Confronting the "Ongoing Emergency": A Pragmatic Approach to Hearsay Evidence in the Context of the Sixth Amendment

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ELLEN LIANG YEE∗

ABSTRACT

The Supreme Court’s pathbreaking decision in Crawford v. Washington held that admission of an extrajudicial testimonial statement by an unavailable declarant-witness violates the Confrontation Clause unless the defendant has an opportunity to cross-examine the declarant. Unfortunately, the determination of admissibility for the trial court judge has not been simplified after Crawford. The role of the trial court judge has now shifted from determining the reliability of the hearsay evidence (as was required before Crawford) to a determination of the testimonial nature of the declarant’s statement. However, with some small exceptions, the Court in Crawford explicitly decided that it would “leave for another day” a more specific definition of the term “testimonial,” which would have helped to clarify how to address admissibility issues in many cases.

This testimonial thicket presents a difficult set of issues for lower court judges making admissibility determinations where there is a relationship between an unavailable witness-declarant and a criminal defendant. The relationship between a criminal defendant and a witness-declarant is often nuanced and complex, making trial appearance of the declarant problematic. For example, in cases where the declarant-witness is a victim of domestic violence or child abuse, courts face some of the most difficult issues in determining which hearsay statements implicate the Confrontation Clause.

Davis v. Washington provided an opportunity for the Court to address this issue in the context of two separately appealed domestic violence cases. To its credit, in Davis, the Court partially cleared the Crawford path by providing more guidance on the types of “police in-

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2. Id. at 68.
terrogations” that may produce “testimonial” statements. However, the Court’s approach in Davis fails to provide a comprehensive set of considerations for lower courts in addressing relationships that make it problematic for the witness-declarant to testify at trial. For example, the Court has provided incomplete guidance for determining when an “ongoing emergency” is present—an important predicate inquiry to an admissibility determination where there is a relationship between a witness-declarant and a criminal defendant. Drawing from and extending the Court’s approach in Davis, this Article suggests a method of analysis that implements the framework of Crawford within the broader institutional goals of the criminal justice system. Specifically, by providing an analytical approach to aid courts in defining an “ongoing emergency” in the context of problematic relationships, the Article gives lower courts some much-needed guidance to assist in addressing the admissibility of statements by witness-declarants who may be unavailable to testify.

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I. INTRODUCTION

According to the Confrontation Clause of the Sixth Amendment, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Judicial interpretation of this clause critically impacts the admissibility of evidence in criminal trials. The Supreme Court only intermittently addressed confrontation issues until 1980, when the Court established a framework of analysis for admission of hearsay evidence based on a pretrial judicial determination of reliability in \textit{Ohio v. Roberts}.5

In 2004, after nearly twenty-four years of this well-entrenched reliability approach, the Supreme Court substantially altered the course of Confrontation Clause analysis with its pathbreaking decision in \textit{Crawford v. Washington}.6 In \textit{Crawford}, the Court concluded that the Sixth Amendment barred “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”7 Not surprisingly, following \textit{Crawford}, lower courts struggled to develop predictable and principled rules to implement this approach, and a number of leading scholars critically debated how the doctrine should apply.8 One particular problem is

4. U.S. CONST. amend. VI.
5. 448 U.S. 56 (1980).
7. Id. at 53-54.
how exactly lower courts should determine what kinds of statements are “testimonial” within the new Confrontation Clause framework.9

Two years later, the Supreme Court offered a partial solution when it issued its opinion in Davis v. Washington.10 With Davis, the Court was no longer able to sustain its “luxury of indecision”11 and was forced into the difficult effort of beginning to actually spell out a definition of “testimonial.”12 Davis recognized that “[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”13 In contrast, the Court reasoned “[statements] are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”14 The “primary purpose” test that the Court set forth in Davis can be useful in evaluating the testimonial nature of a communication between a declarant and the police. In making the pragmatic differentiation of a police officer’s multiple roles, the Court signaled that it would not paint with broad strokes that are overinclusive simply because a bright-line standard may be easier to implement.

While Davis’s overall conclusion that not all statements to the police are testimonial is unassailable, the Court’s application of its standards to the two cases it decided is far too narrow to give meaningful guidance to lower courts. This Article argues that the Court misapplied the primary purpose test to some of the facts addressed in Davis and that a more comprehensive evaluation of the surrounding


10. 547 U.S. 813 (2006). This decision reflects appeals of two state supreme court cases that were consolidated, argued in tandem, and addressed by the Supreme Court in a single opinion. See Hammon v. State, 829 N.E.2d 444 (Ind. 2005); State v. Davis, 111 P.3d 844 (Wash. 2005).

11. Davis, 547 U.S. at 823.

12. Crawford, 541 U.S. at 68.


14. Id.
circumstances is necessary, especially in certain types of cases. The Court’s approach provides insufficient guidance to assist lower courts in determining which facts indicate the presence of an “ongoing emergency,” particularly in the context of domestic violence and in other scenarios where the scope of the emergency may be indeterminate. This Article proposes a principled way for courts to take a more careful and holistic approach to determining whether “the circumstances objectively indicate that there is [an] . . . ongoing emergency.”

Part II begins with a brief description of the legal landscape that preceded Crawford to provide background context for that decision. Part II then discusses the abrupt turn the Crawford Court took in its approach to the Confrontation Clause by changing the focus of the Clause from functioning as a judicially-determined safeguard against unreliable evidence to operating as a procedural trial right. In Crawford, the Court declared that “[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” Because police interrogation is one of “the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed,” the Court held that statements made in police interrogations are testimonial. While application of the Court’s new approach adequately resolved the issue presented in Crawford, the opinion left open many questions about how the doctrine would apply in future cases. The primary issue remains how courts will determine which hearsay statements are “testimonial” and therefore subject to the Confrontation Clause.

Part III addresses Davis v. Washington, the U.S. Supreme Court’s most recent decision on testimonial hearsay and the Confrontation Clause. The Crawford Court had “use[d] the term ‘interrogation’ in its colloquial, rather than any technical legal, sense.” Refusing to select among the “various definitions of ‘interrogation,'” the Court left open how this term would be interpreted and applied in future cases. In Davis, the Court began to articulate a more comprehensive definition of “testimonial” by delineating more specifically which police interrogations invoke the protection of the Confrontation Clause.

Davis’s standard requires a determination of the primary purpose of the police interrogation by objectively evaluating whether the circumstances indicate that there is an “ongoing emergency.” In Davis,

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15. Id.
17. Id.
18. Id. at 53 n.4.
19. Id.
the Court gave short shrift in both cases to the determination of whether there was an ongoing emergency. On the facts of Davis, the Court found the declarant was facing a “bona fide physical threat” because she was “apparently in immediate danger from Davis” until Davis left the scene. Yet on the facts of Hammon, a companion case that the Court referred to in the Davis opinion, the Court found no ongoing emergency even though the defendant was still present and the officers observed broken items in the home. The Court reached this conclusion based on the fact that the declarant told the police when they arrived that “things were fine” and the fact that the police did not hear any “arguments or crashing” or see anyone “throw or break anything.” The scope of the circumstances considered in both cases was too limited to provide a meaningful determination regarding the existence of an ongoing emergency.

Davis presented a unique opportunity for the Court to address Crawford’s impact in domestic violence cases. In cases where the declarant-witness is a victim of domestic violence or child abuse, courts face some of the most difficult issues in determining which hearsay statements implicate the Confrontation Clause. Given the particular interpersonal dynamics involved in these types of cases, the declarant is often absent from the court proceedings. Yet the Court refused to address this problem to the extent it failed to comprehensively consider all of the relevant circumstances, presenting a variety of potential barriers to lower courts’ truth-finding function in these kinds of cases.

Part IV criticizes the Court’s underinclusive conceptualization of what constitutes an “ongoing emergency.” For cases involving witnesses who have a relationship with others involved with the case, a more thoroughly examined and nuanced view of which situations constitute an ongoing emergency is necessary. Institutional and sociological factors can help in identifying when these kinds of relationships are present and how the relationship impacts the circum-

20. Davis, 547 U.S. at 827.
21. Id. at 831.
22. Id. at 828.
23. See infra Part III.A.2 (referencing lower court opinion in Hammon).
24. Davis, 547 U.S. at 830 (citing Joint Appendix at 14, Davis, 547 U.S. 813 (No. 05-5705), 2005 WL 3617526 [hereinafter Hammon Appendix]).
25. Id. at 829 (citing Hammon Appendix, supra note 24, at 25).
26. Id. at 832-33.
28. See infra Part IV.A.
29. See Tuerkheimer, supra note 8, at 10.
stances of a police interrogation. In recognition that certain kinds of relationships will inevitably hinder declarants’ appearance at trial, this Part discusses how lower court judges might approach admissibility determinations in light of the broader goals of the criminal justice system, including truth and fairness. In addition, this Part identifies the specific factors courts should consider when making the inferential determination of whether the declarant’s statements were made during an ongoing emergency.

II. BACKGROUND

The two primary components of the Confrontation Clause raise equally complex issues of interpretation and application. First, who are “the witnesses against [the accused]?" Second, what does it mean to “enjoy the right . . . to be confronted with” those witnesses? In 1970, Justice Harlan wrote, “[T]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into [its] intended scope . . . .” Nevertheless, courts and scholars have continued to scour the historical record for some indication of the Clause’s intended meaning. While the concept of confrontation has been traced back to the Roman era and to early English jurisprudence, comprehensive searches of early American historical documents reveal only rare mention of the right.

30. U.S. CONST. amend. VI.
31. Id.
34. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: “It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.” Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988) (quoting Acts 25:16).
35. Id. at 1016 (“It has been argued that a form of the right of confrontation was recognized in England well before the right to jury trial.” (citing Daniel H. Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. PUB. L. 381, 384-87 (1959)).
36. Jonakait, supra note 33, at 77 n.4 (“Congressional intent is virtually impossible to determine since ‘[the clause was debated for a mere five minutes before its adoption.’ ” (alteration in original) (quoting Howard W. Gutman, Academic Determinism: The Division of the Bill of Rights, 54 S. CAL. L. REV. 295, 332 n.181 (1981)).
However, there is some evidence of the right in American jurisprudence even before the Sixth Amendment was ratified in 1791.\textsuperscript{37} Several states had adopted declarations of rights that guaranteed a right of confrontation before the federal constitutional amendment.\textsuperscript{38} The Supreme Court has also recognized that the right of confrontation—a common law right that had recognized exceptions—preceded the adoption of the Sixth Amendment.\textsuperscript{39} While the Supreme Court’s interpretation and application of the right of confrontation initially developed in piecemeal fashion, one significant characteristic has remained constant: beginning in 1895 with \textit{Mattox v. United States}, the Court, in several landmark cases, has consistently held that the right is not absolute.\textsuperscript{40}

As the Court was faced with these issues over the next century, it primarily interpreted the Confrontation Clause as functioning to ensure the reliability of evidence. While maintaining a preference for live testimony—where the courtroom tools of the oath, observation of demeanor, and cross-examination help increase the accuracy and reliability of the testimony—the Court held that if the evidence was adequately reliable, then the benefits of confrontation were outweighed by the interests in public justice.\textsuperscript{41}

In 1980, the Court attempted to impose a coherent analytical framework for hearsay and confrontation issues in \textit{Ohio v. Roberts}.\textsuperscript{42} Subsequent cases increasingly intertwined the analysis of evidentiary and constitutional issues, effectively eroding the protection the right was intended to provide. The Court addressed these problematic developments by completely shifting gears in \textit{Crawford v. Washington}. In \textit{Crawford}, the Court reexamined the origins of the right and concluded that both the history and text of the Clause compelled the Court to redirect the focus of its analysis to the procedural aspect of the right of confrontation.\textsuperscript{43}

\begin{itemize}
\item \textsuperscript{37} U.S. CONST. amend. VI.
\item \textsuperscript{38} See \textit{Crawford v. Washington}, 541 U.S. 36, 48 (2004) (citing Virginia Declaration of Rights § 8 (1776); Pennsylvania Declaration of Rights § IX (1776); Delaware Declaration of Rights § 14 (1776); Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Vermont Declaration of Rights Ch. I, § X (1777); Massachusetts Declaration of Rights § XII (1780); New Hampshire Bill of Rights § XV (1783), \textit{all reprinted in 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY} 235, 265, 278, 282, 287, 323, 342, 377 (1971)).
\item \textsuperscript{39} Salinger v. United States, 272 U.S. 542, 548 (1926).
\item \textsuperscript{40} Mattox v. United States, 156 U.S. 237, 250 (1895). Although the Confrontation Clause was ratified in 1791, more than a century passed before the Supreme Court significantly considered the meaning and the application of the Clause in \textit{Mattox}.
\item \textsuperscript{41} \textit{Crawford}, 541 U.S. at 51-52.
\item \textsuperscript{42} 448 U.S. 56 (1980).
\item \textsuperscript{43} \textit{Crawford}, 541 U.S. at 67.
\end{itemize}
A. The Reliability Era

1. Before 1980

In Mattox v. United States, the defendant had been convicted of a murder based in part on the in-court testimony of two witnesses. The conviction was overturned and remanded for a new trial. By the time the new trial began, the two witnesses had died. Both had testified and had been cross-examined by the defendant at the previous trial. In lieu of their live testimony, the prosecutor offered as evidence the reporter's stenographic notes of their testimony from the previous trial. Upon reconviction for murder, the defendant claimed his right to confront the witnesses against him had been violated by admission of the reporter's notes.

The Mattox Court stated that the primary objective of the Confrontation Clause was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

While this right was an important aspect of a criminal trial, the Court explained that the right was not absolute; it “must occasionally give way to considerations of public policy and the necessities of the case.” The Court noted it could recognize an exception to a general rule without interfering with the spirit of the right. With that justification, the Court found that the “spirit” or the “substance” of the confrontation right was preserved in that the defendant once had the opportunity to see the witness face-to-face and to subject the witness to cross-examination.

44. Mattox, 156 U.S. at 240.
45. Id. at 238.
46. Id. at 240.
47. Id.
48. Id.
49. Id.
50. Id. at 242-43.
51. Id. at 243. In the Court’s view, live testimony from a witness is better than a transcript of former testimony, but if the witness is unavailable, it is better to have the transcript than no evidence at all. Id.
52. Id.
53. Id. at 243, 244. Later in California v. Green, the Court similarly held that when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. 399 U.S. 149, 162 (1970).
As the Court continued to articulate the purposes of confrontation, each interpretation was aimed at improving the truth-finding function of the trial by increasing the accuracy of the evidence. In California v. Green, the Court identified three main purposes of confrontation. First, the oath insures that a witness appreciates the seriousness of the matter and helps decrease the likelihood of false statement by threat of a penalty for perjury. Second, cross-examination subjects a witness to "the greatest legal engine ever invented for the discovery of truth." Third, observation of the witness's demeanor assists the factfinder in assessing the witness's credibility. In addressing hearsay issues, the Court acknowledged that the Confrontation Clause and the hearsay rule "are generally designed to protect similar values." However, the Court asserted that it had "never equated the two."

2. Ohio v. Roberts

In Ohio v. Roberts, the Court attempted to establish a clear framework for the application of the Confrontation Clause to hearsay

The Court concluded that "substantial compliance with the purposes behind the confrontation requirement" had been met. Id. at 166.

54. The significance of the confrontation right in American jurisprudence greatly expanded in 1965 when the Court applied the Confrontation Clause to the states by incorporating the Sixth Amendment via the Due Process Clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965).

55. In Dutton v. Evans, the Court stated "that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process." 400 U.S. 74, 89 (1970) (plurality opinion). The Court examined the circumstances under which the statement was made and found that it was "inconceivable that cross-examination could have shown that [the accomplice] was not in a position to know whether or not [the defendant] was involved in the murder." Id. at 89-89.

56. Green, 399 U.S. 149.

57. Id. at 158.

58. Id. (quoting 5 J. WIGMORE, EVIDENCE § 1397 (3d ed. 1940)).

59. Id.; see also Tennessee v. Street, 471 U.S. 409, 415 (1985) ("[T]he Confrontation Clause's very mission [is] to advance 'the accuracy of the truth-determining process in criminal trials.' " (quoting Dutton, 400 U.S. at 89)).

60. Dutton, 400 U.S. at 81 (quoting Green, 399 U.S. at 155).

61. Id. at 86. Dutton involved a statement by the defendant's accomplice to a fellow inmate. After returning from his arraignment, the accomplice stated to his fellow inmate that if it had not been for the defendant "we wouldn't be in this now." Id. at 77. Even though the accomplice was never cross-examined regarding this statement, the Court found no Confrontation Clause violation by emphasizing that the case does not involve the use, or misuse, of a confession made in the coercive atmosphere of official interrogation . . . . It does not involve any suggestion of prosecutorial misconduct or even negligence . . . . It does not involve the use by the prosecution of a paper transcript . . . . It does not involve a joint trial . . . . And it certainly does not involve the wholesale denial of cross-examination . . . .

Id. at 87. The Court found that "the statement contained no express assertion about past fact." Id. at 88.
evidence. In deciding to admit an unavailable witness’s former testimony, the Court created a two-prong test requiring both unavailability and reliability as a predicate to admissibility.

Acknowledging that the Confrontation Clause establishes a preference for face-to-face accusations, the Court held that under a “rule of necessity,” the prosecution must either produce the witness or demonstrate his unavailability. If the declarant’s unavailability is established, then the out-of-court statement may be admissible only if the statement bears “indicia of reliability” sufficient to safeguard the Clause’s “underlying purpose [of] augment[ing] accuracy in the factfinding process.” To meet that standard of reliability, the Court determined that the evidence must either “fall[] within a firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness.”

In applying the “indicia of reliability” requirement, the Court concluded “that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’” The Court further explained that “[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.” Noting again that both the Confrontation Clause and the hearsay rule are “designed to protect similar values” and that they “stem from the same roots,” the Roberts analysis used hearsay law as a means of determining the constitutional admissibility of evidence.

3. Post-Ohio v. Roberts

As the constitutional confrontation standard evolved, gradually more out-of-court declarations were allowed to serve as evidence in place of in-court testimony. Soon after the Court set out the two-prong test in Roberts, the necessity prong began to erode. The number of exceptions to the necessity requirement steadily increased until a showing of unavailability was rarely required. Minimizing the necessity requirement was justified by the rationale that the hearsay statements were reliable, perhaps more reliable than in-court testi-
mony. In 1992, the Court, in *White v. Illinois*, essentially eliminated the necessity prong for all types of hearsay cases except former testimony. The Court went so far as to say that hearsay admissible “under a ‘firmly rooted’ hearsay exception is so trustworthy that adversarial testing can be expected to add little to [the statement’s] reliability.”

Foreshadowing the radical shift to come in *Crawford*, Justices Thomas and Scalia in their concurrence suggested that the Court’s “Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself.” Justice Thomas then attacked the majority’s assumption “that all hearsay declarants are ‘witnesses against’ a defendant within the meaning of the Clause,” asserting that such an assumption is “neither warranted nor supported by the history or text of the Confrontation Clause.” Setting forth an analysis of the term “witness,” Justice Thomas supported a narrow interpretation that included only

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71. See United States v. Inadi, 475 U.S. 387, 394-95, 399-400 (1986). The Court concluded that the Constitution did not require a showing of unavailability prior to the admission of a co-conspirator’s statements because the circumstances in which the statements were given made them more reliable and could not be replicated on the stand. *Id.*

72. 502 U.S. 346 (1992). The Court held that the admission of a child’s statements to her babysitter, her mother, and a police officer under the spontaneous declaration exception and the admission of the child’s statements to a nurse and a doctor under the medical examination exception, did not violate the defendant’s confrontation rights. *Id.* at 348-51. At trial, there was no finding that the four-year-old child abuse victim was unavailable, but she did not testify. *Id.* at 350. By restricting the holding of *Roberts* to its facts, the Court stated, “*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding.” *Id.* at 354 (citing *Inadi*, 475 U.S. at 394).

73. *Id.* at 357 (citing Idaho v. Wright, 497 U.S. 805, 820-21 (1990)).

74. *Id.* at 358 (Thomas, J., concurring in part and concurring in the judgment).

75. *Id.* at 359 (citing Wright, 497 U.S. 805; Lee v. Illinois, 476 U.S. 530 (1986); *Roberts*, 448 U.S. 56).

76. *Id.* Justice Thomas first discussed Wigmore’s view of the term “witnesses.” *Id.* at 359-60. He then analyzed the “plain language” of the Clause, quoting Justice Scalia’s dissent in another recently decided case:

> The Sixth Amendment does not literally contain a prohibition upon [hearsay] evidence, since it guarantees the defendant only the right to confront the “witnesses against him.” As applied in the Sixth Amendment’s context of a prosecution, the noun “witness”—in 1791 as today—could mean either (a) one “who knows or sees any thing; one personally present” or (b) “one who gives testimony” or who “testifies,” *i.e.*, “[i]n judicial proceedings, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court.” The former meaning (one ‘who knows or sees’) would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: ‘witnesses against him.’ The phrase obviously refers to those who give testimony against the defendant at trial. *Id.* at 360 (quoting Maryland v. Craig, 497 U.S. 836, 864-65 (1990) (Scalia, J., dissenting)) (alterations in original).
those who actually appear and testify at trial.\textsuperscript{77} Attempting to be faithful to the text and history of the Confrontation Clause, Justice Thomas suggested a formulation that encompasses “extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”\textsuperscript{78}

In the years following \textit{Roberts}, the Court continued to focus on the reliability of the hearsay statement to determine whether the Confrontation Clause required in-court cross-examination.\textsuperscript{79} If the statement was not a “firmly rooted” hearsay exception, the Court looked only at the circumstances surrounding the making of the statement for indicia of reliability.\textsuperscript{80} The Court’s rationale for this limitation was based on the notion that the trustworthiness of the statement depends on information normally obtained through cross-examination.\textsuperscript{81} In other words, circumstantial indicia of trustworthiness best replace what is lost by lack of cross-examination.

\textit{Roberts} bound the constitutional issue of confrontation with the evidentiary issue of hearsay reliability. Academics have long criticized this approach for diminishing defendants’ rights to confrontation and for determining reliability with a standard that was vague,
arbitrary, and subjective.82 When the category of firmly rooted hearsay exceptions was stretched to include an accomplice’s confession that inculpated the accused,83 the Court disagreed and found that the statements against the declarant’s penal interest did not, “in light of ‘longstanding judicial and legislative experience,’ ”84 “‘[rest on] such [a] solid foundation] that admission of virtually any evidence within [it] comports with the ‘substance of the constitutional protection.’ ”85 However, the rationales for this holding diverged, and in his concurrence, Justice Breyer left the door open for the changes to come in Crawford.86

B. Identifying a Bold New Path—Crawford v. Washington

In 2004, the Court, in Crawford v. Washington, seized the opportunity to untangle the Confrontation Clause from hearsay rules and to reframe completely the analysis by returning to the Clause’s “original meaning.”87 Michael Crawford had been accused of stabbing a man who allegedly tried to rape his wife, Sylvia.88 When Michael and Sylvia were arrested and taken to the police station, they were individually questioned about their involvement in the stabbing.89 Detectives gave both Michael and Sylvia Miranda warnings before the Crawfords gave statements to the police.90 Michael’s statement arguably suggested that the victim may have reached for a weapon


83. In Lilly v. Virginia, the trial court admitted a taped statement that the defendant’s accomplice gave to the police that implicated himself and the defendant as a statement against penal interest. 527 U.S. 116, 121-22 (1999).

84. Id. at 126 (quoting Wright, 497 U.S. at 817).

85. Id. (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)). The plurality’s opinion stated that an accomplice’s confession that inculpated the accused is not a firmly rooted hearsay exception and that admission of the statement was a violation of the defendant’s confrontation rights. Id. at 139. However, Chief Justice Rehnquist and Justices O’Connor and Kennedy did not agree that the Confrontation Clause so broadly imposed a “blanket ban on the government’s use of accomplice statements that incriminate a defendant.” Id. at 147 (Rehnquist, C.J., concurring in the judgment).

86. Id. at 142-43 (Breyer, J., concurring). Justice Breyer stated:

We need not reexamine the current connection between the Confrontation Clause and the hearsay rule in this case, however, because the statements at issue violate the Clause regardless. I write separately to point out that the fact that we do not reevaluate the link in this case does not end the matter. It may leave the question open for another day.

Id. (internal citation omitted).


88. Id. at 38.
89. Id.
90. Id.
first. Sylvia’s statement arguably suggested that Michael was the aggressor and that the victim did not reach for, or did not have, a weapon before the stabbing.

At trial, Michael claimed the stabbing was in self-defense. He asserted his evidentiary marital privilege and prevented Sylvia from testifying. Unable to call Sylvia as a witness, the prosecution sought to use her tape-recorded statement to rebut the defendant’s self-defense theory. The trial court admitted Sylvia’s hearsay statement under the exception for statements against penal interest. Furthermore, the trial court held that the statement did not violate the Confrontation Clause, as construed in Roberts, because it bore “particularized guarantees of trustworthiness.”

91. Id. at 38-39.

92. Id. at 39.

93. Id. at 40.

94. Id. (citing WASH. REV. CODE § 5.60.060(1) (1994)).

95. Id. (citing WASH. R. EVID. 804(b)(3) (2003)).

96. Id. (citing WASH. R. EVID. 804(b)(3) (2003)). The statement implicated Sylvia as an accomplice because she had admitted to assisting in the assault by leading the defendant to the victim’s residence. Id.

97. Id. (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)).
Michael Crawford was convicted of assault. On appeal, the case flipped back and forth as the Washington courts came to opposite conclusions about the trustworthiness, and thus admissibility, of Sylvia’s statement. While the U.S. Supreme Court could have reversed the judgment within the existing framework of Confrontation Clause jurisprudence, the Court forged a new path which it rooted in the history of the Clause.

1. Crawford and the Confrontation Clause

The Crawford Court began with a textual analysis but was quick to conclude that the text alone was insufficient to resolve the issue. The Court conceded that the phrase “witnesses against [the accused]” could be interpreted broadly to include all declarants whose statements were offered at trial, narrowly to include only those who appear and actually testify at trial, or “something in-between.”

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98. Id. at 41.
99. The Washington Court of Appeals disagreed with the trial court and applied a nine-factor test to determine that Sylvia’s statement did not bear particularized guarantees of trustworthiness and therefore its admission violated the Confrontation Clause. Id. The Washington Supreme Court then reversed with a logically incoherent conclusion. Id. The State offered Sylvia’s statement precisely because it differed from the defendant’s statement on the critical issue of who may have reached for a weapon first. However, the court found that it was reliable because of its similarity with the defendant’s statement. Id.
100. As Chief Justice Rehnquist and Justice O’Connor argued in their separate opinion concurring with the judgment, the Court simply could have held that the Washington Supreme Court’s consideration of the defendant’s own statement and its interlocking nature with Sylvia’s statement impermissibly relied on corroborative evidence to indicate trustworthiness in violation of the rule established in Idaho v. Wright. Id. at 76 (Rehnquist, C.J., concurring in the judgment) (citing Idaho v. Wright, 497 U.S. 805, 820-24 (1990)).
101. Id. at 42-50 (majority opinion).
102. Id. at 42-43.
103. Id. at 43 (citing 3 J. WIGMORE, EVIDENCE § 1397, at 104 (2d ed.1923)). In White v. Illinois, Justices Thomas and Scalia characterized the majority’s approach to the Clause as adopting this view. White v. Illinois, 502 U.S. 346, 359 (1992) (Thomas, J., concurring in part and concurring in the judgment) (“Unfortunately, in recent cases in this area, the Court has assumed that all hearsay declarants are ‘witnesses against’ a defendant within the meaning of the Clause, see, e.g., Ohio v. Roberts, 448 U.S. 56 (1980); Lee v. Illinois, 476 U.S. 530 (1986); Idaho v. Wright, 497 U.S. 805 (1990) . . . .”). Even though all hearsay declarants could be “witnesses” within the meaning of the Confrontation Clause, the Court has consistently interpreted the Clause to allow some exceptions. See Mancusi v. Stubbs, 408 U.S. 204, 213-14 (1972).
104. Crawford, 541 U.S. at 43 (citing Woodsides v. State, 3 Miss. 655, 664-65 (1837)); see also White, 502 U.S. at 359-60 (Thomas, J., concurring in part and concurring in the judgment) (“The strictest reading would be to construe the phrase ‘witnesses against him’ to confer on a defendant the right to confront and cross-examine only those witnesses who actually appear and testify at trial.”).
The Court then probed the history of the clause for meaning.\textsuperscript{106} In contrast to the continental civil law procedures that allowed judicial officers to examine witnesses in private, the Court found that English common law tradition involved an actual meeting between the accused and the witnesses who gave testimony in court and were subjected to adversarial testing of their testimony.\textsuperscript{107} Citing examples of deviations from this procedure—the most famous of which was the treason trial of Sir Walter Raleigh—the Court concluded that English law developed a right of confrontation through subsequent statutory and judicial reforms to limit those abuses.\textsuperscript{108}

From this review of history, the Court derived two important inferences about the meaning of the Sixth Amendment.\textsuperscript{109} First, the Court articulated that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.”\textsuperscript{110} Second, the Court inferred “that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”\textsuperscript{111}

Ultimately, the Court rejected the broadest and narrowest interpretations of the Clause and concluded that the Constitution requires “something in-between.”\textsuperscript{112} Then, referring back to the text, the Court attempted to establish the plain meaning of the word “witness” by referencing a contemporary edition of Webster’s Dictionary that defined “witnesses” as “those who ‘bear testimony.’”\textsuperscript{113} The same dictionary, in turn, defined “testimony,” as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”\textsuperscript{114}

\textsuperscript{106}. Though many scholars have noted the dearth of documentation of the Framers’ intended meaning of the Clause, many attempts have been made to trace the history of the concept of confrontation. See generally Herrmann & Speer, supra note 33; Jonakait, supra note 33; Pollitt, supra note 35; Peter Tillers, Legal History for a Dummy: A Comment on the Role of History in Judicial Interpretation of the Confrontation Clause (Benjamin N. Cardozo Sch. of Law Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 110, 2005). The Court has traced the concept from the Roman era, Crawford, 541 U.S. at 43 (citing Coy v. Iowa, 487 U.S. 1012, 1015 (1988); Herrmann & Speer, supra note 33); to English law, Crawford, 541 U.S. at 43; and to the colonies. Crawford, 541 U.S. at 47-50.

\textsuperscript{107}. Crawford, 541 U.S. at 43 (citing 3 William Blackstone, Commentaries on the Laws of England 373-74 (1768)).

\textsuperscript{108}. Id. at 43-44.

\textsuperscript{109}. Id. at 50.

\textsuperscript{110}. Id.

\textsuperscript{111}. Id. at 53-54.

\textsuperscript{112}. Id. at 42-43, 68.

\textsuperscript{113}. Id. at 51 (quoting 2 Noah Webster, An American Dictionary of the English Language (1828)).

\textsuperscript{114}. Id. (quoting 2 Webster, supra note 113). But see id. at 71 (Rehnquist, C.J., concurring in the judgment) (referencing the same dictionary alternatively “defining
Following this guideline, the Court concluded that the Sixth Amendment barred “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”115 In other words, “[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”116

2. The “Testimonial” Thicket

Crawford transformed the constitutional landscape by requiring courts to determine which out-of-court statements are “testimonial” for Confrontation Clause purposes. The most significant issue following Crawford is how, exactly, courts are to identify such statements.117

The Crawford Court identified five types of statements as definitively testimonial: prior testimony at a preliminary hearing,118 prior testimony before a grand jury,119 prior testimony at a former trial,120 statements made during police interrogations,121 and guilty plea allocutions.122 The Court listed the first four types of statements together within the same breath, as though they were equivalent.123 On closer examination, however, they are not equivalent. The first three are most commonly understood as testimonial statements because they are in fact sworn testimony given in a formal court setting. The Court wove police interrogations into the same cloth as prior in-court testimony by noting they share the “closest kinship to the abuses at which the Confrontation Clause was directed.”124

Statements made during police interrogations, however, are substantially different from in-court testimony. Characterizing them as “clearly testimonial” requires a significant conceptual leap from in-court sworn statements to unwitnessed statements made to a police offi-

115. Id. at 53-54 (majority opinion).
116. Id. at 68. But see id. at 69 (Rehnquist, C.J., concurring in the judgment) (“The Court’s distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine.”).
117. See supra note 9 and accompanying text.
118. Crawford, 541 U.S. at 68.
119. Id.
120. Id.
121. Id.
122. Id. at 64.
123. See id. at 68.
124. Id.
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cer.125 Using “the term ‘interrogation’ in its colloquial, rather than any technical legal, sense,” the Court intentionally designed an opportunity for future development of what circumstances may constitute a police interrogation.126 However, the Court declared that, at a minimum, when a declarant knowingly gives a recorded statement “in response to structured police questioning,” the statement is testimonial.127

By analogizing police interrogations to examinations by the justice of the peace under the Marian statutes in Sir Walter Raleigh’s case,128 the Court attempted to ground its testimonial characterization of police interrogations in history. However, by including statements made outside a formalized legal setting, the Court substantially expanded the scope of the definition of testimonial statements.

(a) Crawford’s Three Formulations of the “Core Class of Testimonial Statements”

Outside of identifying a few categories of “clearly testimonial” statements and suggesting that a few others are not,129 the Crawford court deferred to “another day” the task of defining “testimonial.”130 In the meantime, the Court suggested three formulations that compose the “core class of ‘testimonial’ statements.”131 The narrowest formula encompassed those “‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’”132 The second included “‘ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutori-

125. The Court dismissed the importance of the oath as a critical factor in characterizing a statement as testimonial. Id. at 65.
126. Id. at 53 n.4.
127. Id.
128. Id. at 52.
129. The Crawford Court identified a few types of statements as clearly nontestimonial, such as business records and statements in furtherance of a conspiracy. Id. at 56. The Court also hinted at other statements that may be considered nontestimonial. See id. at 58 n.8. For example, the Court suggested that “[a]n off-hand, overheard remark” may not be testimonial. Id. at 61 (“The remark bears little resemblance to the civil-law abuses the Confrontation Clause targeted.”). Additionally, a “casual remark to an acquaintance” may not be testimonial. Id. (“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”).
130. Id. at 68.
131. Id. at 51.
ally.' "133 The broadest formulation included "statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." 134

(b) Other Routes of Admissibility for Out-of-Court Statements

The Court further discussed several situations in which an out-of-court statement may be admissible regardless of its testimonial nature. For example, the first circumscription the Court placed around the definition of "witnesses" was to limit the term to those declarants whose statements are offered for the truth of the matter asserted.135 Therefore, if the out-of-court statement is being offered for some other, nonhearsay purpose, the Confrontation Clause poses no concern.136 In addition, testimonial hearsay may be admissible when the declarant appears as a witness at trial subject to cross-examination regarding the prior statements137 or when the declarant is "unavail-

133. Crawford, 541 U.S. at 51 (emphasis added) (quoting Brief for Petitioner at 23, Crawford, 541 U.S. 36 (No. 02-9410)). This formulation is potentially broader because there is no requirement that the statement be contained in formalized testimonial material. However, a determination vesting a defendant’s confrontation right in a declarant’s reasonable expectation may ultimately turn on a reasonable declarant’s knowledge of criminal law and procedure—an unusual measure for a constitutional standard.

134. Id. at 52 (emphasis added) (quoting Brief for National Ass’n of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner at 3, Crawford, 541 U.S. 36 (No. 02-9410)). Also, without the requirement of formality, this standard considers a third party’s perspective of what evidence may be available for use at trial, without specifying criminal or civil. This standard, again, relies on a reasonable person’s general knowledge of the judicial system as a standard for the application of a constitutional right.

135. Id. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)).

136. Id. at 60 n.9. The meaning of the out-of-court statement may still be unclear or misleading. However, if the statement is offered to prove something other than its truth, then the question for the factfinder is whether the declarant really uttered the statement and whether the in-court witness really heard the declarant’s statement. Proof of this fact is like proof of any other perceived event. The witness’s testimonial capacities can be challenged on the stand and the factfinder will decide based on corroboration and credibility of the testifying witness.

137. Id. (citing California v. Green, 399 U.S. 149, 162 (1970)). Professor Friedman expressed concern regarding the position that the Confrontation Clause poses no obstacle to admission of the witness’s prior statements if that witness testifies subject to cross-examination at trial. Richard Friedman, The Crawford Transformation, AALS SEC. ON EVID. NEWSL. (Am. Ass’n L. Sch., Wash. D.C.), Spring 2004, at 4. In particular, Professor Friedman highlights the problems of substantively admitting prior statements that the witness no longer affirms. Id.; see also Richard D. Friedman, Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket, 1995 SUP. CT. REV. 277 (1995). Given the Court’s adherence to this position, Professor Friedman notes that there may be increased pressure to eliminate the hearsay barrier to all prior statements of a witness. Friedman, The Crawford Transformation, supra, at 4.
able to testify, and the defendant had a prior opportunity for cross-

examination.”138

The Crawford Court also suggested there may be other exceptions
to the Confrontation Clause that are unrelated to the Roberts reli-

ability rationale. For example, if declarants are rendered unavailable
by the defendant’s wrongdoing, their testimonial hearsay statements
may be admissible under the equitable rule of forfeiture by wrongdo-

ing.139 As in the exception to the hearsay exclusionary rule codified in
Federal Rule of Evidence 803(b)(6), the rationale for admitting such
evidence is not based on the theory that it is more reliable, but on the
grounds that the defendant should not benefit from his own wrongdo-

ing.140

Finally, the Court acknowledged the longstanding exception to the
hearsay rule for dying declarations.141 Conceding that a dying decla-
ration may be testimonial, the Court in Crawford declined to explic-

itly make it an exception to the application of the Confrontation
Clause.142 Nevertheless, it suggested that such a singular exception
might be accepted on historical grounds.143

(c) Applicability of the Confrontation Clause to Nontestimonial

Statements?

Crawford appeared to leave open the question of what, if any, con-

frontation rights applied to nontestimonial hearsay statements.144

138. Crawford, 541 U.S. at 53-54. However, the admissibility of these statements may
depend on whether the prior opportunity for cross-examination was constitutionally suf-
cient.

139. Id. at 62 (citing Reynolds v. United States, 98 U.S. 145, 158-59 (1879)) (“[T]he rule
of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essen-
tially equitable grounds; it does not purport to be an alternative means of determining re-
liability.”).

140. Id.; see also Fed. R. Evid. 806(b)(6) advisory committee’s notes.

141. Crawford, 541 U.S. at 56 n.6. Note, however, that the Federal Rules of Evidence
further limit the use of such statements to homicide prosecutions. Fed. R. Evid. 804(b)(2).

142. Id.

143. Id. (“We need not decide in this case whether the Sixth Amendment incorporates
an exception for testimonial dying declarations. If this exception must be accepted on his-
torical grounds, it is sui generis.”). Professor Richard Friedman has suggested a more theo-
retically sound basis for the admissibility of testimonial dying declarations that is based on
the rule of forfeiture by wrongdoing. See Richard D. Friedman, Confrontation and the Definition

144. Crawford, 541 U.S. at 53. (“[E]ven if the Sixth Amendment is not solely concerned
with testimonial hearsay, that is its primary object . . . .”). “Where nontestimonial hearsay
is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in
their development of hearsay law—as does Roberts, and as would an approach that ex-
empted such statements from Confrontation Clause scrutiny altogether.” Id. at 68. Com-
mentators have criticized the potential impact of Crawford and Davis for diminishing a de-
fendant’s ability to challenge possibly unreliable evidence when nontestimonial hearsay
evidence may be admitted with no confrontation review analysis. See, e.g., Laird C.
Kirkpatrick, Nontestimonial Hearsay After Crawford, Davis and Bockting, 19 REGENT U. L.
The Court severely criticized the reliability-based analysis of Roberts and its progeny, stating that “[r]eliability is an amorphous, if not entirely subjective, concept.”\(^\text{145}\) Describing Roberts as an “open-ended balancing test” with only “vague standards” that are “manipulable,” the Court warned that such a standard may often fail to provide “any meaningful protection.”\(^\text{146}\) Whether the test is characterized as manipulable, malleable, or flexible, it fundamentally was not a bright-line test. In reiterating its procedural interpretation of the Confrontation Clause guarantee, the Court emphasized that reliability should be determined through cross-examination rather than the fallible methods that followed the Roberts line of cases.\(^\text{147}\)

The Court acknowledged that in White it rejected the theory that the Confrontation Clause was applicable only to testimonial statements.\(^\text{148}\) While the Crawford Court explicitly acknowledged that its analysis cast doubt on the holding in White, it declined to resolve the issue of whether Confrontation Clause protections apply to nontestimonial statements—instead, it narrowly ruled on the facts of the present case, where it characterized Sylvia Crawford’s statement as “testimonial under any definition.”\(^\text{149}\)

Without explicit direction from the Court,\(^\text{150}\) lower courts continued to apply Roberts before admitting nontestimonial statements in the wake of Crawford.\(^\text{151}\) However, given the Court’s reasoning that confrontation is based on the procedural right of the defendant, the rationale for judicial review of reliability of nontestimonial statements was substantially undermined.

(d) Right to Confrontation for Testimonial Statements

The second primary component of Confrontation Clause interpretation explores what it means to “enjoy the right . . . to be confronted with”\(^\text{152}\) witnesses. In 1970, Justice Harlan suggested, “If one were to translate the Confrontation Clause into language in more common
use today, it would read: ‘In all criminal prosecutions, the accused shall enjoy the right to be present and to cross-examine the witnesses against him.” 153 The Court has recognized several elements of the confrontation right,154 including the physical face-to-face presence of the witness in court with the defendant and the “implied and collateral rights such as cross-examination, oath, and observation of demeanor.”155

i. Witness Testimony in the Presence of the Accused

One meaning of confrontation derives from a literal interpretation of the term, that the accused should physically meet his accuser face-to-face.156 The Court noted that a “face-to-face encounter between witness and accused serves ends related both to appearances and to reality.”157 Courts have reasoned that such a meeting increases the perceived fairness of the process.158 Furthermore, the interpersonal meeting may actually increase the likelihood that the witness’s testimony is truthful and reliable. A witness may be discouraged from lying in the presence of the defendant out of a sense of shame or knowledge that the lie may be exposed.159 Imposing this obligation on the accuser lends respect to the accusation and assures that the de-

155. Id. at 862 (Scalia, J., dissenting) (arguing that the Constitution “explicitly provides for ‘face-to-face’ confrontation” and therefore it is an “indispensable element” of the right).
156. Coy v. Iowa, 487 U.S. 1012, 1020-22 (1988) (holding it was a violation of the defendant’s right to face-to-face confrontation to allow two children who were alleged victims of sexual abuse to testify behind a screen placed in the courtroom that prevented the victims from having eye contact with the defendant). Quoting the Bible as a historical reference, the Court noted that

The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: “It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face-to-face, and has been given a chance to defend himself against the charges.”

Id. at 1015-16 (quoting Acts 25:16). The Court then traced the development of its cases and concluded that the Confrontation Clause guarantees a face-to-face meeting between the defendant and the witness. Id. at 1016-17.

Nevertheless, the right has not been absolute. In limited situations, the Court has allowed the presence of the witness to be modified from the traditional face-to-face, in-court confrontation with the defendant. On the heels of Coy, a five justice majority held that it did not offend the confrontation right to allow a child witness to testify via a one-way closed circuit television after a particularized finding that “‘testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.’ ” Craig, 497 U.S. at 841 (quoting Md. CTS. & JUD. PROC. CODE ANN. §9-102(a)(1)(i) (1989)). The child was in a separate room with the prosecutor and the defense attorney and could not see the defendant. Id. at 841-42. The jury and the defendant were able to view the child on the television. Id.
158. Id. at 1019.
159. Id.
clarant stands behind the statement, quite literally.\textsuperscript{160} Crawford continues to require the witness’s physical face-to-face presence for testimony at trial, making an exception only if the witness is unavailable\textsuperscript{161} and the defendant had a prior opportunity to cross-examine.

\textit{ii. Opportunity for Cross-Examination}

Cross-examination not only provides an opportunity for a defendant to challenge the credibility of the witness’s testimony, but also allows the defendant a means to further develop the testimony. Questioning the witness about prior statements can assist the defense by filling in the gaps or by clarifying ambiguities that may be misleading. Providing this additional information reduces the likelihood that a jury may otherwise fill the gaps with speculation. Through cross-examination, the defendant can also challenge the memory and perception of the witness.

While courts use the language “opportunity” for cross-examination, it remains undetermined what kind of “opportunity” is constitutionally sufficient. In some cases the Court has evaluated the substance and scope of cross-examination and found that a trial court’s limitations were unconstitutional violations of the defendant’s right of confrontation.\textsuperscript{162}

If the court is treating the prior testimonial statement as the functional equivalent of prior testimony, then the same considerations underlying the sufficiency of the prior cross-examination for statements admitted pursuant to Federal Rule of Evidence 804(b)(1) should be present in the Confrontation Clause analysis. Federal Rule of Evidence 804(b)(1) states that the party against whom the hearsay is offered must have not only had an opportunity, but also a “\textit{similar motive} to develop the testimony by direct, cross, or redirect examination.”\textsuperscript{163}

\begin{footnote}
\textsuperscript{161} Although Crawford is silent about any particular standard of unavailability, courts are likely to adhere to established doctrine. See Mancusi v. Stubbs, 408 U.S. 204, 212-13 (1972) (declarant, who was in Sweden, was unavailable when beyond the reach of process from state court); Barber v. Page, 390 U.S. 719, 724-25 (1968) (declarant, incarcerated in a federal prison in another state, was not unavailable unless the state had made a good faith effort to produce him); see also Fed. R. Evid. 804(a) (defining unavailability for hearsay purposes).
\textsuperscript{162} See, e.g., Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (holding that the court cannot preclude questioning about matters relevant to bias or motivation); Davis v. Alaska, 415 U.S. 308, 318 (1974) (holding that it was unconstitutional to prohibit cross-examination on the witness’s prior juvenile criminal history).
\textsuperscript{163} Fed. R. Evid. 804(b)(1) (emphasis added). For example, the Second Circuit in \textit{United States v. DiNapoli} held that a defendant could not offer the grand jury testimony of two witnesses against the prosecution at trial because the prosecution did not have “an interest of substantially similar intensity to prove (or disprove) the same side of a substan-
However, if the declarant appears for trial and the defendant has the opportunity to cross-examine regarding the hearsay statements, courts have been reluctant to evaluate the effectiveness of the cross-examination. Therefore, the Confrontation Clause is not violated by admitting a declarant’s prior testimonial statements as long as the declarant is testifying as a witness and subject to cross-examination.

iii. Oath and Observation of Demeanor

The oath, as an element of confrontation, serves to “impress[] the seriousness of the matter and guard[] against the lie by the possibility of a penalty for perjury.” While the justices differed on the historical significance of the oath in determining whether the Confrontation Clause applied to out-of-court statements, the majority demonstrated that “the absence of oath was not dispositive” on whether a statement was subject to the Confrontation Clause.

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164. See California v. Green, 399 U.S. 149, 162 (1970) (holding that when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements).

165. For example, in United States v. Owens, a five-to-four majority of the Court held that constitutional requirements are satisfied whenever the hearsay declarant is produced at trial and subject to unrestricted cross-examination. 484 U.S. 554, 563-64 (1988). In Owens, the victim suffered a severe head injury as the result of an attack. Id. at 556. About a month after the attack, an FBI agent visited the victim in the hospital and questioned him, and the victim identified the defendant as his assailant. Id. At trial, the victim was unable to proffer much information on direct or cross-examination. Id. Although he testified that he remembered stating that Owens had assaulted him, he did not remember anything about the attack and did not remember any of his hospital visitors. Id.


167. Green, 399 U.S. at 158.

168. Crawford, 541 U.S. at 52 (noting that the statement at issue in Sir Walter Raleigh’s trial was unsworn). But Chief Justice Rehnquist emphasized that historically, unsworn hearsay had lesser evidentiary value and lesser credibility among juries. Id. at 69 n.1, 70 n.2, 71 (Rehnquist, C.J., concurring in the judgment). Using the dictionary cited by the majority as a reference for the meaning of “testimonial,” Chief Justice Rehnquist suggested that it was not clear that Framers were as concerned with unsworn statements as with sworn statements. Id. at 71.
The opportunity for the jury to observe the demeanor of the witness in making his statement is an element of confrontation because such observations can assist "the jury in assessing [the witness's] credibility."169 But this element of confrontation is also not dispositive. While the jury is never able to make demeanor observations at the moment the out-of-court statement is uttered, seeing the declarant at trial gives "the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement."170

Since the Court handed down the Crawford decision, lower courts have struggled to apply the new standard. With some exceptions, the Crawford Court explicitly decided that it would "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"171 While the Court acknowledged that its refusal to provide clear guidance would leave lower courts to struggle with implementing the new standard, it attempted to downplay the impact on courts by noting that the new uncertainty is no worse than the prior uncertainty.172 Predictably, lower courts have indeed been struggling. A sample review of post-Crawford decisions demonstrates that courts have used the new standard to arrive at widely divergent conclusions.173

While the rationale for the new analysis was arguably more fitted to the language and the history of the Sixth Amendment, the determination for the trial court judge has not been simplified. The duty of the trial court judge has shifted from determining the reliability of the hearsay evidence to determining the testimonial nature of the declarant’s statement. As a matter of constitutional text, Crawford’s bold new path may seem simple, but it is hardly clear of conceptual obstacles over which lower court judges will inevitably stumble in making admissibility decisions.

III. BEGINNING TO CLEAR THE THICKET: DAVIS V. WASHINGTON

Two years after Crawford, the Supreme Court issued its decision in Davis v. Washington,174 another important Confrontation Clause case that purports to clear some of the testimonial thicket. In Davis,

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169. Green, 399 U.S. at 158; see also Mattox v. United States, 156 U.S. 237, 242-43 (1895).
170. Green, 399 U.S. at 160.
171. Crawford, 541 U.S. at 68.
172. Id. at 68 n.10.
173. See, e.g., United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005) (child's statements to forensic interviewer testimonial); Shiver v. State, 900 So. 2d 615 (Fla. 1st DCA 2005) (certification that breathalyzer is working properly was testimonial); Rackoff v. State, 637 S.E.2d 706 (Ga. 2006) (certification regarding breathalyzer was not testimonial); State v. Krasky, 736 N.W.2d 636 (Minn. 2007) (child's statement to nurse in interview arranged by police was not testimonial).
the Court began to clarify when out-of-court statements may be used in place of in-court testimony without violating a defendant’s Sixth Amendment right to confront witnesses. The case, which involved the admissibility of statements by alleged victims of domestic violence, provided the Court with a much-needed opportunity to further define “testimonial” by determining which police interrogations produce statements that fall within the prohibition of the Confrontation Clause as set forth in *Crawford*. In addition, it provided the Court with an opportunity to provide clear guidelines for lower courts in addressing the many new questions that arose as they applied the *Crawford* approach. In the end, the Court’s decision provided some guidance, but not enough. For certain kinds of questions, including in domestic violence cases like those that were before the Court, lower courts remain on a murky path.

A. An Independent Pair of Domestic Violence Cases

The Court’s opinion in *Davis* is based on independent appeals of two state supreme court cases, *State v. Davis* and *Hammon v. State*, that were consolidated on the grant of certiorari and argued in tandem. The issue in both cases was whether the domestic violence victim’s excited utterances were testimonial statements subject to the Confrontation Clause.*Davis* involved an alleged victim’s statements to a 911 operator naming her assailant.*Hammon* involved an oral accusation made to an investigating officer at the scene of the alleged crime.

1. State v. Davis

*State v. Davis* arose from Adrian Davis’s alleged violation of a court order that prohibited him from having any contact with Michelle McCottry. On February 1, 2001, a 911 emergency operator answered a call, but the call ended before anyone spoke. When the operator reversed the call, Michelle McCottry answered.

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175. Justice Scalia, author of the majority opinion in *Crawford*, also wrote for the majority in *Davis*. Id. Of course, in the two years between the decisions in *Crawford* and *Davis*, the composition of the Supreme Court changed. Chief Justice Rehnquist and Justice O’Connor, who had both disagreed with the reformation of the Court’s approach to the Confrontation Clause in *Crawford*, were no longer on the Court.

176. 111 P.3d 844 (Wash. 2005) (en banc).

177. 829 N.E.2d 444 (Ind. 2005).

178. *Davis*, 547 U.S. at 817.

179. Id. at 817-18.

180. Id. at 819-21.

181. Joint Appendix at 3-5, *Davis*, 547 U.S. 813 (No. 05-5224), 2005 WL 3617525 [hereinafter *Davis* Appendix].

182. *Davis*, 547 U.S. at 817.

183. Id.
was crying and sounded frantic\textsuperscript{184} and hysterical.\textsuperscript{185} The operator asked her, “‘What’s going on?’”\textsuperscript{186} Over a period of about four minutes—including an interruption when McCottry left the telephone to close her door\textsuperscript{187}—the operator determined the basic events leading up to the call.\textsuperscript{188} At trial, the prosecution used the information that McCottry communicated at the very beginning of the call to establish the identity of the assailant.\textsuperscript{189}

Later in the conversation, McCottry told the operator “that Davis had ‘just r\textsuperscript{un} out the door’ after hitting [her], and that he was leaving in a car with someone else.”\textsuperscript{190} At one point, she started talking, but the operator interrupted by saying, “‘Stop talking and answer my questions.’”\textsuperscript{191} McCottry informed the operator that Davis had

\begin{verbatim}
185. State v. Davis, 111 P.3d 844, 850 (Wash. 2005) (en banc). Contra id. at 854 (Sanders, J., dissenting) (“While McCottry was upset, the majority mischaracterizes the tape when the majority describes McCottry as ‘hysterical and crying.’ In fact, the first sounds heard in the call-back are not those reflected in the official transcript of the tape, but rather McCottry instructing an unknown person to ‘put [unintelligible] down,’ and a male voice responding ‘c’mon baby.’ It is a full 10 seconds before McCottry answers the 911 operator’s ‘hello.’ During that 10 seconds McCottry does not ask for help. In fact, at no time does McCottry ask for help.” (internal citations and footnote omitted)).
186. Davis Appendix, supra note 181, at 8.
187. Id. at 11; see also Davis, 64 P.3d at 664.
188. Davis Appendix, supra note 181, at 8-13.
189. The transcript is as follows:
  911 Operator: Hello.
  Complainant: Hello.
  911 Operator: What’s going on?
  Complainant: He’s here jumpin’ on me again.
  911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?
  Complainant: I’m in a house.
  911 Operator: Are there any weapons?
  Complainant: No. He’s usin’ his fists.
  911 Operator: Okay. Has he been drinking?
  Complainant: No.
  911 Operator: Okay, sweetie. I’ve got help started. Stay on the line with me, okay?
  Complainant: I’m on the line.
  911 Operator: Listen to me carefully. Do you know his last name?
  Complainant: It’s Davis.
  911 Operator: Davis? Okay, what’s his first name?
  Complainant: Adrian
  911 Operator: What is it?
  Complainant: Adrian.
  911 Operator: Adrian?
  Complainant: Yeah.
  911 Operator: Okay. What’s his middle initial?
  Complainant: Martell. He’s runnin’ now.
\end{verbatim}

190. Id. at 818 (quoting Davis Appendix, supra note 181, at 9-10).
191. Id. (quoting Davis Appendix, supra note 181, at 10).
told her that he came to the house “to get his stuff” because she was moving.192 After she “described the context of the assault,”193 the operator told her that the police would check the area to try to find Davis and then come talk with her.194 The operator offered the assistance of an aid car but McCottry declined, stating that she was all right.195

Within four minutes of the 911 call, two officers arrived at the residence where McCottry and her three children were present.196 The officers observed that the house was in disarray, clothes were strewn all over, and “McCottry was visibly upset and crying.”197 “[S]he was frantically moving around the house and packing” as she spoke with the officers.198 One of the officers observed that McCottry had several “fresh injuries on her forearm and face”199 that had started to swell.200

On hearsay grounds, the trial court ruled that McCottry’s statements on the 911 tape were admissible as excited utterances,201 but that her statements to the officers at the residence were not.202 Davis objected to the 911 tape on Confrontation Clause grounds, but the trial court overruled the objection and admitted the tape.203 Although under subpoena,204 McCottry failed to appear for trial205 and could not be located.206 The state’s evidence included the no contact order, the

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192. Id. (quoting Davis Appendix, supra note 181, at 11-12).
193. Id. (citing Davis Appendix, supra note 181, at 11-12).
194. Id. (citing Davis Appendix, supra note 181, at 12-13).
195. State v. Davis, 111 P.3d 844, 850 (Wash. 2005) (en banc) (“The fact that the operator determined McCottry did not need an aid car does not necessarily mean McCottry was out of danger or that her subsequent responses were then testimonial. Her 911 call was part of an ongoing emergency situation.”).
196. Davis, 547 U.S. at 818.
198. Id.
199. Id.
200. Id.
201. Id. at 664.
202. Davis Appendix, supra note 181, at 34-40.
203. Davis v. Washington, 547 U.S. 813, 819 (2006). The 911 tape admitted at trial was redacted to exclude portions relating to prior police contact with Davis at the residence two days before the charged offense. Davis Appendix, supra note 181, at 8-13, 20-21; see also State v. Davis, 111 P.3d 844, 847 n.1 (Wash. 2005).
204. Davis, 64 P.3d at 666; see also Davis Appendix, supra note 181, at 60-61.
205. Davis, 547 U.S. at 819.
206. Davis, 64 P.3d at 666. The prosecutor had spoken with McCottry by telephone the night before her scheduled appearance, and McCottry had indicated that she would be present for trial. Id. at 665 n.22; Davis Appendix, supra note 181, at 18. McCottry did not appear the day before trial for a defense interview. Davis, 64 P.3d at 666. The victim’s advocate was able to locate McCottry and learned that she had been at the hospital and that she was in fear because there had been contact between McCottry and Davis where Davis “told her that if she appeared in Court his defense attorney was going to make her out to be a liar, and that he would make sure that their children were taken away from her, things of that nature.” Davis Appendix, supra note 181, at 22-23 (quoting prosecutor Nicole Gaines); see also Davis, 64 P.3d at 666. The Court of Appeals found that “the State used all available means to locate McCottry.” Id. When she failed to appear, the prosecutor imme-
911 tape, photographs, and the officers’ testimony.\textsuperscript{207}

Davis did not testify at trial or call any witnesses on his own behalf, and a jury convicted Davis for felony violation of a domestic no contact court order.\textsuperscript{208} The Washington Court of Appeals affirmed the conviction based on pre-\textit{Crawford} Confrontation Clause analysis.\textsuperscript{209} While \textit{Davis} was pending before the Washington Supreme Court, \textit{Crawford} was decided.\textsuperscript{210} The Washington Supreme Court, with one dissenting justice, affirmed the conviction under \textit{Crawford}’s analysis, finding that the critical part of the 911 conversation (in which the victim identified Davis as the perpetrator) was not testimonial.\textsuperscript{211} If other portions were testimonial, the Court found that they were harmless beyond a reasonable doubt.\textsuperscript{212} The Washington Supreme Court looked at the declarant’s subjective intent\textsuperscript{213} and found that “McCottry called 911 because of an immediate danger”\textsuperscript{214} during “an ongoing emergency situation.”\textsuperscript{215} Citing the lack of evidence that she sought to “bear witness,” the court found her statements to be non-testimonial.\textsuperscript{216} The one dissenting justice criticized the court’s consideration of the declarant’s subjective intent and argued that under a proper objective analysis, “a reasonable person today who calls 911 in

\textsuperscript{207} Davis, 111 P.3d at 847, 851. The officers described the scene of the crime, including their observations of McCottry’s behavior, demeanor, and physical injuries. \textit{Davis}, 547 U.S. at 818-19 (“Both officers testified that McCottry exhibited injuries that appeared to be recent, but neither officer could testify as to the cause of the injuries.’’” (quoting \textit{Davis}, 111 P.3d at 847)).

\textsuperscript{208} \textit{Id}. The court sentenced Davis to fifteen months confinement. Brief for Petitioner at 9, \textit{Davis}, 547 U.S. 813 (No. 05-5224) (citing Davis Appendix, \textit{supra} note 181, at 85, 88).

\textsuperscript{209} \textit{Davis}, 64 P.3d at 663.

\textsuperscript{210} \textit{Davis}, 111 P.3d at 847-48. The Washington Supreme Court allowed the parties to submit additional briefs and reargue the case. \textit{Id}. at 848.

\textsuperscript{211} \textit{Id}. at 851.

\textsuperscript{212} \textit{Id}. The U.S. Supreme Court did not review whether later parts of the 911 call were testimonial and, if so, whether their admission was harmless beyond a reasonable doubt. \textit{Davis}, 547 U.S. at 828-29.

\textsuperscript{213} \textit{Davis}, 111 P.3d at 850. Amicus Curiae Washington Association of Criminal Defense Lawyers (WACDL) argues it is common knowledge that 911 calls may be used at subsequent trials and that McCottry reasonably knew her 911 call would later be used to prosecute Davis. Thus, McCottry’s call would fit within one of the core classifications of testimonial hearsay listed in \textit{Crawford}. However, there is no evidence that McCottry had such knowledge or that it influenced her decision to call 911.

\textit{Id}. (internal citations and footnote omitted).

\textsuperscript{214} \textit{Id}. at 851.

\textsuperscript{215} \textit{Id}. at 850. The majority reasoned that statements “not concerned with seeking assistance and protection from peril” may be testimonial. \textit{Id}. at 851.

\textsuperscript{216} \textit{Id}. at 849.
connection with a criminal act could anticipate that his or her statement would be used in investigating and prosecuting the crime."217

2. Hammon v. State

Hammon v. State arose from two police officers’ response to a dispatch concerning “a ‘reported domestic disturbance’ at the home of Hershel and Amy Hammon.”218 When the officers arrived at the house, they found Amy on the front porch appearing timid219 and “somewhat frightened.”220 One officer asked her if “there ‘was a problem and if anything was going on,’ ” and Amy answered “no.”221 After Amy gave permission to enter the house, the police went inside and noticed “the living room was in ‘disarray.’ ”222 One “officer saw ‘a gas heating unit in the corner of the living room’ that had ‘flames coming out of the . . . partial glass front. There were pieces of glass on the ground in front of it and there was flame emitting from the front of the heating unit.’ ”223 Hershel admitted “that he and his wife had ‘been in an argument’ but ‘everything was fine now’ and the argument ‘never became physical.’ ”224 “One of the officers remained with Hershel; the other went to the living room to talk with Amy . . . .”225 The officer testified that when he “‘again asked [her] what had occurred,’”226 Amy

informed [him] that she and Hershel had been in an argument. . . . The argument became . . . physical after being verbal and she informed [him] that [Hershel], during the verbal part of the argument was breaking things in the living room.”227

The officer testified that he “‘believe[d] she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater.’”228

While the officer was talking with Amy, Hershel tried to enter the

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217. Id. at 853 (Sanders, J., dissenting).
220. Davis, 547 U.S. at 819 (quoting Hammon, 809 N.E.2d at 947).
221. Hammon, 809 N.E.2d at 947; see also Hammon Appendix, supra note 24, at 15.
222. Davis, 547 U.S. at 819 (quoting Hammon Appendix, supra note 24, at 16).
223. Hammon, 809 N.E.2d at 447.
224. Davis, 547 U.S. at 819 (citing Hammon, 809 N.E.2d at 447).
225. Id.
226. Id.
227. Id. at 820 (quoting Hammon Appendix, supra note 24, at 17-18).
228. Id. (quoting Hammon Appendix, supra note 24, at 17-18). In addition to her oral statement, Amy filled out and signed a battery affidavit recounting what she had already told the officer. Id. She wrote “‘Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn’t leave the house. Attacked my daughter.’” Id. (quoting Hammon Appendix, supra note 24, at 2).
living room at least twice.229 The officer observed that Amy “would become quiet, almost afraid to speak at that time.”230 While there were no visible injuries on Amy, she indicated that she had some pain from the attack.231

The officers arrested Hershel.232 Amy was not present at the trial.233 Over Hershel’s continuing hearsay objections, the trial court admitted Amy’s statements to the officer as excited utterances.234 After a bench trial, Hershel was convicted of misdemeanor domestic battery and violation of his probation.235 The Indiana Court of Appeals affirmed the conviction using Crawford, finding the victim’s responses to the officer’s “preliminary investigatory questions asked at the scene of [the] crime shortly after it has occurred” were not testimonial.236 The court differentiated between police questioning and police interrogation, finding that interrogations have “official and formal” as well as adversarial qualities.237 The Indiana Supreme Court affirmed.238

B. The Supreme Court’s Opinion in Davis v. Washington

The consolidated opinion in Davis, written by Justice Scalia, affirmed the state court opinion in Davis but reversed and remanded Hammon.239 Justice Thomas wrote a separate opinion concurring in the judgment on the facts of Davis and dissenting in part on the facts of Hammon. Although the Court treated differently the facts of the

229. Hammon Appendix, supra note 24, at 32.
230. Id.
231. Hammon v. State, 809 N.E.2d 945, 948 (Ind. Ct. App. 2004). Amy told the officer where her head was shoved into the glass and that her head was hurting her. Hammon Appendix, supra note 24, at 21.
232. Hammon, 809 N.E.2d at 948.
233. Davis, 547 U.S. at 820.
234. Id. (citing Hammon Appendix, supra note 24, 40). Amy’s battery affidavit was admitted as a “present sense impression.” Id.
235. Id. at 821 (citing Hammon Appendix, supra note 24, at 40). The court sentenced Hershel to one year in jail, “with all but twenty days suspended.” Hammon v. State, 829 N.E.2d 444, 447 (Ind. 2005).
236. Hammon, 809 N.E.2d at 952. Without deciding whether Amy’s affidavit was testimonial and therefore improperly admitted, the court noted that any error in admitting the affidavit was harmless error because it was cumulative of the officer’s testimony. Id. at 948 n.1.
237. Id. at 952.
238. Hammon, 829 N.E.2d at 459. The Supreme Court of Indiana held the admission of the affidavit was a violation of the defendant’s confrontation rights, but also found that the error was harmless beyond a reasonable doubt. Id. at 458-59.
239. On remand, the Indiana Supreme Court treated Davis as if it compelled exclusion of Amy’s affidavit and any officer’s testimony regarding Amy’s statements at the Hammon home because Amy did not testify at trial. Hammon v. State, 853 N.E.2d 477, 478 (Ind. 2006). The court reversed and remanded to the trial court for possible retrial. If retried, the trial court then could resolve “whether evidence otherwise excluded by the Sixth Amendment may nevertheless be admitted under the doctrine of forfeiture explained by the [U.S.] Supreme Court.” Id.
two cases before it, at its core, the Court’s opinion in *Davis* held that “[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”240 In contrast, “[t]hey 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.”241 This framework essentially asks three questions: First, was the statement made in a police interrogation? Second, was there an ongoing emergency? Third, what was the primary purpose of the police interrogation? In addition, the Court settled the question left ambiguously open in *Crawford* by holding that the Confrontation Clause applies only to testimonial hearsay.242 If the hearsay is nontestimonial, then the Confrontation Clause does not apply, and no further analysis under *Ohio v. Roberts* and its progeny is required.243

1. **Clearing the Testimonial Thicket**

The first issue the *Davis* Court identified it “must decide” in order to resolve these cases is “whether the Confrontation Clause applies only to testimonial hearsay.”244 Noting that the rationale of *Crawford* certainly supported the conclusion that the Clause applies exclusively to testimonial hearsay, the *Davis* Court acknowledged that the language in that opinion was not explicit.245 Therefore, in the interim period between *Crawford* and *Davis*, most courts cautiously applied a

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240. *Davis*, 547 U.S. at 822.
241. Id.
242. See id. at 823-24.
243. Id. at 822; see also Duane, *supra* note 151, at 37. But see Kirkpatrick, *supra* note 144 (arguing that although *Crawford* overruled *Roberts* with respect to testimonial hearsay, its abandonment of protection against nontestimonial hearsay has raised concerns in confrontation jurisprudence).
244. *Davis*, 547 U.S. at 823.
245. Id. (“The answer to the [question whether the Confrontation Clause applies only to testimonial hearsay] was suggested in *Crawford*, even if not explicitly held . . . .”).

In response to the proposal that the Court revise the Confrontation Clause doctrine to apply the Clause to only testimonial statements, the *Crawford* Court indicated that it had previously considered this proposal in *White v. Illinois* and rejected it. *Crawford v. Washington*, 541 U.S. 36, 60-61 (2004) (citing *White v. Illinois*, 502 U.S. 346, 352-53 (1992)). Admitting that the analysis in *Crawford* “casts doubt on that holding,” the Court ultimately avoided ruling on the issue, stating “we need not definitively resolve whether it survives our decision today.” Id. at 61. While the Court commented that “even if the Sixth Amendment is not solely concerned with testimonial hearsay,” it emphasized that “[testimonial hearsay] is its primary object.” Id. at 53. Further, the Court noted that the focus of the Clause on the evil of the civil-law mode of criminal procedure “also suggests that not all hearsay implicates the Sixth Amendment’s core concerns.” Id. at 51. “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to . . . exempt[] such [hearsay] statements from Confrontation Clause scrutiny altogether.” Id. at 88.
Roberts reliability analysis before admitting nontestimonial hearsay statements.\textsuperscript{246}

In \textit{Davis}, the Court reemphasized \textit{Crawford}'s reliance on the dictionary definition of “witnesses” as “those who ‘bear testimony,’”\textsuperscript{247} and interpreted this textual limitation of the Sixth Amendment “to mark out not merely its ‘core,’ but its perimeter.”\textsuperscript{248} Following this logic, the Court appeared to clarify that \textit{only} testimonial hearsay is subject to the Confrontation Clause.\textsuperscript{249} The Court supported this interpretation by reviewing the history of American cases that invoked the right to confrontation. The early American cases applied the Confrontation Clause only in the testimonial context.\textsuperscript{250} Later cases—with one arguable exception in \textit{White v. Illinois}\textsuperscript{251}—also consistently required unavailability and prior cross-examination in cases involving testimonial hearsay.\textsuperscript{252} The \textit{Davis} majority, albeit in a footnote, stated for the first time that it “overruled Roberts in \textit{Crawford} by restoring the unavailability and cross-examination requirements.”\textsuperscript{253}

2. Defining a “Police Interrogation”

In \textit{Davis}, the Supreme Court began to articulate more comprehensive definitions of the two key terms it employed in \textit{Crawford} to designate concepts essential to Confrontation Clause analysis: “testimonial” and “interrogation.” \textit{Crawford} held that the Sixth Amendment barred “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”\textsuperscript{254} While the \textit{Crawford} Court had explicitly deferred the challenge of

\begin{itemize}
  \item \textsuperscript{246} See supra note 151 and accompanying text.
  \item \textsuperscript{247} \textit{Davis}, 547 U.S. at 823 (quoting \textit{Crawford}, 541 U.S. at 51). “Testimony,” as defined by the dictionary used in \textit{Crawford}, is “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” \textit{Crawford}, 541 U.S. at 51.
  \item \textsuperscript{248} \textit{Davis}, 547 U.S. at 824.
  \item \textsuperscript{249} Id. at 821 (“Only [testimonial] statements . . . cause the declarant to be a ‘witness’ within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.” (internal citations omitted)).
  \item \textsuperscript{250} See id. at 824-25.
  \item \textsuperscript{251} 502 U.S. 346 (1992).
  \item \textsuperscript{252} \textit{Davis}, 547 U.S. at 825.
  \item \textsuperscript{253} Id. at 825 n.4.; cf. \textit{Crawford} v. Washington, 541 U.S. 36, 69, 75 (2004) (Rehnquist, C.J., concurring with the judgment). Nevertheless, there was debate and disagreement over whether or how \textit{Davis} answered this question. See Duane, supra note 151 (claiming that \textit{Davis} completely overruled \textit{Roberts}). But see Raeder, supra note 144, at 16 (noting the discussion of the \textit{Roberts} reliability test in \textit{Davis} was in dictum and not necessary to the holding). In \textit{Wharton v. Bockting}, the issue was finally put to rest when the Court confirmed it intended to overrule \textit{Roberts} in \textit{Crawford}, 127 S. Ct. 1173, 1179 (2007) (holding that \textit{Crawford} did not apply retroactively on collateral review); see also Kirkpatrick, supra note 144.
  \item \textsuperscript{254} \textit{Crawford}, 541 U.S. at 53-54.
\end{itemize}
comprehensively defining “testimonial,” it found that “some statements qualify [as testimonial] under any definition” including “[s]tatements taken by police officers in the course of interrogations.”

First, the Davis Court summarily resolved the issue of whether only sworn law enforcement officers qualify as “police” for purposes of “police interrogation” under Confrontation Clause analysis. The Court reasoned that even if 911 operators were not “law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers.” The Court considered “their acts to be acts of the police” only for purposes of the Davis opinion. Attempting to reemphasize the limitation of this conclusion, the Court stated that it is proceeding in this manner “without deciding the point.”

Next, the Davis Court considered the definition of “interrogation.” The Crawford Court suggested that “[j]ust as various definitions of ‘testimonial’ exist, one can imagine various definitions of ‘interrogation,’ and we need not select among them in this case.” Even though Sylvia’s statement was taken under conditions that would constitute a custodial interrogation in a technical legal sense under a Fifth Amendment Miranda analysis, the Court implicitly authorized other courts to expand the interpretation to other instances of police questioning that might also qualify as interrogations that invoke the Confrontation Clause. The Court commented that it was “us[ing] the term ‘interrogation’ in its colloquial, rather than any technical legal, sense.”

The Davis Court clearly indicated that formality of the questioning was an essential but not determinative factor in objectively evaluating the circumstances of the declarant’s statements. In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which no case—English or early American, state or federal—can be cited, that is it.
ing the definition of “testimony” used in Crawford,\(^\text{264}\) the Davis Court reinforced Crawford’s position that, while formality must be considered, a solemn declaration could be uttered outside of a formal judicial proceeding. Responding to the dissent’s criticism that the primary purpose test was not “‘a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause,’” the majority chided the dissent for the futility of overemphasizing the historical origins of the right.\(^\text{265}\) Justice Scalia, who heavily relied on the historical origin and purpose of the Clause in justifying the drastic change of course in Crawford, stated that “[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”\(^\text{266}\)

The Court looked back to English cases for support that the right of confrontation is not limited to only the types of formal statements to which most American cases have applied the right, such as sworn testimony from prior judicial proceedings and formal sworn depositions.\(^\text{267}\) There are two ways of interpreting this history. First, one

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\(^{264}\) Id. at 826.

\(^{265}\) Id. (citing Crawford, 541 U.S. at 51).

\(^{266}\) Id. at 830 n.5 (alteration in original).

\(^{267}\) Id. at 830-31 n.5. As the Court states:

> The dissent criticizes our test for being “neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause.” As to the former: We have acknowledged that our holding is not an “exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation,” but rather a resolution of the cases before us and those like them. For those cases, the test is objective and quite “workable.” The dissent, in attempting to formulate an exhaustive classification of its own, has not provided anything that deserves the description “workable”—unless one thinks that the distinction between “formal” and “informal” statements qualifies. And the dissent even qualifies that vague distinction by acknowledging that the Confrontation Clause “also reaches the use of technically informal statements when used to evade the formalized process” and cautioning that the Clause would stop the State from “us[ing] out-of-court statements as a means of circumventing the literal right of confrontation.” It is hard to see this as much more “predictable” than the rule we adopt for the narrow situations we address. . . .

> As for the charge that our holding is not a “targeted attempt to reach the abuses forbidden by the [Confrontation] Clause,” which the dissent describes as the depositions taken by Marian magistrates, characterized by a high degree of formality: We do not dispute that formality is indeed essential to testimonial utterance. But we no longer have examining Marian magistrates; and we do have, as our 18th-century forebears did not, examining police officers who perform investigative and testimonial functions once performed by examining Marian magistrates. It imports sufficient formality, in our view, that lies to such officers are criminal offenses. Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.

\(^\text{Id. (internal citations omitted) (alteration in original).}\)

\(^{267}\) Id. at 825-26 (citing Crawford, 541 U.S. at 52 & n.3); cf. id. at 836-37 (Thomas, J., concurring in the judgment in part and dissenting in part). In support of his view that for-
could interpret the shift in the American cases as an implicit departure from the English approach. Second, one could view as mere coincidence the fact that American cases involved only formal statements with no intent to depart from the English approach. The Davis Court chose the latter interpretation and refused to infer from the absence of American cases that involve less formality that any limitation had been created in American confrontation jurisprudence. 268 The Court reasoned that just as the oath and the threat of perjury render courtroom statements solemn, the criminal consequences of lying to law enforcement render responses to police interrogation solemn and sufficiently formal. 269

3. Towards a New Objective Approach: The “Primary Purpose” Test

In Davis, the Court set out “to determine more precisely which police interrogations produce testimony.” 270 Consistent with the incremental approach the Court set forth in Crawford, the Davis Court tried to narrowly limit its holding to the facts of the cases before it by issuing the caveat that it was not “attempting to produce an exhaustive classification of all conceivable statements... in response to police interrogation—as either testimonial or nontestimonial.” 271

Sylvia’s statements in Crawford qualified as a police interrogation that produced testimonial statements subject to the Confrontation Clause “under any conceivable definition.” 272 For emphasis, the Davis

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268. See id. at 826 (majority opinion).
269. Id. at 826-27 (citing United States v. Stewart, 433 F.3d 273, 288 (2d Cir. 2006); State v. Reed, 695 N.W.2d 315, 323 (Wis. 2005)); see also id. at 831 n.5 (“It imports sufficient formality, in our view, that lies to such officers are criminal offenses.”). In his dissent, Justice Thomas disagreed with the majority’s position that the potential legal consequences for making a false statement to a police officer are sufficient to make the statement “solemn or formal in the ordinary meanings of those terms,” id. at 838 n.3 (Thomas, J., concurring in the judgment in part and dissenting in part), asserting that generally, responses to informal police questioning lack “sufficient indicia of solemnity” to render them testimonial. Id. (Thomas, J. concurring in judgment in part and dissenting in part).
270. Id. at 822 (majority opinion). While the Davis Court examined the application of the Confrontation Clause to statements made during police interrogations, it is not necessary that a statement be given in response to a question for it to be regulated by the Confrontation Clause. Id. at 822-23 n.1. In other words, the Court limited its holding to police interrogations only because the two cases before the Court involved police interrogations, not because the Court intended to limit the interpretation of testimonial statements to responses to interrogations.
271. Id. at 822. Clearly, the applicability of the primary purpose test is limited to police interrogations and does little to inform courts about the testimonial nature of statements in other contexts.
Court even referred to Sylvia as a "deponent."  

The Court then constructed a general analytical framework that declared that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."  

The Davis Court elaborated on the Crawford decision by characterizing Sylvia’s interrogation as one that was "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator."  

In essence, the evaluation asks whether the officer is acting like a prosecutor asking questions on direct examination “to establish or prove past events potentially relevant to later criminal prosecution,” or like a rescue worker getting information “to enable police assistance to meet an ongoing emergency.”  

A trial court must determine the officer’s primary purpose by objectively evaluating the circumstances in which the statements are made.  

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273. Davis, 547 U.S. at 822; see also BLACK’S LAW DICTIONARY 471 (8th ed. 2004) (defining “deponent” as “1. One who testifies by deposition. 2. A witness who gives written testimony for later use in court; affiant”).

274. Davis, 547 U.S. at 822.

275. Id. (emphasis added).

276. Id. at 822 (emphasis added). By emphasizing objectivity, the Court may be seeking to avoid the potential difficulty in determining the subjective mental state of either the police or the declarant.

277. Id. at 826 (emphasis added).

278. Id. at 828-29.

279. Id. at 822.

280. Id. at 823 n.1.

281. See id. at 822, 822-23 n.1, 826.
The objective approach adopted by the Court increases the utility of the primary purpose test because an objective consideration of all the factors ensures that any one circumstance does not control the outcome. As a result, many incentives for the police to manipulate the circumstances are diminished. Neither the declarant’s location nor the stage of investigation will by itself determine the testimonial character of the statement. The Court recognized that the Confrontation Clause is not aimed at regulating police conduct, and police conduct cannot alter the trial court’s later determination regarding the character of the hearsay statement. A defendant’s rights are not violated by the state’s method of evidence collection but by the state’s use of the evidence at trial without demonstrating the unavailability of the declarant and giving the defendant the opportunity for cross-examination.

(a) Applying the Primary Purpose Test to Davis

To apply the primary purpose analytical framework to the facts of Davis, the Court evaluated four factors to determine “whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements.” This list of factors does not appear to be a comprehensive list. Rather, it included aspects of comparison that highlight some of the differences between the circumstances of Davis and Crawford.

The first point of comparison was the timing of the questioning relative to the events described by the declarant. Sylvia Crawford’s statements to the officers were made hours after the stabbing. In contrast, McCottry was telling the 911 operator about events “as they were actually happening, rather than ‘describ[ing] past events.’” Next, the Court considered whether there were circumstances objec-

282. Id. at 822. While the Court repeatedly expressed that the primary purpose test is an objective evaluation, the Court continued to use the subjective perspective of the officer to bolster its conclusion. For example, the Court fortified its determination that Amy Hammon’s statements to the officer were testimonial because the interrogating officer expressly acknowledged that his purpose was to investigate past criminal conduct. Id. at 829 (citing Hammon Appendix, supra note 24, at 25, 32, 34). Similarly, Amy’s affidavit was testimonial because the officer testified that the purpose of the document is “ ‘[t]o establish events that have occurred previously.’ ” Id. at 832 (Hammon Appendix, supra note 24, at 18).

283. Id. at 832.
284. Id. at 832 n.6.
285. Id.
286. Id. at 826.
287. Id. at 827.
288. Id. (alteration in original) (quoting Lilly v. Virginia, 527 U.S. 116, 137 (1999)). Justice Thomas disagreed with this characterization of the statements. Id. at 841 n.6 (Thomas, J., concurring in the judgment in part and dissenting in part) (“Similarly, ‘the events described [by McCottry] were over’ by the time she recounted them to the 911 operator.” (alteration in original)).
tively indicating the existence of an ongoing emergency involving imminent danger.289 Unlike Sylvia, who was safely in police custody, McCottry “was facing an ongoing emergency” because she was still alone at the scene of the alleged crime and unprotected by the police.290 The Court determined that “McCottry’s call was plainly a call for help against bona fide physical threat”291 because she was “apparently in immediate danger from Davis.”292 The Court concluded that “[s]he was seeking aid” and that her use of “present-tense statements showed immediacy.”293 Endorsing the Indiana Supreme Court’s view that nontestimonial statements can “‘evolve into testimonial statements’”294 when the purpose of the interrogation is no longer to enable police assistance to meet the ongoing emergency,295 the Court strongly suggested that the duration of an ongoing emergency should be narrowly construed.296

The third inquiry considered whether, objectively viewed, “the nature of what was asked and answered . . . was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in Crawford) what had happened in the past.”297 The Court characterized Sylvia Crawford’s interrogation as one that was “solely directed at establishing the facts of a past crime.”298 By contrast, the Court observed that “at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to ‘establish[ ] or prov[ ]e’ some past fact, but to describe current circumstances requiring police assistance.”299 On the facts of Davis, the Court found that questions establishing the identity of the assailant were necessary to resolve the present emergency because the responding officers needed the information to assess the dangerousness of the situation they would encounter.300

289. Id. at 826-27 (majority opinion). Interestingly, the Court adopted the limited perspective of the recipient of the statement rather than considering all of the relevant circumstances by noting that “any reasonable listener would recognize that McCottry . . . was facing an ongoing emergency.” Id. at 827.
290. Id. at 827, 831-32.
291. Id. at 827.
292. Id. at 831.
293. Id.
294. Id. at 828 (quoting Hammon v. State, 829 N.E.2d 444, 457 (Ind. 2005)).
295. Id. at 829. For example, the Court suggested that the emergency may have expired the moment that Davis left the premises. Id. at 828. This portion of the call is only the beginning one-third of the redacted call. The Court cagily indicates that Davis’s jury “may well have heard some testimonial portions” but avoids actually determining if and when the 911 call evolved into an interrogation producing testimonial statements. Id. at 829. Nevertheless, the Court confidently asserted that this determination “presents no great problem” because “trial courts will recognize the point at which . . . statements in response to interrogations become testimonial.” Id.
296. Id. at 827.
297. Id. at 826 (emphasis added).
298. Id. at 827 (alteration in original).
299. Id.
Lastly, the Court examined the formality of the questioning.\textsuperscript{300} The Court found a striking difference between the formality of Sylvia Crawford's calm station house interview and the informality of McCottry's "frantic" 911 call.\textsuperscript{301}

Objectively considering all these circumstances, the Court concluded that the primary purpose of McCottry's interrogation "was to enable police assistance to meet an ongoing emergency."\textsuperscript{302} In summation, the Court considered the overall character of her statement and found that it "was not 'a weaker substitute for live testimony' at trial."\textsuperscript{303} In effect, the statements did not do what a witness does on direct examination. The Court illustrated this concept by suggesting that "[n]o 'witness' goes into court to proclaim an emergency and seek help."\textsuperscript{304}

(b) Applying the "Primary Purpose" Test to Hammon

Applying the primary purpose test to the facts of Hammon proved an "easier task" for the Court.\textsuperscript{305} Finding the circumstances to be similar to those in Crawford and dissimilar to those in Davis,\textsuperscript{306} the Court dispensed with the first three factors quickly. First, Amy's statements were made after, not during, the events she described.\textsuperscript{307} Second, given that the interrogating officer "heard no arguments or crashing and saw no one throw or break anything,"\textsuperscript{308} the Court concluded that these circumstances objectively indicated "there was no emergency in progress."\textsuperscript{309} Unlike McCottry—who was alone, unprotected by the police, and in apparent immediate danger from Davis—Amy Hammon made her statement when she was protected by the police. Because Amy told the officers when they arrived "that things were fine,"\textsuperscript{310} the Court found "no immediate threat to her person."\textsuperscript{311} These conclusions rendered consideration of the third factor unnecessary—without an ongoing emergency, the elicited statements were clearly not necessary for the police "to resolve the present emer-

\textsuperscript{300} Id. at 827.
\textsuperscript{301} Id.
\textsuperscript{302} Id. at 828.
\textsuperscript{303} Id. (quoting United States v. Inadi, 475 U.S. 387, 394 (1986)).
\textsuperscript{304} Id.
\textsuperscript{305} Id. at 829. Both the majority and Justice Thomas agreed that the affidavit Amy completed after the police questioning was testimonial and admitted in error. Id. at 834; id. at 840 n.5 (Thomas, J., concurring in the judgment in part and dissenting in part).
\textsuperscript{306} Id. at 831 (majority opinion).
\textsuperscript{307} Id. at 829-30. "When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in Davis) 'what is happening,' but rather 'what happened.' " Id. at 830.
\textsuperscript{308} Id. at 829 (citing Hammon Appendix, supra note 24, at 25).
\textsuperscript{309} Id. (citing Hammon Appendix, supra note 24, at 25).
\textsuperscript{310} Id. at 830 (citing Hammon Appendix, supra note 24, at 25).
\textsuperscript{311} Id.
Finally, the Court conceded there was a difference between the formality of the interrogations in Hammon and Crawford. In Crawford, the interrogation “followed a Miranda warning, was tape-recorded, and took place at the station house.”\(^{313}\) In Hammon, the “interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his ‘investigation.’”\(^{314}\) While the comparatively formal circumstances of Crawford’s interview “made it more objectively apparent” that the statements were testimonial, the Court determined that Amy’s interrogation “was formal enough.”\(^{315}\)

Highlighting a few similarities, the Court set civil-law ex parte examinations, the in-custody interrogation of Sylvia Crawford, and the responding officer’s questioning of Amy Hammon on equal ground.\(^{316}\) “Both declarants were actively separated from the defendant[,] . . . [b]oth statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed and both took place some time after the events described were over.”\(^{317}\) The Court concluded that it was entirely clear that the circumstances objectively indicated the primary purpose of the interview was to investigate possible past criminal conduct.\(^{318}\) In sum, the Court characterized these statements as “obvious substitute[s] for live testimony, because they do precisely what a witness does on direct examination.”\(^{319}\)

**C. Justice Thomas’s Dissent**

Justice Thomas, concurring in the judgment in part and dissenting in part, concluded that neither declarants’ statements in Davis and Hammon were testimonial\(^{320}\) because neither statement was a

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312. *Id.* at 827.
313. *Id.* at 830 (citing Crawford v. Washington, 541 U.S. 36, 53 n.4 (2004)).
314. *Id.* (alteration in original) (citing Hammon Appendix, supra note 24, at 34).
315. *Id.*
316. *Id.* (“What we called the ‘striking resemblance’ of the Crawford statement to civil-law ex parte examinations is shared by Amy’s statement here.” (internal citation omitted)).
317. *Id.*
318. *Id.* Justice Thomas disagreed with a court’s ability to discern the primary purpose of an interrogation from these circumstances. The Court had distinguished the facts of Davis from those of Hammon and Crawford to reach opposite conclusions regarding the testimonial character of the declarants’ statements. In his dissent, Justice Thomas demonstrated that the facts were actually more similar than different. For example, McCottry was also separated from defendant Davis when she was speaking to the 911 operator. *Id.* at 841 n.6. (Thomas, J., concurring in the judgment in part and dissenting in part). Also, like the declarants in Crawford and Hammon whose statements were made after the events took place, McCottry also described in her statement events that were over. *Id.* at 829-30 (majority opinion).
319. *Id.* at 830.
320. *Id.* at 840 (Thomas, J., concurring in the judgment in part and dissenting in part).
formalized dialogue taken under circumstances similar to those in *Crawford*.

Furthermore, there was no indication that the prosecution was offering the hearsay evidence in bad faith “in order to evade confrontation.”

By focusing on formality, Justice Thomas was primarily concerned with the state’s opportunity to corrupt the integrity of the evidence rather than the potential benefits that providing a procedural right to the defendant may have on enhancing the truth-finding process. Given that governmental abuses historically have resulted in formal statements, allowing the defendant to confront those formalized statements would appropriately target the governmental abuse. While a bright-line standard based on formality may simplify the analysis, the relative ease in judicial application does not further the ultimate goal of pursuing truth and fairness.

Justice Thomas disagreed with both the majority’s method and scope in *Davis*. He criticized the majority’s primary purpose test for having the same flaws as the *Roberts* reliability analysis: it did not fulfill either of *Crawford’s* goals of making Confrontation analysis more focused on the abuses forbidden by the Clause or more predictable. Justice Thomas characterized the scope of the primary purpose test as overbroad and not appropriately targeted “to reach the abuses forbidden by the [Confrontation] Clause,” “namely, the ‘civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.’”

Further, Justice Thomas argued the test was not workable because it reverted Confrontation analysis back to an inherently unpredictable test. The *Crawford* Court criticized and abandoned the *Roberts* test largely because it was “‘inherently, and therefore permanently, unpredictable.’” Claiming that it would be as difficult for trial courts to apply a primary purpose test as it was to apply a reliability test, Justice Thomas argued that the results would be

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321. *Id.* Additionally, neither statement resembled the formality of the Marian examinations. *Id.*

322. *Id.*

323. *Id.* at 834.

324. *Id.* at 842. Justice Thomas asserts that the historical origin of the Confrontation Clause supported the conclusion that its reach was limited to prevent abuses of the government. Justice Thomas examined how closely a particular procedure resembles the abusive inquisitorial practices of the Marian bail and committal statutes that gave rise to the Confrontation Clause. *Id.* at 835-36.


326. *Id.* at 841-42. The majority responds that “the test is objective and quite workable” for “the cases before [the Court] and those like them.” *Id.* at 831 n.5 (majority opinion).

327. *Id.* at 834 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting *Crawford*, 541 U.S. at 68 n.10).
equally unpredictable. He noted that “[i]n 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.” Justice Thomas doubted that in many cases one purpose is primary to the other, and even if it were, he doubted that courts could reliably discern which purpose was primary.

Justice Thomas illustrated how the circumstances in Davis and Hammon indicated both purposes of an interrogation. Even though the officer was investigating Herchel’s past conduct, it is also possible that the officer was primarily assessing “whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action.” While there were no observable circumstances showing that Herschel was in the process of causing physical harm to his wife, other circumstances that could demonstrate an ongoing emergency may not have been immediately apparent while the officers were present. It was possible “his violence would have resumed had the police left without further questioning.” Similarly, even though McCottry apparently needed emergency help, it was also possible the 911 operator was asking questions about the identity of the alleged assailant primarily to establish past events potentially relevant to later criminal prosecution.

Instead of the primary purpose approach, Justice Thomas advocated a standard that focused on the formality of the statement. Beginning in White v. Illinois, Justice Thomas has consistently proposed that “statements regulated by the Confrontation Clause must include ‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’” The procedure for procuring affidavits, depositions,
and prior testimony is clearly formal because all are sworn statements given for use in judicial proceedings. Confessions, however, are not necessarily solemn or formal. Recognizing that various procedures may be used to procure confessions, Justice Thomas found that only those confessions that are “extracted by police in a formal manner” are sufficiently solemn to be characterized as testimonial.\textsuperscript{335} Similarly, conversations between the police and witnesses or suspects are solemn declarations only when they “are somehow rendered ‘formal.’”\textsuperscript{336}

However, the majority was concerned that if the application of the Confrontation Clause depended only on the formality of the process in which the statements were taken, then the state could easily avoid formality in order to evade the Clause.\textsuperscript{337} Under such a standard, the police would have the incentive to modify their investigatory practices to collect witness statements in the most informal manner. To address this valid concern,\textsuperscript{338} Justice Thomas created a narrow exception to a rule based on formality for “technically informal statements when used to evade the formalized process.”\textsuperscript{339} Assuming this issue would arise less frequently than the issues in the primary purpose test, Justice Thomas promoted his analysis as simplifying the application of the Clause.\textsuperscript{340}

Despite Justice Thomas’s split from the majority, the justices all shared the common goal of creating a criminal justice system that produces accurate results within a procedural system that is fair and able to function within all the practical constraints of time and re-

\textsuperscript{335} Id. at 837 (Thomas, J., concurring in the judgment in part and dissenting in part).

\textsuperscript{336} Id. at 826 (majority opinion).

\textsuperscript{337} Id. at 826 (majority opinion).

\textsuperscript{338} Justice Thomas concedes that this result would be detrimental to the criminal justice system. Id. at 838 (Thomas, J., concurring in the judgment in part and dissenting in part).

\textsuperscript{339} Id. The scope of this exception is aimed at the abusive prosecutorial practices that resemble the particular abuses targeted by the Confrontation Clause, unlike the “needlessly overinclusive” primary purpose test. Id.

\textsuperscript{340} Id. While Justice Thomas’s exception addresses unfair manipulation by the police and prosecution, it raises another difficult issue: trial courts would need to decipher the intent of the prosecution to determine whether it was offering evidence in good or bad faith. The majority’s approach draws on a wider range of circumstances in characterizing the testimonial nature of a declarant’s statement during a police investigation. Given that many of these circumstances are “essentially beyond police control[,] . . . [t]he Confrontation Clause in no way governs police conduct.” Id. at 832 n.6 (majority opinion).
sources. However, both the majority and the dissent in *Davis* struggled with the desire to create clear guidelines for theoretical consistency and ease of application on the one hand and the desire to cautiously decide the case before it so that its holding does not inadvertently create precedent that is inflexible to unforeseen circumstances on the other. Each recognizes that the other's approach is overbroad in some areas, underinclusive in others, and difficult to administer. While a broad, bright-line rule may be too rigid or blunt to adequately address various future cases, a narrow holding limited specifically to the facts does not provide sufficient useful guidance to courts.

Notwithstanding similarities on these broader principles, the Justices' perspectives on procedure differ based in part on which element of a trial they perceive to be the most untrustworthy. In other words, they differ fundamentally on where within the system they choose to emphasize distrust. The *Davis* majority is skeptical about the credibility of a hearsay declarant. On the other hand, Justice Thomas appears to lack confidence in the courts and the state. The parties also differ on which aspects of the system are most problematic in a search for the truth. The defense in *Davis* distrusted the credibility of both the hearsay declarant and the testifying witness. The prosecution contends that the system is flawed only when the government has the opportunity to be abusive in the manners in which it has historically been abusive or when probative evidence is excluded.

**IV. CONFRONTING THE ONGOING RELATIONSHIP**

Together, *Crawford* and *Davis* challenge courts to develop a principled jurisprudence for reconciling the admissibility of hearsay evidence with the Confrontation Clause. Although the Court made substantial progress in *Davis* towards clearing the testimonial thicket, important unresolved issues remain. For example, even though the Court analyzed two domestic violence scenarios in *Davis*, the Court failed to give clear guidance on how lower courts should assess admissibility issues in contexts in which the defendant and the declarant are involved in an ongoing relationship. This Part begins by highlighting how the psychology and sociology of certain relation-

341. For example, Justice Thomas appears to be primarily concerned with the opportunity of the state to corrupt the integrity of the evidence rather than the provision of a procedural right, regardless of the positive effect that the procedure may have on enhancing the truth-finding process. See *supra* Part III.C.

342. However, the defense did not address the inaccuracy of a statement due to the incompleteness of detail or ambiguity of word choice, because these problems also exist in extrajudicial statements to nongovernmental actors or statements to unknown government agents.
ships present problems for courts. After discussing the broader goals of the criminal justice system, this Part presents an approach courts can use in interpreting *Davis* that respects these goals in addressing cases with problem relationships.

**A. Identifying Problematic Relationships**

After *Crawford*, many cases in which the prosecution had sufficient evidence to proceed at trial under the pre-*Crawford* confrontation framework were dismissed. Essential evidence was rendered inadmissible because the declarant’s out-of-court statements were deemed testimonial and the defendant lacked the opportunity to cross-examine the declarant. For example, many domestic violence cases were dismissed because the victim was absent from trial. This drastic change in the ability to prosecute some crimes raises serious concerns about the inadvertent impact of allowing factually guilty defendants to avoid criminal conviction.

1. **A Relational Approach**

Certain types of cases commonly present witness-availability problems for the prosecution because of the relationship between the defendant and the witness. The dynamics of many defendant-witness relationships can powerfully impact the witness’s willingness to participate in the criminal process. In the context of domestic violence, Professor Deborah Tuerkheimer has presented a useful framework for understanding the special concerns that arise when the defendant and the declarant-witness have an ongoing relationship. Professor Tuerkheimer describes the complex triangular “relationships between accuser, state, and accused” and how they frequently hinder domestic violence prosecution. Generally, the interests of a prosecu-

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343. As Professor Tom Lininger starkly described the impact:
Indeed, within days—even hours—of the *Crawford* decision, prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past. For example, during the summer of 2004, half of the domestic violence cases set for trial in Dallas County, Texas, were dismissed because of evidentiary problems under *Crawford*.

In a survey of over 60 prosecutors’ offices in California, Oregon, and Washington, 63 percent of respondents reported the *Crawford* decision has significantly impeded prosecutions of domestic violence. Seventy-six percent indicated that after *Crawford*, their offices are more likely to drop domestic violence charges when the victims recant or refuse to cooperate. Alarmingly, 65 percent of respondents reported that victims of domestic violence are less safe in their jurisdictions than during the era preceding the *Crawford* decision.

Lininger, supra note 8, at 749-50 (footnotes omitted).

344. Tuerkheimer, supra note 8.

345. Id. at 10.
tion witness are either neutral or aligned with the state against the defendant. In contrast, the interests of the accuser in domestic violence cases may often be aligned with the defendant against the state. Professor Tuerkheimer conceptualizes these relationships as a triangle and urges courts to adopt a “relational approach” to Confrontation Clause analysis in domestic violence prosecutions. The relational approach considers the dynamics of abuse and the context of the relationship between the victim and the defendant.

The ongoing relationship between the defendant and the victim is problematic for the state to the extent that it “causes the expressed interests of victims and law enforcement to diverge.” For example, a victim may decline to cooperate with the prosecution by “re菅ing” her allegations, refusing to testify, effectively disappearing, or simply articulating her desire not to “press charges.”

In domestic violence prosecutions, the relationship between the victim and the state, as witness and prosecutor, is problematic for the defendant simply because it puts him at risk for criminal sanction and deprives him of some of the power he typically has over the victim. The relationship between the state and the defendant may be problematic for the victim because it may put her at more risk of harm because of the defendant’s reaction to law enforcement intervention or because of the consequences of the prosecution. Citing various reasons for a victim’s noncooperation, Professor Tuerkheimer convincingly demonstrates how these reasons are “rooted in the continuing relationship between the woman and the defendant.” For example, the victims may “fear greater violence if they cooperated; . . . still love the batterer and . . . not want him to suffer; . . . need his financial support; [or] . . . want their children to have a father in the home.”

The Davis Court expressly acknowledged the extraordinary challenges raised by domestic violence cases, noting that “[t]his particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall.” While the Court declined to create a different constitutional standard altogether for domestic violence crimes, the Court cautioned that de-
fendants may not “undermine the judicial process” and “destroy the integrity of the criminal-trial system.”

However, domestic violence cases are hardly unique. The same shifting dynamics between accuser, accused, and state can be found in other contexts. For example, as has recently been chronicled in the popular press, in gang cases the accuser may be a fellow gang member, a rival gang member, or a member of the community where gangs have significant power and control. While the accuser may need law enforcement intervention to prevent serious harm caused by the accused gang member, the accused gang member’s relationship with the accuser may cause the accuser’s interests to diverge from those of the state. The gang member defendant or the defendant’s fellow gang members have the power to threaten serious harm, thus intimidating the witness into not cooperating with the state in the prosecution. Similarly, in the culture of a business or corporation, employees may be intimidated into silence by employers who have engaged in wrongdoing, echoing many of the characteristics of gang culture. In both gangs and some business cultures, loyalty to the organization and hierarchy within the organization are strong forces that impact the relationships of the members of the organization. As a result, a member may be reluctant to accuse another of criminal wrongdoing. If the accusation is made, the relationship between the accused and the accuser may cause risk of serious harm to the accuser’s welfare such that the accuser is not willing to cooperate with the state. For example, the accuser’s economic welfare may be at serious risk if participation in the prosecution causes the accuser to lose employment.

2. Applying the Relational Approach to the Facts of Hammon

The case of Amy Hammon itself illustrates how the dynamics of the relationship between the defendant and the witness-declarant is in tension with the witness-declarant’s relationship with the state. When law enforcement officers arrived at the Hammons’ home in response to “a reported domestic disturbance,” they found Amy on

353. Id. at 833.
355. See James Fanto, Whistleblowing and the Public Director: Countering Corporate Inner Circles, 83 OR. L. REV. 435, 441 (2004) (arguing that the “contrast between the behavior of the executives, board members, and corporate advisors who were reluctant to challenge the corporate misbehavior, and the small number of corporate whistleblowers who did, points to a disturbing social psychological reality that has been overlooked in the discussion and reforms addressing the corporate scandals: namely, a group dynamic that binds group members together and blinds them to their failings and abuses”).
the front porch of her house appearing “timid and frightened.” An officer asked Amy if “there was a problem and if anything was going on.” Amy answered “no,” and said “nothing was the matter and that ‘everything was okay.’” At this point, Amy’s interests seem more aligned with Herschel’s because her statements appear aimed at keeping the police away in order to protect her husband. The officer continued to inquire despite Amy's answer because he “didn’t feel safe leaving the premises when we were responding to a call of a fight due to her state of frightens [sic].”

When Amy gave permission, the police entered the house and noticed “the living room was in ‘disarray’” and the gas heating unit was broken. Hershel Hammon was in the kitchen. Hershel admitted “that he and his wife had ‘been in an argument’ but ‘everything was fine now’ and the argument ‘never became physical.’” “One of the officers remained with Hershel; the other went to the living room to talk with Amy . . . .” At this time, Hershel’s interests were already opposed to the state’s interests.

When separated from Hershel, Amy’s interests appeared to become either more neutral or more aligned with those of the state. After the officer “‘again asked [her] what had occurred,’ he testified that Amy “informed [him] that she and Hershel had been in an argument. That [Hershel] became irritate [sic] over the fact of their daughter going to a boyfriend’s house. The argument became . . . physical after being verbal and she informed [him] that Mr. Hammon, during the verbal part of the argument was breaking things in the living room and [he] believe[d] she stated he broke the phone, broke the lamp, broke the front of the heater. When it became physical he threw her down into the glass of the heater.”

At trial, the officer testified that “[Amy] ‘informed me Mr. Hammon had pushed her onto the ground, had shoved her head into the bro-

357. Id.
358. Id.
359. Hammon, 829 N.E.2d at 447.
360. Hammon Appendix, supra note 24, at 25, “I didn’t know if someone had told her to tell them everything was okay and that everything actually wasn’t. It’s my job to investigate further than just the beginning realms.” Id.
361. Hammon, 809 N.E.2d at 948 (quoting Trial Transcript at 10, Hammon, 809 N.E.2d 945 (No. 52A02-0308-CR-693)).
363. Id.
364. Hammon, 829 N.E.2d at 447.
365. Davis, 547 U.S. at 819.
367. Davis, 547 U.S. at 819 (quoting Hammon Appendix, supra note 24, at 17-18).
ken glass of the heater and that he had punched her in the chest twice I believe.”

While the officer was talking with Amy, Hershel tried at least twice to enter the living room, and when he entered, the officer observed that Amy “would become quiet, almost afraid to speak at that time.”

Amy’s reaction demonstrates her understanding that her cooperation with the police was contributing to potentially negative consequences for Hershel and, in turn, for herself. Hershel “became angry when [the officer] insisted that [he] stay separated from Mrs. Hammon so that [they could] investigate what had happened.’”

The state’s intervention had interfered with the defendant’s control over the victim. Despite the prosecutor’s subpoena, Amy was not present at the trial. By the time of sentencing, Amy was again acting to protect her husband. She even wrote a letter to the probation department in support of Hershel.

3. A Principled Framework for Identifying the Relationship

The types of relationships that result in “absent accusers” occur in several categories of criminal cases. While domestic violence cases often involve this type of relationship, these relationships occur in many other categories of crime as well, such as child and elder abuse, corporate crime, and gang-related crime. A close look at these types of relationships reveals at least five features that generally characterize such relationships.

The first characteristic is a power imbalance between the witness-declarant and the defendant where the defendant holds the dominant position in the relationship. For example, in domestic violence cases, the declarant is often a victim who is emotionally or financially dependant on the defendant. Child abuse cases present a similar type of power imbalance.

Second, the relationship is ongoing in nature. The length of the past history or the future prospects may vary greatly, but at the time of the alleged crime, a relationship has already been established and there is an expectation that a relationship will continue into the future. Where one or both parties to a relationship anticipate that as-

368. Id. at 821 (quoting Hammon Appendix, supra note 24, at 17-18).
369. Hammon Appendix, supra note 24, at 32.
370. Id.
371. Davis, 547 U.S. at 820 (quoting Hammon Appendix, supra note 24, at 34).
372. Id.
373. See infra note 434 (quoting her handwritten letter).
374. In using the term “defendant” in this discussion, I am referring to a larger category of people that includes not only a named defendant but also any unidentified perpetrators and any other people who have sufficiently close ties to the perpetrator such that their interests are aligned with the perpetrator to a degree that causes their relationship with the witness-declarant to be similar to that of the perpetrator.
pects of the relationship will continue into the future, this may influence their willingness to cooperate with an investigation and to testify at trial.

Third, the criminal activity relates to or occurs within the relationship. For example, many drug and property crimes occur in the context of gang relationships. In corporate relationships, crimes may relate to the basic economic enterprise of the institution, as is well chronicled in recent episodes involving fraud, antitrust abuses, securities wrongdoing, and other kinds of corporate crime.

Fourth, the declarant has special knowledge or information that is related to or is within the relationship. In many instances this special information is unique or essential to prosecute crimes. However, the declarant’s perception that there is a confidential aspect to the relationship protects the perpetrator’s criminal activity from discovery and evaluation at trial.

Finally, requiring the declarant’s participation in the investigation and prosecution of the crime interferes with the relationship by creating a serious risk of harm to the declarant’s personal welfare in the form of physical violence or economic loss. For example, domestic violence victims live in serious fear of additional physical or psychological abuse. This notion of fear extends to other relationships as well. In gangs, fear of harm to gang members and their families for snitching is pervasive. In the business context, fear of job loss or economic retaliation for taking positions that are contrary to management or higher-ups is common.

375. See Kocieniewski, With Witnesses at Risk, supra note 354.

376. Fanto, supra note 355, at 441 (maintaining that group psychology is a “basic cause of the corporate scandals; only it can convincingly account for why so many respected executives, board members, bankers, and trained professionals participated in improper corporate action or turned a blind eye to it.”); see, e.g., BETHANY McLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2004).

377. Gang members, for example, frequently possess unique information about the commission of a crime. Kocieniewski, With Witnesses at Risk, supra note 354.

378. Id.

379. For example, Sharon Watkins, the lead whistleblower in the Enron scandal, was pressured by higher-ups to restate corporate earnings. See generally Tom Hamburger, Questioning the Books: Enron Memo Shows Watkins Urged Lay to Restate Earnings, WALL ST. J., Feb. 14, 2002, at A8 (describing Watkins’ efforts to bring problems with Enron to the attention of CEO Kenneth Lay). Even before Watkins’ revelations, John Olson, a securities analyst with Merrill Lynch, discovered problems in the company, but Merrill Lynch was concerned with maintaining its business relationship with Enron and fired him. See Charles Gasparino & Randall Smith, Merrill Defends Ties to Enron Before Congress—Yet a Veteran Analyst’s Perspective on the Firms’ Dealings Shows Pressures from Major Clients, WALL ST. J., July 31, 2002, at C1 (describing Enron’s pressure on Merrill analyst John Olson); see also Fanto, supra note 355, at 439 n.10.
B. Situating the Debate in the Context of the Goals of the Criminal Justice System

Fundamentally, the law is an expression of values. In implementing a procedural system to enforce laws, the two most salient values are truth and fairness. Ideally, the procedural system would effectively reveal the factual truth in all matters. The ability to substantively determine the truth about allegedly illegal conduct impacts the system’s legitimacy and validity. However, the value of accurate results is counterbalanced with the value of fairness in the truth-seeking process. Justice is a combination of these two values and the balance struck between them.

But as in all things human, our endeavors are not uniformly successful. The meaning of truth itself has been explored and debated by philosophers, each with a varying understanding of the concept. The ability to determine the factual truth about a past event is imperfect given that the fact-finder cannot travel back in time. The fact-finder must rely on incomplete and imperfect information in the truth-seeking process. The burden of proving the past event is therefore not to an absolute certainty, but beyond a reasonable doubt.\footnote{See In re Winship, 397 U.S. 358, 361-64 (1970).} Fairness requires the procedure to minimize the negative impact of incomplete and imperfect information.

The goals of truth and fairness frequently overlap. As Parts II and III have discussed, the Supreme Court has reconceptualized the Confrontation Clause in \textit{Crawford} and \textit{Davis} by emphasizing that the history of the Clause is rooted in its purpose of procedural fairness. The criminal justice system is concerned with procedural fairness because it helps us avoid false positives—wrongful convictions. However, it is also well-acknowledged that the system embraces the value of getting to the truth as a means to both convict the guilty and to protect the innocent. If there were no concerns about practical constraints or mitigating factors, a court could decide that all hearsay declarants must be confronted at trial. But that requirement may lead to unjust results when a witness who is a source of probative evidence is unavailable through no fault of the state.\footnote{See Raeder, supra note 144, at 15 (advocating a balancing approach to confrontation analysis that would “admit reliable testimonial statements only when the witness’s absence was not as a result of negligence or wrongdoing by the government and, paraphrasing \textit{Maryland v. Craig}, 497 U.S. 836 (1990), there is a particularized showing of need for the testimonial evidence based on the facts of the case”).} As the Court held over a century ago, general rules of law, “however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.”\footnote{Mattox v. United States, 156 U.S. 237, 243 (1895).}
The goal of procedural fairness is to create a structure that maximizes the ability of the fact-finder to determine the truth. If it is impossible to guarantee truth in the outcome, then the procedure must be constructed in a manner that minimizes the risk of a false outcome. But unlike truth, fundamental fairness is a judgment that embodies a range of values, and as these values change, it might be expected that the notion of fairness also changes. For example, in the past, judicial systems denying African-Americans the ability to serve as jurors or denying parties the opportunity to testify in their own cases were considered fair by many.\textsuperscript{383} As we have seen, perspective on fairness is influenced, in part, by context.

If the scope of the analysis were narrowly limited to two equal parties, then fairness, strictly speaking, would require allocation of that risk evenly to both sides. In other words, for as many “erroneous” acquittals, there should be an equal number of “erroneous” convictions. However, American criminal jurisprudence analyzes this equation from a different, broader perspective. The Constitution guarantees an individual person certain rights in relation to the state and in doing so acknowledges a criminal defendant “has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.”\textsuperscript{384} Here, the goals of pursuing truthful outcomes and using fair procedures are frequently in tension with one another and can begin to conflict with each other.

Emphasis on procedural fairness elevates protecting against false positives over protecting against false negatives. There are many examples of this conflict where courts have highly (some would argue excessively) proceduralized criminal investigations and prosecutions resulting in factually guilty defendants who are not held responsible due to the state’s violations of procedure.\textsuperscript{385} For example, if a suspect’s truthful confession is taken in violation of the procedures set

\textsuperscript{383}. See Albert W. Alschuler & Andrew G. Deiss, A Brief History of Criminal Jury in the United States, 61 U. CHI. L. REV. 867, 882-901 (1994) (discussing the history of exclusion of African-Americans and women from jury service); George Fisher, The Jury’s Rise as Lie Detector, 107 YALE L.J. 575, 624-27, 656-76 (1997) (examining witness competency rules that prohibited categories of witnesses, including criminal defendants, civil parties, and nonwhites, from testifying based on the rationale that such witnesses were most likely to lie).

\textsuperscript{384}. Winship, 397 U.S. at 363.

\textsuperscript{385}. This has been an issue of great debate in twentieth century criminal procedure. In some ways this is a lesson of the Warren Court, which was focused on protecting the procedural rights of defendants. See Akhil Reed Amar, The Constitution And Criminal Procedure (1997) (critiquing Warren Court view that the Bill of Rights is predominantly concerned with protecting minority and individual rights against majorities); Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1132-33 (1991) (arguing that the Bill of Rights is concerned with empowering, not impeding, popular majorities).
forth in *Miranda v. Arizona*,\(^{386}\) the confession may be suppressed and the outcome may be a false acquittal. Over time, the Court has struck this balance differently. More recently, the Court has leaned more toward the goal of protecting the value of truth. For example, since the Warren Court, the Supreme Court has cut back on the reach of *Miranda* in large part because the truth was being obstructed.\(^{387}\)

The fundamental concerns raised in striking a balance between truth in factfinding and fairness in procedure are three-fold: the actual intentional divergence from the truth by the government to obtain a result, the actual but unintentional divergence from the truth by the factfinder due to misinterpretation or misleadingly incomplete information, and the appearance of divergence from the truth based on inequality of power and opportunity to portray or shape the evidence. The prescribed remedy for these problems is confrontation. However, the curative ability of physically placing the declarant face-to-face with the defendant or of challenging the declarant’s statements through cross-examination is based at least in part on presumptions about psychological aspects of human behavior and presumptions about the ability of humans as jurors to recognize truth-telling. It also presumes that a declarant may be more likely to be inaccurate or untruthful in a setting where the declarant could or should realize that statements may be used against the defendant for purposes of proving guilt. Further, it presumes that the law enforcement agent may be inaccurate or untruthful in the collection or recounting of evidence.

Truth, in pursuit of fairness, may often require a broader scope of analysis. In this Article, I argue that a court, in analyzing the application of the Confrontation Clause, must evaluate from a broader perspective whether there is an ongoing emergency during a police interrogation. Narrowly limiting the question to whether there is risk of imminent physical harm may be an easier standard for courts to apply, but such an analysis unacceptably increases the risk of error in finding the truth.

The normative goal of the criminal justice system is to render a result as accurate as practicable in the determination of guilt—the verdict should reflect the truth. Given that the system requires a certain minimum level of accuracy to maintain our collective confidence

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in its fairness, it is necessary to evaluate whether the discussion to date has emphasized fairness to the exclusion of the value of truth. Errors in the criminal justice system should inure to the benefit of the defendant; however, the occurrence of the error cannot be so frequent that the public trust in the system is destroyed.

As we have seen, certain kinds of relationships give rise to the problem of uncooperating witnesses or absent accusers, which makes it difficult to prosecute when the witness refuses or is unable to testify subject to cross-examination. Cases within this category of absent accusers are problematic because they have a high risk of reaching false outcomes when the state cannot go forward. The resulting increased risk of false negatives decreases the overall accuracy of the truth-finding function of the criminal justice system and undermines public trust in its justice and fairness. In this sense, our system often fails to protect those who most need its protection. If a system is not effective at achieving its goals of promoting the values of both truth and fairness, the public may rationally choose not to rely on or use the system. Fewer people relying on or using the system renders the system even less effective in regulating society. Courts must prescriptively implement procedures that protect the fairness of the process to both sides.

C. Confronting the “Ongoing Emergency”

By interpreting the Sixth Amendment in light of the goals of the criminal justice system, courts could apply Davis in a manner that takes into account the relationship circumstances that give rise to the problem of false negatives as well as promotes the goals of the criminal justice system. Given the ongoing nature of criminal conduct in certain relationships, courts must consider the ongoing nature of the relationship in determining whether there is an ongoing emergency at the time of the declarant’s responses to police interrogation. When a criminal case involves a relationship that is subject to the conditions discussed in Part IV.A, courts must widen the lens of analysis in deciding whether there is in fact an ongoing emergency.

Davis prescribes a multi-step inquiry in directing courts to objectively evaluate the circumstances as they existed during the interrogation. In applying Davis, the threshold determination for a court is whether the hearsay statement is a result of a police interrogation. If so, then under Davis, the trial court must determine whether there was on an ongoing emergency at the time of the police interroga-

388. See supra Part IV.A.
tion. Next, the court must analyze the purposes of the interrogation and identify the primary purpose, if any. Both of these determinations are predicates to assessing whether the declarant’s statements are testimonial.

This Article focuses on a court’s challenges in determining whether there is an ongoing emergency at the time of the interrogation, although in doing so it also briefly addresses how a court might characterize a police interrogation and identify the primary purpose of the interrogation. It is my claim that, where relationships of the sort identified above are present, the nature of the relationship is relevant to each of these inquiries, thus requiring a court to expand its inquiry to consider a range of circumstances in making an admissibility determination. Had the Court properly done this in applying the primary purpose test to the facts of Hammon, it may have reached a different outcome.

1. The Threshold Inquiry: “Police Interrogation”

The threshold question is whether the declarant’s statements were made in the course of a police interrogation. The Court has yet to resolve how far the definition of these terms may extend for purposes of determining whether a police interrogation occurred. However, both Davis and Crawford indicate that these terms are not strictly construed. In Davis, the definition of “police” was indirectly expanded beyond law enforcement officers when the Court considered (without, it said, “deciding the point”) that a 911 operator is included in the meaning of police. Whether the characterization of

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390. Id. While some have questioned the utility of using an ongoing emergency as a factor in assessing the testimonial nature of a statement, in this Article I have chosen to work within the structure set out in Davis. See, e.g., Myrna S. Raeder, Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?, 15 J.L. & POL’Y 759, 764-78 (2007).

391. Davis, 547 U.S. at 822

392. Id.

393. The Court has been very cautious in making any bright-line, or even dim-line, rules about which characteristics define “police.” The role of the state, either embodied in a prosecutor or a police officer, is clearly within the scope of concern the Court is targeting. How attenuated the Court will allow this analysis to stretch is unclear. One factor courts should examine is how closely the police interrogation resembles, or is acting in place of, a prosecutor’s direct examination at trial.

394. As the majority in Davis states: If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police. As in Crawford v. Washington, 541 U.S. 36 (2004), therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are “testimonial.” Davis, 547 U.S. at 823 n.2 (2006); see also id. at 837 n.1 (Thomas, J., concurring in the judgment in part and dissenting in part) (“Like the Court, I presume the acts of the 911
“police” will be extended further to include other agents of the state—such as emergency response medical personnel or teachers and doctors who are legally mandated to report abuse to law enforcement—remains an open question.

The definition of “interrogation” was not an issue that was challenged by the facts of Crawford, because the declarant’s statements were made during an in-custody recorded interview by a law enforcement officer. However, the Court was explicitly clear about its intention to consider other less formal situations as interrogations for purposes of Confrontation analysis, saying that it “use[d] the term ‘interrogation’ in its colloquial, rather than any technical legal, sense.” Later, in Davis, the Court even suggested that volunteered statements made in the absence of any interrogation could be testimonial.

2. Objectively Assessing Whether There is an Ongoing Emergency

The Davis Court directs trial courts to conduct an objective analysis. It is important to note that the protections of the Sixth Amendment are triggered by the initiation of a criminal prosecution. A defendant’s right to confrontation applies in court; thus, the constitutionally relevant event is the trial judge’s decision regarding the procedure for the admissibility of evidence. The defendant’s rights are not violated by the state’s method of evidence collection, but by the state’s use of testimonial hearsay evidence at trial without demonstrating the unavailability of the declarant and providing the opportunity for confrontation. Therefore, Davis correctly instructs operator to be the acts of the police. Accordingly, I refer to both the operator in Davis and the officer in Hammon, and their counterparts in similar cases, collectively as “the police.”

395. Crawford, 541 U.S. at 53 n.4 (“Just as various definitions of ‘testimonial’ exist, one can imagine various definitions of ‘interrogation,’ and we need not select among them in this case. Sylvia’s recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.”).

396. Davis, 547 U.S. at 822-23 n.1.

397. See supra Part III.B.2.

398. According to the Sixth Amendment, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI. A violation of the right occurs after the charges have been filed. For example, a defendant does not have the right to confront witnesses during grand jury proceedings. In most jurisdictions, the target of a grand jury investigation does not have a right to testify or be present before the grand jury. See United States v. Mandujano, 425 U.S. 564 (1976) (dictum) (plurality opinion) (no right to counsel in grand jury); Kirby v. Illinois, 406 U.S. 682 (1972) (Sixth Amendment right to counsel attaches after the initiation of adversary judicial criminal proceedings); 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: ADJUDICATION 128-29 (4th ed. 2006); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 585 (4th ed. 2000).

399. Confrontation is a trial right aimed at preserving the integrity of the trial process. As the Davis Court noted, “[t]he Confrontation Clause in no way governs police conduct,
courts to engage in ex post reasoning to determine how the Confrontation Clause applies to the evidence. A court’s temporal and physical distance from the event, as well as its neutral role, enable it to evaluate the circumstances from an objective perspective.

This objective analysis is from the perspective of a reasonable third party who is unrelated to the incident—in other words, the neutral perspective of the court. As the Davis Court illustrates, it is the “reasonable listener” who recognizes an ongoing emergency. The Court’s findings are not based on the reasonable belief of either the declarant or the law enforcement officer. Although the Davis Court had the opportunity, it did not adopt the formulation in Crawford that described testimonial statements as those “‘that declarants would reasonably expect to be used prosecutorially.’” Nor did it precisely adopt the broader formulation suggested in Crawford that included “‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” The issue of the testimonial nature of the statement arises only during the subsequent litigation, when the declarant and the law enforcement officer may perceive a stake in the outcome. The incentives, opportunity, and ability of either declarants or law enforcement to intentionally manipulate the circumstances of the interrogation and to impact the

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400. In his dissent, Justice Thomas criticizes the majority’s “objective” test because of its effect in “shift[ing] the ability to control whether a violation occurred from the police and prosecutor to the judge.” Id. at 840 (Thomas, J., concurring in the judgment in part and dissenting in part). In his view, a judge’s determination regarding the objectively discernable primary purpose of an interrogation may be different from the officer’s actual purpose for conducting the interrogation. Id. For Justice Thomas, the possibility of an inaccurate conclusion renders the test itself useless. What he fails to consider, however, is that the focus is not on the officer’s true intention in asking the declarant questions, but rather on whether the declarant’s conduct in communicating with the officer is akin to testimony in court such that, like in court, the defendant should have the right to confront the witness.

401. Id. at 827 (majority opinion) (“Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency.”).

402. Id. at 832 n.6.

403. Crawford, 541 U.S. at 51 (emphasis added) (quoting Brief for Petitioner at 23, Crawford, 541 U.S. 36 (No. 02-9410)).

404. Id. at 52 (emphasis added) (quoting Brief for National Ass’n of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner at 3, Crawford, 541 U.S. 36 (No. 02-9410)).
constitutional analysis decrease when the test is objective and no one circumstance controls the outcome.

Most importantly, in applying *Davis*, courts must refrain from prematurely abbreviating the analysis. It is obviously easier for courts to focus on the circumstantial factors that were immediately apparent to the police on the scene. But that is not what *Davis* prescribes. Instead, *Davis* governs a court’s subsequent evaluation of the totality of the circumstances in determining the existence of an ongoing emergency. The circumstances may include factors such as the presence or lack of threat to the declarant’s welfare, the location of the defendant or others who threaten the declarant’s welfare, the declarant’s ability to escape the threat, and the need for preventive intervention.

Some relevant circumstances will not be readily apparent because they are simply more difficult to perceive or are hidden. Crimes that involve certain relationships are different from sporadic, isolated, and discrete stranger crimes. In these cases, the court must consider the nature of the relationship between the declarant and others potentially involved in the criminal activity. A court may be required to consider past events because of the resulting consequences that create a present circumstance of emergency during the interrogation. Or, a court may be required to consider the potential future consequences of the interrogation that contribute to the emergency of the present situation. Because the trial court applies an objective standard, it is irrelevant whether the questioning officer was aware,

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405. Tuerkheimer, supra note 8, at 23 (“To posit a clean divide between the crime and the exigency it creates, and the crime’s aftermath, is to import a model of crime characterized by discrete instances of one-time, episodic violence. . . . [T]his conventional paradigm is incompatible with the realities of battering.”).

406. Professor Tuerkheimer astutely observes:

The domestic violence victim's exigency extends beyond what might appear to an outside observer, or even to the "reasonable person" unfamiliar with the culture of the particular battering relationship, to be the "end" of the criminal incident. The exigency the victim experiences requires a narration of past events in order to resolve the immediate danger they precipitated. In short, the meaning of "exigency" to a victim of domestic violence is different than it is to victims of other types of crime. This reality fatally undermines judicial reasoning predicated on the "crying for help" versus "providing information to law enforcement" rubric.

Id. at 24-25 (footnote omitted). In *State v. Camarena*, the court affirmed the admission of a response to a callback by a 911 operator after a hung-up call where the victim answered, “Yeah, my boyfriend hit me but then he left.” 145 P.3d 267, 269, 276 (Or. App. Ct. 2006).

*Camarena* relied on the fact that the defendant could have returned and it was likely the victim was seeking assistance against possible renewal of an attack, a position that, although reasonable in a domestic violence context, extends emergencies until defendants are captured—a conclusion that directly contradicts the *Davis* view that “the emergency appears to have ended (when Davis drove away from the premises).” *Raeder*, supra note 144, at 13 (quoting *Davis*, 547 U.S. at 828).
or should have been aware, of these circumstances at the time of the interrogation.

3. Evaluating the Primary Purpose of the Interrogation

Police interrogate witnesses for a myriad of purposes, including first responder emergency aid, investigation, and evidence collection. Recognizing that a police interrogation may often simultaneously serve multiple purposes, the Davis Court focused on determining the “primary” purpose.\textsuperscript{407} However, the Court’s decision specifically acknowledged only two significant purposes of police interrogation: enabling the police to assist with an ongoing emergency and “establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.”\textsuperscript{408} Nevertheless, the Court’s decision does not preclude recognition of the many other purposes of police interrogation, such as enabling the police to give preventive safety advice or enabling the police to identify what service they can provide.

Courts approaching this inquiry should apply a multi-step analytical process to determine the primary purpose of the interrogation. First, a court should objectively examine all of the circumstances surrounding the interrogation and identify all of the purposes reasonably served by that interrogation. The circumstances will include many factors. One will be the timing of the interrogation.\textsuperscript{409} Was the statement taken near the time of the alleged crime or at some other stage of the investigation or prosecution? Location will be another factor. Was it at the scene of the crime, or in the police station?

Courts may also consider the subjective motivations of the police or the declarant. While the court must evaluate objectively, the subjective motivations of the police in questioning a witness or of the declarant in speaking with the police may be relevant circumstances that contribute to the overall equation, even though these motivations are not solely determinative.\textsuperscript{410} As the Davis Court said, “[The

\textsuperscript{407} See supra Part III.B.3.

\textsuperscript{408} Davis, 547 U.S. at 822.

\textsuperscript{409} See id. at 827 (“The difference between the interrogation in Davis and the one in Crawford is apparent on the face of things. In Davis, McCottry was speaking about events as they were actually happening, rather than ‘describ[ing] past events.’ Sylvia Crawford’s interrogation, on the other hand, took place hours after the events she described had occurred.” (internal citation omitted)); see also id. at 832 (“Such exigencies may often mean that ‘initial inquiries’ produce nontestimonial statements. But in cases like this one, where Amy’s statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene and were ‘initial inquiries’ is immaterial.”).

\textsuperscript{410} Contrast the holding of the Indiana Supreme Court, which reasoned “that a ‘testimonial’ statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings,” where “the motivations of the questioner and declarant are the central concerns.” Hammon v. State, 829 N.E.2d 444, 456-57 (Ind. 2005). As the Indiana Supreme Court stated:
police] saying that an emergency exists cannot make it be so. 411 The content of the interrogation itself should be considered. While the focus is on the declarant’s statements, 412 the officer’s questioning is one circumstance to consider in evaluating the testimonial nature of the declarant’s statements. In assessing the risk of present or future danger, the officer may ask questions that are potentially related to criminal activity. The content of the questions and responses may provide the police with necessary information that “enable[s] police assistance to meet an ongoing emergency.” 413

Next, the court should objectively evaluate the identified purposes and apportion weight to them according to their relative importance under the circumstances. If the proportional importance of one purpose equals or exceeds that of the others, then the court should find that purpose to be the primary purpose of the interrogation. 414 As Justice Thomas astutely observed in his dissent, an objective determination of the primary purpose of an interrogation is perhaps more accurately described as an ex post determination of “the function served by the interrogation.” 415

In evaluating whether a statement is for purposes of future legal utility, the motive of the questioner, more than that of the declarant, is determinative, but if either is principally motivated by a desire to preserve the statement it is sufficient to render the statement “testimonial.” If the statement is taken pursuant to established procedures, either the subjective motivation of the individual taking the statement or the objectively evaluated purpose of the procedure is sufficient.

411. Davis, 547 U.S. at 832 n.6 (“While prosecutors may hope that inculpatory ‘nontestimonial’ evidence is gathered, this is essentially beyond police control.”).

412. See id. at 823 n.1 (“It is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.”).

413. Id. at 822.

414. But see, e.g., id. at 839 (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. . . . Assigning one of these two ‘largely unverifiable motives’ primacy requires constructing a hierarchy of purpose that will rarely be present—and is not reliably discernible.” (internal citations omitted)). Professor Tuerkheimer discusses how the interrogation purposes may be intertwined. Asserting that Davis’s dichotomy between “crying for help” and “providing information” for investigatory purposes is false in domestic violence cases, Professor Tuerkheimer argues that abuse victims face ongoing threats that require them to provide information about past violence to prevent imminent harm. Tuerkheimer, supra note 8, at 7-8.

415. Davis, 547 U.S. at 839 (Thomas, J., concurring in the judgment in part and dissenting in part).
4. Determining Whether the Statement is Testimonial

After the court has addressed the issues of ongoing emergency and primary purpose of the interrogation, the court can use these two determinations to assess whether the declarant’s statement is testimonial. *Davis* lays out the basic parameters of the range of possibilities. On one end, *Davis* decided that “[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” On the other end, *Davis* decided that statements “are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

In between these two situations, the Court left open a wide area of undecided middle ground. For example, if there is an ongoing emergency but the primary purpose of the interrogation is anything other than to enable police assistance to meet that ongoing emergency, then the statement may or may not be testimonial. In fact, *Davis* only characterizes as testimonial those statements which are made when “there is no such ongoing emergency.”

The Court’s apparent confinement of testimonial statements to those taken when there is no ongoing emergency may reflect an uncertainty over which “evil” the Confrontation Clause is intended to avoid. If prosecutorial abuse were the main target of the Confrontation Clause, then even statements taken during an ongoing emergency when “the primary purpose of the interrogation is to establish or prove past events potentially relevant to [a] later criminal prosecution” would likely be testimonial. But the Court did not address this situation. In fact, the Court reinforced the importance of the emergency ending before statements might “‘evolve into testimonial statements.’” Similarly, the Court did not decide whether a state-

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416. *Id.* at 822 (majority opinion).
417. *Id.*
418. *Id.*
419. *Id.*
420. *Id.* at 828 (quoting Hammon v. State, 829 N.E.2d 444, 457 (Ind. 2005)). The Court reasoned:

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, “evolve into testimonial statements,” once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on,
ment would be testimonial when there is no ongoing emergency and the primary purpose of the interrogation is anything other than to establish or prove past events potentially relevant to later criminal prosecution.

5. Incorporating the Relationship into the Analysis

Applying this approach to the facts of Hammon illustrates how a broader perspective—one that considers the relationship at each step of the analysis—directs courts to more thoroughly consider all the relevant circumstances. There are many relevant circumstances that the Court should have considered in its evaluation of whether there was an ongoing emergency when Amy Hammon gave her oral statement to the police. The initial circumstances observed by the officers were that “Amy told them that things were fine,” and they did not hear any “arguments or crashing” or see anyone “throw or break anything.” Because of these few circumstances, the Court determined that “[t]here was no emergency in progress.”

The Court failed to provide a meaningful determination regarding the existence of an ongoing emergency in Hammon because the scope of circumstances it considered was too limited. For example, the location and condition of the scene provided evidence of recent violence. The officers observed recently broken items in the home. More importantly, the defendant was still present in the home with Amy. The home was presumably the primary residence for both. In the home, Amy was still within the reach of the defendant who had the capacity to render further harm to her. Arguably, Amy may have been physically free to leave; she was standing on the porch when the police arrived. However, there was evidence that Herschel was trying to prevent her from calling for help or leaving. He broke the

McCottry’s statements were testimonial, not unlike the “structured police questioning” that occurred in Crawford.

Id. at 828-29 (citations omitted).
421. Id. at 830 (citing Hammon Appendix, supra note 24, at 14).
422. Id. at 829 (citing Hammon Appendix, supra note 24, at 25).
423. Id. at 829-30. But see id. at 841 (Thomas, J., concurring in the judgment in part and dissenting in part). In Justice Thomas’s view:

[T]he fact that the officer in Hammon was investigating Mr. Hammon’s past conduct does not foreclose the possibility that the primary purpose of his inquiry was to assess whether Mr. Hammon constituted a continuing danger to his wife, requiring further police presence or action. It is hardly remarkable that Hammon did not act abusively towards his wife in the presence of the officers, and his good judgment to refrain from criminal behavior in the presence of police sheds little, if any, light on whether his violence would have resumed had the police left without further questioning, transforming what the Court dismisses as “past conduct” back into an “ongoing emergency.”

Id. (citations omitted).
phone and "[t]ore up [Amy's] van where [she] couldn't leave the house." 424

In a situation where police respond to a call and the alleged batterer and victim are located within a shared residence, a court should objectively assess whether there is a continuing threat of harm and an inability to escape the threat. Studies have shown that the most dangerous time for a victim of domestic violence is when she leaves the relationship. 425 Police may need to gather information from the victim to determine whether there is probable cause to make an arrest so they are able to resolve the present emergency by removing the threat from the residence. In appropriate cases, a court should consider this statistical data as a circumstance indicating an ongoing emergency.

The Court should also have considered the time of day in determining whether there was an ongoing emergency. Emergencies certainly may occur at any time of day or night. 426 However, the exigency of a violent situation may be intensified by the fact that it occurred at night, when there are fewer safe places for escape and there is a heightened need for shelter. The Hammon incident occurred around 11:00 p.m. 427

In addition to the circumstances that were observed at the time of the statements, a court should consider other external circumstances that factor into the existence of an emergency. For example, in Hammon, Herschel was on probation for battery of his daughter. 428 A court could reasonably infer that Amy was aware of this battery and therefore knew that the defendant was willing to use violence against family members. Not only was Herschel responsible for prior violence to his family, he was also on probation for that incident. Amy, just having been the object of Herschel’s violence, was in a situation where the circumstances indicated that Herschel was undeterred from using physical violence even after the criminal justice system

424. Id. at 820 (quoting Hammon Appendix, supra note 24, at 2).
425. "Up to seventy-five percent of reported domestic assaults may occur after the separation of the batterer and his wife." Developments in the Law: Legal Responses to Domestic Violence, 106 HARV. L. REV. 1498, 1610 (1993). Many "have noted that the batterer's level of violence escalates after a victim has gained her independance." Id. Further studies have shown that victims of domestic violence "are most likely to be murdered when they attempt to leave . . . or report abuse." Id. at 1610-11; see also Desmond Ellis, Post-Separation Woman Abuse: The Contribution of Lawyers as “Barracudas,” “Advocates,” and “Counsellors,” 10 INTL. J.L. & PSYCHIATRY 403 (1987); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 1 (1991).
426. For example, the Davis incident occurred at around noon. Davis Appendix, supra note 181, at 8.
427. In Hammon, the prosecuting attorney “verified police were called at 10:52 p.m. . . . by a third party calling 911.” Laurie Kiefaber, Miami County Case to Be Heard by U.S. Supreme Court, PERU TRIB., Nov. 14, 2005. The officers arrived at the Hammon home at 10:55 p.m. Hammon v. State, 829 N.E.2d 444, 446 (Ind. 2005).
428. Hammon Appendix, supra note 24, at 58.
had intervened and imposed consequences for it. A reasonable person in that situation would not feel or be safe just because the police were temporarily intervening. Objectively, the defendant’s probationary status is a circumstance the court should have considered as relevant to the potential danger that was present in the Hammon household at the time the declarant was speaking with the officer. Furthermore, the fight between Amy and Herschel was due to a disagreement over their daughter.\footnote{See Davis, 547 U.S. at 820. Amy wrote in her affidavit that Herschel “[a]ttacked my daughter.” \textit{Id.} (quoting Hammon Appendix, supra note 24, at 2). The officer testified that Amy told him “[t]hat [Herschel] became irrate [sic] over the fact of their daughter going to a boyfriend’s house.” \textit{Id.} (citing Hammon Appendix, supra note 24, at 17-18).}

Most important, the court should examine the declarant’s relationship with the defendant. Amy and Herschel Hammon’s relationship possessed all five features of the type of relationship for which a court should closely consider the relationship dynamics and their impact on the existence of an ongoing emergency. First, there appears to be a power imbalance between the witness-declarant and the defendant where the defendant holds the dominant position. Amy appeared timid when the officers observed her, and she initially lied to protect Herschel. She appeared intimidated when Herschel tried to intervene while she was giving her statement to the officer.\footnote{“Hershel ‘became angry when [the officer] insisted that [he] stay separated from Mrs. Hammon so that [the officers could] investigate what had happened.’” \textit{Id.} (quoting Hammon Appendix, supra note 24, at 34).}

Second, Amy and Herschel had an ongoing relationship. They were married and had a child together. Amy apparently loved and needed Herschel.\footnote{While not evidence at the pretrial stage, Amy’s letter to the probation department for sentencing indicated her feelings for Herschel and her desire to stay together with him. \textit{See infra} note 434.} In the absence of evidence that they were in the process of ending the relationship, it is reasonable to infer that there was an expectation that the relationship would continue into the future. Third, the criminal activity related to or occurred within the relationship. On two occasions known to the court, Herschel was violent within the relationship. Previously, Herschel battered their daughter. Presently, Herschel was accused of battering Amy in their home in an argument about their daughter. Fourth, Amy had special knowledge or information that was related to or was within the relationship. Amy was in a position where she was the only known witness to the battery. Because they were married and had children together, it is reasonable to infer that she possessed all the information inherent in that type of family relationship.

Finally, the requirements of the declarant’s participation in the investigation and prosecution of the crime interfere with the relationship by creating a serious risk of harm to the declarant’s personal

\footnote{While not evidence at the pretrial stage, Amy’s letter to the probation department for sentencing indicated her feelings for Herschel and her desire to stay together with him. \textit{See infra} note 434.}
welfare through physical violence or economic loss. As the sole witness, Amy’s evidence was essential to intervention by the state because the case would not have sufficient evidence without her statements or testimony. While Amy told the officer what happened, Herschel continued to threaten her by trying at least twice to enter the living room. Her response—“becom[ing] quiet, almost afraid to speak at that time”—demonstrated how her participation interfered with the relationship, which created a serious risk of harm. Furthermore, Amy needed Herschel to continue working in order to help the family financially and to help with their children. The possibility of Herschel being incarcerated created a serious risk of economic loss and harm to Amy and her children.

Considering this nonexclusive list of factors, a court could reasonably find that an ongoing emergency existed at the time of Amy’s statements to the police. Only when the police intervened by arresting Herschel and removing him from the home were they able to assist in abating the emergency threat of imminent harm to Amy.

While there may be many reasons why a declarant may be unable or unwilling to participate in the trial, one reason in cases involving relationships, as discussed above, is to avoid the negative consequences of the ongoing emergency. In fact, in many cases, the declarant’s later inability or unwillingness to testify at trial can be indirect evidence of the ongoing emergency: the declarant is trying to avoid the negative consequences of making the statement to the police. The emergency may still be ongoing at the time of trial and the declarant’s unavailability is a direct result of that emergency. The risk of serious harm to welfare may be present from the time of the hearsay statement to the moment of trial. Analyzing the testimonial nature of a hearsay statement in this manner both recognizes the complex and problematic dynamics of cases involving certain relationships and respects the ultimate values of the criminal justice system.

432. Hammon Appendix, supra note 24, at 32.
433. Id.
434. As her handwritten letter in the Hammon record stated:

As for sentencing, I would like my husband, Hershel Hammon to receive counseling [sic] and go to AA, because it has helped him in the past. I would like to see him put on probation to ensure that it happens and where he can still work to help financially and be here to help with our children. I also need his help around the house for we’re remodeling the house and plan to sell it so we can move out of town. I love my husband, I just want to see him stop drinking. I do not feel threatened by his presence.

Id. at 65.
435. In Davis, the Court recognized that domestic violence cases were “notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.” 547 U.S. at 832-33.
D. Concerns with a More Pragmatic Approach to Assessing the Ongoing Emergency

This Article has highlighted some of the unique institutional problems that criminal cases involving certain relationships present and has proposed a solution that judges can apply. While, as Professor Lininger has argued, some of these issues could be addressed by state legislatures, even absent legislation courts have at their disposal a more flexible approach that is able to do justice in individual cases while also implementing the constitutional values of the new Confrontation Clause regime. Inevitably, however, there are some potential objections to the approach I advocate.

To begin, any legal standard other than a bright-line rule faces the recurring issues of where to draw the line and the resulting lack of predictability. For example, Justice Thomas in his dissent criticized the primary purpose test as not workable for all hearsay statements that may implicate the Confrontation Clause; thus the results are unpredictable. Inevitably, courts will continue to face challenges in deciding when the analysis I propose in this Article should be applied and how the parameters should be defined.

Predictability and consistency of results are important factors in developing a fair and just system. Assuredly, bright-line standards are efficient and useful when they produce just results. However, the majority rejected the bright-line rule Justice Thomas urged the Court to adopt. While this bright-line rule may be easier to administer because factors of formality are more overtly observable than circumstances indicating the purpose of an interrogation, it is flawed in other ways. The majority struck back at Thomas’s dissent, by similarly criticizing the “workability” of his approach and pointing out that even the bright-line formality test must have exceptions to reach a just result. These exceptions inevitably diminish the test’s predictability. Ultimately the majority acknowledged that designing an

437. See supra Part III.C.
438. Beginning in White v. Illinois, Justice Thomas has consistently proposed that “statements regulated by the Confrontation Clause must include ‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’ ” Davis, 547 U.S. at 836 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment) (emphasis added)). Police would have great incentive to avoid taking a statement under circumstances with markers of formality. This built-in incentive does not promote quality investigation or evidence preservation. The consequence is detrimental to both the state and the defendant and would potentially increase the inaccuracy of the entire system.
439. Id. at 830-31 n.5 (majority opinion). The majority also defended its approach by modestly defining its goal as simply resolving the cases before it and claiming that the
exhaustive classification system for testimonial statements proves problematic, for there is always a hypothetical scenario where a generalized standard of analysis could result in injustice or incongruity with the purpose of the Clause. Similarly, the flexibility of my approach provides for a more comprehensive analysis of an individual case which ideally leads to a more just result.

Furthermore, there is the concern that this approach will increase the risk of false positives—that the lack of cross-examination of these declarants will result in the conviction of more innocent defendants. However, the criminal justice system has many other protections in place that guard against this outcome. Before Crawford dramatically revised the confrontation analysis, our system had a risk of false outcomes under Ohio v. Roberts and its progeny that was accepted for almost twenty-five years. One indication that the previous level of risk is still acceptable may be found in Wharton v. Bockting, the Court’s recent decision holding that Crawford does not apply retroactively. In Bockting, the Court held that Crawford embodied a new rule, but the rule was “a ‘watershed rule[e] of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” The potential increase of false positives may be a true risk, but it should not be overemphasized. The risk of false positives must also be considered in the context of the risk of false negatives to fairly evaluate the total impact. There is always a potential risk of false outcomes, but one must evaluate the balance fairly in pursuing the goal of increasing overall accuracy. This approach promotes decisions based on values that will encourage courts to find an acceptable balance in the risks.

Another objection is that the focus in this category of cases should be on forfeiture rather than a more complex and nuanced analysis of identification of testimonial statements. Both approaches potentially result in admitting hearsay evidence without the confrontation of the declarant’s trial testimony. However, forfeiture is perhaps too narrowly focused on the fault of the defendant. The approach in this Article differs in that it is not focused exclusively on the defendant’s

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440. For example, defendants retain all the other Sixth Amendment trial rights as well as due process rights generally.
442. Id. at 1181 (“A new rule is defined as ‘a rule that . . . was not ‘dictated by precedent existing at the time the defendant’s conviction became final.’” (citations omitted)).
443. Id. at 1180 (“A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a ‘watershed rule[e] of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” (alteration in original) (citations and internal quotations omitted)).
wrongdoing. Instead, it more broadly incorporates key factors about the dynamics of the relationship.

Finally, some may object based on constitutional methodology. It might be claimed that this proposal is inconsistent with the text of the Sixth Amendment. However, the goal of this Article has been to apply a functional and pragmatic rather than textualist or originalist interpretation of the Confrontation Clause. Ultimately, the Sixth Amendment will be evaluated by its ability to promote truth and fairness. The Sixth Amendment allows this application when interpreted, not in isolation, but in view of the goals of the criminal justice system. This approach to interpreting the Confrontation Clause is consistent with both textualist approaches that recognize truth-seeking goals and the functionalist approach to constitutional interpretation that holds sway with most judges and practitioners.

V. CONCLUSION

Crawford is a groundbreaking Confrontation Clause decision, but like many new legal approaches, it leads lower court judges down an unsettled path that is entangled in the thicket of many novel issues, such as how to determine when statements are “testimonial.” In Davis, the Court cleared up some of Crawford’s testimonial thicket, but its guidance to lower court judges remains incomplete. It is particularly disappointing that the Court had an opportunity to specifically address how courts should approach cases with complex relationships between witness-declarants and defendants. Such circumstances are typical in domestic violence cases, including the two cases before the Court, as well as in other relationships in which criminal activities occur, such as child abuse, gangs, and corporate crimes.

As this Article has argued, the institutional and sociological dynamics of some relationships frequently impose an impediment to a declarant-witness testifying at trial. Davis leaves much of the analy-

444. Even Justice Scalia apparently abandoned Crawford’s strict originalist approach when he noted in Davis that “[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.” Davis, 547 U.S. at 831 n.5.

445. See Amar, The Bill of Rights as a Constitution, supra note 385, at 1132-33; Akhil Reed Amar, Confrontation Clause First Principles: A Reply to Professor Friedman, 86 GEO. L.J. 1045 (1998); Akhil Reed Amar, Foreword: Sixth Amendment First Principles, 84 GEO. L.J. 641 (1996).

sis to be worked out case-by-case as trial court judges make ad hoc
determinations of admissibility in such relationships. For example,
despite *Davis*, lower court judges continue to face challenges in de-
termining whether there is an ongoing emergency at the time of the
interrogation—an important predicate inquiry to an admissibility de-
termination where there is a relationship between the declarant-

witness and the defendant. While more open-ended and pragmatic,
however, this inquiry should not be without some guiding principles.
In this Article, I have drawn from *Crawford* and *Davis* to provide a
set of pragmatic considerations that might allow lower courts to
strike a balance between the goals of the criminal justice system and
the complexities presented by certain relationships. Where ongoing
relationships present problematic characteristics that make the trial
availability of the witness-declarant unlikely, the nature of the rela-
tionship is relevant, and a court must expand its inquiry to consider
a broad range of circumstances in making an admissibility determi-
nation.