interrogation by issuing warnings to the suspect—“that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed”—and securing a valid waiver of his rights.¹⁰⁷

In *Harris*, the defendant testified in a manner inconsistent with unwarned statements he had made following his arrest.¹⁰⁸ The prosecutor was permitted to ask the defendant on cross-examination whether he had made the unwarned statements, and the jury was instructed to consider the statements only for whatever light they shed on the credibility of the defendant’s trial testimony, not for their truth.¹⁰⁹ The U.S. Supreme Court ruled that use of unwarned statements for impeachment purposes was permitted by the Fifth Amendment.¹¹⁰ The Court analogized the use to the use for impeachment purposes of physical evidence seized in violation of the Fourth Amendment,¹¹¹ which the Court had previously approved.¹¹² Borrowing the cost-benefit analysis it developed in the Fourth Amendment context, the Court first noted the substantial benefit of allowing unwarned statements as impeachment evidence in enabling the jury to assess the defendant’s credibility fully.¹¹³ Meanwhile, the cost of allowing use of the evidence, in terms of a diminution of the deterrent effect of *Miranda*’s exclusionary rule, was minimal: “Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the

104. 496 U.S. 582 (1990).

105. 471 U.S. 409 (1985). See *supra* notes 89-101 and accompanying text for a discussion of *Street*’s holding that introduction of a statement violates the Confrontation Clause only when it is introduced to prove the statement’s truth.

106. *Miranda*, 384 U.S. at 467.

107. *Id.* at 444.

108. *Harris*, 401 U.S. at 223.

109. *Id.*

110. *Id.* at 225-26.

111. *Id.* at 224.

112. See *Walder v. United States*, 347 U.S. 62, 65 (1954) (holding that government can use illegally obtained evidence to impeach defendant’s statements on direct examination).

113. *Harris*, 401 U.S. at 225.

prosecution in its case in chief.”¹¹⁴

Harris has been subject to much scholarly criticism for using a Fourth Amendment analysis in a Fifth Amendment case.¹¹⁵ The Fourth Amendment’s exclusionary rule is a judge-made remedial device designed to ameliorate a constitutional violation that has taken place prior to trial.¹¹⁶ It does so largely by deterring future police misconduct.¹¹⁷ Thus, it makes some sense that it should apply only when one might think this deterrent effect would be both effective and not outweighed by the benefits of introduction of the evidence. The Fifth Amendment is entirely different, for “[i]t contains its own exclusionary rule.”¹¹⁸ If the use of the defendant’s own compelled incriminating words against him renders him “a witness against himself,” the Self-Incrimination Clause has been violated, irrespective of the relative costs and benefits involved.¹¹⁹

But does the use of the defendant’s own compelled incriminating words against him *for impeachment purposes* render him “a witness against himself”? As Donald Dripps has cogently observed, it does not, because such statements are nontestimonial in the classic Fifth Amendment sense: they are “not offered for truth, but only to prove that the witness [is] unworthy of belief.”¹²⁰ A suspect’s in-custody statement might, when viewed in isolation, “relate a factual assertion or disclose information,”¹²¹ thus superficially satisfying the assertion requirement. Nevertheless, it is the *use* of the statement at trial that is critical. In

114. *Id.* The Court later extended the impeachment exception to cover statements made as a result of interrogation after the suspect asserted the right to counsel. *See Oregon v. Hass*, 420 U.S. 714, 722 (1975) (“We see no valid distinction to be made in the application of the principles of *Harris* to that case and to *Hass*’ case.”).

115. *See, e.g.,* Martin R. Gardner, *Section 1983 Claims Under Miranda: A Critical View of the Right to Avoid Interrogation*, 30 AM. CRIM. L. REV. 1277, 1289-90 (1993) (criticizing *Harris* for using Fourth Amendment reasoning out of context); Michael J. Zydney Mannheim, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57, 127 (2002) (arguing that *Harris*’s reliance on Fourth Amendment jurisprudence is misplaced because Fourth Amendment’s text differs greatly from Fifth Amendment’s Self-Incrimination Clause); Pardo, *supra* note 17, at 1860 (noting that Fourth Amendment rationales are improperly used in Fifth Amendment analysis).

116. *See* Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 910 (1989) (endorsing view that exclusionary rule is remedial device designed to protect substantive Fourth Amendment right); Mannheim, *supra* note 115, at 126-27 (same).

117. *See* Loewy, *supra* note 116, at 908-09 (asserting that prominent theory behind Fourth Amendment is that evidence is excluded to deter future police impropriety); Mannheim, *supra* note 115, at 126 (discussing how exclusion as remedy to Fourth Amendment violation is enforced only where deterrence value outweighs probative value of such evidence).

118. Mannheim, *supra* note 115, at 127.

119. *See* Alan M. Dershowitz & John Hart Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1214 (1971) (criticizing use of cost-benefit analysis in *Miranda* context); Gardner, *supra* note 115, at 1289-90 (same); Loewy, *supra* note 116, at 925-26 (same); Mannheim, *supra* note 115, at 127 (same); *see also* Pardo, *supra* note 17, at 1860 (discussing how “Fourth Amendment rationales, concerns, and concepts get mistakenly imported into Fifth Amendment analysis”).

120. Donald Dripps, *Is the Miranda Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT. 19, 34 (2000).

121. *Doe v. United States*, 487 U.S. 201, 210 (1988).

Harris, the prosecutor introduced the statement, and the jury was instructed to consider it, only for purposes of determining whether the defendant was a credible witness.¹²² The statement's probative value derived not from the truth of its contents but from the mere fact that it was made. Accordingly, such a statement is "no more testimonial than a compelled voice exemplar."¹²³ This view of a defendant's own out-of-court statement as nontestimonial when used only to impeach parallels exactly the Court's determination in *Street* that use of *another's* out-of-court statement to impeach is, in essence, nontestimonial.¹²⁴

b. The "Sixth Birthday" Question and Compelled Psychiatric Examinations

The analogy to the Confrontation Clause, and its reliance on the underlying law of hearsay, also helps explain one of the most intractable and disputatious issues in the Court's Self-Incrimination Clause canon: the "sixth birthday" question issue from *Pennsylvania v. Muniz*.¹²⁵ *Muniz*, suspected of driving while intoxicated, was taken into custody and, prior to the administration of the warnings prescribed by *Miranda*, was asked the date of his sixth birthday.¹²⁶ He stated that he did not know.¹²⁷ It was undisputed that *Muniz* was subjected to custodial questioning and that his response was incriminating.¹²⁸ Thus, if it was also testimonial, it should not have been admitted into evidence at trial. The Court held that *Muniz's* response to the "sixth birthday" question was testimonial and therefore inadmissible.¹²⁹ Because it was the "content of [the]

122. *Harris v. New York*, 401 U.S. 222, 223 (1971).

123. *Dripps*, *supra* note 120, at 35. I have previously advocated that *Harris* be overruled as inconsistent with the language of the Self-Incrimination Clause. See *Mannheimer*, *supra* note 115, at 128 (arguing that *Harris's* holding failed to account for language of the Self-Incrimination Clause and is inconsistent with *Miranda's* presumption of coercion). Nevertheless, I have since achieved a better appreciation of what makes a statement "testimonial" and its speaker a "witness" within the meaning of the Self-Incrimination Clause. I take solace in the fact that I am in good company. *Cf. Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late.").

124. See *supra* Part II.B.1 for an analysis of the assertion requirement in the Confrontation Clause.

125. 496 U.S. 582 (1990).

126. *Muniz*, 496 U.S. at 586.

127. *Id.*

128. *Id.*

129. *Id.* at 600. *Allen and Mace* argue that it is erroneous to characterize this as the holding of the Court because the fifth vote for the majority was supplied by Justice Marshall, who would have held more broadly that all the evidence produced by *Muniz* in response to police questions or actions, including that which was clearly nontestimonial pursuant to a conventional analysis, was inadmissible. *Allen & Mace*, *supra* note 17, at 274-76; see also *Pardo*, *supra* note 31, at 331 (agreeing with *Allen and Mace*). These arguments have some force. See *Sonja R. West, Concurring in Part and Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1954 (2006) ("When it is self-evident that the rationale of the primary opinion does not hold the support of five justices, it should not be treated as a majority, no matter how many justices allegedly concurred."). Because the ultimate resolution of the "sixth birthday" question issue does not affect this Article's examination of *Muniz*, the actual holding of *Muniz* is beyond the scope of this Article.

truthful answer”—“I don’t know”—that “supported an inference that his mental faculties were impaired,” which was precisely why the prosecutor offered the response into evidence, the response was testimonial.¹³⁰ That is, it was testimonial because it constituted an “assertion of his knowledge at that time”¹³¹ that the prosecutor sought to introduce for its truth: that Muniz actually did not know the date of his sixth birthday, which in turn supported the inference that he was intoxicated.

By contrast, Chief Justice Rehnquist, writing for himself and three other Justices, disagreed that the answer to the “sixth birthday” question was testimonial.¹³² To them, the State did *not* “care[] about” the truth of the content of the response,¹³³ whether it was the date on which Muniz turned six or his lack of knowledge of that date, but only the fact that he said it.¹³⁴ The probative value of his answer lay not with the truth of its contents but with the fact that it represented Muniz’s inability “to do a simple mathematical exercise.”¹³⁵ To the dissenters, the result of this test of Muniz’s mental dexterity was no more testimonial than the results of the tests Muniz was compelled to perform that showed his lack of physical coordination.¹³⁶

The apparent holding of *Muniz* is consistent with the decision in *Estelle v. Smith*,¹³⁷ where the Court held that statements made during compulsory psychiatric examinations are inadmissible pursuant to the Self-Incrimination Clause to show the examinee’s mental state.¹³⁸ The Court rejected the state’s argument that the defendant’s statements were nontestimonial,¹³⁹ an argument based on the proposition that the statements’ relevance related not to their truth but only to the fact that the defendant made them.¹⁴⁰ Rather, in stressing that the

130. *Muniz*, 496 U.S. at 599.

131. *Id.* at 599 n.13.

132. *Id.* at 606 (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

133. *Id.* at 599 n.13 (plurality opinion).

134. *Id.* at 607 (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

135. *Muniz*, 496 U.S. at 607-08.

136. *Id.* at 608.

137. 451 U.S. 454 (1981).

138. *Estelle*, 451 U.S. at 469. In *Estelle*, statements made by a criminal defendant at a compulsory psychiatric examination, conducted to determine whether he was competent to stand trial, were used at his penalty phase hearing to prove he posed a future danger and therefore was deserving of the death penalty. *Id.* at 456-60, 464 & n.9.

139. *Id.* at 463-64.

140. Brief for the Petitioner at 36-37, *Estelle*, 451 U.S. 454 (No. 79-1127); see also Robert H. Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 55, 68 (1973) (“A number of courts . . . maintain that words spoken in answer to a psychiatrist’s questions are not sought for their factual content[] but as an indication of the state of the defendant’s mind.”); Marianne Wesson, *The Privilege Against Self-Incrimination in Civil Commitment Proceedings*, 1980 WIS. L. REV. 697, 706-07 (observing that view “that a defendant’s statements in the course of an examination are [nontestimonial] when admitted regarding an issue related to the defendant’s mental condition. . . . rests on the linguistic argument that statements are testimonial only when offered to prove the truth of their contents”); Note, *Requiring a Criminal*

state psychiatrist's testimony was based on the defendant's "account of the crime,"¹⁴¹ the Court suggested that the defendant's statements were being used in a testimonial fashion—as assertions of fact—because his sincerity might have been questioned.¹⁴² Thus, both *Muniz* and *Estelle* address whether a statement, though not offered literally to prove its truth, ought still be considered an assertion, and therefore testimonial pursuant to the Self-Incrimination Clause, on the ground that its probative value hinges significantly on the sincerity of the speaker.¹⁴³

It is unsurprising that the "sixth birthday" question issue proved so contentious for the Court, for it was but a replay of a chestnut from the law of hearsay.¹⁴⁴ Suppose one wants to introduce the declarant's statement "I am the Emperor Napoleon" in order to show that the declarant was insane at the time he made the statement. On one view, this is not hearsay, because the proponent seeks not to prove the truth of the statement (that the speaker actually is Napoleon Bonaparte) but that the speaker is insane.¹⁴⁵ Wigmore¹⁴⁶ and

Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination, 83 HARV. L. REV. 648, 654 (1970) ("Those arguing for the constitutionality of psychiatric examinations have often characterized them as gathering physical evidence.").

141. *Estelle*, 451 U.S. at 464.

142. See Wesson, *supra* note 140, at 709 (arguing that statements made during psychiatric examinations should be considered testimonial even when used to determine defendant's mental state because "in many cases an examiner is interested in the objective accuracy of a subject's statements"); Note, *supra* note 140, at 658 (observing that "it is likely that many defendants would try to affect the diagnosis of their mental state," in that those suffering from mental illness often try to mask their disorders while some "[s]ane defendants . . . try to feign insanity").

143. Marianne Wesson presciently drew this comparison a decade before *Muniz* was decided:

If an examiner asks a subject the month and year and the subject intentionally misstates them to create an impression of disorientation, the examiner may be misled. It is not the falseness of the answer that misleads, for the examiner knows the month and year, but the falseness of the implicit representation that the subject does not know.

Wesson, *supra* note 140, at 710. This is not to say that the Court in *Muniz* should have considered the statement testimonial. Although "[c]onsiderable evidence exists that the psychiatric examination has a tendency to elicit untrue or unreliable evidence," *id.*, thus supporting the holding in *Estelle*, there is little reason to doubt *Muniz*'s sincerity in his lack of knowledge of the date of his sixth birthday, especially if, as was likely the case, he knew that a lack of knowledge would be incriminating, see Allen & Mace, *supra* note 17, at 269-70, 276 (asserting that statements in *Estelle* were testimonial while statement in *Muniz* was nontestimonial); Pardo, *supra* note 31, at 331 ("[T]he psychiatric examination in *Estelle* and the sixth-birthday question in *Muniz* provide an example on each side of the 'testimonial' line.").

144. Surprisingly few have recognized the connection between the Self-Incrimination Clause's assertion requirement and the law of hearsay. See, e.g., Pardo, *supra* note 16, at 184 (drawing connection between term "testimonial" in Self-Incrimination Clause context and its relation to hearsay); Wesson, *supra* note 140, at 707 (noting that Clause's testimonial/nontestimonial distinction has its roots in hearsay doctrine); see also *United States v. Baird*, 414 F.2d 700, 709 (1969) (holding that defendant who relied on theory that self-serving statements to psychiatrist were admissible as nonhearsay because they were not offered for their truth was estopped from arguing that other statements to psychiatrist offered by prosecution were testimonial for purposes of Self-Incrimination Clause).

145. See Edward W. Hinton, *States of Mind and the Hearsay Rule*, 1 U. CHI. L. REV. 394, 397-98 (1934) (explaining view that no hearsay arises from admitting statement "I am the Emperor

McCormick¹⁴⁷ subscribed to this view. Yet, on a more nuanced view, the statement may indeed be hearsay, for it is simply shorthand for the statement “*I believe that I am the Emperor Napoleon.*” According to this view, the speaker’s irrational belief is precisely what the proponent seeks to prove, and the sincerity of his statement of belief might be questioned.¹⁴⁸ Morgan¹⁴⁹ and Hinton¹⁵⁰ subscribed to this view.

This Article does not attempt to cut the Gordian Knot of the “I am the Emperor Napoleon” problem—that is, to settle the score between Wigmore and Morgan—any more than it picks sides in *Muniz*. The more modest point is that both represent the same problem, so both should be answered uniformly. Suppose, for example, a witness in a contest over Muniz’s will, in an attempt to show that Muniz was intoxicated when he executed the will, were to testify that, just after executing it, Muniz stated: “I don’t know when my sixth birthday was.” Under the Wigmore/McCormick view, the statement is not hearsay because it is offered to prove Muniz’s intoxicated state of mind rather than the truth of the matter asserted. According to the Morgan/Hinton view, the statement might well be hearsay if we have reason to doubt Muniz’s sincerity. But the answer in both the real and the hypothetical case should be the same: either the statement is categorically excluded from the class of assertions or its status as an assertion depends on whether we can reasonably question the sincerity of the speaker.

C. *The Contemplation-of-Litigation Requirement in the Self-Incrimination Clause*

As demonstrated above, the Fifth Amendment’s limitation of the term “witness” to a criminal suspect who has made an assertion almost exactly parallels the Sixth Amendment’s limitation of the term “witnesses.” Perhaps less obvious is the way the Sixth Amendment’s contemplation-of-litigation requirement is replicated in the Fifth Amendment context. This limitation, only recently enunciated in the Sixth Amendment context in *Crawford* and *Davis*, nonetheless was prefigured by two seemingly discrete doctrines in Fifth Amendment jurisprudence: the exceptions to the *Miranda* requirements and the treatment of compelled incrimination pursuant to a neutral regulatory scheme. Only in light of *Crawford*’s and *Davis*’s clear articulation of the contemplation-of-litigation requirement can one see the common thread tying together these discrete areas: where incriminating assertions are compelled, but for reasons other than to gather evidence for later use at trial, the evidence is nontestimonial

Napoleon” if it is offered to show speaker’s mental state rather than to prove speaker is Napoleon).

146. 6 WIGMORE, EVIDENCE § 1790 (1976).

147. MCCORMICK ON EVIDENCE § 274, at 233 (John W. Strong ed., 4th ed. 1992).

148. See Note, *Public Opinion Surveys as Evidence: The Pollsters Go to Court*, 66 HARV. L. REV. 498, 502 & n.29 (1953) (explaining that statement “I believe I am the Pope” is hearsay if it is offered to prove nature of speaker’s belief).

149. See MORGAN, *supra* note 35, at 147 (explaining and distinguishing Wigmore’s perspective).

150. See Hinton, *supra* note 145, at 397-98 (explaining that, where sanity of testator is at issue, absurd statement may be hearsay because it implies assertion of belief).

and the Fifth Amendment does not bar the later use of the evidence at trial.

1. The Other Exceptions to *Miranda*

The Supreme Court has prescribed that any statements taken in the context of custodial interrogation must be preceded by the now-familiar *Miranda* warnings and a waiver of the right to remain silent if the prosecution wishes to introduce the statements in its case-in-chief at trial.¹⁵¹ Yet the Court has carved out from this general rule three exceptions. First, when the objective circumstances indicate that the questions are motivated by public safety concerns, they need not be preceded by the warnings and waiver in order to render the responses admissible in evidence.¹⁵² Second, a plurality of the Court has determined that answers to “routine booking questions” are admissible at trial despite the absence of warnings and waiver.¹⁵³ Finally, the Court has held that responses to questioning are admissible if the questioner is an undercover officer and therefore the suspect does not know he is being questioned by a state actor.¹⁵⁴ While the Court has adequately explained the “undercover officer” exception, its explanation for the “public safety” exception is unpersuasive and its explanation for the “routine booking question” exception is virtually nonexistent. Only the contemplation-of-litigation requirement can explain all three.

a. The “Public Safety” Exception

In *New York v. Quarles*,¹⁵⁵ two police officers were told by a woman that she had just been raped by a man armed with a gun who subsequently entered a supermarket.¹⁵⁶ When Officer Kraft arrested Quarles in the supermarket, he saw that Quarles was wearing an empty shoulder holster.¹⁵⁷ Before administering the warnings prescribed by *Miranda*, the officer asked where the gun was, and Quarles nodded toward some empty cartons and said “the gun is over there.”¹⁵⁸ Despite the fact that the statement was a response to custodial interrogation not preceded by *Miranda* warnings and a waiver, the Court held the statement to be admissible because “overriding considerations of public safety justif[ied] the

151. See *Miranda v. Arizona*, 384 U.S. 386, 444 (1966) (requiring warnings to dissipate coercion inherent in custodial interrogation).

152. See *New York v. Quarles*, 467 U.S. 649, 651 (1984) (establishing public safety exception to *Miranda*). For a discussion of the public safety exception to *Miranda*, see *infra* Part II.C.1.a.

153. See *Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990) (plurality opinion) (recognizing routine booking question exception to *Miranda*). For a discussion of the routine booking question exception to *Miranda*, see *infra* Part II.C.1.b.

154. See *Illinois v. Perkins*, 496 U.S. 292, 300 (1990) (holding that undercover officer posing as inmate need not administer *Miranda* warnings prior to questioning). For a discussion of the *Perkins* exception to *Miranda*, see *infra* Part II.C.1.c.

155. 467 U.S. 649 (1984).

156. *Quarles*, 467 U.S. at 651-52.

157. *Id.* at 652.

158. *Id.*

officer's failure to provide *Miranda* warnings."¹⁵⁹

In creating this "public safety" exception to *Miranda*, the Court again utilized a type of cost-benefit analysis typically seen in its Fourth Amendment jurisprudence.¹⁶⁰ The Court reasoned that the provision of *Miranda* warnings could be expected to reduce the amount of information forthcoming from a criminal suspect.¹⁶¹ In *Miranda*, the Court implicitly determined that, in the typical case, the cost of this lost evidence would be offset by the benefit of guaranteeing that the Fifth Amendment rights of all criminal suspects would be honored.¹⁶² But, the *Quarles* Court reasoned, where public safety is endangered, the cost of administering the *Miranda* warnings is manifested not simply in the currency of foregone evidence and lost convictions but also the potential for serious injury or death to the police or innocent bystanders.¹⁶³ In such a case the costs of the rule outweigh its benefits and the rule should not apply.¹⁶⁴

As thus justified, *Quarles* is subject to heavy criticism. All three elements essential for a Self-Incrimination Clause violation were present there: compulsion, via *Miranda*'s conclusive presumption that compulsion attends any custodial interrogation without the prescribed warnings and waiver;¹⁶⁵ incrimination, because Quarles's knowledge of the location of the gun could be used by the prosecution to show that he had knowingly possessed the weapon;¹⁶⁶ and testimony, at least as conventionally understood, since Quarles's revelation "explicitly . . . disclose[d] information"¹⁶⁷ regarding the whereabouts of the gun. Accordingly, had the prosecution been able to use Quarles's answer to convict him, the Self-Incrimination Clause clearly would have been violated on a conventional reading of the Clause.

Like the Court in *Harris v. New York*,¹⁶⁸ the *Quarles* Court inappropriately used a Fourth Amendment cost-benefit analysis in a Fifth Amendment case. Indeed, the Court showed its hand by reasoning that a contrary rule would effectively "penalize[e] officers for asking the very questions which are the most crucial to their efforts to protect themselves and the public."¹⁶⁹ The Court thus

159. *Id.* at 651.

160. See Mannheim, *supra* note 115, at 118 (observing that *Quarles* Court used "the same cost/benefit analysis employed in determining whether the Fourth Amendment exclusionary rule should be employed in a particular instance").

161. *Quarles*, 467 U.S. at 656.

162. See *id.* at 656-57 (finding that *Miranda* Court decided that protection for Fifth Amendment privilege outweighed cost to society).

163. *Id.* at 657.

164. *Id.* at 657-58.

165. See *supra* notes 106-07 and accompanying text for a discussion of the *Miranda* Court's view that coercion is inherent in all custodial interrogations.

166. See, e.g., *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (stating that privilege "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used").

167. *Doe v. United States*, 487 U.S. 201, 210 (1988).

168. 401 U.S. 222, 223 (1971). See *supra* notes 108-19 and accompanying text for a discussion of *Harris*.

169. *New York v. Quarles*, 467 U.S. 649, 658 n.7 (1984).

had in mind the judge-made Fourth Amendment exclusionary rule, which does indeed penalize the police in order to deter them from acting unlawfully in the future.¹⁷⁰ But incriminating testimonial evidence compelled from a suspect is excluded from that suspect's criminal case, not to penalize whoever compelled it, but because the Fifth Amendment says it must be.¹⁷¹ Whatever the propriety of using a cost-benefit analysis when determining the applicability of the judge-made Fourth Amendment exclusionary rule, this type of analysis is "misplaced in the face of the clear command of the Self-Incrimination Clause that no person be 'compelled . . . to be a witness against himself.'"¹⁷² As Justice Marshall, dissenting in *Quarles*, cogently observed, the Fifth Amendment has nothing to say about whether questioning in the face of exigency is proper or improper: "All the Fifth Amendment forbids is the introduction of coerced statements at trial."¹⁷³ Furthermore, Justice Marshall's view of the Self-Incrimination Clause was vindicated in *Chavez v. Martinez*¹⁷⁴ in which the Court held that a failure to read the *Miranda* warnings prior to custodial interrogation does not violate the Constitution.¹⁷⁵ Rather, the Self-Incrimination Clause is violated only when compelled statements are actually introduced into evidence at a criminal judicial proceeding.¹⁷⁶

There is, however, a better way to justify the result in *Quarles*. Once one recognizes that the contemplation-of-litigation requirement defines what evidence is testimonial for purposes not only of the Sixth Amendment but of the

170. See *supra* text accompanying notes 116-17 for a discussion of the rationale behind the Fourth Amendment's exclusionary rule.

171. See Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 534 (2002) ("A police officer who disregards *Miranda* does nothing wrong."); Mannheim, *supra* note 115, at 122-23 ("In essence, when a police officer conducts a custodial interrogation without adhering to *Miranda*, he is informally granting the suspect immunity. It does not mean that he has done anything wrong." (footnote omitted)).

172. Mannheim, *supra* note 115, at 120 (alteration in original) (quoting U.S. CONST. amend. V); accord M.K.B. Darmer, *Lessons from the Lindh Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 281 (2002) ("[T]he language of the Fifth Amendment . . . does not suggest that society's 'need' for a 'compelled' statement can be balanced against an absolute prohibition against compelled self-incrimination."); Daniel Brian Yeager, Note, *The Public Safety Exception to Miranda Careening Through the Lower Courts*, 40 U. FLA. L. REV. 989, 1004-05 (1988) ("[T]he judiciary created the penalty of exclusion under the fourth amendment; the Constitution mandated exclusion of compelled testimony under the fifth amendment.").

173. *Quarles*, 467 U.S. at 686 (Marshall, J., dissenting); see also *id.* at 665 (O'Connor, J., concurring in part and dissenting in part) ("[T]here is nothing about an exigency that makes custodial interrogation any less compelling . . .").

174. 538 U.S. 760 (2003) (plurality opinion).

175. *Chavez*, 538 U.S. at 772 ("Chavez's failure to read *Miranda* warnings to Martinez did not violate Martinez's constitutional rights . . ."); *id.* at 789 (Kennedy, J., concurring in part and dissenting in part) ("[F]ailure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues."); see also *United States v. Patane*, 542 U.S. 630, 637 (2004) (plurality opinion) ("[P]olice do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn.").

176. *Chavez*, 538 U.S. at 766-67 (plurality opinion); *id.* at 777 (Souter, J., concurring); accord *Patane*, 542 U.S. at 641 ("Potential violations [of the Self-Incrimination Clause] occur, if at all, only upon the admission of [compelled incriminatory] statements into evidence . . .").

Fifth Amendment as well, the result in *Quarles* is unremarkable. Information provided by a suspect about an ongoing public danger creates evidence that is nontestimonial in the same way that the 911 caller in *Davis* provided only nontestimonial evidence: in each case, the statements were not made in contemplation of their later use at trial. Thus, *Quarles* should be viewed not as an exception to the Fifth Amendment but as a judgment that the Fifth Amendment is not implicated where information is sought for some reason other than its later use at trial.¹⁷⁷

Indeed, the parallels between *Davis* and *Quarles* are striking. For example, both recognize that those who seek information relating to criminal activity might be acting with mixed motives. Thus, the *Quarles* Court noted that a police officer, when placed in a position such as the police faced in that case, might “act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.”¹⁷⁸ Nonetheless, the Court expressed confidence in the ability of police officers to “distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed *solely* to elicit testimonial evidence from a suspect.”¹⁷⁹ The use of the word “solely” suggests that responses to police questioning fall within the public safety exception so long as there is some plausible public safety reason for the questions even if the police also appear to be motivated by a desire to gather evidence for trial.¹⁸⁰

Likewise, the *Davis* Court acknowledged that alio-inculpatory statements are often made and collected for a variety of purposes. After all, the Court articulated the standard as a “primary purpose” test,¹⁸¹ implicitly acknowledging

177. See William T. Pizzi, *The Privilege Against Self-Incrimination in a Rescue Situation*, 76 J. CRIM. L. & CRIMINOLOGY 567, 596 (1985) (“The relevant issue is not . . . whether fifth amendment rules permit exceptions in emergency situations, but whether the fifth amendment is meant to apply in circumstances where the police are functioning in a situation which is primarily noninvestigative and where life is at stake.”); see also Darmer, *supra* note 172, at 282 (“The question is one of defining the scope of the Fifth Amendment right against self-incrimination.”).

178. *Quarles*, 467 U.S. at 656; see also Pizzi, *supra* note 177, at 583 (observing that *Quarles* recognized existence of variety of motives that can drive human behavior); Marc S. Reiner, Note, *The Public Safety Exception to Miranda: Analyzing Subjective Motivation*, 93 MICH. L. REV. 2377, 2381 (1995) (noting that Court realized police officers may have many different motives).

179. *Quarles*, 467 U.S. at 658-59 (emphasis added).

180. See Reiner, *supra* note 178, at 2382 (“By limiting impermissible questions to those whose sole purpose is to produce incriminatory evidence, the Court suggested that the purpose behind a permissible question must, at least in part, be a genuine belief in a public safety emergency.”); Jim Weller, Comment, *The Legacy of Quarles: A Summary of the Public Safety Exception to Miranda in the Federal Courts*, 49 BAYLOR L. REV. 1107, 1111 (1997) (“[T]he exception applie[s] if the officer’s motive could objectively be viewed as a concern for public safety.” (emphasis added)); see also *Quarles*, 467 U.S. at 657 (“Officer Kraft needed an answer to his question *not simply* to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.” (emphasis added)); Pizzi, *supra* note 177, at 583 (opining that public safety exception applies even when officer has multiple concurrent objectives).

181. *Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006). See *supra* note 54 and accompanying text for a discussion of the “primary purpose” test.

that such information is often sought or provided for more than one purpose.¹⁸² And in *Davis*, the Court observed that, when it wrote in *Crawford* that “‘interrogations by law enforcement officers fall squarely within [the] class’ of testimonial hearsay, [the Court] had immediately in mind . . . interrogations *solely* directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.”¹⁸³ Yet the Court was sanguine that courts would be able to determine when the evidence-gathering motive was the predominant one, citing the very same passage from *Quarles* quoted above that expressed the same measure of confidence in the police.¹⁸⁴

Implicit in the Court’s dual-motivation analysis in both *Quarles* and *Davis* is a frank recognition that the police perform multiple functions in our society. At least one purpose of both Clauses is to avoid a reversion to the English practice, beginning in the sixteenth century, of introducing into evidence at trial statements made by both the accused (as relevant to the Self-Incrimination Clause) and his accusers (as relevant to the Confrontation Clause) to a committing magistrate before trial.¹⁸⁵ Because professional police now replicate the investigatory function of the magistrate,¹⁸⁶ the application of both Clauses to police interrogation makes sense. But it is critical to remember that such application makes sense only because, and only to the extent that, police now perform the function, once performed by committing magistrates, of investigating completed crimes.¹⁸⁷ “Although the investigation of crimes and the enforcement of the criminal laws may be the police functions most visible for the courts, they are only two of many important responsibilities that police carry out”¹⁸⁸

182. See *Davis*, 126 S. Ct. at 2283 (Thomas, J., concurring in part and dissenting in part) (“In many, if not most, cases where police respond to a report of a crime . . . the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence.” (citing *Quarles*, 467 U.S. at 656)).

183. *Davis*, 126 S. Ct. at 2274 (majority opinion) (emphasis added) (alteration in original).

184. The Court noted:

Just as, for Fifth Amendment purposes, “police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect,” trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial.

Id. at 2277 (citation omitted) (quoting *Quarles*, 467 U.S. at 658-59).

185. See *Crawford v. Washington*, 541 U.S. 36, 44 (2004) (discussing sixteenth-century “Marian bail and committal statutes [that] required justices of the peace to examine *suspects and witnesses* in felony cases and to certify the results to the court” (emphasis added)). See also *supra* Part II.A.1 for a discussion of this historical practice.

186. See *Crawford*, 541 U.S. at 52 (noting that modern police interrogations bear strong resemblance to examinations by justices of the peace in sixteenth-century England); Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness” Test*, 65 MICH. L. REV. 59, 69 (1966) (noting that modern police mirror role of early magistrates in interrogating suspects).

187. See Pizzi, *supra* note 177, at 594 (suggesting investigative role of police forms basis of *Miranda*).

188. *Id.* at 573-74; see also *id.* at 588 (noting that police have variety of other tasks in addition to

Among the most important of these other functions is the maintenance of public safety,¹⁸⁹ precisely the function with which *Quarles* was most concerned, though there are others, such as keeping general order and providing various types of assistance to citizens in need. Application of either Clause makes little sense when the police are performing tasks “that judges do not perform.”¹⁹⁰ And it is doubtful that any sixteenth-century English magistrate ever, in his official capacity, secured a dangerous weapon, broke up a barroom brawl, searched for a lost child, or retrieved a cat from a tree. Thus, just as *Davis* recognized that we should not treat all accusatory statements made to the police the same for purposes of the Confrontation Clause, it “is wrong [to] assume[] that all government questioning to obtain information that happens to be incriminating must be treated the same for purposes of the privilege against self-incrimination.”¹⁹¹

Partly in recognition of the fact that motives are often mixed, both *Quarles* and *Davis* established objective standards for determining the purpose of the exchange of information. In *Quarles*, the Court held that “the availability of [the public safety] exception does not depend upon the motivation of the individual [police] officers involved.”¹⁹² Rather, the exception applies whenever the sought-after information “relate[s] to an objectively reasonable need to protect the police or the public from any immediate danger.”¹⁹³ As the Court also put it, the exception applies “to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.”¹⁹⁴ *Davis* likewise enunciated an objective standard. The Court instructed that, in determining the “primary purpose” of the exchange of information, one must look only to what “the circumstances objectively indicate.”¹⁹⁵

While some language in both *Quarles* and *Davis* purports to establish a wholly objective test,¹⁹⁶ each is best interpreted as taking into account the police officer’s actual subjective motives, determined, however, solely from objective

apprehending criminals). The recognition that the police perform both crime-fighting and community-caretaking functions is most highly developed in the Supreme Court’s “special needs” jurisprudence pursuant to the Fourth Amendment. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (explaining that certain circumstances create special needs, making warrant and probable cause requirements impractical). Ironically, it is in this area that differential treatment of multiple police functions is arguably least justifiable, as the Fourth Amendment, unlike the Fifth and Sixth Amendments, makes no mention that its strictures are limited to “criminal case[s],” U.S. CONST. amend. V, or “criminal prosecutions,” *id.* amend. VI. *See id.* amend. IV (providing right of people to be free of unreasonable searches and seizures and requiring probable cause before warrants are issued without explicitly limiting right to “criminal” cases).

189. Pizzi, *supra* note 177, at 574.

190. *Id.* at 594.

191. *Id.*

192. *New York v. Quarles*, 467 U.S. 649, 656 (1984).

193. *Id.* at 659 n.8.

194. *Id.* at 656.

195. *Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006).

196. *See id.* (stating objective test for determining whether statements are testimonial); *Quarles*, 467 U.S. at 656 (claiming *Miranda* does not require looking to officer’s subjective motivation).

factors and scrutinized to determine whether they are objectively reasonable. As student commentator Marc Reiner has argued persuasively, the language and reasoning of *Quarles* indicate that the officer's actual subjective motivation must indeed be evaluated.¹⁹⁷ For example, the Court wrote that the exception applied to "questions reasonably prompted by a concern for the public safety,"¹⁹⁸ not to questions that "'could have been reasonably prompted by a concern for the public safety.'"¹⁹⁹ In addition, the public safety exception was created in large part to obviate the need for officers to decide between responding appropriately to an emergency, thereby forgoing valuable evidence, or gathering evidence for trial, thereby potentially failing to address the emergency.²⁰⁰ Yet, as Reiner points out, "[t]he difficult choice that the *Quarles* Court sought to eliminate does not exist unless an actual belief in an emergency motivates the arresting officer."²⁰¹ Still, *Quarles* demands that, to the extent a court must account for a police officer's actual, subjective motivation, it must do so by looking only "to purely objective, external evidence," such as "how directly the officer focused [his questions] on the alleged emergency" and "the immediacy of the officer's questions relating to the emergency."²⁰²

In addition, the officer's subjective belief that he was acting pursuant to an emergency must be objectively reasonable in light of all the circumstances.²⁰³ Objective reasonableness is established only when a perceived public danger is sufficiently imminent to justify dispensing with *Miranda* warnings.²⁰⁴ Moreover,

197. Reiner, *supra* note 178, at 2383-86; accord Pizzi, *supra* note 177, at 582 (stating that majority opinion in *Quarles* assumed that officer's primary concern was public safety despite Court's dismissal of importance of subjective motivation).

198. *Quarles*, 467 U.S. at 656.

199. See Reiner, *supra* note 178, at 2385 n.36 (quoting James G. Scotti, Comment, In re John C.—An Opportunity for the New York Courts to Save *Miranda* from the Public Safety Exception, 62 ST. JOHN'S L. REV. 143, 145 (1987)) (analyzing language of *Quarles* as demanding inquiry into actual belief of officer); see also Pizzi, *supra* note 177, at 580 (observing that Court's "reasonably prompted" language is in serious tension with its enunciation of wholly objective test).

200. See *Quarles*, 467 U.S. at 657-58 (declining to place police officers in that "untenable position").

201. Reiner, *supra* note 178, at 2384; accord Pizzi, *supra* note 177, at 583 (noting difficulty in applying public safety exception without inquiry into officer's subjective intent).

202. Reiner, *supra* note 178, at 2386-87; see also *id.* at 2401 (observing that even courts that eschew inquiry into officer's subjective motivations nevertheless consider objective factors that demonstrate officer's subjective motivation).

203. See *id.* at 2395-96 (noting *Quarles* decision explicitly requires analysis of reasonableness of officer's public safety concern); see also Pizzi, *supra* note 177, at 583 (discussing *Quarles* as standing for proposition that officer's belief must be both held in good faith and objectively reasonable to satisfy public safety exception).

204. See *Quarles*, 467 U.S. at 659 n.8 (stating that, for public safety exception to apply, there must be immediate danger that creates objectively reasonable need to protect police and public). Reiner astutely points to other language in *Quarles* suggesting that a danger must be imminent for the public safety exception to apply. Reiner, *supra* note 178, at 2396 n.78. For example, the Court noted that "[t]he police . . . were confronted with the immediate necessity of ascertaining the whereabouts of [the] gun." *Quarles*, 467 U.S. at 657. Moreover, the Court observed that decisions regarding public safety "often" must be made "in a matter of seconds," *id.*, and, in any event, "only [within a] limited time," *id.* at 658 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). See Pizzi, *supra* note

the officer's subjective belief is objectively reasonable only when the perceived danger presents a threat above and beyond the mere "possibility that a dangerous felon will escape justice," for that was precisely the price the *Miranda* Court was willing to pay for the protection of a suspect's Fifth Amendment rights.²⁰⁵

Davis, too, purports to establish a purely objective standard yet contains language that makes an inquiry into subjective mental states virtually inevitable.²⁰⁶ As Justice Thomas pointed out in his separate opinion, the Court's use of the word "objective" is in serious tension with its use of the word "purpose."²⁰⁷ After all, as one commentator has noted, "[a] purpose cannot merely *exist*; someone must *have* one."²⁰⁸ The Court's own analysis confirms this insight. For one thing, the Court referenced the declarant's own mental state in *Davis* by noting that "[a] 911 call . . . is ordinarily not *designed* primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance,"²⁰⁹ and in *Hammon* by describing how the declarant "*deliberately* recounted, in response to police questioning, how potentially criminal past events began and progressed."²¹⁰ Furthermore, the Court referred to the subjective motivations of the 911 operator in *Davis*, by adverting to her "effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon,"²¹¹ and of the police officer in *Hammon* by noting that he testified that "he had her execute an affidavit, in order . . . [t]o establish events that have occurred previously."²¹²

Moreover, there is good reason to think that the primary purpose test of *Davis* also looks to the objective reasonableness of the subjective motivation of the participants in the exchange of information. As in *Quarles*, the Court intimated that an emergency can reasonably be said to exist only when there is some sense of imminence and substantiality to the danger. Thus, the Court distinguished *Hammon* from *Davis* by observing that, in *Hammon*, the declarant

177, at 584 ("[T]he opinion in *Quarles* sometimes seems to be directed only to a fast-developing, 'on-the-scene' situation."). *But see* Jeffrey S. Becker, *A Legal War on Terrorism: Extending New York v. Quarles and the Departure from Enemy Combatant Designations*, 53 DEPAUL L. REV. 831, 868 (2003) ("[A]n officer's need to make a spontaneous decision was not a determinative factor of the public safety exception.").

205. Reiner, *supra* note 178, at 2396 n.78; *see also Quarles*, 467 U.S. at 656-57 (noting that *Miranda* majority determined that increased protection of Fifth Amendment rights outweighed risk of fewer convictions of guilty suspects).

206. *See Leading Cases, supra* note 56, at 218 ("[T]he precise nature of the Court's 'purpose' requirement is somewhat ambiguous.").

207. *Davis v. Washington*, 126 S. Ct. 2266, 2283 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part) ("The Court's repeated invocation of the word 'objectiv[e]' to describe its test . . . suggests that the Court may not mean to reference purpose at all . . ." (alteration in original)).

208. *Leading Cases, supra* note 56, at 218.

209. *Davis*, 126 S. Ct. at 2276 (emphasis added) (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (alteration in original)).

210. *Id.* at 2278 (emphasis added).

211. *Id.* at 2276.

212. *Id.* at 2279 (internal quotation marks omitted) (second alteration in original).

faced “no immediate threat to her person”²¹³ and that her “statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation.”²¹⁴ Accordingly, *Davis* is best read, like *Quarles*, as implicating the subjective motivation of the police but only as manifested through the objective, “observable circumstances of [the] incident”²¹⁵ and only to the extent that the subjective motivations are objectively reasonable.²¹⁶

Thus, *Quarles* and *Davis* operate in much the same fashion in determining the admissibility of out-of-court statements that relate to an exigency but that also implicate past criminal activity. Pursuant to *Davis*, if the predominant purpose of the exchange of information, viewed objectively, is “to meet an ongoing emergency,”²¹⁷ the statement is not testimonial; that is, the declarant does not become a “witness[] against” the accused within the meaning of the Confrontation Clause when the statement is introduced into evidence.²¹⁸ Similarly, pursuant to *Quarles*, if one plausible purpose of the exchange of information, viewed objectively, is to meet a “need to protect the police or the public from an[] immediate danger,”²¹⁹ the statement is not testimonial; that is, the declarant does not become a “witness against” himself within the meaning of the Self-Incrimination Clause when the statement is introduced into evidence, even if the statement is also compelled and incriminating.²²⁰

b. The “Routine Booking Question” Exception

In *Pennsylvania v. Muniz*,²²¹ *Muniz*, in addition to the “sixth birthday” question discussed above,²²² was asked “his name, address, height, weight, eye color, date of birth, and current age,”²²³ prior to the administration of the warnings prescribed by *Miranda*. He “stumb[ed] over his address and age.”²²⁴ A majority of the Court concluded that answers to routine booking questions need

213. *Id.* at 2278.

214. *Davis*, 126 S. Ct. at 2279.

215. *Leading Cases*, *supra* note 56, at 219; *see also* Friedman, *Grappling*, *supra* note 58, at 253 (noting that, even if test looked to declarant’s subjective expectation of later use of evidence, this expectation could be determined only by looking at objective circumstances).

216. *See* *Wilson*, *supra* note 60, at 287 (using “ordinary officer” standard to determine whether there has been a gathering of evidence for prosecution).

217. *Davis*, 126 S. Ct. at 2273.

218. U.S. CONST. amend. VI.

219. *New York v. Quarles*, 467 U.S. 649, 659 n.8 (1984).

220. The only difference appears to be that any plausible noninvestigatory motive for the interrogation will save a response from being testimonial under the Self-Incrimination Clause, whereas only a noninvestigatory motive that predominates above all other motives will render a statement nontestimonial pursuant to the Confrontation Clause. This distinction is addressed *infra* in Part III.B.

221. 496 U.S. 582 (1990).

222. *See supra* notes 126-28 and accompanying text for a discussion of the factual background of *Muniz*.

223. *Muniz*, 496 U.S. at 586 (plurality opinion).

224. *Id.*

not be preceded by *Miranda* warnings in order to be admissible in evidence.²²⁵ However, a majority could not agree on a rationale. A four-Justice plurality, led by Justice Brennan, rejected the notion that the questions themselves did not constitute interrogation on the ground that they were not intended to elicit incriminating responses.²²⁶ Nevertheless, the plurality embraced the adoption of a “‘routine booking question’ exception” to *Miranda*, applicable to answers to “questions [that] appear reasonably related to the police’s administrative concerns.”²²⁷ A separate group of four Justices, led by Chief Justice Rehnquist, apparently believed that the answers were nontestimonial in that they did not make any relevant assertions.²²⁸ Courts have subsequently excluded from *Miranda*’s dictates answers to routine booking questions without agreeing among themselves on the underlying rationale.²²⁹

Neither rationale in *Muniz* is wholly satisfying. The Brennan plurality failed to give any real explanation whatsoever for its conclusion that answers to routine booking questions fall outside of *Miranda*’s dictates. Justice Brennan wrote only that “the questions appear reasonably related to the police’s administrative concerns.”²³⁰ He failed to explain why the motivation for the questions rendered admissible the responses, which were concededly the incriminating products of custodial interrogation that was presumptively compulsive.

Yet Chief Justice Rehnquist’s opinion for four Justices was equally unpersuasive. He declined to reach the issue of whether there is a “‘routine booking question’” exception to the *Miranda* rule.²³¹ He wrote instead only that the “responses to the . . . ‘booking’ questions were not testimonial” for the same reasons that the answer to the “sixth birthday” question was not testimonial.²³² Yet, even pursuant to the Chief Justice’s analysis of the “sixth birthday”

225. *Id.* at 601; *id.* at 608 (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

226. *Id.* at 601 (plurality opinion). This conclusion suggests that the plurality viewed the information provided as testimonial in the classic Fifth Amendment sense, a result at odds with the conclusion of a plurality in *California v. Byers*, 402 U.S. 424, 432 (1971) (plurality opinion), that disclosure of one’s name and address is nontestimonial. See *infra* notes 285-86, 303-16, and accompanying text for a discussion of *Byers*.

227. *Muniz*, 496 U.S. at 601-02 (plurality opinion) (quoting Brief for United States as Amicus Curiae at 12, *Muniz*, 496 U.S. 582); see also Meghan S. Skelton & James G. Connell, III, *The Routine Booking Question Exception to Miranda*, 34 U. BALT. L. REV. 55, 68 (2004) (summarizing plurality as “explicitly recogniz[ing] a routine booking question exception to *Miranda*”).

228. *Muniz*, 496 U.S. at 608 (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part); see Allen & Mace, *supra* note 17, at 274 (discussing plurality opinion in *Muniz* and Justices’ differing analyses of police questions).

229. See Skelton & Connell, *supra* note 227, at 68-78 (describing approaches courts have taken when deciding cases involving *Miranda* rights and routine booking questions).

230. *Muniz*, 496 U.S. at 601-02 (plurality opinion).

231. *Id.* at 608 (Rehnquist, C.J., concurring in the result in part, and dissenting in part); see also Skelton & Connell, *supra* note 227, at 68 (noting that Chief Justice Rehnquist’s opinion did not address routine booking question exception to *Miranda*).

232. *Muniz*, 496 U.S. at 608 (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

question,²³³ answers to routine booking questions can indeed have testimonial worth. Responses to questions about the suspect's name, address, or age, for example, "explicitly . . . relate a factual assertion [and] disclose information."²³⁴ This information can also be quite incriminating.²³⁵

Nor have the lower courts or commentators provided a satisfactory explanation for the "routine booking question" exception. Some have pointed to the fact that, in *Rhode Island v. Innis*,²³⁶ the Court defined "interrogation" as "either express questioning or . . . any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."²³⁷ These courts and commentators have concluded that *Innis* excludes from the definition of interrogation questions that are "normally attendant to arrest and custody."²³⁸ Some courts and commentators also reason that routine booking questions do not constitute interrogation pursuant to *Innis* because such questions are not "reasonably likely to elicit an incriminating response from the suspect."²³⁹ Yet even a cursory reading of *Innis* reveals that both the "normally attendant to arrest and custody" exclusion and the "reasonably likely to elicit" test apply only to the functional equivalent of express questioning and not to express questioning itself.²⁴⁰

Others have posited a compulsion-based rationale and reasoned that a

233. See *supra* notes 132-36 and accompanying text for discussion of Chief Justice Rehnquist's discussion of the "sixth birthday" question in *Muniz*.

234. *Doe v. United States*, 487 U.S. 201, 210 (1988); see also Pardo, *supra* note 17, at 1895 (illustrating how routine booking questions may be testimonial because government seeks and suspect reveals "the propositional content of a suspect's beliefs or knowledge"); cf. *Hibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 189 (2004) (assuming without deciding that disclosure of identity would be testimonial).

235. Pizzi, *supra* note 177, at 600 (demonstrating how disclosure of even basic biographical information can incriminate); Skelton & Connell, *supra* note 227, at 55-56 (same). But see *Hibel*, 542 U.S. at 191 (asserting in dicta that disclosure of one's identity is likely to be incriminating "only in unusual circumstances").

236. 446 U.S. 291 (1980). See *infra* Part III.A.1 for a discussion of *Innis*.

237. *Innis*, 446 U.S. at 300-01 (footnote omitted).

238. See, e.g., Jonathan L. Marks, Note, *Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the Innis Definition of Interrogation*, 87 MICH. L. REV. 1073, 1105 (1989) (discussing "[t]he *Innis* exception for questions normally attendant to arrest and custody").

239. See, e.g., Pizzi, *supra* note 177, at 598 (articulating *Innis* test as dependent on whether questions are likely to produce incriminating response); see also Skelton & Connell, *supra* note 227, at 68-71 (surveying courts that "have explicitly rejected the plain language reading of *Innis*" by applying "reasonably likely to elicit" test to express questioning).

240. See *United States v. Downing*, 665 F.2d 404, 407 (1st Cir. 1981) ("The exception in *Innis* for police actions or statements 'normally attendant to arrest and custody' does not apply to the 'express questioning' . . . but only to its 'functional equivalent.'" (quoting *Innis*, 446 U.S. at 300-01)); Skelton & Connell, *supra* note 227, at 76-77 (arguing that plain reading of *Innis* reveals that all "express questioning" falls within definition of interrogation). Nevertheless, some courts have "questioned . . . whether the *Innis* Court meant what it said about express questioning." *Id.* at 69; see also Daniel Yeager, *Rethinking Custodial Interrogation*, 28 AM. CRIM. L. REV. 1, 25 (1990) (suggesting that some "close cases" involving express questioning might fall "beyond *Miranda*"); Marks, *supra* note 238, at 1100 (contending that *Innis* does not necessarily render all express questioning interrogation).

suspect faced only with routine booking questions does not face the sort of compulsion with which *Miranda* and the Fifth Amendment are concerned.²⁴¹ Yet this argument gives short shrift to *Miranda*'s bright-line approach to compulsion. *Miranda* chose to treat all custodial interrogation by known police agents to be inherently compulsive. Indeed, Justice White in dissent noted that the Court effectively deemed compulsive a single question asked in a custodial setting.²⁴² Any approach that attempts to measure degrees of compulsion, like one that attempts to "distinguish degrees of incrimination,"²⁴³ would be inconsistent with *Miranda*. In addition, it is by no means clear in many cases that routine booking questions are less compelling of a response than accusatory questions. After all, granted that stony silence in the face of an accusation feels uncomfortable, it is at least as unnatural to remain silent in the face of a simple request for one's name, address, or date of birth. More concretely, "the pressure of obtaining bail may necessitate the arrestee's cooperation in providing such information."²⁴⁴

Again, there is a more compelling account of the "routine booking question" exception. And, again, we must borrow from the Sixth Amendment's articulation of who is a "witness" and *Davis*'s contemplation-of-litigation requirement. Routine booking questions, by definition, are not asked in order to solve a crime and convict the perpetrator.²⁴⁵ Rather, they are asked by police in their administrative capacities, not their investigative capacities: they are asked simply so that the police may know who it is they have detained and may keep a proper record of the detention.²⁴⁶ As two commentators have put it: "Society trusts the government to care for individuals who are accused and convicted of crimes. With that trust, the government assumes the responsibility for those people's health and welfare, which requires it to learn certain information about an individual."²⁴⁷ When routine booking questions are asked, in the words of the *Davis* Court, "the circumstances objectively indicate . . . that the primary purpose of the interrogation is [not] to establish or prove past events potentially

241. See, e.g., Marks, *supra* note 238, at 1101 (observing that booking questions do not tend to increase suspect's feeling of compulsion while in custody); see also Skelton & Connell, *supra* note 227, at 99-100 (advocating that routine booking question exception not apply when question is psychologically manipulative and threatening in tone).

242. See *Miranda v. Arizona*, 384 U.S. 436, 533 (1966) (White, J., dissenting) (arguing that majority opinion makes any response to single police question compelled).

243. *Id.* at 476 (majority opinion).

244. Pizzi, *supra* note 177, at 599.

245. See Skelton & Connell, *supra* note 227, at 98 (noting that biographical questioning tends to be noninvestigative and thus unlikely to incriminate suspect); see also Marks, *supra* note 238, at 1101 (asserting that *Miranda* protects only against investigatory questioning).

246. See Skelton & Connell, *supra* note 227, at 96 (noting that routine booking question exception is intended to facilitate police administrative duties).

247. *Id.* at 101. This is not to deny the residual side benefit to the police in their investigative capacities of learning a suspect's identity. Such information can be used prosecutorially, for example, to subject a suspect to enhanced punishment pursuant to a recidivism statute if he is ultimately convicted of a crime. In the typical case, however, the police likely want to learn the identity of a suspect without regard to this potential prosecutorial use of the information.

relevant to later criminal prosecution.”²⁴⁸ The answers to routine booking questions are thus nontestimonial in the *Davis* sense.²⁴⁹

Notice that this use of the Sixth Amendment’s contemplation-of-litigation requirement to explain the “routine booking question” exception presupposes an extension of the reasoning of *Davis*. That case addressed a situation in which questioning was arguably prompted by one or both of only two concerns: quelling an emergency and solving a crime. Thus, the reasoning of *Davis* provides a virtually perfect fit for the “public safety” exception, which also addressed a situation in which the police faced both an emergency and an unsolved crime. Yet the “routine booking question” exception implicates yet another concern not directly related to crime-fighting: accurate record-keeping by the police. One has to read into *Davis* the principle 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” *anything other than* “to establish or prove past events potentially relevant to later criminal prosecution.”²⁵⁰ Yet, as discussed previously,²⁵¹ the language of *Davis* certainly bears this weight, and this reading of *Davis* recognizes that the police perform a multitude of functions in our society, not just two.²⁵²

c. *The “Undercover Officer” Exception*

In *Illinois v. Perkins*,²⁵³ the Court created a third exception to the strictures of *Miranda*: the “undercover officer” exception.²⁵⁴ Perkins, who was being

248. *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006); cf. Ross, *supra* note 16, at 213 (asserting that certain background information, such as address of accused provided by declarants who do not testify at trial, should be considered nontestimonial pursuant to Confrontation Clause).

249. See Jefferson V. Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S.C. L. REV. 699, 704 (1974) (arguing that *Miranda* applies only to questioning aimed at drawing out admission of crime). Again this approach is precisely the tack some lower courts and commentators have taken but, ironically, have been able to do so only by misreading *Innis*. See *supra* notes 236-40 and accompanying text for a discussion of lower court misapplication of *Innis*.

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

251. See *supra* notes 51-63 and accompanying text for a discussion of *Davis*.

252. The major difference between the “routine booking question” exception and *Davis* relates to the facts that should be taken into account in determining whether the exception applies. While *Davis* contemplates that courts will look to objectively observable indicia of the “primary purpose” of police questioning, see *supra* notes 54-57 and accompanying text, the test for the “routine booking question” exception is less clear. Some courts look solely to the intent of the officer. See Skelton & Connell, *supra* note 227, at 79-86 (identifying and describing courts’ analyses of subjective intent of investigating officer). Other courts track the language of *Innis* and “ask[] whether the police reasonably should have known that the question would elicit an incriminating response.” *Id.* at 86. Still other courts, adopting a different reading of *Innis*, see *infra* note 397-99 and accompanying text, ask “whether an objective observer would conclude that the police intended to elicit incriminating information,” Skelton & Connell, *supra* note 227, at 92.

253. 496 U.S. 292 (1990).

254. Though the Court did not expressly carve out an exception to the *Miranda* rule, that is how the case is typically read. See, e.g., *Perkins*, 496 U.S. at 304 (Marshall, J., dissenting) (asserting that

detained in jail pending trial of unrelated charges, was suspected of murdering one Stephenson.²⁵⁵ The police had government informant Charlton and undercover police agent Parisi placed in close proximity to Perkins at the jail, posing as fellow detainees.²⁵⁶ Parisi suggested that the three escape and, during the course of discussing a possible jail break, asked Perkins whether he had ever killed anyone.²⁵⁷ Parisi, of course, neither administered the warnings prescribed by *Miranda* nor obtained a waiver of Perkins's rights.²⁵⁸ Perkins described his murder of Stephenson in detail.²⁵⁹ Before trial, he moved to suppress the statements made to Parisi on the ground that they were the product of custodial interrogation not preceded by the *Miranda* warnings and waiver.²⁶⁰

The Court held that the statements need not be suppressed.²⁶¹ The Court conceded, as it had to, that Perkins was "in custody in a technical sense"²⁶² and also that he was subjected to "questioning initiated by law enforcement officers."²⁶³ Yet, the Court observed, "the danger of coercion results from the interaction of custody and official interrogation."²⁶⁴ Custody and interrogation "may create mutually reinforcing pressures" that presumptively amount to compulsion to speak, "but where a suspect does not know that he is conversing with a government agent, these pressures do not exist."²⁶⁵

Perkins, like *Quarles* and *Muniz*, can be explained by reference to the contemplation-of-litigation component of what it means to be a witness, ultimately fleshed out in *Davis*.²⁶⁶ With respect to *Perkins*, this explanation is less obvious. While the officers in both *Quarles* and *Muniz* perhaps did not contemplate at the time they asked their questions that the answers would be

Court created exception to *Miranda*); Yeager, *supra* note 240, at 66 (concluding that *Perkins* is probably best viewed as "an exception to *Miranda*, whether couched as such or not").

255. *Perkins*, 496 U.S. at 294.

256. *Id.* at 294-95.

257. *Id.* at 295.

258. *Id.*

259. *Id.*

260. *Perkins*, 496 U.S. at 295.

261. *Id.* at 300.

262. *Id.* at 297.

263. *Id.* at 296 (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)); *see also id.* at 305-06 (Marshall, J., dissenting) (noting that police expressly questioned suspect); Daniel J. Capra, *Prisoners of Their Own Jurisprudence: Fourth and Fifth Amendment Cases in the Supreme Court*, 36 VILL. L. REV. 1267, 1344 (1991) (arguing that *Perkins* involved custodial interrogation); Yeager, *supra* note 240, at 43 (observing that *Perkins* involved interrogation pursuant to "even the most restrictive reading of *Innis*"); Marks, *supra* note 238, at 1117 ("A literal reading of the *Innis* test does require courts to view jail plant tactics as interrogation.").

264. *Perkins*, 496 U.S. at 297 (emphasis added).

265. *Id.*

266. This is not to deny that the compulsion-based rationale for *Perkins* provided by the Court is persuasive. And because compulsion, incrimination, and testimony must coalesce before the Self-Incrimination Clause is violated, *see supra* note 17 and accompanying text, the result in *Perkins* is overdetermined: *Perkins* was correctly decided both because testimony was lacking and because compulsion was absent. Nonetheless, only the testimonial-based explanation covers both *Quarles* and *Muniz* as well.

used at trial, Parisi surely did. Thus, it appears at first blush that *Perkins* may not fit the *Quarles/Muniz* pattern of cases in which information is gathered for some reason other than later use at trial.

This objection falls away, however, once one recognizes that the contemplation-of-litigation issue was resolved in *Davis* by looking only to what “the circumstances objectively indicate.”²⁶⁷ That is, we are to “consider only the observable circumstances of [the] incident and determine [its] purpose on the basis of those observable circumstances”²⁶⁸ And any disinterested third-party observer viewing Parisi’s questioning of Perkins would have seen precisely what Perkins saw: a fellow detainee questioning him about a past crime, not to gather evidence for trial, but rather in an attempt to determine whether Perkins was deserving of his respect and confidence. From Perkins’s perspective, his admissions to Parisi, a man Perkins evidently trusted, would never see the light of day, much less be used against him in a criminal prosecution. Accordingly, in *Perkins*, the circumstances objectively indicated that the information flow from Perkins to Parisi occurred for reasons other than—indeed, antithetical to—any contemplation that the information would later be used in a criminal trial.

As *Quarles* has its parallel in *Davis*, *Perkins* has its own doppelganger in Confrontation Clause jurisprudence: *Bourjaily v. United States*.²⁶⁹ There, the Court held that the admission against the defendant of a statement by one of his alleged coconspirators, made to a government informant during and in furtherance of the conspiracy, did not violate the Confrontation Clause.²⁷⁰ *Bourjaily* remains good law, for the *Crawford* Court wrote that “statements in furtherance of a conspiracy” are “by their nature . . . not testimonial.”²⁷¹

To understand why, and to make the connection complete between *Bourjaily* and *Perkins*, we must go back to the Court’s prior decision in *United States v. Inadi*.²⁷² There, the Court held that the declarant of a statement made in furtherance of a conspiracy need not be produced at trial, or shown to be unavailable, in order for his hearsay statement to be used against the defendant, because such a statement cannot be fully replicated by in-court testimony.²⁷³ The Court reasoned that such a “statement often will derive its significance from the circumstances in which it was made. *Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand.*”²⁷⁴ Thus, “co-conspirator statements derive much of their

267. *Davis v. Washington*, 126 S. Ct. 2266, 2273 (2006).

268. *Leading Cases*, *supra* note 56, at 219.

269. 483 U.S. 171 (1987).

270. *See Bourjaily*, 483 U.S. at 181-82 (holding that coconspirator’s out-of-court statement was sufficiently reliable for admission notwithstanding Confrontation Clause).

271. *Crawford v. Washington*, 541 U.S. 36, 56 (2004); *see also Davis*, 126 S. Ct. at 2275 (characterizing statements in *Bourjaily* as “clearly nontestimonial”).

272. 475 U.S. 387 (1986).

273. *Inadi*, 475 U.S. at 394-96. In *Inadi*, the statements were intercepted via wiretap rather than made to an undercover officer. *Id.* at 390. Nevertheless, as the Court apparently believed in *Bourjaily*, this was a distinction without a difference. 483 U.S. at 182.

274. *Inadi*, 475 U.S. at 395 (emphasis added).

value from the fact that they are made in a context very different from trial.”²⁷⁵ The difference to which the Court adverted was that, when a former coconspirator is speaking from the witness stand, he certainly contemplates that his statements will be used against the defendant, for that is their immediate and obvious effect. But when a conspirator speaks in furtherance of the conspiracy, he generally contemplates quite the opposite: that his words will be kept in confidence.²⁷⁶ This is so even if, as in *Bourjaily*, the addressee is an undercover law enforcement agent. What is critical, reading *Bourjaily* together with *Davis*, is that “the circumstances objectively indicate”²⁷⁷ that the statements have been made in furtherance of a criminal enterprise, not in contemplation of litigation.²⁷⁸ This is precisely what made Perkins’s admissions to Parisi nontestimonial in the *Davis* sense.

2. Compelled Incrimination Pursuant to a Neutral Regulatory Scheme

Far distant from the exceptions to the *Miranda* rule, another distinct grouping of cases also reflects the application of the contemplation-of-litigation requirement in the Self-Incrimination Clause context. Where incriminating assertions are compelled pursuant to a regulatory scheme that does not target those inherently suspect of criminal activity, the Fifth Amendment has not been violated even when those assertions are later used against their maker in a criminal case.²⁷⁹ This dovetails precisely with the Sixth Amendment’s newly minted contemplation-of-litigation requirement.

Notwithstanding the Fifth Amendment, the government may require that records be kept pursuant to a valid regulatory scheme and may also compel the

275. *Id.* at 395-96.

276. See Ariana J. Torchin, Note, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington*, 94 GEO. L.J. 581, 595 n.66 (2006) (noting that distinction drawn in *Inadi* “appears relevant to an understanding of the requisite purposes and consequences associated with a ‘solemn declaration’ as opposed to a ‘casual remark’ addressed in *Crawford*”).

277. *Davis*, 126 S. Ct. at 2273.

278. See *Leading Cases*, *supra* note 56, at 219 & n.52 (noting that *Davis* Court’s reference to statement in *Bourjaily* as “‘clearly nontestimonial’” indicates that courts must look only to objectively observable context of statement in question, because undercover police officers are trying to gather evidence for use in future court proceedings (quoting *Davis*, 126 S. Ct. at 2275)); see also Friedman, *Grappling*, *supra* note 58, at 255-56 (observing that subjective motivations of undercover agent “to gather evidence for use in prosecution” could not, consistently with pre-*Crawford* law, be “the critical consideration”); *id.* at 259 (asserting that “the essence of testifying is provision of information *understanding* there is a significant probability it will be used in prosecution,” an understanding absent in “the conspirator or the unwitting drug customer”). *But see* Pardo, *supra* note 16, at 174 (asserting that statements made to undercover officers should be considered testimonial); Michael L. Seigel & Daniel Weisman, *The Admissibility of Co-Conspirator Statements in a Post-Crawford World*, 34 FLA. ST. U. L. REV. 877, 901-04 (2007) (arguing that statements made to undercover officers should be considered testimonial when made in response to “sustained questioning”).

279. See, e.g., *Balt. City Dep’t of Soc. Servs. v. Bouknight*, 493 U.S. 549, 561 (1990) (holding mother suspected of child abuse could not invoke Fifth Amendment to resist order to produce son for Social Services); *California v. Byers*, 402 U.S. 424, 427 (1971) (plurality opinion) (holding Self-Incrimination Clause is not violated by statute requiring persons involved in car accidents to stop and report their name and address).

production of those records, even though their contents might incriminate those required to keep and produce them. Thus, in *Shapiro v. United States*,²⁸⁰ the progenitor of this “required records” doctrine, the defendant had been required by the Emergency Price Control Act (the “Act”) to keep records relating to his sale of commodities.²⁸¹ He later was forced to produce these records to the Office of Price Administration, and they were used to convict him of violations of the Act.²⁸² The Court held that he had no Fifth Amendment privilege with respect to these records because, when the government requires that records be kept, they become, in effect, ““public documents”” kept ““for the benefit of the public, and for public inspection.””²⁸³ As to such records, “the privilege which exists as to private papers cannot be maintained.”²⁸⁴

The reasoning of the required records cases has been extended to cases involving both oral and act-of-production evidence. In *California v. Byers*,²⁸⁵ the Court rejected the claim that the Self-Incrimination Clause is violated by a statute requiring those involved in motor vehicle accidents to stop and provide their names and addresses.²⁸⁶ And in *Baltimore City Department of Social Services v. Bouknight*,²⁸⁷ the Court held that a juvenile court’s order to a mother to produce her child so that he could be placed in foster care presented no Fifth Amendment problem, despite her claim that her “implicit communication of control over [the child] at the moment of production might aid the State in prosecuting” her if it became apparent that the child had been physically abused.²⁸⁸

On the other hand, the required records doctrine has also been cabined in a different way. In *Marchetti v. United States*²⁸⁹ and *Grosso v. United States*,²⁹⁰ the Court addressed the Fifth Amendment implications of a federal statute requiring “those engaged in the business of accepting wagers”²⁹¹ to register annually with the Internal Revenue Service and pay a yearly excise tax.²⁹² In *Haynes v. United States*,²⁹³ the Court did the same with respect to the National Firearms Act,

280. 335 U.S. 1 (1948).

281. *Shapiro*, 335 U.S. at 4-5.

282. *Id.* at 3-5.

283. *Id.* at 17-18 (quoting *Wilson v. United States*, 221 U.S. 361, 381 (1911) (dicta)). This language from *Wilson* was dicta, given that *Wilson* held that a person who maintains custody of documents on behalf of a corporation may not claim the privilege to avoid production of the documents, even if they incriminate him. *Wilson*, 221 U.S. at 382.

284. *Shapiro*, 335 U.S. at 33.

285. 402 U.S. 424 (1971).

286. *Byers*, 402 U.S. at 427 (plurality opinion); *see also id.* at 458 (Harlan, J., concurring in the judgment) (emphasizing noncriminal government purpose of self-reporting statute, government’s need for information through self-reporting, and minimal nature of information required to be disclosed).

287. 493 U.S. 549 (1990).

288. *Bouknight*, 493 U.S. at 555.

289. 390 U.S. 39 (1968).

290. 390 U.S. 62 (1968).

291. *Marchetti*, 390 U.S. at 42.

292. *Id.*; *Grosso*, 390 U.S. at 63.

293. 390 U.S. 85 (1968).

which established registration requirements for those who possessed certain types of firearms.²⁹⁴ The Court held that the “required records” doctrine did not apply in these cases²⁹⁵ for three reasons. First, the records required by the statutes involved in those cases, unlike those required by the statute at issue in *Shapiro*,²⁹⁶ were not of the kind that were “customarily kept.”²⁹⁷ Second, the information sought from Marchetti, Grosso, and Haynes did not share the “public aspects” of the records in *Shapiro*: “The Government’s anxiety to obtain information . . . does not without more render that information public”²⁹⁸ Finally, the Court noted that, because “[w]agering and its ancillary activities are very widely prohibited under both federal and state law,”²⁹⁹ and because the reporting requirement in *Haynes* was “directed principally at those persons who have obtained possession of a firearm without complying with the [National Firearms] Act’s other requirements,”³⁰⁰ the statutes were “directed to a ‘selective group inherently suspect of criminal activities.’”³⁰¹

At first blush, it appears that all the elements necessary to a violation of the Self-Incrimination Clause—compulsion, incrimination, and testimony—coalesce when the government requires, under threat of criminal penalties, that incriminating assertions be recorded and produced, and those assertions are later used to convict their maker.³⁰² What, then, can explain the required records doctrine? The answer to this question has remained “fuzzy.”³⁰³

Byers is emblematic of the confusion in this area. The plurality opinion, in scattershot fashion, raised a number of points but relied on none.³⁰⁴ At one point, it opined that disclosure of one’s name and address is not testimonial in the classic Fifth Amendment sense.³⁰⁵ At another, it wrote that the act of disclosing one’s vital information in the context of a traffic accident is insufficiently incriminating to implicate the Self-Incrimination Clause.³⁰⁶ And

294. *Haynes*, 390 U.S. at 87-89.

295. *Id.* at 98-99; *Grosso*, 390 U.S. at 67; *Marchetti*, 390 U.S. at 56.

296. *Shapiro*, 335 U.S. 1 (1948).

297. *Marchetti*, 390 U.S. at 57 (internal quotation marks omitted).

298. *Id.* (internal quotation marks omitted); *see also Haynes*, 390 U.S. at 99 (“There are . . . no records or other documents here to which any ‘public aspects’ might reasonably be said to have attached.”).

299. *Marchetti*, 390 U.S. at 44.

300. *Haynes*, 390 U.S. at 96.

301. *Marchetti*, 390 U.S. at 57 (quoting *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965)).

302. *See Stuntz*, *supra* note 30, at 1282 (“[C]ompulsion, incrimination and testimony are all plainly present, yet the privilege does not apply.”).

303. Amar & Lettow, *supra* note 77, at 871.

304. *See id.* (noting that plurality “struggled to find a rationale for [its] holding”); *Stuntz*, *supra* note 30, at 1284-85 (characterizing plurality opinion in *Byers* as “famously unpersuasive”).

305. *California v. Byers*, 402 U.S. 424, 432 (1971) (plurality opinion) (“Stopping in compliance with [the statute] does not provide the State with ‘evidence of a testimonial or communicative nature’” (quoting *Schmerber v. California*, 384 U.S. 757, 761 (1966) (alteration added))).

306. *Id.* at 428 (“[T]he mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure”).

still another portion of the opinion suggests that the proper result must emerge from balancing the weightiness of the government's interests against the strength of the claim of privilege in the particular case.³⁰⁷

The first two points represent "analysis . . . so tortured that . . . a majority of the Court actually rejected it."³⁰⁸ As Justice Black asked incredulously in dissent: "What evidence can possibly be more 'testimonial' than a man's own statement that he is a person who has just been involved in an automobile accident inflicting property damage?"³⁰⁹ Justice Harlan, whose fifth vote was critical to the Court's rejection of the Fifth Amendment challenge, nonetheless agreed with Justice Black on this point: "If evidence of . . . self-identification were admitted at trial, it would certainly be 'testimonial.'"³¹⁰

Justice Harlan also agreed with the dissenters that the statutory stop-and-identify requirement "entail[ed] genuine risks of self-incrimination from the driver's point of view."³¹¹ Indeed, this was true for Byers himself, who was charged with a moving violation that, the parties stipulated, was a proximate cause of the accident that spawned the litigation.³¹² The plurality's error was to look to the risk of incrimination in the run of cases rather than in Byers's case in particular. The plurality wrote that because "most accidents occur without creating criminal liability . . . disclosures with respect to automobile accidents simply do not entail [a] substantial risk of self-incrimination."³¹³ But that is tantamount to saying that because most people who enter banks do not rob them, compelled disclosure of whether one was present during a bank robbery is insufficiently incriminating to be recognized by the Fifth Amendment. Obviously, those suspected of the robbery can claim the privilege.³¹⁴

Justice Harlan, concurring only in the judgment, appeared to find common ground with the plurality in its balancing approach. He opined that, although the

307. See *id.* at 427 (opining that courts must "balanc[e] the public need on the one hand, and the individual claim to constitutional protections on the other").

308. Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 34-35 (1986); see also David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1142 (1986) (citing *Byers* as case in which Court "distorted facts and strained logic"); *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 273 (1971) (arguing that plurality in *Byers* "manipulate[d] the definitions of 'incriminating' and 'testimonial'").

309. *Byers*, 402 U.S. at 462-63 (Black, J., dissenting); see also Dolinko, *supra* note 308, at 1142 n.318 ("[T]he claim that stating one's name is not 'testimonial' is frankly bizarre.").

310. *Byers*, 402 U.S. at 435-36 (Harlan, J., concurring in the judgment).

311. *Id.* at 448.

312. *Id.* at 457 n.9; see also Stuntz, *supra* note 30, at 1285 ("[P]lainly, the statute *did* compel self-incrimination in *Byers* itself and in many similar cases.").

313. *Byers*, 402 U.S. at 431 (plurality opinion).

314. See Nagareda, *supra* note 30, at 1654 ("It is of no significance that the question 'Were you present at the scene of the murder?' might be answered in the negative by virtually everyone in the population. The actual murderer still may invoke the Fifth Amendment to avoid having to answer that question."); see also Dolinko, *supra* note 308, at 1142 n.318 ("However low the risk of self-incrimination that compliance with the statute posed to drivers as a class, the risk to Byers was undoubtedly 'substantial.'").

statute required incriminating assertions, the Fifth Amendment privilege must give way in some cases to “the efficient pursuit of other governmental objectives.”³¹⁵ Balancing “the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures,” Justice Harlan found no constitutional difficulty.³¹⁶ Accordingly, *Byers* and the required records cases in general are typically read as embracing this point of intersection between the plurality and Justice Harlan’s separate concurrence: “The standard explanation for these cases is that they involve ad hoc trade-offs between fifth amendment concerns and the needs of law enforcement.”³¹⁷

This rationale is subject to precisely the same criticism as that leveled at *Harris v. New York*³¹⁸ and *New York v. Quarles*,³¹⁹ for it relies on a balancing of the government’s interests against those of the individual despite the clear and absolute language of the Self-Incrimination Clause.³²⁰ The Clause does not merely forbid the government from *unreasonably* requiring people to supply incriminating assertions that are then used against them at trial; it forbids the government from doing so *at all*.³²¹

Scholars who have examined the required records doctrine generally fall into two categories: those who accept the Court’s anemic atextualism³²² and those who reject the doctrine itself rather than seek to explain it.³²³ But there is

315. *Byers*, 402 U.S. at 448 (Harlan, J., concurring in the judgment).

316. *Id.* at 458.

317. Stuntz, *supra* note 30, at 1283.

318. 401 U.S. 222 (1971). See *supra* notes 108-14 and accompanying text for a discussion of *Harris*.

319. 467 U.S. 649 (1984). See *supra* notes 155-76 and accompanying text for a discussion of *Quarles*.

320. See Amar & Lettow, *supra* note 77, at 872 (“[T]he language of the Self-Incrimination Clause does not balance: it states a bright-line rule.”).

321. *Id.*

322. See, e.g., Saltzburg, *supra* note 308, at 35 (finding “the only acceptable explanation for the result” in *Byers* to be Justice Harlan’s determination “that the decision of the case required making a judgment about the role of the privilege in the modern world”). Even William Stuntz’s intriguing excuse theory—that we recognize the privilege against self-incrimination in those instances in which it would be deemed excusable for those claiming it to have instead committed perjury—concededly fails to explain the required records doctrine. See Stuntz, *supra* note 30, at 1287 (admitting that excuse theory, as applied to *Byers*, “proves too much [because] [t]he *Byers* problem is present in some degree whenever there is some chance that a confession might not lead to criminal liability but would serve some civil interest”). Thus, Stuntz ultimately falls into the category of those who accept the Court’s balancing approach. See *id.* (“The only solution is to make judgments of degree.”).

323. See Amar & Lettow, *supra* note 77, at 907 (proposing that required records receive full Fifth Amendment protection without distinction); Dolinko, *supra* note 308, at 1142 (deriding required records doctrine as “dubious[]” and “defended by the Court on the flimsiest of grounds”); Nagareda, *supra* note 30, at 1654-55 (“To point to the general applicability of a given reporting requirement as a justification for its application in such a way as to compel self-incrimination in a given instance—as the Court in *Byers* does—is to misconstrue fundamentally the nature of the Fifth Amendment.”). To be fair, Amar and Lettow suggest in a footnote the possibility of a textual argument similar to the one made by this Article. See Amar & Lettow, *supra* note 77, at 907 n.222 (“[I]t might be argued that certain kinds of records, required of broad classes of persons not suspected of criminal wrongdoing,

an explanation for the required records doctrine, one far better than that provided by the Court. Disclosures required pursuant to a neutral and broadly applicable regulatory scheme, while they may be testimonial in that they comprise assertions, are not testimonial in the *Davis* sense. That is, they are compelled, not in contemplation of litigation, but to serve some other, noncriminal purpose.

This rationale becomes clear once one closely examines the *Marchetti/Grosso/Haynes* exception to the required records doctrine. Of the three reasons the Court in those cases gave for distinguishing *Shapiro*,³²⁴ only the last has any merit. First, that the records *Shapiro* was required to keep were of a type he customarily kept³²⁵ was a dubious way to distinguish the cases. As Stephen Saltzburg points out, not only was *Shapiro* required to “keep certain . . . books and records[] without regard to whether they were customarily kept,” but also the Court’s “tacit assumption that gamblers do not keep records” is empirically suspect.³²⁶ More fundamentally, the Court “failed to explain why ‘customary’ records should warrant less protection than records uniquely required by the government.”³²⁷ Second, that the records in *Marchetti*, *Grosso*, and *Haynes* lacked any “public aspects”³²⁸ is less a way of distinguishing *Shapiro* than of acknowledging that the reasoning of *Shapiro* itself was faulty. As Justice Frankfurter wrote in dissent in that case: “If records merely because required to be kept by law *ipso facto* become public records, we are indeed living in glass houses.”³²⁹

It is the third distinction between *Marchetti*, *Grosso*, and *Haynes*, on the one hand, and *Shapiro*, on the other—that the requirements in the former cases were “directed to a ‘selective group inherently suspect of criminal activities’”³³⁰—that has become critical in the Court’s later cases defining the border between legitimate recording requirements and illegitimate compulsion.³³¹ For example, in *Bouknight*, the Court rejected the Fifth Amendment claim largely because “the Fifth Amendment privilege may not be invoked to resist compliance with a

and not involving face-to-face encounters with interrogators, need not be seen as akin to criminal ‘witnessing’ even though these records are testimonial and ultimately introduced in a criminal case.”).

324. See *supra* notes 289-301 and text accompanying for a discussion of *Marchetti*, *Grosso*, and *Haynes*.

325. *Marchetti v. United States*, 390 U.S. 39, 57 (1968).

326. Saltzburg, *supra* note 308, at 22.

327. *Id.* (emphasis omitted).

328. *Haynes v. United States*, 390 U.S. 85, 99 (1968) (internal quotation marks omitted); *Grosso v. United States*, 390 U.S. 62, 68 (1968) (internal quotation marks omitted); *Marchetti*, 390 U.S. at 57 (internal quotation marks omitted).

329. *Shapiro v. United States*, 335 U.S. 1, 51 (1948) (Frankfurter, J., dissenting); see also Saltzburg, *supra* note 308, at 23 (“It might be sufficient here simply to recall Justice Frankfurter’s attack on the notion that the *Shapiro* records were ‘public.’”).

330. *Marchetti*, 390 U.S. at 57 (quoting *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965)).

331. Although Saltzburg disagrees with all three of the distinctions set forth in *Marchetti*, *Grosso*, and *Haynes*, Saltzburg, *supra* note 308, at 22-24, he does concede that the third one has the greatest merit, *id.* at 23.

regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws."³³² The Court wrote "that *Shapiro*'s reach is limited where requirements 'are directed to a "selective group inherently suspect of criminal activities.'"³³³ The Court held that the government may compel the production of incriminating assertions "as part of a broadly directed, noncriminal regulatory regime" without running afoul of the Self-Incrimination Clause.³³⁴ It is on this point that the dissent disagreed most vociferously: "[T]he regulatory scheme that the Court describes as 'broadly directed' is actually narrowly targeted at parents who through abuse or neglect deny their children the minimal reasonable level of care and attention. . . . [Such] parents . . . are clearly 'a selective group inherently suspect of criminal activities.'"³³⁵

The best reading of these cases is that the Court utilizes this consideration to determine whether, at the time of compulsion, it was the government's objective purpose to create evidence for a potential criminal proceeding. Even more so than with individual police officers, it will be exceedingly difficult to pinpoint the collective motive of a legislature that has enacted a recording requirement. The Court's cases, in a diverse array of areas, are legion with admonitions against attempts to discern legislative motives.³³⁶ But it is equally true that the Court has endorsed, in some contexts, an investigation into the effects of a law to determine what its purpose must have been.³³⁷ That is precisely the import of *Marchetti*, *Grosso*, and *Haynes*. If a recording requirement is clearly aimed at a "selective group inherently suspect of criminal activities,"³³⁸ we ought to conclude that the purpose is not to regulate but to gather evidence for a possible criminal proceeding.³³⁹ Indeed, in a critical passage, the *Grosso* Court came close to recognizing the ulterior motives

332. *Balt. City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 556 (1990). See *supra* note 287-88 and accompanying text for a discussion of *Bouknight*.

333. *Bouknight*, 493 U.S. at 557 (quoting *Marchetti*, 390 U.S. at 57).

334. *Id.* at 559; see also Pardo, *supra* note 17, at 1871 ("[T]he privilege is generally unavailable if the government demands information in order to effectuate a non-criminal regulatory regime . . .").

335. *Bouknight*, 493 U.S. at 571 (Marshall, J., dissenting) (citation omitted).

336. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (describing risk of misinterpreting motive because legislators have different reasons for supporting laws); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1212-17 (1970) (discussing futility and disutility of attempting to determine and base decisions on legislative motivation).

337. See, e.g., *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race than another.")

338. *Marchetti*, 390 U.S. at 57 (quoting *Albertson*, 382 U.S. at 79).

339. See Pardo, *supra* note 17, at 1871 (observing that Self-Incrimination Clause is "fully applicable when the government purports to be carrying out a non-criminal purpose but its true motive is directed at criminals and criminal prosecution"); *The Supreme Court, 1970 Term*, *supra* note 308, at 272 (citing *Marchetti*, *Grosso*, and *Haynes* as cases in which "the government's claim of nonprosecutorial motivation was more suspect"); see also *Bouknight*, 493 U.S. at 561 ("[O]rders to produce children cannot be characterized as efforts to gain some testimonial component of the act of production. The government demands production . . . for compelling reasons unrelated to criminal law enforcement and as a part of a broadly applied regulatory regime.").

Congress must have had in enacting the recording requirements at issue there:

[T]he statutory obligations are directed almost exclusively to individuals inherently suspect of criminal activities. The principal interest of the United States must be assumed to be the collection of revenue, and not the prosecution of gamblers, but we cannot ignore either the characteristics of the activities about which information is sought, or the composition of the group to which the inquiries are made. These collateral circumstances, in combination with Congress' apparent wish that any information obtained as a consequence of the wagering taxes be made available to prosecuting authorities, readily suffice to distinguish these requirements from those at issue in *Shapiro*.³⁴⁰

On the other hand, if, as in *Quarles*, *Muniz*, and *Perkins*, the government's purpose, as objectively ascertained, in compelling one to disclose information is something other than an evidence-gathering one, the information is not testimonial because it is not compelled with an eye toward trial.³⁴¹

Once again, the required records doctrine has its analogue in Confrontation Clause jurisprudence: the likely categorization of most business and public records as nontestimonial. The Court in *Crawford v. Washington*³⁴² opined that business records, like statements made in furtherance of a conspiracy, are "by their nature . . . not testimonial."³⁴³ They are nontestimonial because the dominant character of the business record is that it was made "in the course of a

340. *Grosso v. United States*, 390 U.S. 62, 68 (1968) (citation omitted). Years before the Court created the *Marchetti/Grosso/Haynes* carve out, Bernard Meltzer presciently predicted this limitation on the required records doctrine based on just such a motives analysis. He posited a hypothetical federal statute "requir[ing] the keeping of records of all interstate excursions involving women." Bernard D. Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 714 (1951). Though such a requirement would make it easier to enforce the criminal prohibitions of the Mann Act, that the statute might be upheld under the required records doctrine was a result Meltzer intuited as incorrect. *See id.* at 715 (noting that statute could likely survive standard promulgated in *Shapiro* but was clearly of a different type). He continued:

It is not easy, however, to say precisely what the difference is [between the hypothetical statute and the statute in *Shapiro*]. Perhaps it is that the *sole or the dominating purpose* of the hypothetical record requirement appears to be to compel criminals to keep incriminating records to be used to convict the record-keepers in subsequent criminal trials. Where this appears to be the *dominant purpose*, a compelling argument may be made that the statutory requirement would appear to be invalid under the Fifth Amendment . . .

Id. (emphasis added).

341. Admittedly, this view is in some tension with dicta in *United States v. Sullivan*, 274 U.S. 259, 263-64 (1927) (dicta), reiterated with some force in *Garner v. United States*, 424 U.S. 648, 650-51 (1976), suggesting that a taxpayer may invoke the privilege rather than answer particular incriminating questions on a tax return. *See Saltzburg, supra* note 308, at 24 (noting that income tax returns are records required of general population and therefore do not fit within *Marchetti/Grosso/Haynes* reasoning, but observing that *Sullivan* suggests privilege still applies). Nevertheless, the Court has never squarely held that the privilege can be validly claimed on an income tax return, and the *Sullivan* Court's "cautionary language . . . casts doubt on the applicability of the privilege to income tax returns." Meltzer, *supra* note 340, at 717.

342. 541 U.S. 36 (2004).

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

regularly conducted business activity, and . . . it was the regular practice of that business activity to make the . . . record.”³⁴⁴ That is, like records falling within the required records doctrine, business records are created with something other than litigation in mind. And because of the similarity between business records and public records, many, including Chief Justice Rehnquist, have read the *Crawford* dictum to include public records.³⁴⁵

This is not to say that any record ostensibly kept for business or analogous public purposes and otherwise satisfying the requirements for such records established by the applicable rules of evidence must be deemed nontestimonial for purposes of the Confrontation Clause. Rather, as the Supreme Court held in *Palmer v. Hoffman*,³⁴⁶ a document is a true business record only if created by virtue of “the inherent nature of the business in question and . . . the methods systematically employed for the conduct of the business as a business,”³⁴⁷ and not for “the business of preparing cases for trial.”³⁴⁸ This is because “[t]he danger of intentional distortion is particularly prevalent when the records are prepared in anticipation of possible litigation.”³⁴⁹ While *Palmer* was a civil case decided on statutory grounds, its lesson takes on a constitutional cast after *Crawford*.³⁵⁰

The Federal Rules of Evidence (and their state counterparts) reflect these constitutional considerations. For one thing, both Federal Rules of Evidence 803(6) and 803(8) incorporate the *Palmer* limitation³⁵¹ by expressly excluding those records that otherwise satisfy the requirements for business and public records, respectively, but that lack reliability because of the way the record was created or the underlying data collected.³⁵² More importantly, Rule 803(8)(B)

344. FED. R. EVID. 803(6).

345. See, e.g., *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring in the judgment) (“To its credit, the Court’s analysis of ‘testimony’ excludes at least some hearsay exceptions, such as business records and official records.” (emphasis added)); *United States v. Feliz*, 467 F.3d 227, 237 (2d Cir. 2006) (finding public records to be nontestimonial under *Crawford*); *United States v. Weiland*, 420 F.3d 1062, 1077 (9th Cir. 2005) (“[P]ublic records . . . are not themselves testimonial in nature and . . . do not fall within the prohibition established by the Supreme Court in *Crawford*.”); *United States v. Lopez-Moreno*, 420 F.3d 420, 437 (5th Cir. 2005) (“In *Crawford*, the Supreme Court stated that business records, which are analogous to public records, are ‘by their nature . . . not testimonial’ and not subject to the requirements of the Confrontation Clause.” (quoting *Crawford*, 541 U.S. at 56)); cf. *Torchin*, *supra* note 276, at 600 (“*Crawford* . . . did not address the distinction between public records and business records.”).

346. 318 U.S. 109 (1943).

347. *Palmer*, 318 U.S. at 115.

348. *Id.* at 114.

349. Stanley A. Goldman, *Not So “Firmly Rooted”: Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1, 21 (1987).

350. See Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 508-09 (2006) (arguing that, after *Crawford*, Confrontation Clause forbids introduction of documents prepared for litigation purposes, even if they otherwise qualify as business or public records).

351. See Goldman, *supra* note 349, at 21 n.78 (discussing legislative ratification of *Palmer* to make business records created in potentially untrustworthy manner inadmissible).

352. See FED. R. EVID. 803(6) (creating exclusion where “the source of information or the method or circumstances of preparation indicate lack of trustworthiness”); *id.* 803(8) (creating

and (C) expressly forbid the government in a criminal case from introducing records “setting forth . . . matters observed by police officers and other law enforcement personnel”³⁵³ and “factual findings resulting from an investigation made pursuant to authority granted by law.”³⁵⁴ Again, while these limitations are statutory in nature, the legislative history of the provisions makes clear that the drafters felt they were acting pursuant to constitutional mandate, not legislative grace. The Advisory Committee’s Notes, for example, state that admission against a criminal defendant of evaluative reports of a type contemplated by Rule 803(8)(C) would cause an “almost certain collision with confrontation rights.”³⁵⁵ Likewise, much of the floor discussion in the House of Representatives concerning the limitation imposed by Rule 803(8)(B) suggested that the limitation was necessary in order that the Rule pass constitutional muster.³⁵⁶ Most of the courts that have addressed the issue have read these limitations into Rule 803(6) as well, “in part to avoid potential conflict with the confrontation clause.”³⁵⁷

Thus, again, there is parity between the Self-Incrimination and Confrontation Clauses, this time with respect to business and other records. When such records are created for some purpose other than litigation, they do not constitute testimony—their maker is not a “witness”—pursuant to either Clause. When they are made or compelled in contemplation of litigation, however, they become testimonial—their maker becomes a “witness”—pursuant to both Clauses.

exclusion where “the sources of information or other circumstances indicate lack of trustworthiness”).

353. *Id.* 803(8)(B). Due to an apparent drafting glitch, Rule 803(8)(B) forbids the introduction of such records completely “in criminal cases,” even when offered by the defendant. Nevertheless, courts have tended to interpret this provision based on its apparent intent rather than on what it actually says. *See, e.g.,* *United States v. Smith*, 521 F.2d 957, 968 n.24 (D.C. Cir. 1975) (“We are convinced . . . that 803(8)(B) should be read, in accordance with the obvious intent of Congress and in harmony with 803(8)(C) to authorize the admission of the reports of police officers and other law enforcement personnel at the request of the defendant in a criminal case.”).

354. FED. R. EVID. 803(8)(C).

355. FED. R. EVID. 803(8)(C) advisory committee’s note; *see also* *Torchin*, *supra* note 276, at 600 (“Although these Committee notes were written well before *Crawford*, they continue to reflect how reports by forensic medical staff, law enforcement officers, and coroners should be analyzed—namely, that they should be deemed testimonial . . .”).

356. *See* 120 CONG. REC. 2366, 2388 (1974) (statement of Rep. Holtzman) (arguing that proposed limitation “reaffirms the right of cross examination to the accused”); *id.* (statement of Rep. Dennis) (“[I]n a criminal case the defendant should be confronted with the accuser to give him the chance to cross examine.”); *id.* (statement of Rep. Brasco) (“One of the basic tenets of our law is that one should be confronted by one’s accuser and be able to cross-examine the accuser.”); *see also id.* (statement of Rep. Johnson) (“[T]he Supreme Court would have to ultimately declare that kind of a rule [without the limitation] unconstitutional if we did pass it . . .”).

357. Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 699 (1986); *see also id.* (“A business record charging illegal activity by the defendant . . . would come dangerously close to ‘trial by affidavit’ . . .”).

III. SOME IMPLICATIONS OF A UNIFORM MEANING OF “WITNESS”

Once one recognizes that “witness” has only one meaning in the Constitution, and “testimonial” has only one meaning in the case law, one can better appreciate what the Self-Incrimination and Confrontation Clauses have to teach about each other.³⁵⁸ Elaborations about what makes a person a “witness” and evidence “testimonial” pursuant to one set of cases ought to accord with similar principles in the other set of cases. While the Court has gone quite some distance toward establishing a uniform jurisprudence of “testimonial” evidence, it has still further to go. For one thing, the Court’s newly minted elaboration in *Crawford v. Washington*³⁵⁹ and *Davis v. Washington*³⁶⁰ of the concept of testimonial evidence pursuant to the Confrontation Clause suggests a number of ways in which Self-Incrimination Clause jurisprudence ought to be altered to provide a fit. For another, the Court has yet to deal adequately in either context with the issues that arise when the government gathers information for two or more purposes simultaneously.

A. *What the Confrontation Clause Can Teach Us About the Self-Incrimination Clause*

The Court’s use of the term “testimonial evidence” in the Confrontation Clause context tells us much about the meaning of that term in the Self-Incrimination Clause context. In order to apply fully both the assertion and contemplation-of-litigation requirements in the Self-Incrimination Clause context and make the two Clauses truly parallel, some minor adjustments must be made in Self-Incrimination Clause jurisprudence. First, the definition of “interrogation” pursuant to *Miranda* must be modified both to take into account the exceptions the Court has already created and to cover other instances in which, viewed objectively, words or actions are directed at a criminal suspect for reasons other than evidence-gathering. Second, because only those statements by a suspect that the prosecution wishes to introduce for the truth of the matter asserted are truly testimonial in the classic Fifth Amendment sense, the dictates of *Miranda v. Arizona*³⁶¹ should be limited to such statements. Finally, for the same reason, *New Jersey v. Portash*³⁶² appears to be the only decision inconsistent with the Court’s emerging unified theory of testimonial evidence and thus should be overruled.

358. Cf. *Mosteller*, *supra* note 62, at 557-58 (observing that definition of “interrogation” in *Miranda* context may be “illustrative” in Confrontation Clause context); *Wilson*, *supra* note 60, at 279 (“The courts’ experience in defining interrogation to guard against coercion by the police provides models for a Confrontation Clause interrogation test.”).

359. 541 U.S. 36 (2004).

360. 126 S. Ct. 2255 (2006).

361. 384 U.S. 436 (1966).

362. 440 U.S. 450 (1979).

1. Tweaking the Definition of “Interrogation” Pursuant to *Miranda*

The exceptions to the *Miranda* rule demonstrate that not all custodial questioning by police, when viewed objectively, is geared toward gathering incriminating evidence against the suspect for later use at trial. Yet because the Court has defined the key term “interrogation” to include all “express questioning,”³⁶³ it has had to carve out ad hoc exceptions to *Miranda*.³⁶⁴ Rather than continuing to posit a not-quite-right definition of interrogation, and then make categorical exceptions when the definition does not quite fit, the Court ought to effect a modest alteration in the definition itself.³⁶⁵ That is, the Court should exclude from the definition of interrogation even those express questions that, objectively speaking, are not motivated by evidence-gathering concerns.

In *Miranda* itself, the Court defined interrogation as “questioning initiated by law enforcement officers.”³⁶⁶ Yet the Court also acknowledged that some conduct or statements not in the form of questions could be considered interrogation as well.³⁶⁷ Thus, the question arose: what, other than express questioning, constitutes interrogation? As noted earlier, in *Rhode Island v. Innis*,³⁶⁸ the Court provided an answer. Innis, suspected of killing a cab driver with a shotgun blast, was being transported in a patrol car with three officers before the murder weapon was found.³⁶⁹ He had been advised of his *Miranda* rights and had invoked the right to counsel.³⁷⁰ One of the officers commented to another that a school for handicapped children was in the area and, in effect, that “it would be too bad if [a] little . . . girl[] would pick up the gun, [and] maybe kill herself.”³⁷¹ Innis promptly disclosed the location of the gun.³⁷² In holding that he had not been interrogated, the Court defined “interrogation” as “either express questioning or its functional equivalent.”³⁷³ In turn, the Court wrote that the “functional equivalent” of express questioning consists of “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.”³⁷⁴ Each of these two tiers of interrogation must be studied closely before a new, all-purpose definition of interrogation can be formulated.

363. *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980).

364. See, e.g., Pizzi, *supra* note 177, at 586 (referring to *Quarles* as “an ad hoc solution”).

365. See Darmer, *supra* note 172, at 281 (calling on Court to “strive for a more comfortable doctrinal home for public safety exceptions than the unsatisfying *ipse dixit*”).

366. *Miranda*, 384 U.S. at 444.

367. See *id.* at 453 (describing several interrogation techniques used to induce confession that do not require or include questioning).

368. 446 U.S. 291 (1980).

369. *Innis*, 446 U.S. at 293-94.

370. *Id.* at 294.

371. *Id.* at 295.

372. *Id.*

373. *Id.* at 300-01.

374. *Innis*, 446 U.S. at 301 (footnote omitted).

a. *Express Questioning*

Innis appears to create a bright-line rule that any “express questioning”—that is to say, any statement ending in a question mark—by the police constitutes interrogation.³⁷⁵ Yet this “question mark” rule suffers from three main deficits. First, one can imagine some obvious examples in which the rule will be far too strict. Pursuant to a literal reading of *Innis*, a suspect has been interrogated if he has been asked whether he would like cream in his coffee or if he wants a sandwich.³⁷⁶

Second, and relatedly, the test draws an artificial distinction between express questioning and its functional equivalent, holding the latter to a more exacting standard before it can be considered interrogation. If, in *Innis* itself, the officer had directly asked *Innis* “Wouldn’t it be too bad if a little handicapped girl found the gun and killed herself?” that would be considered interrogation under the “express questioning” prong. Yet, because the officer made a virtually identical declaratory statement³⁷⁷—in effect, “It would be too bad if a little handicapped girl found the gun and killed herself”—the remark constituted interrogation only if, in addition, it passed the functional equivalence test, which it did not.

Finally, the courts have not in practice adhered fully to the “express questioning” prong. “[N]o such absolute rule had been recognized by the lower courts prior to *Innis*, and it does not seem that all of those decisions are cast in doubt by the *Innis* decision.”³⁷⁸ Moreover, since *Innis* was decided, the Supreme Court itself has created three “exceptions” to the dictates of *Miranda*.³⁷⁹ These departures from the literal language of *Innis* are not surprising, because a rule as strict as one deeming any express questioning to constitute interrogation “will soon result in pressures by those subject to the rule for its relaxation.”³⁸⁰ This relaxation can be done either by reformulating the rule or making exceptions to it.³⁸¹ The Court has chosen the latter course.

Yet, it is at least as sensible to recast the definition of interrogation as it is to

375. See *supra* note 236-40 and accompanying text for a discussion of *Innis* and its apparent scope.

376. See Kenneth W. Graham, Jr., *What Is “Custodial Interrogation?”: California’s Anticipatory Application of Miranda v. Arizona*, 14 UCLA L. REV. 59, 105-06 (1967) (observing absurdity of requiring warnings before “the police can ask a man if he wants cream in his coffee”); Marks, *supra* note 238, at 1100 (“An officer cannot be thought to interrogate a suspect when, during booking, he asks: ‘Do you want a sandwich?’”). Of course, the answers to these questions will usually not be incriminating. But sometimes they will, as when the suspect states that he is not hungry because he just “ate his [victim’s] liver with some fava beans and a nice Chianti.” *THE SILENCE OF THE LAMBS* (Orion Pictures Corp. 1991).

377. *Innis*, 446 U.S. at 295.

378. WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 6.7(b), at 351 (4th ed. 2004).

379. See *supra* Part II.C for a discussion of the *Miranda* exceptions.

380. Graham, *supra* note 376, at 118.

381. *Id.* Graham presciently predicted the “routine booking question” exception. *Id.* (reasoning that courts may wish to treat all questions as interrogation, but recognizing that suspects under arrest may be asked questions necessary for processing).

continue to read *Quarles*, *Muniz*, and *Perkins* as setting forth “exceptions” to *Miranda*.³⁸² After all, running through all three exceptions is one common theme: where information is provided for a purpose, as objectively ascertained, other than to gather evidence for a possible criminal trial, the information is not truly testimonial. Thus, it is at least arguable that where direct questioning does not seek an incriminating response for use in a later prosecution, interrogation has not occurred.³⁸³ As it happens, this rule is entirely consistent with the standard for the “functional equivalent” of express questioning.

b. The Functional Equivalent of Express Questioning

The standard for determining the functional equivalent of questioning—whether “words or actions on the part of the police . . . are reasonably likely to elicit an incriminating response from the suspect”³⁸⁴—is difficult to unpack because this language is ambiguous in at least two respects.³⁸⁵ First, it is unclear how high a threshold “reasonably likely” is.³⁸⁶ Justice Stevens suggested in his dissent that the Court would deem that the functional equivalent to direct questioning has taken place only when it was more likely than not that the suspect would respond in an incriminatory fashion.³⁸⁷ Yet this interpretation “would contrast sharply with the Court’s treatment of direct interrogation, where no inquiry is made into whether the police thought their questions likely to yield

382. As Michael Pardo cogently observes in another context:

When [an] initial rule is too broad, many exceptions may be necessary to account for the undesirable implications created by applying the rule. A rule that covers many situations at the front end requires more work at the back end—sorting which of those situations deserve ultimate inclusion and exclusion. A narrow rule may thus be more powerful precisely because it applies to fewer situations.

Pardo, *supra* note 16, at 163 (citing FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 155 (1991)).

383. See LAFAVE ET AL., *supra* note 378, § 6.7(b), at 351 (arguing that *Miranda* may not be applicable to certain types of questioning because such questions are unlikely to produce incriminating response); Graham, *supra* note 376, at 104 (suggesting that if police are not questioning with purpose of eliciting incriminating response, privilege is not invaded); cf. Smith, *supra* note 249, at 702 (defining “core concept” of interrogation as “the questioning of a subject by police officers with a view to obtaining information related to his guilt or innocence in suspected criminal activity”).

384. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (footnote omitted).

385. See LAFAVE ET AL., *supra* note 378, § 6.7(a), at 350 (stating that meaning of *Innis* is somewhat unclear); Welsh S. White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 MICH. L. REV. 1209, 1223 (1980) (same); Marks, *supra* note 238, at 1034 (stating that *Innis* seems to create ambiguous test); see also Pizzi, *supra* note 177, at 581 (describing *Innis* test as “a maverick”).

386. See White, *supra* note 385, at 1224 (asking “[h]ow likely is ‘reasonably likely?’”); Marks, *supra* note 238, at 1085 (reasoning that level of probability needed to meet “reasonably likely” standard remains unclear).

387. See *Innis*, 446 U.S. at 311-12 (Stevens, J., dissenting) (asserting that, since most suspects in custody “are unlikely to incriminate themselves,” findings of interrogation will be rare under Court’s standard absent express questioning); White, *supra* note 385, at 1224 (“Justice Stevens’s view of the *Innis* majority’s test seems to be that it looks to the apparent probability that police speech or conduct will elicit an incriminating response.”).

incriminating responses.”³⁸⁸ This interpretation would also conflict with the way commentators and lower courts had uniformly interpreted “interrogation” prior to *Innis*.³⁸⁹

The second ambiguity relates to whether and to what extent the subjective motivations of the police and perceptions of the suspect should be taken into account in determining whether the “reasonably likely” threshold has been met.³⁹⁰ Although asking what the police “should know” is “reasonably likely” to occur sounds like a purely objective test,³⁹¹ the Court immediately qualified this objective test with consideration of two subjective factors. First, in its very next breath after articulating the “reasonably likely” standard, the Court cautioned that it “focuses primarily upon the perceptions of the suspect.”³⁹² Next, almost immediately after disclaiming reliance on “the intent of the police,” the Court allowed that such intent might in fact be relevant where the police did intend to elicit an incriminating response, for “where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.”³⁹³ Moreover, the Court also explained that the outcome of the “reasonably likely” test might be affected by “[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion.”³⁹⁴ Thus, *Innis* is best read as “establishing a close correlation between an officer’s purpose to elicit an incriminating response and the ‘reasonably likely’ standard.”³⁹⁵

The proper interpretation of *Innis*, then, must accommodate both this “close correlation between [the] officer’s purpose . . . and the ‘reasonably likely’ standard,” on the one hand and, on the other, the Court’s disclaimer against looking to the actual subjective intent of the officer.³⁹⁶ Such an approach must also give substantive content to the “reasonably likely” standard that does not hinge on the literal mathematical likelihood of an incriminating response. Welsh

388. White, *supra* note 385, at 1228.

389. *See id.* at 1229 n.137 (stating that, before *Innis*, courts did not consider interrogator’s apparent probability of success as determinative of whether interrogation occurred).

390. *See* Alexander S. Helderman, *Revisiting Rhode Island v. Innis: Offering a New Interpretation of the Interrogation Test*, 33 CREIGHTON L. REV. 729, 738 (2000) (noting *Innis* “Court’s failure to make clear if the interrogation test is objective or subjective and from whose perspective a police officer’s words or actions should be viewed”); Marks, *supra* note 238, at 1085 (“The role of intent in the *Innis* definition is probably the test’s most confusing aspect.”); *see also* White, *supra* note 385, 1224 (“[W]hat factors should be weighed in determining whether the requisite degree of ‘likelihood’ is present?”).

391. *See* White, *supra* note 385, at 1224 (noting that inquiry is objective and looks to perspective of objective observer rather than view of officer or suspect).

392. *Innis*, 446 U.S. at 301.

393. *Id.* at 301-02 n.7. This makes sense, as when it is one’s “conscious object . . . to cause [a particular] result,” MODEL PENAL CODE § 2.02(2)(a)(i) (1962), one typically “should be aware of a substantial and unjustifiable risk that” the result will occur, *id.* § 2.02(2)(d).

394. *Innis*, 446 U.S. at 302 n.8.

395. White, *supra* note 385, at 1231.

396. *Id.*

White proposed such an interpretation of *Innis* that has been widely adopted.³⁹⁷ He argued that whether statements or actions other than questions constitute interrogation must “turn[] upon the *objective purpose manifested* by the police.”³⁹⁸ He proposed the following test: “[I]f an objective observer (with the same knowledge of the suspect as the police officer) would, on the sole basis of hearing the officer’s remarks, infer that the remarks were designed to elicit an incriminating response, then the remarks should constitute ‘interrogation.’”³⁹⁹

This methodology—looking to the purpose of the interaction between police officer and citizen, but only as manifested through objectively observable phenomena—almost exactly parallels the methodology of both *Quarles*⁴⁰⁰ and *Davis*.⁴⁰¹ The difference is that *Quarles* and *Davis* ask whether it was the objectively manifest purpose of the police to gather evidence for trial while *Innis*, at least as conventionally understood, asks only whether it was the objectively manifest purpose of the police to ask a question. Thus, Professor White would disregard whatever motive the police had for undertaking the functional equivalent of asking a question.⁴⁰² According to White, once it is determined that an “objective observer would infer that the officer’s speech or conduct was . . . an implicit demand for information,”⁴⁰³ the inquiry is over because compulsion—the “‘tug’ on the suspect”⁴⁰⁴—has been exerted. Critics of *Innis* have also read the case in this way. Thus, Professor Pizzi wrote that the *Innis* Court’s classification as interrogation any police conduct likely to evoke an incriminatory response “ignore[ed] the purpose and function of [the] police conduct.”⁴⁰⁵

The conventional reading of *Innis* is thus that it focuses entirely on whether compulsion is present.⁴⁰⁶ But a close reading of the case throws this conventional reading into question for two reasons. First, and more obviously, the Court

397. See, e.g., *United States v. Gay*, 774 F.2d 368, 379 n.22 (10th Cir. 1985) (citing White, *supra* note 385); *Hawkins v. United States*, 461 A.2d 1025, 1030 n.8 (D.C. 1983) (same); *State v. Abadie*, 612 So. 2d 1, 6 (La. 1993) (same); *Commonwealth v. Torres*, 678 N.E.2d 847, 851 n.7 (Mass. 1997) (same); *State v. Washington*, 402 S.E.2d 851, 854 (N.C. Ct. App. 1991) (Greene, J., dissenting) (same), *rev’d*, 410 S.E.2d 55 (N.C. 1991); *Timbers v. Commonwealth*, 503 S.E.2d 233, 237 (Va. Ct. App. 1998) (same); see also *LAFAVE ET AL.*, *supra* note 378, § 6.7(a), at 350 (advocating White’s view); Marks, *supra* note 238, at 1085 (asserting that White’s view helps clarify *Innis* Court’s confusing discussion of intent).

398. White, *supra* note 385, at 1231.

399. *Id.* at 1232; see also Pizzi, *supra* note 177, at 582 (“[E]ven after *Innis*, courts continue to emphasize heavily the officer’s motive in deciding whether interrogation has taken place . . .”).

400. 467 U.S. 649 (1984). See *supra* notes 192-202 and accompanying text for a discussion of the Court’s methodology in *Quarles*.

401. 126 S. Ct. 2266 (2006). See *supra* notes 206-16 and accompanying text for a discussion of the Court’s methodology in *Davis*.

402. White, *supra* note 385, at 1234 n.155. This, of course, was before *Quarles* was decided.

403. *Id.* at 1233.

404. *Id.* at 1234 n.155.

405. Pizzi, *supra* note 177, at 595.

406. See, e.g., Marks, *supra* note 238, at 1086 (praising reading of *Innis* that “focus[es] on compulsion, rather than on the government’s purpose or design”); see also Helderman, *supra* note 390, at 747 (“[A] definition of interrogation must necessarily . . . focus on the suspect’s perceptions.”).

exempted from the “reasonably likely” standard words or actions “normally attendant to arrest and custody.”⁴⁰⁷ Professors Pizzi and White note this exclusion but do not attempt to explain it.⁴⁰⁸ Second, and more subtly, the Court was concerned not with all police words or actions “reasonably likely to elicit a response from the suspect,” but only those “reasonably likely to elicit an *incriminating* response from the suspect.”⁴⁰⁹ And, the Court elaborated, “incriminating response” means “any response . . . that the prosecution may seek to introduce at trial.”⁴¹⁰

The fact that compulsion is required in order for the Self-Incrimination Clause to be implicated cannot explain the categorical exclusion of either “words or actions . . . normally attendant to arrest and custody” or those not “reasonably likely to elicit a[] response from the suspect” “that the prosecution may seek to introduce at trial.”⁴¹¹ After all, the suspect might feel a “tug” to respond to statements falling into either category. A suspect facing a command to put his hands over his head—“words . . . normally attendant to arrest”—might well feel compelled to tell the police that he cannot because he has been shot.⁴¹² Likewise, when an officer driving a suspect in a patrol car says to him “it’s a beautiful day,”⁴¹³ conventional societal expectations, exacerbated by the fact that the speaker is an authority figure, may exert pressure on the suspect to respond. But, in the typical case, no objective observer would view the comment as calling for information “that the prosecution may seek to introduce at trial,” irrespective of whether the actual response is “Too cold for my tastes” or, instead, “Good day to put someone in a wood chipper.”

That is to say, police words or actions that rise to the level of compulsion are necessary but not sufficient to constitute interrogation. Those words or actions must also be reasonably likely to elicit incriminating *testimony* in order to implicate the Fifth Amendment. Only the contemplation-of-litigation gloss on the word “testimony,” enunciated in *Davis*, can explain both of these limitations

407. *Innis*, 446 U.S. at 301.

408. See Pizzi, *supra* note 177, at 599 (noting “exclu[sion] by fiat”); White, *supra* note 385, at 1234 n.155 (calling exemption a “caveat”).

409. *Innis*, 446 U.S. at 301 (emphasis added). Even that phrasing is imprecise, for the Court should have said “reasonably likely to elicit an incriminating *testimonial* response from the suspect.” Thus, if an officer told a suspect to pull up his sleeve knowing that the perpetrator of a crime was identified as having a certain tattoo on his shoulder, the officer’s command would not be considered interrogation just because a reasonable observer would view the command as a demand for information.

410. *Id.* at 301 n.5 (emphasis omitted).

411. *Id.* at 301 & n.5.

412. See *Fleming v. Collins*, 954 F.2d 1109, 1110-11 (5th Cir. 1992) (en banc) (presenting similar facts).

413. Cf. *FARGO* (Gramercy Pictures 1996) (“So that was Mrs. Lundegaard on the floor in there? And I guess that was your accomplice in the wood chipper. And those three people in Brainerd. And for what? For a little bit of money. There’s more to life than a little money, you know. Don’t you know that? And here y’are. And it’s a beautiful day. Well, I just don’t understand it.”). Obviously, this more extensive version of the officer’s comments would almost certainly constitute interrogation, especially because there are direct questions embedded within it.

on what constitutes the “functional equivalent” of questioning. Thus, the “reasonably likely” standard includes only those words or actions on the part of the police that an objective observer would view as “an implicit demand for information”⁴¹⁴ to be used in a later prosecution.

c. *An All-Purpose Definition of Interrogation*

The *Innis* definition of interrogation remains too broad because it classifies all direct questioning as interrogation rather than subjecting it to the “likely to elicit” standard. This overbreadth stems from the Court’s failure to appreciate the multiple tasks the police perform.⁴¹⁵ A minor modification of *Innis* is in order, one that acknowledges what makes a statement testimonial in the *Davis* sense, thus affording greater sensitivity to what the police actually do. Such a modification would result in but a single standard for interrogation, irrespective of whether the police engaged in direct questioning or other words or actions: any words or conduct on the part of the police constitute interrogation where an objective observer with the same awareness as the police of the idiosyncratic characteristics of the suspect would conclude that the purpose of the words or conduct was to elicit a response from the suspect to be used against him prosecutorially.

This definition of interrogation does not merely collapse into a single standard the two-tiered “express questioning/functional equivalence” test from *Innis*. It also renders superfluous the “public safety,” “routine booking question,” and “undercover officer” exceptions, for each is simply encompassed by the more nuanced definition of interrogation itself. When the police seek to ensure public safety, learn identifying evidence about an arrestee, or gather evidence for trial through an undercover officer, the objectively observable circumstances indicate that their purpose is not to elicit a response from the suspect to be used against him prosecutorially but to do so for some other purpose.

One consequence of a narrower definition of interrogation than that set forth in *Innis* is that there will be many instances in which the police expressly question a suspect that will not quite fall into any of the established exceptions to *Miranda* and yet which will not involve interrogation. This is because the police motive in those circumstances, as objectively ascertained, is not to gather evidence against a suspect. This is perhaps true of questions asked by government agents in order to avert potential future danger, a scenario increasingly important in a post-September 11 world.⁴¹⁶ As noted above, the public safety exception appears to apply only to dangers that are imminent.⁴¹⁷

414. White, *supra* note 385, at 1233.

415. See Pizzi, *supra* note 177, at 607 (reasoning that Court’s view does not account for other objectives of police conduct and makes for an overbroad conception of Fifth Amendment interrogation).

416. See Darmer, *supra* note 172, at 286 (stating that public safety exception is most justified in context of terrorism and national security).

417. See *supra* note 205 and accompanying text for a discussion of the requirement of an

Moreover, implicit in *Quarles* is a requirement of some level of certainty on the part of the police that a dangerous situation exists.⁴¹⁸ Yet if the government seeks information about a future danger, it should not matter that the danger is neither imminent nor reasonably certain to occur.⁴¹⁹ All that matters is that the information is sought primarily to avert the hazard.⁴²⁰

Likewise, a more nuanced definition of interrogation will exclude from the constraints of *Miranda* questions asked in more mundane cases when officers are trying to ascertain whether a dangerous situation exists at all.⁴²¹ For example, asking a person suspected of drug trafficking whether there are any needles on his person prior to a frisk likely falls outside the definition of interrogation proposed here because the objectively ascertainable goal of the question is to protect the frisking officer from infection associated with accidental needle sticks, not to gather evidence for trial.⁴²² Similarly, asking a suspect brandishing a weapon outside a building with fresh bullet holes who he was shooting at objectively appears to be motivated by a concern that a person inside the building might be “injured or armed or both” and so also falls outside the more nuanced definition of interrogation proposed here.⁴²³ Rather than attempting to shoehorn such scenarios into the *Quarles* exception, as some have,⁴²⁴ we ought to recognize that such attempts at information-gathering produce statements that are not testimonial, even if they are compelled and incriminating, and even if they are actually used to prosecute the speaker.

Further afield from *Quarles*, one can imagine instances in which the police

imminent danger.

418. See Darmer, *supra* note 172, at 274 (observing that “the more speculative public safety cases” do not fall neatly into *Quarles* exception); Reiner, *supra* note 178, at 2397-98 (“Lower courts tend to allow questions about the whereabouts of accomplices or guns if the officer *knows* that they exist, or about the *existence* of accomplices or guns if the officer *reasonably suspects* that they may exist.” (footnotes omitted)).

419. See Becker, *supra* note 204, at 869 (“[I]t is farfetched to argue that a bomb going off in a crowded building is less of a public safety concern than a hidden gun, simply because the bomb might not detonate for twenty-four hours.”); Darmer, *supra* note 172, at 280 (urging that “public safety exception [be read] expansively [so] that an exception is justified even if an ‘immediate’ need cannot be easily demonstrated”).

420. See Becker, *supra* note 204, at 866 (noting potential argument by government “that it is not concerned with whether or not a suspected terrorist’s statements can be used against him at trial because its chief concern is to prevent *future* attacks”); Darmer, *supra* note 172, at 280 (requiring only “a reasonable belief that questioning might yield information vital to the public interest”).

421. Weller, *supra* note 180, at 1126 (stating that courts should permit officers to determine facts by asking questions when “unknown dangers may exist”).

422. See *United States v. Carrillo*, 16 F.3d 1046, 1049 (9th Cir. 1994) (holding that police officer’s prefrisking inquiry as to whether prisoner had drugs or needles on his person falls under the *Quarles* public safety exception).

423. See *United States v. Padilla*, 819 F.2d 952, 960-61 (10th Cir. 1987) (holding that police questioning as to whether prisoner had shot anyone in house with three bullet holes in window did not constitute police interrogation under *Quarles*).

424. See generally Darmer, *supra* note 172 (asserting that *Quarles* applies where investigators seek information on potential future acts of terrorism); see also Becker, *supra* note 204, at 869 (urging “good faith extension of *Quarles*”).

ask “clarifying questions,” where the predominant objective purpose is to clarify an ambiguous situation and yet no public safety issue is presented.⁴²⁵ The leading treatise in the area suggests that a noninvestigatory purpose might be inferred, and interrogation has not occurred,

when the question is very general in nature, not directed at one particular person, obviously asked before it is known that any criminal conduct has occurred or before there has been any sorting of suspects from witnesses, apparently asked about a seemingly innocuous matter not directly related to the police intervention, obviously spontaneous in nature, or seemingly a natural question anyone would ask given defendant’s condition or other unusual circumstances.⁴²⁶

As in the typical “public safety exception” case, the police “will inevitably, almost reflexively, ask impulsive questions” to clarify an ambiguous situation.⁴²⁷ Even when no exigent circumstances are present, the questioning, objectively speaking, is “not tailored to elicit incriminating responses” but instead constitutes “spontaneous question[ing] prompted by necessity of the circumstances.”⁴²⁸

These are just some examples of the benefits of a definition of interrogation that explicitly recognizes that there is a contemplation-of-litigation component to the term “testimonial.” Rather than forcing courts to carve out ad hoc exceptions every time they consider police questioning undertaken for reasons other than gathering evidence for trial, we should alter the definition of interrogation itself to take into account that statements produced in response to such questioning are not truly testimonial.

2. Limiting *Miranda* to Statements Offered for Their Truth

In its quest for a workable bright-line rule, the *Miranda* Court refused to distinguish between inculpatory and exculpatory statements for Fifth Amendment purposes.⁴²⁹ Thus, it forbade the prosecution from using any statement “whether exculpatory or inculpatory” unless preceded by warnings and waiver.⁴³⁰ The Court reasoned:

425. See Alan Raphael, *The Current Scope of the Public Safety Exception to Miranda Under New York v. Quarles*, 2 N.Y. CITY L. REV. 63, 76 (1998) (“Another new exception to *Quarles* [sic] may be found where courts have ruled that police are permitted to ask questions in order to ‘clarify the nature of the situation’ they face.” (quoting *People v. Luna*, 559 N.Y.S.2d 377, 378 (App. Div. 1990)); Smith, *supra* note 249, at 714 (“There are many situations where psychologically it is very hard to superimpose the rather formidable and formal kind of exchanges required by *Miranda* onto situations where the overwhelming human response is quickly to say, ‘Who are you? What is going on? What are you doing here?’”) (quoting Louis B. Schwartz & Paul M. Bator, *Criminal Justice in the Mid-Sixties: Escobedo Revisited*, 42 F.R.D. 463, 474 (1967)); Marks, *supra* note 238, at 1104 (observing that courts generally “allow officers the opportunity to evaluate the nature of the situation they confront”).

426. LAFAYE ET AL., *supra* note 378, § 6.7(b), at 353.

427. Yeager, *supra* note 172, at 1005.

428. *Id.* at 1008-09.

429. *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

430. *Id.* at 444. The Court reiterated this notion when it defined “interrogation” in *Rhode Island v. Innis*, 446 U.S. 291, 301 n.5 (1980) (“By ‘incriminating response’ we refer to any response—whether

If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word⁴³¹

The Court derived this rule from the fact that “[t]he privilege against self-incrimination protects the individual from being compelled to incriminate himself *in any manner*.”⁴³²

But, of course, this is not true, as the Court itself ruled exactly one week later in *Schmerber v. California*.⁴³³ Rather, the Self-Incrimination Clause “protects the individual from being compelled to incriminate himself” *only* in a testimonial manner, and “testimonial,” in the traditional Fifth Amendment sense, applies only to those statements advanced by the prosecution to prove the truth of the matter asserted therein.⁴³⁴ *Harris v. New York*⁴³⁵ demonstrates this principle in action.⁴³⁶ Indeed, *Harris* directly rejects the above-quoted dicta from *Miranda*.

Given the justification for *Harris* set forth above, that decision can be extended even further. If *Harris* is properly viewed as standing for the proposition that unwarned statements can be used by the prosecution for any purpose other than proving their truth, then that case should be seen as a first step toward permitting *any* use of exculpatory statements at trial. As the *Miranda* Court observed,⁴³⁷ by definition, exculpatory statements are used at trial for reasons other than proving the truth of the matter asserted in the statements. As long as the jury is instructed to consider such statements only for the fact that they were made, and not for their truth, admission of such exculpatory statements should pose no constitutional problems.

For example, the prosecution may seek to introduce in its case-in-chief numerous, inconsistent versions of a defendant’s unwarned station house alibi in order to show that he was obviously dissembling and therefore was conscious of his own guilt. Likewise, where a defendant claims to have been insane at the time of the crime, the prosecution may seek to admit a defendant’s unwarned self-serving statements to show that he was sane enough to know to lie to the

inculpatory or exculpatory—that the prosecution may seek to introduce at trial.” (emphasis omitted)).

431. *Miranda*, 384 U.S. at 477.

432. *Id.* at 476 (emphasis added).

433. 384 U.S. 757 (1966).

434. See *Schmerber*, 384 U.S. at 765 (limiting Fifth Amendment to suspect’s communications). See *supra* Part I.A for a discussion of the Supreme Court’s definition of “testimonial” in the context of the Self-Incrimination Clause.

435. 401 U.S. 222 (1971).

436. See *Harris*, 401 U.S. at 225 (holding that Fifth Amendment does not preclude prosecutorial use of suspect’s unwarned statements for impeachment purposes at trial). See *supra* Part II.B.2.a for a discussion of *Miranda*’s impeachment exception.

437. See *supra* notes 429-32 and accompanying text for a discussion of the *Miranda* Court’s observations regarding exculpatory statements.

authorities just after the crime. Obviously, in neither case does the prosecution have any interest in having the jury believe that the unwarned statements are true. Indeed, typically the opposite is the case. As long as the statements are not admitted for their truth, they are not testimonial in the classic Fifth Amendment sense and they should be admissible even if unwarned.

3. Whither *Portash*?

For the same reason, the decision in *New Jersey v. Portash*⁴³⁸ is incorrect and should be overruled. There, the Court held that statements compelled via a grant of immunity could not, consistently with the Self-Incrimination Clause, be used to impeach the defendant's testimony at trial.⁴³⁹ In distinguishing *Harris*, the Court wrote that "a defendant's compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him in a criminal trial."⁴⁴⁰ But, as demonstrated above, statements are *not* "put to a[] testimonial use"—that is, introduced for the truth of the matter asserted—when used only to impeach.⁴⁴¹ Accordingly, even when "deal[ing] with the constitutional privilege against compulsory self-incrimination in its most pristine form,"⁴⁴² admission of the statements solely for impeachment purposes would not render the speaker "a witness against himself." Significantly, *Portash* appears to be the only decision inconsistent with the emerging unified theory of testimonial evidence identified in this Article.

Donald Dripps, who first suggested that statements used only to impeach a defendant are nontestimonial in the classic Fifth Amendment sense,⁴⁴³ also suggested that *Portash* could nonetheless be salvaged. He reasoned that juries might be very unlikely in the *Portash* context to follow an instruction to use the statement for impeachment purposes only, largely because a self-inculpatory statement made under oath and under penalty of perjury is so reliable.⁴⁴⁴ In such a case, he suggests, the "risk that the jury will not, or even cannot, follow the instruction [is] so extreme that the instruction will not save a conviction from constitutional attack."⁴⁴⁵

The problem with this suggestion is that the U.S. Supreme Court has virtually always concluded that juries follow their instructions sufficiently to avert any constitutional difficulties.⁴⁴⁶ This conclusion "is a pragmatic one,

438. 440 U.S. 450 (1979).

439. *Portash*, 440 U.S. at 459-60.

440. *Id.*

441. *Id.* See *supra* Part II.B.2.a for a discussion of *Miranda*'s impeachment exception.

442. *Portash*, 440 U.S. at 459.

443. See *supra* note 120 and accompanying text for a discussion of the nontestimonial nature of statements used for impeachment purposes only.

444. See Dripps, *supra* note 120, at 35 (arguing that juries may interpret even statements offered only for impeachment as proof of guilt).

445. *Id.*

446. See *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (noting that law consistently assumes that jurors actually follow instructions, and Supreme Court has applied this assumption in various contexts).

rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.”⁴⁴⁷ As such, very narrow exceptions to the general presumption that juries follow their instructions have been created but only in those rare cases where an alternative procedure is possible. Thus, where a nontestifying codefendant’s confession implicating the defendant is introduced into evidence, an instruction not to consider it against the defendant is deemed ineffective⁴⁴⁸ largely because there are so many alternatives available:⁴⁴⁹ severance of the trial, separate juries, or redaction of the defendant’s name from the statement.⁴⁵⁰ Likewise, where the prosecution seeks to admit the defendant’s confession into evidence, the jurors cannot be permitted to decide whether it was voluntary and told to disregard it if they answer in the negative.⁴⁵¹ But this is so only because an obvious alternative procedure is available in the form of a pretrial decision by the court.⁴⁵² It appears that where no alternatives exist, juries are counted on to follow their instructions. At the least, Dripps does not cite any authority to the contrary. Thus, while Dripps nobly tries to save *Portash*, that case is inconsistent with the Court’s classification of impeachment evidence as, in essence, nontestimonial.

B. The Problem of Mixed Motives

One tension that remains unresolved between the meaning of “witness” in the Self-Incrimination Clause and the Confrontation Clause relates to the not uncommon problem that arises where there is more than one objectively ascertainable police purpose for information-gathering.⁴⁵³ *Davis* specifically requires that, in order for any statements to be testimonial, the “primary purpose” of the activity be for use of the information at a later trial.⁴⁵⁴ Thus, even where a secondary noninvestigatory purpose is present, the statement will still be deemed testimonial.

447. *Id.* at 211.

448. *See* *Bruton v. United States*, 391 U.S. 123, 137 (1968) (noting that codefendant’s confession inculcating defendant posed significant constitutional hazard to warrant exclusion of testimony, regardless of limiting instructions provided to jury).

449. *See id.* at 133-34 (holding that failing to consider alternatives to introduction of codefendant’s implicating-defendant confession unnecessarily infringes on nonconfessing defendant’s right of confrontation).

450. *Gray v. Maryland*, 523 U.S. 185, 192 (1998) (discussing alternatives to introducing nontestifying codefendant’s confession at trial).

451. *See* *Jackson v. Denno*, 378 U.S. 368, 388-89 (1964) (noting that jurors cannot be allowed to judge whether defendant’s confession was voluntary because confessions deemed involuntary may still influence jury, thus violating defendant’s constitutional rights).

452. *See id.* at 378-79 (discussing “Massachusetts procedure,” whereby jury is permitted to hear confession only if found voluntary in initial determination by court).

453. *See* *Graham*, *supra* note 376, at 128 (reasoning that police will usually have multiple purposes when asking questions).

454. *See supra* note 54 and accompanying text for a discussion of the “primary purpose” test.

Though it is far from certain,⁴⁵⁵ the Self-Incrimination Clause standard appears weighted more toward the admissibility of evidence. For example, pursuant to *Quarles*, it seems that a statement is testimonial only if the sole purpose of the questioning is evidence-gathering. As long as a plausible purpose other than an investigatory one is objectively apparent, any statement made is nontestimonial.⁴⁵⁶ This standard appears to be confirmed by the result in *Innis*. While one might justifiably conclude that the officers there were primarily concerned with locating evidence to be used against the suspect, “there is a plausible argument that an objective observer could conclude that the officer’s remarks were made out of genuine concern for the risks posed by the hidden weapon.”⁴⁵⁷ The issue does not seem to have been pursued with respect to routine booking questions or, for reasons that should be obvious, the undercover officer scenario.

If “testimonial” is to have a single meaning, the Court should attempt to harmonize these cases and choose one way of addressing the mixed-motive problem. Unfortunately, *Davis*’s “primary purpose” test is very difficult to apply. Consider, for example, the recent case of *People v. Nieves-Andino*,⁴⁵⁸ where a police officer, having come upon Millares, a very seriously injured man, called for an ambulance, asked for some basic biographical information, and then asked what had happened.⁴⁵⁹ Millares told him that he had had an argument with the defendant, who shot him three times.⁴⁶⁰ This simple, and not atypical, fact pattern split the New York Court of Appeals four-to-three. The court held that the statements were nontestimonial on the ground that the primary purpose of the officer’s inquiry was “to assess . . . whether there was any continuing danger to the others in the vicinity,”⁴⁶¹ apparently because of the unknown whereabouts of a dangerous armed man. By contrast, the concurrence would have found the statements testimonial—though their admission harmless—because the primary purpose of the interrogation was “an investigation into past criminal conduct,”

455. See, e.g., Yeager, *supra* note 172, at 1000 (arguing that *Quarles* Court failed to address situations where officers may have mixed motives for asking questions).

456. See Sidney M. McCrackin, Note, *New York v. Quarles: The Public Safety Exception to Miranda*, 59 TUL. L. REV. 1111, 1126 (1985) (opining that public safety exception applies even if primary motivation of police is to gather incriminating evidence); Reiner, *supra* note 178, at 2383 (suggesting that *Quarles* requires only that concern for public safety be present, even if that concern is not necessarily officers’ primary concern); Yeager, *supra* note 172, at 1001 (noting that *Quarles* dealt with dual-purpose questions by not requiring safety to be primary motivation). *But cf.* Pizzi, *supra* note 177, at 598 (“The privilege and its attendant rules . . . should not control in a crisis situation where the primary purpose of the state conduct is to prevent a tragedy from occurring.”).

457. Marks, *supra* note 238, at 1086; accord White, *supra* note 385, at 1235 (arguing that, to objective listener, policemen’s comments in *Innis* could seem to have been made purely out of concern for public safety).

458. 872 N.E.2d 1188 (N.Y. 2007).

459. *Nieves-Andino*, 872 N.E.2d at 1188-89. In the interest of full disclosure, I should reveal that from 1999 to 2004, I was affiliated with the organization representing the defendant in this case, and that counsel is a close personal friend of mine.

460. *Id.* at 1189.

461. *Id.* at 1190.

and “there [was no] indication that the assailant was still on the scene.”⁴⁶²

Both sets of analyses are deficient. Both sides failed to appreciate that the officer’s motivation behind obtaining the information—arresting the assailant—can simultaneously be characterized as a desire both to get a dangerous person off the streets and to commence formal legal proceedings against him ultimately leading to his conviction of a crime. Ascribing a hierarchy to these two related motivations is an exercise in advanced metaphysics.⁴⁶³ As the drafters of the Model Penal Code wrote in the context of determining whether motivations in addition to self-protection could detract from a valid claim of self-defense, “an inquiry into dominant and secondary purposes would inevitably be far too complex.”⁴⁶⁴

Yet the *Innis/Quarles* approach seems unmoored from a critical presupposition of the modern jurisprudence of both the Self-Incrimination and Confrontation Clauses: that special constraints should be placed on evidence taken by the police when acting as the modern-day equivalents of the committing magistrate.⁴⁶⁵ And a question posed by a sixteenth-century English magistrate, who recorded the response to be used at trial, regarding the location of an unapprehended, dangerous accomplice would likely be seen as having been motivated by an investigatory purpose, even though another motive was plausibly present. Thus, if the objective circumstances indicate that questions are posed *because* the police are investigating a completed crime, the responses arguably should be deemed testimonial even if a plausible noninvestigatory reason is also ascertainable from the objective circumstances.

The word “because” in the previous sentence suggests a solution: the use of conventional causation analysis to determine whether the interrogation was motivated by a noninvestigatory purpose. The prosecution would have to convince the court that the noninvestigatory purpose caused the interrogation to occur.⁴⁶⁶ Nevertheless, special rules of causation apply to mixed-motive cases.

462. *Id.* at 1192 (Jones, J., concurring).

463. See Friedman, *Way Beyond*, *supra* note 58, at 560 (“Labeling one purpose after the fact as primary seems to be a rather arbitrary exercise—and thus the test invites manipulation to enhance the chance that the evidence will be received.” (footnote omitted)).

464. Pizzi, *supra* note 177, at 583 n.113 (quoting MODEL PENAL CODE § 3.04 cmts. at 17 (Tentative Draft No. 8, 1958)); see also Brooks Holland, *The Road ‘Round Edmond: Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN. ST. L. REV. 293, 309 (2006) (“Human motivation simply is too complex for discrete motives to be accurately isolated and prioritized as ‘primary’ and ‘secondary,’ as conduct often is produced not by any single objective, but by the full range of objectives operating together to influence human behavior.”). Courts have struggled to apply the distinction between primary and secondary purposes in other areas as well. See, e.g., Holland, *supra*, at 296 (noting that Supreme Court has failed to “provide lower courts with a clear analytical framework” for distinguishing Fourth Amendment seizures whose primary programmatic purpose is crime control and those whose primary purpose extends beyond ordinary needs of law enforcement).

465. See *supra* notes 185-87 and accompanying text for a discussion of how modern police officers replicate the investigatory function of the sixteenth-century English magistrate.

466. The burden of proof generally falls to the party proffering the evidence. See, e.g., *Idaho v. Wright*, 497 U.S. 805, 816 (1990) (placing burden of proof on prosecution to show evidence is admissible pursuant to Confrontation Clause).

Such “cases can be analogized to multiple-sufficient-causation cases in that two concurrent ‘forces’ . . . both ‘cause’ an actor to follow a particular course of action.”⁴⁶⁷ The noninvestigatory and investigatory purpose will each constitute a concurrent, sufficient cause because, absent one motive, the questioning would have occurred anyway, so neither motive would be a but-for cause.⁴⁶⁸

Typically, where there are multiple sufficient causes, the usual burden of proving but-for causation is lifted but the party bearing the burden of persuasion must demonstrate that the act at issue was a substantial factor in bringing about the event.⁴⁶⁹ Utilizing this line of reasoning, the prosecution would have to prove that, considering only objectively observable indicia, the noninvestigatory purpose of the questioning was a substantial factor in bringing about the questioning. In the overwhelming majority of cases this showing should not be hard to make. Indeed, it is difficult to conceive of a true mixed-motive case—in which, by hypothesis, the questioning would have occurred even without the investigatory motive—where the prosecution will be unable to show that the noninvestigatory purpose was a substantial factor in bringing about the interrogation.

At all events, what is critical is not that any particular mode of addressing the mixed-motive problem is adopted. The point is rather that a uniform approach should be applied, irrespective of whether the statement is ultimately used against its speaker or someone else, that is, whether the issue concerns the status of the speaker as “witness” pursuant to the Self-Incrimination Clause or the Confrontation Clause.

467. Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 287-88 (2007); see also Holland, *supra* note 464, at 308 (noting that “courts typically look for a traditional causal relationship” in cases of mixed motives). To some extent, I share Paul Gudel’s skepticism over whether human motivation can adequately be captured by traditional causation analysis. See Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 70-96 (1991) (discussing failure of traditional causation analysis to serve as useful framework to evaluate mixed-motive employment discrimination cases). Nonetheless, the courts continue to utilize causation analysis in this way in a variety of contexts. See, e.g., *Hudson v. Michigan*, 126 S. Ct. 2159, 2164 (2006) (utilizing causation analysis to determine whether constitutional violation by police resulted in discovery of evidence); *O’Neal v. McAninch*, 513 U.S. 432, 446 (1995) (Thomas, J., dissenting) (suggesting that even majority opinion contains implicit requirement of causation to show that constitutional error resulted in guilty verdict); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-42 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76 (utilizing causation principles to determine whether adverse employment action was motivated by discriminatory animus). Accordingly, a causation approach to whether one motive or another was behind the gathering of information is at least consistent with what courts already do.

468. See Pardo, *supra* note 16, at 175 & n.346 (suggesting that courts should engage in counterfactual inquiry as to whether information would have been gathered even without investigatory purpose as “a useful way of locating the ‘primary purpose’” pursuant to *Davis*).

469. See RESTATEMENT (SECOND) OF TORTS § 432(2) (1965) (formulating “substantial character” test as alternative to “but-for” test in cases of multiple sufficient causes).

CONCLUSION

When the Constitution is studied and applied piecemeal, commonalities between and among its provisions tend to fall through the cracks.⁴⁷⁰ That is what has happened to the word “witness” in the Self-Incrimination and Confrontation Clauses. Like twins separated at birth, the two Clauses share common DNA that guides their respective development. Thus, on close inspection, a great many Self-Incrimination Clause and Confrontation Clause cases have analogues with one another. *New York v. Quarles*⁴⁷¹ holds that statements compelled from the accused during an emergency can nonetheless be used against him, and *Davis v. Washington*⁴⁷² holds that statements taken from a third party during an emergency can be used against the accused as well. *Illinois v. Perkins*⁴⁷³ dictates that statements made by an accused to an undercover government agent can be introduced against the accused, and *United States v. Bourjaily*⁴⁷⁴ dictates that statements made by a third party to an undercover government agent can be introduced against the accused. Pursuant to *Harris v. New York*,⁴⁷⁵ statements made by an accused under compulsion can be used to impeach his trial testimony, and pursuant to *Tennessee v. Street*,⁴⁷⁶ statements made by a third party can be used to impeach the accused’s trial testimony. And so on.

If the Self-Incrimination and Confrontation Clauses are twins separated at birth, they live just the next town over from one another, leading parallel lives, even occasionally, but unknowingly, crossing paths. It is time for them to meet once more and reacquaint themselves with each other. This Article represents an initial, if modest, attempt to lay the groundwork for an introduction.

470. See Nagareda, *supra* note 5, at 1064 (“The right to present witnesses . . . tends to slip through the cracks of the conventional curriculum.”).

471. 467 U.S. 649 (1984).

472. 126 S. Ct. 813 (2006).

473. 496 U.S. 292 (1990).

474. 483 U.S. 171 (1987).

475. 401 U.S. 222 (1971).

476. 471 U.S. 409 (1985).

