THE PRIMARY PURPOSE FOR ADMITTING HEARSAY OVER CONFRONTATION CHALLENGES IN ELDER ABUSE CASES: A FRAMEWORK FOR BRINGING UNAVAILABILITY CONCERNS INTO THE LIGHT IN A POST-CRAWFORD WORLD

Anna Corcoran

Elder abuse remains a serious social, legal, and ethical issue in the United States, and resolving America's elder abuse problem will become only more important as the elderly population continues to grow. Furthermore, combating elder abuse in the criminal justice system is difficult because the prosecution of elder abuse cases often must rely upon hearsay statements. Ultimately, hearsay statements are valuable in elder abuse prosecutions because the victims and witnesses are likely to become unavailable before trial. The Confrontation Clause's primary purpose test, which was created by the Crawford v. Washington line of cases, has made it more difficult to combat elder abuse through the criminal justice system. To reverse this post-Crawford trend, the Supreme Court should make two modifications to the primary purpose test. First, if the witness is not speaking to a known state actor, there should be a presumption that the primary purpose was not to provide a substitute for at-trial testimony. Second, if the witness is unavailable to testify due to events completely outside the State's control, the unavailability of the witness should be incorporated into the primary purpose test, and it should weigh in favor of admitting the unavailable witness's testimony. Consequently, if the primary purpose test is not modified, prosecuting elder abuse cases will remain difficult, and the elderly will continue to be victimized.

Anna Corcoran is Notes Editor 2016-2017, Member 2015-2016, *The Elder Law Journal*; J.D. 2017, University of Illinois, Urbana-Champaign; B.A. 2014, University of Illinois at Springfield.

I. Introduction

Imagine that your seventy-nine year old mother has been badly beaten.[1] She tells you and law enforcement that a teenager struck her with a concrete block in the process of stealing her car.[2] She has some health issues and has been showing signs of dementia, but she still appears to be able to remember the assault clearly.[3] You inform the prosecutor's office that her memory problems are worsening.[4] They fail to take any action.[5] By the time they come to talk to your mother, she cannot even respond to basic questions.[6] Shortly thereafter, she dies of unrelated causes.[7] The case is dropped.[8] You feel like the justice system that you believed in has re-victimized your mother.[9]

This story repeats itself over and over again across the country. Combating elder abuse, often through the criminal law, has remained a forefront social, legal, and ethical problem; however, the viability for prosecution of elder abuse cases often revolves around the availability and competency of elderly witnesses.[10] Elderly witnesses can present some unique challenges.[11] The ability of prosecutors to work adeptly with elderly witnesses is only going to become even more important over the next several decades as the elderly population rapidly grows.[12] By the year 2050, the population of Americans ages sixty-five and older is projected to be 88.5 million, more than double the population size of this group in 2010.[13] In 2014, the Illinois Adult Protective Services (APS) alone received over fourteen thousand reported cases

1. George Brown & Mike Suriani, *Teen Won't go to Trial for Beating After Elderly Victim Dies*, NEWSCHANNEL (July 10, 2014, 1:26 P.M.), http://wreg.com/2014/07/10/teen-wont-go-to-trial-for-beating-after-elderly-victim-dies/.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *See* Jonathan M. Golding & Nesa E. Wasarhaley, *How is Elder Abuse Perceived in the Courtroom?* 2, https://nlrc.acl.gov/Legal_Issues/Elder_Abuse/docs/golding_art_elder_abuse_courtroom.pdf (last visited Mar. 27, 2017).
11. AM. PROSECUTORS RES. INST., *Protecting America's Senior Citizens: What Local Prosecutors Are Doing to Fight Elder Abuse*, 29 (2003), http://www.ndaa.org/pdf/protecting_americas_senior_citizens_2003.pdf [hereinafter AM. PROSECUTORS RES. INST.].
12. U.S. CENSUS BUREAU, *The Next Four Decades The Older Population in the United States: 2010 to 2050*, 1 (May 2010), http://www.aoa.acl.gov/Aging_Statistics/future_growth/DOCS/p25-1138.pdf [hereinafter U.S. CENSUS BUREAU].
13. *Id.*

of abuse.[14] Thus, if rates of elder abuse do not decline, just Illinois could potentially be looking at more than thirty thousand reported cases by 2050.[15]

With changing demographics and the likely accompanying increase in the number of elder abuse cases, the ability of law enforcement and prosecutors to work adeptly with elderly witnesses will become even more important than it already is.[16] In one survey, APS workers identified prosecution of perpetrators as one of the "top ten" most important services provided for victims of elder abuse.[17] They also identified it as the most difficult to obtain because of a perceived lack of interest or cooperation.[18] One of the unique challenges that elder abuse cases present is the possibility of victims and witnesses becoming unavailable before trial.[19] Hearsay statements may be the only remaining "testimony" that the witness can give due to the onset of dementia, physical inability to testify, or death.[20] Because of this, hearsay can be an important aspect of elder abuse cases.[21]

This Note proposes that the Supreme Court should incorporate the unavailability of witnesses into the current test that it uses to de-

14. IL DEP'T ON AGING, *Adult Protective Serv.'s Fiscal Year 2014 Annual Report*, 2 (2014), http://www.illinois.gov/aging/ProtectionAdvocacy/Documents/DoA2014_Adult%20Protective%20Services%20An%20Rpt_web%20document.pdf [hereinafter IL DEP'T ON AGING].

15. *See generally* U.S. CENSUS BUREAU, *supra* note 12; IL DEP'T ON AGING, *supra* note 14.

16. *See* Priscilla Vargas Wrosch, *What More Can Congress Do About the Elder Abuse Epidemic? A Proposal for National Movement*, 23 TEMP. POL. & CIV. RIGHTS L. REV. 1, 2 (2013) ("It is estimated that in 2010, 5.7 million Americans sixty years old or older were victims of some form of abuse.") [hereinafter Wrosch]; *see generally* U.S. CENSUS BUREAU, *supra* note 12 (discussing projected population growth as being more than double that of 2010 in 2050).

17. AM. PROSECUTORS RES.INST., *supra* note 11, at 4.

18. *Id.*

19. *See id.*; *see also* Daniel L. Madow, Comment, *Why Many Meritorious Elder Abuse Cases in California Are Not Litigated*, 47 U.S.F. L. REV. 619, 635 (2013) (noting that even when elderly witnesses are enjoying good health, the risk of unavailability at trial looms heavy) [hereinafter Madow]; *see generally* Ann M. Murphy, *Vanishing Point: Alzheimer's Disease and its Challenges to the Federal Rules of Evidence*, 2012 MICH. ST. L. REV. 1245, 1248-49, 1255-56 (discussing how later stages of Alzheimer's disease could make a witness unavailable to testify at trial and by the age of eighty-five, half of Americans will have some type of Alzheimer's disease) [hereinafter Murphy].

20. *See* Murphy, *supra* note 19, at 1248, 1256; Madow, *supra* note 19, at 635.

21. *See* Katherine G. Breitenbach, Comment, *Battling the Threat: The Successful Prosecution of Domestic Violence After Davis v. Washington*, 71 ALB. L. REV. 1255, 1255 (2008) (discussing how domestic abuse cases are more likely to rely on hearsay testimony than other cases) [hereinafter Breitenbach]; Madow, *supra* note 19, at 635 (discussing the risk of unavailability at trial in elder abuse cases).

termine the admissibility of hearsay statements under the Confrontation Clause. This modification should not be limited to cases involving elderly witnesses. However, the problems leading to its necessity are most acutely demonstrated in cases involving elderly witnesses. In Part II, this Note will provide a short background. First, it will survey recent Supreme Court Confrontation Clause decisions. It will then explain how these decisions have presented challenges to the successful prosecution of elder abuse cases. In Part III, it will examine several ways that state courts have attempted to apply current Supreme Court jurisprudence regarding the Confrontation Clause to cases involving elderly witnesses. Part IV will suggest that the Supreme Court should modify the current test to include concerns about the unavailability of the witness. Part V will provide a brief conclusion.

II. Background

A. The *Crawford* Era

The Supreme Court's recent Confrontation Clause decisions reflect a sharp movement away from the historical trend of relaxing the confrontation requirement and then a slow shift back towards greater flexibility.[22] This shift represents a purported return to how the Confrontation Clause was viewed at the time of the founding.[23] It has also presented some new challenges to the successful prosecution of elder abuse cases when a witness is unavailable to testify at trial.[24]

22. *See* Eleanor Swift, *A Foundational Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1345 (1987) (noting that over "the 17th, 18th, and 19th centruies [sic], judges admitted more hearsay by creating additional exceptions to the principle of exclusion") [hereinafter Swift]; Jarot Hunt Scarbrough, Comment, *The Swinging Pendulum of Confrontation Clause Jurisprudence: Was Michigan v. Bryant a Response to the Inequitable Outcomes in Crawford, Davis, and Giles?*, 36 AM. J. TRIAL ADVOC. 153, 156 (2012) (discussing how *Crawford*, combined with the narrow definition of forfeiture set forth in Giles v. California, 554 U.S. 353, 377 (2008), caused the eventual narrowing of the definition of testimonial statements that occurred in *Michigan v. Bryant*, 562 U.S. 344 (2011)) [hereinafter Scarbrough].

23. Thomas Y. Davies, *Dialogue: Revisiting the Fictional Originalism in Crawford's "Cross-Examination Rule": A Reply to Mr. Kry*, 72 BROOK. L. REV. 557, 559-60 (2007).

24. Linda K. Chen, *Eradicating Elder Abuse in California Nursing Homes*, 52 SANTA CLARA L. REV. 213, 236 (2012) ("The United States Supreme Court case *Crawford v. Washington* also acts as an evidentiary roadblock to criminal prosecution of elder abuse where it significantly limits the admission of hearsay evidence. This makes it challenging to prosecute abuse in cases where the victim is no longer available to testify due to incapacity or death. Without this medium of testimony, criminal prosecutions of elder abuse will continue to fail.").

During the founding era, the rule against hearsay and the Confrontation Clause were more like two facets of the same bright-line rule[25] than distinct entities.[26] Under the common law, there were only two widely-accepted exceptions to the rule against the admission of out-of-court statements as evidence of the defendant's guilt.[27] First, courts allowed a written summary of a sworn "Marian" examination of persons who had been witnesses against the defendant at the time of the arrest but who were unavailable for testimony at trial.[28] This exception did not survive the incorporation of the rule against hearsay into the Constitution through the Confrontation Clause.[29] Second, the dying declaration of a murder victim could be admitted because impending death was considered the equivalent of the oath performed by sworn witnesses.[30]

The basic principles behind the common-law rule against hearsay and the codification of this rule in the Confrontation Clause were (1) the assurance of reliability and (2) deterrence from government abuse.[31] Both underlying policies are ensured through the requirement that the government produce witnesses in public who take an oath to tell the truth and testify subject to cross-examination.[32] Chief Justice Marshall described the confrontation right as "essential to the correct administration of justice."[33] At the time of the founding, the right to confrontation would ensure that the kind of infamous treason cases that occurred in England where the defendant could be convicted solely on out-of-court statements would not occur.[34] Witnesses would not be able to hide behind a cloak of obscurity. If a witness's testimo-

25. Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J. L. & POL'Y 349, 352-53 (2007) [hereinafter Davies].

26. *Id.* at 352.

27. *Id.* at 391.

28. *Id.* at 391, 397 ("Under the Marian statutes, justices of the peace were not only authorized but required to take and record in writing the sworn 'information' of the complainant and any supporting witness whenever a felony arrest was made, and coroners were required to do likewise regarding witnesses who testified at inquests of homicides.").

29. Crawford v. Washington, 541 U.S. 36, 54 n.5 (2004).

30. Davies, *supra* note 25, at 391.

31. *See* Crawford, 541 U.S. at 53.

32. *See id.*

33. United States v. Burr, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) ("I know not . . . why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him.").

34. *See* Crawford, 541 U.S. at 50.

ny would be able to convict a person then it would need to be tested in open court through cross-examination.[35]

Despite unified principles, the confrontation clause and the rule against hearsay have a long and twisted past.[36] The text of the Sixth Amendment incorporated the common law rule into the Constitution, but the two then drifted steadily apart as the rules of evidence evolved.[37] However, in the 1980 case *Ohio v. Roberts*, they were essentially wedded once again.[38] In *Roberts*, the Court held that when an unavailable declarant is not present for cross-examination at trial, his statement would still be admissible if it bore an adequate "indicia of reliability."[39] The "indicia of reliability" could be inferred when (1) the evidence fell within a firmly rooted hearsay exception, or (2) the evidence indicated a particularized guarantee of trustworthiness.[40] Through subsequent decisions, the Court deemed virtually all of the hearsay exceptions in the Federal Rules of Evidence and adopted by most of the states to be "firmly rooted."[41]

For roughly twenty-five years after *Roberts*, the union between the federal rules and the Confrontation Clause stood strong.[42] However, the unnatural wedding of "constitutional doctrine to the twists and turns of evidence law" was thoroughly criticized by commentators.[43] In 2004, the Supreme Court re-evaluated this jurisprudence in *Crawford v. Washington*.[44] In a sharp turn away from *Roberts*, the Court held

35. Davies, *supra* note 25, at 391-92 (discussing how at the founding time there were only two widely accepted exceptions to the hearsay rule in criminal cases. This commentator also noted that at the time of the founding hearsay was not limited to out-of-court statements offered to prove the truth of the matter asserted; it included all unsworn out-of-court statements by anyone other than the defendant.).

36. David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 1 ("Years of trial practice can sometimes give a lawyer a certain fondness for the oddities of hearsay law, but it is the kind of affection a volunteer docent might develop for the creaky, labyrinthine corridors of an ancient mansion, haphazardly expanded over the centuries. The charm arises largely from the elements of quirky dysfunctionality.") [hereinafter Sklanksky].

37. *See* Swift, *supra* note 22, at 1345.

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

39. *Id.*

40. *Id.*

41. Sklansky, *supra* note 36, at 39 ("The only exceptions a majority of the Court ever found *not* to qualify were the catchall provisions in the Federal Rules of Evidence and most state evidence codes for statements 'not specifically covered' by other exceptions 'but having equivalent circumstantial guarantees of trustworthiness.'").

42. *See* Roberts, 448 U.S. at 66; Sklansky, *supra* note 36, at 39.

43. Sklansky, *supra* note 36, at 40.

44. Crawford, 541 U.S. at 36.

that testimonial statements of a witness who did not appear at trial were not admissible unless the defendant had a prior opportunity to cross-examine the witness about the statements.[45] *Crawford* broke the union between the rules of evidence and the Confrontation Clause.[46] It also shifted the pressure for admitting statements from exceptions to the hearsay rule as allowed under *Roberts* to defining and re-defining the meaning of "testimonial."[47]

The Court eventually conceptualized the meaning of "testimonial"[48] by establishing the primary purpose test several years later in *Davis v. Washington*.[49] In *Davis* and its companion case, *Hammon v. Indiana*, the Court held that statements are not testimonial when they are made under circumstances objectively indicating that the primary purpose of the police interrogation was to meet an ongoing emergency.[50] But they are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecutions."[51]

The primary purpose test was later explained as a totality of the circumstance analysis.[52] In *Michigan v. Bryant*, the Court resolved the case on the basis of an ongoing emergency, but simultaneously noted that there may be situations where the primary purpose of the interrogation is not to respond to an emergency and it is not to obtain an out-of-court substitute for trial testimony.[53] In determining whether the primary purpose of the interrogation was to respond to an ongoing emergency, courts should objectively analyze "the circumstances in which the encounter occurs and the statements and actions of the parties."[54] In determining primary purpose, the trial judge should con-

45. *Id.* at 53-54.
46. *Id.*
47. *See* Scarbrough, *supra* note 22, at 153 (discussing how Crawford combined with the narrow definition of forfeiture set forth in *Giles v. California*, 554 U.S. 353, 377 (2008), caused the eventual narrowing of the definition of testimonial statements that occurred in *Michigan v. Bryant*, 562 U.S. 344 (2011)).
48. Crawford, 541 U.S. at 68 ("Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing . . . and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.").
49. Davis v. Washington, 547 U.S. 813, 822 (2006).
50. *Id.*; Hammond v. Indiana, 546 U.S. 976 (2005).
51. Davis, 547 U.S. at 814.
52. *See* Michigan v. Bryant, 562 U.S. 344, 359 (2011).
53. *Id.* at 358.
54. *Id.* at 359.

sider "all of the relevant circumstances."[55] Furthermore, the Court noted that to determine the primary purpose of an interrogation, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant."[56]

The Court further identified pertinent factors applicable to the primary purpose analysis in the 2015 case *Ohio v. Clark*.[57] In *Ohio v. Clark*, the Court held that statements a three-year-old made to a teacher at his preschool when the teacher asked the child "Who did this?" and "What happened to you?" after seeing whip-like marks on the child's face were non-testimonial.[58] The Court analyzed multiple factors in order to determine the primary purpose of the encounter including: the presence of an ongoing emergency, the informality of the encounter, the age of the witness, and the lack of state actors.[59]

The statements were made in the context of an ongoing emergency regarding suspected child abuse.[60] The encounter was informal and spontaneous, unlike the station house interrogation in *Crawford* or the battery affidavit in *Hammon*.[61] The Court noted that statements by very young children will rarely if ever implicate the confrontation clause.[62] Furthermore, "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."[63] Finally, the Court also noted that the confrontation clause does not bar every statement that satisfies the primary purpose test.[64] If the statement would have been admissible in a criminal case at the time of the founding, the court concluded that it would still be admissible.[65]

55. *Id.* at 369.
56. *Id.* at 358.
57. Ohio v. Clark, 135 S. Ct. 2173, 2181 (2015).
58. *Id.* at 2178.
59. *Id.* at 2181-82.
60. *Id.* at 2181.
61. *Id.*
62. *Id.* at 2182.
63. *Id.*
64. *Id.* at 2180.
65. *Id.*

B. How the *Crawford* Era Has Impacted Elder Abuse Cases

The *Crawford* era has presented new challenges to the prosecution of elder abuse cases in three ways. First, it has presented significant challenges to the prosecution of domestic abuse cases, and many elder abuse cases involve domestic abuse.[66] Second, elderly abuse cases often suffer from a lack of physical evidence, making witness testimony, and potentially hearsay, crucial.[67] Third, elderly witnesses are more likely to become unavailable to testify at trial than younger witnesses; thus, a piece of hearsay testimony that might simply be helpful in a case involving younger witnesses may be critical in an elder abuse case.[68]

1. ELDER ABUSE CASES OFTEN INVOLVE DOMESTIC ABUSE, AND *CRAWFORD* HAS MADE IT MORE DIFFICULT TO PROSECUTE DOMESTIC ABUSE CASES

First, *Crawford* and its progeny have presented significant challenges to the prosecution of domestic abuse cases, including elder abuse cases.[69] Elder abuse cases often involve all the difficulties that are involved with domestic abuse cases.[70] In domestic abuse cases, prosecutors are likely to rely on hearsay statements at trial because the nature of the domestic abuse often makes witnesses uncooperative or unavailable.[71] In some domestic violence situations, the victims cooperate with law enforcement in the immediate aftermath of the abuse,

66. *See generally* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 749 (2005) [hereinafter Lininger].

67. *See* AM. BAR ASS'N, *Senior Lawyers Division Comm'n on Domestic Violence Comm'n on Law and Aging Report to the House of Delegates* 7, http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_crimeselderly.authcheckdam.pdf ("Many cases of abuse and neglect take place behind closed doors and do not leave visible signs on the victim. In these cases, the victim's cooperation is critical to successful prosecution.") [hereinafter AM. BAR. ASS'N].

68. *See id.* ("One challenge is that victims of elder abuse may suffer from some degree of cognitive impairment. . . . In addition . . . elderly victims may face health problems that interfere with their ability to participate in the prosecution.").

69. *See* Lininger, *supra* note 66, at 749-50.

70. *See* ADMIN. FOR COMM. LIVING, *What is Elder Abuse?*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (July 22, 2016), http://www.aoa.gov/AoA_programs/Elder_Rights/EA_Prevention/whatIsEA.aspx (discussing how elder abuse encompasses physical abuse, sexual abuse, neglect, exploitation, emotional abuse, abandonment, and self-neglect); AM. BAR. ASS'N, *supra* note 67, at 5 ("In over 90 percent of cases where the perpetrator is known to the victim, he or she is a family member.").

71. *See* Breitenbach, *supra* note 21, at 771.

but this "window of opportunity" for cooperation may close quickly.[72] Later on, large proportions of domestic violence victims "recant or refuse to cooperate."[73] Sadly, victims of domestic violence are more likely to avoid participation in criminal trials and recant than victims of other crimes.[74] In fact, up to eighty to ninety percent of battered women refuse to cooperate at some point.[75]

This refusal to cooperate has led to the importance of the introduction of hearsay evidence. In one survey, district attorneys in California, Oregon, and Washington reported that their offices had relied on what was now considered testimonial hearsay in more than half of all their domestic violence prosecutions before *Crawford*."[76] Before *Crawford*, hearsay evidence had a more prominent place in evidence-based prosecutions for domestic violence.[77] In the domestic abuse context, many of these challenges can be overcome by producing the hostile witness for cross-examination, leaving the contradictions for the jury to sort out.[78] However, this solution will only be effective if the witness is able to testify, and the elderly witness may not be able to do so.

2. ELDER ABUSE CASES ARE OFTEN HIGHLY WITNESS-CENTRIC, AND *CRAWFORD* HAS SHRUNK THE NUMBER OF AVAILABLE "WITNESSES"

Second, elder abuse cases are highly witness-centric.[79] Witness testimony remains even more important in elder abuse cases than in many types of criminal prosecutions because of a lack of other physical evidence.[80] There is often a failure to report incidents by elderly

72. Lininger, *supra* note 66, at 771.
73. *Id.* at 768.
74. Brief of the Nat'l Network to End Domestic Violence et al. as Amici Curiae Supporting Respondents at 13, Davis v. Washington, 547 U.S. 813 (2006) (No. 05-5224).
75. *Id.*
76. Lininger, *supra* note 66, at 771.
77. *Id.*
78. *See, e.g.*, State v. Fields, 168 P.3d 955 (Haw. 2007) (holding that hearsay statements made by victim in domestic violence case did not violate the defendant's right to confrontation because she appeared at trial even though she testified at trial that she did not remember).
79. *See generally* AM. BAR. ASS'N, *supra* note 67.
80. *See id.* at 7 ("Many cases of abuse and neglect take place behind closed doors and do not leave visible signs on the victim. In these cases, the victim's cooperation is critical to successful prosecution.").

victims "due to shame, fear of further retaliation, or fear that no one will believe them."[81]

Actual physical evidence in elder abuse cases may be scarce and not gathered correctly. For instance, medical examiners can rarely distinguish symptoms of illness from signs of abuse in elderly decedents.[82] "[S]igns of abuse commonly recognized in younger decedents. . . [are] missed in elders."[83] One study found that both abused and non-abused elders were likely to have bruises.[84] Furthermore, almost three-quarters of the non-abused elders could not identify the cause of their bruises.[85] While there were subtle differences between the bruises on the abused and non-abused elderly, consistently being able to distinguish between the two requires special training.[86] Careful documentation of the physical evidence that does exist can aid in successful prosecution, but witness testimony is still often essential because of a lack of physical abuse and the often incorrect gathering of evidence that does exist.

3. ELDERLY WITNESSES ARE MORE LIKELY TO BE UNAVAILABLE TO TESTIFY

Third, elderly witnesses present unique challenges in their ability to testify.[87] Some of the most difficult challenges in prosecuting elder abuse cases "revolve around the victims' physical and mental capacities, as well as the victims' degree of cooperation in their case."[88] One in eight Americans sixty-five and older have symptoms of Alzheimer's disease, and the incident rate doubles every five years past age sixty-five.[89] Under the Federal Rules of Evidence, there is a broad presumption that witnesses are competent to testify;[90] however, later stages of dementia that affect the witnesses' ability to recall events or understand his or her surroundings could make the witness unavailable even under this standard.[91] All of these reasons together make the

81. Wrosch, *supra* note 16, at 3.
82. NAT'L. INST. OF JUSTICE, *Identifying Elder Abuse*, OFF. OF JUST. PROGRAMS (May 6, 2013), http://www.nij.gov/topics/crime/elder-abuse/pages/identifying.aspx#note1.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *See* AM. BAR. ASS'N, *supra* note 67, at 9 (quoted above).
88. AM. PROSECUTORS RES. INST., *supra* note 11, at 2.
89. Murphy, *supra* note 19, at 1246.
90. *See* Fed. R. Evid. 601.
91. *See* Murphy, *supra* note 19, at 1248, 1250.

use of hearsay so critical in the prosecution of elder abuse cases, and they also explain how the Crawford era has made the prosecution of elder abuse cases more difficult than before.

III. Application of the Primary Purpose Test to Elder Abuse Cases

There are three primary ways that lower courts have applied the primary purpose test to admit hearsay statements of elderly witnesses. This Note will recount these three approaches and weigh the positive and negative implications of each approach. Although most of the cases discussed occurred in state courts, the confrontation challenges in state cases are the same as in federal cases.[92] Most of the discussion regarding the rule against hearsay and its intersection with the Confrontation Clause will primarily refer to the Federal Rules of Evidence. Most state rules of evidence are closely modeled off of the Federal Rules of Evidence,[93] so it makes little sense to discuss different state codes.

A. First Approach: Applying the Primary Purpose Test through Multi-Factor Analysis

The first way that courts have addressed this problem is through applying the primary purpose test through a multi-factor approach. In this approach, the court will examine the admissibility of the statement made by the elderly individual through analyzing primarily (1) the primary purpose of the victim, (2) the primary purpose of the individual who hears the statement, and (3) the surrounding circumstances.[94] This approach does appear to closely track binding precedent. However, it cannot resolve the inequitable problems that

92. *See* Pointer v. Texas, 380 U.S. 400, 403 (1965) (providing that the right to confrontation ensured by the confrontation clause of the Sixth Amendment has been incorporated to the states through the Fourteenth Amendment. Thus, a state court is held to the same standard as a federal court in applying a confrontation challenge).

93. Sklansky, *supra* note 36, at 40 (noting that "most states have copied the Federal Rules of Evidence virtually verbatim").

94. *See* People v. Cooper, 148 Cal. App. 4th 731, 734-35 (Cal. Ct. App. 2007); *see also* People v. Burney, 963 N.E.2d 430, 443 (Ill. App. Ct. 2011) (determining that a statement was non-testimonial the court analyzed the existence of the ongoing emergency, the informality of the interrogation, and how these factors informed the court about the primary purpose of the officer and the declarant).

arise when a witness is unavailable to testify and there is no alternative testimony.[95]

1. HOW CALIFORNIA COURTS HAVE USED THE MULTI-FACTOR APPROACH

The California Appellate Court used the multi-factor approach in the 2007 case *People v. Cooper*.[96] The court considered whether two videotaped interviews of the elderly victim, Ms. Nelson; a videotaped tour of her house; and the testimony of an expert psychologist on her mental capacity could be admitted over confrontation challenges when she had died before trial.[97] Police first received anonymous reports of elder abuse two years before the first interview.[98] However, each time a detective had visited her house to conduct a welfare check prior to 2003, the detective had concluded the reports were unfounded.[99] In February of 2003, however, the situation appeared to become more critical, and a detective, along with a social worker and a nurse from Adult Protective Services, conducted the first videotaped interview in question.[100]

During the interview, the team questioned Nelson about the financial power that she had given the defendant, looked for signs of memory loss, conducted a videotaped tour of her home, and conducted a "Folstein mini-mental" evaluation to determine whether she was mentally impaired.[101] After the interview, social services obtained medical treatment for Nelson's high blood pressure, and a court-appointed conservator replaced the defendant for oversight of her financial affairs.[102] The second videotaped interview was conducted several months later when the detective in the first interview returned

95. *See* Thomas D. Lyon & Raymond LaMagna, *The History of Children's Hearsay: From Old Bailey to Post-Davis*, 82 IND. L.J. 1029, 1056 (2007) (contending that it is fundamentally unfair to allow defendants to benefit from their choice to victimize individuals who are unavailable to testify for reasons other than the state or defendant's actions) [hereinafter Lyon].

96. *See* Cooper, 148 Cal. App. 4th at 742-43.

97. *Id.* at 734-35.

98. *Id.* at 735.

99. *Id.* at 735-36.

100. *Id.* at 736.

101. *Id.* at 737 ("[The] 'Folstein mini-mental' evaluation of Nelson [was designed] to determine if she was mentally impaired. The evaluation revealed that Nelson had difficulty remembering three words after performing simple mathematical tasks. She also had difficulty drawing clock hands to reflect a specified time.").

102. *Id.*

by himself to her home.[103] At this time, Nelson believed that the defendant was taking advantage of her and made accusatory statements against the defendant during the interview.[104] She also demonstrated continuing memory impairment.[105]

The California appellate court found that the first interview, including the tour of Nelson's house, was not primarily testimonial while the second interview was.[106] The court identified several factors in determining whether the resulting statements were testimonial including: when the statements were made (proximity to the events), the nature of the reports given, the level of formality when the statements were made, and the purpose of obtaining the statements.[107] However, as the court applied these factors, they focused on three main avenues of analysis: the primary purpose of the declarant, the primary purpose of the person hearing the statements, and the surrounding context of the statements.[108]

In applying these factors to the first interview, the court found that the primary purpose was to "assess Nelson's mental and physical condition and deal with her potentially critical need for assistance and protection."[109] However, the interview did later devolve into testimonial statements during the discussion about the defendant's control over her finances.[110] In determining the majority of the first interview was nontestimonial, the court first pointed to statements by the detective during the interview.[111] These statements seemed to indicate that the primary purpose of the interview was to determine whether Nelson needed help and whether the defendant was taking advantage of her.[112] The inclusion of a social worker and nurse in the team who conducted the interview also made it more likely that the primary

103. *Id.*
104. *Id.*
105. *Id.* at 738.
106. *Id.* at 743-45 (After finding that the February interview was largely nontestimonial, the court further concluded that substantial portions were not subject to the Confrontation Clause because they were ultimately admitted not to prove the truth of the matter asserted but as evidence of Nelson's mental state).
107. *Id.* at 743.
108. *Id.* at 742-43.
109. *Id.*
110. *Id.* at 743-44 (discussing how the interview evolved into testimonial questioning when it began to discuss Nelson's relationship with the defendant, his involvement in her financial affairs, and her feelings towards him since these statements were aimed at implicating him for elder abuse).
111. *Id.* at 743.
112. *Id.* ("Detective Percy described that the purpose of the visit was 'to make sure no one's taking advantage of you.'").

purpose from the team's perspective was not to elicit the equivalent of in-court testimony.[113] In regards to the declarant's primary purpose, Nelson made no accusatory statements towards the defendant.[114] Thus, it was unlikely that her primary purpose would have been to bear testimony against him.[115] Third, even though the surrounding context of an "emergency" was not as stark as in *Davis*, there was serious doubt as to whether she could take care of her basic medical needs at this point.[116] Furthermore, the interview was conducted in the informal setting of Ms. Nelson's house, and the defendant was not arrested for any crimes at the time.[117] Thus, the purpose of the interview was primarily to determine whether she was in need of assistance not to create an out-of-court record for trial.

In contrast, the court held that the second interview was primarily testimonial because its "primary purpose appear[ed] to be the gathering of information to prosecute defendant."[118] The primary purpose of both the officer and Ms. Nelson appeared to be gathering evidence to use against the defendant to eventually bring him to trial.[119] A substantial portion of the interview revolved around Nelson's accusations against the defendant, her opinion of him, and her desire that he not inherit her property.[120] The context surrounding the interview did not have the same involvement of an emergency.[121] By this time a court-appointed caretaker had taken the place of the defendant.[122] Consequently, there was no immediate need to assess Ms. Nelson's ability to meet her medical needs.[123]

113. *Id.* at 744.
114. *See id.* at 737, 744 ("Nelson was not acting as a witness against defendant or as his accuser, as she only made positive comments about him.").
115. *See id.*
116. *Id.* at 743 ("While the emergency presented was not as stark or temporarily discrete as the domestic violence incident in *Davis*, it was no less real. Nelson was 92 years old, could not drive, was in failing physical and mental health, and did not know who her doctor was and what medication she was taking. Her ability to provide for her basic needs and the adequacy and propriety of the care defendant was providing were in question.").
117. *Id.*
118. *Id.* at 745 (however, the court also found portions of the interview admissible to demonstrate Nelson's mental state and not prove the truth of the matter asserted).
119. *See id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

2. HOW AN ILLINOIS COURT APPLIED THE MULTI-FACTOR ANALYSIS

People v. Burney provides another example of how courts use the multi-factor analysis to determine admissibility under the primary purpose test for cases involving elderly witnesses.[124] In this Illinois case, a deputy testified that when he responded to a call for residential burglary, he found the elderly victim, Ms. Krause, "very upset" and shaking.[125] She gave him a partial description of the defendant and what had happened to her.[126] The trial court allowed the deputy to testify to the statements the victim made as nontestimonial on the basis that they were made in the course of an ongoing police emergency.[127] Krause had been declared unavailable to testify for the defendant's second trial for residential burglary.[128] By this time, she was in poor health, and her doctor feared that the stress of testifying could exacerbate her health conditions.[129]

The court held that the statements were nontestimonial.[130] The state appellate court applied the test that a plurality of the Illinois Supreme Court had previously adopted for determining whether a statement is testimonial.[131] Under the Illinois test, a statement was testimonial if it (1) was made in a solemn fashion and (2) was intended to establish a particular fact.[132] From Krouse's point of view, the statements were made in response to an ongoing emergency.[133] A strange man had barged into an elderly woman's house, demanded her keys, and he was still on the loose when she made the partial description to the officer.[134] Furthermore, from the officer's point of view, there was no structured interrogation.[135] The deputy was primarily seeking to resolve the situation on hand and not to recount the victim's story for investigation.[136] The surrounding context of the interrogation was the

124. Burney, 963 N.E.2d at 434.
125. *Id.* at 436.
126. *Id.*
127. *Id.*
128. *Id.* at 435.
129. *Id.*
130. *Id.* at 442.
131. *Id.* at 441 (citing People v. Stechly, 870 N.E.2d 333, 355 (Ill. 2007)).
132. *Id.*
133. *Id.* at 442-43.
134. *Id.* at 443.
135. *Id.*
136. *Id.*

ongoing emergency to find and detain the individual who had broken into Krause's home.[137]

3. ADVANTAGES OF THE MULTI-FACTOR ANALYSIS APPROACH

Cooper and *Burney* illustrate how the multi-factor analysis has several key advantages. First, it purports to closely follow the most recent Supreme Court precedent on the matter. Binding precedent requires lower courts to determine whether statements are testimonial on the basis of the primary purpose of the encounter.[138] The multi-factor approach also appears to broadly track the Court's approach in its most recent case of *Ohio v. Clark*. In *Clark*, the Court identified factors relevant to the primary purpose determination as including: the existence of an ongoing emergency, the informality of the situation and interrogation, the private or public nature of the interrogator, standard rules of hearsay designed to identify some statements as reliable, the purpose of the individual making the statement, and the purpose of the individual hearing the statement.[139] These factors could be broadly grouped into the purpose of the person making the statement, the purpose of the individual hearing the statement, and the surrounding context.[140] When the context includes an emergency as it

137. *See id*.

138. Clark, 135 S. Ct. at 2179-80 ("[Statements] are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions."); Bryant, 562 U.S. at 358-59 ("When no such primary purpose exists [to create an out-of court substitute for trial testimony], the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause."); Washington, 547 U.S. at 822 (discussing statements as testimonial when "the primary purpose of the interrogation is to establish or prove events potentially relevant to later criminal prosecution").

139. *See* Clark, 135 S. Ct. at 2180.

140. The existence of an ongoing emergency would go towards the surrounding context; the informality of the situation and interrogation would inform both the surrounding context and the primary purpose of the interrogator and declarant; the private vs. public nature of the interrogator would go to both the primary purpose of the interrogator and the primary purpose of the declarant; the purpose of the individual making the statement would inform the court as to the primary purpose of the declarant, and the purpose of the individual hearing the statement would inform the court as to the primary purpose of the interrogator. *See* Clark, 135 S. Ct. at 2180. The existence of standard rules of hearsay designed to identify some statements as reliable is of debatable weight, but it appears to go to the surrounding circumstances. *See* Bryant, 562 U.S. at 391 (Scalia, J., dissenting) (criticizing the inclusion of this factor as being too similar to the *Roberts*' indicia of reliability).

did in *Cooper* and *Burney*, this approach can use *Davis* as a close analogy in conducting the inquiry.[141]

The other main advantage of this approach is the inherent flexibility that it gives trial courts in determining whether statements are testimonial.[142] This flexibility has allowed courts to expansively define ongoing emergencies so as to admit statements of victims who are since deceased.[143] In *Bryant*, the Supreme Court held that a victim's statements of "Rick shot me" or "I was shot," made while the victim was lying on a gas station parking lot bleeding from a mortal wound, was made in the context of an ongoing emergency.[144] Although there clearly was a medical emergency, it is unclear how the objective purpose of the police encounter with the victim was to resolve the emergency and not to obtain important information about the assailant from the victim who might not survive.[145] In *Cooper*, the court was even more expansive in its definition of ongoing emergency by including the possibility that the victim would not be able to take care of herself.[146] This expansive definition of an "ongoing emergency" allows for significant discretion at the trial court.

4. DRAWBACKS OF THE MULTI-FACTOR ANALYSIS APPROACH

However, the multi-factor approach also has some drawbacks. First, the multitude of factors and the expansive definition of "ongo-

141. *See* Cooper, 148 Cal. App. 4th at 743 ("The February interview bore significant similarities to the scenario presented in *Davis*. The circumstances of the interview objectively indicate that its primary purpose was to assess Nelson's mental and physical condition and deal with her potentially critical need for assistance and protection."); *see also* Burney, 963 N.E.2d at 443 (discussing how the victim Krause made her statements in response to an ongoing emergency).

142. *See generally* Clark, 135 S. Ct. at 2179-80 (discussing the primary purpose test as an objective test that considers all the circumstances).

143. *See, e.g.*, Cooper, 148 Cal. App. 4th at 743 (analogizing the February interview to the emergency in *Davis*); *Burney*, 963 N.E.2d at 443 (discussing how the victim Krause made her statements in response to an ongoing emergency).

144. Bryant, 562 U.S. at 375.

145. *See id.* (Scalia, J., dissenting) ("The Court invents a world where an ongoing emergency exists whenever 'an armed shooter, whose motive for and location [are] unknown, . . . mortally wound[s]' one individual 'within a few blocks and [25] minutes of the location where the police' ultimately find that victim . . . nothing suggests the five officers in this case shared th[e] court's dystopian view of Detroit, where drug dealers hunt their shooting victims down and fire into a crowd of police officers to finish him off."); *see also id.* at 395 (Ginsberg, J., dissenting) (arguing that the primary purpose of the declarant was to bear testimony, and the officers likely "viewed their encounter with Covington [as] an investigation into a past crime with no ongoing or immediate consequences.").

146. *See* Cooper, 148 Cal. App. 4th at 743.

ing emergency" do little to limit discretion.[147] The Court has reiterated that the primary purpose inquiry is "not the subjective or actual purpose of the individuals involved . . . but rather the purpose that reasonable participants would have had."[148] It focuses on both the objective purposes of the interrogator and the declarant.[149] However, the Supreme Court has given little guidance for what lower courts ought to do when the primary purpose of one party seems to contradict the primary purpose of the other party or when there are multiple objective purposes and no one purpose seems to dominate.[150] Lower courts can adopt additional guidance in this area if they see fit and it is in comport with the general rules the Supreme Court has laid forth. For example, Illinois has developed the rule that if a statement is the product of police questioning, the objective intent of the questioner is determinative.[151] However, even if the police have an institutional purpose for creating a record for future trial, the police may have alternative purposes as well.[152] Moreover, the multitude of factors analyzed can lead to a back-door reliability analysis similar to the *Roberts* analysis rejected in *Crawford*.[153]

The second drawback of the multi-factor approach is that it fails to provide for any balancing of the confrontation right against public safety.[154] The right of confrontation is not an absolute right.[155] The ultimate goal behind the confrontation clause is to "ensure reliability of evidence" while deterring state abuse.[156] Although the Court in *Crawford* characterized this as a procedural rather than substantive

147. *See* Bryant, 562 U.S. at 393 (Scalia, J., dissenting) ("Where the prosecution cries 'emergency,' the admissibility of a statement now turns on 'a highly context-dependent inquiry. . . .'").
148. *Id.* at 360.
149. *Id.*
150. *See id.* (Ginsberg, J., dissenting 2011) (arguing that the declarant's intent should be determinative).
151. Burney, 963 N.E.2d at 441 (citing People v. Sutton, 908 N.E.2d 50, 64 (Ill. 2009)).
152. Davis, 547 U.S. at 839 (Thomas, J., dissenting) ("In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence.").
153. Bryant, 562 U.S. at 393 (Scalia, J., dissenting).
154. *See infra* Part III: Recommendation.
155. *See* Crawford, 541 U.S. at 74 (Rehnquist, J., concurring); *see generally Burr*, 25 F. Cas. At 187.
156. Crawford, 541 U.S. at 61.

right,[157] such a procedural right should still not be absolute. When a victim has died before trial and cannot be subjected to cross-examination, it is unduly intrusive on the truth-seeking function to exclude hearsay statements that would traditionally be admissible under the rules of evidence.[158] The right to confrontation is one of the most important constitutional rights.[159] However, the multi-factor approach does little if anything to balance the accused's rights against public safety against the truth seeking function.

B. Second Approach: Applying the Primary Purpose Test through Actor Analysis

The second approach that courts have taken in confrontation cases involving elderly witnesses involves making the determination largely on admissibility on the basis of the private vs. public nature of the individual testifying.

1. HOW A FLORIDA COURT HAS UTILIZED ACTOR ANALYSIS

In *Paraison v. State*, a Florida appellate court held that statements made by an elderly woman to police officers who arrived on the scene of an armed burglary shortly after the defendant had left were testimonial, but statements that she made to her son were not.[160] Intruders broke into the home of Ms. Whitehead, the elderly victim; battered and robbed her; and left her tied to a chair with duct tape when they left.[161] She freed herself and called emergency services and her son.[162] When the police arrived, she was found lying on the kitchen floor in her nightgown with remnants of duct tape on her wrists, face,

157. *Id.* ("It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

158. *See* Lyon, *supra* note 95, at 1056 (contending that it is fundamentally unfair to allow defendants to benefit from their choice to victimize individuals who are unavailable to testify for reasons other than the state or defendant's actions).

159. Burr, 25 F. Cas. at 193.
("I know of no principle [sic] in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore [13] incumbent on courts to be watchful of every inroad on a principle so truly important. This rule as a general rule is permitted to stand, but some exceptions to it have been introduced, concerning the extent of which a difference of opinion prevails, and that difference produces the present question.").

160. Paraison v. State, 980 So. 2d 1134, 1136 (Fla. Dist. Ct. App. 2008).

161. *Id.* at 1135.

162. *Id.*

and neck.[163] Still in a state of shock,[164] she told police officers and her son, who arrived after the police, what had occurred.[165] Tragically, the victim died before trial.[166]

In finding that the statements made to the officers at the scene were testimonial,[167] the court reasoned that there was no ongoing emergency unlike the situation in *Davis*.[168] The court in *Paraison* did find that, even though the elderly victim was lying on the kitchen floor with the remnants of duct tape on her and in shock when the officers arrived at her house, "there was no ongoing emergency."[169] As such, the statements made were the result of "Officer Hayes. . . simply interviewing the victim of a crime to ascertain the facts necessary to establish criminal activity, assist in further investigation, and further a possible future prosecution."[170] The fact that similar statements made to the son at virtually the same time were admitted while the ones to the officer were not indicates that the reliance on the emergency rationale for the statements to her son was stressed at best. It is more likely that the court mainly based its decision on the principle that "spontaneous statements to family or friends are not likely to be testimonial under *Crawford*. . . ."[171]

2. A SECOND EXAMPLE: HOW A MICHIGAN COURT ALSO IMPLEMENTED ACTOR ANALYSIS

In *People v. Jordan*, a Michigan court reached a similar conclusion.[172] In *Jordan*, a seventy-three-year-old woman called the police at

163. *Id.*

164. *See id.* This case provides a good illustration of the space between the rules of evidence and the Confrontation Clause. Because the victim here was still in a state of shock, the statements that she made to the police officers would likely be admissible as an excited utterances. If the statements were made just a little while later while she was not still in a statement of excitement, they would likely be barred by the hearsay rule, so there would not need to be any discussion of the Confrontation Clause.

165. *Id.*

166. *Id.*

167. *See id.* at 1136 (The victim's statements that she had been robbed when she was calling for help were admissible as non-testimonial statements since they were made for the primary purpose of obtaining assistance.)

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 1137; *see* Clark, 135 S. Ct. at 2182 ("[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.").

172. People v. Jordan, 739 N.W.2d 706, 710 (Mich. Ct. App. 2007).

about 6:00 a.m. to report that someone was trying to break into her apartment.[173] The perpetrator broke into the apartment, tore the telephone off the wall, robbed and raped the victim, and then fled.[174] The victim ran outside and told Ferris, the owner of a service station across the street, to call 911 and that she had been raped.[175] She failed to tell the police about the rape when they arrived.[176] However, after they left, the victim's landlord and close friend, Avery, arrived, and the victim told Avery about the rape.[177]

The court held that the statements both to the service station owner and to the friend, Avery, were admissible as non-testimonial statements.[178] The Court found that neither the convenience store owner nor the longtime friend had conducted the functional equivalent of an interrogation.[179] Even if the questions that the storeowner and friend asked were the functional equivalent of interrogation, their questions were non-testimonial under the primary purpose test because they were necessary "to obtaining or providing emergency medical care."[180] Like the court in *Paraison*, the court in *Jordan* identified the existence or non-existence of an emergency as a crucial factor in assessing whether the statements were testimonial or not.[181] In practice, both courts excluded very little of the unavailable victim's hearsay testimony except for those statements made directly to police officers who were in the process of investigating a criminal offense.[182]

173. *Id.* at 708.
174. *Id.*
175. *Id.* at 709.
176. *Id.*
177. *Id.*
178. *Id.* at 710.
179. *Id.* at 709-11 (The victim also made statements to the police officers who arrived on the scene. However, at the trial level the defendant challenged only the statements to Ferris and Avery not to the 911 supervisor or the detective as a matter of trial strategy. The court held that there was no plain error.).
180. *Id.* at 710.
181. *Id.*; *see* Paraison, 980 So. 2d at 1136 (discussing how there was no ongoing emergency at the time of the statements to the officer).
182. *See* Paraison, 980 So. 2d at 1137 (noting that "spontaneous statements to family or friends are not likely to be testimonial under *Crawford*"); Jordan, 739 N.W. 2d at 710 (admitting statements made to friend after police arrived on the theory that they were made to obtain emergency treatment even though 911 had been called, the police had come, and they had already left before the statements to Avery were made).

3. ADVANTAGES TO THE ACTOR ANALYSIS APPROACH

The first benefit of the actor analysis is that it, like the multi-factor analysis, purports to follow Supreme Court guidance on the matter.[183] Since the final determination as to admissibility should be based on the primary purpose of the encounter,[184] and it is unlikely that most private citizens would tell another private citizen a statement with the intent of creating a record to be used for trial,[185] it is logical for courts to be more flexible in admitting such statements. In *Ohio v. Clark*, the Court made its ultimate determination as to admissibility of the three-year-old's statement based on all the circumstances.[186] However, the Court recognized that the private nature of the preschool teacher was a critical fact.[187] The Court advised that in situations involving private parties, such statements would rarely be testimonial.[188]

The second advantage of this approach is that it can provide some balancing of equitable concerns when statements are made to a private party. It provides an easy way for courts, like the one in *Paraison*, to admit statements that are virtually identical to the statements made to the police officers on the scene when the exclusion might be removal of the victim's only testimony and the victim's unavailability is due to no fault of the state.[189] In situations where the elderly witness has died before trial, like in both *Paraison* and *Jordan*, this reliance on statements made to a private party can be a creative solution to potential confrontation problems.[190]

183. Both cases analogize to the emergency rationale in *Davis*. *See* Paraison, 980 So. 2d at 1137. Jordan, 739 N.W. 2d at 710.

184. Clark, 135 S. Ct. at 2179-80 ("[Statements] are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions."); Bryant, 562 U.S. at 358-59 ("When no such primary purpose exists [to create an out-of-court substitute for trial testimony], the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause."); *Davis*, 547 U.S. at 822 (discussing statements as testimonial when there is no ongoing emergency and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions.").

185. *See* Clark, 135 S. Ct. at 2182 ("Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.").

186. *See id.* at 2181.

187. *See id.* at 2181-82.

188. *Id.* at 2181.

189. *See* Paraison, 980 So. 2d at 1135.

190. *See id.*; Jordan, 739 N.W. 2d at 710.

4. DISADVANTAGES TO THE ACTOR ANALYSIS APPROACH

However, when there is no private party to fall back upon, most of the concerns discussed above are still applicable.[191] The court will have to fall back onto the standard primary purpose analysis and all the ambiguities that the test involves.[192] In fact, the way that courts admit statements made to a private party while simultaneously excluding other statements that are virtually identical made to law enforcement highlights the arbitrariness of the primary purpose test.[193] Furthermore, this approach also fails to provide for any balancing between the defendant's right to confrontation and the necessity to admit the testimony when there is no private party.[194] The defendant's right to confrontation should be protected zealously.[195] But the harsh exclusion of all testimonial hearsay when the rule is triggered still remains one of the more prominent problems with *Crawford*'s attempted implementation of eighteenth century hearsay law into constitutional doctrine.[196]

C. Third Approach: Creating Accommodations for Witnesses when They Can Testify

The third method that lower courts have used in applying the primary purpose test to cases with elderly witnesses involves requiring the witnesses to testify with special accommodations.[197] This can be accomplished in three ways. First, the court can create accommodations for those who are too physically impaired to travel.[198] Second, it can allow the memorialization of testimony before trial subject to

191. *See supra* notes 147-159 and accompanying text.

192. *See, e.g.*, Bryant, 562 U.S. at 393 (Scalia, J., dissenting) ("Where the prosecution cries 'emergency,' the admissibility of a statement now turns on 'a highly context-dependent inquiry. . . .'").

193. *See supra* notes 150-153 and accompanying text.

194. *See supra* notes 154-159 and accompanying text.

195. Burr, 25 F. Cas. at 193.

196. *See* discussion *infra* Part III: Recommendation.

197. Some states have adopted special hearsay exceptions for dependent or elderly adults. This Note will not address these exceptions in any sort of detail as they appear to be, at best, on shaky constitutional grounds. *See, e.g.*, People v. Pirwani, 14 Cal. Rptr. 3rd 673, 681 (Cal. Ct. App. 2004) (holding that statute creating hearsay exception for elderly or dependent adults to police officers violates the confrontation clause post-Crawford); Conner v. Florida, 748 So.2d 950, 960 (Fla. 1999) (holding that a statutory hearsay exception for elderly adults in criminal cases violated the confrontation clause).

198. *See, e.g.*, People v. Wrotten, 923 N.E.2d 1099, 1099 (N.Y., 2009).

cross-examination.[199] Third, it can allow the witness to testify for the purposes of confrontation even if he or she cannot actually remember the statements made.[200]

1. ACCOMMODATIONS FOR WITNESSES WHO ARE UNABLE TO TRAVEL

First, the courts can create accommodations for witnesses who are unable to travel to testify. In *People v. Wrotten*, the New York Court of Appeals held that the defendant's confrontation rights were not violated when the trial court allowed real-time, two-way video testimony of an elderly witness living in another state after finding that because of age and poor health he was unable to travel to New York.[201] The trial court required that the prosecution show that the witness was unavailable to testify at trial before it would allow the video appearance to occur.[202] The witness testified from a courtroom in California, where he then lived, appearing "on screen" so that the judge, prosecutor, defense counsel, defendant, and jury could all see him "very clearly," including "any expression on his face."[203]

In holding that the live two-way video satisfied the Confrontation Clause, the court reasoned that it satisfied the primary concern of "ensur[ing] the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[204] The court also noted that this was "an exceptional procedure to be used only in exceptional circumstances."[205] The court also stressed that the core elements of the confrontation right, including the testimony under oath, the opportunity for cross-examination, and the opportunity for the judge, jury, and defendant to view the witness's demeanor, were unimpaired.[206]

199. *See, e.g.*, Colo. Rev. Stat. Ann. § 18-6.5-103.5 (West 2016).
200. *See* United States v. Owens, 484 U.S. 554, 559 (1988); United States v. George, 532 F.3d 933, 937 (D.C. Cir. 2008); Murphy, *supra* note 19, at 1250.
201. Wrotten, 14 N.Y. 2d at 36.
202. *Id.* at 37.
203. *Id.*
204. *Id.* at 39.
205. *Id.* at 40; *see also id.* at 39 (analogizing to two-way video testimony permitted by child witness allegedly the victim of child abuse as upheld in *Maryland v. Craig*, 497 U.S. 836 (1990)).
206. *Id.* at 39.

2. ACCOMMODATIONS THROUGH PRE-TRIAL DEPOSITIONS

Second, courts can allow for special depositions to be made in cases involving elderly witnesses who may have declining health.[207] Prosecutors can use depositions in cases that involve elderly witnesses who are ill or appear to have declining mental capacity in anticipation of the possibility of future unavailability.[208] Under the Federal Rules of Criminal Procedure, the court has significant discretion to allow for depositions "because of exceptional circumstances and in the interest of justice."[209] Colorado has a statute that specifically allows for special depositions to preserve testimony for trial and provide for cross-examination in cases involving elderly witnesses.[210]

3. SATISFYING CONFRONTATION EVEN WHEN THE WITNESS REMEMBERS NOTHING

Third, since the inability to remember information often occurs at later stages of dementia,[211] it is possible for a witness to be unavailable to testify for the purpose of allowing the admittance of hearsay testimony while still being physically capable of appearing for the purposes of cross-examination.[212] While mental illness by itself should not be presumed to undermine a witness's competency to testify under the Federal Rules of Evidence,[213] witnesses are not qualified to testify if they lack personal knowledge or are without the ability to understand the duty to testify truthfully.[214] Nevertheless, confrontation can remain unimpaired despite a witness failing to remember the tes-

207. *See* Crawford v. Washington, 541 U.S. 36, 53-54 (discussing how testimonial statements of witnesses who do not appear at trial are not barred if the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine the witness).

208. *See* FED. R. CRIM. P. 15.

209. *Id.*

210. Colo. Rev. Stat. Ann. § 18-6.5-103.5 (West 2016).

211. ALZHEIMER'S ASS'N, *What is Dementia?*, http://www.alz.org/what-is-dementia.asp (last visited Mar. 27, 2017) (discussing memory loss as a symptom of dementia and noting that in many of dementia's symptoms start out slowly and grow worse over time).

212. *See* U.S. v. Owens, 484 U.S. 554, 559 (1988); *see also* U.S. v. George, 532 F.3d 933, 937 (D.C. Cir. 2008); Murphy, *supra* note 19, at 1250.

213. George, 532 F.3d at 937.

214. *See* FED. R. EVID. 601 (competency to testify in general); FED. R. EVID. 602 (personal knowledge requirement); FED. R. EVID. 603 (oath or affirmation requirement); *see also* United States v. Odom, 736 F.2d 104, 112 (4th Cir. 2008); Murphy, *supra* note 19, at 1251.

timonial statements that he or she made previously when the witness appears for cross-examination at trial.[215]

4. THE ADVANTAGE OF PROVIDING ACCOMMODATIONS

These kinds of special accommodations are helpful in providing adequate balancing of the right to confrontation against the need to admit hearsay evidence when the elderly witness would be otherwise unavailable.[216] The Supreme Court has previously allowed the use of testimony through a one-way television stream under the Confrontation Clause in a child abuse case with a child witness.[217] Since the policy concerns are similar, such an accommodation when the television allows for confrontation to be unimpaired is likely constitutional.[218] The increased use of special depositions could likewise be helpful.[219] However, they also present an additional cost of time and money. Finally, in dealing with mental impediments to testimony, the production of witnesses could satisfy both confrontation problems and also present the jury with the complete picture.[220]

5. THE DISADVANTAGES OF COUNTING ON ACCOMMODATIONS

However, the requirement that the witness testify with appropriate accommodations either before or during trial will only provide greater guidance and balancing of equitable concerns in those cases where the elderly witness can be deposed or testify.[221] These accom-

215. *See* Owens, 484 U.S. at 559; *see also* State v. Fields, 168 P.3.d 955 (holding post-Crawford that hearsay statements made by victim in domestic violence case did not violate the defendant's right to confrontation because she appeared at trial even though she testified at trial that she did not remember).

216. *See, e.g.*, People v. Wrotten, 14 N.Y. 3d 33, 37, 40 (2009) (recognizing that the two-way video is an exceptional solution to an exceptional problem while simultaneously recognizing that the defendant's rights were still ensured through adequate transmission of the testimony through the two-way video).

217. *See* Maryland v. Craig, 497 U.S. 836, 850 (1990).

218. *See id.* at 850 (holding that live testimony through one-way television was permitted under the Confrontation Clause in child abuse cases with a child witness so long as there was an individual finding that denial of the physical face-to-face testimony was necessary to further an important public policy and the reliability of the testimony was otherwise assured); *see also* Wrotten, 14 N.Y. 3d at 33.

219. *See* AM. PROSECUTORS RES. INST., *supra* note 11, at 20 (noting that only nine percent of local prosecutors surveyed report using any means including videotapes to preserve victim's statements and only one in seven offices use any particular strategies in elder abuse cases).

220. *See* Owens, 484 U.S. at 559; *see also* Fields, 168 P.3d at 955.

221. *See* FED. R. EVID. 601. (providing a broad presumption that witnesses are competent to testify); *but see* FED. R. EVID. 602-603 (providing personal knowledge requirement and oath or affirmation requirement).

modations can provide for increased flexibility when prosecutors and courts reach the harsh limits of the primary purpose test.[222] As such, they can ameliorate some of the potential pressure to narrow the definition of testimonial statements as occurs in the multi-factor approach.[223] But the limits of such special accommodations are narrowly confined to a small set of cases where the witness can testify in another location, can be deposed adequately before trial, or can still take the stand. When none of these circumstances exist, all of the same problems regarding the ambiguity involved in the primary purpose test discussed above will still be present.[224] Likewise, outside of these special circumstances, there will still be no adequate balancing of the defendant's constitutional rights against the public interest in admitting the testimony.[225]

IV. Recommendation: Moving Beyond *Crawford* by Incorporating Unavailability into the Analysis

In order to better balance the need for testimony along with the right to confrontation, the Supreme Court should clarify and add to the primary purpose test. If the witness is not speaking to a known state actor, there should be a presumption that the primary purpose was not to provide a substitute for at-trial testimony.[226] If the witness is unavailable to testify due to events completely outside the control of the state—such as physical impairment, mental impairment, or death—the unavailability of the witness should be incorporated into the primary purpose test. Unavailability should weigh towards the admissibility for three reasons. First, this addition would recognize the way that lower courts are already applying the primary purpose test.[227] Second, it would be a natural extension of current Supreme Court doctrine.[228] Third, it would provide a better balancing of public

222. *See* Brooks Holland, *Crawford & Beyond: How Far have We Traveled from Roberts After All?*, 20 J.L. & POL'Y 517, 542 (2012) (arguing that the strict exclusionary rule for testimonial evidence causes pressure on judges to narrow the definition of testimonial) [hereinafter Holland]; *see also* Scarbrough, *supra* note 22, at 153 (arguing that the definition of testimonial has been narrowed throughout the years since Crawford).

223. *See* Holland, *supra* note 222, at 542.

224. *See supra* notes 145-151 and accompanying text.

225. *See supra* notes 152-157 and accompanying text.

226. Clark, 135 S. Ct. at 2181. (The Court has already advised that in situations involving solely private parties, statements will rarely be testimonial).

227. *See* Holland, *supra* note 222, at 525.

228. *See infra* notes 248-255 and accompanying text

policy concerns by addressing the problems with the primary purpose test that have been highlighted above.[229]

A. Considering Availability in Determining Admissibility Would be Consistent with Current Practice

First, this addition would be in line with the way that courts already apply the primary purpose test. The flexibility accompanying the totality of the circumstances analysis and the use of the emergency rational already allow for courts to consider the underlying equitable principles involved in the case including unavailability.[230]

1. CONCERN REGARDING AVAILABILITY IS LIKELY ONE FACTOR ALREADY CONSIDERED TO SOME EXTENT IN ADMITTING STATEMENTS NOT MADE TO LAW ENFORCEMENT

In cases where statements are not made directly to law enforcement alone, the statements are not likely to be testimonial.[231] For example, in *Cooper* the court found that the first interview discussed was largely non-testimonial even though the intervening team did include a detective and there were allegations that the defendant might be defrauding the victim.[232] Similarly, in *Clark*, the Court admitted the statement made by the three-year-old child to his preschool teacher despite the fact that the teacher was required by statute to report any allegations of child abuse.[233] In both of these cases, concerns about excluding the only available testimony of child abuse and elder abuse were likely lurking in the background.[234]

229. *See infra* notes 256-265 and accompanying text. Such statements would still need to meet the traditional hearsay requirements. In the Federal system, this would be meeting an exception under FED. R. EVID. 802 or 803.

230. *See* Holland, *supra* note 222, at 525 ("Bryant certainly returns confrontation law to a malleable judicial test that invites judges to decide whether out-of-court statements inspire sufficient confidence to dispense with cross-examination at trial.").

231. *Clark*, 135 S. Ct. at 2181.

232. *See* Cooper, 148 Cal. App. 4th at 736 (finding that first videotaped interview was largely non-testimonial in part because it was conducted by a team including a social worker and a nurse).

233. Clark, 135 S.Ct. at 2180.

234. *See generally* Holland, *supra* note 222, at 542; Sklansky, *supra* note 36, at 1 (arguing that the importance of the rule against hearsay has been declining in the United States).

2. CONCERN REGARDING AVAILABILITY IS LIKELY A FACTOR ALREADY CONSIDERED IN ADMITTING STATEMENTS MADE TO LAW ENFORCEMENT AS WELL

Even in cases that do involve statements made directly or indirectly to law enforcement, courts have been willing to admit statements as non-testimonial when there is a reasonable alternative explanation for the encounter other than simply investigating a crime.[235] The existence of an ongoing emergency has been stretched at times.[236] For instance, in *Bryant*, the Court found that the primary purpose of the questions the police asked the victim was to resolve the ongoing medical emergency that arose after the victim was shot.[237] In *Bryant*, the police asked the victim to identify the person who shot him while he was bleeding from a mortal wound on the ground of a gas station surrounded by police officers six blocks away from the shooter.[238] The identification of the shooter was in no way necessary to obtain emergency medical care for the victim.[239] However, the Court allowed it to be admitted as non-testimonial.[240] There was a reasonable explanation for the officers to question the victim other than only to investigate a crime.[241] The crucial piece of evidence would not be otherwise admitted. As such, the Court was able to use the flexible totality of the circumstances analysis to allow it to come in even when it was part of a police interrogation.[242]

3. BRINGING UNAVAILABILITY CONCERNS TO LIGHT WOULD HELP RESOLVE CONCERNS REGARDING THE AMORPHOUS NATURE OF THE PRIMARY PURPOSE TEST

Recognizing the unavailability of the witness as one factor in the primary purpose test would allow for these equitable concerns already addressed to be dealt with in a more forthright manner.[243]

235. *See, e.g.*, Burney, 963 N.E.2d at 443 (discussing how the victim Krause made her statements in response to an ongoing emergency); *see also* Cooper, 148 Cal. App. 4th at 743 (discussing how the February interview was made with the primary purpose of meeting an ongoing emergency to determine whether the victim could take care of her medical needs).

236. *See* Bryant, 562 U.S. at 393 (Scalia, J., dissenting).

237. *Id.* at 374-75.

238. *Id.* at 374-75; *see id.* at 383 (Scalia, J., dissenting) (contending that there was little reason for officers to repeatedly ask the victim who had shot him other than to ensure the arrest and eventual prosecution of the defendant).

239. *See id.* at 374-75.

240. *Id.*

241. *See id.*

242. *See id.*

243. *See* Holland, *supra* note 222, at 542 ("Judges already are acknowledging these [real-world equity] concerns, just under the guide of Crawford's testimonial

Cooper provides a useful illustration. In *Cooper*, there were several possible rationales for the primary purpose surrounding the first interview.[244] It could have been to investigate a possible crime.[245] It also could have been to determine whether the victim was in need of medical treatment.[246] Under the proposed primary purpose test, the unavailability of the victim to testify for reasons completely outside the control of the state would weigh towards the admission of the entire interview. If the test is already flexible enough to accommodate these unavailability concerns, and judges already likely do consider them,[247] they should be considered out in the open.

B. This Approach Would Be a Natural Extension of *Crawford*

Not only would this exception be consistent with actual practice, but it would also be a natural extension of current *Crawford* doctrine. Scholars debate whether the Court's movement towards the strict testimonial framework in *Crawford* is justified.[248] However, even assuming that this movement is justified,[249] the common-sense move-

evidence framework."); *see also* Josephine Ross, *Criminal Law: After Crawford Double-Speak: "Testimony" Does not Mean Testimony and "Witness" Does not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 148 ("*Davis v. Washington* . . . puts to rest some of Crawford's ambiguity, but does not resolve Crawford's central contradiction between its desire for more face-to-face confrontation and its limited reading of the scope of the Confrontation Clause.") [hereinafter Ross].

244. *See* Cooper, 148 Cal. App. 4th at 743-44.

245. *See generally id.* (discussing how the first interview's primary purpose was to assess Nelson's mental and physical condition and deal with her potential need for assistance but the primary purpose later devolved into investigation in anticipation of a possible future criminal trial). Ultimately, this is not what the court decided, but considering the ambiguous circumstance and the flexibility of the multifactor approach it could have decided this.

246. This argument was ultimately accepted by the court. *See id.* at 743.

247. *See* Holland, *supra* note 222, at 542 ("Judges already are acknowledging these [real-world equity] concerns, just under the guide of Crawford's testimonial evidence framework."); *see also* Ross, *supra* note 243, at 148 ("*Davis v. Washington* (*Davis/Hammon*), puts to rest some of Crawford's ambiguity, but does not resolve Crawford's central contradiction between its desire for more face-to-face confrontation and its limited reading of the scope of the Confrontation Clause.")

248. *See* Davies, *supra* note 25, at 350-51 (arguing that the testimonial framework in *Crawford* and *Davis* is not rooted in history); Lininger, *supra* note 66, at 766 (contending that *Crawford* is generally sound but fails to provide adequate guidance to lower courts); Ross, *supra* note 243, at 149 (discussing how *Crawford* may have been needed to return the rights of the accused to confront witnesses in domestic violence cases where hearsay was often readily admitted under *Roberts* but gave little guidance to lower courts).

249. This Note takes the primary purpose test as the starting position because that is what the Supreme Court has adopted as its framework for the past twelve years, and the Court will not likely overrule this framework lightly.

ment in both evidence law and constitutional law has been away from rigidity and towards greater flexibility.[250]

Recent Supreme Court cases have evidenced this movement towards greater flexibility. In *Davis*, the Court narrowed what could have been a much broader definition of testimonial statements through its ongoing emergency rationale.[251] In *Bryant*, the Court arguably expanded the definition of emergency[252] by adopting the flexible totality of the circumstances analysis.[253] The Court also noted in *Bryant* that in determining the primary purpose, "standard rules of hearsay, designed to identify some statements as reliable will be relevant."[254] Finally, in *Clark*, the Court continued to stress the importance of flexibility through the multitude of factors used for the primary purpose analysis.[255] Thus, incorporating unavailability concerns into the primary purpose test would be consistent with the Court's current movement towards greater flexibility.

C. This Approach Would Further Public Policy

Third, the incorporation of unavailability concerns into the primary purpose test would further the public policies underlying both Crawford and the Confrontation Clause. The basic policies behind both the confrontation clause and *Crawford* are (1) ensuring reliability and (2) preventing governmental abuse.[256] At the most basic level, these policies promote the truth-seeking function of the courts.[257] In regards to reliability, the Confrontation Clause generally requires evidence to be verified through "the crucible of cross-examination."[258] The concern for reliability as ensured through oath and cross-examination[259] is largely satisfied through the rules of evidence.[260]

250. *See* Sklansky, *supra* note 36, at 1; Swift, *supra* note 22, at 1345.
251. Davis, 547 U.S. at 822.
252. *See* Bryant, 562 U.S. at 383 (Scalia, J., dissenting).
253. Bryant, 562 U.S. at 374-75.
254. *Id.* at 358-59.
255. *See* Clark, 135 S. Ct. at 2178, 2181.
256. *See* Crawford, 541 U.S. at 53.
257. *See, e.g.*, Akil Reed Amar, *Sixth Amendment First Principles*, 84 GEO L.J. 641, 688 (1996) ("Like many other intermeshing Sixth Amendment ideas, confrontation is designed to promote the truth."); *see also*, FED. R. EVID. 801(a)(1) (discussing both the oath that witnesses undertake to testify in court and cross-examination as "truth-compelling device[es]").
258. *Crawford*, 541 U.S. at 61.
259. *See* generally Amar, *supra* note 257, at 688 (discussing the confrontation requirement as a requirement designed to promote the truth); FED. R. EVID

The other main principle, the prevention of governmental abuse, is likewise ensured through confrontation.[261] But this policy is not always ensured through the rules of evidence, and as such, actually drives significant confrontation decision-making.[262] For example, courts find statements made to police officers to be more likely to be testimonial than those made to a private party.[263] This makes little sense in regards to reliability. A statement is no more reliable and perhaps even less so because it is made to an acquaintance than a police officer.[264] However, the introduction of testimonial statements made to a police officer does implicate the very real danger of abuse because only the state actor could potentially be deterred from abuse.[265]

Including the unavailability of the witness into the primary purpose test would further public policy.[266] Since the witness is either unavailable to testify or deceased, the prosecution and the police would not be able to count on such an exception.[267] Failing to recognize unavailability as an aspect of the analysis has little to no deterrent effect on police or prosecutors.[268] Instead, it simply extracts an unfairly

801(a)(1) (discussing both the oath that witnesses undertake to testify in court and cross-examination as "truth-compelling device[es]").

260. *See* FED. R. EVID. 804 ("The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant."); *see also* Sklansky, *supra* note 36, at 1 (noting that "most laypeople who give the matter any thought, understand the dangers of secondhand testimony").

261. *See* Crawford, 541 U.S. at 53.

262. *See* Bryant, 562 U.S. at 353 (discussing how the confrontation clause was drafted to prohibit the "civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused," thus prohibiting the abuses in England where a defendant could be convicted without ever facing or getting to test the testimony of his accuser).

263. Clark, 135 S. Ct. at 2181.

264. *See* Crawford, 541 U.S. at 51 (discussing how an off-hand overheard remark might be unreliable and thus excluded under the hearsay rules but it did not present the type of danger that the Confrontation Clause targeted); *see also* Holland, *supra* note 222, at n.87.

265. Crawford, 541 U.S. at 51 ("An 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."); *see also Bryant*, 562 U.S. at 353 (discussing how the confrontation clause was directed at preventing *ex parte* examination as evidence against defendants).

266. *See generally*, Crawford, 541 U.S. at 53 (discussing the prevention of governmental abuse as one of the primary policies behind the confrontation clause).

267. *See* FED. R. EVID. 804. Even when hearsay is allowed, the state's interest is to produce live testimony from the witness whenever possible. The trier of fact will likely realize that testimony given on the stand is of more value than hearsay.

268. *See generally* Crawford, 541 U.S. at 68. It would be unlikely that police officers would be able to predict which witnesses would be unavailable in the future

high price upon society and elderly victims who are unable to testify at trial. Thus, it would be in the interest of justice for the Court to incorporate unavailability concerns into the primary purpose test.

V. Conclusion

Few could fault the Supreme Court for breaking the alliance between the rules of hearsay and the Confrontation Clause under *Roberts*. However, *Crawford* has had the unintended consequences of making the prosecution of elder abuse cases more difficult than it already was. Lower courts and state courts have experimented with a variety of approaches in dealing with confrontation challenges in cases involving elderly witnesses. Some courts have used a multi-factor analysis to determine admissibility of hearsay statements. Other courts have focused on whether the encounter took place with a law enforcement officer or a private actor. Still other courts have allowed some special accommodations for elderly witnesses who are unable to testify without them.

Ultimately, all of these approaches fail to provide adequate guidance to lower courts and fail to provide any meaningful balance of the applicable constitutional concerns.[269] In moving beyond the *Crawford* framework, the Court should include the unavailability of the witness into the primary purpose test. This movement would (1) be consistent with how courts currently address unavailability concerns, (2) be a natural extension of *Crawford*, and (3) further the underlying public policies. The consideration of unavailability as part

and attempt to elicit hearsay statements from them in anticipation of this future unavailability. Even if they did try to game the system, so to say, they would have to comply not only with the confrontation requirement but also with the exceptions to the hearsay rule. On the rare occasion where testimony was adequately preserved in this manner, it is still a far cry from the kind of abuse the confrontation clause was aimed at eliminating. The greater danger occurs when the government conducts an out-of-court trial of the defendant through the use of hearsay statements by competent witnesses to avoid cross-examination.

269. In this way the primary purpose test as it currently stands has problems with both overbreadth and under-breadth. It is overbroad because it does not include the important consideration of unavailability. It is under broad because the test is so flexible that it allows for the unavailability concerns to come in but without the appropriate analysis of a legitimate factor. Including unavailability concerns into the actual test would not solve every problem with the primary purpose test but it would ameliorate some of the pressure towards narrowing the constitutional right for reasons outside the rule while also focusing the exclusion on the kind of cases that actually need to be excluded.

of the primary purpose test will not solve every challenge accompanying elder abuse cases; but it is a step in the right direction.