BEYOND MICHIGAN V. BRYANT: A PRACTICABLE APPROACH TO TESTIMONIAL HEARSAY AND ONGOING EMERGENCIES

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The Confrontation Clause of the Sixth Amendment protects the right of a defendant to confront and cross-examine the witnesses against him or her. When the Supreme Court issued its opinion in Crawford v. Washington in 2004, the Court, for the first time in American legal history, distinguished the Confrontation Clause from the hearsay rule, by recasting it as protecting a procedural, rather than substantive, guarantee. In the 2006 case of Davis v. Washington, the Court narrowed the scope of the Confrontation Clause by taking into account “ongoing emergencies,” and in 2011, the Court, in Michigan v. Bryant, incorporated a “combined inquiry” test in determining the primary purpose of an out-of-court interrogation, to determine whether statements made in such an interrogation were testimonial. The framework for applying the Confrontation Clause, however, is a confusing one, and there are several inherent problems in the combined approach that have yet to be solved.

This Note analyzes three major categories of approaches to defining testimony within the current framework for applying the Confrontation Clause: the purpose-based approach, the characteristic-based approach, and the functionalist approach. This Note then argues that each approach is insufficient due to serious problems in concept, application, manipulability, and breadth. Finally, this Note proposes the adoption of a new, practical three-step analysis for determining whether an out-of-court statement is testimonial in nature.

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I. INTRODUCTION

An ‘inner process’ stands in need of outward criteria.¹

Suppose that in the early hours of the morning, a police officer receives a call indicating that someone has been shot. The police officer responds to the message and arrives at a gas station parking lot. At the scene, the police officer finds a man lying on the ground and bleeding from a wound to his stomach. The police officer asks simply, “What happened?” The man on the ground, speaking with difficulty, answers, “Rick shot me.” The wounded man describes Rick to the police officer. Paramedics arrive shortly afterward, but they are unable to save the wounded man’s life. The police, however, track down a person fitting Rick’s description, and this suspect is charged with the murder of the wounded man. Imagine you are the judge at this suspect’s trial. One question, which you must decide, will effectively determine the outcome of the trial: What was the primary purpose of the police officer’s interrogation of the wounded man?²

If you decide the primary purpose of the interrogation was “to establish or prove past events potentially relevant to later criminal prosecution,”³ then the wounded man’s statement to the police is probably inadmissible and may not be used to convict the suspect.⁴ On the other hand, if you decide the primary purpose of the interrogation was “to enable police assistance to meet an ongoing emergency,”⁵ then the statement is probably admissible evidence which may be used to convict the suspect.⁶ But how do you decide? Does the inquiry entail the determination of private mental states? How does one weigh mixed motives? What if the wounded man’s and the police officer’s purposes are differ-

² See Michigan v. Bryant, 131 S. Ct. 1143, 1165 (2011) (“[T]he ultimate inquiry is whether the primary purpose of the interrogation was to enable police assistance to meet the ongoing emergency.”) (quotation marks and brackets omitted).
⁴ This hypothetical tracks the issue before the Court in Bryant; neither the dying declaration exception, nor the doctrine of forfeiture, is addressed. See Bryant, 131 S. Ct. at 1151 n.1 (“Because of the State’s failure to preserve its argument with regard to dying declarations, we . . . need not decide that question here.”). It is worth noting, however, that the dying declaration exception has not yet been addressed by the Court in a contemporary case and that the doctrine of forfeiture is strict, such that the statement in this hypothetical would probably not fall under its exception to the Confrontation Clause. See Giles v. California, 554 U.S. 353, 368 (2008) (holding that the forfeiture doctrine applies only if the defendant murdered the declarant with “the purpose of preventing testimony”).
⁵ Davis, 547 U.S. at 822.
⁶ See Bryant, 131 S. Ct. at 1150 (“We hold that . . . the ‘primary purpose of the interrogation’ was ‘to enable police assistance to meet an ongoing emergency.’ . . . Therefore, [the victim’s statements] were not testimonial statements, and their admission at [defendant’s] trial did not violate the Confrontation Clause.”)
ent? Although it may seem like this analysis amounts to “an exercise in fiction,” this Note aims to show how such a criticism misunderstands the necessary inquiry.8

The facts in the hypothetical above are based on Michigan v. Bryant, a recent United States Supreme Court decision concerning the Confrontation Clause of the Sixth Amendment.9 The Confrontation Clause provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”10 As interpreted by the Court, the Clause was created in response to the type of “evil” exemplified by the prosecutorial use of “ex parte examinations as evidence.”11 The Clause protects “a defendant’s right to confront those who bear testimony against him.”12 What constitutes “testimony,” however, is something the Court has struggled to make clear.13

Difficulties arise when testimony is given out-of-court by a “witness” who is not under oath.14 Although the “most important” protection of the Clause is against the formal out-of-court interrogation of witnesses, the Court has recognized that informal out-of-court statements may also “evade the basic objective” of the Clause.15 Accordingly, the Court has mostly rejected a formality-based approach.16 Instead, the Court has defined testimony in terms of purpose: “Testimony . . . is typically a solemn declaration or affirmation made for the purpose of estab-

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8. This Note employs linguistic analysis. See, e.g., Wittgenstein, supra note 1, § 109 (“These are, of course, not empirical problems; they are solved, rather, by looking into the workings of our language, and that in such a way as to make us recognize those workings: in despite of an urge to misunderstand them.”).
10. U.S. CONST., amend. VI.
13. See, e.g., Leading Cases, Sixth Amendment Witness Confrontation, 122 HARV. L. REV. 276, 336 (2008) (“[S]ince Crawford, courts and scholars have been struggling to define the bounds of this newly rediscovered right, largely unaided by the Supreme Court.”).
14. Compare Crawford v. Washington, 541 U.S. at 69-71 (Rehnquist, C.J., concurring in the judgment) (“Under the common law . . . out-of-court statements made by someone other than the accused and not taken under oath . . . were generally not considered substantive evidence upon which a conviction could be based. . . . Without an oath, one usually did not get to the second step of whether confrontation was required.”), with Melendez-Diaz, 129 S. Ct. at 2542 (“This case involves little more than the application of our holding in [Crawford]. The Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error.”).
16. See id. at 1160 (“Formality is not the sole touchstone of our primary purpose inquiry because . . . informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.”); see also Davis v. Washington, 547 U.S. 813, 834 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part) (“Today, a mere two years after the Court decided Crawford, it adopts an equally unpredictable test, under which district courts are charged with divining the ‘primary purpose’ of police interrogations. Besides being difficult for courts to apply, this test characterizes as ‘testimonial,’ and therefore inadmissible, evidence that bears little resemblance to what we have recognized as the evidence targeted by the Confrontation Clause.” (citations omitted)).
lishing or proving some fact.” Specificall", the Court’s Confrontation Clause doctrine requires a trial judge to determine the objective, primary purpose of the statement or interrogation at issue. If the out-of-court statement was made for the primary purpose of establishing some fact for “future prosecutorial use,” then the statement counts as testimony under the Confrontation Clause. This approach, which defines the scope of the Sixth Amendment in relation to an individual’s purpose, has sparked controversy.

In addition to its general complexity and reliance on individuals’ purposes, the Court’s Confrontation Clause doctrine faces another serious criticism. In Bryant, the Court applied the purpose-based approach described above to the interrogation of the dying man in the gas station parking lot. The Court held that the objective, primary purpose of the interrogation was “to enable police assistance to meet an ongoing emergency.” Thus, the statements were not testimony which implicated the Confrontation Clause. In its reasoning, the Court purported to clarify its precedent in one important respect: “[Our precedent] requires a combined inquiry that accounts for both the declarant and the interrogator.” This reasoning was criticized by those who previously endorsed the Court’s Confrontation Clause doctrine. Moreover, the Court’s move in Bryant provoked a bitter dissent from Justice Scalia, who authored all of the Court’s contemporary, pre- Bryant Confrontation Clause decisions. “[The Court’s reasoning] is so transparently false that professing to believe it demeans this institution.... In its vain attempt to make the incredible plausible... today’s opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles.”

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17. Crawford, 541 U.S. at 51 (quotation marks and brackets omitted).
18. See Bryant, 131 S. Ct. at 1162 (“Objectively ascertaining the primary purpose of the interrogation by examining the statements and actions of all participants is also the approach most consistent with our past holdings.”); see also Davis, 547 U.S. at 822 n.1 (“The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.”).
21. 131 S. Ct. at 1161, 1165.
22. Id. at 1166–67.
23. Id. at 1167.
24. Id. at 1160.
25. See, e.g., Richard D. Friedman, Preliminary Thoughts on the Bryant Decision, CONFRONTATION BLOG (Mar. 2, 2011, 12:42 AM), http://confrontationright.blogspot.com/2011/03/preliminary-thoughts-on-bryant-decision.html (“I believe the decision is a very unfortunate development for the Confrontation Clause. The approach that emerges is remarkably mushy, unjustified by any sound reasoning and virtually incoherent.”).
27. Bryant, 131 S. Ct. at 1168 (Scalia, J., dissenting).
Justice Scalia charged the Court’s decision with further complicating the purpose-based approach and creating a novel problem for lower courts: “[T]he Court’s solution creates a mixed-motive problem where (under the proper theory) it does not exist—viz., where the police and the declarant each have one motive, but those motives conflict.”

Using the Court’s decision in _Bryant_ as a point of departure, this Note enters the Confrontation Clause debate and proposes a novel approach to defining testimony; this approach reconciles current doctrine with the conceptual and practical considerations raised above. The Note’s scope, however, is limited: it focuses on the problem of out-of-court interrogations. Thus, neither the doctrine of forfeiture by wrongdoing nor any other specialized exceptions are analyzed. Rather, the Note has three main aims: first, to analyze and clarify the Court’s current purpose-based approach to defining testimony; second, to recommend an approach that is consistent with precedent but much easier to apply; and third, to resolve the critical issue raised by Justice Scalia regarding the combined approach.

The discussion begins in Part II, which describes the hearsay rule and provides historical background on the Supreme Court’s approach to the Confrontation Clause. Part III identifies and evaluates three approaches to defining testimonial statements: by the statement’s purpose, by the statement’s characteristics, or by the statement’s function. Finally, Part IV rejects the existing approaches and, in their place, recommends a new, practical three-step analysis.

II. BACKGROUND

The Confrontation Clause of the Sixth Amendment protects a “right of confrontation and cross-examination,” which is “an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.” The Sixth Amendment was adopted with the rest of the Bill of Rights in 1791. Although the Clause was only first applied to the federal government, the Supreme Court eventually made

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29. Compare _id._ at 1162 (“The dissent...criticizes the complexity of our approach, but we, at least, are unwilling to sacrifice accuracy for simplicity.”), _with id._ at 1170 (Scalia, J., dissenting) (“Sorting out the primary purpose of a declarant with mixed motives is sometimes difficult. But adding in the mixed motives of the police only compounds the problem. Now courts will have to sort through two sets of mixed motives to determine the primary purpose of an interrogation.”).

30. _Id._ at 1170 (Scalia, J., dissenting); _see also id._ at 1168 (Scalia, J., dissenting) (“_Crawford_ and _Davis_ did not address whose perspective matters—the declarant’s, the interrogator’s, or both—when assessing the primary purpose of an interrogation.”). In those cases the statements were testimonial from any perspective. I think the same is true here, but because the Court picks a perspective so will I: The declarant’s intent is what counts.”).

31. _See Giles_, 554 U.S. at 359.

32. _See, e.g., Friedman, supra note 20, at 272 (raising the issue of child witnesses)._ See _Davis_.

33. _ Pointer v. Texas_, 380 U.S. 400, 405 (1965); _see U.S. Const._ amend. VI.

its protections obligatory on the states through the Due Process Clause of the Fourteenth Amendment.35

This Section provides a historical background of the Supreme Court cases that have interpreted the Confrontation Clause and describes the current state of the law. It also briefly describes the hearsay rule and distinguishes it from the protections afforded by the Confrontation Clause.

A. The Hearsay Rule

The hearsay rule provides the threshold question to the analysis under the Confrontation Clause. If the statement is not “hearsay,” then it is not barred by the Clause.36 Furthermore, in order to appreciate the Court’s construction of the Clause in its contemporary decisions as a “procedural” guarantee (as distinguished from a “substantive guarantee”),37 it is critical to understand the limits on admissible evidence imposed by the hearsay rule. It is worth noting at the outset that, for reasons addressed below, rules of evidence and their purposes are often conflated with the principles behind the Confrontation Clause.38

Hearsay is an out-of-court statement, offered in court, to prove the truth of the matter asserted.39 The hearsay rule generally renders such evidence inadmissible.40 “Out-of-court” refers to any statement not made by a declarant testifying at a trial or hearing.41 A “statement” may be any verbal assertion or nonverbal assertive conduct.42 The “matter asserted” refers to the content of the out-of-court statement, as it relates to a subject the court is considering.43 The statement only becomes hearsay when it is offered for its truth value; statements are not hearsay when they are offered to prove the state of mind of the declarant, the state of mind of the listener, or merely that the statement was made.44 The idea behind the hearsay rule is simple: because the witness “relates not what he or she knows personally, but what others have said,” making the statement’s truth value “therefore dependent on the credibility of someone other than the witness.”45

35. See Pointer, 380 U.S. at 403; see also U.S. CONST. amend. XIV.
39. Black’s Law Dictionary 790 (9th ed. 2009); see also Fed. R. Evid. 801(c).
41. See Black’s Law Dictionary 1212 (9th ed. 2009).
42. Id. at 1539.
43. See id. at 1067.
44. See id.
45. See id.
The hearsay rule provides the first hurdle in the testimonial hearsay analysis. In order to be admitted, the evidence must generally first fall within some recognized exception to the hearsay rule. As noted by the Court in Crawford v. Washington, the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” Accordingly, where a statement is not offered as hearsay (i.e., it is offered for some purpose other than proving the truth of the matter asserted), federal and state courts alike have found the Confrontation Clause inapplicable.

Generally, the hearsay rule serves a purpose distinct from that of the Confrontation Clause. The hearsay rule and its exceptions are primarily concerned with limiting the admission of unreliable evidence. The rule applies in this capacity both to civil and criminal cases. Although the Confrontation Clause was, for a long time, similarly satisfied by sufficient “indicia of reliability,” this is no longer the case under current interpretations. Instead, the Clause, which applies only to criminal proceedings, would exclude some evidence that the hearsay rule has traditionally recognized as admissible:

An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, ex parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

Because the purposes of the hearsay rule and Confrontation Clause are no longer aligned, it is unclear whether historical hearsay exceptions still satisfy the Sixth Amendment. For example, the Supreme Court has yet to address the “dying declaration” exception in a contemporary case. The dying declaration exception to hearsay is a long-recognized canon of the common law that allows admission of otherwise inadmissible hearsay where the declarant is unavailable and the statement was

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47. Crawford, 541 U.S. at 73 (Rehnquist, C.J., concurring in judgment).
48. Id. at 59 n.9.
51. Huff, supra note 38, at 448.
52. Id.
53. See infra Part II.C.
made under the belief that declarant’s death was imminent. Its rationale turns on the evidence’s reliability: “No person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips.” This rationale seems to have no bearing on the concern with whether a statement was “testimonial.” In fact, in cases where a declarant realizes that he or she is at death’s door, there seems good reason to think that the witness is trying to “testify,” which would seem to trigger the Confrontation Clause’s bar to admissibility. The Confrontation Clause, however, is not absolute. The Supreme Court has recognized at least one exception to the general exclusion of testimonial evidence: the doctrine of forfeiture.

Also known as the doctrine of “forfeiture by wrongdoing,” this exception to the Confrontation Clause was established in order to remove the perverse incentive otherwise created by the Clause to kill or make unavailable witnesses that might be called to testify against one at trial. The doctrine renders inapplicable the protections of the Confrontation Clause in cases in which the defendant caused a witness’s unavailability with the specific intent of preventing the witness from testifying. Obviously, under such circumstances, it would be unconscionable to permit the defendant to invoke the Clause’s protections. It is important to note that this exception is tethered to concerns regarding “indicia of reliability.”

B. The Confrontation Clause Before Crawford

Insofar as Crawford is said to have “breathed new life into the Confrontation Clause,” the Clause was considered by some to be either dead or dying for most of the twentieth century. Nonetheless, the Clause has a history that is worth describing for the purposes of this Note. Pre-Crawford history can be broadly divided into two periods: first, the
Clause’s early history; and second, the Clause’s near death in *Ohio v. Roberts*.

Throughout most of American legal history, the protections afforded by the Confrontation Clause were conflated with the hearsay rule. Generally, this law was shaped around concerns of reliability. Notwithstanding, Professor Richard Friedman has suggested that early American hearsay law was also influenced by a “confrontation principle.” This principle, Professor Friedman argues, helped define the bounds of ever-expanding hearsay law. On one hand, the principle simply recognized the unique value of cross-examination in testing the veracity of evidence. On the other hand, Professor Friedman asserts that this principle also led to a distinction between statements made “for the express purpose of being given in evidence” and “the natural effusions of a party. . . who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth.”

Eventually, as the hearsay rule and its exceptions continued to expand and develop, there was no distinction in federal law between the protections of the Confrontation Clause and the limits imposed by hearsay law. By the 1930s, the Supreme Court ceased to make doctrinal distinctions between the rules. As a result, the “confrontation principle” was eroded and the opportunity for cross-examination was no longer a strict precondition for the admission of hearsay statements.

In 1965, the significance of the Confrontation Clause greatly changed when it was incorporated by the Fourteenth Amendment and applied to the states. The flood of cases from state courts forced the Supreme Court to reexamine the rights afforded by the Sixth Amendment and to attempt disentangling the Confrontation Clause from the background of hearsay law, including rules of evidence that varied between the states. After struggling for over a decade to develop a coherent Confrontation Clause doctrine, however, the Court eventually decided to effectively abandon the pursuit and conform the Clause’s meaning to common law hearsay protections. *Ohio v. Roberts* framed the Con-

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68. *Id.* at 446–47.
69. *Id.* at 447–48.
70. *Id.* at 447.
71. *See id.*
72. *See id.*
73. *Id.* at 447 n.26 (quoting 1 S. M. PHILLIPS, A TREATISE ON THE LAw OF EVIDENCE 175 (1876)).
74. *See id.* at 447.
75. See, e.g., Shepard v. United States, 290 U.S. 96, 103–06 (1935) (holding that an “accusatory declaration” was barred from admission by the hearsay rule).
78. See Friedman, *supra* note 55, at 448.
79. *Id.*
frontation Clause as a substantive guarantee against convictions by unreliable evidence.80 In other words, the right of confrontation was not offended if the offered hearsay evidence bore certain “indicia of reliability.”81

Beginning from the assumption that hearsay offered against a criminal defendant must be analyzed under the Confrontation Clause,82 Roberts essentially established two hurdles for the admission of hearsay evidence. First, the hearsay statement had to either be supported by “particularized guarantees of trustworthiness” or fall “within a firmly rooted hearsay exception” (such as the dying declaration exception).83 Second, in some cases, the witness also had to be unavailable.84

Because the Confrontation Clause is understood today as targeting the prosecutorial use of ex parte examinations, as exemplified at the 1603 trial of Sir Walter Raleigh in England,85 it is ironic that Roberts aligned the Clause with the court’s rationale from Sir Raleigh’s trial:86 “[S]o many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced . . . .”87 Sir Raleigh’s problem was that the substantive guarantee—reliable evidence—means little in practice when it comes from one’s prosecutor.88

Moreover, Roberts risked providing prosecutors with a carte blanche exception to the Confrontation Clause.89 “[F]irmly rooted hearsay exception[s]” were abundant, and the vague “particularized guarantees of trustworthiness” test was subject to ad hoc manipulation.90 With these expansive exceptions, the Court struggled to find any conceptual basis to exclude hearsay under the Confrontation Clause.91

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81. Id. (identifying the “indicia of reliability” test as the determinative factor in the Court’s Confrontation Clause analysis). Compare this with Crawford’s reasoning that “the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” Crawford v. Washington, 541 U.S. 36, 69 (2004).
82. Roberts, 448 U.S. at 65-66 (“[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable.”).
83. Id. at 66.
84. See id.; see also Friedman, supra note 55.
85. Crawford, 541 U.S. at 44.
86. See Roberts, 448 U.S. at 66; Friedman, supra note 55.
87. DAVID JARDINE, I CRIMINAL TRIALS 427 (1832) (quoting from the record of Sir Walter Raleigh’s trial for high treason).
88. See id.; see also Crawford, 541 U.S. at 44.
89. See Roberts, 448 U.S. at 66 (noting “the truism that ‘hearsay rules and the Confrontation Clause are generally designed to protect similar values’”); Friedman, supra note 55.
90. Friedman, supra note 55, at 449.
91. See id. at 448.
C. Crawford and Its Progeny

Crawford was a watershed moment for the Confrontation Clause. In Crawford, the Court unequivocally rejected the Roberts approach and, for the first time in American legal history, articulated a Confrontation Clause doctrine that was conceptually distinct from hearsay law. Essentially, the Court rejected Roberts’s framing of the Confrontation Clause as a substantive guarantee concerned with reliability and recast the Clause as protecting a procedural guarantee: the right of confrontation.

Crawford concerned the trial of Michael Crawford, who was charged with assault and attempted murder. Michael claimed that the victim in the case had attempted to rape Michael’s wife, Sylvia. The hearsay statement at issue was a tape-recorded statement made by Sylvia during a custodial interrogation. This statement was apparently inconsistent with Michael’s version of the facts. Under Washington’s spousal privilege law, Michael could not cross-examine his wife about the statement without waiving the privilege. Nevertheless, the tape-recorded statement was admitted into evidence over the defense’s objection.

The Washington appellate courts analyzed Michael’s case under the Roberts framework and reached opposite conclusions, demonstrating the flaws in the Roberts approach. The Washington appellate court held that the tape-recorded statement did not bear sufficient “indicia of reliability” and reversed Michael’s conviction. The Washington Supreme Court, in turn, held that the tape-recorded statement was, in fact, supported by sufficient guarantees of trustworthiness and reinstated Michael’s conviction.

Although the Supreme Court in Crawford recognized that the Roberts framework suffered serious practical issues (i.e., it was vague and difficult to apply), the Court primarily abandoned the framework on historical grounds. Professor Friedman provided extensive historical research on which the Court relied in reaching its decision. It is worth noting that the Court’s historical approach is somewhat peculiar in at

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92. See, e.g., Mosteller, supra note 66, at 6; Smith, Jr., supra note 66.
94. Id.; Friedman, supra note 55, at 468.
95. Crawford, 541 U.S. at 40.
96. Id. at 38.
97. Id.
98. Id. at 38-39.
99. Id. at 40.
100. Id.
101. Id. at 41; see also Friedman, supra note 55, at 450.
102. Crawford, 541 U.S. at 41.
103. Id.
104. Id. at 56 n.6; see also Friedman, supra note 55, at 450.
least two ways. First, *Crawford* rejects very longstanding precedent in its “historical” analysis. The nuance is that *Crawford* purports to interpret the original public meaning of the text in the Confrontation Clause, despite the fact that *Crawford* represents the first definite articulation of a Confrontation Clause protection that is totally distinct from the law of hearsay. Second, *Crawford* looks to the time of ratification of the Bill of Rights for the Confrontation Clause’s original public meaning. The analysis relied, in part, on definitional support from an early *Webster’s Dictionary*. This seems to overlook the fact that the Confrontation Clause was not originally applied to the states. Thus, some have argued that this approach is flawed unless the Court looks to the time of adoption of the Fourteenth Amendment, through which the Confrontation Clause was incorporated and applied to the states, for the original public meaning of the Clause.

Based on this historical reasoning, the Court distinguished the Confrontation Clause’s purpose from the hearsay rule. Justice Scalia, writing for the majority, rejected the view that the Confrontation Clause, like rules of evidence, stand for a substantive guarantee: reliability. Instead, Justice Scalia construed the Clause as protecting a procedural guarantee against a specific type of hearsay: “testimonial” hearsay. The procedural right’s content was the right to cross-examination and trial by live, in-court testimony.

Although the Court recognized that the utility of these rights consists of their capacity to test the veracity of evidence, the procedural and substantive distinction is nonetheless important in that a trial court does not get to make the reliability determination. Instead, the defendant is

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106. See Ariana J. Torchin, Note, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington*, 94 Geo. L.J. 581, 585 (2006) (“Although Justice Scalia noted that the Court had the option of simply reweighing a balance of factors under *Roberts* he instead took issue with the historical accuracy of such a balancing test. As such, *Crawford* abrogated *Roberts* with Justice Scalia observing the prior standard had improperly conflated constitutional procedural guarantees with the substantive concerns of the modern rules of evidence.”).
107. See *Crawford*, 541 U.S. at 60.
108. *Id.* at 50-51.
110. *Crawford*, 541 U.S. at 61.
111. *Id.* at 51.
115. *Id.*
116. *Id.*
117. *Id.* at 68.
118. See *id.* at 61-62.
given the tools to protect the integrity of his or her own trial. The protection afforded by the Clause also contains a passive right. Not only is the defendant entitled to cross-examine the prosecution’s witnesses, but the prosecution is also required to put on its proof at trial through live testimony. This is significant because it prevents a cold cross—that is, a cross-examination conducted with no prior sworn statements by the witness on the record. The idea is that when the prosecution is required to put the witness on the stand first, the defense is better able to prepare a meaningful cross-examination.

The strict rule adopted by the Court protected procedural rights by excluding “testimonial” hearsay where the declarant was unavailable and the defendant had no prior opportunity for cross-examination. As to nontestimonial hearsay, the Confrontation Clause is totally inapplicable, and the Clause allows states some “flexibility” in the development of their own hearsay law and rules of evidence. The Court limited the Confrontation Clause to “testimonial” hearsay on its definition of “witnesses”:

The text of the Confrontation Clause reflects this focus. It applies to “witnesses” against the accused—in other words, those who “bear testimony.” . . . “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

The Court declined to give an exhaustive definition of “testimonial” hearsay—the type of statements that would trigger the Clause’s protections. Instead, relying on a careful historical analysis of the Sixth Amendment’s text, the Court proceeded by defining a core class of statements that the Clause was meant to exclude: the “civil-law mode of criminal procedure.” It was these practices that the [English] Crown deployed in notorious treason cases like [Sir Walter] Raleigh’s . . . and that the founding-era rhetoric decried. Specific examples of this “core class” include affidavits, custodial examinations, ex parte testimony, and

119. Id.
120. Id.
121. Id.
122. See id. at 54.
123. See id. at 50–52.
124. Id. at 53–54.
125. See id. at 68.
126. Id. at 51.
127. Id. at 68.
128. See id. at 50.
129. Id.
“similar pretrial statements that declarants would reasonably expect to be used prosecutorially.”

In addition to its underdeveloped definition of testimony, Crawford’s guidance was complicated by the fact that the Court attempted to reconcile its holding with the outcome of Roberts-era decisions. Nonetheless, there is some debate as to whether the cases would have been decided differently under Crawford’s analysis. Therefore, the Court’s dicta did little to mitigate the uncertainty created by the rejection of Roberts’s longstanding analysis. In fact, less than two years later, the Court granted certiorari in two cases dealing with the application of Crawford’s new testimonial hearsay analysis.

The Court decided these two cases together, as companion cases, in Davis v. Washington. The cases forced the Court to build upon the Crawford framework and “determine more precisely which police interrogations produce testimony.” The Court in Davis added a new consideration to the Confrontation Clause analysis: ongoing emergencies. “Statements are nontestimonial... under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” On the other hand, the Court held that statements are testimonial “when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

With this modification to the “primary purpose” test, the Court turned to the facts of the two cases. Both cases involved convictions arising out of domestic violence incidents. In Adrian Davis’s case, the court held that a 911 caller’s statement—which identified the defendant—was nontestimonial hearsay because it was “plainly a call for help against bona fide physical threat.” The witness’s primary purpose in making the statement was “to enable police assistance to meet an ongoing emergency.” Thus, the Confrontation Clause does not apply.

The Court distinguished this statement from the statement in Crawford

130. Id. at 51.
131. Id. at 58-60.
132. See Torchin, supra note 106, at 585-86.
133. See id. at 586.
135. Id. at 813.
136. Id. at 822.
137. Id.
138. Id.
139. Id.
140. Id. at 817-21.
141. Id. at 818, 820.
142. Id. at 827.
143. Id. at 828.
144. Id. at 829.
in that the Davis statement described unfolding events and consisted of “frantic answers” made in a dangerous setting. The Court noted that these facts are far from the formal, custodial interrogation of Michael Crawford’s wife, Sylvia.

The Court reached a different conclusion in Hershel Hammon’s case. Here, the Court held that a victim made a testimonial statement when the victim responded to police questioning after the defendant had already been detained. Rather than a “cry for help” or “the provision of information enabling officers immediately to end a threatening situation,” the Court held that the primary purpose of the police questioning “was to investigate a possible crime.” The statement qualified as “testimonial” because it is more akin to a “narrative of past events . . . delivered at some remove in time from the danger” than “a cry for help” that “showed immediacy.” Accordingly, the lower courts erred in admitting the statement, and the Supreme Court reversed.

As in Crawford, the Court in Davis did not attempt “an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial.” Nevertheless, the ongoing emergency consideration is an important contribution to the Court’s Confrontation Clause jurisprudence. Where Crawford practically amounted to a dramatic upheaval for the criminal justice system, Davis substantially reduced this uncertainty. Ongoing emergencies are part and parcel of the criminal law, and the consideration represented a significant narrowing of the Confrontation Clause’s applicability. Still, the holding in Davis is “far too narrow to give meaningful guidance to lower courts.”

The Court did not consider the application of its purpose-based approach to out-of-court interrogations again until Michigan v. Bryant. Between Davis and Bryant, however, the Court decided two cases involving the Confrontation Clause. In Giles v. California, the Court distinguished the doctrine of forfeiture by wrongdoing from the dying declara-

145. Id. at 827.
146. Id.
147. Id. at 829.
148. Id. at 829–30.
149. Id. at 830–32.
150. Id. at 831–32.
151. Id. at 834.
152. Id. at 822.
155. See id.
156. Yee, supra note 153, at 732.
tion exception to hearsay. The Court held that the forfeiture doctrine only applies to the Confrontation Clause when the defendant has caused a witness’s unavailability with the specific intent of preventing her testimony. In *Melendez-Diaz v. Massachusetts*, the Court held that sworn affidavits, which were created by lab analysts to report the results of forensic tests on narcotics, constituted testimonial statements. Accordingly, the defendant was entitled to an opportunity to cross-examine the declarants. The Court described this holding as a “rather straightforward application of our holding in *Crawford*.”

**D. Michigan v. Bryant**

*MICHIGAN v. BRYANT* concerned the trial of Richard Bryant for the murder of Anthony Covington. Detroit police officers responding to a 911 call found Covington on the ground in a gas station parking lot. Covington was bleeding from a gunshot wound to his abdomen. When the police asked him “what had happened,” Covington responded that “Rick” had shot him. Covington also described the location, approximate time, and general circumstances of the shooting. The conversation lasted between five and ten minutes. Covington died from his wounds several hours later. Bryant was not arrested until a year later, when he was in California. A jury convicted Bryant of Covington’s murder. Because Bryant’s trial occurred prior to the Supreme Court’s decisions in *Crawford* and *Davis*, Bryant did not raise any objection to the admission of Covington’s statements to the police. Following the Supreme Court’s decision in *Crawford*, however, Bryant raised the issue on appeal. The Michigan appellate courts reached opposite conclusions.

Purporting to apply an approach required under *Davis*, the U.S. Supreme Court held that Covington’s statements were not out-of-court tes-

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158. 554 U.S. 353 (2008). Because the lower court held that the statement was admissible under the exception, the scope of the Confrontation Clause itself was not an issue before the Court. *Id.* at 378 (Alito, J., concurring).
159. *Id.* at 368 (majority opinion).
161. *Id.*
162. *Id.* at 2532–33.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 1164.
171. *Id.* at 1150.
172. *See id.*
173. *Id.* at 1150–51.
timony barred by the Confrontation Clause.\textsuperscript{175} The Court emphasized the necessity of a “combined inquiry” when determining the objective, primary purpose of an out-of-court interrogation.\textsuperscript{176} In support of this approach, the Court explained that the interrogator’s purposes provided necessary context to the interrogation.\textsuperscript{177} Furthermore, the Court reasoned that such an approach could help resolve problems arising from cases where a declarant has either “mixed motives” or no purpose at all.\textsuperscript{178} Applying this inquiry to the facts of Bryant’s case, the Court considered several factors to determine the interrogation’s objective, primary purpose, including the declarant’s medical condition,\textsuperscript{179} the type of weapon allegedly used,\textsuperscript{180} the suspect’s location,\textsuperscript{181} and the amount of time that had passed since the shooting.\textsuperscript{182} Ultimately, the Court held that “the primary purpose of the interrogation” was “to enable police assistance to meet an ongoing emergency.”\textsuperscript{183} Because Covington’s statements were not testimonial, they did not offend Bryant’s confrontation rights under the Sixth Amendment.\textsuperscript{184}

Neither \textit{Crawford} nor \textit{Davis} is an attempt by the Court to provide an “exhaustive” definition of testimony for purposes of the Sixth Amendment.\textsuperscript{185} This is also not the aim of the Court in \textit{Bryant}.\textsuperscript{186} Nonetheless, \textit{Bryant} does represent a distinct chapter in the Court’s Confrontation Clause doctrine.\textsuperscript{187} The Court described its task in \textit{Bryant} as providing “further explanation of the ‘ongoing emergency’ circumstance addressed in \textit{Davis}.”\textsuperscript{188} This “explanation” consisted of the Court’s explicit adoption of a combined-purposes approach to out-of-court interrogations.\textsuperscript{189} The practical consequences of this approach are foreshadowed in \textit{Davis}.\textsuperscript{190} In particular, some commentators have expressed concern that the ongoing emergency consideration is a potential “toehold” for the admission of “accusatory statements that were made absent an opportunity for confrontation.”\textsuperscript{191} This concern only seems to be exacerbated by the introduction of police officers’ purposes to the testimonial analy-

\begin{thebibliography}{9}
\bibitem{175} Bryant, 131 S. Ct. at 1160-61, 1167.
\bibitem{176} \textit{Id.} at 1160.
\bibitem{177} \textit{Id.} at 1160-61.
\bibitem{178} \textit{Id.} at 1161.
\bibitem{179} \textit{Id.} at 1159.
\bibitem{180} \textit{Id.} at 1158-59.
\bibitem{181} \textit{Id.} at 1156.
\bibitem{182} \textit{Id.} at 1166.
\bibitem{183} \textit{Id.} at 1167-68 (quoting \textit{Davis} v. Washington, 547 U.S. 813, 822 (2006)).
\bibitem{184} \textit{Id.}
\bibitem{186} Bryant, 131 S. Ct. at 1155.
\bibitem{187} See Friedman, supra note 25.
\bibitem{188} Bryant, 131 S. Ct. at 1156.
\bibitem{189} \textit{Id.} at 1160.
\bibitem{190} See generally Yee, supra note 153, at 755 (describing \textit{Davis} as providing “some guidance, but not enough”).
\bibitem{191} Richard D. Friedman, Crawford, Davis and Way Beyond, 15 J.L. POLY 553, 563 (2007).
\end{thebibliography}
sis. When applied to the ongoing emergency consideration, the combined approach will likely be another significant narrowing of the Clause’s applicability.

III. ANALYSIS

The Court’s decision in Crawford provides lower courts with a confusing framework in which to apply the Confrontation Clause, and the many practical difficulties entailed by this framework have led courts and scholars to consider modifications to the Supreme Court’s explicit doctrine. Even after Bryant, the testimonial analysis remains broad and ambiguous. Moreover, the Court has provided little or no guidance to lower courts for resolving problems inherent in a combined approach: for example, when the declarant’s and the interrogator’s purposes conflict. In determining the objective, primary purpose of the interrogation in Bryant, the Court considered the declarant’s purpose, the police officer’s purpose, the formality of the interrogation, and the anticipated use of the declarant’s statements. This holding leaves room for lower courts to adopt a more detailed approach that prioritizes the considerations and resolves the problems left by an ambiguous framework. As courts demonstrated in the wake of Davis, slight differences in the application of this framework can result in meaningful practical differences.

Three categories of approaches to defining testimony within the current framework are discussed. First, purpose-based approaches to resolving Bryant’s ambiguities are analyzed. Within this category, courts and scholars disagree over whether the analysis should focus on the declarant’s purpose. Second, a characteristic-based approach, which focuses on the formality consideration, is described. This approach relies heavily on Crawford’s identification of the “core class” of testimonial evidence in order to determine the scope of the Confrontation Clause. Finally, a functionalist approach with a broader interpretation of the Clause is evaluated. This approach resolves ambiguities by looking to the functional consequences of a statement.

192. See Bryant, 131 S. Ct. at 1170-73 (Scalia, J., dissenting).
193. See id. at 1173 (“The Court’s distorted view creates an expansive exception to the Confrontation Clause for violent crimes.”).
194. See generally Friedman, supra note 20.
195. See Friedman, supra note 25.
196. See Bryant, 131 S. Ct. at 1170 (Scalia, J., dissenting).
197. Id. at 1165 (majority opinion).
198. Id. at 1165-66.
199. Id. at 1166.
200. Id. (“[T]he circumstances lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial use of his statements.”).
201. See, e.g., Friedman, supra note 191, at 561-63.
202. See id. at 563-66.
203. See, e.g., Bryant, 131 S. Ct. at 1168-69; see also Friedman, supra note 20, at 255-59.
A. The Purpose-Based Approaches

Although Crawford made a purpose-based approach part of the Court’s express constitutional doctrine, the Court has consistently refused to provide lower courts with an “exhaustive” definition of its analysis.204 In general, purpose-based approaches make the objective, primary purpose of a statement or interrogation the “ultimate inquiry” in the testimonial analysis.205 Because it would not be possible to determine the subjective mental state of the participants in an interrogation, the analysis incorporates a reasonable person standard: In the participant’s position at the time the statement was made, what would have been a reasonable person’s purpose?206 Despite this modification, the inquiry still involves a complex factual analysis. The Court recognizes that a reasonable person may have “mixed motives” and requires lower courts to determine the “primary” purpose.207 Moreover, it seems that nearly every factual circumstance of the out-of-court statement could have some bearing on the reasonable person’s motives. Therefore, in practice, the approach is extremely burdensome for the trial judge.208

Notwithstanding these practical difficulties, purpose-based approaches have some definite appeal. First, the approaches provide a satisfying definition of “testimony.”209 This is the payoff of the complex factual analysis. The definition does not rely on any arbitrary limitations. Second, the approach satisfies some of the moral sentiments behind the Confrontation Clause. Accusations that are purposefully made to government officials are offensive in a sense that casual, undirected remarks are not. Furthermore, in the first case, it would not be unfair to compel the accuser’s presence at the accused’s trial.210 In the other case, it seems ridiculous to require the appearance of every person who makes an offhand remark that is relevant to some issue in a criminal trial.211 Finally, purpose-based approaches appreciate the procedural value of confrontation. The Sixth Amendment does not only provide the defendant with an opportunity to cross-examine the witness; it also requires the prosecution to produce its evidence through live, in-court testimony.212 This means that the witness is generally required to literally face the defendant when giving the accusatory testimony. The value in this procedure

204. See Bryant, 131 S. Ct. at 1155-66.
205. Id. at 1160, 1165.
206. See id. at 1161.
207. Id.
209. See Yee, supra note 153, at 746-54.
210. See Friedman, supra note 20, at 259.
211. Id. at 251.
is that it tends to deter false accusations. Purpose-based approaches recognize that the procedural guarantee provides little of the desired deterrence in the case of statements not made for the purpose of prosecutorial use.

Even after the Bryant decision, lower courts will likely continue to struggle with the broad framework set up by Crawford. The Supreme Court has provided little guidance for resolving problems of mixed motives or, in the case of a combined purposes analysis, conflicting purposes. The significance of focusing on a particular participant’s purpose did not become apparent until after Davis. The ongoing emergency consideration complicates the mixed motives problem because violent crimes will almost always involve a plausible emergency. When first responding to a 911 call, police officers will always have the two purposes considered in Bryant. It is basic procedure for an officer to both determine whether an ongoing emergency exists and collect any evidence from a crime. Thus, judges will generally be required to consider at least two candidates for an interrogation’s primary purpose.

Bryant identifies two paths for the trial judge. First, a court may focus on the declarant’s purpose and weigh this factor more heavily than any other circumstance. Second, a court could focus on the overlap between the declarant’s purpose and the interrogator’s purpose—without considering either in isolation.

1. The Declarant’s Purpose

The Supreme Court did not begin to address the issue of whose perspective ultimately matters until Bryant. Crawford, however, derived the testimonial analysis from the definition of a “witness.” This implies that the declarant’s purpose is determinative. Moreover, the Court emphasized that testimony consists of a “solemn declaration.” By expressly rejecting formality as the governing factor, the Court made clear that a statement’s context does not dictate solemnity. Accordingly,

213. See JARDINE, supra note 87 (“[T]he accusation is not to be produced; for having first confessed against himself voluntarily, and so charged another person, if we shall now hear him again in person, he may for favour or fear retract what formerly he hath said, and the jury may, by that means, be inveigled.”).
214. See Friedman, supra note 25.
216. See Friedman, supra note 191, at 559-63.
218. See Bryant, 131 S. Ct. at 1161-62.
219. Id.
220. See id. at 1168 (Scalia, J., dissenting).
222. Id. at 51.
courts and commentators mostly assume that, under Crawford's framework, this is the crucial factor.\textsuperscript{224}

Focusing on the declarant’s purpose provides a generally consistent analysis. The approach is justified by Crawford's definition of testimony: “[A] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”\textsuperscript{225} The analysis is the same for volunteered statements as it is for interrogations; in both cases, the declarant’s primary purpose is sufficient to make a statement testimonial.\textsuperscript{226} In addition, the approach avoids the problem of an interrogator’s concealed purposes. The Supreme Court has indicated that a co-conspirator’s statements to an undercover government agent would not be considered testimonial by virtue of the agent’s concealed purpose to collect evidence.\textsuperscript{227} This is also consistent with Roberts-era precedent.\textsuperscript{228}

Nevertheless, the approach still suffers from all the drawbacks inherent in a purpose-based approach to defining testimony. Focusing on the declarant’s purpose does not avoid a factually intensive review of every circumstance surrounding the out-of-court statement. Even though the interrogator’s purpose is not determinative, a court must still carefully consider nearly all of the interrogator’s actions.\textsuperscript{229} In addition to these general issues, this approach also suffers from two inherent problems. It is possible to imagine a number of cases where the factual circumstances cannot provide a definite outcome. Specifically, a complex weighing of all the facts may only reveal that a reasonable person in the declarant’s position would have had mixed purposes or no purpose.\textsuperscript{230} The approach does not indicate how to prioritize the reasonable person’s motives to resolve the issue. In the second case, the Supreme Court has acknowledged the potential for cases where a seriously injured declarant responds to police questions by reflex, with no objectively discernible purpose.\textsuperscript{231}

Focusing on the declarant’s intent is the conceptual implication of Crawford’s definition of testimony. The approach closely tracks the core class of statements targeted by the Confrontation Clause. The approach, however, is also very burdensome and inherently flawed. It necessarily entails borderline cases that it cannot resolve. Thus, the approach is incapable of providing a complete doctrine.

\textsuperscript{224} See Friedman, supra note 191, at 569-71.
\textsuperscript{225} Crawford, 541 U.S. at 51 (brackets omitted).
\textsuperscript{226} See Friedman, supra note 20, at 255-59.
\textsuperscript{227} See id. at 255-56.
\textsuperscript{228} Id.
\textsuperscript{230} Id. at 1161.
\textsuperscript{231} Id.
2. The Declarant’s and the Interrogator’s Purposes

In Bryant, the Supreme Court expressly endorsed a “combined approach” to determining the objective, primary purpose of an interrogation; the Court held that lower courts must consider both the declarant’s and the interrogator’s purposes. Furthermore, the Court justified its adoption of this approach by reference to Davis. Specifically, the Court based its interpretation of Davis on the language that “a statement’s testimonial or nontestimonial nature derives from ‘the primary purpose of the interrogation.’” The Court acknowledged the language from Davis that “it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.” The Court, however, interpreted this second quotation as merely cautioning courts against confusing the interrogator’s questions with the statement at issue: “An interrogator’s questions, unlike a declarant’s answers, do not assert the truth of any matter.” Justice Scalia, who authored the Court’s opinion in Davis, did not join in this interpretation: “Crawford and Davis did not address whose perspective matters—the declarant’s, the interrogator’s, or both—when assessing ‘the primary purpose of [an] interrogation.’” The Court’s construction of Davis has also surprised some commentators.

The Court also justified its use of a combined approach by reference to practical concerns. “The combined approach also ameliorates problems that could arise from looking solely to one participant.” In particular, the Court addressed the mixed motives and the absent purpose problems entailed by focusing only on the declarant’s purpose: Victims are... likely to have mixed motives when they make statements to the police. During an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant.... Alternatively, a severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive.

The Court did not, however, offer any clear guidance for applying its approach. In applying the combined analysis to Bryant’s case, the Court seemingly considered any relevant fact that could weigh on either participant’s purpose. In effect, the Court purported to clarify Davis’s complex analysis by adding yet another factor.
Besides the added burden created by its complicated inquiry, the combined approach suffers from the same inherent flaws as an approach that focuses on only the declarant’s purpose. The Court in *Bryant* seemed to recognize this. First, the Court recognized that an interrogator may also have mixed purposes: “Police officers in our society function as both first responders and criminal investigators.”240 Because the Court still did not provide any explicit guidance for prioritizing these purposes, the combined approach—at best—only limits the number of borderline cases that it cannot determine. Second, the Court apparently acknowledged that a declarant may have a different purpose from the interrogator.241 Nevertheless, the Court provides no guidance for whose purpose should ultimately determine the primary purpose of the interrogation. Like the mixed motives problem, this creates a class of cases that the approach is unable to resolve. Consequently, the scope of the Confrontation Clause remains ambiguous, and lower courts are left to guess at the appropriate outcome.

### B. The Characteristic-Based Approach

When the Supreme Court in *Crawford* cast its contemporary testimonial framework, the Court declined to limit the scope of the Confrontation Clause to a characteristic-based approach. Nevertheless, this has not stopped some lower courts from adopting this analysis.242 A characteristic-based approach defines testimonial hearsay in terms of the objective characteristics that an out-of-court statement shares with in-court testimony or the historical abuses targeted by the Sixth Amendment.243 The Court in *Crawford* recognized that this type of formal statements would fall within the “core class” of statements targeted by the Clause: “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”244 In *Davis*, the Court clarified its rejection of a definition based on formal characteristics: “We do not dispute that formality is indeed essential to testimonial utterance. But . . . restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”245

Justice Thomas, who has consistently recommended a characteristic-based approach, rejects the notion that a formality-based approach would unduly narrow the scope of the Sixth Amendment.246 “Rejection of the narrowest view of the Clause does not . . . require the broadest ap-

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240. *Id.*
241. *Id.* at 1161-62.
242. *See id.* at 1161-62.
243. *Supra.*
246. *Id.* at 834-42 (Thomson, J., dissenting).
plication of the Clause to exclude otherwise admissible hearsay evidence. The history surrounding the right to confrontation supports the conclusion that it was developed to target particular practices...”

Notwithstanding Justice Thomas’s objections, the Court has consistently treated characteristic-based factors (i.e., formality) as a sufficient—but not necessary—condition for the application of the Clause.

A characteristic-based approach avoids most of the problems inherent in the purpose-based approaches. The analysis does not entail the “exercise in fiction” that requires the trial judge to determine the objective, primary purposes of hypothetical reasonable persons in the declarant’s and the interrogator’s positions. Rather, the analysis is fairly straightforward: the test only requires a court to compare an out-of-court statement’s characteristics to the characteristics of certain historical practices—for example, the evidence presented at Raleigh’s trial. Commentators have generally credited this approach for its potential to produce predictable, consistent results. There is little doubt that it would dramatically reduce the burden imposed by Crawford on lower courts.

The problem, however, is that a formality-based approach’s predictability is also related to its potential for manipulation. Insofar as the analysis is simple for lower courts to apply, would-be interrogators are effectively provided with a roadmap to circumvent the Sixth Amendment. As one critic has recognized, it makes little sense to define out-of-court testimony by reference to the characteristics of in-court testimony. The result is an absurd construction of the Confrontation Clause: the accuser should not be compelled to testify in-court because the accusation did not resemble in-court testimony. Moreover, the participants have complete control over the informality of an out-of-court interrogation. Although the interrogator could not make any interrogation formal, he or she could almost certainly make any interrogation informal. In sum, a characteristic-based approach is likely a “recipe for [the] extinction” of the right to confrontation.

C. The Functionalist Approach

The Supreme Court has also alluded to a third approach that defines testimony in terms of the function it serves at trial. In its delineation of the core class of testimonial statements, the Court in Crawford included “pretrial statements that declarants would reasonably expect to be used prosecutorially” and “statements that were made under circum-

247. Id. at 835 (Thomas, J., dissenting).
248. See Friedman, supra note 191, at 568-71.
250. Friedman, supra note 20, at 248.
251. Davis, 547 U.S. at 830 n.5.
stances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

Professor Friedman, a proponent of this approach, describes the relevant inquiry as “whether the declarant understood that there was a significant probability that the statement would be used in prosecution.” The Court indicated that these definitions of testimonial statements were at a higher “level of abstraction” than was required to decide Crawford: “Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.”

In Davis, however, it became apparent that the Court was not adopting the functionalist framework. The introduction of the ongoing emergency consideration, in effect, substantially narrows the applicability of the Confrontation Clause. Some commentators characterize this move as a “compromise” with the burdens imposed on lower courts under Crawford. An ongoing emergency would only be relevant to a functionalist approach insofar as a reasonable person could be so concerned with an emergency that he or she would not anticipate that his or her statements would be used for prosecution. This seems, however, like an imperfect reconciliation. In emergencies involving a violent crime, resolving the emergency generally involves arresting the offender. Although a declarant’s medical condition or stress would potentially bear on a primary purpose inquiry, the anticipation threshold is much lower. Even mortally wounded persons would likely anticipate the potential prosecution of the attacker.

Notwithstanding the problems related to reconciling the approach with Davis and Bryant, a true functionalist approach is substantially easier to apply than the purpose-based approaches. Generally, the functionalist approach does not require the determination of hypothetical mental states. Professor Friedman has compared the analysis to the concept of general intent: “[O]ne might speak of it as an intent test, but only in the soft sense that a person is deemed to have intended the natural consequences of her actions.” The advantage is that the analysis avoids the mixed motives problem and the no-purpose problem. A reasonable person in the declarant’s position either would have the awareness or would not. The approach avoids the conceptual problem of unsolvable cases. Moreover, although the approach may involve some careful factual analysis, the threshold for anticipation is much lower than for a purpose

253. Friedman, supra note 20, at 252.
254. Crawford, 541 U.S. at 52.
255. See Ross, supra note 154, at 388.
256. Friedman, supra note 191, at 568.
257. See id. at 561–62.
259. See Friedman, supra note 20, at 252.
analysis. Thus, the analysis is much easier for the trial judge to apply than the purpose-based approaches.

Despite these advantages, few courts are likely to adopt a functionalist approach. Although a simpler testimonial analysis is easier for courts to apply, it does not actually reduce the overall burden. In fact, a more expansive application of the Confrontation Clause would likely increase the burden on lower courts by requiring more witnesses to appear in court to testify. The reaction to Crawford in lower courts supports this prediction: a criminal justice system already overwhelmed by the volume of cases struggled to limit the consequence of the Supreme Court’s decision.\textsuperscript{260} This is a practical reality that must be considered in choosing an approach that determines the scope of the Sixth Amendment.

IV. RECOMMENDATION

The foregoing analysis highlights serious problems for each of the current approaches to defining testimonial statements under the Confrontation Clause. The purpose-based approaches are conceptually flawed; they are incapable of reaching an outcome in certain cases. The second approach, focusing on interrogation characteristics like formality, is easier to apply but is also highly manipulable; adopting this approach would likely mean the end of the Confrontation Clause. Therefore, neither of these approaches should be adopted. The third approach, although avoiding the problems of the first and second, is not consistent with the Court’s current doctrine; adopting this approach would substantially broaden the Confrontation Clause vis-à-vis \textit{Davis}.\textsuperscript{261} Furthermore, courts are unlikely to adopt a broad reading of the Clause that requires more witnesses to appear in-court to testify because this would further burden already overwhelmed criminal justice systems.\textsuperscript{262} There is, however, an approach that offers a way to resolve the problems of the first two approaches without creating an overbroad definition of testimonial statements.

A. \textit{The Preface}

Before describing the novel approach, a brief preface is necessary. First, this Section describes the general methodology behind the recommendation. Second, a very brief justification for an objective theory of purpose is offered. This theory helps to support the new approach that will be described below.

\textsuperscript{260} See \textit{Ross}, \textit{supra} note 154, at 404-07.
\textsuperscript{261} See \textit{Friedman}, \textit{supra} note 25.
\textsuperscript{262} See \textit{Ross}, \textit{supra} note 154, at 451.
1. Methodology

The recommendation, which is aimed at judges and practicing attorneys, proceeds with the assumption that it is constrained by current Supreme Court doctrine. The novel approach is totally consistent with the outcomes of the Supreme Court’s contemporary cases. Moreover, this Note accepts the rationales provided by the Court to support its interpretation of the Clause. Accordingly, at minimum, the Sixth Amendment must protect against the historical prosecutorial abuses identified in *Crawford*.

2. Objectivity

When we see a person take a certain action, we often attach significance to this act that does not reflect any attempt to mirror an actual mental state.263 For example, if we see someone with an umbrella in her hand look up at an overcast sky and squint, we might fairly say that her “purpose” in doing so was to assess the weather. We can do this only insofar as there is a public understanding concerning the meaning of certain behavior.264 We cannot determine meaning based on an inaccessible, subjective criterion.265 “[T]he test of whether a man’s actions are the application of a rule is not whether he can formulate it but whether it makes sense to distinguish between a right and a wrong way of doing things in connection with what he does.”266 Furthermore, it is equally senseless to purport to identify “objective” mental states. If we have rejected mental states as an accessible criterion for judging meaning, we have also ruled out the possibility of “objective” mental states. This leads to an important conclusion about the Supreme Court’s Confrontation Clause doctrine.

The objective, primary purpose test applied in *Davis* and *Crawford*, insofar as it represents a coherent rule, cannot be using the word “purpose” to refer to a mental state. Instead, the doctrine may only be rationally understood in so far as it parallels the scenario described above. That is, like a word in a language, a “purpose” is based on an identifi-


264. For a more thorough account of the nature of rule following, see generally *Saul A. Kripke, Wittgenstein on Rules and Private Language* (1982) (purporting to outline an argument against private languages based in Wittgenstein’s *Philosophical Investigations*); *Wittgenstein supra* note 1, § 201 (observing that no course of action could be determined by a private rule, because every course of action could be interpreted to accord with the private rule).


able, social understanding. This is a requirement for one to identify a “purpose” behind a public action.

B. The Proposal

When an out-of-court statement is produced during an interrogation and then offered at a defendant’s trial to prove the truth of the matter asserted, a court should engage in the following three-step analysis.

1. Step One: Determining the Declarant’s Primary Purpose

The court must first determine the declarant’s objective, primary purpose. Based on the objective framework described in Section A of this Part, the inquiry should proceed as follows. First, the court should determine whether a reasonable person in the declarant’s position would have anticipated the prosecutorial use of the statement. Generally, the court should mostly avoid considering any psychological stress on the declarant. Instead, the question should mostly turn on whether the declarant was aware that she was speaking to a government actor. For the most part, this is a good indicator of whether one anticipated the potential for prosecutorial use of a statement.

Second, the court should conduct a similar inquiry with regard to the ongoing emergency consideration and ask whether a reasonable person in the declarant’s position would have anticipated the use of her statement to resolve an ongoing emergency. A broad definition of ongoing emergency should be used. The court should not attempt to draw distinctions, for example, between medical emergencies and violent offenders on the loose. Emergencies should simply be limited to circumstances where a person is in serious danger. Because the question is asked from the declarant’s perspective, the issue turns on the facts as they would have been known to a reasonable person in the declarant’s position.

The third step, determining the “primary” purpose, is a simple prioritization. The ongoing emergency anticipation should always take precedence over the prosecutorial use anticipation. Therefore, there are three possible outcomes from step one: the declarant did not have a primary purpose; the declarant’s primary purpose was to provide a statement for prosecutorial use; or the declarant’s primary purpose was to provide a statement to aid in the resolution of an ongoing emergency.

If the declarant did not have a primary purpose, the analysis is complete, as the statement is nontestimonial. If the outcome is either of the other two results, then the court should continue to the next step.
2. Step Two: Determining the Interrogator’s Primary Purpose

After the court considers the declarant’s purpose, it should review the interrogator’s anticipations in the same manner as done in step one. This will determine the interrogator’s primary purpose. Again, there are three possible results from this inquiry: the interrogator did not have a primary purpose; the interrogator’s primary purpose was to produce evidence for prosecutorial use; or the interrogator’s primary purpose was to aid in the resolution of an ongoing emergency.

Most cases are resolved after step two. If the declarant and the interrogator both had the same primary purpose, then the analysis is complete. Statements are testimonial where both participants’ primary purpose was prosecutorial use, and statements are nontestimonial where both participants’ primary purpose was resolving an ongoing emergency. In addition, the court’s analysis is complete if the interrogator did not have a primary purpose; the declarant’s purpose will determine the result.

Only two cases are not resolved after step two. These are the scenarios in which the declarant’s and the interrogator’s purposes actually “conflict.” It makes no difference which party had which purpose. If one participant had prosecutorial use as his or her primary purpose and the other participant had resolving an ongoing emergency as his or her primary purpose, the court must proceed to step three.

3. Step Three: Determine Whether an Emergency Actually Existed

The final step resolves the cases where the participants’ purposes directly conflict. In these situations, the court should disregard both participants’ purposes and determine whether an ongoing emergency actually existed at the time of the out-of-court interrogation. Although this determination is somewhat vague, it provides an objective method for the court to proceed. When necessary, the court should resolve borderline cases by finding that an ongoing emergency existed. This will mostly limit nontestimonial statements to cases in which a participant had a good faith belief that an emergency existed. On the other hand, where the participants’ purposes conflicted and no ongoing emergency existed, the out-of-court statement will be testimonial under the Confrontation Clause.


C. An Illustration

Applying this approach to the facts of Bryant demonstrates that it produces results consistent with the Supreme Court’s current Confrontation Clause doctrine. Recall that the Detroit police officers were responding to a 911 call when they found Anthony Covington lying on the pavement in a gas station parking lot.\(^{267}\) Covington was bleeding from an apparent gunshot wound to his abdomen.\(^{268}\) When asked about what had happened, Covington told the officers that a man named “Rick” had shot him twenty-five minutes ago.\(^{269}\)

The first step is to determine, from a reasonable person’s perspective, the declarant’s objective, primary purpose. Presumably, the police officers interrogating Covington were in uniform. A reasonable person in Covington’s position would have been aware that a crime had been committed, and thus, under the circumstances, Covington should have anticipated the potential for prosecutorial use of the statement. Next, the court would need to determine whether Covington anticipated that his statements could help resolve an ongoing emergency. This is a tougher question.\(^{270}\) Covington was apparently not pursued when he fled from his attacker. Moreover, the facts do not suggest that Covington was aware of a general danger posed to anyone else. Thus, as Justice Scalia determined, Covington’s objective, primary purpose was to provide the officers with statements for future prosecutorial use.\(^{271}\) The analysis, however, is not complete.

The second step requires the court to determine the police officers’ objective, primary purpose. In this case, the police knew almost nothing about the situation when they began asking Covington questions. More importantly, Covington was apparently bleeding from a gunshot wound. Accordingly, at least with regard to the officers’ initial questions, the objective, primary purpose was to resolve an ongoing emergency.

The third step is aimed at resolving the conflict between Covington’s and the officers’ primary purposes. Because the purposes directly conflict, the court must reject them and determine whether an ongoing emergency actually existed. In this case, the determination is a close decision. Although Covington was not aware of an ongoing emergency, this does not determine the outcome of the third step. Furthermore, it is important not to judge the facts from hindsight—the dangerousness of the situation should be assessed from the risk existing at the time of the interrogation. The fact that no one besides Covington was actually


\(^{268}\) Id.

\(^{269}\) Id.

\(^{270}\) Note that, because Covington’s statements did not address medical treatment for his bleeding abdomen, see id., it is not the relevant emergency for the analysis.

\(^{271}\) Id. at 1168–70 (Scalia, J., dissenting).
harmed does not preclude the possibility of an ongoing emergency. The most salient facts are that the attack occurred only twenty-five minutes earlier and that the attack involved the use of a firearm.\textsuperscript{272} Clearly, when a shooter has already mortally wounded one person, the risk to the public remains relatively high in the hours following the attack. It is reasonable to assume that the shooter would harm anyone preventing escape. In this case, further analysis is not required. The third step of the approach counsels courts to find the existence of an ongoing emergency in borderline cases. Therefore, in \textit{Bryant}, a court would find that an ongoing emergency existed.

The recommended approach would find that the statements at issue in \textit{Bryant} were nontestimonial. This was also the Supreme Court’s holding. In addition, the described approach closely parallels the Court’s reasoning. Both the declarant’s and the interrogators’ purposes were considered. This is consistent with the “combined approach” employed by the Court. Although the recommended approach’s analysis in this case ultimately comes down to whether an ongoing emergency existed, this factor was not considered in isolation. Nevertheless, this is consistent with the Court’s guidance in \textit{Bryant}. In fact, the Court in \textit{Bryant} also determined that an ongoing emergency actually existed at the time of Covington’s interrogation: “At bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington.”\textsuperscript{273} Thus, the recommended approach not only provides a framework that is easier to apply and more predictable, but the approach is also completely consistent with the outcome and language of the Supreme Court’s most recent decision.

\textbf{D. The Justification}

\textit{1. The Advantages}

The recommended proposal has at least four advantages over the existing approaches. First, as illustrated by its application to the facts of \textit{Bryant}, this proposal provides a much simpler analysis for arriving at the results dictated by Supreme Court precedent. Courts are not required to attempt to discern either participant’s subjective mental state. As with the functionalist approach, the proposal uses anticipation as the threshold for a participant’s purpose. This avoids an intensive, all-things-considered review of the facts. In addition, the approach provides a clear way for courts to prioritize “mixed” purposes: the resolution of an ongo-

\textsuperscript{272} Id. at 1150 (majority opinion).
\textsuperscript{273} Id. at 1164.
ing emergency always takes priority over the provision of information for prosecutorial use.

Second, this proposal anticipates and resolves a problem not yet explicitly addressed by the Supreme Court. Neither Davis nor Bryant provide lower courts with any useful guidance for deciding cases where the declarant’s and the interrogator’s purposes conflict. The proposed analysis, however, provides a clear way for courts to decide these cases: determine whether an ongoing emergency actually existed. Further, the proposal recommends that courts decide borderline situations by finding that an ongoing emergency existed. This standard would prevent the third step of the proposal from becoming unworkably vague.

Third, although the proposal provides an analysis that would produce predictable results, the approach is not vulnerable to manipulation. As the Court in Davis recognized, an approach which permitted manipulation would be the end of a defendant’s right to confrontation. Neither the declarant nor the interrogator would have control over whether a statement implicates the Confrontation Clause. Instead, the analysis turns on the anticipations of a reasonable person in the participants’ position and whether an ongoing emergency actually existed.

Finally, the recommended approach entails no dramatic redefinition of the Sixth Amendment. The proposal accepts the scope of the Clause as defined by Crawford, Davis, and Bryant. This avoids the practical concerns that would be implicated by broadening the protections of the Confrontation Clause. The recommendation protects against the historical abuses identified in Crawford but places no further burden on the criminal justice system.

2. An Objection

One potential objection to the recommended approach is that, in some cases, its third step would override a declarant’s primary purpose. Specifically, this step instructs a court to disregard both participants’ purposes where they are in actual conflict. This seems counterintuitive, and it would produce different results than an approach which focuses on the declarant. This objection, however, misunderstands the proposal in two ways.

First, this proposal is not an attempt to change substantive Confrontation Clause jurisprudence. This Note accepts the scope of the Clause as determined by the Supreme Court. An approach that only focuses on the declarant is inconsistent with the Court’s current doctrine. Although Crawford provides at least two definitions of testimonial statements that focus on the declarant’s purpose, these definitions are not applicable to

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out-of-court interrogations. Instead, in Davis, the Court held that where an out-of-court statement is induced by questioning, the ultimate inquiry concerns “the primary purpose of the interrogation.”276 In Bryant, the Court reiterated this rule and explained that this determination necessarily entails a “combined inquiry that accounts for both the declarant and the interrogator.”277 This Note properly leaves the determination of the scope of the Confrontation Clause to the Supreme Court.

Second, there is nothing problematic with the Court’s reasoning. A coherent rule must focus on an objective purpose. In this case, the act at issue is the interrogation. Interrogations involve more than one participant. Although focusing on the declarant is appropriate in the case of volunteered statements, the rationale is not applicable to a statement induced by an interrogator. The interrogator, by eliciting the statement at issue, shares responsibility with the declarant. Accordingly, both of the participants’ purposes are relevant to determining the objective, primary purpose of the interrogation. This provides a sufficient justification for overriding the declarant’s purpose, in rare cases, by determining whether an ongoing emergency actually existed.

V. CONCLUSION

Prompted by the uncertainty following the Supreme Court’s most recent decision on the Confrontation Clause, this Note examines the important issue of how to define testimonial statements produced during out-of-court interrogations under the Sixth Amendment. The analysis describes and evaluates three types of approaches courts have considered to address this question. Ultimately, it concludes that each of these approaches was unsatisfactory in some critical respect. Therefore, a novel three-step approach is described: (1) determine the declarant’s primary purpose; (2) determine the interrogator’s primary purpose; and (3) determine whether an emergency actually existed. Moreover, in outlining the new approach, this Note describes how courts can avoid the mixed purposes problem and other conceptual flaws related to purpose-based approaches. While remaining completely consistent with current Supreme Court precedent, this practical approach dramatically simplifies the analysis. The proposal, if accepted by courts, would help secure criminal defendants’ right to confrontation under the Sixth Amendment by producing predictable results which are not subject to manipulation by government interrogators.

276. Davis, 547 U.S. at 822 (emphasis added).
277. Bryant, 131 S. Ct. at 1160-61.