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WORKING THROUGH THE CONFRONTATION CLAUSE AFTER DAVIS v. WASHINGTON

Andrew Dylan*

In Davis v. Washington, the U.S. Supreme Court clarified its newly minted approach to the Sixth Amendment’s Confrontation Clause, set out just two years earlier in Crawford v. Washington. While Davis provides some guidance to the lower courts in their attempts to separate “testimonial” from “nontestimonial” statements—the hinge on which confrontation jurisprudence now swings—it falls short of offering a bright-line rule. In fact, Davis may be construed as endorsing not one but three tests for determining whether a statement is testimonial, prompting confusion and inconsistency in the lower courts. This Note attempts to sort through the alternatives in an effort to effect a stable and uniform confrontation jurisprudence.

INTRODUCTION

The Sixth Amendment’s Confrontation Clause guarantees a criminal defendant the right “to be confronted with the witnesses against him.”1 In Crawford v. Washington,2 the U.S. Supreme Court radically revised its understanding of the confrontation right, discarding a jurisprudential stance that had, over the previous quarter-century, reduced the Confrontation Clause to something approaching a duplicate of the hearsay rule.3 The Court’s prior approach, based on Ohio v. Roberts,4 conceived of the Confrontation Clause simply as a guarantor of the substantive “reliability” of criminal evidence.5 Crawford replaced this standard with a procedural rule requiring that “testimonial” evidence from an out-of-court declarant be subject to cross-examination if it is to be admissible at trial.

Two years later, in Davis v. Washington, the Court clarified what it meant in Crawford by “testimonial” evidence, holding that, for confrontation purposes, a statement is testimonial when it describes past events, and that a statement is nontestimonial when the declarant is

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1. U.S. Const. amend. VI.
5. Crawford, 541 U.S. at 68.
describing events as they occur, particularly in the context of an “ongoing emergency.” 6 In the wake of Davis, both state and federal courts have struggled to respond to confrontation challenges in a consistent way. The lower courts’ difficulties suggest that the Supreme Court’s current confrontation jurisprudence has failed to completely remedy the primary defect of the old Roberts test, namely, its tendency to produce unpredictable results under a readily manipulable standard. 7 This Note suggests that, while the Supreme Court’s recent reevaluation of the Confrontation Clause may be doctrinally and historically sound, it has yet to produce a coherent, workable, and predictable constitutional standard in the lower courts. However, with proper refinement, the Crawford/Davis standard may yet effect the stability and predictability that the Court has long sought in this area of the law. This Note attempts to expose the difficulties that Crawford and Davis posed for lower courts, and to suggest solutions that comport with the Supreme Court’s rationale and policy concerns. Part I traces the modern history of the Confrontation Clause, examining the rise and fall of the Roberts test and the ascendancy of the Crawford standard. Part II examines the disparate approaches to Confrontation Clause jurisprudence adopted by the lower courts in response to Crawford and Davis. Finally, Part III proposes that the Crawford/Davis standard remains workable, provided that the lower courts adhere to an approach that hews closely to the historical purpose of the Confrontation Clause as defined by the Supreme Court.

I. THE SUPREME COURT’S MODERN CONFRONTATION JURISPRUDENCE

Until the Supreme Court’s 1965 decision in Pointer v. Texas, which made the Confrontation Clause applicable to the states through the Fourteenth Amendment, 8 the Court had little reason to develop a general theory of confrontation rights, as the hearsay bar had effectively handled most evidentiary challenges up until that time. 9 After Pointer, the Confrontation Clause rendered a broad category of statements in state prosecutions “inadmissible as a matter of federal constitutional law,” which, in turn, required the Supreme Court to produce “a theory of the Confrontation Clause” to be applied in the lower courts. 10 In 1970, in two separate concurrences, Justice John Harlan crafted two distinct theories of the confrontation right, but his efforts twice failed to win a majority of the Court. 11 In Ohio v. Roberts, decided ten years after Justice Harlan’s initial

9. See Friedman, supra note 3, at 1014.
10. Id.
11. See California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring) (arguing that the test for defining confrontation rights should be based on the availability of the declarant and that the prosecution should be required to produce any available witness); Dutton v. Evans, 400 U.S. 74, 95–96 (1970) (Harlan, J., concurring) (arguing that in some
efforts, the Court finally subscribed to a working theory of the confrontation right, standardizing what previously had been an undefined area of constitutional law.\textsuperscript{12}

A. Ohio v. Roberts: The Reliability Test and Its Critics

In \textit{Ohio v. Roberts}, the defendant Herschel Roberts was convicted for forging checks and possessing stolen credit cards.\textsuperscript{13} On appeal, the defendant challenged the trial court’s admission of a transcript from a pretrial hearing.\textsuperscript{14} At that hearing, the defendant called the daughter of the couple whose checks and credit cards had been stolen and attempted to get her to admit that she had given the defendant the checks and credit cards with the tacit permission of her parents.\textsuperscript{15} The witness denied this assertion, but the defendant did not seek to declare the witness hostile or to cross-examine her.\textsuperscript{16} Shortly after the preliminary hearing, the witness left Ohio, making her unavailable to testify at trial.\textsuperscript{17}

At trial, the defendant testified on his own behalf, claiming that the absent witness had given him permission to use her parents’ checks and credit cards.\textsuperscript{18} Over the defendant’s Confrontation Clause objection, the court allowed the prosecution to rebut the defendant’s version of the events by introducing the transcript of the absent witness’s statements at the preliminary hearing.\textsuperscript{19} The defendant was convicted, and the conviction was reversed on appeal.\textsuperscript{20}

Intending to “respond[] to the need for certainty in the workaday world of conducting criminal trials,”\textsuperscript{21} Justice Harry Blackmun’s \textit{Roberts} opinion set out the Court’s framework for analyzing confrontation challenges:

\begin{quote}
\textbf{In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate “indicia of reliability.”} Reliability can be inferred without more
\end{quote}

cases there would be little value in requiring the prosecution to bring forward every available defendant); see also Roger W. Kirst, \textit{Does Crawford Provide a Stable Foundation for Confrontation Doctrine?}, 71 Brook. L. Rev. 35, 41–44 (2005).

\textsuperscript{12} Ohio v. Roberts, 448 U.S. 56, 64–65 (1980) (noting that the Court had never previously attempted to map out a complete theory of the Confrontation Clause, but that its prior decisions on the matter made a general approach “discernible”).

\textsuperscript{13} \textit{Id.} at 58.

\textsuperscript{14} \textit{Id.} at 59.

\textsuperscript{15} \textit{Id.} at 58.

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{Id.} at 59.

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} \textit{Id.} Ohio law permitted the use of pretrial examination testimony when a witness “cannot for any reason be produced at the trial.” \textit{Id.} (citation omitted).

\textsuperscript{20} Initially, an Ohio court of appeals reversed on the ground that the prosecution had failed to establish that it had made a good faith effort to locate the unavailable witness. The Supreme Court of Ohio affirmed the court of appeals’ decision, but on the ground that the defendant’s confrontation right had been violated. \textit{Id.} at 60–62.

\textsuperscript{21} \textit{Id.} at 66.
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.\textsuperscript{22}

Effectively then, \textit{Roberts} created a two-pronged test. To admit an out-of-court statement over a Sixth Amendment challenge, it was necessary for a court to find (1) that the declarant was unavailable to testify, and (2) that the declarant's statement was "reliable" in terms of trustworthiness. In devising this test, Justice Blackmun determined that the "underlying purpose" of the Confrontation Clause was "to augment accuracy in the factfinding process," and consequently the Clause should not be construed as a bar to hearsay "marked with . . . trustworthiness."\textsuperscript{23}

1. The Constitutionalization of the Hearsay Rule

Because the Confrontation Clause and the hearsay rule both serve to limit the introduction of out-of-court statements in criminal trials, they are in some sense overlapping doctrines. In tying the Confrontation Clause to a reliability test, the same rationale underpinning many exceptions to the hearsay rule, \textit{Roberts} left little room for distinction between the criteria for admissibility under these two separate doctrines.\textsuperscript{24} Despite this overlap, the Supreme Court subsequently noted that the Confrontation Clause and the hearsay rule remained separate doctrines.\textsuperscript{25}

Such assurances from the Court aside, \textit{Roberts} and its progeny prompted a chorus of complaint from scholars, who roundly criticized the \textit{Roberts} doctrine for its constitutionalization of the hearsay rule.\textsuperscript{26} Under the \textit{Roberts}-era position that "a statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testing [under the mandate of the Confrontation Clause] can be expected to add little to its reliability,"\textsuperscript{27} it should have come as no surprise that the \textit{Roberts} test (which admitted testimony based on its "reliability") and the hearsay exceptions (also premised on "reliability") would so regularly yield identical results.

\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id. at 65.}
\textsuperscript{24} \textit{Roberts} noted that "hearsay rules and the Confrontation Clause are generally designed to protect similar values." \textit{Id. at 66} (quoting California v. Green, 399 U.S. 149, 155 (1970)).
\textsuperscript{25} See White v. Illinois, 502 U.S. 346, 352 (1992) ("We have been careful 'not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements.'" (quoting Idaho v. Wright, 497 U.S. 805, 814 (1990))).
\textsuperscript{26} See Friedman, supra note 3, at 1020 ("[W]e see the Confrontation Clause being conformed to ordinary hearsay doctrine."); Jerome C. Latimer, \textit{Confrontation After Crawford: The Decision's Impact on How Hearsay Is Analyzed Under the Confrontation Clause}, 36 Seton Hall L. Rev. 327, 334–35 (2006) ("Some argue that . . . the Court has effectively constitutionalized the hearsay rules and most of the exceptions in spite of its previous declaration to the contrary . . . .")
\textsuperscript{27} \textit{White}, 502 U.S. at 357.
This arrangement created a number of difficulties. As one commentator explained,

First, the Court's [then-]current approach requires a constitutional analysis of every out-of-court statement offered at a criminal trial, no matter how tangential to the issues at hand. Such a zealously broad approach could not have been intended by the framers. Second, the rigid approach set forth by the Court could conceivably allow any out-of-court statement into evidence which fortuitously fell into a firmly rooted hearsay exception or which demonstrated indicia of reliability, even if such statement took the form of an ex parte affidavit or similar device.28

Thus, the Roberts test was too broad, in the sense that it created a constitutional issue on the admissibility of virtually every out-of-court statement offered at trial. At the same time, the Roberts test was too rigid, depriving trial courts of the ability to police a defendant's confrontation rights once an out-of-court statement met a well-rooted hearsay exception.

The Roberts-era Court also drew criticism for “infusing the [Confrontation] Clause with a meaning that made the admissibility of hearsay constitutionally suspect,” and then “abdicat[ing] to the common law its role in elaborating that meaning.”29 The problem with this arrangement is that, unlike the Confrontation Clause, the common law hearsay rule was not developed with the primary purpose of protecting the rights of criminal defendants.30 Although courts have always required a high degree of trustworthiness where hearsay exceptions are concerned, institutional considerations—such as the need to streamline dockets and concern over excluding potentially probative evidence—may have pushed courts over the centuries to “brook a greater degree of error” in the development of the hearsay rule—and Roberts effectively imported this common law tolerance for error into the Constitution.31

2. Judicial Determinations of Reliability Confound the Truth-Seeking Process

The Roberts analysis conceived of the Confrontation Clause as a device designed to aid the truth-seeking process at trial.32 However, the Roberts test “puts the cart before the horse, essentially asking whether the assertion made by the statement is true as a precondition to admissibility.”33 This approach brought a “utilitarian perspective” to constitutional analysis, eliminating the importance of “cross-examination for its own sake as a libertarian or deontological imperative,” placing the ends of the Clause, the

30. See id.
31. Id. at 495.
32. See Friedman, supra note 3, at 1027.
33. Id. at 1027–28.
reliability of evidence, before the means, the literal right to confrontation. Further, even if Roberts did correctly find that the purpose of the Confrontation Clause was to guarantee the reliability of evidence, it provided “very ineffectual safeguards to accomplish this objective.” Roberts left enormous discretion to the trial judge, which in turn led to the likelihood of inconsistent results. And, because the reliability test was so fact specific, it was largely “immune to effective appellate monitoring.”

3. The Lack of Historical Support for the Roberts Test

The marriage of the hearsay and confrontation doctrines led Justice Clarence Thomas to complain in his White v. Illinois dissent,

There appears to be little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation. . . . [I]t is difficult to see how or why the Clause should apply to hearsay evidence as a general proposition.

Justice Thomas’s focus on the original purposes of the Confrontation Clause would lay much of the groundwork for the eventual overthrow of the reliability test in Crawford.

The Roberts test created further historical confusion by asking the lower courts to determine which hearsay exceptions were “firmly rooted” for the purpose of Confrontation Clause analysis. For instance, Roberts-era courts found that the common law exceptions for present sense impressions and statements against penal interest were admissible as firmly rooted hearsay exceptions, even though neither exception was recognized by the common law at the time the Sixth Amendment was ratified. For years, these inconsistencies cast a shadow over Roberts as it was applied in the lower courts.

B. Crawford v. Washington: The Testimonial/Nontestimonial Distinction

In 2004, in Crawford v. Washington, the Supreme Court discarded the Roberts test, replacing it with a new theory of confrontation that turns on the testimonial quality of an out-of-court statement offered against a criminal defendant. In Crawford, a criminal defendant was convicted of stabbing a man who had allegedly attempted to rape his wife. At trial, the prosecution introduced a tape-recorded statement that the defendant’s wife

35. Id.
36. See id. at 760; Friedman, supra note 3, at 1031.
37. Friedman, supra note 3, at 1029.
41. Id. at 38.
had made to the police, which cast doubt on the defendant’s claim of self-defense.\footnote{Id. at 38–40.} Over the defendant’s Confrontation Clause objections, the trial court admitted the recordings, finding that they displayed “particularized guarantees of trustworthiness” as required under the \textit{Roberts} test.\footnote{Id. at 40.}

The Washington Court of Appeals reversed on confrontation grounds, finding that the wife’s statement lacked “particularized guarantees of trustworthiness.”\footnote{Id. at 41.} This decision was reversed again by the Washington Supreme Court, which found that the wife’s statement met the reliability threshold of the constitutional confrontation standard.\footnote{Id. at 41–42.} Reviewing the back-and-forth determinations of the courts below, Justice Antonin Scalia, writing for the Court, described this case as “a self-contained demonstration of \textit{Roberts}' unpredictable and inconsistent application.”\footnote{Id. at 46.}

Justice Scalia explained that, were the Supreme Court simply to reverse the Washington Supreme Court’s decision based on its own reliability analysis, it would “perpetuate, not avoid, what the Sixth Amendment condemns.”\footnote{Id. at 66.} He continued, “[T]he framers] knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people,” and “[b]y replacing categorical constitutional guarantees with open-ended balancing tests,” the Court had deviated from the core purpose of the Confrontation Clause.\footnote{Id. at 67–68.} Accordingly, the Court discarded the “inherently, and therefore \textit{permanently}, unpredictable” \textit{Roberts} test.\footnote{Id. at 68 n.10.}

To correct the Court’s confrontation jurisprudence, Justice Scalia turned to “[t]he founding generation’s immediate source of the concept,” the English common law, with its tradition of live, in-court testimony, subject to cross-examination.\footnote{Id. at 43.} This tradition of adversarial testing dates back to Roman times, but its modern incarnation developed in reaction to Queen Mary’s introduction of the civil law practice of admitting the pretrial examinations of absent witnesses into evidence at trial.\footnote{Id. at 43–44.} It was this practice that led to the infamous miscarriage of justice at the trial of Sir Walter Raleigh.\footnote{Id. at 44.}

Justice Scalia’s examination of the history of the common law confrontation right led him to conclude that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of \textit{ex parte} examinations as evidence
against the accused.” Consequently, the Court rejected a view of the Confrontation Clause dating back to Wigmore, which would allow the accused to confront witnesses at trial, but not to confront out-of-court declarants, whose hearsay testimony could still be admitted:

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 would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.

In reaching this conclusion, Justice Scalia implied that prior Supreme Court confrontation decisions had mistakenly focused on the wrong element of the Confrontation Clause—“confrontation”—when the word “witness” was in fact the key element of the Confrontation Clause. Justice Scalia’s exposition of the confrontation right hinged on his use of Webster’s Dictionary’s 1828 definition of the word “witness”—one who “bear[s] testimony”—with “testimony” defined as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Applying these definitions to the Sixth Amendment, the Court indicated that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not,” and it is the former category of statements with which the Confrontation Clause is concerned.

The Court then proceeded to offer several other formulations describing testimonial statements without adopting a decisive rule. Testimonial statements could include “ex parte in-court testimony or its functional equivalent,” such as affidavits or custodial examinations, “that declarants would reasonably expect to be used prosecutorially”; “extrajudicial statements... contained in formalized testimonial materials”; and “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.”

Having reformulated the core of the Confrontation Clause’s protections, the Court then set out to define its boundaries. Once again, Justice Scalia looked to the state of the law at the time of ratification, finding 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.”

53. Id. at 50.
54. Id. at 50–51.
55. Id. at 68.
56. See Kirst, supra note 11, at 86.
57. Crawford, 541 U.S. at 51.
58. Id.
59. Id. at 51–52 (citations omitted).
60. Id. at 53–54.
Court then reviewed its own line of confrontation cases and concluded that the results of its prior decisions hewed closely to its new, historically sound standard, even if the rationales supporting those prior decisions did not. The Court then discarded the Roberts formula as a “manipulable” balancing test that failed to “satisfy constitutional demands,” and announced its new formulation of the confrontation right in unequivocal terms: “Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” Without satisfying those preconditions, the testimonial statement of an absent declarant would be constitutionally barred.

Crawford thus revamped the landscape of the Confrontation Clause. Turning the old reliability analysis on its head, Justice Scalia summed up, “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” However, the Crawford Court declined to offer a comprehensive explanation of the distinction between testimonial and nontestimonial hearsay, offering only a general guideline: “Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” In effect, Crawford’s intense focus on the history of the Confrontation Clause left modern courts with “no clear principles for deciding whether a particular statement is testimonial or nontestimonial.”

Rightly predicting the “interim uncertainty” that would follow, Crawford encouraged a surge of scholarly commentary intended to offer a more complete definition of what the Court meant by “testimonial” evidence. Some went so far as to argue that Crawford simply exchanged one balancing test for another, “with the balancing now being carried out in

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61. Id. at 57–60. The one arguable exception to this trend was White v. Illinois, 502 U.S. 346 (1992), which allowed the admission of a child victim’s spontaneous declarations to a police officer. Crawford, 541 U.S. at 58 n.8. In dicta, the Court then cast doubt on the viability of testimonial statements admitted as excited utterances, stating that, under the common law of 1791, “to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statement be made ‘immediately’ upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.” Id. (quoting Thompson v. Trevanion, (1693) 90 Eng. Rep. 179 (K.B.)).

62. Id. at 67–69. In his dissent, Chief Justice William Rehnquist indicated that Crawford had overruled Roberts. Id. at 75 (Rehnquist, J., dissenting). However, a Court majority did not acknowledge Roberts’s demise until Davis v. Washington, 126 S. Ct. 2266, 2275 n.4 (2006).

63. Crawford, 541 U.S. at 68.
64. Id. at 68–69.
65. Id. at 68. Some commentators have assumed that the Court’s imprecise definition of “testimonial” was a result of a compromise necessary to secure a majority. See, e.g., Latimer, supra note 26, at 358.
66. Kirst, supra note 11, at 88.
67. Crawford, 541 U.S. at 68 n.10.
68. See, e.g., Kirst, supra note 11; Latimer, supra note 26; Lininger, supra note 34.
deciding whether any statement should be labeled testimonial.”

Understandably, the lower courts struggled to apply Crawford to difficult fact patterns, such as statements made to police or 911 operators in response to an emergency, which in turn led to varying and unpredictable results.

Further, in response to Crawford’s suggestion that formality may play a role in determining whether a statement is testimonial, some law enforcement agencies changed their techniques, hoping to elicit informal statements that would skirt the boundaries of Crawford.

As one commentator summarized the problem, “The appeal of the testimonial interpretation as a bright-line test rests on the assumptions that testimonial and nontestimonial statements are so clearly different that they can be readily distinguished, . . . [but] [t]he opinions of other courts have shown that the distinctions are not easy to make.”

C. Davis v. Washington: The Ongoing Emergency Test

Two years after Crawford, the Supreme Court revisited the Confrontation Clause in Davis v. Washington and its companion case Hammon v. Indiana, further delineating the distinction between testimonial and nontestimonial statements. In Davis, the trial court admitted an audio tape of a domestic violence victim’s 911 call, finding it nontestimonial over the defendant’s Confrontation Clause objection. The Washington Court of Appeals and Washington Supreme Court both affirmed the trial court’s determination that the evidence was admissible. In Hammon, the trial court allowed a police officer to testify to the contents of an affidavit filled out at the scene of the crime by a domestic violence victim who refused to testify against her attacker. The Indiana Court of Appeals and Indiana Supreme Court both affirmed the trial court’s determination that the victim’s statements at the scene were excited utterances that were nontestimonial under the Confrontation Clause.

The Supreme Court affirmed Davis and reversed Hammon. In doing so, it articulated a new standard for determining whether a statement is testimonial or nontestimonial:

69. Kirst, supra note 11, at 70. Roger W. Kirst suggested that Crawford’s focus on the historical development of the confrontation right requires any such balancing test to be controlled by history, rather than “present-day factors.” Id. Kirst argued further that Justice Antonin Scalia’s reliance on antifederalist documents to set the parameters of the Confrontation Clause may have “warp[ed] the ratification history,” as the antifederalists cited by Scalia were making broad political arguments, not debating the intricacies of English common law. Id. at 81–83.

70. The two cases that the Supreme Court reviewed in Davis both involved statements offered to authorities during domestic violence incidents. See infra Part I. C.

71. See Kirst, supra note 11, at 88–89.

72. Id. at 90.

73. Davis, 126 S. Ct. at 2271.

74. Id.

75. Id. at 2272.

76. Id. at 2273.
Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.77

Applying this rule to the cases before it, the Court found that the primary purpose of the 911 call in Davis was to seek police assistance to resolve an ongoing emergency, but that in Hammon, the declarant's statements to the police were made in a formalized manner, after the emergency had ended, and that, consequently, those statements could not be admitted at trial without allowing the defendant to cross-examine the declarant.78

The Court reached its decision by once again considering the historical meaning of the terms "witness" and "testimonial," just as it had done in Crawford.79 The Court concluded that, in order for a statement to be testimonial, it must seek to establish or prove some past event.80 By contrast, when a speaker narrates events as they are happening, the statement will not be considered testimonial.81 The Court fleshed out this distinction by contrasting the facts of Davis with the facts of Crawford, focusing on the fact that "any reasonable listener" would recognize that the 911 call in Davis was made in the face of "an ongoing emergency," and that the nontestimonial statements made by the caller "were necessary to be able to resolve the present emergency," rather than to restate past events.82 Additionally, the Court found that "the difference in the level of formality between the two interviews [was] striking."83

The interview in Hammon, on the other hand, consisted of inadmissible testimonial hearsay, because the circumstances of the interview indicated that the emergency had passed by the time the declarant had offered her statements, and, "[o]bjectively viewed, the primary . . . purpose of the interrogation was to investigate a possible crime . . . ."84 The Court also noted that the interview in Hammon was "formal enough" to produce testimonial statements, even though the statements were elicited at the crime scene while the declarant's husband forcibly attempted to interrupt

77. Id. at 2273–74.
78. Id. at 2276–79.
79. Id. at 2274; see also supra note 57 and accompanying text. Curiously, Davis did not insist on framing the Confrontation Clause completely within the common law of 1791. In a footnote discussing the relatively relaxed levels of formality necessary to create testimonial statements, Justice Scalia noted that "[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction." Davis, 126 S. Ct. at 2278 n.5.
80. See Davis, 126 S. Ct. at 2276.
81. Id.
82. Id.
83. Id. at 2276–77.
84. Id. at 2278.
the police interview. Because the statements narrated past events, after the emergency had ended, the statements were testimonial.

The Court was careful to indicate that its holding did not categorically mark as testimonial all responses to the "initial inquiries" of police at a crime scene. Further, it cautioned police and prosecutors against manipulating the way in which evidence is gathered: "While [they] may hope that inculpatory 'nontestimonial' evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so."

While the Court's holding seemed to offer something approaching a bright-line rule, several qualifications tended to blur the edges of the decision. For instance, the Court noted that it did not wish to imply "that statements made in the absence of any interrogation are necessarily nontestimonial" and that "in the final analysis [it is] the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." The Court also added that "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" Further complicating the Court's opinion was its acknowledgment that certain statements, though initially nontestimonial, may "evolve into testimonial statements" over the course of the interrogation, such as when an excited 911 caller calms down over the course of the call and begins offering statements that go beyond that which is necessary to meet the exigency of the moment, as was the case in Davis. Additionally, the Court expressed its confidence that "trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial." Finally, the Court reaffirmed a position it originally had taken in Crawford, supporting the application of the rule of forfeiture by wrongdoing to extinguish a defendant's confrontation rights when the defendant procured the unavailability of a witness set to testify against him.

Justice Thomas, the lone dissenter in Davis, accused the Court, just two years after its abandonment of Roberts, of issuing "an equally unpredictable test, under which district courts are charged with divining the 'primary purpose' of police interrogations." The trouble with the Court's new

85. Id.
86. Id.
87. Id. at 2279.
88. Id. at 2279 n.6. The Court then cryptically summarized its position on government manipulation of statements taken at crime scenes by noting that "testimonial statements are what they are." Id.
89. Id. at 2274 n.1.
90. Id. at 2274 n.2.
91. Id. at 2277 (citation omitted).
92. Id.
93. Id. at 2280.
94. Id. (Thomas, J., dissenting).
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approach, Thomas argued, is that “the purposes of an interrogation, viewed from the perspective of the police, are both to respond to the emergency situation and to gather evidence” and that discerning which of these purposes has primacy amounts to “an exercise in fiction.” Although ostensibly “objective,” the Court’s holding “would shift the ability to control whether a violation occurred from the police and prosecutor to the judge, whose determination as to the ‘primary purpose’ of a[n] . . . interrogation would be unpredictable and not necessarily tethered to the actual purpose” of the police interrogation. Instead, Justice Thomas proposed a test that would consider only “formal” statements to police to be testimonial, as the evidentiary use of such formal statements (including affidavits, depositions, prior testimony, and confessions) were the very prosecutorial abuses that the Confrontation Clause sought to check.

II. THE LOWER COURTS’ EFFORTS TO APPLY DAVIS

Since Davis was handed down, the lower courts have struggled to apply its rule in a consistent manner. The source of this difficulty lies in the complexity at the core of the Davis holding. In one figurative breath, Davis directed the lower courts to consider (1) the circumstances surrounding the making of the out-of-court statement, (2) the primary purpose of the police in taking the statement, (3) whether or not an objective observer could determine that the statement was made in the course of an ongoing emergency, and (4) the intent of the declarant in making the statement.

Most lower courts consider all of these factors, to varying degrees, in determining whether an out-of-court statement is testimonial. As matters stand though, Davis has essentially provided the lower courts with three viable approaches to determining whether or not a statement is testimonial for confrontation purposes. As Part II.A describes, trial courts may focus on the intent of the declarant, focus on the intent of the listener, or focus on the circumstances in which the statement was made. In practice, most courts applying Davis will simply select one of these approaches over the others in order to settle evidentiary challenges as they arise.

Making matters still more complicated for the lower courts, Davis fails to articulate precisely what the Supreme Court meant by the term on which its new confrontation analysis hinges—the “ongoing emergency.”

95. Id. at 2283.
96. Id. at 2284.
97. Id. at 2282.
98. See supra Part I.C.
99. See Tom Lininger, Davis and Hammon: A Step Forward or a Step Back?, 105 Mich. L. Rev. First Impressions 28, 28 (2006), http://www.michiganlawreview.org/firstimpressions/vol105/lininger.pdf (“[O]ne might argue that the line of cases extending from Ohio v. Roberts to Crawford to Davis has not reduced ambiguity, but has only relocated the ambiguity from the term ‘reliable’ (in Roberts) to the term ‘testimonial’ (in Crawford) to the term ‘ongoing emergency’ (in Davis).”).
Consequently, as Part II.B discusses, the lower courts have split on whether to apply a narrow or broad approach to this new doctrine. Making matters still murkier, *Davis* also revives old questions concerning the place of the excited utterance exception to the hearsay bar in relation to the Confrontation Clause. Part II.C examines the following tension: *Davis*’s ongoing emergency test may suggest that excited utterances must be considered per se admissible under the Confrontation Clause, but at the same time *Davis*’s strong reaffirmation of the confrontation right suggests that such an approach would be unwarranted.

### A. Whose Intent Controls?: Three Approaches to Determining Whether a Statement Is Testimonial

1. **Focus on the Intent of the Declarant**

   Even before the Supreme Court revised its confrontation jurisprudence in *Crawford*, commentators had long argued for a confrontation right that would be triggered by the subjective testimonial intent of the out-of-court declarant. While this approach may have enjoyed a short ascendency in the period immediately following *Crawford*, the Court’s ruling in *Davis* casts some doubt on the continuing viability of such views.

   Instead, *Davis* prompts the lower courts to determine whether a statement is testimonial by focusing primarily on the circumstances in which the out-of-court statement was made. If the circumstances indicate that the government’s primary purpose in taking the statement was to investigate a past criminal event, the statement will be considered testimonial and therefore inadmissible under the Confrontation Clause. If the circumstances indicate that the government’s primary purpose in taking the statement was to use it to resolve an ongoing emergency, the statement will be considered nontestimonial and therefore admissible. The core of the Court’s holding then seems to preclude the lower courts from considering the subjective intent of the declarant in determining whether or not a statement is testimonial.

   Focusing on the circumstances in which the statement was made produces practical advantages. As an initial matter, it provides trial judges with a stable, objective framework that relieves them of the messy guesswork inherent in making evidentiary determinations that turn on the

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100. See, e.g., Friedman, *supra* note 3, at 1029.
101. See, e.g., United States v. Saget, 377 F.3d 223, 228 (2d Cir. 2004) ("*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant’s awareness or expectation that his or her statements may later be used at a trial."); see also Latimer, *supra* note 26, at 409–10 (arguing in favor of "focus[ing] on the intent of the declarant determined by evaluating the surrounding circumstances" (citing Commonwealth v. Gonsalves, 833 N.E.2d 549, 558 (Mass. 2005))).
102. See *supra* note 76 and accompanying text.
103. See *supra* note 76 and accompanying text.
104. See *supra* note 76 and accompanying text.
subjective intent of witnesses who are absent from the proceedings. Additionally, focusing on police motives might reduce the likelihood of investigative police interrogation of declarants "at a time when declarants are so distraught that they are not contemplating prosecutorial use of their statements."

At the same time though, the Court's move away from an approach that focuses on the declarant's intent raises certain problems. As an initial matter, Justice Scalia's Davis opinion relies on the same 1828 Webster's Dictionary definitions of the key Confrontation Clause terms, "witness" and "testimony," which had supported his opinion in Crawford. Webster's definition of "testimony" implied a volitional element on the part of the speaker: "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." However, Justice Scalia's opinion shifts the emphasis away from the speaker's "purpose," focusing instead on the purposes of the government in taking the speaker's statement. This move could yield troubling results—allowing, for instance, the statements of "malicious accusers" to be offered against a criminal defendant without affording him the opportunity to cross-examine the slanderer.

In addition to these analytical problems, the language of Davis itself suggests the continued viability of the subjective declarant approach. In an effort to forestall the possibility of prosecutors and police from manufacturing "emergencies" in order to admit testimonial hearsay, the Court made it clear that it is "in the final analysis the declarant's statements, 

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105. Cf. Latimer, supra note 26, at 399 (describing post-Crawford courts' tendency to "apply[] Crawford's testimonial approach to suspend logic, to selectively emphasize Crawford criteria that support admission and ignore others, or to undermine the underlying need and importance of confrontation in these situations"). But see Lisa K. Griffin, Circling Around the Confrontation Clause: Redefined Reach but Not a Robust Right, 105 Mich. L. Rev. First Impressions 16, 18 (2006), http://www.michiganlawreview.org/firstimpressions/voll05/griffin.pdf (arguing that Davis offers only a totality of the circumstances test and that "s]tating seven times in the opinion that it is an 'objective' test does not make it so").


108. Id.


110. See Mosteller, supra note 109, at 9 ("[D]efendants are harmed just as much by malicious accusers acting on their own as they are by government manipulation of those witnesses, and there is reason to assume the Framers considered the malicious or mistaken witness perspective.").
not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.\textsuperscript{111} However, it is worth noting that Justice Scalia’s language requires the lower courts to evaluate the declarant’s statements, not the declarant’s intentions.\textsuperscript{112}

Since \textit{Davis}, most lower courts have moved away from an approach based purely on the intent of the declarant. If the declarant’s intent is to be considered at all, it will fall within some form of a multifaceted approach to confrontation questions. For example, in \textit{State v. Mechling}, the Supreme Court of Appeals of West Virginia found that \textit{Crawford} and \textit{Davis} require “a court assessing whether a witness’s out-of-court statement is ‘testimonial’ [to] focus more upon the witness’s statement, and less upon any interrogator’s questions.”\textsuperscript{113} At the same time, \textit{Mechling} also considered whether an objective witness would recognize that the declarant’s statements would be available for use at trial, and whether the statements were made in the course of an ongoing emergency.\textsuperscript{114} Ultimately, the Supreme Court of Appeals of West Virginia reversed and remanded the conviction in \textit{Mechling}, focusing primarily on the circumstances in which the challenged, out-of-court statements were made, rather than on the statements themselves, or on the intent of the declarant.\textsuperscript{115}

As \textit{Mechling} indicates, \textit{Davis} has pushed the lower courts toward more multifaceted approaches in determining whether a statement is testimonial, but it has not generated a consensus on the lingering viability of the subjective declarant approach. For instance, the Washington Court of Appeals recently found that, under \textit{Davis}, “the critical question . . . is whether the circumstances objectively indicate the declarant’s purpose.”\textsuperscript{116} The court then found that statements made by a declarant to medical

\textsuperscript{111} \textit{Davis}, 126 S. Ct. at 2274 n.1; \textit{see also} Michael H. Graham, \textit{The Davis Narrowing of Crawford: Is the Primary Purpose Test of Davis Jurisprudentially Sound, “Workable,” and “Predictable?”}, 42 Crim. L. Bull. 604, 611 (2006) (arguing that, under \textit{Davis}, courts will “continue to espouse the view that a reasonable belief or expectation . . . of the declarant that the statement would be used ‘against’ the accused . . . makes the statement . . . ‘testimonial’”).

\textsuperscript{112} Perhaps Justice Scalia’s tautology, “testimonial statements are what they are,” \textit{Davis}, 126 S. Ct. at 2279 n.6, suggests that testimonial statements are testimonial by their very nature, and no amount of intent on the part of the declarant, or lack thereof, can make it otherwise, diminishing the importance of the declarant’s subjective intent, and elevating the importance of the language contained in such statements in its own right. Of course, such an interpretation runs afoul of the definition of “testimony” cited by the Court. \textit{See supra} note 108 and accompanying text.


\textsuperscript{114} Id.

\textsuperscript{115} Specifically, the court found that statements given to police by a domestic violence victim were made after the emergency had passed, and that the record did not sufficiently reveal “the circumstances surrounding” another witness’s intervention in the dispute. \textit{Id.} at 323–24.

personnel after "she decided to report the crime" were testimonial, based on
the volitional element in the declarant's speech. On the other hand, the
Minnesota Court of Appeals has stated that Davis "emphasized that the
expectations of the declarant are not determinative," as such an approach
would not provide adequate protection against government manipulation of
Sixth Amendment standards. Given such wildly different interpretations
of Davis, it can only be said that the viability of an approach focusing
primarily on the intent of the declarant remains unsettled.

2. Focus on the Circumstances in Which the Statement Was Made

The core holding of Davis lays out a relatively bright-line rule that a
statement made to government officials in the course of an ongoing
emergency will be considered nontestimonial, while a statement narrating
past events, after an emergency has passed, will be considered
testimonial. Consequently, the lower courts have widely understood
Davis as a mandate to examine the circumstances surrounding the making
of an out-of-court statement to determine if it is admissible under the Sixth
Amendment. In practice, however, this approach has led to curious results
that tend to conflict with the central concerns of Crawford and Davis.

On its surface, Davis asks lower courts to focus on the circumstances
surrounding the making of an out-of-court statement in order to determine
the intention of the government officials who took that statement. The
advantage of this approach rests in the clarity that it brings to the
confrontation analysis. Under Davis, the difference between testimonial
and nontestimonial hearsay hinges on a "distinction between past and
ongoing crimes—a distinction that is doctrinally straightforward, if perhaps
somewhat difficult to apply in particular cases." Effectively, then, by
offering an empirical test that focused objectively on the circumstances
surrounding the making of a statement, rather than the subjective intentions
of the declarant, Davis could potentially infuse the Confrontation Clause
with a new measure of fairness and stability.

However, the shortcomings of hanging confrontation analysis on the
circumstances surrounding a statement tend to undermine Davis's wider
policy goals. As an initial matter, Davis failed to articulate a clear
definition of the "ongoing emergency" test used to determine whether a
statement is testimonial or nontestimonial. The failure to rein in this
concept may leave lower courts with "the flexibility to reach varying

117. Id. at *6.
120. Id.
122. See infra Part II.B.
outcomes based on notions of expediency rather than doctrinal consistency."123

Furthermore, Davis raises certain practical difficulties that tend to weaken the confrontation right. For instance, Davis requires courts to evaluate the circumstances surrounding the making of a challenged statement "objectively."124 In an effort to curtail prosecutorial misconduct, the Supreme Court further insisted that police "saying that an emergency exists cannot make it be so."125 However, courts will find it extremely difficult to discount an officer’s claim that he believed an emergency to be ongoing at the time he questioned the declarant.126 Depending on the availability of evidence to the contrary, an officer’s subjective claim that he believed an emergency to be ongoing may then stand as the only grounds necessary for a court to deny a confrontation challenge, despite the confrontation right’s origins as a protection against prosecutorial abuse.127

A Texas court of appeals’ decision in Vinson v. State demonstrates many of the shortcomings of an approach that focuses on the circumstances in which the statement is made.128 In Vinson, the court heard the defendant’s appeal from a domestic assault conviction, in which the defendant argued that the trial court erred when it allowed a deputy sheriff to relate incriminating statements made by the victim when the deputy arrived at the scene.129

The fact pattern in this case had much in common with facts of Hammon.130 In Vinson, when the deputy arrived, he asked the victim a series of preliminary questions intended to ascertain if the domestic emergency was still ongoing, as permitted by Davis.131 The deputy then continued with “subsequent questioning” (the extent and formality of which is not revealed) of the victim as the defendant entered the room.132 The defendant then began “implicitly” ordering the victim to answer the deputy’s questions in a way that would prevent the defendant’s arrest.133

123. Lininger, supra note 99, at 28; see also Joan S. Meier, Davis/Hammon, Domestic Violence, and the Supreme Court: The Case for Cautious Optimism, 105 Mich. L. Rev. First Impressions 22, 26 (2006) http://www.michiganlawreview.org/firstimpressions/vol105/meier.pdf ("What is an ‘emergency’ and when it begins and ends likely will provide litigants with fodder for years to come.").
124. Davis, 126 S. Ct. at 2273–74.
125. Id. at 2279 n.6.
126. See Fine, supra note 109, at 12.
129. Id. at 264–67.
130. See Davis v. Washington, 126 S. Ct. at 2272–73 (describing the facts of Hammon: police arrived at a domestic violence scene, which was littered with broken glass from a recent argument, and the suspected abuser repeatedly attempted to interfere with police questioning of the declarant-victim).
131. Vinson, 221 S.W.3d at 264–65 (citing Davis, 126 S. Ct. at 2276).
132. Id. at 265.
133. Id. at 266.
The victim gave the defendant’s name and explained the circumstances leading up to the altercation.134

Because the defendant remained present and was “very excited” during the interview, the court determined that the circumstances “objectively indicated an ongoing and dangerous situation . . . very different from that in [Hammon], in which the assailant was not present during the interview, and, clearly, no emergency existed any longer.”135 The court accordingly found that the emotionally shaken declarant’s statements were nontestimonial.136

While the Texas court of appeals discerned a clear difference between the facts of Vinson and the facts of Hammon, on close inspection, this finding seems at the very least debatable.137 As set out in the court’s opinion, the facts of Vinson seem nearly identical to those of Hammon: a domestic violence victim offers statements to an investigating officer after she has been separated from her attacker, while the attacker attempts to intervene in the police interrogation. It is therefore difficult to determine why, based on an objective view of the circumstances surrounding the making of the statement, the Vinson court determined that the out-of-court statements were made in the course of an ongoing emergency, when the Hammon portion of the Davis opinion reached the opposite conclusion.138

More troubling though, is the court’s reliance on the deputy’s own subjective account of the circumstances in reaching the conclusion that the incriminating statements were made in the course of an ongoing emergency.139 The court accepted the deputy’s claim that he never “felt safe” until after the arrival of his partner—despite the fact that the defendant had already been restrained in the deputy’s patrol car at the time that the deputy called for backup.140 In relying so heavily on the officer’s perception of the circumstances surrounding the making of the statements, the court showed little concern for both Crawford’s and Davis’s apprehensions of prosecutorial abuse. Davis specified that the rule it announced was not intended to be open to prosecutorial manipulation:

134. Id.
135. Id. at 266–67.
136. Id.
137. Compare id., with Davis v. Washington, 126 S. Ct. 2266, 2272–73 (2006). One notable difference between Vinson and Hammon, never mentioned by the court, is the difference in level of the formality of the statements offered by the victims in each case. While in Vinson the declarant merely answered the officer’s questions orally, in Hammon the declarant wrote out a formal affidavit.
138. The court further acknowledged that the declarant’s statements “concerned past events,” Vinson, 221 S.W.3d at 267, a trait that Davis identified as a hallmark of testimonial statements, Davis, 126 S. Ct. at 2274. The Texas court nonetheless found such statements admissible, based on the deputy’s description of the circumstances in which they were made. Vinson, 221 S.W.3d at 267.
139. See Vinson, 221 S.W.3d at 266; see also Fine, supra note 109, at 12 (predicting that, “[w]hen determining the ‘primary purpose’ of questioning, it will be difficult for courts to ignore an officer’s claim that he believed the emergency to be ongoing when he questioned the declarant”).
140. Vinson, 221 S.W.3d at 266
“saying that an emergency exists cannot make it be so.”

The Vinson court failed to consider that caveat, basing its objective determinations almost entirely on a police officer’s subjective assessment of a domestic dispute that had ended upon his arrival, despite the Supreme Court’s warning in Davis.

Decisions such as Vinson do not indicate the failure of a confrontation jurisprudence that focuses on the circumstances surrounding the making of the challenged statement. However, Vinson does suggest that, in its current form, such an approach may be too open-ended, allowing judges to make constitutional determinations based on expediency rather than doctrinal consistency.

3. Focus on the Intent of the Interviewer

Davis instructs the lower courts to make their Confrontation Clause determinations based on an examination of the circumstances in which an out-of-court statement is made. The purpose of this test is to provide the courts with an objective means of ascertaining “the primary purpose of the interrogation” that gave rise to that statement. But because Davis’s ultimate concern rests with the motivations of the government officials who procure statements from witnesses, Davis opens the possibility of lower courts focusing directly on police intent, without necessarily considering the circumstances in which the statement was made.

This approach draws some support from Davis and Crawford’s position that the historical purpose of the Confrontation Clause was to prevent “flagrant inquisitorial practices” by government agents. Given the confusion surrounding the Court’s newly minted “ongoing emergency” test, a direct consideration of police intent might in some cases prove an effective method of determining whether a statement was procured for prosecutorial purposes.

On the other hand, critics of this type of test, beginning with Justice Thomas, have noted that determining the “primary purpose” of an investigating police officer will often prove to be nothing better than an exercise in “divin[ation].” Justice Thomas points out that police officers responding to an emergency generally will be led by the dual purposes of resolving the emergency and collecting evidence for use in future...
prosecution.\textsuperscript{148} Trial judges faced with the task of determining which of these police purposes was “primary” will, Justice Thomas argues, yield inconsistent results “not necessarily tethered to the actual purpose of the police interrogation.”\textsuperscript{149} Furthermore, any test turning on the question of police intent runs the risk of encouraging police manipulation,\textsuperscript{150} and any test that does not consider the intent of the declarant potentially runs afoul of the doctrinal justifications underlying \textit{Crawford}.

Despite this criticism, an approach focusing primarily on the intent of the listener seems entirely valid under \textit{Davis}. One extreme example of this approach occurred in \textit{State v. Krasky}, where the Minnesota Court of Appeals read \textit{Davis} as endorsing “a new approach that focuses on an uncomplicated study of the purpose of an interviewer who takes a statement that is later introduced at trial.”\textsuperscript{152}

The question in \textit{Krasky} involved the admissibility of a videotaped interview of a six-year-old child-abuse victim.\textsuperscript{153} In finding the child’s statements to be testimonial, the court placed primary emphasis on the intent of the interviewer, focusing primarily on the fact that the videotaped interview of the child was conducted by a nurse practitioner who was cooperating with the police.\textsuperscript{154} Since the videotaped statement was made at the behest of the police, and it described acts of abuse that had occurred years earlier, the court found that the tape was prepared with prosecutorial intent and was therefore testimonial.\textsuperscript{155}

\textit{Krasky} is unusual in that it focuses so heavily on the motivations of the police, without much discussion of whether or not the statements were made in the course of an ongoing emergency.\textsuperscript{156} It suggests that, where the actions of police investigators indicate a clear intent to gather evidence for a
future prosecution, a court need not rely solely on an examination of the circumstances surrounding the making of the statement, but may base its confrontation analysis on a direct consideration of police intent.157

B. The Ongoing Emergency Test

*Davis* instructed courts to admit an unavailable declarant’s out-of-court statement only when the circumstances indicate that the statement was made in the course of an ongoing emergency.158 Although the lower courts must make this determination objectively,159 the contours of this doctrine remain unclear and, therefore, malleable.

One commentator has argued for an aggressive expansion of the emergency concept: "*Davis* can easily be interpreted to make every single surrounding circumstance, known or unknown, possibly associated with the statement itself relevant in deciding emergency versus prosecutorial."160 No court has explicitly announced its support for such an expansive view of the ongoing emergency concept, but under the open-ended language of *Davis*, the trial courts seem to have wide leeway in determining the scope of the ongoing emergency test.

Rather than taking a clear theoretical stand, most courts applying the ongoing emergency test simply delve directly into some form of fact-intensive inquiry and then announce their results. Often, despite *Davis*'s admonition that the existence of the ongoing emergency must be determined objectively, the lower courts will base their determinations on the subjective perceptions of either the declarant or the interviewer who was at the scene. The lower courts’ general reluctance to take a clear doctrinal stance on this issue leaves several questions unanswered. First, and most importantly, what are the physical and temporal end points of an ongoing emergency? Second, does *Davis* mark statements made during all emergencies as nontestimonial, or will only certain types of emergencies, such as assault-based crimes, give rise to nontestimonial statements? For instance, would a purely medical emergency also give rise to nontestimonial statements?

In this state of uncertainty, the courts have adopted two general approaches to the ongoing emergency concept: a “narrow” approach, which limits the ongoing emergency concept to roughly the period of time

157. The U.S. Court of Appeals for the Seventh Circuit formulated an interesting exception to this approach when it found that lab reports of toxicology tests constituted nontestimonial business records, even when the lab technician creating the reports knew that the reports were being prepared at the police’s request for use in a future prosecution. United States v. Ellis, 460 F.3d 920 (7th Cir. 2006).


159. This element of *Davis* has raised skeptical eyebrows. See Griffin, *supra* note 105, at 18 (“Stating seven times in the opinion that it is an ‘objective’ test does not make it so.”).

160. Graham, *supra* note 111, at 623. Michael H. Graham further claims that the concept of an ongoing emergency “logically extends to circumstances requiring assistance from medical personnel, firefighters, or other government services such as those dealing with hazardous materials.” Id. at 609.
in which the declarant is exposed to danger, and a “broad” approach, which
tends to view ongoing emergencies expansively, extending the time frame
of the emergency beyond the point when the declarant’s exposure to danger
has passed.

1. The Narrow Approach to the Ongoing Emergency Doctrine

Instead of providing a rigid rule, Davis leaves the application of the
ongoing emergency doctrine to the discretion of the trial judges, allowing
them to base their decisions on the facts in front of them.161 However, the
Court’s analysis did note that once an officer has obtained information
necessary “to address the exigency of the moment,” further statements by
the declarant should be considered testimonial.162 The Court also found
that the domestic emergency in Davis had ended at the point when “[t]he
defendant] drove away from the premises.”163 Davis also indicated that for
confrontation purposes, statements that relate “what happened” may be
marked as testimonial, in contrast to statements that describe “what is
happening.”164 The Court offered no further guidance for determining the
scope of an ongoing emergency for Confrontation Clause purposes, but its
findings suggest that a “narrow” approach to the ongoing emergency
doctrine would be appropriate, limiting the scope of the emergency to the
time frame in which the declarant was subject to actual risk of harm from
the source of danger.165

As a matter of doctrinal consistency, the narrow approach, implicit in
Davis, tends to fall in line with the Court’s general reaffirmation of the
confrontation right, which began with Crawford. Insofar as Davis functions
as a clarification of the work that the Court began in Crawford,166 the
narrow approach prevents the ongoing emergency test from potentially
swallowing the Confrontation Clause whole.167 Furthermore, as a practical
matter, the narrow approach provides a reasonably clear end point to the

161. Davis, 126 S. Ct. at 2277.
162. Id.
163. Id.; see also State v. Mechling, 633 S.E.2d 311, 321 (W. Va. 2006) (“[T]he phrase
‘ongoing emergency’ means just that.”).
164. Davis, 126 S. Ct. at 2278. But see Griffin, supra note 105, at 17–18 (“[I]t is too
close to suggest a clear distinction between statements about what ‘is happening’ and what
‘has happened,’ when the latter is almost always necessary to explain the former.”).
165. See, e.g., Lininger, supra note 99, at 29 (arguing that an emergency should be
deemed to have ended once the assailant has left the scene). But see Griffin, supra note 105,
at 17 (indicating that Davis permits “[a]n unspecified amount of aftermath questioning [to]
escape the testimonial label”).
166. See generally Richard D. Friedman, “We Really (for the Most Part) Mean It!,” 105
Davis’s role in clarifying the ambiguities left in the wake of Crawford).
167. See infra Part II.B.2.
ongoing emergency question, which in turn increases the likelihood of a more consistent application of the rule.\textsuperscript{168}

But by no means does the narrow approach offer a perfect solution. In its strictest form it would provide the lower courts with a means of setting clear end points, after which time an emergency would be deemed to have passed. However, true rigidity may prove untenable, as the factual variations of each individual case tend to require varying degrees of flexibility in the rule.\textsuperscript{169} In \textit{Davis} itself, despite the Court's implicit acceptance of the narrow approach, it admitted statements to a 911 operator made even after Davis was in retreat, suggesting that an "unspecified amount of aftermath questioning" might be considered nontestimonial.\textsuperscript{170} Furthermore, the narrow approach seems incapable of functioning successfully in certain areas of criminal conduct. For instance, in the domestic violence context, a court can rather easily determine the end point of a violent "incident," but even when that incident has passed, the victim will continue to be exposed to the latent danger inherent in any pattern of domestic abuse.\textsuperscript{171}

2. Broad Approaches to the Ongoing Emergency Doctrine

Several courts have applied the ongoing emergency test in a broad manner. Such courts tend to view the scope of the emergency in an expansive fashion, allowing accusatory statements into evidence even where the declarant was no longer in danger of further harm at the time the statement is made.

Given the absence of a firm definition of the ongoing emergency concept in \textit{Davis}, the lower courts have found themselves facing relatively few constraints when interpreting the rule. Lower courts adopting a broad approach have tended to understand the ongoing emergency concept as encompassing both danger to the public and danger to the declarant. Therefore, whenever public safety is at risk, a court taking a broad view would likely recognize the existence of an ongoing emergency and would admit an out-of-court statement over a Confrontation Clause objection, even if the declarant herself was not in immediate danger at the time of the statement. Unlike the narrow approach, which sets definite end points to the ongoing emergency concept based on the end of the declarant's personal exposure to danger, the broad approach tends to expand the range of accusatory statements admissible at trial, in direct correlation to the court's determinations of the spatial and chronological bounds of the public risk.  

\textsuperscript{168} But see Griffin, supra note 105, at 18 (arguing that \textit{Davis} presents the lower courts with what is effectively a "totality of the circumstances test in many ways more similar to the \textit{Roberts} reliability inquiry than the bright lines of \textit{Crawford}").

\textsuperscript{169} See Lininger, supra note 99, at 28 (noting the flexibility of the ongoing emergency test and expressing concern over the risk of inconsistency in its application).

\textsuperscript{170} Griffin, supra note 105, at 17.

\textsuperscript{171} Meier, supra note 123, at 26.
While a broad view of the ongoing emergency test may be necessary to preserve certain types of nontestimonial statements for use at trial, it tends to place a great deal of discretion in the hands of the court, which may lead to unexpected and inconsistent application of the principles handed down in Crawford and Davis. For instance, in State v. Reardon, an Ohio court of appeals considered an appeal from a home invasion robbery conviction, based on an alleged violation of the Confrontation Clause.\textsuperscript{172} Responding to the victim’s 911 call, police disrupted the crime.\textsuperscript{173} As one officer entered the home of the victims to gather information, his partner pursued the robbers back to their own home on the same street.\textsuperscript{174} Back at the victims’ home, one of the victims, in a hysterical state, blurted out the names of the robbers and identified one of them by his lazy eye.\textsuperscript{175} Based on this description, the robbers were arrested, but the declarant was unavailable to testify against them at trial.\textsuperscript{176} The court nonetheless admitted the statement as an excited utterance, based on the emotional state of the declarant at the time it was made.\textsuperscript{177}

Following the defendant’s Sixth Amendment challenge, the court of appeals determined that the statement was nontestimonial under Davis, as it was made to enable police to “meet an ongoing emergency.”\textsuperscript{178} Even though the victims’ home was secure at the time the statement was made, the court determined that the emergency was still ongoing, as the robbers had not yet been detained, the police were as yet unsure how many suspects were involved in the crime, and “[t]he officers needed to ensure their own safety and the safety of the rest of the neighborhood by eliciting information from the victims.”\textsuperscript{179}

This decision raises difficult questions, in part because it relies so heavily on the emotional state of the declarants as a measuring stick for determining the scope of the emergency.\textsuperscript{180} At the time the statements were made, the declarants were in no immediate danger, as the suspects had already retreated to hide in an accomplice’s house.\textsuperscript{181} Effectively, the court’s decision expanded the scope of the ongoing emergency to include the entire neighborhood where the crime had taken place. While the risk to public safety may have still seemed grave at the time the declarant offered her statements, the court’s decision offers no hint as to the point at which that

\begin{itemize}
\item \textsuperscript{172} State v. Reardon, 860 N.E.2d 141 (Ohio Ct. App. 2006).
\item \textsuperscript{173} Id. at 142.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id. at 142–43.
\item \textsuperscript{176} Id. at 143.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Id.
\item \textsuperscript{179} Id. at 144. The court also determined that, because the officer on the scene relayed the declarant’s statements over the police radio as the declarants answered his questions, and because this questioning was done in an informal manner, the statements were designed to assist the police in the resolution of an ongoing emergency. Id. at 144–45.
\item \textsuperscript{180} Under Davis, the lower courts are to determine the existence of an ongoing emergency objectively. See supra note 77 and accompanying text.
\item \textsuperscript{181} Reardon, 860 N.E.2d at 143.
\end{itemize}
danger would be deemed to have passed. Under this standard, it is difficult to know how far from the source of danger the declarant may be while still offering up nontestimonial statements. Taken to extremes, this approach threatens to swallow the Confrontation Clause whole, as it provides courts with the option of citing any danger, no matter how remote, circumventing the defendant’s right to cross-examine his accusers.

While Reardon supports the use of a broad “zone of danger” test, extending the ongoing emergency concept to cover a wide geographic area over a lengthy period of time, other courts have adopted a causation-based approach to the doctrine. In State v. Alvarez, an Arizona court of appeals considered a confrontation challenge to a first-degree murder conviction. While on a routine patrol, a sheriff’s deputy came upon the victim-declarant staggering down a deserted road. When the deputy approached the victim, he saw that the victim’s face was covered in blood. The victim then collapsed, falling in and out of consciousness while the deputy questioned him. At trial, the deputy testified that he asked the victim his name and what had happened to him. The victim responded that three men had jumped him and taken his 1995 Suzuki. The victim then fell unconscious again and, two days later, he died.

The defendant’s appeal focused on the portion of the deputy’s testimony that recounted the statements of the victim. Specifically, the defendant argued that the victim’s statements were testimonial under Davis. The court first considered the intent of both the victim and the deputy and determined that the primary purpose of both parties was to secure the victim’s safety, not to produce information that could be used at a later criminal proceeding.

The court then considered whether the statements were made in the course of an ongoing emergency. Focusing on the severity of the victim’s injuries and the fact that he died within 48 hours of making his statements, the court found that the officer’s questions were designed to resolve an

183. Id. at 669.
184. Id.
185. Id.
186. Id.
187. Id. In fact, the victim had been driving a Chevrolet rental vehicle on the day of the attack, and the defendant was later caught in that vehicle. Id. at 669 n.2. The victim’s Suzuki had been reported stolen one month earlier in a presumably unrelated incident. Id.
188. Id. at 669.
189. Id. at 670. Originally, the defendant had merely objected to the deputy’s testimony on hearsay grounds (failing to preserve a confrontation objection), but the court of appeals reviewed the defendant’s confrontation claim to determine if a “fundamental error” had occurred at the trial level. Id.
190. Id. at 670–71.
191. Id. at 673; see also Griffin, supra note 105, at 18 (arguing that under Davis statements made for the purpose of obtaining medical attention should be considered nontestimonial).
ongoing emergency.\textsuperscript{192} The defendant argued that the deputy's questions to the victim as to "what happened" and the victim's subsequent incriminating responses actually had little to do with resolving the medical emergency at hand.\textsuperscript{193} The court dismissed these arguments by noting that, "[a]lthough the criminal activity that resulted in [the victim's] injuries and the ensuing charges against [the defendant] had ended, the emergency that those events set in motion was very much ongoing."\textsuperscript{194}

Alvarez's expansive view of the ongoing emergency doctrine tends to complicate Confrontation Clause jurisprudence, as it offers no clear point at which an ongoing emergency is determined to have ended. Unlike Reardon, which created problems concerning the end point of an emergency,\textsuperscript{195} Alvarez does not rely on a theory that would identify an ongoing emergency by physically expanding the zone of danger.\textsuperscript{196} Instead, Alvarez adopts a relatively open-ended causation-based approach that, if pushed to its limits, might admit any statement as nontestimonial, so long as the declarant continued to suffer the ill effects of the defendant's deeds at the time the statement was made.\textsuperscript{197}

This version of the broad approach seems once again to run contrary to the Supreme Court's views in Crawford and Davis. Although Davis fails to provide a precise definition of the ongoing emergency concept, the distinction it presents between statements that describe "what happened" and "what is happening" provides some guidance as to the nature of the concept.\textsuperscript{198} The Arizona court of appeals' decision to carve out an exception to that precept tends to attenuate the rule laid out in Davis. For instance, had the declarant-victim in Alvarez offered statements against his attackers two days later, while lying in the hospital, would those statements still be considered as falling within the emergency that the defendant had "set in motion?"\textsuperscript{199} By failing to explain how far this exception would extend, and to what types of emergencies it would apply to, the Arizona court of appeals' approach invites inconsistency and confusion, which in turn threatens to undermine the continued vigor of the confrontation right.

C. The Excited Utterance Hearsay Exception Under Davis

Prior to Crawford, the Supreme Court's confrontation jurisprudence was commonly criticized for effectively having constitutionalized the hearsay

\begin{itemize}
\item \textsuperscript{192} Alvarez, 143 P.3d at 674.
\item \textsuperscript{193} Id.
\item \textsuperscript{194} Id.
\item \textsuperscript{195} See supra notes 172–81 and accompanying text.
\item \textsuperscript{196} The Alvarez opinion might have followed the same track as Reardon by, for instance, finding that the officer was eliciting "what happened" statements from the victim in an effort to help track down the perpetrators, who were likely still on the loose and a threat to public safety at the time the statements were made.
\item \textsuperscript{197} This approach bears similarity to the doctrine of forfeiture by wrongdoing, which received the approval of the Davis Court. See supra note 93 and accompanying text.
\item \textsuperscript{198} Davis v. Washington, 126 S. Ct. 2266, 2278 (2006).
\item \textsuperscript{199} See supra note 194 and accompanying text.
\end{itemize}
rule. Since, under Roberts, any out-of-court statement that was admitted under a “firmly rooted hearsay exception” would also be admissible under the Sixth Amendment, Roberts essentially eliminated any distinction between the rules of evidence and the Confrontation Clause. By adopting the testimonial approach in Crawford, the Court effectively imposed a separate and distinct analytical step for the consideration of confrontation challenges. Davis reemphasizes the separation between confrontation and hearsay analysis, as it specifically barred, on confrontation grounds, a set of statements that were admitted at trial under the excited utterance exception to the hearsay rule.

At the same time though, Davis’s ongoing emergency test tends to flatten the distinction between confrontation analysis and hearsay analysis under the excited utterance exception. Lower courts commonly look to the same sets of facts to determine both whether a statement was made during the course of an ongoing emergency (the constitutional analysis) and whether that same emergency “excited” the declarant at the time he spoke (the hearsay analysis). This tendency has led one commentator to declare that “Davis in fact made all statements properly considered excited utterances admissible” on confrontation grounds, as “the government’s ‘primary purpose’ upon receipt of such statements is to respond to the emergency presented and not to employ the statements received in a subsequent criminal prosecution.” While this position may offer some appeal to law enforcement, it tends to narrow the confrontation right and to subvert many of the underlying concerns of Crawford and Davis by once again tying a constitutional standard to a component of the hearsay rule.

In the interim between Crawford and Davis, the lower courts developed three different tests for determining the admissibility of excited utterances under the Confrontation Clause: (1) focusing on “whether the declarant should have foreseen the use of the statement in a criminal prosecution,” (2) focusing on the level of formality of police interrogation, and (3) finding that excited utterances are nontestimonial per se, as the declarant necessarily lacks the clarity of mind to “contemplate future use of her statement in a criminal prosecution.” Davis seems to supplant the first two approaches, replacing them with the ongoing emergency test. Davis then leaves the lower courts with two possible choices: (1) categorically

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201. See supra note 24 and accompanying text.
202. See supra note 76 and accompanying text.
203. Graham, supra note 111, at 605. Of course, Davis itself suppressed, on confrontation grounds, the excited utterances in evidence in the Hammon portion of the opinion, but Graham argues that the Indiana courts erred in allowing these statements as excited utterances in the first place. Id. at 620.
204. See Lininger, supra note 34, at 778. Additionally, some courts considered the motives of either the declarant or the police in the challenged conversation, and others applied a “reasonable person” test to determine whether an objective speaker would have expected that his statements would be available for use at trial. Id. at 780–81.
205. See supra Part II.A.1–3.
admit all excited utterances as nontestimonial statements, or (2) adopt a fact-intensive, case-by-case approach.

1. The Categorical Approach

Before *Hammon* reached the Supreme Court, the Indiana Court of Appeals determined that the excited utterances offered into evidence at the defendant’s trial did not violate the Confrontation Clause. The court based this result on its finding that the very nature of the excited utterance exception precluded the excited declarant from making testimonial statements: "An unrehearsed statement made without time for reflection or deliberation, as required to be an ‘excited utterance,’ is not ‘testimonial’ in that such a statement, by definition, has not been made in contemplation of its use in a future trial."206 The basis for the categorical admissibility of excited utterances on confrontation grounds rests then on a theory that focuses on the intent of the declarant.207 Under this approach, testimonial statements necessarily include a volitional element on the part of the declarant. It follows then, that if a declarant offers a truly spontaneous statement, without time for reflection, the statement will necessarily be nontestimonial.

However, most pre-*Davis* courts applying the *Crawford* test rejected the categorical approach. In Florida, for example, a district court of appeals reasoned that

> a startled person who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation that will be used against the suspect. In this situation, the statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made.208

The court therefore adopted a knowledge-based theory that sets aside the lack-of-volition argument that underpins the categorical approach suggested by the appeals court in *Hammon*. Under this view, even if a truly excited declarant is caught in circumstances producing an immediate reaction that renders him unable to frame his statements with an intent to incriminate, his spontaneous outburst of speech would not preclude the possibility that he is aware of the potential that his statements could be used at a later trial, and such awareness may itself render the declarant’s statements testimonial.

*Davis*, however, de-emphasizes the significance of the mental state of the declarant, and raises, to a point of prominence, the trial court’s inquiry into the circumstances surrounding the making of the statement and the

206. *Hammon v. State*, 809 N.E.2d 945, 953 (Ind. Ct. App. 2004). On appeal, the Indiana Supreme Court declined to adopt the categorical approach of the court of appeals, as it failed to account for the motivation of government officers in eliciting statements from an excited declarant. See *Latimer*, supra note 26, at 394 (citing *Hammon v. State*, 829 N.E.2d 444, 453 (Ind. 2005)).
intentions of the police officer who recorded it. Consequently, the Davis standard for determining whether a statement is testimonial brushes closely against the Supreme Court’s own prior formulation of the excited utterance exception:

The basis for the “excited utterance” exception... is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous.

Potentially then, Davis validates the categorical approach to excited utterance admissibility by reducing confrontation analysis and excited utterance analysis to a single inquiry: what were the circumstances in which the out-of-court statements were made?

There are, however, compelling reasons for resisting such a facile conclusion. For instance, in Crawford, the Supreme Court signaled that White v. Illinois, which admitted excited utterances as a “firmly rooted” hearsay exception under the Roberts test, may have been wrongly decided. Crawford also indicated that excited utterances may not have been admissible as testimonial hearsay in 1791, “the baseline year from which the Court now derived its confrontation analysis.” Furthermore, Justice Scalia’s opinion indicated that, to be admissible under the evidentiary standards of 1791, an excited utterance must be made within close temporal proximity of the startling event. In light of this stance, as well as the Court’s reversal of Hammon, the Supreme Court has made it clear that it does not intend for the Confrontation Clause simply to fold before the excited utterance exception.

Beyond Justice Scalia’s historical concerns, the excited utterance exception raises special problems in its own right. Perhaps most troubling is the excited utterance’s susceptibility to bootstrapping. The excited utterance exception is predicated upon the occurrence of some startling event, which dominates the senses of the declarant, producing an automatic response that precludes the declarant from engaging in the type of studied self-reflection that may lead to fabrication. However, the party offering the excited utterance into evidence need not corroborate the event that...

209. See supra Part II.A.1–3.
210. See supra note 61.
211. Crawford, supra note 61.
212. Davis, supra note 61.
214. Id. Crawford also indicated the Court’s reluctance to admit excited utterances under the Confrontation Clause where the testifying witness was not “present for the startling event to observe the context of the statement.” Kirst, supra note 11, at 101.
215. See Fed. R. Evid. 803(2) advisory committee’s note.
triggers the exception with outside evidence. Thus, in circular fashion, an excited utterance may become admissible “simply because the complainant said it,” without further corroboration. Consequently, without a firm Confrontation Clause standing behind the relatively porous excited utterance exception, a prosecutor could submit statements made by an out-of-court declarant with relative ease, depriving the defendant of an opportunity to cross-examine the source of those incriminating statements—exactly the type of prosecutorial abuse that Crawford intended to prevent.

2. The Two-Tiered Approach

Since Davis, the categorical approach has fallen into general disfavor. Rather than combining hearsay and confrontation analysis into a single test, most courts carry out their hearsay and confrontation analyses separately, on a case-by-case basis.

In State v. Rodriguez, a good example of this approach, the Wisconsin Court of Appeals considered the appeal of a convicted batterer, who alleged that his Sixth Amendment rights were violated by the admission of his victims’ excited utterances at trial, when the victims themselves did not testify.

The court employed a two-tiered approach to consider the admissibility of the victims’ statements. The court began by noting that there was nothing to indicate that the victims’ statements failed to qualify as excited utterances, as their statements to the police were “[not] motivated by anything other than their desire to get help and secure safety.”

Having settled the hearsay issue, the court then considered the defendant’s confrontation argument. In doing so, the court considered the intent of both the victims and the responding officers in finding that the victims’ statements were nontestimonial. Concerning the victims, the court found that “given their contemporaneously endured trauma it cannot be said


218. Id. However, the Supreme Court has found that allowing an excited utterance to be supported by corroborating evidence might allow for the admission of unreliable statements by “bootstrapping on the trustworthiness of other evidence at trial.” Idaho v. Wright, 497 U.S. 805, 823 (1990). Furthermore, “confrontation of an excited declarant may be more important than confrontation of a dispassionate declarant because the former is more likely to fabricate or exaggerate details out of spite toward the assailant.” Tom Lininger, Yes, Virginia, There Is a Confrontation Clause, 71 Brook. L. Rev. 401, 404 (2005).

219. Holland, supra note 217, at 182.

220. State v. Rodriguez, 722 N.W.2d 136 (Wis. Ct. App. 2006). The statements of the victims, a mother and daughter, were offered through the testimony of police officers who had responded to a neighbor’s telephone call reporting the beating. Additionally, one of the officers testified as to statements made by the declarant on a follow-up visit the next day, which uncovered another incident of abuse. Id. at 140–41.

221. Id. at 148.
that objectively they said what they said to the officers with a conscious expectation that their words would somehow have the potential for use in court.\textsuperscript{222} The court then considered the motivations of the officers at the scene of the crime, determining that their primary motivation was not to gather evidence of past activities for use in a future prosecution.\textsuperscript{223} Instead, the court determined that the officers' primary purpose was to assist in the resolution of an ongoing emergency, making the victims' statements nontestimonial under\textit{Davis}.\textsuperscript{224}

In focusing on the expectations of the declarant, the court adopted a version of the same method applied in the\textit{Lopez} case\textsuperscript{225}: focusing on the expectations, or knowledge, of the declarant at the time the statements were made. The court's consideration of the primary purpose of the police at the scene provided an additional layer of inquiry, serving as a bulwark to its fully functioning, independent, confrontation analysis. Although in this case the court ultimately determined that the same event that triggered the declarants' excited utterances also produced the ongoing emergency, the adoption of a two-tiered test helps ensure that the confrontation right and the excited utterance exception remain separate doctrines under the law.

III. PROPOSALS FOR A MORE STABLE CONFRONTATION DOCTRINE

The now-defunct\textit{Roberts} test drew criticism largely for its unpredictability and its susceptibility to judicial manipulation.\textsuperscript{226} If\textit{Crawford} and\textit{Davis} are to cure the Supreme Court's confrontation jurisprudence of these defects, these cases must provide the lower courts with stable means for determining the testimonial or nontestimonial nature of out-of-court statements. This part suggests that greater uniformity under the Confrontation Clause may be achieved by including a consideration of the intent of the declarant in confrontation analysis, by adopting a narrow approach to the ongoing emergency test, and by adopting a two-step review of excited utterances offered against a defendant.

A. Restoring the Role of the Declarant's Intent in Confrontation Jurisprudence

As matters now stand, the lower courts have three viable methods for reviewing confrontation challenges: focusing on the intent of the declarant, focusing on the circumstances in which the statement was made, and

\begin{itemize}
  \item \textsuperscript{222} Id.
  \item \textsuperscript{223} Id.
  \item \textsuperscript{224} Id. The lone dissenter in\textit{Rodriguez} argued that the majority had failed to adhere to\textit{Davis}, as the victims' initial statements were made to police after the emergency had ended. In the initial incident, the defendant had already left the scene by the time the police arrived to take the victims' statements, and in the second incident the victims' statements to police were made outside her home, under the protection of police, while the defendant hid inside. \textit{Id.} at 154 (Curley, J., dissenting).
  \item \textsuperscript{225} See supra note 208 and accompanying text.
  \item \textsuperscript{226} See supra notes 48--49 and accompanying text.
\end{itemize}
focusing on the intent of the police conducting the interview.\textsuperscript{227} While an approach focusing on the intent of the declarant remains technically open under \textit{Davis},\textsuperscript{228} the opinion suggests that the Court would prefer an approach that concerns itself largely with the primary purpose of the investigating officers responding to an emergency.\textsuperscript{229} Lower courts may attempt to make this determination based on a direct inquiry into police motives, or indirectly by inferring the primary purpose of the police based on an objective examination of the circumstances surrounding the making of the statement.\textsuperscript{230}

However, the Court’s move away from an approach focusing on the intent of the declarant does not forbid its use as a supplement to the approaches that \textit{Davis} more overtly sanctions.\textsuperscript{231} Consequently, the lower courts should feel free to supplement their determinations of police intent with a second layer of inquiry that would focus on the intent of the declarant. As Justice Thomas and others have indicated, one of the great weaknesses of \textit{Davis} is its failure to account for the fact that responding police officers are typically motivated by multiple purposes, including both the need to restore order and the need to collect evidence.\textsuperscript{232} Determining which of these purposes is “primary” leaves a great deal of discretion to the judges, which may, in turn, result in the development of an inconsistent and manipulable constitutional standard.\textsuperscript{233} The Court’s attempt to head off this tendency through an approach that focuses on the circumstances surrounding the making of the statement goes some way in providing stability through an objective test,\textsuperscript{234} but as the confusion surrounding the nature of the term “ongoing emergency” demonstrates, such an approach, on its own, fails to inject the Confrontation Clause with long sought-after reliability.\textsuperscript{235} Supplementing the lower court’s confrontation inquiry with a third alternative would provide a fallback approach, capable of settling difficult confrontation problems where the intent of the police is not completely transparent, but the intent of the declarant is.

Retaining an approach that focuses on the intent of the declarant serves a further purpose in adding to the doctrinal consistency of the Supreme Court’s recent confrontation jurisprudence. The 1828 dictionary that Justice Scalia relied on in both \textit{Crawford} and \textit{Davis} defined “testimonial” as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”\textsuperscript{236} If indeed testimonial statements must be “made for [a] purpose,” then it is clear that in order for a statement

\begin{itemize}
  \item 227. \textit{See supra} Part II.A.1–3.
  \item 228. \textit{See supra} Part II.A.1.
  \item 229. \textit{See supra} note 77 and accompanying text.
  \item 230. \textit{See supra} Part II.A.2–3.
  \item 231. \textit{See supra} Part I.C and accompanying text.
  \item 232. \textit{See supra} note 95 and accompanying text.
  \item 234. \textit{See supra} note 77 and accompanying text.
  \item 235. \textit{See supra} Part II.B.1–2.
  \item 236. \textit{See supra} note 57 and accompanying text.
\end{itemize}
to be considered “testimonial” under this standard, the declarant must intend for the statement to be used in a proceeding against the accused.237 By shifting the question of intent almost entirely onto the police, the core Davis holding threatens to unmoor the Confrontation Clause from its historical foundations.238 Retaining an approach that focuses on the intent of the declarant, even if only as a supplement, restores a sense of doctrinal consistency to the Confrontation Clause that might otherwise be lost.

B. Promoting Stability Through a Narrow Approach to the Ongoing Emergency Test

Even if the lower courts begin supplementing their confrontation jurisprudence by considering the intent of the declarant in difficult cases, stability and consistency will not be achieved without additionally establishing a clear and coherent approach to the ongoing emergency concept.239 Under the current nebulous state of the test, the lower courts have demonstrated a troubling tendency to interpret the ongoing emergency concept as extending outward in both space and time, without boundaries.240 This open-ended approach threatens to once again reduce the Confrontation Clause to the status of an evidentiary afterthought, despite the Supreme Court’s vigorous reaffirmation of the confrontation right in both Crawford and Davis.241 Furthermore, the broad approaches to the ongoing emergency test tend to subvert the goal of creating a stable, coherent approach to the Confrontation Clause.242

While the narrow approach to the ongoing emergency test does not, in itself, inject automatic predictability into confrontation jurisprudence, it goes a long way toward resolving the problems that the broad approach raises.243 The great advantage of the narrow approach is its provision for a clear end point, after which an emergency is no longer “ongoing.” Once the threat of harm to the declarant has passed, so has the emergency.244 Any statements against the accused made after that point, relating to past events, should be excluded by the Confrontation Clause.245 Imposing such a severe cutoff on the admissibility of out-of-court statements might initially seem too protective of defendants, especially in domestic violence cases, where

237. The general examples of testimonial statements offered by the Supreme Court in Crawford all contain, to varying degrees, a component of intent on behalf of the declarant, with the possible exclusion of statements “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”—and that exception suggests that the declarant must at least be on notice before his statements can be deemed testimonial. See supra note 59 and accompanying text.
238. See supra notes 107–08 and accompanying text.
239. See supra Part II.B.1–2.
240. See supra Part II.B.1–2.
241. See supra notes 64, 79 and accompanying text.
242. See supra Part II.B.2.
243. See supra Part II.B.1.
244. See supra notes 164–65 and accompanying text.
245. See supra notes 164–65 and accompanying text.
determining the exact end point of an emergency might itself be a troublesome task. But in such situations, the Supreme Court’s enthusiasm for the rule of forfeiture virtually invites the lower courts to carve out exceptions to the confrontation right when the accused has in some way procured the unavailability of the witnesses against him.

In addition to the policy benefits of the narrow approach, the *Davis* opinion itself seems to implicitly, if not overtly, endorse it. The Court’s application of the ongoing emergency test to the facts of *Davis* and its companion case provide ample indication of the Court’s preference for a narrow approach, as the opinion indicates that an emergency is deemed to have ended at the time the danger to the declarant has passed, or perhaps shortly thereafter.

The narrow approach should also be construed as a check against the possibility of government-manufactured “emergencies.” Since the Supreme Court has identified the Confrontation Clause as a check against prosecutorial abuse, and since it has warned prosecutors and police against manipulating their investigatory methods in order to circumvent the clause, it would seem unlikely that the Court would allow the introduction of testimonial statements against a defendant simply based on an officer’s assertion that an emergency was ongoing at the time of the statements. Such “protection” against prosecutorial abuse would be no protection at all, as it would reduce the Confrontation Clause to a readily evaded formality. In such cases, the lower courts should demand some form of objective evidence, above and beyond an officer’s mere assertion that an emergency existed, before determining the testimonial or nontestimonial nature of statements against the accused made in such a context.

C. The Need for a Two-Tiered Approach to the Excited Utterance Exception

*Davis* presents an interesting quandary concerning excited utterances. The opinion casts doubt on the viability of the excited utterance exception in the confrontation context generally, while at the same time proposing a constitutional test that is almost indistinguishable from the Supreme Court’s own description of the excited utterance test. Because of this similarity, there is some danger that these two separate doctrines could collapse into one another, but such a result can and should be prevented by the

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246. See Meier, supra note 123, at 26.
247. See supra note 93 and accompanying text.
248. See supra notes 79–86 and accompanying text.
249. See supra note 53 and accompanying text.
250. See supra note 88 and accompanying text.
251. See supra notes 139–41 and accompanying text.
252. See supra note 210 and accompanying text.
253. See supra Part II.C.1.
implementation of a two-tiered approach to potentially testimonial accusatorial statements admitted under the excited utterance exception.254

By implementing a two-tiered test that determines, first, whether a statement meets the excited utterance exception and, second, whether it is barred by the Confrontation Clause, the courts will ensure the viability of the Confrontation Clause as an independent constitutional guarantee, preventing the evils that would arise by collapsing the two rules into one.255 Even if the same evidence, typically the circumstances surrounding the making of the statement, is used to satisfy both rules, it is important to perform both the hearsay analysis and the confrontation analysis independently, as each rule is concerned with safeguarding a separate principle: the hearsay rule assuring the reliability of out-of-court statements, and the Confrontation Clause ensuring the right to cross-examination.256

CONCLUSION

Davis attempts to improve upon Crawford by providing courts with objective means for determining whether or not an out-of-court statement triggers the Confrontation Clause. It does so by moving the lower courts’ inquiry away from the subjective mental state of the declarant and toward an objective view of the circumstances in which the statement was made. This approach will provide courts with something close to a bright-line rule, which will tend to produce more consistent results across jurisdictions. However, as Justice Thomas’s dissent indicates, determining the primary purpose of a police investigation may often prove a fool’s errand. In such cases, the lower courts should rightfully supplement their confrontation review by focusing on the intent of the declarant at the time the statement was made. Further, Davis’s efforts to stabilize the confrontation doctrine will succeed only insofar as the lower courts apply a narrow approach to the “ongoing emergency” concept. Finally, to ensure the viability of the Confrontation Clause as a separate doctrine, courts faced with admitting excited utterances into evidence should not do so categorically. The hearsay rule and the Confrontation Clause were designed to protect separate values, and, although both doctrines require a similar factual analysis, each rule must be considered individually in order to ensure both evidentiary accuracy and constitutional protection against prosecutorial abuse.

254. See supra Part II.C.
255. See supra notes 211–19 and accompanying text.
256. See supra notes 29–31 and accompanying text.