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INTRODUCTION

Recent judicial and scholarly treatment of the Confrontation Clause[1] pays remarkably little attention to confrontation's purposes. This would not be particularly problematic if the confrontation right reduced to a mechanical rule. If, for example, the clause meant simply that out-of-court statements are inadmissible at trial whenever the declarant[2] is not on the stand and subject to

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1. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

2. Some preliminary terminology: A statement is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." FED. R. EVID.

cross-examination, courts could easily administer the right without knowing anything of its purposes. But the clause has never been reduced to such a clean-cut categorical, and courts administering the right have generally had to balance competing interests rather than adjudicate by formula.[3]

The problem with interest balancing is that it risks being unprincipled, and that problem has plagued the U.S. Supreme Court's confrontation jurisprudence. The bulk of that jurisprudence owes to the twenty-four-year reign of *Ohio v. Roberts*,[4] under which a hearsay statement could be introduced at trial whenever the declarant was unavailable and the statement had "adequate indicia of reliability."[5] Because there is no principled way to determine whether a statement has adequate indicia of reliability,[6] the *Roberts* test produced inconsistent results.[7]

801(a). A declarant "is a person who makes a statement." *Id.* R. 801(b). And hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* R. 801(c).

3. The lines of the U.S. Supreme Court's confrontation jurisprudence have always been blurry, not bright. The Court's "leading early decision" on the clause recognized that

> general rules of law . . . , however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. . . . The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

Mattox v. United States, 156 U.S. 237, 243 (1895). (The "leading early decision" characterization comes from *Crawford v. Washington*, 541 U.S. 36, 57 (2004).) This is an endorsement of cost-benefit balancing: when the costs of confrontation far outweigh its potential benefits, the right must give way.

4. 448 U.S. 56 (1980). Twenty-four years constitutes a "bulk" because the clause was not incorporated against the states until 1965, *see* Pointer v. Texas, 380 U.S. 400, 406 (1965), and most cases considering the clause have been decided since that time.

5. 448 U.S. at 66 (internal quotation marks omitted). To meet this standard, a statement had to fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." *Id.*

6. *See, e.g.*, *Crawford*, 541 U.S. at 40-42, 65-67. In *Crawford*, the lower courts applied the *Roberts* test. The state trial court found several reasons why the declarant's statement was reliable. *Id.* at 40. The intermediate appellate court applied a nine-factor test—emphasizing different concerns than the trial court—to conclude that the statement was unreliable. *Id.* at 41. And the state supreme court in turn found the statement reliable, applying still a different reliability test than the two lower courts used. *Id.* at 41-42. As the U.S. Supreme Court observed in reversing that decision and rejecting the reliability-focused approach, "[This] case is . . . a self-contained demonstration of *Roberts*' unpredictable and inconsistent application." *Id.* at 66. "Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the [state intermediate appellate court] below is representative." *Id.* at 63; *see also id.* at 65-67.

7. *Id.* at 63 ("The [*Roberts*] framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations."). The Court observed further that in considering an endless array of factors, "Some courts wind up attaching the same significance to opposite facts." *Id.* The Court gave three examples. First: one court found a statement more reliable because it was a "detailed" accusation, whereas another court found a statement more reliable because it was "fleeting." *Id.* (citations and internal quotation marks). Second: one court found a statement more reliable because the declarant

The Court has recently tried to resolve the problems of unprincipled approaches and inconsistent results in two cases, *Crawford v. Washington*[8] and *Davis v. Washington*.[9] Those cases discard the *Roberts* test (at least as concerns the Confrontation Clause), and hold that the clause (1) applies only to "testimonial hearsay"[10] and (2) bars admission of such hearsay unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.[11]

Though in *Crawford* the Court offered examples of "core" testimonial statements,[12] it did not comprehensively define the term "testimonial."[13] In *Davis* the Court again declined to define testimonial and instead offered a test to apply to a narrow class of statements—those resulting from police interrogation in response to recent or current emergencies—to determine when such statements are testimonial:

> 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

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was in custody and criminally charged, but another court found a statement more reliable because the witness was neither in custody nor a suspect. *Id.* And third: one court found a statement more reliable because it was made "immediately after" the events at issue, but that same court found—in another case decided that same year—that a statement was more reliable because it was made two years after the events at issue. *Id.* (citations and internal quotation marks omitted).

8. 541 U.S. 36. I do not delve into *Crawford*'s facts much in this Note, but here they are for background (*see id.* at 38-41): Defendant Michael Crawford stabbed a man who he claimed tried to rape his wife, Sylvia Crawford. Sylvia witnessed the stabbing. Michael was arrested on the night of the stabbing, and he and Sylvia were taken to the police station where they were given *Miranda* warnings and were separately interrogated. Michael claimed self-defense. Sylvia's account arguably conflicted with Michael's. Sylvia did not testify because of the state marital privilege, and the trial court allowed the State to introduce a tape-recording of her statements to police "as evidence that the stabbing was not in self-defense." *Id.* at 40. Michael was convicted. The U.S. Supreme Court concluded that the admission of the tape-recorded statements violated Michael's right of confrontation because he had no opportunity to cross-examine Sylvia. *Id.* at 68.

9. 547 U.S. 813 (2006). I summarize and analyze *Davis* in Part I, *infra*.

10. *Crawford* overruled *Roberts* at least as *testimonial* statements are concerned. 541 U.S. at 68-69. *Davis* held that the clause is concerned only with testimonial *hearsay*. 547 U.S. at 823-24.

11. *Crawford*, 541 U.S. at 68.

12. *Id.* at 51-52. "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." *Id.* at 68; *see also id.* at 51-52. *Davis* augments the last clause of that quotation, holding that some statements made during police interrogations are nontestimonial. *See infra* text accompanying note 14.

13. 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

> is to establish or prove past events potentially relevant to later criminal prosecution.[14]

So articulated, this test ultimately (though unintentionally) seems to return confrontation jurisprudence to an indeterminate *Roberts*-like interest-balancing regime. It has not taken long (as a quick survey of post-*Davis* lower court opinions shows) to learn that there is no easy way to define an "ongoing emergency"—the part of the test on which lower courts have focused. Thus, courts evaluating statements arising from recent or current emergencies have been left to balance an array of factors and decide whether those factors tip toward the existence or nonexistence of an ongoing emergency. The main difference between the *Roberts* and *Crawford*/*Davis* regimes, then, is that instead of passing on an amorphous concept of reliability, courts now must pass on the amorphous concept "testimonial."

Compounding the problematic indeterminacy of "testimonial" is the Court's failure to use confrontation's purposes to guide this new interest-balancing regime. The *Crawford* Court seemed to believe that it was erecting a formal and mechanical rule whose application does not turn on confrontation's purposes. Indeed, the Court seemed to think that those purposes are unimportant to protecting the right since confrontation "is a procedural rather than a substantive guarantee,"[15] and if the required procedure is clear enough then the Court's job is done.

The required procedure is not clear after *Davis*, however, since the concept of "testimonial" is unclear and as a result it is unclear when the right applies. Determining whether a statement is testimonial requires judgment, and one can exercise good judgment only if one knows what he is judging and what purposes his judgment is meant to serve. In braving this new path in *Crawford* and *Davis* the Court has said almost nothing of confrontation's purposes, and as a result its confrontation jurisprudence is, once again, adrift and rudderless.

We are left then without an easily administrable test and without a purposive framework to guide that test. These are serious problems. This Note addresses them. My broader goal is to show the need to craft an administrable approach to protecting the confrontation right and the need to consider (and the usefulness of considering) confrontation's purposes in crafting that approach. My narrower goal—and the means by which I hope to meet my broader goal—is to suggest a solution to a particular problem that has divided lower courts and which lays bare some difficulties in the *Davis* test. That problem—which I will call the violent-perpetrator-at-large problem—is captured in this question: *When an allegedly violent perpetrator is at large, is there an "ongoing emergency" that renders a declarant's statements to law enforcement agents nontestimonial?* I conclude that confrontation's purposes, the interest in

14. 547 U.S. at 822.

15. *Crawford*, 541 U.S. at 61.

administrability, and the *Davis* test itself[16] suggest that the answer to this question is generally "no" and that a court must evaluate the statements themselves (and in some cases the questions that led to such statements and—when necessary—the circumstances surrounding the statements) to determine whether the statements are given primarily to provide evidence for prosecution or are instead given primarily to seek emergency aid. I also conclude that most courts that have confronted this issue have wrongly focused on the existence or nonexistence of an emergency instead of focusing on the statements. A focus on emergency risks being unprincipled and difficult to administer, and tends to disserve *Davis* and confrontation's purposes. Arriving at these conclusions takes some steps. I begin with *Davis*.

I. THE JURISPRUDENTIAL FRAMEWORK: *DAVIS* AND "ONGOING EMERGENCY"

In *Davis v. Washington*, the Supreme Court reviewed two consolidated cases, *State v. Davis*[17] and *Hammon v. State*.[18] In the former, declarant Michelle McCottry called 911 about a domestic disturbance.[19] The 911 operator asked, "What's going on?" and McCottry answered, "He's here jumpin' on me again."[20] The operator asked McCottry the name of her attacker and whether he was using weapons or had been drinking. McCottry identified her ex-boyfriend Adrian Davis as her assailant and said that he was using fists, had not been drinking, "had just r[un] out the door" after hitting her, and was leaving in his car.[21] The operator told McCottry that police were coming and that they would first check the area for Davis then come talk to her. Officers arrived within four minutes to find McCottry in a "shaken state" with "fresh injuries on her forearm and her face," as she frantically gathered her children and belongings to leave the home.[22] Davis was soon apprehended and was later tried for violating a domestic no-contact order. McCottry did not testify. The two responding officers testified but could not say who or what caused

16. Despite my criticisms of *Davis*, I work within its framework for two reasons. First, this Note is a practical piece, meant to aid courts. Practicality requires me to work within the existing framework. Second, I think the Court's recent move to strengthen the confrontation guarantee is commendable. I agree that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" Coy v. Iowa, 487 U.S. 1012, 1017 (1988) (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)). I believe, however, that the current approach fails to resolve the concerns of consistency, administrability, and principle that the Court has tried to resolve. I hope to suggest how to begin meeting those goals.

17. 111 P.3d 844 (Wash. 2005) (en banc).

18. 829 N.E.2d 444 (Ind. 2005).

19. 547 U.S. at 817. Rather than providing a citation to every fact I summarize, I point the reader to pages 817-19 in the *Davis v. Washington* opinion, which contain the facts. I will use this same method when summarizing other opinions.

20. *Id.* at 817.

21. *Id.* at 818 (internal quotation marks omitted).

22. *Id.*

McCottry's injuries. To identify the injurer, the State introduced the tape-recorded 911 call, over Davis's objection. The jury convicted him.

In *Hammon*, two officers arrived late at night to Hershel and Amy Hammon's home, in response to a reported disturbance.[23] The officers found a frightened-looking Amy on the porch. Amy said nothing was the matter and allowed them in the home. Hershel—already inside—told the officers that "he and his wife had been in an argument but everything was fine now and the argument never became physical."[24] One officer went in the living room to talk to Amy, while the other stayed with Hershel. Hershel tried to join Amy's conversation but was prevented from doing so. Amy filled out and signed a battery affidavit, accusing Hershel of beating her, and Hershel was later tried for domestic battery and violating his probation. Amy did not testify but—over Hershel's objection—the affidavit was admitted and the interviewing officer testified as to her statements that she and Hershel got in an argument, that it became physical, and that he broke several items, shoved her, and punched her in the chest.

The Supreme Court offered a test for determining whether statements of the sort before it in *Davis* and *Hammon* are testimonial:

> 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.[25]

The Court concluded that McCottry's statement identifying Davis as her assailant was nontestimonial because "the circumstances of [the] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency."[26] The Court emphasized four differences between the interrogation of McCottry and the interrogation of Sylvia Crawford (the declarant in *Crawford*).[27] First, "McCottry was speaking about events *as they were actually happening*," whereas Sylvia was questioned "hours after the events she described had occurred."[28] Second, "any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency"; her call to 911 "was plainly a call for help against bona fide physical threat."[29] Third, "the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary

23. For the facts of *Hammon*, see *id.* at 819-21.
24. *Id.* at 819 (internal quotation marks omitted).
25. *Id.* at 822.
26. *Id.* at 828.
27. For a summary of *Crawford*'s facts, see *supra* note 8.
28. *Davis*, 547 U.S. at 827.
29. *Id.*

to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past."[30] It was important, for example, to learn the identity of the assailant "so that the dispatched officers might know whether they would be encountering a violent felon."[31] Fourth, "the difference in the level of formality between the two interviews is striking": whereas Sylvia was "responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers," McCottry's answers were frantic and made over the phone while she was in a nontranquil, unsafe environment.[32] McCottry "simply was not acting as a *witness*; she was not *testifying*"—"[n]o witness goes into court to proclaim an emergency and seek help."[33]

The Court concluded that Amy's statements to the interviewing officer were testimonial. During Amy's interview "[t]here was no emergency in progress" and "no immediate threat to [Amy's] person."[34] When the officer elicited the statements, "he was"—in contrast to the 911 operator in *Davis*—"not seeking to determine . . . 'what is happening,' but rather 'what happened.'"[35] The interview—though not as formal as it might have been—"was formal enough": it was "conducted in a separate room, away from" Hershel, who was "actively separated" from Amy.[36] In all important respects, Amy's statements were like Sylvia Crawford's: the statements "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed" and the interview took place "some time after the events described were over."[37] "Such statements under official interrogation are an obvious substitute for live testimony . . . ."[38]

The functional essence of *Davis* is that statements are testimonial when made primarily for the purpose of providing evidence for a criminal prosecution. The point of government-side testimony in a criminal case is to secure a conviction—by identifying the defendant as the perpetrator or accusing him in some other way and describing what criminal act he committed—and when a declarant's out-of-court statements are given for that purpose, those statements substitute for in-court testimony and implicate the Confrontation Clause. Statements made to seek aid for an ongoing emergency are not primarily directed toward providing evidence for prosecution and are thus nontestimonial.

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30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 828 (internal quotation marks omitted).
34. *Id.* at 829-30.
35. *Id.* at 830.
36. *Id.*
37. *Id.*
38. *Id.*

The last paragraph's distillation of *Davis* leaves an important question unanswered: What does it mean to evaluate the "purpose of an interrogation"? Put differently, when evaluating whether a statement is testimonial—that is, whether it is aimed mainly at securing a conviction or instead at meeting an ongoing emergency—do we look to the interrogator's motives, the interrogator's questions, the declarant's intention, the declarant's answers, the surrounding circumstances (such as the emergency itself), or a combination of these factors?[39] To operationalize *Davis* we must answer these questions. For "core" testimonial statements—testimony at a preliminary hearing, before a

39. There is lively debate over whom and what to focus on when evaluating whether a statement is testimonial. This debate has both a normative dimension (regarding whom and what is best to focus on to evaluate whether a statement is testimonial) and a descriptive dimension (concerning whom and what *Davis* actually focuses on). On the normative question see, for example, Richard D. Friedman, Crawford, Davis, *and* Way *Beyond*, 15 J.L. & POL'Y 553, 556 (2007) (favoring an approach "that asks what the anticipation would be of a reasonable person in the position of the declarant"); Robert P. Mosteller, *Softening the Formality and Formalism of the "Testimonial" Statement Concept*, 19 REGENT U. L. REV. 429, 448 (2007) (contending that "[i]f a single perspective must be chosen, that of the investigative questioner might be the most appropriate"). On the descriptive question see, for example, Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 341 & n.13 (2006) (opining that the *Davis* test focuses on the interrogator's purpose rather than the declarant's); Thomas M. Forsyth III, *Just Don't Say You Heard It from Me: Bridging the* Davis v. Washington *Divide of Indistinguishable Primary-Purpose Statements*, 35 HASTINGS CONST. L.Q. 263, 275-76 (2008) ("[T]he [*Davis* Court's] focus was on the declarant's intent, not the agent's statements or intentions."); Friedman, *supra*, at 560 ("[I]t seems the *Davis* Court agreed" that, "in determining whether a statement is testimonial, the witness' perspective should be the crucial one."); Lisa Kern Griffin, *Circling Around the Confrontation Clause: Redefined Reach but Not a Robust Right*, 105 MICH. L. REV. FIRST IMPRESSIONS 16, 16 (2006) (concluding that *Davis* focuses on the interrogator's purpose rather than the declarant's); Roger W. Kirst, *Confrontation Rules After* Davis v. Washington, 15 J.L. & POL'Y 635, 641 (2007) ("The most significant factor that explains why the outcome in *Davis* was different from the outcome in *Hammon* is whether the speaker was facing an ongoing emergency at the time [she made the statement at issue]."); Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 280 (2006) ("The *Davis* opinion shifted the focus from the declarant's state of mind to the officers' purpose in questioning the declarant."); Mosteller, *supra*, at 447-48 (suggesting that *Davis* favors focusing on the interrogator, while recognizing that the Court equivocates on the issue). In addition to these scholarly discussions, several courts (confronting both the normative and descriptive question) have focused their *Davis* analysis on neither the declarant nor the interrogator but instead on the existence or nonexistence of an emergency. *See infra* Part III. For a powerful argument that takes a somewhat different approach but also focuses neither on the declarant nor on the interrogator, see Jeffrey L. Fisher, *What Happened—and What Is Happening—to the Confrontation Clause?*, 15 J.L. & POL'Y 587, 590-91 (2007) (defending an approach—on both normative and descriptive grounds—that distinguishes between whether a statement "describe[s] ongoing events" and thus is nontestimonial or instead "narrate[s] past occurrences" and is therefore testimonial).

Though I contend in this Note that the best view—normatively and descriptively—focuses on the declarant and the purpose for which the declarant makes his statements, I concede that the issue of whom and what to focus on is heavily contested and that, at least on the descriptive question, I stand athwart the probably dominant view.

grand jury, or at trial[40]—these questions pose few problems since the interrogator and declarant both understand that the questions and answers, in intent and effect, help primarily (often solely) to prove past facts for the purpose of convicting a defendant. Regardless of which player's (interrogator's or declarant's) statements or whose intention we focus on, the answer is the same: the statements produced are testimonial. With out-of-court statements made in response to recent or current emergencies, however, the motives and understandings of interrogator (if there is one) and declarant may differ or be more equivocal; the statements might seem more or less testimonial depending whom or what we focus on. So what ought we to focus on to determine the purpose of the interrogation?

The interrogator's motives or questions—or both—might seem a likely focal point for evaluating an interrogation's purpose.[41] An interrogator's questions (which will tend to reflect the interrogator's motives) tend to dictate the nature of the responses and thus often will indicate the testimonial or nontestimonial nature of those responses and thus the purpose of the interrogation. If, for example, the interrogator asks only about facts relevant to potentially criminal past acts rather than about an alleged perpetrator's current whereabouts or the danger the declarant currently faces, the answers produced are likely meant primarily to aid a criminal prosecution rather than to resolve an ongoing emergency, and thus will be testimonial.[42]

Despite the appeal of focusing on the interrogator, however, *Davis* rejects an approach that focuses solely on the interrogator and it does so for good reason. "[I]t is in the final analysis the declarant's statements," the Court noted, "not the interrogator's questions, that the Confrontation Clause requires us to evaluate."[43] Thus, statements can be testimonial even when there is no interrogator but only a listener—say, when a declarant says something, of his own initiative, to a police officer who has asked no questions.[44] That makes sense and is a good reason not to focus solely on the interrogator, since statements made without police prompting can be made unequivocally to aid criminal prosecution (or unequivocally to seek emergency aid), and it would be an odd test that has nothing to say about such unsolicited statements. Another

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40. Crawford v. Washington, 541 U.S. 36, 51, 68 (2004).

41. *See* Bradley, *supra* note 39, at 341 & n.13; Griffin, *supra* note 39, at 16.

42. Moreover, as discussed in the next Part, the Confrontation Clause is meant in part to limit governmental abuse, and focusing on the interrogator's questions or motives may help to uncover government manipulation or falsification. *See infra* Part II; *cf.* Griffin, *supra* note 39, at 19 (suggesting that "aversion to inquisitorial methods and concern about government manipulation of out-of-court statements" lie behind the clause).

43. *Davis*, 547 U.S. at 822 n.1.

44. *Cf.* Myrna S. Raeder, *Domestic Violence Cases After* Davis*: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL'Y 759, 768 (2007) ("Looking only at the investigatory function could arguably justify admitting the first sentence of every [911] conversation, because the caller always has to explain the nature of the incident in order for the operator to determine how to resolve the perceived emergency.").

reason not to focus only on the interrogator is that an interrogator's questions do not always dictate the nature of the responding statements. Answers may stray far from the questions asked. And even when questions are asked, those questions might not illuminate the interrogation's purpose, such as when the interrogator asks an open-ended question, like "What happened?" And even if the questions asked were a good signal of the nature of answers given, they are often only a second-best signal of an interrogation's purpose. The statements themselves will typically be most probative. After all, the answers are the evidence that prosecutors try to introduce in court, so the content and purpose of such statements are what are important. There is, it seems, no good reason to stop at the questions when the answers can be evaluated.[45]

If both *Davis* and good sense preclude focusing solely on the interrogator—be it his questions or motives—and prescribe that we evaluate the statements themselves, ought we to focus solely on the declarant, and only on his statements? That does not make sense either and *Davis* does not command that. Though *Davis* requires us "in the final analysis" to evaluate the declarant's statements, to understand the meaning of those statements it is often important to know the questions and the purpose of the questions (i.e., the circumstances that gave rise to the questions). For example, if a declarant's statement describes the clothing an alleged perpetrator wore when committing a crime, the statement may aim primarily to identify the perpetrator to prepare for prosecution or it may aim primarily to help find and apprehend a dangerous at-large assailant. We cannot know, in such a case, without knowing the question or, perhaps, the circumstances surrounding the interrogation (is it a 911 call, is the declarant hiding from an assailant and calling for help, is it a stationhouse interview, and so forth), or sometimes both the question and circumstances.

It seems then that given the aim of determining whether an interrogation's purpose is primarily to provide evidence for prosecution or instead primarily to meet an ongoing emergency, we ought to look *first* at each of the declarant's statements and see if the statements reflect a primary purpose. *Davis* says that the statements are ultimately determinative, and for good reason: The statements themselves are what will be introduced at trial and they are in most cases likely to reveal the nature of the interrogation (by virtue of whether the statements are primarily accusatory or primarily a plea for help). And testimony is, after all, "[a] solemn declaration or affirmation made for the purpose of . . . proving some fact"[46] and thus is ultimately about what the declarant—rather

45. The same can be said against stopping at police/interrogator motives. Police/interrogator motives—like police/interrogator questions—will not necessarily dictate the nature of the declarant's statements. Since those statements are what are at issue in court, it is important to evaluate them. Moreover, police motives will likely not tell us much about the nature of unsolicited statements. We must look to the statements themselves—and perhaps also to the circumstances that caused them—to understand the purpose of those statements.

46. Crawford v. Washington, 541 U.S. 36, 51 (2004) (quoting 2 NOAH WEBSTER, AN

than the interrogator—does. When statements do not by their terms demonstrate themselves to be clearly testimonial or nontestimonial, we ought to look *second* to the questions asked and (if that is not enough to reveal the purpose) to surrounding circumstances, as a way to shed light on the declarant's purpose in making his statements. (I suggest moving to questions before circumstances because questions may often be enough to reveal a statement's purpose, and looking at questions keeps the inquiry relatively narrow and focused. "Circumstances" may encompass a lot, and it keeps the inquiry simple to turn to what is easy to identify, which are the questions asked.) If we go from statements to questions to (if necessary) surrounding circumstances we will take all relevant and necessary objective factors into account and arrive at the underlying purpose of interrogation. We will in this way come to *Davis*'s functional essence—a determination of whether a statement is made primarily to provide evidence in a criminal prosecution or instead to address an emergency.

II. CONFRONTATION'S PURPOSES

Having flushed out *Davis*'s functional essence (at least my best interpretation of it), I consider next whether the *Davis* test serves the goals underlying the Confrontation Clause. This requires us first to pause on what courts and commentators too rarely consider: confrontation's purposes.

A. *Why Do We Have a Confrontation Clause?*

It is not easy—probably not possible—to identify completely and confidently the Confrontation Clause's intended purposes. "The origins of the Clause are famously obscure"[47] to the point that "[t]he exact intent of the framers of the Constitution in providing [the right of confrontation] is probably undiscoverable."[48] But the universe of potential purposes is not too large and we can identify with some assurance the main goals the clause plausibly may serve, which I think distill to four.

AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (internal quotation marks omitted).

47. Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1022 (1998).

48. Frank T. Read, *The New Confrontation—Hearsay Dilemma*, 45 S. CAL. L. REV. 1, 6 (1972); *see also* California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring) ("History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause."); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 569 n.46 (1998).

First, confrontation aids the search for truth.[49] It does so in several ways. First, confrontation brings a witness into court and allows the fact-finder to view him and his demeanor and thus judge his credibility.[50] Second, confrontation brings the witness before the accused, which can help because "[a] witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.'"[51] At least some people find it "more difficult to tell a lie about a person 'to his face' than 'behind his back,'" and when told face to face, a lie may "be told less convincingly."[52] Third, confrontation allows the accused to cross-examine the witness, which can help confirm the truthfulness—or demonstrate the falsity—of the witness's testimony by testing consistency, knowledge, veracity, and the like.[53] Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested"[54]—the "greatest legal engine ever invented for the discovery of truth."[55] Fourth, in addition to separating truth from lie, confrontation helps ensure that the fact-finder hears "'the *whole* truth.'"[56] Even if a witness is not lying, he may be laboring under a misconception that adverse questioning can uncover. Cross-examination can "invite the witness herself to supplement, or clarify, or revise the story"[57] in a

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49. This is, of course, the purpose most commonly ascribed to the clause. Disagreement on this point seems to turn on whether confrontation provides a procedural or substantive guarantee. *Roberts* took a substantive view (i.e., is the statement reliable?). *Crawford* takes a procedural one. 541 U.S. at 61 ("[T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee."); *see also* W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After* Crawford v. Washington*: Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1, 2-3 (2005).

50. *Green*, 399 U.S. at 158; Mattox v. United States, 156 U.S. 237, 242-43 (1895) (noting that confrontation allows the judge or jury to "personal[ly] examin[e]" the witness—to "look at him, and judge by his demeanor upon the stand . . . whether he is worthy of belief.").

51. Coy v. Iowa, 487 U.S. 1012, 1019 (1988) (quoting ZECHARIAH CHAFEE, THE BLESSINGS OF LIBERTY 35 (1956)).

52. *Id.* at 1019.

53. *See, e.g.*, *Green*, 399 U.S. at 158.

54. Davis v. Alaska, 415 U.S. 308, 316 (1974).

55. 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940); *see also* Pointer v. Texas, 380 U.S. 400, 404 (1965) ("[P]robably no one . . . would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." (citing 5 WIGMORE, *supra*)).

56. Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 689 (1996) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *372-73). A goal of ascertaining the whole truth goes beyond a desire to ensure that witnesses are not lying, and encompasses as well a desire to clear up any misunderstandings on what the facts are.

> [B]y simply allowing a defendant to hear a witness's story, the clause may help an innocent defendant to figure out where the witness might be mistaken (perhaps in all good faith). . . . [U]nless a defendant knows what the government is alleging, how can he show he didn't do it, or show where the government went wrong?

Id.

57. *Id.*

way that is not possible when the witness is not in court. Fifth, confrontation places an accuser in a setting of seriousness and solemnity—in court, under oath, at a public trial, in the presence of the judge, jury, and accused—thus impressing upon the witness the significance of what he may say. Such seriousness is typically not present in the same way when an accuser speaks outside of court.[58]

Second, confrontation checks potential abuse by government. A chief aim of the clause was to combat the "flagrant inquisitorial practices" of the civil law system, which permitted "use of *ex parte* examinations as evidence against the accused" without the benefit of confrontation.[59] It is easy to imagine the manipulation that can occur through ex parte examination (who knows what happens behind those closed examination doors?) and what further manipulation might occur in court when a clever prosecutor can introduce resulting statements secure in the knowledge that the defendant will often be unable to convincingly rebut them absent cross-examination. The point of the Confrontation Clause—to paraphrase Justice Robert H. Jackson's words in another context[60]—that zealous interrogators and prosecutors do not always grasp is not to deny government the use at trial of probative witness statements. Rather, its protection consists in requiring that those statements be made at trial, so that the fact-finder may judge how probative those statements are and whether those witnesses are worthy of belief, instead of having the probativeness of those statements judged (and perhaps manipulated) by the interrogator or prosecutor engaged in the competitive enterprise of convicting defendants.

Third, confrontation promotes fairness.[61] "'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his

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58. *See, e.g.*, *Green*, 399 U.S. at 158 ("Confrontation . . . insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury . . . ."); Amar, *supra* note 56, at 688-89 ("[T]he Confrontation Clause may discourage deliberate perjury by prosecution witnesses, who might be ashamed to tell their lies with the defendant in the room, and afraid that their lies will not stand up to open scrutiny.").

59. Crawford v. Washington, 541 U.S. 36, 50-51 (2004); *see also id.* at 43-45 (describing the use of ex parte affidavits in the English civil law system).

60. In *Johnson v. United States*, 333 U.S. 10 (1948), Justice Jackson famously wrote the following with respect to the Fourth Amendment's requirement that a search warrant be issued by a neutral, detached magistrate:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14.

61. AKHIL REED AMAR, THE BILL OF RIGHTS 116 (1998); *see* Pointer v. Texas, 380 U.S. 400, 405 (1965) ("[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.").

defense . . . are basic in our system of jurisprudence,'" and these rights at the very least include "'a right to examine the witnesses against him.'"[62] The right to confront and cross-examine witnesses "is critical for ensuring the integrity of the fact-finding process,"[63] and affords the trial some symmetry, allowing the defendant the same opportunity as the government to present his case and rigorously test his opponent's.[64] The interest in fairness extends beyond the quest for truth and bears on the integrity of the process itself and safeguarding that integrity with the best procedures we know.

Fourth, confrontation helps promote the appearance of fairness.[65] As the previous paragraph suggests, "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"[66] "The phrase still persists, 'Look me in the eye and say that.'"[67] "Given these human feelings of what is necessary for fairness, the right of confrontation 'contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.'"[68] Confrontation thus may encourage respect for the justice system by showing its fairness, transparency, and dedication to truth and to limiting governmental abuse.

If this discussion of confrontation's purposes is sound, then those purposes should help guide the analysis of whether a given statement is testimonial, and should augment any test that is fashioned to administer the confrontation right.[69] In bringing this Subpart to a close, I add some thematic considerations that synthesize, to some extent, what I have covered: First, all four of confrontation's purposes suggest a strong preference for in-court testimony over any alternative. Concerns of fairness and the assurance that the government has not profited from manipulation especially favor bringing a declarant into court; seeing a witness himself present his evidence is generally more reassuring than the government's say-so that the evidence is reliable and was collected fairly. Second, literal face-to-face confrontation is, as a general proposition, crucial to the guarantee, not incidental. There is something about in-court testimony that we believe aids the quest for truth, and that

62. *Pointer*, 380 U.S. at 405 (quoting *In re* Oliver, 333 U.S. 257, 273 (1948)).

63. Kentucky v. Stincer, 482 U.S. 730, 736 (1987).

64. *See* AMAR, *supra* note 61, at 116; *see also* Randolph N. Jonakait, *"Witnesses" in the Confrontation Clause:* Crawford v. Washington, *Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155, 157 (2006) ("[C]onfrontation is part of a bundle of rights that help to guarantee an accused the ability to present a defense . . . .").

65. Coy v. Iowa, 487 U.S. 1012, 1017 (1988) ("The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality.").

66. *Id.* (quoting *Pointer*, 380 U.S. at 404).

67. *Id.* at 1018.

68. *Id.* at 1018-19 (quoting Lee v. Illinois, 476 U.S. 530, 540 (1986)).

69. An interest-balancing test must be guided by something, and a right's purposes are a sensible, nonarbitrary guide since they are (hopefully) the root of the test to begin with.

constitutionally ratified preference deserves respect. Third, despite the preference for bringing a declarant into court, we must remember that confrontation is a means, not an end. If admitting a particular statement would not serve any of confrontation's goals, that ought to incline us to find the statement to be testimonial (since such a finding increases the barriers to admitting the statement). Analogously, if admitting a particular statement would serve confrontation's goals, we ought to be inclined to lower the barriers to its admission by finding it to be nontestimonial. Confrontation serves both procedural and substantive ends, and we should keep this in mind in crafting an administrable jurisprudence.

B. *Does the* Davis *Test Serve Confrontation's Purposes?*

As I will now argue, there is no necessary connection between the *Davis* test and confrontation's purposes. Thus, if the *Davis* test is to serve confrontation's purposes, we must keep those purposes in mind when administering the right and be sure to tether *Davis*'s functional essence to confrontation's goals. I consider each purpose in turn to see how we may tether those goals to *Davis*.

First, it is unclear what effect an ongoing emergency has on the search for truth, but an emergency can aid that search. When the declarant faces an emergency at the time she makes her statements, the emergency may help focus her mind, encourage honesty (why lie when it may hinder resolution of the emergency you currently face?), and decrease the opportunity for considered falsification. These considerations suggest that such statements are the sort we would want introduced at trial, and they accordingly counsel in favor of finding such statements to be nontestimonial. At the same time, however, one who faces an emergency may be an unreliable conveyor of truth (because of stress and the like), and if that person is not on the stand it is difficult to check her perception and learn whether she is reliable. The question whether the existence of an ongoing emergency aids the search for truth is thus empirical and can cut in different directions depending on the case. But we can say with some confidence that when the declarant does not herself face an ongoing emergency, we do not have—or have only to a diminished extent—the same mind-focusing, truth-encouraging, spur-of-the-moment quality that we tend to think aids the quest for truth. Any judgment concerning whether a statement is testimonial should keep that consideration in mind.

Second, it is also unclear which way the concern of government manipulation cuts, but an emergency can help to reduce the chance for government abuse. When an emergency is in progress, the potential for abuse is nowhere near as great as it is with, say, ex parte affidavits; much is spontaneous and dictated by the exigencies surrounding the event rather than by the questions an interrogator asks. And in the absence of an emergency—for example, in *Crawford* itself, which involved stationhouse interrogation—the

government likely controls the situation and can manipulate it to produce statements helpful to prosecution.

Despite the decreased potential for manipulation when there is an emergency, however, there is a risk under the *Davis* test that officers could mask the interrogation's purpose by focusing their questions in terms of meeting an ongoing emergency, knowing that the answers elicited will often be accusatorial in nature. The ongoing emergency test could thus become a shield that interrogators use to make all statements admissible.[70] It is not unrealistic that government officers would do this. Consider as an analogy that *Miranda* warnings have arguably taken on the same effect, whereby the mere giving of the warnings insulates from Fifth Amendment challenge.[71] Will resourceful interrogators adapt to swing *Davis* in their favor, if given the chance? It is possible, but courts can reduce this risk by making sure that the statements—regardless of the questions—are given for the bona fide purpose of meeting an emergency and are dictated by the emergency, rather than manipulated by a clever interrogator. It will be particularly difficult for an interrogator to manipulate the answers when the declarant herself is part of the emergency and faces danger. Properly confined, the ongoing emergency test can limit government abuse.

Third—and *fourth*—it is difficult to know which way concerns of fairness and the appearance of fairness cut since these matters are fact-bound and seem to turn on the sympathies of the beholder. In one case it may seem eminently unfair that a likely guilty batterer is let off simply because his alleged victim is too scared to testify. In another it may seem exactly right that a defendant goes free when his accuser refuses to come to court and look him in the eye while accusing him. Accordingly, it does not seem that considerations of fairness and the appearance of fairness offer any general limiting principles. Connecting the concerns of fairness and the appearance of fairness to the *Davis* test—at least in a way that can be easily administered by courts—is probably impossible. The best we can do, I think, is to focus on the first two purposes—ascertaining truth and limiting government abuse—since fidelity to those two purposes can aid fairness and its appearance by producing consistent, predictable, principled, transparent results. The ongoing emergency test best serves confrontation's goals by confining nontestimonial statements to situations in which the declarant seeks help against an emergency and his statements reflect that purpose.

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70. *See, e.g.*, Raeder, *supra* note 44, at 768.

71. *See, e.g.*, Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397 (1999); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996); Richard A. Leo, Miranda*'s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC. REV. 259 (1996).

III. THE VIOLENT-PERPETRATOR-AT-LARGE PROBLEM

Having now considered the current jurisprudential framework, confrontation's purposes, and the potentially uneasy relationship between the two, I move now to the concrete problem with which this Note is interested: *When an allegedly violent perpetrator is at large, is there an "ongoing emergency" that renders a declarant's statements to law enforcement agents nontestimonial?* Courts have divided on this question, with most answering "yes." In this Part, I present and analyze the majority and minority positions and then propose a way to approach the problem. I argue that the majority position focuses too much on the existence or nonexistence of an ongoing emergency rather than on the statements themselves and the declarant's purpose in making those statements. I argue that a court should evaluate each relevant statement and determine its main purpose, in light of confrontation's goals, instead of letting the presence or lack of an ill-defined emergency dictate all.

A. *The Majority View*

A good example of the majority view is *State v. Warsame*.[72] Warsame attacked his girlfriend N.A. at their home. After the fight N.A. walked toward the police station two blocks away. A neighbor saw her and phoned the police. The responding officer drove over and stopped his car upon seeing N.A. Before he exited his car or said anything, N.A. told him, "My boyfriend just beat me up."[73] N.A. was upset and crying and was injured. She described Warsame and said he had a knife, and a second officer (who had arrived soon after the first) radioed that information to other officers. The first officer then administered first aid and asked N.A. "some form of open-ended question of what happened."[74] N.A. said that she and Warsame had argued, he hit her on the head with a cooking pot, she fell, he got on top of her and choked her, her sister tried getting him off, and he then got a knife and threatened to kill N.A. and chased her from room to room. Afterward she walked toward the police station to report the attack because the phone lines were out. Early in the conversation with N.A., the officers learned via radio dispatch that Warsame had been apprehended about two miles from his house, but the interview proceeded. N.A. did not testify. The State introduced her statements through the responding officers' testimony, over Warsame's objection.

The Minnesota Supreme Court concluded that N.A.'s first (unsolicited) statement (that Warsame had beaten her up) was nontestimonial because "the objective circumstances surrounding [the] statement indicate that she did not

72. 735 N.W.2d 684 (Minn. 2007). The facts appear at pages 687-88.

73. *Id.* at 687 (internal quotation marks omitted).

74. *Id.* (internal quotation marks omitted).

make the statement to [the] [o]fficer . . . with the prosecution of Warsame in mind."[75] The phone lines had been cut, N.A. was distressed, and Warsame was at large. "These are not circumstances indicating that N.A.'s primary purpose for talking to the police was to prosecute Warsame . . . ."[76] N.A. sought help—she was not acting as a witness.[77]

The court also concluded that Warsame's flight constituted an ongoing emergency that rendered N.A.'s subsequent statements (until Warsame was apprehended) nontestimonial.[78] The court declined to read "emergency" narrowly, concluding that "the Supreme Court did not intend to restrict what may constitute an ongoing emergency" "to a narrow geographic proximity, based on the declarant's location."[79] It was significant in *Davis* and *Hammon* that "officers need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim," and that need still exists "when the police are pursuing th[e] assailant outside of the victim's proximity."[80] Thus, "ongoing emergencies may exist beyond the declarant's geographic proximity, even when police are with the declarant and particularly when a dangerous suspect remains at large."[81] And thus, the court held, when an interrogator seeks information primarily to address an ongoing emergency, "regardless of where that emergency is occurring, a declarant's statements are nontestimonial."[82]

Warsame has several features that define the majority view. First, *Warsame* adopts a broad view of "ongoing emergency" and makes the emergency—rather than the statements—the focal point of the analysis. So long as an emergency is occurring somewhere, the declarant was involved in that emergency earlier, and the questions *may* be useful to addressing that emergency, the declarant's statements are nontestimonial. The *Warsame* court looked beyond the interrogation, to Warsame's location and apprehension, making the apprehension dispositive of the testimoniality question—even when the apprehension does not affect the interrogation or the statements, and may be unknown to the interrogator and the declarant.

Second, under *Warsame* it makes no difference that the declarant's statements summarized entirely past events. When N.A. made her statements she was not in the throes of an emergency and was unlikely to soon be threatened since she was with an officer. In particular, her first statement and

75. *Id.* at 692.
76. *Id.*
77. *Id.*
78. *Id.* at 696.
79. *Id.* at 694, 693.
80. *Id.* at 694 (internal quotation marks omitted).
81. *Id.*
82. *Id.* The court remanded because the record was unclear as to what N.A. said at what time, in relation to when Warsame was apprehended. *Id.* at 696.

her later step-by-step narrative of the attack seem to be substitutes for in-court testimony.

Third—and perhaps most important—*Warsame*'s approach seems at odds with confrontation's purposes. So broad a conception of "ongoing emergency" seems to allow admission of exactly the sort of ex parte accusations—narrations of past events that are not directed toward obtaining emergency aid (i.e., substitutes for in-court testimony)—that almost everyone agrees the Confrontation Clause bars. Under *Warsame*—which represents the majority position well—so long as an alleged perpetrator is at large, the government can interrogate as it pleases without much of a Confrontation Clause barrier. This disserves confrontation's goal of curbing governmental abuse, and such an expansive view seems to lack any of the potentially truth-enhancing characteristics of in-court interrogation.

These criticisms do not mean that *Warsame* is completely wrong in its conclusions. To evaluate the court's holdings I would want to know more details about the statements and circumstances than the opinion offers, but my best guess is that some of N.A.'s statements were testimonial and some were not. Some of N.A.'s statements seem directed primarily to meet an ongoing emergency, such as some statements identifying Warsame and warning that he had a knife. The same might be said of statements that Warsame was dangerous or that his whereabouts were unknown (again, we would need to look at the statements themselves to see if this is correct). But the narration of everything Warsame allegedly did to N.A. and her sister was directed less at meeting an emergency than at accusing Warsame of criminal activity (or offering evidence of criminal activity), similar to what a witness does in court. Those statements were testimonial.

The important point then is not that the majority position gets it "all wrong." The majority approach correctly brands many statements as nontestimonial. The point is that the existence or nonexistence of an emergency does not necessarily tell us about the purposes of the declarant's statements, and focusing on the emergency rather than on the statements themselves allows clearly testimonial statements to be admitted without any cross-examination and without furthering confrontation's purposes. Almost every 911 call arises from some kind of an emergency, and our test of testimoniality should not lazily brand all statements during such calls as nontestimonial. We need a test that is more exacting and illuminating, since not every 911 call and not every discussion with police produces the same sort of statements. Some statements will clearly be given to seek aid from danger; others will just as clearly be given to report a past crime. The statements—and in some cases the questions asked and surrounding circumstances—are in most cases the best signal of the purpose of the interrogation and they should accordingly be the benchmark of the analysis. The existence or nonexistence of some ill-defined emergency is a second-best signal, if that.

Put slightly differently, the majority view wrongly morphs confrontation into an emergency-focused doctrine. Despite *Davis*'s language of emergency, the majority view's focus is incorrect. The confrontation right does not (directly) turn on the presence or absence of an emergency. An emergency is relevant only in shedding light on the purpose of the declarant's statements; ultimately, a court must evaluate the statements themselves. "[T]he purpose of the [Confrontation] Clause is to ensure that prosecution witnesses testify in court . . . . to safeguard the trial process."[83] Confrontation is thus different than, say, the Fourth Amendment's "exigent circumstances" exception, which is an emergency-focused doctrine.[84] The existence of an emergency may determine whether Fourth Amendment requirements are relaxed.[85] Not so with the confrontation right. The existence of an emergency does not determine whether confrontation's requirements are relaxed; the existence of an emergency merely may bear on the nature of the statements themselves, and thus on whether the prosecution must bring a declarant into court if it wishes to use the declarant's statements against the defendant.[86] It is primarily a statement's purpose that should guide confrontation doctrine, not an emergency.

To further examine the majority view and its shortcomings, I turn to the New Hampshire Supreme Court's decision in *State v. Ayer*,[87] which takes an approach similar to *Warsame*'s. In broad daylight Ayer fatally shot a man, then fled. An officer arrived within minutes and secured the scene. He began investigating and saw a woman—Ayer's wife Joan—"crying hysterically."[88] As he approached, Joan "blurted out, 'He had said th[is] morning that he was going to shoot him,' and, 'he'd been sitting across the street in his truck all morning waiting for him.'"[89] Joan said—in response to the officer's question—that "he" was Ayer, she described him and his truck, and she said that he had access to firearms. The officer radioed his fellow officers, who soon pulled over Ayer's truck and arrested him. Joan did not testify at her husband's trial

83. Fisher, *supra* note 39, at 613-14.

84. *Id.* at 613.

85. *Id.*

86. *Cf. id.* at 613-14 (contrasting the Fourth Amendment exigent circumstances doctrine with the Confrontation Clause). In addition to majority-position courts, some commentators have also, in my view, mischaracterized confrontation analysis under *Davis* as an emergency-focused doctrine rather than a doctrine about the declarant's statements themselves. *See, e.g.*, Candice Chiu, *Convoluting the Confrontation Right:* Davis v. Washington, 126 S. Ct. 2266 (2006), 30 HARV. J.L. & PUB. POL'Y 1059, 1066-67 (2007); Recent Case, *Evidence—Confrontation Clause—New York Court of Appeals Holds that Shooting Victim's Statements to Responding Police Officer Were Not Testimonial*.—People v. Nieves-Andino, 872 N.E.2d 1188 (N.Y. 2007), 121 HARV. L. REV. 906, 906, 910 (2008). For an analysis of the use of "exigency" in Fourth and Sixth Amendment jurisprudence that criticizes the use of emergency with respect to the confrontation right, see Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801 (2007).

87. 917 A.2d 214 (N.H. 2006). The facts appear at pages 219-20.

88. *Id.* at 220.

89. *Id.*

for first-degree murder. The State introduced her statements, over Ayer's objection, through the first officer's testimony.

The court held that both Joan's preliminary blurt and her responses to questions were nontestimonial.[90] The court declined to read "emergency" narrowly, as abating once the shooter flees the scene.[91] "Viewed objectively," when the officer arrived and secured the scene he

> knew that an armed assailant, who had just shot an unarmed individual in public in broad daylight, was loose, and could have remained in the immediate vicinity or could have gone elsewhere in search of other victims. The emergency created by the shooting had not ended merely because more shots had not been fired.[92]

Under such circumstances, "when mere minutes had passed since the public shooting of an unarmed man by an unknown, at-large assailant[, no] rational police officer would believe that the emergency had subsided."[93] An officer's "*primary* concern" would be to procure information to resolve the emergency, not "to interrogate persons to obtain information potentially relevant to a future prosecution."[94]

My observations on *Warsame* apply to *Ayer*. First, *Ayer* adopts a broad view of "ongoing emergency" and makes the emergency the focal point of the analysis. Rather than considering the nature of the statements themselves, the court looked at what the officer knew and did not know, to the officer's motives, and to the existence of an emergency. The problem with this is that, although police motives will often signal the purpose of an interrogation, they do not necessarily do so. Typically they will not indicate the purpose of the interrogation as accurately as the statements themselves will indicate. Consider that the preliminary blurt came without any questioning. There does not seem to be a good reason for police motives to dictate whether that unsolicited statement is testimonial. Police motives have nothing to do with whether that statement's purpose was to resolve an emergency or accuse the defendant. But the court did not look to that statement or its purpose and instead looked to the officer's motives, why he was at the scene, and what he knew. My guess—and again, the court did not recount the precise statements so I cannot say for certain—is that the preliminary blurt was testimonial (it accused someone of premeditated murder and—though it is arguably a close call—was not given primarily to meet an emergency) but the responses to questions were mostly nontestimonial (since they were geared toward identifying and apprehending the defendant). But the court did not evaluate the statements and thus could not draw these distinctions.

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90. *Id.* at 225.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

Second, the court did not distinguish between Joan's descriptions of past and present events. The distinction between past and present will not always neatly divide testimonial from nontestimonial, but it will often help (after all, *Davis* speaks of *ongoing*—i.e., present—emergencies, not just any emergencies). The statement about Ayer's supposed premeditation to kill involved a past event and that statement's main purpose seemed to be to accuse rather than to remedy the emergency. As argued above, that statement was testimonial. The statement about Ayer's access to guns related to an ongoing fact, however, and other statements containing identifying information may have been directed primarily at apprehending him. Such statements were nontestimonial.

Third, *Ayer*'s approach disserves confrontation's purposes. Joan was "crying hysterically" when she made her statements, which does not instill much confidence in the statements' accuracy. Moreover, the facts suggest that Joan did not see the shooting, which causes us to wonder how helpful she really was in relaying facts about the shooting. Were Joan on the stand and subject to cross-examination (at least with respect to the first statement, which seems clearly accusatorial instead of geared toward aiding an emergency), the defense could have forced her to make clear what she saw and when she saw it, and exactly what she claimed her husband said. The fact-finder could then evaluate whether she was worthy of belief. But instead, the fact-finder had the benefit of the statements only as introduced through an officer, who may have had his own spin on Joan's statements and whose questions may have shaped those statements. Perhaps the prosecutor was clever and took advantage of ambiguities in the statements to make Joan appear to have witnessed more than she did. It is hard to say what happened. The point is that the fact-finder would likely have been in a better position to know the truth had Ayer had the chance to confront Joan. The majority view cuts off that opportunity in many cases—perhaps automatically in the violent-perpetrator-at-large scenario.

B. *The Minority View*

Other cases follow the majority position[95] but *Warsame* and *Ayer* highlight the important points and I will move now to the minority position, perhaps best expressed in *Kirby v. State*.[96] Kirby allegedly kidnapped Leslie Buck. Leslie escaped and returned to her home where her husband then called the police. That conversation produced a series of recorded statements from Leslie, as did an interview with police that occurred soon thereafter while Kirby's whereabouts remained unknown. Leslie died the next day in an unrelated fall

95. Two such cases are *People v. Nieves-Andino*, 872 N.E.2d 1188 (N.Y. 2007), and *State v. Kemp*, 212 S.W.3d 135 (Mo. 2007).

96. 908 A.2d 506 (Conn. 2006). The facts appear at pages 512-16.

down the stairs.[97] Over Kirby's objection, the trial court admitted several of Leslie's statements through the tape-recorded 911 call and the interviewing officer. The statements painted a vivid picture of Kirby attacking her, putting her in his car, and using various tools and items in the process. Kirby testified, denied the allegations, and offered an account of the tools and other evidence.

The Connecticut Supreme Court concluded that Leslie's statements were testimonial and that their admission violated Kirby's right of confrontation. The court refused to adopt an "ongoing public safety emergency" gloss of "ongoing emergency."[98] "[A]ccepting [that] argument . . . would render meaningless the distinction drawn by the United States Supreme Court, as [it] would render virtually any telephone report of a past violent crime in which a suspect was still at large, no matter the timing of the call," into an entirely nontestimonial conversation.[99] The call "was made after the emergency" and its primary purpose "was to investigate and apprehend a suspect from a prior crime, rather than to solve an ongoing emergency or crime in progress *at the time of the call*."[100] Leslie "was not under a 'bona fide physical threat' at the hands of the defendant" when she made her statements.[101]

Kirby marks off the key features of the minority position. First, *Kirby* cabins the meaning of "ongoing emergency" and focuses on the purpose for which the statements were made. The court realized that that term "ongoing emergency" could not mean "ongoing public safety emergency." No statements could be testimonial under such a standard (a result that *Hammon* shows cannot be right) and there is little support in *Davis* for a generalized public-safety-emergency gloss. *Davis* focuses not so much on the emergency as it does on the statements themselves and the purpose for which the statements are made. The *Kirby* court correctly looked at why the 911 call was made (i.e., to report the alleged crime and to provide evidence for criminal prosecution rather than primarily to seek emergency aid). The declarant did not still face an emergency, was unlikely again to be kidnapped, and was not providing information geared directly toward apprehending Kirby (as much as accusing him).

Second, *Kirby* follows *Davis*'s distinction between a report of "a past criminal act" and an attempt "to avert a presently occurring" criminal act.[102] As discussed earlier, drawing that distinction will often provide good evidence of whether a statement is testimonial, by indicating the statement's purpose.

Third, *Kirby* reinforces at least some of confrontation's purposes. The decision avoids admitting narratives of purely past events that lack the truth-assuring guarantees that are present when a declarant faces an emergency or is

97. Yes, bizarre.
98. *Kirby*, 908 A.2d at 523 n.19.
99. *Id.*
100. *Id.* at 523.
101. *Id.*
102. *Id.*

trying to help to resolve an emergency. By requiring that an emergency be ongoing, the decision minimizes the potential for government manipulation. And by tightening the definition of "ongoing emergency" and focusing on the purpose of the statements themselves, the court decreases the class of nontestimonial statements and expands the likelihood that the government will have to call the declarant to testify.

C. *The Majority View Versus the Minority View*

To emphasize the differences between the majority and minority position I turn finally to a case that presents both views. *State v. Ohlson*[103] produced, fittingly, a majority opinion expressing the majority view and a concurrence (basically a dissent) expressing the minority position. Two minors, L.F. and D.L., were standing on a sidewalk when Ohlson drove by and yelled racial slurs and made obscene gestures at them. After the first pass, Ohlson turned around and did the same thing, then drove off. He returned after about five minutes and drove "over the curb, and onto the sidewalk where [L.F. and D.L.] were standing, causing the two of them to jump out of the way," then drove away again.[104] An officer arrived at the scene within five minutes of the last drive-by and spoke with L.F. and D.L. Ohlson was arrested a few hours later at his home. L.F. testified at Ohlson's trial for assault and malicious harassment but D.L. did not. Ohlson objected to the admission of D.L.'s statements relating to the fear Ohlson put him in, which were introduced through the responding officer's testimony.

The Washington Supreme Court held that the statements were nontestimonial.[105] The court believed that under *Davis* "the critical consideration is not whether the perpetrator is or is not at the scene, but rather whether the perpetrator poses a threat of harm, thereby contributing to an on-going emergency."[106] In *Davis*, Michelle McCottry's statements were nontestimonial because "the perpetrator posed a threat to [her]," whereas Hershel Hammon "was under police control, 'actively separated' from [Amy]," making her statements testimonial.[107] On that understanding, D.L.'s statements were nontestimonial since Ohlson still "pose[d] a threat of harm."[108]

The court also considered four factors that the *Davis* Court noted in arriving at its conclusions, and found that all four indicated that D.L.'s statements were nontestimonial. First, the court considered "the timing relative to the events discussed" and observed that D.L.'s statements were made within

103. 168 P.3d 1273 (Wash. 2007). The facts appear at pages 1274-75.
104. *Id.* at 1274 (internal quotation marks omitted).
105. *Id.* at 1276.
106. *Id.* at 1279.
107. *Id.*
108. *Id.*

minutes of the assault.[109] "While D.L. was not 'speaking about events *as they were actually happening*,' the statements were made contemporaneously with the events described."[110] Second, the court considered "the threat of harm posed by the situation," and observed that Ohlson had previously left the scene, then returned just five minutes later, "escalat[ing] his behavior" at that time.[111] Ohlson's "identity and location were unknown" when D.L. made his statements, and "there [was] no way to know, and every reason to believe, that Ohlson might return a third time and perhaps escalate his behavior even more."[112] Third, the court considered "the need for information to resolve a present emergency" and concluded that the statements were so needed.[113] No one knew much when the officer arrived at the scene—just that a speeding vehicle tried to hit two minors. "At least until [the officer] completed her initial triage of the situation . . . the situation presented an ongoing emergency."[114] Fourth, the court considered "the formality of the interrogation" and observed that this interrogation was less formal than the one in *Hammon*.[115]

The *Ohlson* concurrence concluded that D.L.'s statements were testimonial (it was not a dissent because it found the trial court's error harmless).[116] The concurrence feared that "the language in *Davis* is flexible enough to accommodate nearly any outcome" and offered three nonexclusive factors (purportedly derived from *Crawford* and *Davis*) to help evaluate whether statements in cases like this are testimonial: (1) the timing of the statements relative to the emergency and "whether statements are in the past or present tense"; (2) "the proximity of the perpetrator to the declarant"; and (3) "the formality of the interrogation" (though the Supreme Court "does not appear to employ a narrow definition of 'formal'").[117]

The concurrence considered the "still at large" factor in some detail. "[T]he majority's emphasis on such a factor," the concurrence noted, "is problematic as many perpetrators will indeed be 'at large' while police are questioning witnesses during an investigation."[118] It was also a mistake, in the concurrence's view, to conclude that the emergency was ongoing simply "because, upon arrival, the police needed more information to determine whether the danger was ongoing," since "this will nearly always be the case."[119] D.L. was not in immediate danger and "he used the past tense to

109. *Id.* at 1277, 1280.
110. *Id.* at 1280.
111. *Id.* at 1277, 1280.
112. *Id.* at 1280-81.
113. *Id.* at 1277, 1281.
114. *Id.* at 1281.
115. *Id.* at 1277, 1281.
116. *Id.* at 1281 (Chambers, J., concurring).
117. *Id.* at 1282-83 & nn.1-2.
118. *Id.* at 1284.
119. *Id.* "I would not conclude that statements to the police are nontestimonial merely

describe what *had occurred* prior to the arrival of law enforcement"—his "recitation of recent, yet past events cannot rightly be construed as a 'call for help,' as there was no 'present emergency' in need of resolution."[120] The concurrence also concluded that the interrogation was sufficiently formal.[121]

Several points merit attention. First, the *Ohlson* majority—as is the case with the majority position generally—views "ongoing emergency" broadly and makes the emergency, rather than the declarant's statements, the focal point of the analysis. The perpetrator was off the scene and D.L. and L.F. were with an officer when D.L. made his statements. Any danger was minimal at that point (unlike Ayer, Ohlson had not just allegedly fatally shot someone). D.L.'s statements were not made over the phone (contra Michelle McCottry) and D.L. was not rushing for help from a nearby, definitive danger (also contra McCottry). The concurrence correctly observes that it "will nearly always be the case" that police will need more information to determine whether any danger still exists, and that the ongoing emergency test becomes meaningless if left to turn on that determination (especially when a court can evaluate the statements and, in so doing, more likely discover the interrogation's purpose).[122] The concurrence's refusal to give the "at large" factor determinative weight helps to cabin the ongoing emergency doctrine as applied to the violent-perpetrator-at-large problem, and gives it some bite in favor of in-court testimony—and thus in favor of confrontation's purposes.

But the concurrence does not seem to get the focus quite right either. The concurrence does not object so much to the majority's focus on emergency as it does to the majority's broadening of that concept. Thus, neither opinion focuses squarely on the statements at issue, which in this case communicated only the declarant's fear rather than information that could have helped to resolve an emergency. Such statements relating to fear are testimonial; they are irrelevant to resolving an emergency and serve only to illustrate the defendant's criminal act in a way helpful to the prosecution. Neither the majority nor the concurrence paused on the statements themselves to consider their purpose. The case is easy once one appreciates *Davis*'s functional essence, which turns—as I have argued, at least—on the purpose for which a statement is given, which in turn requires one to look at the statements themselves.

Second, despite the majority opinion's strained assertion to the contrary, D.L.'s statements described past events. His statements bear little resemblance to the plea for help that Michelle McCottry made while facing a dynamic, ongoing emergency, and are more akin to the after-the-fact narrative that Amy

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because more crime or violence could possibly occur." *Id.*

120. *Id.*

121. *Id.* at 1285.

122. I emphasize that the *Ohlson* majority's view is problematic not because it classifies many statements as nontestimonial, but rather because—among other things—its focus on officer motives does not uncover the purpose of the statements as accurately as an evaluation of the statements themselves would allow.

Hammon or Sylvia Crawford provided. This past-present distinction underscores how clearly testimonial—indeed, accusatorial—D.L.'s statements were.

Third, the *Ohlson* majority's view appears to disserve confrontation's purposes. Once an interrogating officer has secured the scene and the alleged perpetrator has left, subsequent interrogation will tend to produce exactly the sort of ex parte, inherently testimonial statements with which *Crawford* and the Confrontation Clause are concerned. The *Ohlson* majority appears to give officers carte blanche to ask away in cases like this, secure in the knowledge that so long as the perpetrator is out there somewhere, any statements are admissible. That position undermines confrontation's limitation-on-government goal. That position also does not aid truth-seeking, since there is no immediate emergency that increases the costs of lying, impresses the declarant with the seriousness of the situation, or reduces the chance for considered falsification.

D. *An Approach Faithful to* Davis *and to Confrontation's Purposes*

This Part has covered the ways in which courts facing the violent-perpetrator-at-large problem have strayed from *Davis*'s essence and from confrontation's purposes. I have argued first that courts ought to focus on the statements themselves and the purposes for which those statements are given, rather than focusing on the presence or absence of an emergency. When the statements do not by their terms reveal a purpose, a court should look to the questions asked and, as necessary, the surrounding circumstances to understand the purposes of those statements. Second, I have suggested that it is often helpful, when evaluating statements, to distinguish whether the statement refers to past or present events. This can help signal whether a statement's purpose is primarily accusatorial/prosecutorial or primarily intended to seek emergency aid. These first two points suggest that the majority position on the violent-perpetrator-at-large problem is less sound than the minority position. The majority view, by focusing on the existence of an emergency rather than on the statements, allows admission of quintessentially testimonial statements—narratives of past events that do not help to address an emergency.

The third point that I have advanced—regarding the ways in which an emergency can aid confrontation's purposes—confirms that the majority-view courts approach the problem incorrectly. The existence of an emergency, by itself, does little or nothing to serve confrontation's purposes. The key is the effect that the emergency has on the declarant's statements and whether the emergency aids goals of truth-seeking and limiting governmental abuse. When the alleged perpetrator is at large and away from the declarant, the emergency seems less likely to serve these goals than when the declarant faces a more immediate emergency. This is not to say that the violent-perpetrator-at-large scenario will necessarily produce only testimonial statements. It is to say that when it is unclear whether a statement is testimonial, it can help to look to the

emergency to see whether that emergency's effect on the statements helps to serve confrontation's purposes. In this way, the emergency can augment the analysis.

Though I believe the minority position more often arrives at correct conclusions as to whether statements arising from the violent-perpetrator-at-large scenario are testimonial (at least in the cases decided so far), I do not believe it is a completely sound view, as minority-view courts do not always focus on the statements themselves. Also, I want again to caution against assuming that the violent-perpetrator-at-large scenario ought necessarily to produce testimonial rather than nontestimonial statements. It is important to look at each case carefully and to examine each of the relevant statements closely, rather than to adhere to any rigid rule, be it a rule that all statements are testimonial when a perpetrator has left the scene or a rule that all statements are nontestimonial when a violent perpetrator is at large. *Davis* aims to uncover the purpose of the declarant's statements, and though the *Davis* opinion is not always clear and does not buttress its test with confrontation's substantive purposes, courts can—by focusing on the opinion's essence and augmenting it with those purposes—address the violent-perpetrator-at-large problem soundly.

IV. FROM FIDELITY TO ADMINISTRABILITY

Having now defended an approach that (I believe) is faithful both to *Davis* and to confrontation's purposes, one promise remains unfulfilled. I suggested in the Introduction that, unless carefully cabined, *Davis* returns us to a difficult-to-administer, unprincipled, *Roberts*-like regime. It is time to defend that claim.

The main administrability problem resulting from *Davis* is lower courts' tendency to focus on the amorphous, difficult-to-define concept of "ongoing emergency" and to allow that ill-defined concept to drive the confrontation analysis. To be sure, a boundless definition of ongoing emergency is not necessarily difficult to administer. A court could easily conclude that whenever an allegedly violent perpetrator is at large, a declarant's statements in the course of police interrogation are not testimonial. Most courts that have considered the violent-perpetrator-at-large problem have done just that. The problem with such an approach, as I have argued, is that it is unfaithful to *Davis* and disserves confrontation's purposes. The decision in *Hammon* alone indicates that some such statements must be testimonial. Thus, courts administering the confrontation right must draw some lines, and the problem that majority-view courts (in particular) encounter is that under their approach they cannot do so in a principled way. Those courts have failed to attach any limiting principles to their conception of "ongoing emergency" and have not tethered their approach to confrontation's purposes. Majority-view courts do not distinguish between different statements in an interrogation, even when some statements may be clearly accusatory and others may clearly seek help, since such courts focus on the emergency rather than on the purpose for which

each statement is made. Thus, those courts are left with an all-or-nothing option (deciding whether there is an ongoing emergency then letting all statements into evidence or leaving all of them out) or an unpredictable and unprincipled approach (deciding to leave some statements in and some out, without offering a principled reason why or a clear understanding of *Davis*'s essence). The former option contradicts *Davis*, which recognizes that some statements in the course of an interrogation may be testimonial and others may be nontestimonial.[123] The latter option also contradicts *Davis*, which aims to move beyond *Roberts*'s unpredictable, ad hoc, inconsistent interest balancing. In that latter option lies the administrability problem.

By looking at the statements themselves, however, the confrontation right becomes more administrable, in addition to being faithful to *Davis* and to confrontation's purposes. By focusing on a statement itself, a court can home in on a relatively discrete piece of information, rather than trying to balance a mess of factors that might suggest the presence or absence of an ongoing emergency. A statement has fewer moving parts and its chief purpose will often be easy to determine; emergencies are more dynamic and can look different depending on perspective and other factors. Focusing on statements, then questions, then—if necessary—surrounding circumstances, offers a sensible hierarchy and a more administrable approach than one that tries to define an "emergency" in every case.

Admittedly, confrontation analysis requires some balancing. In most cases, there is no talismanic way to determine whether an out-of-court statement is testimonial. Under the test I defend, a court must decide the primary purpose for which a declarant makes each statement. That requires judgment and in making such a judgment there will be some messiness, as in all practical reasoning on which reasonable people will differ. But focusing on the statements themselves and each statement's purpose ought not to be as messy as the multifactor tests used to determine "reliability" under *Roberts*, which devolved into a judicial free-for-all. And it also ought not to be as messy as letting the answer be dictated by an amorphous concept of "emergency" that, by itself, bears no necessary connection to confrontation's purposes and cannot reliably distinguish between different statements, resulting from the same emergency, whose purposes are alarmingly different.

I concede that the test I have defended is not the most administrable test imaginable. As stated before, a test that takes a boundless view of "ongoing emergency" (thus making nontestimonial most of the resulting statements) or a test that requires cross-examination of every out-of-court statement (in effect, a test that brands testimonial any out-of-court statements that a prosecutor

123. Davis v. Washington, 547 U.S. 813, 829 (2006) (noting that "trial courts [should] recognize the point at which . . . statements in response to interrogations become testimonial" and "should redact or exclude the portions of any statement that [has] become testimonial").

attempts to admit at trial) would be easy to administer. But both tests falter in the light of *Davis* and confrontation's purposes.[124] The test I defend is the product of a compromise between, on the one hand, the goal of administrability and, on the other hand, fidelity to the current jurisprudential framework and to confrontation's purposes. *Davis*—distilled to its essence and augmented by confrontation's purposes—can be interpreted to make the confrontation right reasonably administrable by narrowing the inquiry primarily to the relevant statements and evaluating those statements in the light of goals of truth-seeking and limiting governmental abuse. Other approaches may be more administrable, but the test I have defended meets three goals—administrability, fidelity to *Davis*, and service to confrontation's purposes—as other approaches do not.

CONCLUSION

Though I have focused on the violent-perpetrator-at-large problem, I believe the approach I defend—focusing primarily on the declarant's statements and the purpose for which they are given, rather than primarily on the putative emergency or danger—applies more generally to confrontation-right issues arising from emergencies. My concern in concluding, however, is not to test whether the approach I defend applies to all cases involving recent emergencies. Rather, I wish to suggest in closing that the more general approach I have used—of trying to develop an administrable test in light of confrontation's purposes—could help confrontation jurisprudence more generally, in situations that extend beyond emergencies. The Supreme Court's confrontation jurisprudence has drawn lines that are mostly blurry, not bright, and in administering the confrontation right amidst such blurry lines, a court's inquiry must be guided by something. The least arbitrary guide, it seems to me, is the right's purposes. Those purposes can steer the inquiry in the right direction and help make it administrable. Such an approach will produce more consistent, principled results—an outcome that confrontation jurisprudence needs.

124. As already discussed, *Davis* forecloses both tests, and the Confrontation Clause's purposes (particularly the goals of truth-seeking and limiting governmental abuse) foreclose at least the first test.