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IS THERE AN ACCUSER IN THE HOUSE?:
EVALUATING STATEMENTS MADE TO PHYSICIANS
AND OTHER MEDICAL PERSONNEL IN THE WAKE OF
CRAWFORD V. WASHINGTON AND
DAVIS V. WASHINGTON

DAVE GORDON*

What I may see or hear in the course of the treatment or even outside of the
treatment in regard to the life of men, which on no account one must spread abroad,
I will keep to myself, holding such things shameful to be spoken about.¹

I. INTRODUCTION

Most people do not associate medical caregivers with court rooms and criminal
prosecutions. We visit doctors and nurses when we are sick with the hope that they
will make us feel well. But doctors and nurses may take on an entirely different role
when providing treatment to victims of violent crimes. The relatively recent United
States Supreme Court decisions Crawford v. Washington² and Davis v. Washington³
have fundamentally altered long-standing Confrontation Clause jurisprudence. In
turn, this change has affected the role of medical caregivers who treat victims of
physical abuse. Through their patients’ statements, some doctors who report patient
abuse have become suppliers of evidence against criminal defendants.⁴ With the
Supreme Court’s new approach to the Sixth Amendment, that role has had a
significant impact on the constitutional right of criminal defendants to confront their
accusers.

In the year following Crawford approximately 1.7 million victims of physical
assault visited emergency hospital departments.⁵ Presumably, each visit involved
questions about the nature and source of the victim’s injury. In many cases
physicians and medical personnel were required to report the abuse to law
enforcement.⁶ Were these medical caregivers aware that their questions could
subsequently implicate the federally-protected confrontation right of the alleged
attackers?

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Norman Bay for his invaluable guidance in this effort.

¹. HIPPOCRATES, THE HIPPOCRATIC OATH (Ludwig Edelstein trans., 1943), available at
⁴. It is important to acknowledge that the American Medical Association mandates reporting procedures
for physicians who suspect patient abuse. AM. MED. ASS’N, CODE OF MEDICAL ETHICS § 2.02 (2002). Physicians
are also obliged to testify in court whenever necessary to “assist in the administration of justice.” Id. § 9.07.
Additionally, every state has a mandatory reporting law for physicians who reasonably suspect child abuse.
ALBERT R. JONSEN ET AL., CLINICAL ETHICS: A PRACTICAL APPROACH TO ETHICAL DECISIONS IN CLINICAL MEDICINE, 202
⁵. ERIC W. NAWAR ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL HOSPITAL
⁶. See JONSEN, supra note 4, at 202.
This article will explore the effect *Crawford* and *Davis* have had on out-of-court statements made to medical personnel and consider the future repercussions those decisions will have on providers of emergency medicine. Part II of this article will give a historical overview of the Confrontation Clause and its development through the 20th century. It will also provide a brief synopsis of *Crawford* and *Davis* and note some of the initial questions those decisions present in the area of medical communications. Part III will present the divergent analyses that state and federal courts have adopted in applying the Confrontation Clause to statements made to physicians. This section will pay particular attention to the different approaches courts have taken when addressing statements made by adults compared with statements made by children and how that distinction relates to human cognitive development. Lastly, Part IV of this article will evaluate recent developments in New Mexico law concerning the Confrontation Clause and statements made to medical personnel. This section will then argue for a uniform confrontation analysis that upholds the core concepts and values of *Crawford* and *Davis*.

II. CONFRONTATION CLAUSE BACKGROUND

A. Confrontation Origins to Ohio v. Roberts

The Confrontation Clause of the United States Constitution provides that in criminal cases the accused has "the right to be confronted with the witnesses against him." Jurists have noted that the precise origins of the Confrontation Clause are indefinite. However, most scholars agree that the clause was derived from an English common law right that was brought to the forefront during the injustices of the trial of Sir Walter Raleigh in 1603. In light of the limited historical record of the Sixth Amendment, the Supreme Court has continuously sought to discern the extent of protection the clause provides to criminal defendants. While the most expansive reading of the clause would likely bar all hearsay statements in criminal prosecutions, even the earliest decision interpreting the clause notes that such a broad reading of the Amendment would be unworkable.

The Confrontation Clause was designed to prevent the civil law mode of prosecution whereby depositions or ex parte affidavits were used against criminal defendants in place of live testimony by accusatory witnesses. To that end, the Supreme Court has consistently recognized that there are exceptions to the bar

7. U.S. CONST. amend. VI.
8. See California v. Green, 399 U.S. 149, 174 (1970) ("History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause.") (Harlan, J., concurring); Coy v. Iowa, 487 U.S. 1012, 1015 (1988) ("The Sixth Amendment...traces back to the beginnings of Western legal culture.").
11. Commenting on the notion that the Sixth Amendment along with certain other constitutional protections cannot be read as absolute, Justice Brown remarked, "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).
12. Id.
against out-of-court statements used to incriminate where strict adherence to the text of the Sixth Amendment will be "carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant."13

For the greater part of the last three decades the exceptions to the Confrontation Clause have been tethered to a demonstration of trustworthiness. In 1980 the Supreme Court decided Ohio v. Roberts14 which set out the controlling interpretation of the Confrontation Clause as it applied to hearsay for the subsequent twenty-four years. In Roberts, the Court held that where adverse hearsay witnesses were not available for testimony, their out-of-court statements could be admitted into evidence "only if [they bore] adequate indicia of reliability."15 Establishing reliability could be inferred where the statements (1) fell within a "firmly rooted hearsay exception" or (2) demonstrated "particularized guarantees of trustworthiness."16 In the years following Roberts, lower courts developed a host of factors used to determine when a given out-of-court statement showed particularized guarantees of reliability.17

The relatively straightforward Roberts analysis created an efficient solution to the tension between the confrontation right and hearsay.18 However, by the end of the twentieth century the Supreme Court began to recognize that the test did not fully accomplish the goals of the Sixth Amendment.19

B. A New Confrontation Standard: Crawford v. Washington

In 2004 the Supreme Court decided Crawford v. Washington20 and overruled the reliability test set out in Roberts and its progeny. Writing for a majority of seven, Justice Scalia delivered a decision that drastically altered the Confrontation Clause landscape. Defendant Michael Crawford appealed a Washington Supreme Court conviction for assault and attempted murder.21 Michael was charged after stabbing

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13. Id.
15. Id. at 66 (internal quotations omitted).
16. Id.
17. Under the Roberts regime, New Mexico courts looked to four factors in finding particularized indicia of reliability: "(1) ambiguity; (2) lack of candor; (3) faulty memory; and (4) misperception." State v. Ross, 122 N.M. 15, 24, 919 P.2d 1080, 1089 (1996). Other jurisdictions looked to additional factors in making reliability determinations. The litigation that led to the eventual overturning of Roberts was partly based on a Washington appeals court decision noting a nine-factor analysis for reliability. Those factors were (1) motive to fabricate, (2) general character of the statement, (3) number of people who heard the statement, (4) spontaneity of the statement, (5) timing of the statement, (6) existence of express assertions of past facts, (7) whether cross-examination would show lack of knowledge, (8) the possibility of false recollection, and (9) the circumstances surrounding the statement. Washington v. Crawford, 107 Wash. App. 1025 (2001), rev'd Washington v. Crawford 541 U.S. 36 (2004).
19. See Lilly v. Virginia, 527 U.S. 116 (1999). Concurring in the opinion, Justice Breyer expressed his readiness to move beyond the reliability test set out in Roberts, noting that the test was both too narrow and too broad. He explained that the Roberts test was too narrow in that it "authorize[d] the admission of out-of-court statements prepared as testimony for a trial when such statements happen[ed] to fall within some well-recognized hearsay rule exception." At the same time was overbroad because it could "make a constitutional issue out of the admission of any relevant hearsay statement, even if that hearsay statement is only tangentially related to the elements in dispute...." Id. at 141–42 (Breyer, J., concurring).
21. Id. at 41.
a man who allegedly attempted to rape his wife, Sylvia.\textsuperscript{22} As part of the State’s
evidence, prosecutors introduced a taped statement by Sylvia, which provided her
account of the stabbing.\textsuperscript{23} The recording was created during a police interview and
was introduced at trial to show that Michael had not acted in self-defense.\textsuperscript{24} Sylvia
did not testify at her husband’s trial because of the State’s marital privilege; however, the trial court allowed the statement because it fell into the hearsay
exception of statements against penal interest.\textsuperscript{25} Using a nine-factor test to establish
a lack of sufficient reliability, the Washington Court of Appeals reversed the trial
court determination that admitted the recording.\textsuperscript{26} Ultimately, the Washington
Supreme Court reversed the appeals court and allowed the statement finding
sufficient reliability because it was “virtually identical” to statements that Michael
made to police.\textsuperscript{27} Michael appealed the conviction to the U.S. Supreme Court
claiming that admission of the tape violated the Confrontation Clause.

The U.S. Supreme Court reversed the Washington high court’s decision and
explicitly abandoned the reliability approach outlined in Roberts.\textsuperscript{28} Justice Scalia
harshly criticized the Roberts analysis as a “malleable standard”\textsuperscript{29} and noted that
“[w]hether a statement is deemed reliable depends heavily on which factors the
judge considers and how much weight he accords each of them.”\textsuperscript{30} Dissatisfied with
the potential for arbitrary decision-making under Roberts,\textsuperscript{31} the Court articulated a
new approach to determine the scope of the Confrontation Clause. The Court held
that where testimonial statements were at issue, the Constitution requires that the
witness be unavailable and the defendant have a prior opportunity to cross-
examine.\textsuperscript{32} As a basis for establishing testimonial statements, Justice Scalia referred
to a definition of “testimony” as “[a] solemn declaration or affirmation made for the
purpose of establishing or proving some fact.”\textsuperscript{33} Beyond the definition of testimony,
the Court only gave clues pointing toward the meaning of testimonial.

Perhaps the most perplexing aspect of Crawford is its overall lack of guidance. At the same time the Court announced the groundbreaking approach to the

\textsuperscript{22} Id. at 38.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id. Washington’s marital privilege provides, in part, “[a] husband shall not be examined for or against
his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband.”
WASH. REV. CODE § 5.60.060 (1995).
\textsuperscript{26} Crawford, 541 U.S. at 41.
\textsuperscript{27} Id. This line of reasoning is also referred to as the “interlocking” approach. The theory is that statements
inhere a presumption of reliability if they match or are substantially similar to statements made by another. See Lee
\textsuperscript{28} Crawford, 541 U.S. at 63.
\textsuperscript{29} Id. at 60.
\textsuperscript{30} Id. at 63. Echoing Justice Breyer’s concurrence in Lilly, Justice Scalia further attacked the Roberts
analysis by declaring that the “unpardonable vice of the Roberts test...is...its demonstrated capacity to admit core
testimonial statements that the Confrontation Clause plainly meant to exclude.” Id.
\textsuperscript{31} Id. at 65.
\textsuperscript{32} Id. at 68.
\textsuperscript{33} Id. at 51 (citing N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828)).
Justice Scalia has received sharp criticism for selecting this definition of “testimonial” as it was the last of five
available definitions of testimony taken from a dictionary published nearly thirty years after the ratification of the
Sixth Amendment. Randolph N. Jonakait, “Witnesses” in the Confrontation Clause: Crawford v. Washington,
Confrontation Clause, it failed to give specific criteria for distinguishing testimonial and nontestimonial statements.\textsuperscript{34} The Court emphasized that the Confrontation Clause was adopted to prevent the abusive practices of English justices of the peace.\textsuperscript{35} In line with that aim, Justice Scalia indicated three examples of testimonial statements:

\begin{itemize}
  \item [1] \textit{Ex parte} in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,
  \item [2] extrajudicial statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions, and
  \item [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.\textsuperscript{36}
\end{itemize}

Under this new approach to the Confrontation Clause, the Court found that Sylvia's recorded statement was testimonial and its admission therefore unconstitutional.\textsuperscript{37} While many saw \textit{Crawford} as a reification of the confrontation right,\textsuperscript{38} one member of the Court believed that the decision simply "cast[] a mantle of uncertainty over future criminal trials in both federal and state courts."\textsuperscript{39} In a separate opinion, Justice Rehnquist noted that the Court’s refusal to define

\textsuperscript{34} \textit{Crawford}, 541 U.S. at 68. Chief Justice Rehnquist found the Court’s silence particularly troubling given the constant stream of criminal cases in United States courts. He explained that the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

\textsuperscript{35} \textit{Id.} at 75–76 (Rehnquist, J., concurring in the judgment).

\textsuperscript{36} \textit{Id.} at 43–44. Justices of the peace in Marian England were typically "leading local gentry, appointed by royal commission for each county" who were granted the judicial power to investigate criminal violations. JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 5 (1974). Operating under the bail and committal statutes, these justices were empowered to interrogate accused felons and their accusers before trial and prepare memoranda that were used for subsequent prosecution. \textit{Id.} at 16. Because of the relatively crude drafting of the committal statute, justices of the peace were given broad leeway to record evidence of the defendant’s alleged crime. \textit{Id.} at 18. Although the primary function of the bail and committal statutes was not to create written evidence for trial, the memoranda of the justices of the peace began to be used in place of live testimony by the examination witnesses. \textit{Crawford}, 541 U.S. at 48.

\textsuperscript{37} \textit{Id.} at 51–52. Interestingly, the Court announced that dying declarations, even if testimonial, would likely be admissible even under the new constraints of the Confrontation Clause. \textit{Id.} at 56 n.6. The Court explained that dying declarations represented a unique hearsay exception that should remain exempt from Confrontation Clause review. \textit{Id.} Citing \textit{Mattox}, Scalia noted that the dying declaration exception has enjoyed a long history in American law. \textit{Id.} The exception appears to be largely based on inherent guarantees of reliability. See 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1438, at 289 (Chadbourn rev. 1974) ("All courts have agreed, with more or less difference of language, that the \textit{approach of death} produces a state of mind in which the utterances of the dying person are to be taken as free from all ordinary motives to misstate."). \textit{But see} Brian A. Liang, \textit{Shortcuts to "Truth": The Legal Mythology of Dying Declarations}, 35 AM. CRIM. L. REV. 229, 237–43 (1998) (demonstrating the practical and scientific considerations that call the dying declaration hearsay exception into question).

\textsuperscript{38} \textit{Crawford}, 541 U.S. at 68–69.

adequately the meaning of testimonial would cause both prosecutors and defense attorneys a great deal of confusion in determining the scope of the Sixth Amendment.\textsuperscript{40} Indeed, 	extit{Crawford} created significant bewilderment as state and federal courts attempted to formulate new methods for discerning the revised interpretation of the Confrontation Clause.\textsuperscript{41}

\textbf{C. Honing “Testimonial”: Davis v. Washington}

\textit{Crawford} controlled the interpretation of the Confrontation Clause until the Supreme Court refined the meaning of testimonial in \textit{Davis v. Washington}\textsuperscript{42} two years later. \textit{Davis} was a decision based on two consolidated cases that dealt with statements made to police officers by victims of two separate episodes of domestic violence.\textsuperscript{43}

The first case concerned a phone conversation between a 911 operator and Michelle McCottry.\textsuperscript{44} During the conversation the operator discovered that McCottry was involved in a dispute with an ex-boyfriend, Adrian Davis.\textsuperscript{45} McCottry frantically stated that she was being attacked by Davis.\textsuperscript{46} While she was still speaking with the operator, McCottry then reported that the attacks had stopped, Davis had fled, and that she was no longer in immediate danger.\textsuperscript{47} The 911 operator gathered additional information about the incident and informed McCottry that police officers would arrive shortly.\textsuperscript{48}

The companion case resulted from a domestic dispute between a married couple, Amy and Herschel Hammon.\textsuperscript{49} Police arrived after a reported domestic disturbance to find Amy “somewhat frightened” and alone on her front porch.\textsuperscript{50} After brief questioning of Amy, police officers found Herschel in the kitchen of the home.\textsuperscript{51} He explained that the couple had engaged in an argument, but no physical altercation took place.\textsuperscript{52} Police officers separated the couple, inquired into the origins of the dispute, and thereafter discovered signs of recent violence in the home.\textsuperscript{53} Upon further inquiry, the police officers had Amy provide an affidavit in which she stated that Herschel broke the glass front of their furnace, shoved her into the debris, and hit her in the chest.\textsuperscript{54}

Both Adrian Davis and Herschel Hammon were tried on domestic violence charges. In Davis’s case, Washington prosecutors introduced McCottry’s recorded
phone call to the 911 operator as proof that he was the assailant. These statements were used against Davis notwithstanding McCottry’s absence at trial. Similarly, in Hammon’s case Indiana prosecutors introduced Amy Hammon’s affidavit without her live testimony. Both defendants were convicted and appealed on Confrontation Clause grounds.

The Supreme Court moved beyond its relatively vague explanation of the new standard for Confrontation Clause analysis set out in Crawford and introduced a new measure for determining when a statement is testimonial. Again writing for the majority, Scalia explained:

[states]tatement[s] 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 indicated 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.

Under this analysis, the Court found that Michelle McCottry’s statements to the 911 operator were nontestimonial because they were uttered to understand and extinguish a present threat of harm.

Part of the Court’s analysis focused on the distinctions between McCottry’s statements and the recorded statements Sylvia Crawford provided to police after Michael Crawford’s arrest. Justice Scalia highlighted these distinctions as a method for demonstrating the operation of the primary purpose test. He first noted that McCottry was explaining events “as they were actually happening” rather than events that occurred in the past. Unlike Sylvia Crawford, McCottry’s statements did not provide a later narrative account of an event that could be used to incriminate Davis. Instead, McCottry’s statements to the 911 operator were a genuine call for help indicating that she was facing a current emergency. An objective view of the questions and responses between the 911 operator and McCottry revealed that the nature of the discussion was to resolve the present emergency instead of learning what had happened in the past. In other words, the responses were not procured to build evidence against Davis.

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55. Id. at 819. The two officers that arrived after the dispute testified at Davis’s trial that McCottry appeared to have sustained recent injuries, but neither officer could testify that Davis was the source of the injuries. Id. at 2271.

56. Id. at 2273.
57. Id. at 820–21.
58. Id. at 819, 821.
59. Id. at 822.
60. Id.
61. Id. at 828.
62. Id. at 827.
63. Id.
64. Id. (emphasis omitted).
65. Id.
66. Id.
67. Id.
Additionally, the level of formality of the interview played a part in characterizing McCottry's statements. McCottry's responses to the 911 operator were described as "frantic" and recorded during the informal process of a telephone conversation. In contrast, Sylvia Crawford was interviewed in the calm setting of a police stationhouse where officers asked calculated questions about past events.

After finding that McCottry's statements were nontestimonial, the Court shifted its focus to the affidavit Amy Hammon provided to police officers after the domestic dispute with Herschel Hammon. The Court characterized the statement as testimonial, noting the high resemblance to the recorded statement given by Sylvia Crawford. The Court also explained that at the time the statement was given, there was no ongoing emergency and there was no immediate threat to Amy. Accordingly, the purpose of the affidavit could only be to provide evidence of past events for use in later prosecution.

D. Lingering Questions after Crawford and Davis

Although the primary purpose test in Davis refined the theoretical understanding of testimonial statements, the decision still left a fair amount of confusion for practical application. Part of this confusion, noted in Justice Thomas's dissent, is that it is not always clear what the primary purpose of an investigation is or if there is a single primary purpose in making a statement. Thomas's criticism is rooted in the notion that police officers often engage in interrogations both for addressing a criminal emergency and to gather evidence for future prosecution. He explained that declaring that one purpose is primary and another secondary "requires constructing a hierarchy of purpose that will rarely be present...[and] will inevitably be, quite simply, an exercise in fiction."

Thomas further remarked that evaluating primary purpose entailed an inquiry into whose intentions controlled the nature of a statement. While the intent of the declarant may be one possible perspective, it is also possible that one should consider the "subjective intentions of police officers" or other interrogators. Indeed, this consideration makes a great deal of sense given that Crawford was meant to address the unjust inquisitorial practices by Marian justices of the peace in sixteenth-century England.

68. Id.
69. Id.
70. Id.
71. Id. at 829.
72. Id.
73. Id. at 829–30.
74. Id. at 839 (Thomas, J., concurring in the judgment in part and dissenting in part).
75. Id.
76. Id.
77. Id. at 839–40. The majority explains that an analysis of the character of out-of-court statements should ultimately focus on the declarant's statements, not the interrogator's questions. Id. at 822 n.1.
78. Id. at 839.
Davis also raises questions regarding the breadth of interpretation for an "ongoing" emergency.80 This inquiry is largely based on a declarant's proximity to harm.81 If one takes a narrow approach in defining emergency as a present imminent harm, then the vast majority of out-of-court statements made to police officers will be declared testimonial.82 On the other hand, if an emergency is interpreted too broadly then the Confrontation Clause will provide almost no protection to criminal defendants.83 Because of the nature of human trauma, these questions raise particular concern when evaluating statements made to medical personnel. While there may be many situations in which a doctor needs to elicit information from a patient to address immediate trauma, many patients visit their doctors long after any such emergency occurs.

Consider, for example, a victim of physical abuse who suffers non-lethal injuries as a result of a single attack. Weeks later she may visit her doctor to address lingering pain. Even if we presume that the doctor's primary purpose is to treat the pain, the way we define "ongoing emergency" affects the nature of the patient's statement. If one adopts a narrow definition of an emergency that only accounts for immediate and present danger, then it is likely that all of her statements regarding the source of the injury will be considered testimonial because there is no ongoing emergency.84 Conversely, if one takes a broad approach in defining an ongoing emergency that encompasses things like lingering pain, then it is likely that a substantial portion of the victim's statements will be nontestimonial.85

Deciding whose perspective controls the confrontation analysis entails an even more perplexing inquiry. Crawford draws the witness's "solemn declaration" as the baseline for determining whether a statement is testimonial.86 Davis, on the other hand, looks to the purpose of interrogation as the determinative mark.87 This shift in focus from the witness's declaration to the interrogator's purpose appears inconsistent.88 Should the declarative intent of the speaker be the measure? This inquiry would essentially ask, "did the speaker expect his statement to be used for later prosecution?" Should the intent of the inquiring physician be the measure by which we evaluate these statements? Should a comprehensive view of the nature of a discussion that incorporates a totality of circumstances be the appropriate guide in determining the character of a statement? And if so, what considerations should be taken into account?

These are questions that various state and federal courts have struggled with in the wake of Crawford and Davis. Because the Supreme Court has given fairly limited direction in this area (and because that direction has come forward only in
the context of police investigations), lower courts have been left to their own devices in formulating confrontation doctrine. The result is that courts attempt to analogize the primary purpose test to encompass communications made to physicians and medical personnel. In this effort, the law with respect to the Confrontation Clause and medical communications has developed varying ways. The next section will address the different approaches courts have used in this area and the difficulties each approach entails.

III. EVALUATING PATIENT COMMUNICATIONS WITH PHYSICIANS UNDER CRAWFORD AND DAVIS: THREE APPROACHES

After Crawford and Davis, lower courts began to see numerous Confrontation Clause challenges based on incriminating out-of-court statements made to doctors and nurses admitted in evidence. Under the Roberts regime a vast majority of jurisdictions allowed such evidence under the “firmly rooted hearsay exception” of statements made for purposes of medical diagnosis or treatment. With the overruling of Roberts, various courts began to formulate their own tests for finding when statements are considered testimonial or nontestimonial. The goal for each of these courts has been to transpose the evaluative processes outlined by the Supreme Court in the context of law enforcement to the field of communications made to doctors and medical personnel. The results are not uniform.

A survey of post-Crawford and post-Davis decisions reveals that state and federal courts have created three major approaches for determining when statements are testimonial. The first approach focuses on the intent of the declarant at the time the statement was made. The second approach focuses on the purpose sought by the party questioning the declarant. The final approach aims to evaluate the nature of the declarant’s statement based on the totality of circumstances surrounding the utterance. Each approach will be evaluated in turn after a brief introduction of the paradigmatic scenarios that raise the most difficult confrontation dilemmas.

When considering the possibility that both the declarant and the questioner (or some combination thereof) may affect a confrontation determination, it is helpful to recognize that two scenarios raise relatively little analytical difficulty. These two situations occur when the declarant intends to make a testimonial statement and the questioner intends to procure one or, conversely, when the declarant does not anticipate that his statement will be used prosecutorially and the questioner has no intention of gathering evidence for later criminal charges.

The difficult situations arise where the declarant’s and the questioner’s expectations diverge. The first difficult case occurs when the declarant intends to accuse another of a particular act, but the questioner does not intend to use the

89. E.g., United States v. Sumner, 204 F.3d 1182, 1185 (8th Cir. 2000) (“Rule 803(4), which allows the admission of statements made for the purposes of obtaining medical diagnosis and treatment, is widely accepted as a firmly rooted hearsay exception.”).
90. Fed. R. Evid. 803(4). The exception declares the following admissible: “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” Id.
91. See Dylan, supra note 81, at 1918–26.
accusation prosecutorially. The other difficult case occurs when the questioner intends to procure a testimonial statement, but the declarant does not anticipate that the statement will be used against any defendant. When addressing these difficult cases courts will likely reach different results based on which of the following analyses apply.

A. Declarative Intent as a Determinative Guide

In spite of Crawford's heavy emphasis on a witness's "solemn affirmation," relatively few courts have developed an analysis that begins with the declarant's intent when evaluating statements made to medical personnel. One reason for the reluctance is that Davis's primary purpose test has influenced courts to first look to the interviewer's role before the declarant's intent. Professor Richard Friedman argues that the declarant's intent should always be the controlling measure for evaluating whether a statement is testimonial or nontestimonial. His assertion is grounded in the premise that the mere presence of a government investigator does not affect a statement's characterization as testimonial or nontestimonial; rather, it is the declarant's expectation in a given context that ought to control its classification. Friedman asserts that an investigator's intent to procure evidence for trial has limited bearing on the nature of a statement because if a declarant knowingly speaks to a police agent after the commission of some crime, his statement will likely be testimonial simply by virtue of his understanding of the role of law enforcement. Conversely, if he unknowingly speaks to undercover law enforcement, his statements will likely be nontestimonial because the context of the conversation will not lend itself to a declarant's expectation of prosecutorial use.

For instance, a conspirator could not make a testimonial statement to a coconspirator simply because a government agent was secretly listening to the statement. The idea is sensible because it accounts for a declarant's expectations given his audience. However, this approach may not provide a completely workable match in the context of communications made to medical workers.

92. E.g., State v. Slater, 939 A.2d 1105, 1117-18 (Conn. 2008); People v. West, 823 N.E.2d 82, 89 (Ill. App. Ct. 2005); State v. Stahl, 855 N.E.2d 834, 844 (Ohio 2006); State v. Brigman, 632 S.E.2d 498, 506 (N.C. 2006). This does not purport to be an exhaustive list of cases that begin Confrontation analysis with the declarant's expectation, however, this minority view is representative based on a broad survey of post-Crawford cases in this context. Compare infra notes 157 and 188 (noting decisions that employ the function-of-investigator approach and totality of circumstances approach, respectively).

93. See Graham, supra note 80, at 612.
94. Richard D. Friedman, Grappling with the Meaning of "Testimonial", 71 BROOK. L. REV. 241, 255-259 (2005) [hereinafter Friedman, Grappling]. Although this article was written before Davis, Professor Friedman maintains that this is the appropriate approach for characterizing out-of-court incriminating statements. Richard Friedman, The Confrontation Blog, http://confrontationright.blogspot.com/ (last visited Jan. 24, 2008).
95. Grappling, supra note 94, at 256-57.
96. Id. at 253.
97. Id.
98. Id.
In *State v. Stahl*99 a female victim reported a rape to police the day after it occurred.100 After the report, an officer transported the victim to a Developing Options for Violent Emergencies (DOVE)101 unit at a nearby hospital.102 Prior to examination by a nurse for the program, the victim signed a consent form acknowledging the voluntary nature of the examination and the authorization to release evidence “to a law enforcement agency for use only in the investigation and prosecution of this crime.”103 During the examination the victim provided a narrative report of the rape to the nurse that was later used against the defendant in prosecution for rape and kidnapping.104 The victim did not testify nor was she subject to prior cross-examination because she died before the defendant’s trial.105 Over the defendant’s Sixth Amendment objection, the Ohio Supreme Court allowed the victim’s incriminating statements by evaluating the anticipated use of those statements from the perspective of the declarant.106 With this focus the court found that the victim’s statements “served a… distinct medical purpose” because she had already given a testimonial account of the rape to a police officer and the redundant subsequent account could therefore only be given for the purpose of medical treatment.107 The majority addressed the matter of the consent form authorizing release of evidence for later prosecution by stating that the “form does not refer to statements made by a patient,” but instead only to the physical evidence such as clothing and photographs collected during the examination.108 Thus, the court parsed the examination record and asserted that the victim would reasonably believe that physical evidence may be used to incriminate the defendant, but her statements would only be used to render medical treatment.109

Certainly, there is ample room to criticize the Ohio court’s approach. Many of the statements introduced concerned facts about the incident, including a possible motive for the assault, having little to do with the nurse’s treatment.110 The victim’s narrative not only unequivocally identified the defendant but also established the

99. 855 N.E.2d 834 (Ohio 2006).
100. Id. at 836.
101. According to its website, the DOVE Program is a clinical program specifically created for victims of sexual and other types of abuse. The program’s objectives include providing specialized “medico-legal care to victims of sexual assault,” but “[t]he DOVE Program has no affiliation with any law enforcement agency or prosecutor’s office, although collaboration may occur in the course of providing direct patient care.” Summa Health Systems, DOVE Program, http://www.summahealth.org/common/templates/contentindex.asp?ID=337. (last visited Feb. 24, 2008).
103. Id. at 837. (emphasis added).
104. Id.
105. Id. at 838.
106. Id. at 844. The court expressed its view that “for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of the questioner is relevant only if it could affect a reasonable declarant’s expectations.” Under this analysis the court did not find that the DOVE nurse had an influence on the victim’s expectation that her statements would be used at trial. Id.
107. Id. at 846. If this argument is carried to its logical end, it seems that a person can no longer make a testimonial statement after having made a statement containing the same information to police.
108. Id.
109. Id.
110. Id. at 837. In the account the victim explained that she went to see the defendant to attempt to persuade him to rehire her boyfriend, and he explained that he would help them out if “[she would] do something to [him].” Id.
precise events of the assault. In this way, the report highly resembled the affidavit provided by Amy Hammon.

Further criticism came from three dissenting Ohio Supreme Court Justices who agreed with the majority insofar as the declarant’s expectation should control the characterization of her statements. The dissent disagreed, however, that the primary purpose of the statements was for medical diagnosis or treatment. Instead it declared that “[u]nder any objective standard, [the victim] knew her statement could be used at [the defendant’s] trial.” The dissent explained that this knowledge was clear by virtue of the consent release authorizing prosecutorial use of evidence and the answers to the DOVE nurse’s questions about the event.

The differing conclusions in Stahl underscore the difficulty that a solely declarant-based focus raises in evaluating out-of-court incriminating statements. First, it is evident that the dual function of the nurse as a caregiver and an investigator muddles a clear understanding of which purpose is primary during the course of the discussion. Indeed, this seems to be another formulation of Justice Thomas’ criticism of the idea of singular primary purpose when evaluating the acts of police officers. Second, the dual purpose of the nurse frustrates the idea that the victim expected her statements to achieve a single purpose. A patient seeking treatment, even knowing that she is making statements to a government investigator, cannot both anticipate prosecutorial use and medical assessment as the overriding function of her communication. Otherwise stated, the victim in Stahl could not logically assert that she communicated with the DOVE nurse with the foremost intention of receiving medical care and the foremost intention of developing incriminating evidence.

Another difficulty that accompanies a declarant-based focus is evaluating statements of child victims to physicians. The main concern with child declarants is whether they can make testimonial statements given their limited understanding of the criminal justice system and the penal consequences their statements may entail. If children are required to have a certain understanding of criminal prosecution to make testimonial statements, then a strictly declarant-based focus will render statements by particularly young children per se nontestimonial simply because

\[\text{id. at 846 (Lanzinger, J., dissenting).}\]
\[\text{id. at 848.}\]
\[\text{id. It is interesting that in its declarant-focused analysis, the dissent consistently refers to the contextual circumstances surrounding the interview and the effect those circumstances have on the characterization of the victim’s statements. \text{id. One may rightly question whether the dissent’s analysis is exclusively declarant-based. See discussion infra Part III.C.}\]
\[\text{See note 82 and accompanying text.}\]
\[\text{Thomas’s dissent notes the difficulty in assigning primary purpose to investigating police officers and the overlapping motives that an officer may harbor. Davis v. Washington, 547 U.S. 813, 839 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part).}\]
\[\text{See id.}\]
\[\text{See id.}\]
\[\text{One court has recognized that adults with mental retardation pose a similar problem. State v. Hosty, 944 So.2d 255 (Fla. 2006). For Confrontation purposes the court analogized statements of a mentally retarded adult to statements made by children. \text{id. at 260.}\]
by virtue of their limited legal understanding and vocabulary. One concern this raises is a movement away from the accusatory nature inherent in testimonial statements. Professor Friedman shares this concern, especially when considering statements made by very young children. Friedman, however, notes that the test for determining whether a child is capable of making testimonial statements should not rest on her understanding of criminal prosecution; rather, it should be based on whether a child is capable of understanding that her statements will incur some adverse consequence for another person. Leading studies in child behavioral development provide a foundation for Friedman's theory.

In the late 1950s psychologist Lawrence Kohlberg began a series of studies on the development of moral judgment in male children of various ages. Kohlberg proposed a hypothetical scenario involving Heinz, a husband whose dying wife requires a revolutionary drug he cannot afford. Heinz is faced with the dilemma of whether he should steal the drug to save his wife. Based on the responses, Kohlberg devised a framework illustrating the progressive levels of moral reasoning humans develop as they mature. Each level is broken into two sub-stages representing moral understanding.

Kohlberg found that most children under nine-years old reason at the Preconventional Level. Preconventional reasoning begins at Stage 1 where children base moral reasoning on a self-interested understanding of obedience and punishment. At this stage moral agents are entirely egocentric—punishment is understood as a consequence to one's self; rules are obeyed only to avoid punishment. Kohlberg explains that children reasoning at stage 1 "[do not] consider the interests of others or recognize that they differ from the actor's" and that "[a]ctions are considered physically rather than in terms of psychological interests of others."

The notion of consequential punishment for others likely begins at Stage 2 where moral reasoning incorporates an understanding of other viewpoints, but is still highly self-interested. At this stage children recognize that disobedient or

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120. For the results of one study evaluating children's limited ability to define legal terms see Karen Saywitz et al., Children's Knowledge of Legal Terminology, 14 LAW & HUM. BEHAV. 523, 527–34 (1990) (discussing a study examining "age-related patterns in communicative abilities relevant to providing testimonies, specifically, knowledge of legal terms commonly used with children in court").

121. Grappling, supra note 94, at 272.

122. Id. at 273.


124. Id. at 186.

125. Id. at 170–77. Kohlberg's stage theory has been applied in numerous works of legal scholarship. A LexisNexis search including the terms "Lawrence Kohlberg" and "moral reasoning" yields over 100 results. Jurists have applied the theory in areas varying from judicial decision-making, Michael D. Daneker, Moral Reasoning and the Quest for Legitimacy, 43 AM. U.L. REV. 49 (1993), to legal economic analysis, Jeffrey L. Harrison, Egoism, Altruism, and Market Illusions: The Limits of Law and Economics, 33 U.C.L.A. L. REV. 1309, 1321 (1986).

126. KOHLBERG, supra note 123, at 173.

127. Id. at 172.

128. Id. at 174.

129. Id.

130. Id.

131. Id.
unlawful action by others entails possible punishment. This stage is still part of the Preconventional Level because reasoning is highly individualistic and moral agents do not yet consider themselves as members of society. However, the shift from Stage 1 moral reasoning to Stage 2 moral reasoning represents an important development because it marks the point when a child anticipates adverse consequences for others based on his own actions.

The following example illustrates the distinction: Kohlberg asked two subjects whether one brother should tell his father of a sibling’s misdeed, revealed in confidence. Explaining why the brother should tell the father, the younger child gives a Stage 1 answer: “In one way it was right to tell because his father might beat him up. In another way it’s wrong because his brother will beat him up if he tells.” Here, the contemplation of adverse consequences is purely self-referential; the child’s only concern is to avoid being “beat up.” On the other hand, a child reasoning at Stage 2 explains, “The [first] brother should not tell or he’ll get his brother in trouble. If he wants his brother to keep quiet for him sometime, he’d better not squeal now.”

Kohlberg notes the critical difference in the Stage 2 subject as “an extension of concern to the brother’s welfare.” One author refers to this progression as the “overcoming of egocentrism.” This step is significant for a confrontation analysis because it marks the point where a declarant understands that his statements can entail detrimental impact on others. Most importantly, the Stage 2 child expresses a new faculty absent in the Stage 1 child—the understanding of what it means to “squeal” or “turn informer.”

Kohlberg’s theory is useful for confrontation purposes because it shows that at a certain point children anticipate that their words can affect others unfavorably. A child reasoning at Stage 2 may not understand the meaning of the phrase “reasonably expect to be used prosecutorially,” but the child’s understanding captures precisely that idea. The statement of the Stage 2 child wholly incorporates the principle of accusation in the sense that there is an identification of wrongdoing by another. This is valuable for confrontation doctrine because the text of the Sixth Amendment accords a right to “the accused.”

Unfortunately, Kohlberg’s stages do not provide a blueprint for precisely when a child develops the cognitive faculty to comprehend the punitive consequences of

132. Id. at 182.
133. Id. at 174.
134. See id. at 182.
135. Id.
136. Id.
137. Id.
138. Id.
139. Id.
140. WILLIAM C. CRAIN, THEORIES OF DEVELOPMENT: CONCEPTS AND APPLICATIONS 113 (1980).
141. Kohlberg, supra note 123, at 182.
143. Kohlberg, supra note 123, at 182.
145. See Grappling, supra note 94, at 273.
146. U.S. CONST. amend VI.
his statements. There does not appear to be a uniform age for this progression, and it is possible that two or more stages may be simultaneously operative.

Kohlberg's work has also faced criticism on the grounds that his progressive theory was based entirely on responses from male subjects. Professor Carol Gilligan notes that gender differences play a key role in the moral development of humans and illustrated this principle through a series of studies conducted in the 1970s. Using the same methods as Kohlberg with both male and female subjects, Gilligan discovered that the development of female moral reasoning is fundamentally different than that of males. She describes the development of moral judgment in females as an "ethic of care" where understanding of interconnected relationships between people forms the foundation for moral judgment.

Female responses to Kohlberg's Heinz dilemma tended to show a desire to preserve workable relations between all parties—"if Heinz and the druggest [sic] had talked it out long enough, they could reach something besides stealing." Male responses, on the other hand, moved closer towards a mathematical approach based on a calculus of harm. The differences in responses showed slower progression through Kohlberg's moral stages for females. Gilligan advances a rationale for the disparity: "Failing to see the dilemma as a self-contained problem in moral logic, she does not discern the internal structure of its resolution; as she constructs the problem differently herself, Kohlberg's conception completely evades her."

If there is such a difference between male and female moral development then the Kohlberg's stage analysis may not be the exemplary model for Confrontation Clause methodology. The difficult question raised by Gilligan's critique is whether a confrontation analysis should incorporate gender differences. Nonetheless, Kohlberg's framework provides a useful starting point in analyzing inculpatory statements of young children because it marks the fundamental sense of accusation that triggers the protection of the Confrontation Clause.

An approach to Confrontation Clause analysis that focuses entirely on the expectations of the declarant shows promising consonance with the constitutional aim articulated in Crawford and Davis. With that in mind, such an analysis may give rise to challenging questions, especially when considering declarations of young children. Because of these questions, many courts have looked beyond declarative intent in evaluating statements raising confrontation questions. The next section will outline one such approach.

147. See Kohlberg, supra note 123, at 171–72.
148. Crain, supra note 139, at 109, 112.
150. Id. at 1–4.
151. Id. at 31.
152. Id. at 30.
153. Id. at 29.
154. Id.
155. Id. at 26.
156. Id. at 29.
B. Intent of Interviewer as a Constitutional Measure

In evaluating out-of-court statements after *Crawford* and *Davis*, some courts have placed heavy consideration on the function and intent of the questioning party.\(^\text{157}\) It would be wrong to say that these courts entirely disregard the substance of statements; rather, these courts place primary focus on the intent of the investigating party. Although this shift in focus may alter how one views an adverse witness, it is sensible given the apparent common law origins of the Sixth Amendment and the holding in *Davis*.

One of the evils the Sixth Amendment sought to prevent was the Marian form of interrogation by justices of the peace.\(^\text{158}\) That concern has been preserved for those courts that emphasize the role that modern day interrogators play when enforcing the protection of the Confrontation Clause. This view is also sensible after *Davis* because of its specific reference to the "primary purpose of the interrogation"\(^\text{159}\) as the determinative measure of whether a statement is testimonial. A review of several court decisions shows that an approach focusing primarily on the intent of the questioning party carries advantages as well as disadvantages.

In *State v. Vaught*\(^\text{160}\) the defendant was charged with sexual assault of a minor. After the victim's step-mother noticed signs of abuse, the four-year old victim was taken to the hospital for examination the day after the assault.\(^\text{161}\) During the examination the child reported what occurred and the identity of the perpetrator.\(^\text{162}\) At trial the examining doctor relayed the statements of the victim and testified that "[her] Uncle DJ put his finger in her pee-pee."\(^\text{163}\) In determining whether the statement was testimonial, the court explained that the victim's statements had no resemblance to the examples of testimonial statements as described in *Crawford* and gave almost no consideration as to her communicative intent at the time the statements were made.\(^\text{164}\) Instead, the court focused on the fact that the doctor's purpose during the examination was to render medical treatment and there was "no government involvement in the initiation or course of the examination."\(^\text{165}\) The court

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160. 682 N.W.2d 284 (Neb. 2004).

161. Id. at 286.

162. Id. at 289.

163. Id. at 286.

164. Id. at 289.

165. Id. at 291.
contrasted the doctor’s examination with a case where children were interviewed with the explicit purpose of developing incriminating evidence.  

Other courts have reached the opposite result when the investigating nurse or examiner is in some way connected with government investigation. These courts often emphasize the governmental function the interviewer serves when evaluating statements made by young children. This is one strategy for approaching the difficult scenario presented when an interviewer seeks a testimonial statement, but it is unclear whether the declarant intends to make one.

Psychological studies in forensic interviewing techniques aid in understanding this view. These studies indicate that certain interviewing strategies can impair child responses because of their vulnerability to suggestive questioning. Behavioral scientists note that adults are also susceptible to suggestive interviewing, albeit at a reduced level. Psychologist Michael Lamb explains, “young children, especially preschoolers, are more likely than older children both to respond erroneously to suggestive questions about their experiences and to select erroneous options when responding to forced-choice questions.” Lamb further notes that open invitation questions (e.g., “what happened?”) tend to generate more forensically relevant details than other suggestive questioning techniques. But perhaps more troubling are child responses derived in the presence of interviewer bias. Interviewer bias occurs where a questioner holds preconceived beliefs of past events and seeks to elicit responses consistent with those beliefs. The phenomenon is often distinguished by a desire only to gather evidence that confirms the truth of the interviewer’s belief through the use of specific and presumptive questioning. The result is not only a greater occurrence of false assents, but also a greater number of “false claims about a wide range of events.”

With these considerations in mind, it is no wonder that some courts have focused on interviewer intent when evaluating child statements. Suggestive questioning

166. Id. at 292 (citing Snowden v. State, 846 A.2d 36 (Md. App 2004) (child interviewed for express purpose of developing testimony)).
167. See, e.g., id.
168. See supra note 157.
172. Id. at 931.
173. Bruck et al., supra note 170, at 140.
174. Id.
175. Id. at 143. A false assent is an affirmative response to a question that contains a false supposition. Such questions may include subtle hints or suggestions. For example, the following two questions that Professor Bruck cites from a study involving the false supposition that there is a cabinet in a room: (1) “Is there a cabinet in the room?” (2) “Isn’t there a cabinet in the room?” Id. (internal citations omitted).
176. Id. at 144. For illustrative purposes Professor Bruck points to a series of studies in which a large group of three- and four-year-old children participated in a medical examination in which half of the children received a genital examination. After the examination the children responded to subsequent leading questions. A significant proportion of children who underwent a genital exam reported inaccurate and overemphasized genital touching. And among the children who did not undergo any genital exam, many reported genital touching. Id. at 142.
tends to draw presumed responses from interviewees. If medical personnel have reason to suspect abuse, then their questions may be informed by those suspicions. If those questions naturally lead toward accusatorial responses, then finding testimonial statements is the obvious consequence.

An increased emphasis on the interviewer’s intent, however, tends to produce strict line drawing where statements are made to medical personnel performing investigative functions.\(^1\) This is problematic because it is just as plausible that a child could make a nontestimonial statement to an investigating doctor as he could to an investigating police officer.\(^1\)\(^7\)\(^8\) In fact, the above studies show that a given statement’s content may have more to do with the question posed than the questioner. Moreover, if this strict interpretation prevails, then witnesses who have sustained episodes of abuse may be able to subvert the protection of the Confrontation Clause by, afterward, choosing to visit doctors with no government affiliation.\(^7\)\(^9\) This could become especially prevalent in jurisdictions that consider the relationship between medical personnel and law enforcement as an influential factor in confrontation analysis.\(^1\)\(^8\)

Part of the problem with the intent-of-the-questioner approach is the way in which “ongoing emergency” is interpreted in the context of medical trauma. In Vaught, the victim was taken to the hospital nearly twenty-four hours after the victim sustained the trauma that led to the visit.\(^1\)\(^8\)\(^1\)\(^7\) Part of the court’s justification in allowing the statement was that the doctor needed to determine the identity of the victim’s attacker to prevent subsequent harm.\(^1\)\(^8\)\(^2\) The difficulty here is that there is no principled reason for distinguishing physicians from police officers in this respect. Both professions aim to protect citizens from future harm, and it would be equally understandable that a police officer would need to know the identity of an attacker to prevent future harm. For instance, Davis explained that the disclosure of the defendant’s identity to the 911 operator enabled dispatched officers to “know whether they would be encountering a violent felon.”\(^1\)\(^8\)\(^3\) The same rationale applies to the physician in Vaught because that doctor needed to know the identity of the attacker to prevent future harm to the victim even though the disclosure occurred long after the injury.\(^1\)\(^8\)\(^4\)

\(^1\)\(^7\) See Elizabeth J. Stevens, Comment, Deputy Doctors: The Medical Treatment Exception After Davis v. Washington, 43 CAL. W. L. REV. 451, 453 (2007) (arguing that government-connected health care providers act as police agents when interviewing crime victims). But see Tom Harbinson, Crawford v. Washington and Davis v. Washington’s Originalism: Historical Arguments Showing Child Abuse Victims’ Statements to Physicians are Nontestimonial and Admissible as an Exception to the Confrontation Clause, 58 MERCER L. REV. 569, 616 (2007) (arguing that agency law does not support the theory that physicians can act as government agents).

\(^1\)\(^8\) See Grappling, supra note 94, at 260.

\(^1\)\(^9\) Professor Friedman explains that prosecutors could attempt to manipulate the intent-of-interviewer approach to enhance the chances that a statement will be characterized as nontestimonial by suggesting that witnesses visit physicians with no government affiliation. Confrontation Blog, http://confrontationright.blogspot.com/ (Jan. 7, 2008, 14:50 EST).

\(^1\)\(^8\)\(^0\) See, e.g., Hernandez v. State, 946 So.2d 1270, 1280 (Fla. Dist. Ct. App. 2007) (finding “the nature and extent of law enforcement involvement in the examination of the child” relevant to a Sixth Amendment determination).

\(^1\)\(^8\)\(^1\) State v. Vaught, 682 N.W.2d 284, 286 (Neb. 2004).

\(^1\)\(^8\)\(^2\) Id. at 291.


\(^1\)\(^8\)\(^4\) Vaught, 682 N.W.2d at 291. The reasoning behind this theory is that knowing the identity of the
Another concern this approach raises is whether it is harmonious with the command in *Davis* that "it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires lower courts to evaluate." After all, *Crawford* reminds lower courts that the Confrontation Clause "applies to ‘witnesses’ against the accused," i.e., he who makes the accusation. With this in mind, a physician’s intent to create testimonial statements "cannot make [them] so." This result is sensible because it upholds the idea that a criminal defendant has a right to confront the person who makes an incriminating remark, not the person who solicits such a remark.

The doctrinal conflict that a purely interviewer-based approach produces suggests that its limited analysis will prove insufficient to address all Confrontation Clause questions. Because an interviewer’s intent does not adequately capture the notion of a witness’s testimony as advanced in *Crawford*, the approach is vulnerable to overbroad application in situations where a victim does not intend to make a testimonial statement, but a medical professional seeks to produce incriminating evidence. Therefore, to make competent confrontation assessments courts will need to look beyond the questioner’s intent when determining whether or not a statement is testimonial. The next section examines one method of doing so.

C. The "Totality of Circumstances" Approach

A number of courts have adopted a more expansive approach to characterizing statements made to doctors and medical personnel. For these courts the intent of no single party is dispositive of whether a statement is testimonial or nontestimonial. Instead, analysis proceeds with a view of the numerous circumstances surrounding the utterance of a statement, including the declarant’s intent and the function of the interviewer.

The court in *Commonwealth v. DeOliveira* used this approach in evaluating statements made by a six-year-old victim of sexual abuse to a pediatrician. There, a social worker was called to investigate an allegation of domestic abuse. After the social worker spoke with the victim she decided there were sufficient indications of sexual abuse to contact local police immediately. When police arrived, the victim and her mother were transported to a hospital for examination. The examining doctor, a specialist in pediatric emergency medicine, was aware that perpetrator is crucial for the treatment purpose of removing the patient from danger posed by a cohabitant. See, e.g., State v. Perez, 151 P.3d 249, 254 (Wash. App. 2007).

185. *Davis*, 547 U.S. at 822 n.1.
189. 849 N.E.2d 218 (Mass. 2006).
190. *Id.* at 225.
191. *Id.* at 222.
192. *Id.*
193. *Id.*
he would examine the child for signs of sexual abuse and that he could be summoned to testify about the examination in a subsequent criminal trial. During the examination the physician asked the victim what happened to her. She responded that the defendant “put his penis...here, here, and here” while respectively motioning toward her mouth, vagina, and rectum. The question for the Supreme Judicial Court of Massachusetts was whether that statement was testimonial.

The court first looked to the purpose of the interviewing physician. The court noted that “although police officers were present at the hospital...[n]othing in the record would support that the doctor acted as an agent of law enforcement.” Next, the court evaluated the intent of the child to determine whether “a reasonable person in the declarant’s position would anticipate the statement being used against the accused in investigating and prosecuting a crime.”

Under this view, the court found that a child in the victim’s situation would have reasonably understood the questions as designed for medical purposes rather than for later prosecutorial purposes. The court further emphasized that there was nothing in the record to support the notion that the victim recognized the defendant’s acts as criminal or bad acts, and nothing in the record that suggested that the doctor was acting as an agent of law enforcement. Based on all of the above circumstances, the court found that the child’s statement was nontestimonial.

While DeOliveira’s Confrontation Clause analysis provides a more comprehensive understanding of the ways in which a statement may be testimonial, there are drawbacks to consider. First, there is a danger that courts will begin to incorporate a host of considerations in making confrontation determinations. For example, a court could develop a confrontation analysis that focuses on the declarant’s intent, then on the intent of the interviewer, and then on the level of relatedness between the interviewer and law enforcement. The eventual result would be an extensive multifactor test for deciding when a statement is testimonial that is inconsistent with the abandonment of the Roberts multifactor reliability test. Functionally, this approach would merely replace one multifactor test for another. The harm associated with this approach is that it lends itself to the same vulnerability identified in Roberts. When faced with a variety of factors, judges

194. Id. at 222–23.
195. Id. at 223.
196. Id.
197. Id. at 220.
198. Id. at 225.
199. Id.
200. Id. (internal quotations omitted).
201. Id. at 225–26.
202. Id.
203. Id.
204. See, e.g., State v. Bobadilla, 709 N.W.2d 243, 250 (Minn. 2006) (outlining an eight factor analysis in making a determination of whether a statement is testimonial or nontestimonial); Hernandez v. State, 946 So.2d 1270, 1280 (Ct. App. Fl. 2007) (four factor analysis).
independently choose the relative importance of each, inevitably leading to inconsistent results. Ultimately, no single guiding principle prevails.

On the other hand, it is possible that the totality of circumstances approach is merely a declarant-based analysis masquerading under another title. One way to formulate this hypothesis is to begin, as some courts do, with a focus on the intent and anticipation of the declarant. All other considerations, including the interviewer’s function, only provide support (or lack thereof) for the notion that the speaker is making a testimonial statement. In this way, an interviewer’s purpose would no more represent a separate factor to analyze than simply a fact that affects the reasonable declarant’s understanding of her statement.

Applied to the facts of DeOliveira this articulation becomes clear. There, the court focused on both the victim’s intent and the purpose of the doctor to find that the victim’s statements were nontestimonial. However, the court could have reached the same result by beginning its analysis with a focus on the expectations of the child declarant. That the physician did not intend to develop the evidence against the perpetrator would buttress a finding that the victim did not expect her statements to be used in government prosecution.

An approach to Confrontation Clause analysis that incorporates the intent of more than one party appears to be a comprehensive solution in determining how a statement is characterized. However, this approach may ultimately be classified as a declarant-based interpretation of the Sixth Amendment. This formulation is useful in advancing a new approach that New Mexico courts should adopt when applying the Sixth Amendment.

IV. STATE V. ROMERO AND STATE V. ORTEGA: NEW MEXICO’S CONFRONTATION CLAUSE APPROACH TO MEDICAL COMMUNICATIONS

State v. Romero is the only case addressing post-Crawford confrontation issues in the area of medical communications to reach the New Mexico Supreme Court. There are two opinions in the New Mexico appellate courts addressing the confrontation issue in Romero. The first is a decision from the New Mexico Court of Appeals [hereinafter Romero I]. That holding was appealed and later affirmed by the New Mexico Supreme Court [hereinafter Romero II]. The only other New Mexico case addressing statements made to medical personnel is State v. Ortega, heard in the Court of Appeals. This series of decisions shows that New Mexico Courts have also struggled to formulate a coherent analysis when evaluating statements made to medical personnel. This section will address each of those decisions in turn.

207. See supra Part III.A.
A. Romero I

_Romero I_ resulted from a defendant’s appeal from convictions of aggravated battery and assault against a household member.\(^\text{212}\) In early October of 2001, Anthony Romero called his estranged wife Jessica Romero de Herrera expressing his desire to reunite their marriage and threatening to commit suicide if she did not comply.\(^\text{213}\) Sometime during the late hours of October 12th or the very early morning of October 13th Anthony found Jessica and took her back to his mother’s house.\(^\text{214}\) There Anthony began choking Jessica on a bed saying that “if he couldn’t have [her]...nobody could.”\(^\text{215}\) Jessica woke up on the 13th not knowing whether she had passed out the night before.\(^\text{216}\) Later, Jessica was able to call her roommate for help. The roommate then called police to investigate.\(^\text{217}\) When police arrived Anthony forced Jessica into a bathroom, held her at knifepoint, and told her to be quiet.\(^\text{218}\) The police left, only to return later that day.\(^\text{219}\) When they returned, Anthony released Jessica and commanded her to tell police and others that the marks on her neck were from rough sex.\(^\text{220}\) Jessica met police in the front of the house, but Anthony was apparently able to escape through the back door.\(^\text{221}\)

Jessica explained to the responding officer what happened during the previous night and during the first police dispatch.\(^\text{222}\) Nearly three weeks later, Jessica called the officer and alleged that Anthony raped her sometime during the incident on the 12th or 13th of October.\(^\text{223}\) Jessica had not previously mentioned any episode of sexual abuse.\(^\text{224}\) Upon hearing this allegation the officer arranged for the victim to meet with a Sexual Abuse Nurse Examiner (SANE)\(^\text{225}\) practitioner on November 8th for an examination and interview.\(^\text{226}\) During the examination Jessica reiterated what happened nearly a month earlier and further stated that she was raped by

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\(^{212}\) *Romero I*, 2006-NMCA-045, ¶ 2, 133 P.3d at 846.

\(^{213}\) *Id.* ¶ 3, 133 P.3d at 846.

\(^{214}\) *Id.*

\(^{215}\) *Id.*

\(^{216}\) *Id.*

\(^{217}\) *Id.* ¶ 4, 133 P.3d at 847.

\(^{218}\) *Id.*

\(^{219}\) *Id.*

\(^{220}\) *Id.*

\(^{221}\) *Id.*

\(^{222}\) *Id.* ¶ 5, 133 P.3d at 847.

\(^{223}\) *Id.* ¶ 6, 133 P.3d at 847.

\(^{224}\) *Id.*

\(^{225}\) The primary objective of SANE practitioners is to “provide objective forensic evaluation of victims of sexual assault.” A SANE practitioner’s first order of procedure is to assess any need for emergency medical treatment. After the practitioner determines that immediate medical care is not required, he or she begins an “evidentiary examination” of the patient-victim. SANE practitioners may “release evidence to law enforcement agencies only with the victim’s consent in cases where the victim has agreed to report or has already reported the crime,” but are required to report cases of sexual assault of vulnerable adults or minor victims to appropriate authorities. *Kristen Littel, U.S. Dep’t of Justice, Sexual Assault Nurse Examiner (SANE) Programs: Improving the Community Response to Sexual Assault Victims* (2001), http://www.ojp.usdoj.gov/ovc/publications/bulletins/sane_4_2001/welcome.html (follow “Program Operation” hyperlink).

\(^{226}\) *Romero I*, 2006-NMCA-045, ¶ 6, 133 P.3d at 847.
Anthony.\textsuperscript{227} Roughly two months after the interview Jessica was found dead in Anthony's bed.\textsuperscript{228}

At Anthony Romero's subsequent prosecution the trial court allowed all of Jessica's statements made to the SANE nurse under the then-controlling Roberts regime.\textsuperscript{229} Romero was found guilty on assault, battery, false imprisonment, and witness intimidation charges.\textsuperscript{230} He appealed the convictions on confrontation grounds after Crawford.\textsuperscript{231} In finding that Jessica's statements to the SANE practitioner should not have been admitted, the Court of Appeals relied on multiple considerations surrounding those statements.\textsuperscript{232}

First, the examination was set up by a police officer.\textsuperscript{233} This fact, coupled with the victim's prior accusatory statements to police, tended to show that a "person in [her] position would likely have recognized that her statements could later be used prosecutorially."\textsuperscript{234} The court substantiated this conclusion by noting the extensive period of time that elapsed between the examination and the incident.\textsuperscript{235} It further reasoned that the results of the examination showed that the victim was "not primarily concerned with getting treatment" because the victim's statements reiterated the entire incident with Romero, not just the sexual assault.\textsuperscript{236}

The function of the SANE practitioner provided additional support for concluding the victim's statements were testimonial.\textsuperscript{237} Citing Hammon v. State\textsuperscript{238} (before it reached the U.S. Supreme Court) the court emphasized that a statement is testimonial if it is "given or taken in significant part for future use in legal proceedings."\textsuperscript{239} It then explained that the motive of an interviewer is relevant because (1) it "bears on the intent and understanding of the declarant," and (2) "[i]f the listener is motivated by a desire to gather evidence, he or she will be more likely to elicit responses that will be useful in a later prosecution, thereby implicating the concerns of Crawford."\textsuperscript{240} Ultimately, the statements were testimonial based on the apparent expectations of the declarant, the circumstances of the interview, and the qualifications of the SANE examiner.\textsuperscript{241}

The State appealed Romero I on grounds separate from the Confrontation Clause issue and the Supreme Court granted certiorari in April of 2006.\textsuperscript{242} By that time the U.S. Supreme Court decided Davis. Thus, the admissibility of the victim's

\begin{itemize}
  \item \textsuperscript{227} Id.
  \item \textsuperscript{228} Id. § 2, 133 P.3d at 846. Romero was charged with second degree murder of his wife in a separate proceeding. His trial court conviction was overturned based on an error in jury instructions. State v. Romero, 2005-NMCA-060, 112 P.3d 1113, cert. granted, 2005-NMCERT-005, 113 P.3d 346.
  \item \textsuperscript{229} Romero I, 2006-NMCA-045, § 11, 133 P.3d at 848.
  \item \textsuperscript{230} Id. § 2, 133 P.3d at 846.
  \item \textsuperscript{231} Id. § 11, 133 P.3d at 848.
  \item \textsuperscript{232} Id. § 53, 133 P.3d at 858.
  \item \textsuperscript{233} Id.
  \item \textsuperscript{234} Id. § 46, 133 P.3d at 856.
  \item \textsuperscript{235} Id. § 53, 133 P.3d at 858.
  \item \textsuperscript{236} Id. § 59, 133 P.3d at 859.
  \item \textsuperscript{237} Id. § 60, 133 P.3d at 859.
  \item \textsuperscript{238} 829 N.E.2d 444 (Ind. 2005), aff'd sub. nom. Davis v. Washington, 547 U.S. 813 (2006).
  \item \textsuperscript{239} Romero I, 2006-NMCA-045, § 60, 133 P.3d at 859 (internal quotations omitted).
  \item \textsuperscript{240} Id.
  \item \textsuperscript{241} Id. § 61, 133 P.3d at 860.
  \item \textsuperscript{242} State v. Romero, 2006-NMCERT-004, 134 P.3d 120.
\end{itemize}
statements to the SANE practitioner was reconsidered in light of Davis in the New Mexico Supreme Court. 243

B. Romero II

In Romero II the defendant advanced three arguments in support of his claim that the victim’s statements to the SANE practitioner were testimonial: (1) “the statement was the product of an investigation by authorities,” (2) “the victim subjectively knew her statement was testimonial in nature,” and (3) “a reasonable person would have objectively understood [the statements] to be testimonial.” 244 The Court agreed that the statements were testimonial, but the vast majority of its reasoning focused on the content of the victim’s statements, rather than the SANE practitioner’s investigative role. 245 Conceding that some of the victim’s statements could have been used for securing medical treatment, the Court explained that the statements accused the defendant of specific criminal acts. 246 It also noted the significant temporal gap between the date of the incident and the meeting with the SANE practitioner. 247 These findings provided the thrust for concluding that Jessica’s statements were testimonial. 248

C. Ortega

State v. Ortega, 249 New Mexico’s most recent case involving statements made to medical personnel, represents a marked analytical shift away from Romero I and Romero II. The facts are similar to Romero with one key difference: the victim was an eight-year-old child. 250

In that case, the child disclosed that her mother’s boyfriend molested her and two days later the mother took the child to a hospital. 251 The child was examined by a medical professional who collected physical evidence for forensic examination, but did not question her. 252 Four days later the child was examined by a SANE practitioner who conducted an interview. 253 When the SANE practitioner asked the child why she was there, the child responded with a “spontaneous” disclosure of the molestation. 254 The court characterized the disclosure as a description of the times and places where the episodes of abuse happened and also mentioned that the victim stated that the defendant told her not to tell anyone about the incidents to spare him from “big trouble.” 255

244. Id. ¶ 12, 156 P.3d at 698.
245. Id. ¶¶ 15–17, 156 P.3d at 698–99.
246. Id. ¶ 15, 156 P.3d at 698.
247. Id. ¶ 17, 133 P.3d at 699.
248. Id.
250. Id. ¶ 2, 175 P.3d at 930.
251. Id.
252. Id. ¶ 3, 175 P.3d at 930.
253. Id. ¶ 4, 175 P.3d at 930.
254. Id. ¶ 5, 175 P.3d at 930–31.
255. Id. ¶ 24, 175 P.3d at 934–35.
The court found that the child’s statements were testimonial, but only through a modified analytical approach. Instead of scrutinizing the content of the declarant’s statements as in *Romero II*, *Ortega* focused almost exclusively on the SANE practitioner’s purpose in conducting the interview. The court noted that the primary purpose of the interview was to “gather[] evidence,” and also described the interview from the perspective of the SANE practitioner by defining the “purpose of the interrogation” as “the process of asking questions designed to elicit an answer useful for an ascertainable purpose.”

D. Shifting Analyses in New Mexico’s Confrontation Doctrine

*Romero II* and *Ortega* both incorporate an objective approach when making confrontation determinations, but also show analytical gaps that leave an incomplete confrontation analysis. *Romero II* focuses almost entirely on the declarant’s statements whereas *Ortega* focuses almost completely on the nature of the interview. Compared against each other, the cases show two separate analyses for achieving a single result.

The *Ortega* approach is questionable because it signals a departure from the declarant-based approach developed in *Romero II*. Where *Romero II* maintained focus on the accusatory nature of the victim’s statements, *Ortega* proceeded with a focus on the interviewer’s purpose.

*Ortega* follows an analytical path that many other jurisdictions use when evaluating statements of young children. Uneasy with analyzing the declarative intent of especially young victims, these courts quickly move to the purpose of the interviewer to determine whether statements are testimonial. The central failing of this approach is that it is unfaithful to *Crawford’s* emphasis on the witness who makes the accusation and remains vulnerable to overbroad application when there is no indication that a declarant intends to accuse.

While *Ortega* focuses almost exclusively on the purpose of the interview, *Romero II*’s focus rests at the opposite end of the confrontation spectrum by relying exclusively on declarative intent. Under this approach, there is no mention of the SANE practitioner’s purpose in interviewing the victim or how that purpose may have affected the declarant’s utterance. Instead, the court’s holding is premised on the victim’s specific accusations of the defendant’s violence. In this case, such accusations are a strong indicator of testimonial speech, but a one-sided approach will prove more difficult when the content of a declarant’s statement is not quite so definite.

Using two separate analytical models for victims of different ages is neither workable nor consistent with the propositions of *Crawford* and *Davis*. The first
problem that separate analyses raise is determining when to begin a declarant-based inquiry given a victim's age. Courts are reluctant to evaluate the communicative intent of child statements, but even more reluctant to proclaim when a child reaches an age where he is able to anticipate the use of his statements for future criminal litigation.

Moreover, multiple analytical approaches subvert the procedural guarantee of Crawford and Davis because a varied focus retains the potential to mischaracterize testimonial statements. That is to say, an emphatic focus on interviewer intent may neglect accusatory declarations. Conversely, a heavy focus on declarative substance neglects the influence of contextual phenomena such as interviewer bias.

In light of the above-mentioned pitfalls associated with these one-sided evaluations, New Mexico courts should adopt a consistent confrontation doctrine with respect to statements made to medical personnel. The next section proposes an approach to confrontation analysis that is both consonant with the propositions of Crawford and Davis and accounts for the difficulties that different sets of victims present.

E. A Proposed Uniform Approach to Confrontation Clause Analysis in New Mexico

New Mexico's varied approach in post-Crawford confrontation analysis with respect to medical caregivers requires a stable solution. This section argues for one such analytical process that begins with a focus on declarant intent. Before offering this new approach, however, it is important to keep in mind the lessons of Crawford and Davis that have contributed to lower court disparity. Of course, those lessons must be understood against the backdrop of longstanding Sixth Amendment values. Those issues will be discussed first to better inform a stable confrontation doctrine.

The struggle to develop a comprehensive confrontation standard stems from the variety of analytical tools the Supreme Court delivered in Crawford and Davis. Other sections of this article refer to the limited guidance of those decisions, but one reason the lower courts diverge significantly in doctrinal approach comes from the many resources Crawford and Davis delivered. Crawford sets the starting point for deciding which statements are testimonial with a single definition—"[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." The definition is based on the perspective of the witness-declarant, he that "bear[s] testimony" or the "accuser who makes a formal statement."

At the same time Crawford reminds lower courts of the prosecutorial abuses of Marian justices of the peace and the risks of evidence procured in ex parte

265. See supra Part III.B.
266. As of the time of this writing, no state or federal court has announced an age at which child declarants are able to recognize the prosecutorial implications of their statements.
267. See supra Part III.
268. See supra Part II.
271. Id.; see also Grappling, supra note 94, at 246 ("If a statement is testimonial, then the maker has acted as a witness, and so the statement is within the purview of the Confrontation Clause.").
These practices move the point of focus away from the declarant and toward the intent of those performing investigative roles. Finally, Davis instructs the courts to look to the primary purpose of an investigation to determine whether a statement is testimonial. With this array of guidance it is no wonder that courts have developed multiple tests for making difficult Confrontation Clause decisions when evaluating statements made to doctors and medical personnel. However, the variety of approaches does not mean that a single approach cannot incorporate both the declarant-based core of Crawford and the purpose-based analysis of Davis.

Along with the diagnostic tools of Crawford and Davis, it is crucial to keep in mind the ultimate value the Confrontation Clause serves: reliability. As one author notes, the right is “not designed to ‘coddle’ criminals; it is designed to ensure that those who must decide the disputed factual issues will arrive at a correct decision.” Accordingly, the Confrontation Clause acts as a mechanism to allow a jury to get as close to the truth as possible by testing the veracity of an incriminating remark.

When a declarant states an accusation, the defendant has the constitutional right to test the credibility of that statement through cross-examination. When moving towards a workable confrontation approach the goal must be to identify accusatory statements so their reliability may be assessed by a fact-finding body.

While still holding closely to the above-mentioned values, an effective way to reconcile the central commands of Crawford and Davis is to employ a comprehensive analysis that maintains a focus on the declarant’s intent as it relates to the purpose of the investigation. This approach first looks to the content of the declarant’s statements to see if they objectively bear the hallmarks of “solemn[ity]” that designate testimonial speech. That is to say, courts should look to whether the declarant’s statement appears to earnestly affirm or prove a past fact that could be used against a defendant. The core of this stage of analysis is concerned with accusatorial speech and recognizes that even young children have the capacity to denounce the acts of others. The analysis would then incorporate the medical caregiver’s purpose in communicating with the witness. In this stage of analysis courts should evaluate how an investigator’s questions affect the declarant’s response.

In line with the reasoning in Romero, This shift incorporates the purpose-based analysis outlined in Davis and takes into consideration the effect that a

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272. Crawford, 541 U.S. at 43.
274. Crawford, 541 U.S. at 61.
276. Latimer, supra note 208, advances a similar two stage approach, but suggests that consideration of surrounding circumstances is relevant insofar as it affects a declarant’s expectation that his statement will be used in subsequent criminal proceedings. Id. at 410–11; see also United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004) (“The proper inquiry... is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant’s position would anticipate his statement being used against the accused in investigating and prosecuting the crime.”)
277. Crawford, 541 U.S. at 51.
278. See supra notes 141–145 and accompanying text.
279. See supra notes 232–241 and accompanying text.
particular interrogation has on the expectations of a reasonable declarant. This stage of analysis is premised on the idea that a declarant’s statements are affected by his audience and are not analyzed in a vacuum. Context plays a large part in making the testimonial determination because the content of any statement is influenced by the circumstances which surround the utterance.

For instance, a reasonable declarant’s knowledge of investigating police officers will lead him to believe that structured questions about past criminal events may be used to develop a record for later prosecution. This may be especially relevant in a situation where an investigating medic has already formed a belief of the occurrence of some abuse. In these situations interviewer bias can increase the likelihood that a declarant’s statements will affirm the belief. On the other hand, the same statements to a curious friend entail a different expectation because the declarant does not anticipate that the friend will use the statements adversely against the person to whom he refers and, depending on circumstance, the friend may not have previously formulated a belief about the event.

This mode of analysis addresses the difficulty presented by medical personnel who serve the dual purposes of medical treatment and evidence collection. Beginning with the content of the declarant’s statements reveals whether he “bear[s] testimony” in the sense that he affirms a prior incriminating fact about the defendant. If the substance of a statement made to a medical caregiver appears to accuse or impose blame, rather than aid in diagnosis or treatment, then the next step in analysis is to see how the nature of the interview contributes to an expectation that the statement could be used adversely against the defendant.

This stage of the inquiry essentially asks, “did the caregiver ask the question with the intent of gathering evidence of a past fact?” Questions intended to establish some prior fact, in turn, affect the reasonable declarant’s expectation of how his response will be used. Again, understanding that suggestive questions and settings influence a declarant’s statement provides the foundation for this stage of scrutiny. In this way, the analysis accounts for the relationship between declarant and interviewer, but does so with a watchful eye on the declarant’s response given the purpose of the interrogation.

Child victims will likely continue to pose difficulty in this area, but confrontation analysis should proceed in the same manner. The substance of a child’s statements should be the starting point for any confrontation analysis. Courts should recognize that although young children may not comprehend the nuances of criminal prosecution, they often do understand that their statements can adversely affect others. Thus, when a child reiterates that a defendant told her not to recount an incident of sexual abuse because he would consequently be in “big trouble,”

280. See Crawford, 541 U.S at 51 (“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.”).
281. See supra notes 169–170 and accompanying text.
282. See supra notes 170–176 and accompanying text.
283. See Crawford, 541 U.S. at 51.
284. Id.
285. See generally Bruck et al., supra note 170.
286. See supra notes 141–145 and accompanying text.
287. See supra note 255 and accompanying text.
courts should consider the developmental maturation that attends making a statement that will get another person in trouble.

That maturation, along with the content of the statement, should be the basis for the child’s capacity for testimonial speech because it underlies the principle of accusation that the confrontation right is designed to address. The important consideration should be whether a child understands the detrimental impact of his statement on another, and how that understanding informs the jury about the declarant’s intent in making the statement. When a child’s statements suggest that he is unaware that another person committed a bad act and should be punished for that act, then courts should be wary of finding intent to impose blame. Conversely, when a child identifies behavior that he considers bad or wrong then courts should note the higher likelihood that he is making an accusation.

The inquiry should then move to evaluate the circumstances that surround the statement. In this process courts should recognize that young children are particularly susceptible to suggestive questioning. These considerations, when coupled with an evaluation of a declarant’s intent, will provide a more robust view of the statement and a better position from which to make confrontation determinations.

The advantage to this uniform approach is that it incorporates a comprehensive view of circumstances that a solely purpose-based inquiry neglects. This approach also provides a single model of analysis for victims of varying ages and mental capacities. While this proposed method will not be completely free from difficulty in application, it will hold true to the central tenets of Crawford, Davis and the Sixth Amendment. It will also provide useful guidance in the difficult situations where the intentions of the declarant and the intentions of the interviewer diverge in the creation of potentially incriminating statements. That is, a comprehensive multi-step inquiry will better assess declarative intent based on an analysis of the circumstances that influence declaration.

Moreover, this approach recognizes that medical personnel do not operate to produce testimonial statements. The work of medical professionals is vital to society. And although doctors and nurses are required to report patient abuse, the assumption that medical professionals are obliged to provide evidence against criminal defendants, in many ways, denigrates the practice of medicine. Additionally, the ethical duties imposed on these professionals may compel testimony that is supportive of criminal defendants in situations where there are false accusations of criminal conduct. These considerations underscore the fact that doctors and nurses seek to help, not to condemn. When discussing the role of doctors and nurses in the criminal justice system this maxim should consistently inform the development of confrontation doctrine.

CONCLUSION

Crawford marked a groundbreaking change in Confrontation Clause jurisprudence and, consequently, has spawned a considerable amount of uncertainty. As

288. See supra Part III.C. F
289. See supra note 4.
state and federal courts attempt to come to terms with the meaning of “testimonial” under *Crawford* and *Davis*, the lower courts have advanced disparate approaches.

Even in the relatively narrow area of statements made to doctors and medical personnel, a survey of decisions shows multiple interpretations of the Sixth Amendment. Those interpretations have been shaped not only by Supreme Court precedent, but also by the way we understand patient characteristics, the role of doctors and nurses, and individual motivations. With these considerations in mind, it is crucial to formulate workable confrontation doctrine when assessing statements made to medical professionals.

To hold true to the values of the Confrontation Clause, that analysis must focus on the accuser’s statements as they relate to the environment in which they were uttered. This not only ensures that accusatory statements do not escape the scrutiny of cross-examination, but also recognizes that doctors and nurses act to prevent harm rather than to develop evidence.

Lastly, we must keep in mind the significant consequences at stake every time a judge makes a confrontation determination. When we consider that the liberty of the defendant may rest on the surrogate testimony of a medical professional, the law should regard the matter with the most rigorous observance. To best further just results for defendants, as well as for victims of violent crimes, that observance should recognize both the intent of the declarant and the circumstances that influence the content of the declarant’s statement.