Toward a Unified Theory of Testimonial Evidence Under the Fifth and Sixth Amendments

Michael J.Z. Mannheimer
Toward a Unified Theory of Testimonial Evidence
Under the Fifth and Sixth Amendments*

Michael J. Zydney Mannheimer**

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 allow a criminal defendant to confront 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 he or 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 both. 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 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 Miranda jurisprudence. 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 all of the other exceptions to Miranda: the “public safety,” “routine booking question,” and “undercover officer” exceptions.

* ©2007 by Michael J. Zydney Mannheimer.

** Associate Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. J.D. 1994, Columbia Law School. E-mail: mannheimem1@nku.edu.
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 non-investigatory motive was a substantial factor in bringing about the exchange of information.

INTRODUCTION..................................................................................................................3

I. “WITNESS” IN THE SELF-INCRIMINATION AND CONFRONTATION CLAUSES........6
   A. “Testimonial” Take One: The Self-Incrimination Clause and the Assertion Requirement..........................................................7
   B. “Testimonial” Take Two: The Confrontation Clause and the Contemplation-of-Litigation Requirement.................................................10

II. TOWARD A UNIFORM MEANING OF “WITNESS”....................................................15
   A. Rebutting the Arguments Against a Uniform Meaning of “Witness”........17
      1. The Historical Argument.....................................................................................................................18
      2. The Functional Argument..................................................................................................................20
   B. The Assertion Requirement..................................................................................................................21
      1. The Assertion Requirement in the Confrontation Clause.................................................................22
      2. The Assertion Requirement in the Self-Incrimination Clause Redux.............................................25
         a. The Impeachment Exception to Miranda.........................................................................................25
         b. The “Sixth Birthday” Question and Compelled Psychiatric Examinations....................................28
   C. The Contemplation-of-Litigation Requirement in the Self-Incrimination Clause – The Other Exceptions to Miranda..................................................33
      1. The “Public Safety” Exception...........................................................................................................34
      2. The “Routine Booking Question” Exception......................................................................................45
      3. The “Undercover Officer” Exception................................................................................................51

III. SOME IMPLICATIONS OF A UNIFORM MEANING OF “WITNESS”..........................55
   A. What the Confrontation Clause Can Teach Us About the Self-Incrimination Clause.................................................................56
      1. Tweaking the Definition of “Interrogation” Pursuant to Miranda.......................................................56
         a. Express Questioning.........................................................................................................................58
         b. The Functional Equivalent of Express Questioning......................................................................60
         c. An All-Purpose Definition of Interrogation....................................................................................66
      2. Limiting Miranda to Statements Offered for Their Truth.................................................................69
      3. Whither Portash?.................................................................................................................................71
   B. The Problem of Mixed Motives...........................................................................................................72

CONCLUSION......................................................................................................................77
INTRODUCTION

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

“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.”

As a teacher of both Criminal Procedure and Evidence, I become frustrated when I teach the Self-Incrimination Clause in the former class and the Confrontation Clause in the latter class. Since 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. The typical law 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.

---

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 . . . .” U.S. CONST., amend. VI.
6 See Gutman, supra note 5, at 314-27.
This dissection of the Constitution into its constituent parts is particularly problematic when one considers the Self-Incrimination and Confrontation Clauses. The former forbids the government from compelling a person “in any criminal case to be a witness against himself;” while the latter requires the government to allow the accused “[i]n all criminal prosecutions . . . to be confronted with the witnesses against him.” The parallelism is striking. One has to assume that the phrase “witness[es] against him[self]” means the same in both places. Thus, Self-Incrimination Clause cases ought to inform our Confrontation Clause jurisprudence as to the meaning of that phrase, 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 Supreme Court has imposed what can be termed an “assertion” requirement for evidence to be considered testimonial. That is, testimonial evidence consists only of assertions of fact or value, as opposed to either physical evidence or statements introduced merely to prove how they were made. And in the Confrontation Clause context, the Supreme Court has imposed

---

7 Gutman, id. at 331-43, specifically discusses the stunted development of Confrontation Clause jurisprudence as a field of evidence law rather than of constitutional law.

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 Malloy v. Hogan, 378 U.S. 1, 7 (1964) (Self-Incrimination Clause); Pointer v. Texas, 380 U.S. 400, 406 (1965) (Confrontation Clause). There are compelling arguments why the Clauses should not apply to the States in the same way that they constrain the federal government. See, 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 the criminal procedure provisions of the 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 See supra note 3.

10 See supra note 4.
what can be termed a “contemplation of litigation” requirement. That is, “testimonial” evidence consists only of statements made under circumstances objectively indicating some contemplation of later use at a criminal 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 do many of the mysteries of the *Miranda* doctrine 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 Self-Incrimination and Confrontation Clause cases, including those setting forth the exceptions to the *Miranda* rule, can be explained by the fact that the evidence in those

---

11 This Article is limited to a discussion of testimonial evidence in the form of oral communications provided from citizens to police. I plan in a future work to examine the Court’s emerging unified theory of testimonial documentary evidence.
cases lacked one of these essential attributes of testimonial evidence. Part III discusses some implications of the Court’s emerging unified theory of testimonial evidence. First, the definition of interrogation pursuant to *Miranda* 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*, 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 police 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. Yet the Court has used the word “testimonial” in two very different 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 indicates that the primary purpose of doing so is to secure evidence for use at trial.

---

12 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 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 one of the most important doctrinal terms 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. ___, 37 (forthcoming 2007).
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.\footnote{See Ronald J. Allen & Kristin Mace, The Self-Incrimination Clause Explained and Its Future Predicted, 94 J. CRIM. L. & CRIMINOLOGY 243, 246 (2004) (“Fifth Amendment violations must contain three elements: compulsion, incrimination, and testimony.”).} 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 \textit{testimonial} evidence.\footnote{See 8 JOHN H. WIGMORE, EVIDENCE § 2263, at 379 (1961) ("[I]t is not merely any and every \textit{compulsion} that is the kernel of the privilege, in history and in the constitutional definitions, but \textit{testimonial} compulsion.").} In \textit{Holt v. United States}, the prosecutor sought to have the accused don a blouse before the jury, apparently as a way of showing his identity as the perpetrator of the crime.\footnote{218 U.S. 245, 252 (1910).} The defendant argued that requiring him to demonstrate against his will that the blouse fit him was a violation of the Self-Incrimination Clause.\footnote{\textit{Id}.} 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.”\footnote{\textit{Id}. at 252-53.}

The modern Court has embraced the distinction between communications and physical evidence. In \textit{Schmerber v. California}, the Court held that the non-consensual 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.\textsuperscript{18} 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.”\textsuperscript{19} The Court recognized a distinction between “testimonial” evidence, which is cognizable by the Self-Incrimination Clause, and “real or physical evidence,” which is not.\textsuperscript{20} 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 handwriting\textsuperscript{21} or voice exemplars,\textsuperscript{22} or the non-consensual appearance in a pre-trial identification procedure.\textsuperscript{23} The Court has also held that, while documents obviously make assertions, the compelled production of pre-existing 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.\textsuperscript{24}

\textsuperscript{18} 384 U.S. 757, 761 (1966).

\textsuperscript{19} Id.

\textsuperscript{20} Id. at 764 (internal quotation marks omitted); accord Pennsylvania v. Muniz, 496 U.S. 582, 590 (1990).

\textsuperscript{21} See United States v. Euge, 444 U.S. 707, 718 (1980) (holding that handwriting exemplars do not constitute “testimonial evidence protected by the Fifth Amendment 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].”).

\textsuperscript{22} See 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.”).

\textsuperscript{23} See United States v. Wade, 388 U.S. 218, (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.”).

\textsuperscript{24} 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.”); William J. Stuntz, Self-Incrimination and Excuse, 88 COLUM. L. REV. 1227, 1227 (1988) (“[T]he privilege protects only the testimonial aspects of the act of producing [a] document and not the document itself.”).
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.”25 Thus, if the probative value of the evidence relies upon a person’s “consciousness of the facts [expressed] and the operations of his mind in expressing” them, the evidence is testimonial.26 The same standard applies to evidence of both verbal and non-verbal conduct,27 for “nonverbal conduct contains a testimonial component whenever the conduct reflects the actor’s communication of his thoughts to another.”28 Thus, irrespective of whether the evidence consists of verbal or non-verbal conduct, the touchstone would seem to be whether the person’s “testimonial capacities [are] implicated”29 in the creation of the evidence.

25 Doe, 487 U.S. at 210; accord Muniz, 496 U.S. at 590; see also JOHN M. MAGUIRE, EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE 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 13, 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.

26 Doe, 487 U.S. at 211 (quoting 8 WIGMORE, supra note 14, § 2265, at 385 (alteration added)).

27 See Muniz, 496 U.S. at 594 n.9 (“This definition applies to both verbal and nonverbal conduct . . . .); Doe, 487 U.S. at 209 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.”).

28 Muniz, 496 U.S. at 594 n.9; see also Doe, 487 U.S. at 209 (stating that the 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.”).

29 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 ed. 1976) (“[The privilege] ought also to apply to any conduct that would operate as a communication and thus require the trier to rely upon the accused’s qualities as a witness . . . .”); Dann, supra note 28, at 609 (“[Schmerber’s] participation . . . did not involve his testimonial capacities.”).
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.” In that context, the Court had struggled to formulate a useable conception of the word “witness” as applied to the admission of hearsay 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 his or her statement is admitted at trial.30

First, a “witness” might simply be a person who testifies at trial.31 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. Since, 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: “[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.”32

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 his or her statement is admitted at trial.

---

30 See Ross, supra note 12, at 160 (“How should the courts define `witnesses’ against an accused? Do criminal defendants only have a right to cross-examine those witnesses who actually appear at trial or is the term so broad that it includes all hearsay declarants?”).


32 Id. at 50-51.
admitted at trial, 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.

In Ohio v. Roberts, 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 his or her statement is used at trial. However, the Court created a large loophole in the Confrontation Clause to preserve the sub-constitutional law of evidence. The Clause did not guarantee the defendant the right to cross-examine every such “witness.” If the statement fell into a “firmly rooted 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.

---

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

34 See id at 51 (“[N]ot all hearsay implicates the Sixth Amendment’s core concerns.”).

35 448 U.S. 56 (1980).

36 See id. at 63; see also Ross, supra note 12, at 160 (“Theoretically, any declarant was a witness for Sixth Amendment purposes under Roberts.”).

37 See Ross, supra note 12, at 161 (“[T]here was no absolute right to confront one’s accuser under Roberts . . .”).

38 See Roberts, 448 U.S. at 66.
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. 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.” 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,” because “[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse.”

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*. *Davis* involved statements made by a 911 caller during and in the immediate aftermath of an attack by Davis, her boyfriend. *Hammon* involved statements made to police after they arrived at a home where a domestic assault had allegedly occurred moments

---

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

40 Id. at 51 (quoting 2 Noah Webster, An American Dictionary of the English Language (1828) (alteration in original)).

41 Id.

42 Id. at 56 n.7 (emphasis added).

43 126 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.”

44 See id. at 2270-71.
before. 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.

Though the Court declined to provide an exhaustive test to decide all potential future cases, its explication in *Davis* tells us much about 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. In adopting an objective standard, *Davis* required “courts [to] consider only the observable circumstances of an incident and determine [its] purpose on the basis of those observable circumstances.” This 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 desire for that use,”

---

45 See id. at 2272.

46 Id. at 2273-74.

47 See id. at 2273.


49 Id. at 219.
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.”

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.” 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. By negative implication, then, a statement is nontestimonial as long as its primary purpose, viewed objectively, is for any purpose other than “to establish or prove past


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

52 This restriction should probably not be read too literally. 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 12, 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 (“While people dialing 911 may not know the exact use their statements will be put to, generally people know that it is a method to summon the police and will likely result in arrest or prosecution.”). Moreover, since 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, supra note 50, at 250 (“A great deal of criminal procedure occurs before trial . . . and evidence provided to the authorities can be useful to them and help them secure a conviction long before trial.”). Thus, Ross, supra note 12, at 180, 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.” 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) (“The test does not demand certainty that a trial is in the offing, but only a reasonable anticipation of a trial.”).

In addition, it is possible that a statement made in contemplation of civil litigation might qualify as testimonial, 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. See Friedman, supra note 50, at 249 n.26 (opining that if “the declarant made [a] statement in anticipation of [civil] litigation, it probably should be considered testimonial as a general matter”). On the other hand, “[a]n alternative and plausible rule would require a demonstration that the declarant anticipated prosecutorial use.” Id. at 250 n.26. Without purporting to definitively resolve the matter, this Article assumes that statements made in contemplation of civil litigation are testimonial within the meaning of Davis. Accordingly, this Article identifies the requirement from Davis as a “contemplation of litigation” requirement, not a “contemplation of prosecution” requirement.
events potentially relevant to later criminal prosecution.”53 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.54 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.55

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 he or she has given “testimonial” evidence, the Court has imbued that word with different meanings depending on the context. In the Self-Incrimination Clause context,

53 Davis, 126 S.Ct. at 2274.

54 See 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) (observing that Crawford Court “suggested non-testimonial status” for “statements for medical treatment”); 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)).

55 See Harbinson, supra note 54, at 632.
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 areas,” 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.” More astutely, Randolph Jonakait has observed: “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 . . . .” Thus, Jonakait asserts that “[u]nder this definition, all hearsay declarants have made testimonial statements and are witnesses.” 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.

Upon 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

---

56 Pardo, supra note 12, at 47. Pardo’s recent piece is an important exception, one that provides an epistemic account of testimony as a matter of both constitutional and sub-constitutional law. Unlike this Article, however, Pardo does not seek to explain current jurisprudence and, instead, argues for significant changes to the law.


59 Id. at 171.

60 See id. (“[I]f ‘witness’ has the same meaning throughout the Constitution, then the Fifth Amendment use of that word indicates that Crawford’s definition of ‘witness’ is wrong.”).
“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, a brief discussion is appropriate of why the Court has implicitly interpreted the word “witness” the same way in the Self-Incrimination and Confrontation Clauses.

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. Yet, after Richard Nagareda’s recent, and compelling, arguments to the contrary, and the suggestion by Justices Scalia and Thomas that they are inclined to agree, this basic proposition needs defending. Nagareda argues that the Fifth Amendment forbids the

61 See Akhil R. Amar, The Constitution and Criminal Procedure: First Principles 128-29 (1997) (suggesting that the meanings we give the word “witness” in the Self-Incrimination and Confrontation Clauses should be consistent with one another); see generally Akhil R. 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 the document).


63 See United States v. Hubbell, 530 U.S. 27, 49 (2006) (Thomas, J., joined by Scalia, J., concurring) (“A substantial body of evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence.”). However, 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, Foreward: Fisher Goes on a 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 the act of production).
government from using against a person any evidence, not just “testimonial” evidence, that has been affirmatively provided by that person under compulsion. That is, Nagareda contends that the word “witness” does not mean the same thing in the Self-Incrimination and Confrontation Clauses. 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. Though he tries valiantly, he does not carry that burden.

1. The Historical Argument

Nagareda’s main argument is an 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.” Moreover, this language tracked the language of every state constitution to contain a self-incrimination clause. 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

---

64 See Nagareda, supra note 62, at 1605 (“The most plausible construction of the phrase ‘to be a witness’ [in the Self-Incrimination Clause] is as the equivalent of the phrase ‘to give evidence’ found in contemporaneous state sources.”).

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

66 See id. at 1607 (“In legal scholarship no less than in legal practice, one properly should be reluctant to equate one set of words with another.”).

67 Id. at 1605; see also Hubbell, 530 U.S. at 52-53 (Thomas, J., concurring).

68 See Nagareda, supra note 62, 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)); see also Hubbell, 530 U.S. at 52 (Thomas, J., concurring).
difference in meaning was intended.\textsuperscript{69} 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.\textsuperscript{70} Yet, as Nagareda himself recognizes, “silence is a slippery tool of interpretation.”\textsuperscript{71} It is especially difficult to gain a toehold in this silence when it is cast against 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.\textsuperscript{72} 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 statements taken from an accused before trial by a committing magistrate.\textsuperscript{73} Nagareda cleverly tries to avoid the implications of this ill-fit between the common-law privilege and the Self-Incrimination Clause by suggesting that the latter incorporated at least the protections of the


\textsuperscript{70} See Nagareda, supra note 62, 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).

\textsuperscript{71} Nagareda, supra note 62, at 1608.

\textsuperscript{72} See id. at 1619; see also Hubbell, 530 U.S. at 51 (Thomas, J., concurring).

\textsuperscript{73} See Nagareda, supra note 62, at 1617 (noting this “common practice” in England and America beginning in sixteenth century); see also John 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 id. at 109, 114-17 (discussing identical procedure used in the American colonies, which continued well into eighteenth century); Edmund M. Morgan, The Privilege Against Self-Incrimination, 34 MINN. L. REV. 1, 18 (1949) (discussing English practice).
former, but was not limited by it. \textsuperscript{74} 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 pre-trial questioning of criminal suspects by magistrates (or the police), and subsequent trial use of their statements. On the other hand, if, as I believe and as the Court has implicitly concluded, the text of the Clause trumps its history, then compelled nontestimonial evidence can be used by the government but the testimonial products of pre-trial 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.\textsuperscript{75} He notes that including physical evidence within the ambit of the Confrontation Clause would be nonsensical, since 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 defendant to see it.”\textsuperscript{76} 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

\textsuperscript{74} See Nagareda, supra note 62, at 1616 (warning against the inference “that the Fifth Amendment affords only those protections that existed in the eighteenth century”).

\textsuperscript{75} See id. at 1613 (“[T]here are good reasons not to apply the same definition of `witness’ for purposes of confrontation and self-incrimination.”).

\textsuperscript{76} Id. at 1614.
what the proponent purports it to be\textsuperscript{77} – 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,\textsuperscript{78} 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,\textsuperscript{79} the Self-Incrimination Clause prohibits the government from requiring the defendant to offer assertions of fact or value, even those needed to authenticate and describe physical evidence. In short, Nagareda’s functional approach, like his historical argument, fails to rebut the heavy presumption that “witness” means “witness.”

B. \textit{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

\textsuperscript{77} 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.").

\textsuperscript{78} See supra text accompanying note 24.

\textsuperscript{79} The Confrontation Clause ensures that the defendant be permitted not only a formal, but also a substantive, right to conduct cross-examination. \textit{See Delaware v. Van Arsdall}, 475 U.S. 673, 678-79 (1986) (holding that Confrontation Clause was violated when defendant prohibited from entire line of inquiry on cross-examination). Accordingly, the Confrontation Clause undoubtedly includes some right to inspect physical evidence prior to trial. \textit{See AMAR, supra} note 61, at 95 ("The confrontation clause says that the accused has a right to observe and examine the government’s \textit{witnesses}, but surely the accused must also have a right to observe and examine the government’s \textit{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.
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*\(^{80}\) 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 had simply forced him to repeat the incriminating statements his co-defendant had already made.\(^{81}\) In rebuttal, the prosecution introduced the non-testifying co-defendant’s confession implicating both himself and the defendant, but differing in some details from the defendant’s own confession.\(^{82}\) The jury was carefully instructed not to consider the co-defendant’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 co-defendant’s.\(^{83}\)

The Court held that the Confrontation Clause was not offended because the out-of-court statement was admitted for a non-hearsay purpose.\(^{84}\) 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 of the matter asserted” in the statement.\(^{85}\) But the statement in *Street*

\(^{80}\) 471 U.S. 409 (1985).
\(^{81}\) See id. at 411.
\(^{82}\) See id. at 411-12.
\(^{83}\) See id. at 412.
\(^{84}\) Id. at 413-14.
\(^{85}\) FED. R. EVID. 801(c).
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. The Court wrote: “The nonhearsay aspect of [the codefendant’s] confession . . . raises no Confrontation Clause concerns.” 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.”

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. Only when a statement is introduced for its truth does its maker

86 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.”).

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

88 Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004); see also Latimer, supra note 86, at 338 (“The Confrontation Clause does not preclude non-hearsay uses of testimonial statements against an accused.”); Mosteller, supra note 54, 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 12, at 46 (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 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.”

89 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. ___, 21 (forthcoming 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. See id. at 21-22 (citing Street, 471 U.S. at 417-18 (Brennan, J., concurring)). However, 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 22-23. However, Street is not a good fit for this category, 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. at 22. Yet, this was a secondary argument Tennessee made. See Br. for Pet., Tennessee v. Street, 471 U.S. 409 (1985), at 18-20. Its primary
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. 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.90 This is the foundation for both the hearsay rule and the Confrontation Clause.91

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.

Id. at 17. Furthermore, though some lower courts may have characterized Street, prior to Crawford, as an “opening the door” case, see Aslett, supra, at 22, in Crawford, the Supreme Court itself, albeit in dictum, characterized Street as broadly holding that nonhearsay does not implicate the Confrontation Clause at all. See 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. See Aslett, supra, at 10-19. However, 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 an 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.


91 See, e.g., Note, Preserving the Right to Confrontation – A New Approach to Hearsay Evidence in Criminal Trials, 113 U. PA. L. REV. 741, 746-47 (1965) (“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.”).
2. The Assertion Requirement in the Self-Incrimination Clause Redux

Although the assertion requirement was developed 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 tells us much about what constitutes an assertion in the latter. This more-or-less uniform assertion requirement explains both the impeachment exception to *Miranda* first enunciated in *Harris v. New York*,92 and the “sixth birthday” question issue of *Pennsylvania v. Muniz*.93

*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 v. Arizona*94 follows almost inexorably from *Tennessee v. Street*.95

*Miranda* dictated that any incriminating testimonial responses to custodial interrogation were presumptively “compelled” within the meaning of the Self-Incrimination Clause.96 Thus, to secure the admissibility of such responses in evidence at trial, the Court held, the police must

---

96 384 U.S. at 467.
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. 97

In *Harris v. New York*, the defendant testified in a manner inconsistent with unwarned statements he had made following his arrest. 98 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. 99 The U.S. Supreme Court ruled that use of unwarned statements for impeachment purposes was permitted by the Fifth Amendment. The Court analogized to the use for impeachment purposes of physical evidence seized in violation of the Fourth Amendment, 100 which the Court had previously approved. 101 Borrowing the cost-benefit analysis it had developed in the Fourth Amendment context, the Court first noted the substantial benefit of allowing unwarned statements as impeachment evidence in allowing the jury to fully assess the defendant’s credibility. 102 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

97 [Id. at 444.](#)


99 See id. at 223.

100 See id. at 224.


102 See *Harris*, 401 U.S. at 225.
conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.\textsuperscript{103}

\textit{Harris} has been subject to much scholarly criticism for using a Fourth Amendment analysis in a Fifth Amendment case. The Fourth Amendment’s exclusionary rule is a judge-made remedial device designed to ameliorate a constitutional violation that has already taken place prior to trial.\textsuperscript{104} It does so largely by deterring future police misconduct.\textsuperscript{105} 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.”\textsuperscript{106} 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.\textsuperscript{107}

But does the use of the defendant’s own compelled incriminating words against him \textit{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

\textsuperscript{103} See 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. \textit{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 \textit{Harris} to that case and to Hass’ case.”).


\textsuperscript{105} See Loewy, supra note 104, at 909; Mannheimer, supra note 104, at 126.

\textsuperscript{106} Mannheimer, supra note 104, at 127.

belief.”\textsuperscript{108} A suspect’s in-custody statement might, when viewed in isolation, “relate a factual assertion or disclose information,”\textsuperscript{109} thus superficially satisfying the assertion requirement. However, what is critical, in the Self-Incrimination Clause context as in the Confrontation Clause context, is the use of the statement at trial. In \textit{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. 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.”\textsuperscript{110} 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 \textit{Street}\textsuperscript{111} that use of another’s out-of-court statement to impeach is, in essence, nontestimonial.\textsuperscript{112}

\textit{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 \textit{Pennsylvania v. Muniz}.\textsuperscript{113}

\begin{itemize}
  \item \textsuperscript{109} \textit{Doe v. United States}, 487 U.S. 201, 210 (1988).
  \item \textsuperscript{110} Dripps, \textit{supra} note 108, at 35. I have previously advocated that \textit{Harris} be overruled as inconsistent with the language of the Self-Incrimination Clause. See Mannheimer, \textit{supra} note 104, at 128. However, I have since achieved a better appreciation of what makes a statement “testimonial,” and its speaker a “witness” within the meaning of the Clause. I take solace in the fact that I am in good company. See \textit{Henslee v. Union Planters Nat. 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.”).
  \item \textsuperscript{111} \textit{Tennessee v. Street}, 471 U.S. 409, 414 (1985).
  \item \textsuperscript{112} See \textit{supra} Part II.B.1.
  \item \textsuperscript{113} 496 U.S. 582 (1990).
\end{itemize}
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.’”\(^{114}\) He stated that he did not know.\(^{115}\) It was undisputed that Muniz was subjected to custodial questioning and that his response was incriminating. 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.\(^{116}\) Because it was the “content of [the] 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.\(^{117}\) That is, it was testimonial because it constituted an “assertion of his knowledge at the time”\(^{118}\) which 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.

Four Justices, by contrast, defined “testimonial” more narrowly. Chief Justice Rehnquist, writing for himself and three other Justices, disagreed that the answer to the “sixth birthday” question was testimonial. To them, the State did not “care[] about” the truth of the content of the response, whether it was the date on which Muniz turned six or his lack of knowledge of that

\(^{114}\) *Id.* at 586.

\(^{115}\) *Id.*

\(^{116}\) *Id.* at 600. Allen & Mace, *supra* note 13, at 274-76, 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 under the Court’s framework, was inadmissible. *See also* Pardo, *supra* note 25, at 331 (agreeing with this analysis). 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 concur.”). 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.

\(^{117}\) *Muniz*, 496 U.S. at 600.

\(^{118}\) *Id.* at 601 n.13.
date, but only the fact that he said it. 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.”

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.

The apparent holding of Muniz is consistent with the decision in Estelle v. Smith, 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. The Court rejected the State’s argument that the defendant’s statements were nontestimonial, 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. Rather, in stressing that the state psychiatrist’s testimony was based on the defendant’s “account of the crime,” the Court suggested that the

---

119 Id. at 608 (Rehnquist, C.J., joined by White, Blackmun, and Stevens, JJ., concurring in part, concurring in the result in part, and dissenting in part).

120 See id. (Rehnquist, C.J., joined by White, Blackmun, and Stevens, JJ., concurring in part, concurring in the result in part, and dissenting in part).

121 451 U.S. 454, 469 (1981). In Estelle v. Smith, 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. See id. at 456-60, 464 & n.9.

122 See id. at 463-64.

123 See Br. for Petitioner, Estelle v. Smith, 451 U.S. 454 (1981), at 36-37; 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.”); Note, Requiring a Criminal 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.”); Marianne Wesson, The Privilege Against Self-Incrimination in Civil Commitment Proceedings, 1980 WISC. L. REV. 697, 705-06 (observing that the 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.”).

defendant’s statements were being used in a testimonial fashion – as assertions of fact – because his sincerity might have been questioned.\textsuperscript{125} Thus, both \textit{Muniz} and \textit{Estelle v. Smith} 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.\textsuperscript{126}

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.\textsuperscript{127} Suppose one wants to introduce the declarant’s statement “I am the Emperor Napoleon” in order to show that the

\textsuperscript{125} \textit{See} Note, supra note 123, at 658 (observing that “it is likely that many defendants would try to affect the diagnosis of their mental state,” in that those suffering mental illness often try to mask their disorders while some “[s]ane defendants . . . try to feign insanity”); Wesson, supra note 123, at 709 (arguing that statements made during psychiatric examinations should be considered testimonial even when used to determine a defendant’s mental state because “in many cases an examiner is interested in the objective accuracy of a subject’s statements”).

\textsuperscript{126} Marianne Wesson presciently drew this comparison a decade before \textit{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 123, at 710. This is not to say that the statement in \textit{Muniz} should have been considered testimonial. Although “[c]onsiderable evidence exists that the psychiatric examination has a tendency to elicit untrue or unreliable evidence,” \textit{id.}, thus supporting the holding in \textit{Estelle v. Smith}, 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. \textit{See} Allen & Mace, supra note 13, at 269-70, 276 (asserting that statements in \textit{Estelle v. Smith} were testimonial while statement in \textit{Muniz} was nontestimonial); Pardo, supra note 25, at 331 (“[T]he psychiatric examination in \textit{Estelle} and the sixth-birthday question in \textit{Muniz} provide an example on each side of the ‘testimonial’ line.”).

\textsuperscript{127} Surprisingly few have recognized the connection between the Self-Incrimination Clause’s assertion requirement and the law of hearsay. \textit{See}, e.g., Pardo, supra note 12, at 53 (drawing connection between term “testimonial” in Self-Incrimation Clause context and as it relates to hearsay); Wesson, supra note 123, at 707 (noting that the Clause’s testimonial/nontestimonial “distinction . . . is borrowed from the law of hearsay”); \textit{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 non-hearsay because 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).
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. Wigmore and McCormick 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”; the speaker’s irrational belief is precisely what the proponent seeks to prove; and the sincerity of his belief might be in doubt. Morgan and Hinton 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 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.” On 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. On 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

---

129 See 6 Wigmore, supra note 14, § 1790.
132 See Morgan, supra note 29, at 147.
133 See Hinton, supra note 128, at 397-98.
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 – The Other Exceptions to Miranda

As we have just seen, 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 by the other exceptions to the Miranda requirements. 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. 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. 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.

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 non-existent. Only in light of Crawford’s and Davis’ clear articulation of the contemplation-of-litigation requirement can we see the common thread tying together each of these exceptions: where incriminating assertions are compelled, but for reasons other than to gather evidence for later use at trial, the evidence is nontestimonial and the Fifth Amendment does not bar the later trial use of the evidence.
1. The “Public Safety” Exception

In *New York v. Quarles*, 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.134 When Officer Kraft arrested Quarles in the supermarket, he saw that the suspect was wearing an empty shoulder holster.135 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.”136 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 officer’s failure to provide *Miranda* warnings.”137

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.138 The Court reasoned that the provision of *Miranda* warnings can be expected to reduce the amount of information forthcoming from a criminal suspect.139 The *Miranda* Court had implicitly determined that, in the typical case, the cost of this lost evidence was offset by the benefit of guaranteeing that the Fifth Amendment rights of all criminal suspects are honored.140 But where

---

135 See id. at 652.
136 Id.
137 Id. at 651.
138 See Mannheimer, *supra* note 104, at 118 (observing that the *Quarles* Court “[u]s[ed] the same cost/benefit analysis employed in determining whether the Fourth Amendment exclusionary rule should be employed in a particular instance”).
139 See *Quarles*, 467 U.S. at 656.
140 See id. at 656-57.
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.\(^{141}\) In such a case, the Court reasoned, the costs of the rule outweigh its benefits and the rule should not apply.\(^{142}\)

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 such compulsion attends any custodial interrogation without the prescribed warnings and waiver;\(^ {143}\) incrimination, since Quarles’s knowledge of the location of the gun obviously could be used by the prosecution to show that he knowingly possessed the weapon;\(^ {144}\) and testimony, at least as conventionally understood, since Quarles’s revelation “explicitly . . . disclose[d] information”\(^ {145}\) 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*,\(^ {146}\) the *Quarles* Court inappropriately used a Fourth Amendment cost/benefit analysis in a Fifth Amendment case. Indeed, the Court plainly showed its hand by reasoning that a contrary rule would effectively “penalize[e] officers for asking the

\(^{141}\) *See id.* at 657.

\(^{142}\) *See id.* at 657-58.

\(^{143}\) *See supra* text accompanying notes 96-97.

\(^{144}\) *See, e.g.*, *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (stating that the 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”).


very questions which are most crucial to their efforts to protect themselves and the public."¹⁴⁷

The Court thus had in mind the judge-made Fourth Amendment exclusionary rule, which does indeed “penalize[e]” the police in order to deter them from acting unlawfully in the future.¹⁴⁸

But incriminating testimonial evidence compelled from a suspect is excluded from that suspect’s criminal case, not to “penalize[e]” whoever compelled it but because the Fifth Amendment says it must be.¹⁴⁹ 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.’”¹⁵⁰ 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.”¹⁵¹ Furthermore, Justice Marshall’s view of the Self-Incrimination Clause was vindicated by the Court in Chavez v. Martinez, in which a majority held that a failure

¹⁴⁹ See Steven D. Clymer, Are Police Free to Disregard Miranda? 112 YALE L.J. 447, 534 (2002) (“A police offer who disregards Miranda does nothing wrong.”); Mannheimer, supra note 104, at 123 (“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)).
¹⁵⁰ Mannheimer, supra note 104, at 120 (alteration in original); 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 B. 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.”).
¹⁵¹ Quarles, 467 U.S. at 686 (Marshall, J. dissenting); see also id. at 665 (O’Connor, J., concurring in the judgment in part and dissenting in part) (“[T]here is nothing about an exigency that makes custodial interrogation any less compelling . . . .”).
to read the *Miranda* warnings prior to custodial interrogation does not violate the Constitution.\(^{152}\)

This is because the Self-Incrimination Clause is violated only when compelled statements are actually introduced into evidence at a criminal judicial proceeding.\(^{153}\)

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 Fifth 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.\(^{154}\)

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

\(^{152}\) 538 U.S. 760, 772 (2003) (opinion of Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.) ("Chavez’s failure to read *Miranda* warnings to Martinez did not violate Martinez’s constitutional rights . . . ."); id. at 789 (Kennedy, J., joined by Stevens and Ginsburg, JJ., concurring in part and dissenting in part) ("[F]ailure to give a *Miranda* warning does not, without more, established 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.").

\(^{153}\)  *See Chavez v. Martinez*, 538 U.S. at 766-67 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.); id. at 777 (Souter, J., joined by Breyer, J., concurring in the judgment); *accord Patane*, 542 U.S. at 641 (plurality opinion) ("Potential violations [of the Self-Incrimination Clause] occur, if at all, only upon the admission of [compelled incriminatory] statements into evidence at trial.").

\(^{154}\) *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 150, at 282 ("The question is one of defining the scope of the Fifth Amendment right against self-incrimination").
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 as the desire to obtain incriminating evidence.” 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.” 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.157

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, implicitly acknowledging that such information is often sought or provided for more than one purpose. And the Court observed that, when it wrote in Crawford that

---

155 Quarles, 467 U.S. at 656; see also Pizzi, supra note 154, at 583 (observing that Quarles recognized that “most of human behavior, legal and illegal, springs from multiple motives”); Marc S. Reiner, Note, The Public Safety Exception to Miranda: Analyzing Subjective Motivation, 93 Mich. L. Rev. 2377, 2381 (1995) (“The Court . . . anticipated that an officer may have several motives . . . .”).

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

157 See Reiner, supra note 155, 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 apply[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.”); Pizzi, supra note 154 at 583 (opining that public safety exception applies even where “there were other objectives that the officer was trying to achieve at the same time.”).

158 See Davis, 126 S.Ct. at 2273-74; see also supra text accompanying note 46.

159 See also Davis, 126 S.Ct. at 2283 (Thomas, J., concurring in the judgment 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)).
“`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.”\textsuperscript{160} 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 \textit{Quarles} quoted above expressing the same measure of confidence in the police.\textsuperscript{161}

Implicit in the Court’s dual-motivation analysis in both \textit{Quarles} and \textit{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 previously 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.\textsuperscript{162} Since professional police now replicate the investigatory function of the magistrate, the application of both Clauses to police interrogation makes sense.\textsuperscript{163} But it is critical to remember that such application makes sense only because, and only to the extent that, police now perform the function of investigating completed crimes once performed by

\textsuperscript{160} \textit{Davis}, 126 S.Ct. at 2276 (emphasis added) (alteration in original).

\textsuperscript{161} See id. at 2277 (“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.” (quoting \textit{Quarles}, 467 U.S. at 658-59).

\textsuperscript{162} See \textit{Crawford}, 541 U.S. at 44 (discussing the sixteenth-century “Marian bail and committal statutes [which] 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 note 73 and accompanying text.

\textsuperscript{163} See Yale Kamisar, \textit{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) (“The function which the police have assumed in interrogating an accused is exactly that of the early committing magistrates . . . .”’ (quoting Morgan, \textit{supra} note 73, at 27-28 (alteration added))); \textit{Crawford}, 541 U.S. at 52 (“Police interrogations bear a striking resemblance to examinations by justices of the peace in England.”).
committing magistrates.164 And “[a]lthough 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.” 165

Among the most important of these other functions is the maintenance of public safety,166
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.” 167 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.”168

164 See Pizzi, supra note 154, at 594 (“Miranda is premised upon police functioning in a traditional
investigative capacity.”).

165 Id. at 573-74; see also id. at 588 (“[T]he police should be recognized as having complex and multiple tasks
to perform in addition to identifying and apprehending persons committing serious criminal offenses.”). 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) (“Although we usually require that a search be undertaken only
pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be), we have
permitted exceptions when special needs, beyond the normal need for law enforcement, make the warrant and
probable-cause requirement impracticable.” (internal quotation marks omitted)). 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, makes no mention that its strictures are limited to “criminal case[s],” U.S. Const., amend V, or
“criminal prosecutions,” U.S. Const., amend VI. See U.S. Const., amend IV.

166 See Pizzi, supra note 154, at 574.

167 Id. at 594.

168 Id.
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.”\(^{169}\) 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.”\(^{170}\) As the Court also put it, the exception applies “to a situation in which police officers ask questions reasonably prompted by a concern for public safety.”\(^{171}\) *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.”\(^{172}\)

While some language in both *Quarles* and *Davis* purports to establish a wholly objective test, each is best interpreted as taking into account the police officer’s actual subjective motives, determined, however, solely from objective factors and scrutinized to determine whether they are objectively reasonable. As student commentator Marc Reiner has argued persuasively, the language and reasoning of *Quarles* indicates that the officer’s actual subjective motivation must indeed be accounted for.\(^{173}\) For example, the Court wrote that the exception applied to “questions reasonably prompted by a concern for public safety,”\(^{174}\) not to questions that “could

---


\(^{170}\) *Id.* at 659 n.8.

\(^{171}\) *Id.* at 656.


\(^{173}\) See Reiner, supra note 155, at 2383-86; accord Pizzi, supra note 154, at 582 (1985) (“When the majority opinion in *Quarles* is examined closely, despite what the Court said about the irrelevance of subjective motivation, the opinion certainly assumes throughout that Officer Kraft was motivated by public safety concerns.”).

\(^{174}\) *Quarles*, 467 U.S. at 656.
reasonably have been prompted by a concern for public safety.”

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. 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.” 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 or her questions] on the alleged emergency [and] the immediacy of the officer’s questions relating to the emergency.”

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

---

175 See Reiner, supra note 155, at 2385-86; see also Pizzi, supra note 154, at 580 (observing that the Court’s “reasonably prompted” language is in serious tension with its enunciation of a wholly objective test).

176 Quarles, 467 U.S. at 657-58.

177 Reiner, supra note 155, at 2384 (1995); accord Pizzi, supra note 154, at 583 (“To try to erect a public safety exception to Miranda that works independently of a genuine concern for public safety on the part of the officer is awkward at best.”).

178 Reiner, supra note 155, at 2386-87; see also id. at 2401 (observing that even courts that eschew any inquiry into an officer’s subjective motivations “nevertheless place great weight on objective factors that reflect the officer’s subjective intent”).

179 See id. at 2395-96 (“After initially ascertaining that a genuine concern for public safety motivated the arresting officer’s questions, a court . . . must determine whether a reasonable police officer under the circumstances would have thought that an immediate and substantial danger existed.”); see also Pizzi, supra note 154, at 583 (“[A]s long as the officer believed that his actions were immediately necessary to ensure public safety and as long as the officer’s conduct and belief were reasonable, that ought to be the central consideration in the application of a public safety exception . . . .”).

180 See New York v. Quarles, 467 U.S. 649, 659 n.8 (1984) (stating that for public safety exception to apply,
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.181

Davis, too, purports to establish a purely objective standard yet contains language that
makes an inquiry into subjective mental states virtually inevitable.182 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.”183 After all, as one commentator has noted, “[a] purpose cannot
merely exist; someone must have one.”184 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 ‘establish[h] or prov[e]’ some past fact, but to
describe current circumstances requiring police assistance,”185 and in Hammon by describing

181 Reiner, supra note 155, at 2396 n.78; see Quarles, 467 U.S. at 656-57 (“The Miranda majority . . .
apparently felt that whatever the cost to society in terms of fewer convictions of guilty suspects, that cost would
simply have to be borne in the interest of enlarged protection for the Fifth Amendment privilege.”).

182 See Leading Cases, supra note 48, at 217 (“[T]he precise nature of the Court’s ‘purpose’ requirement is
somewhat ambiguous.”).

183 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)).

184 Leading Cases, supra note 48, at 218.

(alteration in original)).
how the declarant “deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed.” 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,” 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.’”

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

---

186 Id. at 2278 (emphasis added).
187 Id. at 2276.
188 Id. at 2279 (quoting App. in *Hammon v. Indiana*, No. 05-5705, at 18 (alteration in original)).
189 Id. at 2278.
190 See id. at 2279.
191 Leading Cases, *supra* note 48, at 219; see also Friedman, *supra* note 50, at 253 (observing that even if “the test is a subjective one, a court would still perforce often determine what the declarant’s anticipation was by relying largely on surrounding circumstances”).
192 See Wilson, *supra* note 52, at 287 (“If an ordinary officer, based on the range of factors existing at the time, would have acted in anticipation of trial, then presumptively an interrogation has occurred.” (footnote omitted)).
Thus, Quarles and Davis operate in much the same fashion in determining the admissibility of out-of-court statements relating 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,” 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. 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,” 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.

2. The “Routine Booking Question” Exception

In Pennsylvania v. Muniz, Muniz, in addition to the “sixth birthday” question discussed above, was asked “his name, address, height, weight, eye color, date of birth, and current age,” prior to the administration of the warnings prescribed by Miranda. He

---

193 Davis, 126 S.Ct. at 2273.
195 The only difference appears to be that any plausible non-investigatory motive for the interrogation will save a response from being testimonial under the Self-Incrimination Clause, whereas only a non-investigatory motive that predominates above all other motives will render a statement nontestimonial pursuant to the Confrontation Clause. This distinction is addressed infra Part III.B.
197 See supra text accompanying note 114.
198 Muniz, 496 U.S. at 586.
“stumbled over his address and age.” A majority of the Court concluded that answers to routine booking questions need not be preceded by *Miranda* warnings in order to be admissible in evidence. However, a majority could not agree on a rationale. A four-Judge 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. However, 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.” 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. Courts have subsequently excluded from *Miranda’s* dictates answers to routine booking questions without agreeing among themselves on the underlying rationale.

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.” 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.

---

199 *Id.*

200 *Id.* at 601 (Brennan, J., joined by O’Connor, Scalia, and Kennedy, JJ.).


202 *Muniz*, 496 U.S. at 608 (Rehnquist, C.J., joined by White, Blackmun, and Stevens, JJ., concurring in part, concurring in the result in part, and dissenting in part); *see* Allen & Mace, *supra* note 13, at 274.

203 *See* Skelton & Connell, *supra* note 201, at 68-78 (describing approaches courts have taken).

204 *Muniz*, 496 U.S. at 601-02 (Brennan, J., joined by O’Connor, Scalia, and Kennedy, JJ.).
Yet Chief Justice Rehnquist’s opinion for four Justices was equally unpersuasive. He declined to reach the issue whether there is a “routine booking question” exception to the \textit{Miranda} rule.\footnote{See \textit{id.} at 608 (Rehnquist, C.J., joined by White, Blackmun, and Stevens, JJ., concurring in part, concurring in the result in part, and dissenting in part); \textit{see also} Skelton & Connell, \textit{supra} note 201, at 68.} 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.\footnote{Muniz, 496 U.S. at 608 (Rehnquist, C.J., joined by White, Blackmun, and Stevens, JJ., concurring in part, concurring in the result in part, and dissenting in part).} Yet, even pursuant to the Chief Justice’s analysis of the “sixth birthday” question,\footnote{See \textit{supra} text accompanying notes 119 to 120.} 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”\footnote{Doe \textit{v. United States}, 487 U.S. 201, 210 (1988).} about that particular subject matter. This information can also be quite incriminating.\footnote{See Pizzi, \textit{supra} note 154, at 600 (“In a particular case, one’s age can supply an element of the offense, one’s address can lead to the discovery of evidence . . . one’s medical condition can be incriminating in a drug case and . . . even one’s family status can be powerfully incriminating in a given case.” (footnotes omitted)); Skelton & Connell, \textit{supra} note 201, at 55 (“[A]nswers to ‘routine booking questions’ can be incriminating.”).}

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 \textit{Rhode Island \textit{v. Innis}}, 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,”\footnote{446 U.S. 291, 300-01 (1980) (footnote omitted). For a discussion if \textit{Innis}, \textit{see infra} text accompanying notes 255 to 299.} and concluded that \textit{Innis} excludes from the definition of interrogation questions that are “normally
attendant to arrest and custody.”211 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.”212 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.213

Others have posited a compulsion-based rationale and reasoned that a suspect faced only with routine booking questions does not face the sort of compulsion with which Miranda and the Fifth Amendment are concerned.214 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


212 446 U.S. 291, 300-01 (1980) (footnote omitted). See Pizzi, supra note 154, at 598 (articulating Innis test as “whether the questions were `reasonably likely to elicit an incriminating response” (internal quotation marks omitted) (emphasis added)); see also Skelton & Connell, supra note 201, at 69-71 (surveying courts that “have explicitly rejected the plain language reading of Innis and * * * conflated the two portions of the Innis definition when considering routine booking questions.”).

213 It is clear from the structure of the Court’s definition in Innis that the parenthetical exclusion applies only to the other “words or actions” prong of Innis, not the “express questioning” prong. 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’ which occurred here, but only to its ‘functional equivalent.’”); Skelton & Connell, supra note 201, at 77 (“Innis does not contemplate express questions outside the definition of interrogation. [A]ny express question . . . falls within the definition of interrogation.”). However, some have “questioned . . . whether the Innis Court meant what it said about express questioning.” Id. at 69. See, e.g., Marks, supra note 211, at 1100 (“Innis does not speak directly to whether all questions constitute interrogation . . . .”); 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”).

214 See, e.g., Marks, supra note 211, at 1101 (“While booking questions may be unpleasant, they do not increase the compulsion perceived by a suspect above the level inherent in custody.”); Skelton & Connell, supra note 201, at 99-100 (advocating that the routine booking question exception not apply when “the question is likely to involve the investigatory, psychological ploys and coercive tone that the Supreme Court intended Miranda to address”).
effectively deemed compulsive a single question asked in a custodial setting.\textsuperscript{215} Any approach that attempts to measure degrees of compulsion, like one that attempts to “distinguish degrees of incrimination,”\textsuperscript{216} would be inconsistent with \textit{Miranda}. In addition, it is by no means clear in many or even most 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.”\textsuperscript{217}

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 \textit{Davis}’s contemplation-of-litigation requirement. Routine booking questions, by definition, are not asked in order to solve a crime and convict the perpetrator.\textsuperscript{218} Rather, they are asked by police in their administrative capacities, not their investigative capacities: they are asked simply so that the police know who it is they have detained and keep a proper record of the detention.\textsuperscript{219} 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

\textsuperscript{215} \textit{See} \textit{Miranda v. Arizona}, 384 U.S. 436, 533 (1966) (White, J., dissenting) (”[U]nder the Court’s rule, if the police ask [a suspect] a single question . . . his response, if there is one, has somehow been compelled . . . “).

\textsuperscript{216} \textit{Id.} at 476.

\textsuperscript{217} Pizzi, \textit{supra} note 154, at 599.

\textsuperscript{218} \textit{See} Skelton & Connell, \textit{supra} note 201, at 98 (“Questions seeking biographical information tend to be “‘non-investigative’ questions not designed to investigate crimes or the involvement of the arrested person or others in crimes.”’(quoting \textit{Varner v. State}, 418 So.2d 961, 962 (Ala. Crim. App. 1982)); \textit{see also} Marks, \textit{supra} note 211, at 1101 (“\textit{Miranda} protects against interrogation of an investigative nature rather than against the obtaining of basic identifying data required for booking.”)).

\textsuperscript{219} \textit{See} Skelton & Connell, \textit{supra} note 201, at 96 (“The exception was carved out from \textit{Miranda}’s ambit in order ‘to facilitate the administrative duties of the police at the station house.’”’ (quoting \textit{Jones v. United States}, 779 A.2d 277, 290 (D.C. 2001) (Mack, J., dissenting)).
those people’s health and welfare, which requires it to learn certain information about an individual.”220 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 relevant to later criminal prosecution.”221 The answers to routine booking questions are thus nontestimonial in the Davis sense.222

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.”223

220 Id. at 101.

221 Davis v. Washington, 126 S.Ct. 2266, 2273-74 (2006); cf. Ross, supra note 12, at 213 (asserting that certain “background information,” such as the address of the accused, provided by declarants who do not testify at trial, should be considered nontestimonial pursuant to the Confrontation Clause).

222 See Jefferson V. Smith, The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?, 25 S.C. L. Rev. 699, 704 (1974) (“Miranda does not apply to administrative questioning, as it generally applies only to interrogation designed to elicit admissions of a crime . . .”). Again this 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 text accompanying notes 210 to 212.

223 Davis, 126 S.Ct. at 2273-74.
Yet, as discussed previously, 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.

3. The “Undercover Officer” Exception

In *Illinois v. Perkins*, the Court created a third exception to the strictures of *Miranda*: the “undercover officer” exception. Perkins, who was being detained in jail pending trial of unrelated charges, was suspected of murdering one Stephenson. The police had government informant Charlton and undercover police agent Parisi placed in close proximity to Perkins at the jail, posing as fellow detainees. Parisi suggested that the three escape and, during the course of discussing a possible jail break, asked Perkins whether he had ever killed anyone. Parisi, of course, neither administered the warnings prescribed by *Miranda* nor obtained a waiver of 

---

224 See *supra* text accompanying notes 51 to 55.

225 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* text accompanying notes 48 to 50, 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 201, at 79-86. 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* text accompanying note 285, ask “whether an objective observer would conclude that the police intended to elicit incriminating information.” Skelton & Connell, *supra* notes 201, at 92.


227 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., *id.* at 304 (Marshall, J., dissenting) (“The Court . . . fashion[s] an exception to the *Miranda* rule.”); Yeager, *supra* note 213, at 66 (concluding that *Perkins* is probably best viewed as “an exception to *Miranda*, whether couched as such or not”).

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

229 *Id.* at 294-95.

230 *Id.* at 295.
Perkins’ rights.\textsuperscript{231} Perkins described his murder of Stephenson in detail.\textsuperscript{232} 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 \textit{Miranda} warnings and waiver.\textsuperscript{233}

The Court held that the statements need not be suppressed. The Court conceded, as it had to, that Perkins was “in custody in a technical sense,”\textsuperscript{234} and also that he was subjected to “questioning initiated by law enforcement officers.”\textsuperscript{235} Yet, the Court observed, “the danger of coercion results from the interaction of custody and official interrogation.”\textsuperscript{236} Custody and interrogation “may create mutually reinforcing pressures” that amount, at least presumptively, to compulsion to speak, “but where a suspect does not know that he is conversing with a government agent, these pressures do not exist.”\textsuperscript{237}

\textit{Perkins}, like \textit{Quarles} and \textit{Muniz}, can be explained by reference to the contemplation-of-litigation component of what it means to be a witness, ultimately fleshed out in \textit{Davis}.\textsuperscript{238} With

\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Id. at 297.
\textsuperscript{235} Id. at 296 (quoting \textit{Miranda v. Arizona}, 384 U.S. 436, 444 (1966)); see also id. at 305 (Marshall, J., dissenting) (“Perkins was subjected to express questioning likely to evoke an incriminating response.”); Daniel J. Capra, \textit{Prisoners of Their Own Jurisprudence: Fourth and Fifth Amendment Cases in the Supreme Court}, 36 Vill. L. Rev. 1267, 1344 (1991) (“What occurred in Perkins was custodial interrogation, at least literally interpreted . . . .”); Marks, supra note 211, at 1116 (“A literal reading of the \textit{Innis} test does require courts to view jail plant tactics as interrogation.”); Yeager, supra note 213, at 43 (observing that \textit{Perkins} involved interrogation pursuant to “even the most restrictive reading of \textit{Innis}”).
\textsuperscript{236} \textit{Perkins}, 496 U.S. at 297 (emphasis added).
\textsuperscript{237} Id. at 297.
\textsuperscript{238} This is not to deny that the compulsion-based rationale for \textit{Perkins} provided by the Court is persuasive. And because compulsion, incrimination, and testimony must coalesce before the Self-Incrimination Clause is violated, see supra text accompanying note 13, the result in \textit{Perkins} is over-determined: \textit{Perkins} was correctly decided both because testimony was lacking and because compulsion was lacking. Nonetheless, only the testimonial-based explanation covers both \textit{Quarles} and \textit{Muniz} as well.
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 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 question was resolved in Davis by looking only to what “the circumstances objectively indicate.”\(^{239}\) That is, we are to “consider only the observable circumstances of [the] incident and determine [its] purpose on the basis of those observable circumstances.”\(^{240}\) 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’ 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 indicate[d]” 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: United States v. Bourjaily.\(^ {241}\) 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


\(^{240}\) Leading Cases, supra note 48, at 219.

Clause.\textsuperscript{242} \textit{Bourjaily} remains good law after \textit{Crawford}, for the Court wrote in the latter case that “statements in furtherance of a conspiracy” are “by their nature . . . not testimonial.”\textsuperscript{243}

To fully understand why, and to make the connection complete between \textit{Bourjaily} and \textit{Perkins}, we must go back to the Court’s prior decision in \textit{United States v. Inadi}.\textsuperscript{244} 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.\textsuperscript{245} 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.”\textsuperscript{246} Thus, “co-conspirator statements derive much of their value from the fact that they are made in a context very different from trial.”\textsuperscript{247} The difference to which the Court adverted is 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. This is so even if, as

\begin{itemize}
\item \textsuperscript{242} \textit{Id.} at 173-74, 181.
\item \textsuperscript{244} 475 U.S. 387, 399-400 (1986).
\item \textsuperscript{245} See id. at 394-96. In \textit{Inadi}, the statements were intercepted via wiretap rather than made to an undercover officer. See id. at 390. However, as the Court apparently believed in \textit{Bourjaily}, 483 U.S. at 182, this was a distinction without a difference.
\item \textsuperscript{246} \textit{Inadi}, 475 U.S. at 395 (emphasis added).
\item \textsuperscript{247} \textit{Id.} at 395-96.
\end{itemize}
in *Bourjaily*, the addressee is an undercover law enforcement agent. What is critical, reading *Bourjaily* together with *Davis*, is that “the circumstances objectively indicate”\(^{248}\) that the statements have been made in furtherance of a criminal enterprise, not in contemplation of litigation.\(^ {249}\) This is precisely what made Perkins’ admissions to Parisi nontestimonial in the *Davis* sense.

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

Once we recognize that “witness” has only one meaning in the Constitution, and “testimonial” has only one meaning in the case law, we can better appreciate what the Self-Incrimination and Confrontation Clauses have to teach about each other.\(^ {250}\) Elaborations about what makes a person a “witness” and evidence “testimonial” pursuant to one set of cases ought to accord with 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* and *Davis* of the concept of testimonial evidence pursuant to the Confrontation Clause suggests a number of ways in which its Self-Incrimination Clause jurisprudence ought to be altered to provide a fit. For another, the Court

---

\(^{248}\) *Davis*, 126 S.Ct. at 2273-74.

\(^{249}\) *See* Leading Cases, *supra* note 48, at 219 & n.52 (noting that the *Davis* Court’s reference to the statement in *Bourjaily* as “clearly nontestimonial” indicates that courts must look only to the objectively observable context of the statement in question, since “[c]learly, undercover officers are motivated by the purpose of gathering evidence for use in a later proceeding.”); *see also* Friedman, *supra* note 50, at 255-56 (observing that subjective motivations of the 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 coconspirator or the unwitting drug customer”). *But see* Pardo, *supra* note 12, at 44-45 (asserting that statements made to undercover officers should be considered testimonial).

\(^{250}\) *See* Mosteller, *supra* note 54, at 557 (“‘[I]nterrogation’ has been explored extensively in the *Miranda* context, and some examination of this doctrine is illustrative [in the Confrontation Clause context].” (footnote omitted) (alteration added)); Wilson, *supra* note 52, at 279 (“The courts’ experience in defining interrogation to guard against coercion by the police provides models for a Confrontation Clause interrogation test.”).
has yet to deal adequately in either context with the issues that arise when the police gather 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 should be limited to such statements. Finally, for the same reason, New Jersey v. Portash appears to be the only decision inconsistent with the Court’s emerging unified theory of testimonial evidence, and thus should be overruled.

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,” it has had to carve out ad hoc fashion exceptions to
Rather than continuing to posit a not-quite-right definition of interrogation, and then making categorical exceptions when the definition does not quite fit, the court ought to effect a modest alteration in the definition itself. 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.” Yet the Court also acknowledged that some conduct or statements not in the form of questions could be considered interrogation as well. Thus, the question arose: what, other than express questioning, constitutes interrogation? As noted earlier, in *Rhode Island v. Innis*, 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. He had been advised of his *Miranda* rights and had invoked the right to counsel. 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.” Innis promptly disclosed the location of the gun. In holding that he had not

---

251 See, e.g., Pizzi, supra note 154, at 586 (“Quarles is an ad hoc solution . . . .”).
252 See Darmer, supra note 150, at 281 (calling upon the Court to “strive for a more comfortable home for public safety exceptions than . . . unsatisfying ipse dixit”).
254 See id. at 453.
256 *Id.* at 293-94.
257 *Id.* at 294.
258 *Id.* at 294-95.
259 *Id.* at 295.
been interrogated, the Court defined “interrogation” as “either express questioning or its functional equivalent.” 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.” Each of these two tiers of interrogation must be studied closely before a new, all-purpose definition of interrogation can be formulated.

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. 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.

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

---

260 _Id._ at 300-01 (footnote omitted).

261 _Id._ (footnote omitted).

262 See supra text accompanying note 213.

263 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 the absurdity of requiring warnings before “the police can ask a man if he wants cream in his coffee”); Marks, supra note 211, 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 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).
interrogation under the “express questioning” prong. Yet, because the officer made a virtually identical declaratory statement – 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.”

Moreover, since *Innis* was decided, the Supreme Court itself has created three “exceptions” to the dictates of *Miranda*. This is not surprising, since 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.” This can be done either by reformulating the rule or making exceptions to it. The Court has chosen the latter course.

Yet, it is at least as sensible to recast the definition of interrogation as it is to continue to read *Quarles*, *Muniz*, and *Perkins* as setting forth “exceptions” to *Miranda*. After all, running

---

265 See supra Part II.C.
266 Graham, supra note 263, at 118.
267 Id. Graham presciently predicted the “routine booking question” exception. See id. (“The courts may wish to say that all questions are interrogations but that suspects under arrest may be asked questions necessary to process them.”).
268 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 12, at 36 (citing FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LIFE AND IN LAW (2002)).
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.\(^{269}\) As it happens, this rule is entirely consistent with the standard for the “functional equivalent” of express questioning.

\(b. \quad \textit{The Functional Equivalent of Express Questioning}\)

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”\(^{270}\) – is difficult to unpack because this language is ambiguous in at least two respects.\(^{271}\) First, it is unclear how high a threshold “reasonably likely” is.\(^{272}\) Justice Stevens suggested in 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

\(^{269}\) See LAFAVE ET AL., supra note 264, § 6.7(a), at 351 (“[I]t is not fanciful to suggest that certain types of questioning . . . do not come within \textit{Miranda} because they are unlikely to produce [an incriminating] response.”); Graham, supra note 263, at 104 (suggesting “that if the purpose of the police in asking questions is not to secure an incriminating answer, then the privilege is not invaded”); cf. Smith, supra note 222, at 702 (defining the “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”).


\(^{271}\) See LAFAVE ET AL., supra note 264, § 6.7(a), at 350 (“Just what \textit{Innis} does mean is a matter of some uncertainty . . . .”); Marks, supra note 211, at 1100 (“\textit{Innis’} reasonably likely to elicit’ test is ambiguous on its face . . . .”); Welsh White, \textit{Interrogation Without Questions}: Rhode Island v. \textit{Innis} \textit{and} United States v. Henry, 78 MICH. L. REV. 1209, 1223 (1980) (“[T]he \textit{Innis} test is ambiguous.”); see also Pizzi, supra note 154, at 581 (“The test in \textit{Innis} is a maverick.”).

\(^{272}\) See Marks, supra note 211, at 1085 (“What level of probability was ‘high enough’ . . . remained unclear.”); White, supra note 271, at 1224 (“How likely is ‘reasonably likely?’”).
in an incriminatory fashion. 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 incriminating responses.” This interpretation would also conflict with the way commentators and lower courts had uniformly interpreted “interrogation” prior to Innis.

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. Although asking what the police “should know” is “reasonably likely” to occur sounds like a purely objective test, 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.” Next, almost immediately after disclaiming reliance on “the intent of the police,” the Court allowed that such intent might in fact be relevant.

---

273 See Innis, 446 U.S. at 311-12 (Stevens, J., dissenting); White, supra note 271, 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.”).

274 White, supra note 271, at 1228.

275 See id. at 1229 n.137 (“In none of the discussion of the ‘likely’ or ‘reasonably likely’ standard before Innis did anyone propose an interrogator’s apparent probability of success as the determining factor for whether interrogation had taken place.”).

276 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 the 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 211, at 1085 (“The role of intent in the Innis definition is probably the test’s most confusing aspect.”); see also White, supra note 271, 1224 (“[W]hat factors should be weighed in determining whether the requisite degree of ‘likelihood’ is present?”).

277 See White, supra note 271, at 1224 (“[T]he focus of the inquiry is objective, looking to the situation as it would be viewed by an objective observer in the position of the officer rather than as it actually appeared to either the officer or the suspect . . . .”)

278 Rhode Island v. Innis, 446 U.S. 291, 301 (1980).
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.”

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.”

Thus, *Innis* is best read as “establish[ing] a
close correlation between an officer’s likely purpose to elicit an incriminating response and the
‘reasonably likely’ standard.”

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.

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 White
proposed such an interpretation of *Innis* that has been widely adopted. He argued that whether
statements or actions other than questions constitute interrogation must “turn[] upon the objective

---

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

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

281 White, *supra* note 271, at 1231.

282 *Id.*

283 See, e.g., *United States v. Gay*, 774 F.2d 368, 379 n.22 (10th Cir. 1985); *Hawkins v. United States*, 461
A.2d 1025, 1030 n.8 (D.C. 1983); *State v. Abadie*, 612 So.2d 1, 6 (La. 1993) (Dennis, J.); *Commonwealth v. Torres*,
678 N.E.2d 847, 851 & n.7 (Mass. 1997); *State v. Washington*, 402 S.E.2d 851, 854 (N.C. App.) (Greene, J.,
see also *LAFAYE ET AL.*, *supra* note 264, § 6.7(a), at 350 (advocating White’s view); Marks, *supra* note 211, at 1085
("[White’s] interpretation clears up a good deal of the confusion created by the majority’s discussion of intent.").
purpose manifested by the police.”

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.’”

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 and Davis. 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.

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,” the inquiry is over because compulsion – the “‘tug’ on the suspect” – 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

284 White, supra note 271, at 1231.

285 Id. at 1232.; see also Pizzi, supra note 154, at 582 (“[E]ven after Innis, courts continue to emphasize heavily the officer’s motive in deciding whether interrogation has taken place . . . .”).


288 White, supra note 271, at 1234 n.155. This, of course, was before Quarles was decided.

289 Id. at 1233.

290 Id. at 1234 n.155.
interrogation any police conduct likely to evoke an incriminatory response “ignore[ed] the purpose and function of [the] police conduct.”

The conventional reading of Innis is thus that it focuses entirely on whether compulsion is present. But a close reading of the case throws this conventional reading into question for two reasons. First, and more obviously, the Court exempted from the “reasonably likely” standard words or actions “normally attendant to arrest and custody.” Professors Pizzi and White note this exclusion but do not attempt to explain it. 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.” And, the Court elaborated, “incriminating response” means “any response . . . that the prosecution may seek to introduce at trial.”

The fact that compulsion is required in order for the Self-Incrimination Clause to be implicated can explain neither the categorical exclusion of “words or actions . . . normally attendant to arrest and custody” nor the limitation to “words or actions . . . reasonably likely to elicit a[] response from the suspect” “that the prosecution may seek to introduce at trial.” After

---

291 Pizzi, supra note 154, at 595.

292 See, e.g., Marks, supra note 211, at 1086 (praising a reading of Innis that “focus[es] on compulsion, rather than on the government’s purpose or design”); see also Helderman, supra note 276, at 747 (“[A] definition of interrogation must necessarily . . . focus on the suspect’s perceptions.”).

293 Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

294 See Pizzi, supra note 154, at 599 (noting the “exclu[sion] by fiat”); White, supra note 271, at 1234 n.155 (calling the exemption a “caveat”).

295 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.

296 Id. at 301 n.5 (emphasis omitted).
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” the placing of handcuffs – might well feel compelled to tell the police that he cannot because he has been shot. Likewise, when an officer driving a suspect in a patrol car says to him “it’s a beautiful day,” 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 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,” to be used in a later prosecution.

297 See Fleming v. Collins, 954 F.2d 1109 (5th Cir. 1992) (en banc) (presenting similar facts).

298 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 ya 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 since there are two direct questions embedded within them.

299 White, supra note 271, at 1233.
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.300 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 leave us with 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. Where 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

300 See Pizzi, supra note 154, at 607 (“The Court’s narrow perspective seriously underestimates the importance of other objectives of police conduct, and it leads the Court to a conception of fifth amendment interrogation that is too broad.”).
quite fall into any of the three 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. As noted above, the public safety exception appears to apply only to dangers that are imminent. Moreover, implicit in *Quarles* is a requirement of some level of certainty on the part of the police that a dangerous situation exists. 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. All that matters is that the information is sought primarily to avert the hazard.

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. For example, asking a person suspected of drug trafficking

---

301 See Darmer, *supra* note 150, at 286 (“[N]owhere does the need for a robust public safety exception appear so justified as in those cases dealing with terrorism and national security.”).

302 See *supra* text accompanying note 180.

303 See Darmer, *supra* note 150, at 274 (observing that “the more speculative public safety cases” do not fall neatly into the *Quarles* exception); Reiner, *supra* note 155, at 2397-98 (“Lower courts tend to allow questions about the whereabouts of accomplices or guns if the officer knows they exist, or about the existence of accomplices or guns if the officer reasonably suspects that they may exist.” (footnotes omitted)).

304 See Becker, *supra* note 180, 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 150, at 280 (urging that the “public safety exception [be read] expansively [so] that an exception is justified even if an ‘immediate’ need cannot be easily demonstrated”).

305 See Becker, *supra* note 180, 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 150, at 280 (requiring only “a reasonable belief that questioning might yield information vital to the public interest”).

306 Weller, *supra* note 157, at 1126 (“[W]here unknown dangers may exist, the court should allow questions to determine the facts.”).
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. 307 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 without our more nuanced definition of interrogation. 308 Rather than attempting to shoehorn such scenarios into the Quarles exception, as some have, 309 we ought simply 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 ask “clarifying questions,” where the predominant objective purpose is to clarify an ambiguous situation and yet no public safety issue is presented. 310 The leading treatise in the area suggests that a non-investigatory 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 any criminal conduct has occurred or before there has been any sorting of

307 See United States v. Carrillo, 16 F.3d 1046, 1049 (9th Cir. 1994).
308 See United States v. Padilla, 819 F.2d 952, 960-61 (10th Cir. 1987).
309 See generally Darmer, supra note 150; see also Becker, supra note 180, at 869 (urging a “good faith extension of Quarles”).
310 See Marks, supra note 211, at 1104 (observing that courts generally “allow officers the opportunity to evaluate the nature of the situation they confront”); 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 (App. Div. 2d Dep’t 1990)); Smith, supra note 222, 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 Schwartz & Bator, Criminal Justice in the Mid-Sixties: Escobedo Revisited, 42 F.R.D. 463, 474 (1967))).
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.\textsuperscript{311} As in the typical “public safety exception” case, the police “will inevitably, almost reflexively, ask impulsive questions” to clarify an ambiguous situation.\textsuperscript{312} 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.”\textsuperscript{313}

These are just some examples of the benefit 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 \textit{Miranda} to Statements Offered for Their Truth

In its quest for a workable bright-line rule, the \textit{Miranda} Court refused to distinguish between inculpatory and exculpatory statements for Fifth Amendment purposes.\textsuperscript{314} Thus, it

\textsuperscript{311} \textit{LAFAVE ET AL., supra} note 264, § 6.7(b), at 353.
\textsuperscript{312} \textit{Yeager, supra} note 150, at 1005.
\textsuperscript{313} \textit{Id.} at 1008-09.
forbade the prosecution from using any statement “whether inculpatory or exculpatory” unless preceded by warnings and waiver.\textsuperscript{315} The Court reasoned:

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 word . . . .\textsuperscript{316}

The Court derived this rule from the fact that “[t]he privilege against self-incrimination protects the individual from being compelled to incriminate himself \textit{in any manner}.”\textsuperscript{317}

But, of course, this is not true, as the Court itself ruled exactly one week later in \textit{Schmerber v. California}.\textsuperscript{318} Rather, the Self-Incrimination Clause “protects the individual from being compelled to incriminate himself’ \textit{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.\textsuperscript{319} \textit{Harris v. New York}\textsuperscript{320} demonstrates this principle in action.\textsuperscript{321} Indeed, \textit{Harris} directly rejects the above-quoted dicta from \textit{Miranda}.

Given the justification for \textit{Harris} set forth above, that decision can be extended even further. If \textit{Harris} is properly viewed as standing for the proposition that unwarned statements

\begin{flushright}
\textsuperscript{315} \textit{Id.} at 444. The Court reiterated this notion when it defined “interrogation” in \textit{Rhode Island v. Innis}, 446 U.S. 291, 301 n.5 (1980) (“By `incriminating response’ we refer to any response – whether inculpatory or exculpatory – that the prosecution may seek to introduce at trial.” (emphasis omitted)).

\textsuperscript{316} \textit{Miranda}, 384 U.S. at 477.

\textsuperscript{317} \textit{Id.} at 476 (emphasis added).

\textsuperscript{318} 384 U.S. 757 (1966).

\textsuperscript{319} \textit{See supra} Part I.A.

\textsuperscript{320} 401 U.S. 222 (1971).

\textsuperscript{321} \textit{See supra} Part II.B.2.a.
\end{flushright}
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,\(^{322}\) 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 that they are true, 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 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*\(^ {323}\) 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

---

\(^{322}\) See supra text accompanying note 316.

\(^{323}\) 440 U.S. 450 (1979).
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.” 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. Accordingly, even when “deal[ing] with the constitutional privilege against compulsory self-incrimination in its most pristine form,” 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.

### 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. *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. Thus, even where a secondary non-investigatory purpose is present, the statement will still be deemed testimonial.

---

324 *Id.* at 459.

325 *Id.*

326 *See supra* Part II.B.2.a.

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

328 *See* Graham, *supra* note 263, at 128 (“[T]he police will usually have more than one purpose in asking questions.”).

329 *See supra* text accompanying note 46.
Though it is far from certain, 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 for evidence-gathering. As long as a plausible purpose other than an investigatory one is objectively apparent, any statement made is nontestimonial. This 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 a genuine concern for the risks posed by the hidden weapon.” 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*’ “primary purpose” test is very difficult to apply. Consider, for example, the recent case of *People v. Nieves-Andino*, where a police officer, having come upon Millares, a very seriously injured man, called for an ambulance, asked some basic biographical information, and then asked what had happened. Before expiring, Millares told him that he had had an argument with the

---

330 See, e.g., Yeager, supra note 150, at 1000 (“[T]he [Quarles] Court failed to address circumstances in which officers may have more than one motivation.”).

331 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 155, at 2383 (“Quarles . . . does not appear to require that the officer’s primary purpose be safety, only that such a concern is present.”); Yeager, supra note 150, at 1001 (“In effect . . . Quarles decided the problem of dual-purpose questions in favor of the police.”); cf. Pizzi, supra note 154, 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.”).

332 Marks, supra note 211, at 1086; accord White, supra note 271, at 1223 (“An objective listener could plausibly conclude that the policeman’s remarks . . . were made solely to express their genuine concern about the danger posed by the hidden shotgun.”).

defendant, who had shot him three times.\textsuperscript{334} This simple, and not atypical, fact pattern split the New York Court of Appeals 4-3. 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,”\textsuperscript{335} 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,” and “there [was no] indication that the assailant was still on the scene.”\textsuperscript{336}

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. 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.’”\textsuperscript{337}

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

\textsuperscript{334} \textit{Id.} at *__.

\textsuperscript{335} \textit{Id.} at *__.

\textsuperscript{336} \textit{Id.} at *__ (Jones, J., concurring).

\textsuperscript{337} Pizzi, \textit{supra} note 154, at 583 (quoting American Law Institute, Model Penal Code § 3.04 comments at 17 (Tent. Draft No. 8, 1958)).
equivalents of the committing magistrate. 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 should be deemed testimonial even if a plausible non-investigatory 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 non-investigatory purpose. The prosecution would have to convince the court that the non-investigatory purpose caused the interrogation to occur. However, special rules of causation apply to mixed motive cases. 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.” The non-investigatory and investigatory purpose will each constitute a concurrent sufficient cause

---

338 See supra text accompanying notes 162 to 164.

339 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 admissible pursuant to Confrontation Clause).

340 Russell D. Covey, The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection, 66 Md. L. Rev. 279, 287-88 (2007). 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). 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) (“Even the majority implicitly agrees that causation is necessary [to show that a constitutional error resulted in a guilty verdict].”); Price Waterhouse v. Hopkins, 490 U.S. 228, 239-42 (1989) (plurality) (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.
because, absent one motive, the questioning would have occurred anyway, so neither motive would be a but-for cause.341

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.342 Utilizing this line of reasoning, the prosecution would have to prove that, considering only objectively observable indicia, the non-investigatory purpose of the questioning was a substantial factor in bringing about the questioning. In the overwhelming majority of cases this should not be hard to do. 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 non-investigatory 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.

---

341 See Pardo, supra note 12, at 46 & n.224 (suggesting that courts should engage in counter-factual 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).

342 See RESTATEMENT (SECOND) OF TORTS § 432(2).
CONCLUSION

When the Constitution is studied and applied piecemeal, commonalities between and among its provisions tend to fall through the cracks.\textsuperscript{343} 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, upon close inspection, a great many Self-Incrimination Clause and Confrontation Clause cases have analogues with one another. \textit{New York v. Quarles} tells us that statements compelled from the accused during an emergency can nonetheless be used against him, and \textit{Davis v. Washington} tells us that statements taken from a third party during an emergency can be used against the accused as well. \textit{Illinois v. Perkins} dictates that statements made by an accused to an undercover government agent can be introduced against the accused, and \textit{United States v. Bourjaily} dictates that statements made by a third party to an undercover government agent can be introduced against the accused. Pursuant to \textit{Harris v. New York}, statements made by an accused under compulsion can be used to impeach his trial testimony, and pursuant to \textit{Tennessee v. Street}, statements made by a third party can be used to impeach the accused’s trial testimony. And so on.

Yet, also like twins separated at birth, the two Clauses have been shaped by environmental factors that have effected some minor differences in their personalities. It is time for the Supreme Court to explicitly recognize the close kinship of the two Clauses and understand that it has effectively ascribed a single, uniform meaning to the term “witness.”

\textsuperscript{343} See Nagareda, \textit{supra} note 5, at 1064 (“The right to present witnesses . . . tends to slip through the cracks of the conventional curriculum.”).