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*CRAWFORD'S SHORT-LIVED REVOLUTION:
HOW DAVIS V. WASHINGTON REINS IN
CRAWFORD'S REACH*

JOSEPHINE ROSS*

I. INTRODUCTION: FROM *CRAWFORD* TO *DAVIS*, WHAT THOSE OPINIONS TELL US

There were only two years from the time that the Supreme Court announced a revolution in Confrontation Clause jurisprudence in *Crawford v. Washington*¹ to the time that the Supreme Court took up the issue again in *Davis v. Washington*.² During those two years, hundreds of trial and appellate judges were obligated to implement *Crawford*, often reviewing the same cases where convictions had been affirmed under pre-*Crawford* case law. This subset of decisions offers a unique opportunity to investigate how lower courts implement Supreme Court decisions that are controversial and ambiguous.³ The switch in Confrontation Clause jurisprudence had enormous potential for upheaval in criminal law, particularly in the area of domestic violence prosecutions. At the time that *Crawford* was announced in 2004, trial courts were routinely permitting domestic violence prosecutions to proceed when the alleged victim did not appear to testify and there were no witnesses to the event. Instead, statements the complainant made to the 911 operator or to the police at the scene were repeated at trial. There was no right to cross-examine or confront the person who made the statements, only the police officer who repeated the missing witness' statements. Although this practice of witnessless prosecutions in domestic violence cases was fairly new, it had become entrenched by *Crawford's* time.⁴

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1. 541 U.S. 36 (2004).

2. 126 S. Ct. 2266 (2006).

3. The term "lower courts" is used in this article to indicate both state courts and federal circuit courts, although the article focuses primarily on state courts because they are where the majority of domestic violence cases proceed.

4. See *White v. Illinois*, 502 U.S. 346, 354-58 (1992) (affirming the expanded use of the excited utterance exception to the hearsay rule in a witnessless child abuse case and thereby signaling that the Confrontation Clause permits prosecutors to proceed without live witnesses in domestic violence prosecutions by using the excited utterance exception); Josephine Ross, *After Crawford Double-Speak: "Testimony" Does Not Mean Testimony and "Witness" Does Not Mean*

The Supreme Court's decision in *Crawford*, if fully implemented, would have returned trial courts to the days when domestic violence cases were dismissed when witnesses failed to appear at trial.⁵ Although *Crawford* was a notoriously ambiguous opinion, leaving "for another day" the precise scope of its ruling, it heralded an end to the practice of witnesses testifying in absentia.⁶ Rather than reading the decision broadly and reversing domestic violence convictions that were based on out-of-court statements to police repeated at trial or on out-of-court phone calls played at trial, courts found ways to affirm the convictions by reading, or, as I posit, misreading the Supreme Court precedent. The 2006 Supreme Court case of *Davis v. Washington*⁷ specifically addressed the types of evidence frequently introduced in domestic abuse prosecutions without the witness present to cross-examine, namely, 911 calls and statements to police at the scene. In *Davis*, the Court had an opportunity to correct the lower courts' narrow interpretation of *Crawford*. Instead, *Davis* seemed to forget the principles announced in *Crawford*, such as that "no man shall be prejudiced by evidence which he had not the liberty to cross examine,"⁸ and that our system of justice is based on a "common-law tradition . . . of live testimony in court subject to adversarial testing."⁹ *Davis* provided no constitutional protection for many defendants facing trial based on out-of-court accusations without the witness there to testify face-to-face or to cross-examine. By examining the cases decided between *Crawford* and *Davis*, we can recognize that *Davis* represents a capitulation to the lower court judges who offered various methods of limiting the scope of *Crawford*'s promised protections for those accused of crimes.

Judicial decision-making is generally understood to work in a top-down manner, with the Supreme Court at the top of the hierarchy.¹⁰ Social Science researchers Songer, Segal and Cameron envisioned the relationship

Witness, 97 J. CRIM. L. & CRIMINOLOGY 147, 153-54 (2006) (noting that where the author practiced, it was not until 1999 that this became routine).

5. Tom Linger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 709 n.76 (2003) (estimating that eighty to ninety percent of domestic violence victims recant or do not come to court).

6. *Crawford*, 541 U.S. at 40. *Crawford* was not a domestic violence prosecution but a murder case in which the government introduced a statement to police by a witness to the crime that was then repeated at trial when the witness exercised her marital privilege.

7. 126 S. Ct. 2266 (2006).

8. *Crawford*, 541 U.S. at 49 (citing *State v. Webb*, 2 N.C. (1 Hayw.) 103, 104 (1794)).

9. *Id.* at 43 (citing WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (1768)).

10. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 295 (2005) "In the legal academy, thinking about the judicial system is distinctly top-down. There is a hierarchy, and at the pinnacle sits the Supreme Court." *Id.*

between the Supreme Court and lower appellate courts as an owner walking a dog on a leash.¹¹ The Supreme Court is the owner and the lower courts (the dogs) are expected to stay with the owner. When the Supreme Court changes course, it is like a pull on the leash, and the lower courts will follow. Sometimes the lower court judges want to go the same way as the high court—what researchers call “congruence”—and sometimes judges simply alter their decisions to conform to the desires of the Supreme Court, what researchers call “responsiveness.”¹² Researchers note that it is often difficult to determine whether decisions that conform to precedent are congruent with the attitudes of the lower court judges or whether the judges are simply responding to the precedent.¹³ Some decisions allow more leash than others, but there is almost always some room given within opinions for lower court deviation. It is only when the dog goes beyond the discretion provided by the original precedent that the Supreme Court needs to rein in the dog, reversing the case.

Political scientists use the term “shirking” to apply to lower court judges who do not wish to implement the policy but do anyway because of the principal-agent hierarchy.¹⁴ In a recent article, Pauline Kim embraced the leash analogy but criticized applying the term “shirking” to judges who ultimately conform their rulings to precedent.¹⁵ Kim argues that the term shirking “is implicitly pejorative”¹⁶ and that it is good judicial practice for lower courts to decide cases using their own policy preferences as long as these preferences are within the zone of discretion provided by the higher court.¹⁷ Post-*Crawford* domestic violence opinions enable us to flesh out Professor Kim’s theory against the backdrop of real case decisions. I use the phrase “straining the leash” for what the lower courts did post-*Crawford*, signaling their discomfort with forbidding witness statements in the absence of live witnesses to domestic violence situations.

In a twist on the walking a dog paradigm, the Supreme Court opinion in *Davis* appears to have been influenced by the state courts shirking or straining at the leash. What the *Davis* decision suggests is that it is not

11. Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 674-75 (1994).

12. *Id.*

13. *Id.* at 689 (whether the appellate court panels’ “responsiveness to the High Court . . . is enhanced by the Court’s monitoring or is solely a function of their own internalized norms that are reinforced by their peers in the circuit is difficult to determine empirically”).

14. *Id.* at 674.

15. Pauline Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 386 n.13, 386-87 (2007).

16. *Id.* at 413 n.121.

17. *Id.* at 394.

always a question of the Supreme Court declaring a constitutional right and the lower courts diligently struggling to interpret the opinion and implement it. In the context of the right to confrontation, we see the lower courts resisting implementation of the newly expanded constitutional right and, in turn, the Supreme Court influenced by this resistance.

II. *CRAWFORD* ANNOUNCED A REINVIGORATED RIGHT TO CONFRONTATION

Justice Scalia penned the majority opinion in *Crawford*, announcing a new era for Sixth Amendment Confrontation Clause jurisprudence. *Crawford* overruled a line of cases commencing in 1980 with *Ohio v. Roberts*,¹⁸ which had tied to the fluid rules of evidence the right of the accused to confront witnesses. The Confrontation Clause would no longer be welded to the hearsay rules, but would require its own independent review.¹⁹

The text of the Sixth Amendment reads: “In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him.”²⁰ The term “witnesses,” Scalia explained, applies to those who “bear testimony.”²¹ If a statement is “testimonial” in nature, Scalia wrote, the Constitution requires nothing less than cross-examination, assuming that the witness was available for trial.²² If the witness is unavailable, the Constitution allows prior testimony where there was an opportunity for cross-examination.²³ It was intolerable that judges would decide that evidence was particularly reliable under the *Roberts* format and therefore dispense with the requirement of face-to-face confrontation and cross-examination. Reliability may be useful for rules of evidence, but the

18. 448 U.S. 56 (1980).

19. The opinion was joined by six other justices while Chief Justice Rehnquist, joined by Justice O'Connor, wrote a concurrence highly critical of the majority's new jurisprudence. *Crawford v. Washington*, 541 U.S. 36, 69-76 (2004). Both dissenters were no longer on the bench for the *Davis v. Washington* case in 2006. 126 S. Ct. 2266, 2270 (2006). Chief Justice Rehnquist's concurrence was highly critical of the majority's break with prior jurisprudence. *Crawford*, 541 U.S. at 69-76. In determining the future of *Crawford* in Supreme Court jurisprudence one must note that *Crawford*'s validity will not be threatened by the replacement of the Chief Justice in 2005 and Justice O'Connor in 2006, since they both participated in the minority opinion in *Crawford*'s 7-2 split. If anything, *Crawford*'s continued validity is even more assured.

20. U.S. CONST. amend. VI. The Sixth Amendment to the United States Constitution guarantees in criminal cases the right to a speedy, public trial by jury, the right to be informed of the nature of the accusation, the right to confront witnesses, the right to counsel, and the right to compulsory process (for defendant to call witnesses). *Id.*

21. *Crawford*, 541 U.S. at 51 (quoting N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

22. *Id.* at 56.

23. *Id.* at 59.

Constitution required that the jurors decide whether evidence is reliable and credible.²⁴

Crawford declined to define the term “testimonial,” and the lower courts misinterpreted the opinion’s ambiguity.²⁵ *Crawford* intended a sweeping change in the Sixth Amendment Confrontation Clause analysis in order to return to what was guaranteed by the Bill of Rights. *Crawford*’s majority opinion discussed what confrontation means “at a minimum” and nowhere said that confrontation rights must be kept to this minimum. The Court wrote that “the infamous proceedings against Sir John Fenwick [in England]” in 1696 “must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination.”²⁶ The Court further wrote that: “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with [a] jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”²⁷ The Court thus envisioned an end to trial judges permitting out-of-court statements without confrontation rights simply because the evidence rules permit the statements. Moreover, the Court’s conclusion that statements introduced against Mr. Crawford violated his right to confront witnesses could easily have been reached under older established law, were the Court not interested in breathing new life into a right that had been languishing.²⁸ The thrust of the decision was a broadening of rights coupled with an invitation for later Supreme Court opinions to flesh out the full reach of *Crawford*.²⁹

24. See Ross, *supra* note 4, at 53 for a further discussion of *Crawford*’s distrust of judges and for a comparison of the concepts of reliability and credibility. If the term “testimonial” is defined narrowly, then judges will again be in the business of deciding that evidence is so reliable that cross-examination will not aid the jury in making a decision. Richard Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1028 (1998) [hereinafter Friedman, *Confrontation*]. “If a witness delivers live testimony at trial, the court does not excuse the witness from cross-examination on the ground that the evidence is so reliable that cross-examination is unnecessary to assist the determination of truth.” *Id.*

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

26. *Id.* at 45-46 (citing Fenwick’s Case, 13 How. St. Tr. 537, 591-592 (H.C. 1696); 3 WIGMORE, EVIDENCE § 1364, at 22).

27. *Id.* at 62.

28. See *id.* at 69 (stating that the Chief Justice concurred in the result and dissented in the Court’s decision to overrule *Ohio v. Roberts*, 448 U.S. 56 (1980)). Justice Thomas sought to create a ceiling to confrontation rights in his concurrence in *White v. Illinois*, 502 U.S. 346 (1992) (Thomas, J., concurring) but that idea is not expressed in *Crawford*.

29. Although most jurisdictions have narrowed the reach of *Crawford*, there are at least two jurisdictions that interpret *Crawford* broadly:

Georgia: See *Moody v. State*, 594 S.E.2d 350, 354 (Ga. 2004) (noting that a statement at the scene was testimonial but harmless error); see also *Pitts v. State*, 627 S.E.2d 17, 2 (Ga. 2006) (holding that it was harmless error to admit testimonial statement when a police officer testified about what witness told him shortly after the defendant shot into the bedroom in which she was sleeping). “Georgia courts have adopted a broad

A. THE TERM “CORE” IMPLIES THERE IS A ZONE OF PROTECTION LARGER THAN THE CORE

Consider the word “core” within the *Crawford* opinion. The decision lists several possible definitions of “core” testimonial rights, but nowhere says that the right to confrontation must only apply to these core testimonial rights.³⁰ While the opinion was likely a compromise, and the justices may have had different concepts of the scope of the revitalized Confrontation Clause, the common usage of the term “core” supports the interpretation that there is more to protect than just the core. In the dictionary, “core” is defined as the “fibrous central part of certain fruits . . . containing the seeds;” also as “the basic or most important part; the essence.”³¹ It is never the whole, but always a central part. To determine if something falls outside of the purview of confrontation rights, one would need to understand the core definition and core values the Clause protects, but the core would hardly describe the full landscape of evidence protected.

Many scholars interpreted *Crawford*'s focus on the definition of “core” testimonial statements to mean that the resuscitated Confrontation Clause only applied to core testimonial statements.³² However, the opinion uses terms such as “at a minimum,” signifying that the Sixth Amendment covers much more than the minimum. Consider this sentence from the text: “it applies at a minimum to . . . the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed,” such as police interrogations.³³ Or consider this quotation: “Statements taken by police

interpretation of interrogation and have generally found statements made to police are testimonial.” *State v. Davis*, 613 S.E.2d 760, 772 (S.C. Ct. App. 2005) (citing several Georgia decisions).

Hawaii: In *State v. Grace*, the court found that statements made to police at the scene by ten and eleven year olds explaining how their mother was hit were testimonial because they “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.” 111 P.3d 28, 37 (Haw. Ct. App. 2005). However, the court may have been influenced by the fact that the police officer did not establish a solid foundation for an excited utterance, testifying that they were not upset; rather, “they seen what happened so they were anxious to tell what they saw.” *Id.* at 31.

30. *Crawford*, 541 U.S. at 51-56.

31. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 407 (4th ed. 2000).

32. See Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, 20 CRIM. JUST. MAG. 39 (2005), available at <http://www.abanet.org/crimjust/cjmag/20-2/taslitz.html> (“The scope of that core[—]and thus the meaning of ‘testimonial’—was not decisively demarcated by *Crawford*.”); see also Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 513 (2005) (stating that “Justice Scalia’s opinion points towards a narrow construction” although Mosteller thinks there is room for a somewhat broader view).

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

officers in the course of interrogations are also ‘testimonial’ under *even a narrow standard*.³⁴ This language suggests not only that there were multiple types of core statements but that the Supreme Court intended to cover more than the mere core discussed.

B. IN FREE SPEECH THE CORE IS NOT THE CIRCUMFERENCE

The use of the term “core” in First Amendment jurisprudence points the way to a proper reading of the term “core” in *Crawford*. When the *Crawford* opinion discussed “possible core definitions” of testimonial statements, the Court meant those statements that most implicate the values that the Sixth Amendment was designed to protect.³⁵ Similarly, the word “core” is used in free speech jurisprudence to identify those forms of speech that most implicate the values that the First Amendment was designed to protect.³⁶ For example, political speech is said to be “core” speech.³⁷ In deciding whether the term “core” in *Crawford* signals a broad or narrow conception of the Confrontation Clause, we should look to the First Amendment doctrine, where the concept of core values has been established through Supreme Court case law.

Free speech doctrine is instructive for a number of reasons. First, in the free speech arena, the Supreme Court does not limit protection only to those forms of speech that the Court defines as core.³⁸ Case law created a hierarchy where core speech receives more protection than non-core speech, but only a few categories of speech fall completely outside the First

34. *Id.* at 52.

35. *Id.* at 51-52; see also Brief for Petitioner at 23, 33-34, *Crawford v. Washington*, No. 02-9410 (U.S. July 24, 2003) (using the term core as in “core concerns of the Confrontation Clause” but explicitly excluding from the clause only “hearsay statements made unrelated to any pending or potential prosecution.”).

36. See generally *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (“[P]olitical belief and association constitute the core of those activities protected by the First Amendment.”).

37. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting) (emphasis added) (“[C]ontributions to political campaigns generate essential political speech. And contribution caps, which place a direct and substantial limit on *core* speech, should be met with the utmost skepticism and should receive the strictest scrutiny.”).

38. See, e.g., *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983)) (“As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . [h]owever, this principle, like other First Amendment principles, is not absolute.”); see also *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 757 (1985) (“[W]hen the defamatory statements involve no issue of public concern . . . we must . . . balance the State’s interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression.”).

Amendment's reach.³⁹ First Amendment doctrine therefore supports a broad reading of the Confrontation Clause, in which the clause protects more than just "core" testimonial statements. Second, in the free speech arena, the Court has never settled on one definition of "core" speech or "core" purpose for the First Amendment, but has allowed a variety of core purposes to remain within the doctrine. In *Crawford*, the Court did not choose one core definition of testimonial but proffered several. The First Amendment doctrine suggests that the Court need not decide on any one core definition of testimonial statements. A jurisprudence that allows several definitions of core testimonial statements to co-exist will provide more protection to defendants than if the Supreme Court insists on one definition. A third way that First Amendment jurisprudence can inform Confrontation Clause analysis is by examining the role that the fear of governmental abuse plays in interpreting the Free Speech Clause of the First Amendment.⁴⁰ Although *Crawford* correctly recognized that the Confrontation Clause was designed as a check on governmental power, *Davis* used this insight to incorrectly limit the clause to statements taken by police for certain purposes.⁴¹

Turning to the first issue, the Supreme Court does not limit free speech protections only to core speech. Although the Court has articulated what it considers to be core expression, much expression that would never be labeled political or core by any stretch of the imagination enjoys First Amendment protection. There is a hierarchy of speech that allows different degrees of protection depending upon whether speech is labeled as core speech or categorically unprotected speech, or something in-between. Categorically unprotected speech is limited to obscenity, fighting words, libel or slander, threats or advocacy of illegal action, but even this type of

39. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)) ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'"); Wilson R Huhn, *Assessing the Constitutionality of Laws that are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 827 (2004) (emphasis omitted) (arguing that the Court is moving away from speech categories towards a test that looks "upon the degree to which the law suppressed expression of particular ideas or denied people the opportunity to express themselves").

40. See generally *Cohen v. California*, 403 U.S. 15, 21 (1971).

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependant upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Id.

41. *Crawford*, 541 U.S. at 52-53; *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006).

speech does not fall wholly outside First Amendment protection.⁴² By naming the types of speech that fall outside the purview of First Amendment protection, the Supreme Court allows other types of non-core speech to enjoy protection even though the rights are subject to certain types of governmental regulation.⁴³

One ready example of non-core speech is commercial speech, for although it is less protected than other kinds of speech, advertisements and other forms of commercial speech have had constitutional protection for thirty years.⁴⁴ The debate about what theory underlies free speech rights takes place in the margins, not at the core. In determining whether certain speech is beyond the First Amendment canopy, courts enunciate versions of core principles to determine if the speech at issue furthers the principles laid forth.⁴⁵ In commercial cases, the value of the public receiving information about products has been given various amounts of importance.⁴⁶ Generally,

42. Even for categories of unprotected speech, the First Amendment does not condone viewpoint discrimination. *See* *Virginia v. Black*, 583 U.S. 343, 362 (2003) (stating that statute may ban cross burning for purposes of intimidation for “[u]nlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward one of the specified disfavored topics.”). For cases allowing regulation of unprotected speech see, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (libel); *Miller v. California*, 413 U.S. 15, 24-25 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942) (fighting words); *see also* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (allowing government to forbid advocacy “directed to inciting or producing imminent lawless action” that “is likely to incite or produce such action”).

43. Some types of speech that are recognized to fall outside of core speech but still enjoy protection are sexual speech, campaign financing, and commercial speech. *See, e.g.*, *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957) (invalidating a law banning sexual materials that do not meet the Court’s definition of obscene); *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 155 (2003) (citing *Buckley v. Valeo*, 424 U.S. 1, 26-28, 47 (1976) (per curiam)) (stating that campaign contributions carry “a plain threat to political integrity”); *Suzanne Sherry, Hard Cases Make Good Judges*, 99 NW. U. L. REV. 3, 4 (2004) (determining that while commercial speech receives constitutional protection, it is subject to more regulation than non-commercial speech).

44. *See* *Sherry, supra* note 43, at 4 (noting that since *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) the Court continues to affirm that “commercial speech is constitutionally protected but subject to greater regulation than non-commercial speech”); *see also* *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980) (“The Statute must assert a substantial interest to be achieved by restrictions on commercial speech.”). However, “commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not ‘particularly susceptible to being crushed by overbroad regulation.’” *Id.* at 564 n.6.

45. In determining whether a particular form of speech falls outside First Amendment protection, the Court looks at the meaning and core purpose of the Free Speech Clause, but does not limit protection only to those forms of speech that formed the core purpose of the First Amendment. *Roth v. United States*, 354 U.S. 476, 484 (1957) (“All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.”).

46. *See* *Cent. Hudson*, 447 U.S. at 564 (accordng less protection to commercial speech and not branding the right to make informed decisions as core); *but see id.* at 574-75 (Blackmun, J., concurring) (acknowledging the advertising ban that promotes the use of electricity as “strikes at

information about a product or service is not viewed as core and the Court has fashioned rules for commercial speech regulation that are different than those for pure political or artistic expression.⁴⁷

Borrowing from the First Amendment context, the Court may continue to have various formulations of core protected statements while bestowing a different test for protecting non-core statements. Only certain statements need fall outside of any constitutional scrutiny, just as only a few categories of speech—such as obscenity—fall completely outside of First Amendment protection.⁴⁸ An analogy to free speech jurisprudence suggests that the term “core” describes the most important purposes served by a section in the Bill of Rights without restricting the Amendment to its core purposes.

Turning to the second issue above, there is no single definition of core value in free speech cases. When determining the standard for libel, free speech has been described as valuable because it provides “uninhibited robust and wide-open debate on public issues.”⁴⁹ In an obscenity case, free speech was described as important because it provides audiences with “serious literary, artistic or scientific value.”⁵⁰ In deciding whether fighting words should fall inside or outside the scope of protection, the Court has considered the importance of the “exposition of ideas.”⁵¹ Recognizing that the value of the free speech clause is both personal and societal, the Court wrote that the “freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.”⁵² Thus, there are multiple values that the First Amendment was designed to protect,

the heart of the First Amendment” and calling the advertising regulation a “covert attempt by the State to manipulate the choice of its citizens [and] . . . depriv[e] the public of the information needed to make a free choice”).

47. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 466 (1978) (“To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech.”).

48. One could argue that the First Amendment is different because of the fear of chilling expression and because it is such an expansive right. On the other hand, the Confrontation Clause is already bounded by certain facts that make it much less unwieldy even if the right were deemed absolute; namely, it only applies to a trial of a criminal case where the government is attempting to introduce the evidence. It is further bounded by the fact that it only arises in situations where evidence law would otherwise render evidence admissible, and the rule is limited by other factors such as the forfeit rule.

49. *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 349 (1974).

50. There has been friction in the obscenity arena about how much speech outside the core is included within the First Amendment, but it is has never been limited to core values such as political discourse. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 97 (1973) (Brennan, J., dissenting) (“[B]efore today, the protections of the First Amendment have never been thought to be limited to expressions of serious literary or political value.”).

51. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

52. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 51 (1988).

including political ideas, literary merit, scientific ideas, the right to speak one's mind as well as the value of public debate.

Similarly, in the Sixth Amendment context, there is no necessity for the Court to provide only one core purpose or core definition of the Confrontation Clause. Given the free speech doctrine in this area, readers of *Crawford* should not assume that there is only one core definition of testimonial. Instead, readers should assume that as new confrontation issues greet the Court, the Court is likely to expand its understanding of the core purposes of the clause as it has in the context of the Free Speech Clause of the First Amendment. The term "core," therefore, signifies an expansive view of the reinvigorated right to confront witnesses. The Confrontation Clause has the capacity to have multiple core values as does the First Amendment.

Turning to the third issue above, free speech doctrine is also useful in helping to determine what should constitute "core" testimonial statements. To determine core protections for any constitutional right, one begins by identifying the purpose of the Amendment.⁵³ The First Amendment, like the Sixth Amendment, is informed by the Framers' healthy distrust of governmental overreaching. In the free speech context, the Amendment broadly guards against control of what people think and say.⁵⁴ The fear of government translates into all cases where the government is prosecuting individuals for free expression, even where the government had no hand in producing the expression, only in suppressing it.⁵⁵ Moreover, fear of governmental abuse is so broadly enforced that it even extends to private actions for libel. The government is the actor in these cases only in the sense that the state allows libel actions to proceed.⁵⁶ Even speech that is

53. See, e.g., *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002).

54. See *Hustler*, 485 U.S. at 50 ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.").

55. See *Cohen v. California*, 403 U.S. 15, 16 (1971) (involving an epithet on a jacket). Although speech occurring in a public forum generally receives more protection than private speech, in *Bartnicki v. Vopper*, Justice Rehnquist wrote that "fostering private speech" constitutes an interest of the "highest order." 532 U.S. 514, 544 (2001) (Rehnquist, C.J., dissenting). In *Bartnicki*, the Court upheld the right of radio station to broadcast intercepted cell phone conversation despite wiretap laws that protected privacy by forbidding the broadcast of illegally intercepted conversations. *Id.* at 544.

56. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("[H]ere, we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no further than is necessary to protect the legitimate interest involved.").

uttered from one private individual to another is still clearly protected from prosecution under the First Amendment.⁵⁷

The way that distrust of government informs constitutional doctrine for First Amendment analysis should help the Court embrace a broad understanding of the term testimonial for Confrontation Clause analysis. In a prior article, I argued that the Confrontation Clause should not turn on whether a police officer gathered the information, since the prosecutor is a government actor and it is the prosecutor who seeks to present the evidence at trial as testimony against the accused.⁵⁸ The phrase “witness against” the accused in the Confrontation Clause should refer to whether the statements serve the same purpose as live testimony at trial, not the intent of the person making the statement or taking the statement when it was first uttered.⁵⁹ First Amendment analysis supports this broad understanding of what constitutes core testimony, for free speech rights are hardly limited to patrolling governmental production of statements.

As in First Amendment case law, there is no reason for the Court to limit Sixth Amendment protections depending upon how the police obtained statements. If free speech recognizes government action to occur where there is prosecution or fear of prosecution, then the Confrontation Clause should also recognize the danger of governmental abuse in the fact of prosecution itself. That the government used or plans to use these statements in a courtroom to prosecute an individual should be enough to qualify these statements for Sixth Amendment protection even if the police initially gathered the statements for purposes other than law enforcement. After all, the courts want police to continue investigating crimes and to continue taking statements from witnesses, just as the Framers wanted witnesses to testify before grand juries. It is the repetition of the statements and not the manner in which the statements were taken that creates a violation of the Bill of Rights. There is the potential of governmental abuse in the act of prosecution and in the Sixth Amendment context; the specific danger is that of prosecutors obtaining convictions based on out-of-court statements without live witnesses. By analogizing to the free speech arena, one can grasp how broadly the *Crawford* opinion should be understood. By using the term “core,” the opinion described the most important purposes served by this clause in the Bill of Rights without restricting the Confrontation Clause to these core purposes. The opinion set out a range of possible definitions of core, allowing for an expansion of protections as

57. See generally *Cohen*, 403 U.S. at 21.

58. Ross, *supra* note 4, at 196-98.

59. *Id.* at 215.

different core values become clear. And finally, the Court's focus on governmental abuse as an underpinning of the Confrontation Clause supports a broad reading of the clause just as the First Amendment is implicated whenever the government prosecutes an individual for statements made, regardless of whether the government helped create the statement.⁶⁰

The First Amendment is not the only area of law where the term core refers to only some of what the Constitution protects. Initially, the *Miranda* warnings were treated by the Supreme Court as a prophylactic rule designed to advance core constitutional protections.⁶¹ In *Dickerson v. United States*, the Supreme Court finally declared the *Miranda* warnings to be a constitutional rule, overturning a law that instructed courts to ignore *Miranda* when determining the validity of confessions.⁶² Even though *Miranda* was finally recognized as a constitutionally mandated rule, it is not viewed as a core constitutional right.⁶³ Justice Thomas defined "the core protection afforded by the Self-Incrimination Clause" to be "a prohibition on compelling a criminal defendant to testify against himself at trial" and also described the clause as advancing the goal of "assuring trustworthy evidence," presumably by preventing false confessions.⁶⁴ Thomas recognized that there was not a complete fit between the core concerns of the Confrontation Clause and the mandated *Miranda* warnings. In *United States v. Patane*, Justice Thomas noted that *Miranda* requirements "sweep beyond the actual protections of the Self-Incrimination Clause."⁶⁵ The

60. One sobering aspect of the First Amendment is that the protections tend to wane in times of perceived national crisis. *Abrams v. United States*, 250 U.S. 616, 623 (1919). In upholding the Espionage Act of 1917, the Court seemed to accept a narrowing of the scope of what constitutes protected political dissent and a broadening of what constitutes advocacy of illegal action and categorically unprotected speech. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done."). One could analogize here to Sixth Amendment jurisprudence, where perhaps the Court is influenced by the perceived crisis in crime, including domestic violence.

61. *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987); see also *Miranda v. Arizona*, 384 U.S. 436, 467-72 (1966) (establishing *Miranda* warnings and the right of individuals to protection under the Fifth Amendment to the Constitution).

62. *Dickerson v. United States*, 530 U.S. 428, 441-44 (2000). ("*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress."); see Richard H. Fallon, Jr., *Judicially Manageable Standards And Constitutional Meaning*, 119 HARV. L. REV. 1274, 1305 (2006) (discussing the constitutionality of the *Miranda* rule).

63. *United States v. Patane*, 542 U.S. 630, 641-42 (2004).

64. *Id.* at 637; see Note, *Constitutional Law*, 18 HARV. L. REV. 296, 298-300 (2004) (discussing the Supreme Court's decision in *Miranda*); *Dickerson*, 530 U.S. at 433 (attributing the longstanding inadmissibility of coerced confessions in English and American law to the belief that such confessions are inherently unreliable); see also Note, *Self-Incrimination*, 116 HARV. L. REV. 302, 312, n.56 (2002).

65. *Patane*, 542 U.S. at 639.

Miranda rule “creates a presumption of coercion” in order to protect against “the possibility of coercion inherent in custodial interrogations.”⁶⁶ This protective rule should only be extended to exclude evidence seized as a result of non-Mirandized statements if this extension would extend “the ‘Fifth Amendment goal of assuring trustworthy evidence’ or by any deterrence rationale.”⁶⁷ Thus, Fifth Amendment protection of core principles, like the First Amendment protection, involves a protective layer surrounding the core.

By discussing protections outside of the core, I do not mean to suggest that the formula set forth in *Ohio v. Roberts*⁶⁸ for determining the application of the Confrontation Clause continued to have force after *Crawford*. The *Roberts* formula was based on the notion that reliable evidence need not be tested through live testimony subject to cross-examination, and, consequently, allowed judges to determine what was reliable.⁶⁹ If evidence was reliable, then the confrontation requirement could be lifted. As Professor Taslitz has noted, if *Roberts* survived, it would be through a residual due process analysis separate from the Sixth Amendment.⁷⁰ *Crawford* analyzed confrontation differently from *Roberts*. Unlike *Roberts*, *Crawford* distrusted judges as gatekeepers.⁷¹ The core value being protected in the Confrontation Clause was the process of determining reliability and credibility, namely that the factfinder would determine these after the witness testified by answering questions posed by counsel from both sides. Thus, *Crawford*’s breadth is defined by its enunciated policy to return criminal courts to a system where “no man shall be prejudiced by evidence which he had not the liberty to cross examine.”⁷²

66. *Id.*

67. *Id.* at 640 (quoting *Oregon v. Elstad*, 470 U.S. 298, 308 (1985)).

68. 448 U.S. 56 (1980).

69. *Id.* at 62-66.

70. Taslitz, *supra* note 32, at 40, 43 (“Thoroughly unreliable evidence entirely casually unconnected with governmental action is thus not the Confrontation Clause’s concern. *Roberts* is indeed dead.”).

71. *Crawford v. Washington*, 541 U.S. 36, 67 (2004).

72. *Id.* at 49 (citing *State v. Webb*, 2 N.C. 103 (Super. L. & Eq. 1794) (per curiam)). Similarly, before the Confrontation Clause was adopted, the complaint at one state’s convention was that it was still not determined whether an accused “is to be allowed to confront the witnesses and have the advantage of cross examination.” *Id.* at 48 (citing 2 DEBATES ON THE FEDERAL CONSTITUTION 110-11 (J. Elliot 2d ed. 1863)).

III. THE DAVIS DECISION REDUCED THE MINIMUM CORE PROTECTION TO THE MAXIMUM

When the Supreme Court accepted certiorari in a couple of domestic violence prosecutions, resulting in *Davis v. Washington*, the Court had the opportunity to reaffirm Crawford's bold vision of the Sixth Amendment's right to confront witnesses.⁷³ This opportunity was particularly important because an overwhelming number of state courts and lower federal courts had continued affirming domestic violence convictions where the primary evidence against the defendants were accusations made out of court and repeated at trial through police officers or 911 recordings.⁷⁴

In *Davis v. Washington*, the Supreme Court combined two domestic violence prosecutions into one opinion, sometimes referred to as *Davis/Hammon* since the other case reviewed was *Hammon v. Indiana*.⁷⁵ Both cases involved the excited utterance exception to the rule against hearsay.⁷⁶ A statement constitutes an excited utterance (sometimes referred to as a spontaneous utterance or spontaneous declaration) if it is made while still under the stress of an exciting event, before the declarant has had time to fabricate.⁷⁷ John Henry Wigmore is generally recognized as the midwife and advocate of the excited utterance exception, writing more than one hundred years after the Sixth Amendment's ratification.⁷⁸ During the time of the Framers, the *res gestae* exception distinguished between statements that were "an inseparable part of the event itself," from those that were "purely narrative of what had already transpired."⁷⁹ Statements describing

73. *Davis v. Washington*, 126 S. Ct. 2266, 2273-80 (2006). The *Davis* Court reviewed two domestic violence convictions, *Hammon v. Indiana*, 829 N.E.2d 444 (Ind. 2005) and *Washington v. Davis*, 111 P.3d 844 (Wash. 2005). *Id.* at 2270-73. The *Davis* Court reversed *Hammon* and affirmed *Davis*. *Id.* at 2280.

74. See *infra* discussion section IV (discussing the misinterpretation of Crawford's ambiguity in first responder cases).

75. *Hammon*, 829 N.E.2d at 448-49, *rev'd*, 126 S. Ct. 2266 (2006), *remanded to* 853 N.E.2d 477 (Ind. 2006); *Washington*, 111 P.3d at 847, *aff'd*, 126 S. Ct. 2266 (2006).

76. In *Hammon*, the trial court also admitted the affidavit of the complainant as a present sense impression. *Hammon*, 829 N.E.2d at 447. "The Court of Appeals did not decide whether the affidavit was properly admitted, reasoning that the issue was academic because the affidavit was cumulative of Mooney's testimony and therefore harmless, if error at all." *Id.* at 448.

77. FED. R. EVID. 803(2).

78. Aviva Orenstein, "MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159, 159, 169 n.22 (1997); see also Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, n.141 (1992) (establishing the timeframe for the birth of the excited utterance and noting that Wigmore published three editions of his Treatise, in 1904, 1923 and 1939).

79. Brief of Petitioner at 11-12, *Davis v. Washington*, 126 S. Ct. 2266 (2005) (No. 05-5224), 2005 WL 3598182.

a shocking or traumatic event were not admitted before Wigmore, with perhaps a couple of cases that constituted exceptions to the general rule. Wigmore examined these exceptions and brought a psychological gaze to bear on the issue, concluding that the spontaneous utterance exception should be unmoored from *res gestae*, and that people should be able to testify about underlying events even if the retelling was not immediate. The premise upon which excited utterance exception rests has long been in doubt, namely that people are physically incapable of lying when they are under great stress.⁸⁰ An irony within the excited utterance exception is that in order for a trial judge to conclude that a witness was under the influence of a stressful event (generally the crime perpetrated against him), the trial judge must first conclude that there was such a stressful event. In cases where the only evidence of the stressful event was the alleged victim's out-of-court statement, the judge must determine the witness's credibility without hearing the witness testify and without benefit of cross-examination.⁸¹

In an effort to prosecute criminal cases where eye-witnesses and victims do not show up at trial, prosecutors began using the excited utterance exception during the 1990s as a means to conduct witnessless prosecutions.⁸² Under the *Roberts* framework, excited utterances were held not to violate the Confrontation Clause because they were "firmly rooted" exceptions to the hearsay rule and therefore inherently reliable.⁸³ *Hammon* and *Davis* are typical examples of witnessless domestic violence prosecutions.

A. THE DECISION IN THE APPEAL OF *DAVIS* V. *WASHINGTON*

The facts in *Davis* were that an alleged victim of domestic violence telephoned 911 and hung up. When the 911 operator phoned back, she asked a series of questions, eliciting the allegation from the alleged victim

80. Stanley A. Goldman, *Distorted Vision: Spontaneous Explanation as a "Firmly Rooted" Exception to the Hearsay Rule*, 23 LOY. L.A. L. REV. 453, 462 (1990) ("Theoretically, the excitement eliminates the witness' capacity to reflect, thus precluding the ability to fabricate and ensuring an accurate, reliable description of the event perceived."); see also Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432, 435-38 (1928) (criticizing the notion that witnesses have no ability to fabricate once more than a few seconds has transpired after the startling event).

81. See, e.g., *Spencer v. State*, 162 S.W.3d 877, 880 (Tex. App. 2005) (involving a situation in which there was independent evidence that an alleged victim was hurt but what happened was established by a missing witness' statements).

82. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1220 (2002).

83. *White v. Illinois*, 502 U.S. 346, 356 n.8 (1992).

that she was being assaulted at her home by the defendant.⁸⁴ The operator was also told that the defendant left the home during the phone call.⁸⁵ The complainant did not appear at trial and the 911 tape was played for the jury, who convicted the defendant. The trial judge allowed the statements in as excited utterances,⁸⁶ and the appeals court—hearing the case after *Crawford* was decided—affirmed the conviction.

The Supreme Court upheld the use of the 911 tape at Mr. Davis' trial despite the absence of the witness at trial. The primary purpose of the questions posed by the operator, the Court found, objectively indicated that they were “to enable police to meet an ongoing emergency.”⁸⁷ Where the primary purpose of police questioning is to allow police to meet an ongoing emergency, the statements made by the absent witness do not constitute witness testimony under the Sixth Amendment, and the Confrontation Clause does not apply.

The Supreme Court noted that later portions of the *Davis* 911 tape might not have been primarily for emergency purposes, and urged future trial courts to redact portions of 911 calls when “circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”⁸⁸ Similarly, the Court deemed that statements taken by police officers should not have come in, but that their admission was harmless error.⁸⁹ The Court distinguished the *Davis* facts from those in *Crawford* and set forth a variety of criteria that lower courts can use as a guide for deciding if evidence violates the Confrontation Clause when admitted in the absence of a witness at trial.

B. THE DECISION IN THE APPEAL OF *HAMMON V. INDIANA*

The other case decided by the Supreme Court in *Davis v. Washington* was *Hammon v. Indiana*.⁹⁰ In *Hammon*, police officers interviewed an alleged victim at the scene following an emergency response phone call.

84. *Davis v. Washington*, 126 S. Ct. 2266, 2271 (2006). The operator asked for the first name then the last name and then the middle initial of the assailant. *Id.*

85. *Id.* The exchange was as follows: “911 Operator: Okay. What’s his middle initial? Complainant: Martell. He’s runnin’ now.” *Id.*

86. See FED. R. EVID. 803(2) (indicating that excited utterances are alternatively referred to as spontaneous utterances or spontaneous declarations).

87. *Davis*, 126 S. Ct. at 2268-69.

88. *Id.* at 2269.

89. *Id.* at 2277-78. “That Court also concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.” *Id.*

90. 829 N.E.2d 444 (Ind. 2005).

Police separated the alleged victim from the alleged assailant who was still in the house and asked the alleged victim to state what occurred before the officers arrived. As in *Davis*, the alleged victim failed to appear at trial and the witness statements were repeated at trial by the interviewing officer.

The Supreme Court reversed Mr. Hammon's conviction, holding that the statements at issue were similar to those in *Crawford* and could not be introduced without the witness who made the statements testifying at trial under oath.⁹¹ Such statements under official interrogation are an obvious substitute for live testimony, "because they do precisely what a witness does on direct examination," and are therefore covered by the Confrontation Clause.⁹²

C. THE AMBIGUITY IN *DAVIS* WILL HELP FUTURE PROSECUTORS

Davis v. Washington must be understood as a retreat from the principles laid out in *Crawford*. The *Davis* Court was asked to determine whether the statements in *Davis* and *Hammon* were "testimonial," a word coined by *Crawford* to mean when a declarant of out-of-court statements counts as a "witness" for the Sixth Amendment right to confront the witnesses against you.⁹³ If an out-of-court statement repeated at trial is testimonial, then the declarant is a witness and must appear for cross-examination unless the government has a reason that satisfies the Sixth Amendment.⁹⁴ If the statement is nontestimonial then the Confrontation Clause does not even apply.⁹⁵ *Davis* held that out-of-court statements repeated at trial must be deemed "testimonial when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."⁹⁶ In contrast, statements repeated at trial must be deemed "nontestimonial" if they were "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation . . . [was] to enable police assistance to meet an ongoing

91. *Davis*, 126 S. Ct. at 2278. *Hammon* was also remanded: "The Indiana courts may determine on remand whether a claim of forfeiture by wrongdoing—under which one who obtains a witness's absence by wrongdoing forfeits the constitutional right to confrontation—is properly raised in *Hammon*, and, if so, whether it is meritorious. Absent such a finding, the Sixth Amendment operates to exclude Amy Hammon's affidavit." *Id.* at 2270.

92. *Id.* at 2278. "Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Id.*

93. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

94. *Id.* at 54-59.

95. *Id.* at 56.

96. *Davis*, 126 S. Ct. at 2273-74.

emergency.”⁹⁷ That means that even if one person accuses another person of a crime, that initial accusation may serve as the basis to bring charges, hold the defendant before trial, and convict the defendant, if the police were engaged in resolving an emergency at the time the accusation was made. It makes little sense that a person’s opportunity to cross-examine a witness rests not on whether the out-of-court statement serves to accuse the defendant at trial, but on the police officer’s reason for gathering the statement in the first place. It also makes little sense that a witness who lied to a police officer about a crime or the person who committed the crime need not affirm his accusation before the court if the lie was made to an emergency 911 system, or if the police did not interrogate him. The holding in *Davis* represents a dramatic retreat from the vision of the Confrontation Clause ensuring our long-standing tradition of “live testimony in court subject to adversarial testing.”⁹⁸

Davis is consciously ambiguous, declining to “produce an exhaustive classification of all conceivable statements” to determine whether the Confrontation Clause applies.⁹⁹ Many questions remain in the aftermath of the *Davis* decision. Is the concept of an emergency broad or narrow?¹⁰⁰ Is it an emergency when police need to find out whether an arrest should be made and whether the person they might arrest has a violent history or just behaved in a violent manner? Who has the burden of showing that there is an ongoing emergency or that the emergency has ended? Does the decision admit most 911 calls without the witness while barring statements taken at the scene? Or does the application of the Confrontation Clause turn on how the missing witness phrases her phone call and how the police phrase their response at the scene?

As ambiguous as the primary purpose test is standing alone, *Davis* lends it greater ambiguity by creating a test that is essentially a totality of the circumstances test. The Court asks judges to consider a number of factors in deciding whether a statement to a police officer is testimonial.¹⁰¹ The prongs of this test seem to have originated from state appellate court decisions that provided narrow interpretations of *Crawford*’s holding, rather than from any principled understanding of the purposes of the

97. *Id.* at 2274.

98. *Crawford*, 541 U.S. at 43 (citing BLACKSTONE, *supra* note 9, at 373-74).

99. *Davis*, 126 S. Ct. at 2268.

100. Note that one of the amicus briefs in *Davis* used the term “safety concerns” rather than the term “ongoing emergency” to delineate when evidence fell outside of the scope of the Confrontation Clause. On its face, “ongoing emergency” suggest a narrower exception than “safety concerns” to the right to confront witnesses.

101. *Davis*, 126 S. Ct. at 2276.

Confrontation Clause.¹⁰² As Scalia himself has said, totality of the circumstances tests leave too much discretion to lower court judges.¹⁰³ Scalia wrote, “The common-law, discretion-conferring approach is ill suited, moreover, to a legal system in which the Supreme Court can review only an insignificant proportion of the decided cases.”¹⁰⁴ “To adopt such an approach, in other words, is effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue.”¹⁰⁵

In Section IV the reader will discover how appellate courts capitalized on the ambiguities of *Crawford v. Washington* to forego face-to-face confrontation, despite the strong wording in that opinion condemning trials by out-of-court accusation. There is no reason to suppose that *Davis*' ambiguity supplies anything but encouragement to courts to continue allowing prosecutors to introduce out-of-court accusations without giving the accused the opportunity to test the credibility of the accuser through cross-examination. Indeed, the cases that have been decided in the year since *Davis* was published prove exactly that.¹⁰⁶

Robert Mosteller argued that confrontation rights were not assured as long as they relied on behavior by the police because the police could always alter their investigative techniques.¹⁰⁷ Even before *Davis*, he predicted that police departments could change their methods of gathering information to help create evidence that would withstand a Sixth Amendment challenge.¹⁰⁸ *Davis* invites police to do so by allowing them to gather statements orally rather than in writing and by providing them an opportunity to characterize their questioning as part of an ongoing emergency investigation. This article examines cases that were decided even before police had an opportunity to change their methods. The cases discussed in

102. See discussion *infra* section IV (discussing first responder cases).

103. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80 (1989) (“Much better . . . to have a clear, previously enunciated rule that one can point to in explanation of the decision.”). *Id.* at 1178.

104. *Id.* at 1178

105. *Id.* at 1179.

[W]here an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat . . . equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.

Id. at 1182.

106. See *infra* discussion Section C (discussing the post-*Davis* decisions).

107. Mosteller, *supra* note 32, at 529-30, 539-40, 543-44, 566-68.

108. *Id.* at 538-40.

this article were investigated before *Davis* and *Crawford* and in many instances police had already testified about these investigations before they had an opportunity to conform their evidence to *Crawford's* new Confrontation Clause ruling.

This article also shows that an even larger problem than defining constitutional rights by the police's investigatory actions is that courts can manipulate their findings. Judges can take the totality of the circumstances test in *Davis* and conclude that the statements were taken as part of an ongoing investigation. Plus, appellate courts must be deferential to the discretion of the trial judges since the trial judges heard the officers testify.¹⁰⁹ Moreover, even when the appellate courts were interpreting the law, applying *Crawford* to domestic violence cases before *Davis* weakened the new jurisprudence and appellate courts were routinely finding ways to affirm convictions.¹¹⁰ The ambiguity in *Davis*, its focus on police practices, and its totality of the circumstances test all sound the bugle for retreat from confrontation rights for those charged with domestic violence.

D. DAVIS USED LACK OF PRECEDENT IN CONTRADICTIONARY WAYS

While *Crawford* used history to stress the importance of the Confrontation Clause, *Davis* used a lack of history in conflicting ways. *Crawford* used history primarily to augment the idea of witnesses testifying at trial rather than having out-of court statements read to the factfinder. For example, the Court cited an early American case for the proposition that "it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine."¹¹¹ This is similar to the Blackstone quotation: "The common-law tradition is one of live testimony in court subject to adversarial testing."¹¹² Or this quote, reminding the reader that the Bill of Rights is rooted in distrust of government: "The Framers would be astounded to learn that *ex parte*

109. See *Stancil v. United States*, 866 A.2d 799, 815 (D.C. 2005) (noting that "[m]oreover, the trial judge's assessment of the events is especially significant, for she heard the testimony first hand" and remanding the case for the trial judge to determine the circumstances under which the statements were made to decide if the Confrontation Clause applied); *but see* *People v. Johnson*, 150 Cal. App. 1467, 1477-78 (Cal. Ct. App. 2007) ("We independently review determinations affecting a defendant's constitutional rights.").

110. See *infra* discussion Section IV (discussing the misinterpretation of *Crawford's* ambiguity in first responder cases).

111. *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (citing *State v. Webb*, 2 N.C. 103, 104 (Super. L. & Eq. 1794)). Similarly, before the Confrontation Clause was adopted, the complaint at one state's convention was that it was still not determined whether an accused "is to be allowed to confront the witnesses and have the advantage of cross examination." *Id.* at 48.

112. *Id.* at 43 (citing BLACKSTONE, *supra* note 9, at 373-74).

testimony could be admitted against a criminal defendant because it was elicited by ‘neutral’ government officers.”¹¹³

There was a contradiction within *Davis* regarding the significance of a lack of precedent connected to the seminal issue whether the Confrontation Clause affirmatively guarantees a method of presenting testimony or whether it only applies to abuses known to the Framers.¹¹⁴ In one section of the decision, the Court celebrated the lack of precedent as proof that the evidence was historically excluded from trials owing to the Confrontation Clause.

We do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition. Indeed, if there is one point for which *no case-English or early American*, state or federal-can be cited, that is it.¹¹⁵

In this quote, the *Davis* Court affirmed *Crawford’s* pronouncement that unsworn statements are covered by the Confrontation Clause even if they were not an abuse considered by the Framers.¹¹⁶ The very fact that there was no prior case that discussed the application of the Sixth Amendment to unsworn statements as in Mr. Hammon’s case proved to the *Davis* Court that in the time of the Framers, these statements would not have been permitted. The absence of case law here proved the breadth of the Sixth Amendment.

In contrast, in another section of the decision, the Court celebrated the lack of precedent as proof that the evidence was historically admitted at trials, the very opposite conclusion from the quotation above. The Court wrote:

Davis seeks to cast McCottry [the caller] in the unlikely role of a witness by pointing to English cases. *None of them* involves statements made during an ongoing emergency. In *King v. Brasier*, 1 Leach 199, 168 Eng. Rep. 202 (1779), for example, a young rape victim, “immediately on her coming home, told all the circumstances of the injury” to her mother. *Id.*, at 200, 168 Eng. Rep., at 202. The case would be helpful to *Davis* if the relevant statement

113. *Id.* at 66.

114. *Id.* at 52 n.3.

115. *Davis v. Washington*, 126 S. Ct. 2266, 2276 (2006); *see also id.* at 2283 (Thomas, J., dissenting) (“The Court all but concedes that no case can be cited for its conclusion that the Confrontation Clause also applies to informal police questioning under certain circumstances.”).

116. *Id.*

had been the girl's screams for aid as she was being chased by her assailant.

Here, the Court assumed that because appellate counsel did not find an early case that discussed whether the Sixth Amendment excluded hue and cry evidence, the early courts must have allowed in such evidence. The Supreme Court found that the absence of case law proved the limits rather than the breadth of the Confrontation Clause in this instance. The two quotations, therefore, indicate confusion about how to interpret a lack of history and a lack of precedent. This confusion, in turn, makes it more difficult to interpret how *Davis* answered the question about whether the Confrontation Clause only addresses historic abuses or whether it also included new forms of abuses that are created as the rules of evidence shift. While *Crawford* stated that the Court would determine new abuses by deciding what the Framers would have thought,¹¹⁷ *Davis* muddied this issue, helping to undue the broad protections announced just two years before.

The main problem with limiting the Confrontation Clause to those modern practices with the closest kinship to abuses that the Framers thought of at the time, is that other evidence the Framers did not think about, such as excited utterances, may also serve to accuse the defendant and prejudice the defendant. The more the term "testimonial" is limited, the more evidence will be introduced without the opportunity to cross-examine the accusers. The process mandated by the Clause will become a right to confront some accusers but not others. For other accusations, there will be no opportunity to confront the accusers. Judges, mistrusted by *Crawford*, again become the guardians of whether evidence is reliable enough to dispense with confrontation rights.¹¹⁸

In another article, I argue that the term "testimonial" is defined improperly in *Davis*.¹¹⁹ In defining what is akin to testimony or "testimonial," the *Davis* Court mistakenly examined how the evidence was

117. *Crawford*, 541 U.S. at 52 n.3.

But even if, as [the Chief Justice] claims, a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn testimonial statements a moot point, that would merely change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference. We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK.

Id.

118. For example, in *State v. Davis* the court noted that it was the trial judge that decided in the first instance that the 911 call was reliable enough to be introduced, which allowed the government to present the caller's accusation against Mr. Davis as testimony not subject to cross-examination. 111 P.3d 844 (Wash. 2005).

119. Ross, *supra* note 4, at 198-200.

gathered rather than how the evidence was actually used at trial.¹²⁰ The Sixth Amendment is a trial right. The Confrontation Clause is not designed to discourage or prevent the police from investigating crimes in a manner that is consistent with the Fourth and Fifth Amendment. It does not prevent people from making true or false accusations outside of court. What the Clause is designed to prevent is the government using these statements to establish that a person is guilty of a criminal charge without allowing the factfinder to view the declarant as he or she takes an oath, answers questions formally and submits to cross-examination.¹²¹

One case from Ohio displays the problems of trusting judges to be gatekeepers of reliability and the danger posed by *Davis*' narrow reading of *Crawford*. In *State v. Byrd*,¹²² police officers, responding to an altercation between a man and a woman, interviewed both and thought that the woman had started the fight. The only reason the police did not arrest the woman was because the defendant interceded and begged them not to because she was pregnant.¹²³ Since the police were bound by state law to make an arrest in domestic violence cases, they then arrested the man.¹²⁴ Nevertheless, a judge determined that the woman's statements to the 911 operator and to the police at the scene were reliable enough to dispense with cross-examination and defendant was convicted without the opportunity to probe the declarant's bias and credibility through cross-examination.¹²⁵ The appellate court in *Byrd* reversed the conviction after *Crawford* was decided, holding that the statements at the scene were "testimonial," but allowed the case to proceed on remand based upon the statements to the operator.¹²⁶ Thus, the government was allowed to try the defendant again based upon some of the witness' statements without her having to appear.¹²⁷ It is easy to imagine how a cross-examination of the caller could probe for bias and help the jury determine if the person claiming to be the victim was really the aggressor. Instead, once the judge decides on remand that the witness provided reliable evidence to the operator, the jury may make a factual determination of the accuser's credibility without having an opportunity to

120. *See id.* (providing a more detailed explanation of this issue).

121. *Id.* at 195-213.

122. 828 N.E.2d 133 (Ohio Ct. App. 2005). Note that this was decided after *Crawford* but before *Davis*; however, *Davis* seems to support the resolution of the case. *Id.*

123. *Id.* at 134.

124. *Id.* at 134-35.

125. *Id.* at 135.

126. *Id.* at 136-37.

127. *Id.* at 137. "Lastly, under Evid. R. 803(2), the availability of the declarant is immaterial. Thus, it was of no consequence that the state did not call the female witness to testify and face cross-examination from the accused." *Id.*

watch the witness answer questions on direct and cross-examination. This scenario is likely to happen quite often after *Davis*. It is hardly the process envisioned by the majority in *Crawford v. Washington*.

E. *DAVIS* SHRUNK CONSTITUTIONAL PROTECTION SO THAT THE CORE BECOMES THE PERIMETER

The *Davis* Court used the term “core” in a most haphazard way. The Court wrote, “We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies.”¹²⁸ That sounds like it was asking whether *Roberts* survived *Davis*, a most important inquiry. The Court answered that *Roberts* was dead, phrasing it this way: “A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core,’ but its perimeter.”¹²⁹ This is oddly phrased because the protection around the core would not be the old *Roberts*’ reliability jurisprudence anyway, but would be statements introduced at court whose introduction would start impinging upon core confrontation concerns. Just as the *Miranda* rules protect the core of the Fifth Amendment, so would a rule preventing police from repeating accusations made to them protect the core purpose of confrontation rights announced in *Crawford*. By using the word “core” to identify a perimeter, the *Davis* Court collapsed the broad possibilities of the term core in *Crawford*, and it did this incidentally, almost casually. Instead of the term “core” inviting protections surrounding the core, the core became the circumference or perimeter of the scope of the clause.

If statements made to law enforcement with the understanding that they would be used as testimony at trial could be deemed nontestimonial under the *Davis* test, then statements made to private persons would seem to be per force excluded from the right to confront one’s accusers. Remember that *Crawford* stated that: “Whatever else the term covers, it applies at a *minimum* to . . . the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.”¹³⁰ With *Davis*, the minimum in fact became the maximum. The Court decided that the Confrontation Clause is only concerned with modern practices with the closest kinship to the abuses of the past.¹³¹ The Supreme Court no longer imagined a comprehensive definition of “testimonial” as it did in *Crawford*, but only

128. *Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006).

129. *Id.*

130. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

131. *Davis*, 126 S. Ct. at 2274.

one discreet definition.¹³² It would now be inconsistent for *Crawford*'s third possible definition to survive *Davis*, namely statements made to private persons with the understanding that they would be used as testimony at trial. In two years, the Court moved from *Crawford*'s proclamation that the Confrontation Clause is a "bedrock procedural guarantee" and "the common-law tradition is one of live testimony in court subject to adversarial testing" to the cryptic language in *Davis* quoted above, that a "limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter."¹³³

IV. FIRST RESPONDER CASES MISINTERPRET *CRAWFORD*'S AMBIGUITY

Surprisingly, after *Crawford*, a majority of lower courts continued allowing out-of-court statements of witnesses through police testimony. They did so by interpreting the term "testimonial" in a narrow fashion so that the Sixth Amendment applied to only a handful of incriminating statements. Instead of treating the existence of various possible definitions of core "testimonial" rights as an invitation to expand the rights of criminal defendants, these courts seized upon the ambiguity in *Crawford* as a reason to restrict the reach of the Confrontation Clause. Sometimes, the Confrontation Clause was interpreted so narrowly that it would not even apply to the *Crawford* fact pattern.¹³⁴

In the wake of *Crawford*, courts in numerous jurisdictions held that *Crawford* did not prevent the government from introducing out-of-court statements made by an accuser to police to prove the charges without the opportunity for cross-examination.¹³⁵ The post-*Crawford*, pre-*Davis*

132. *Id.*

133. *Id.*

134. See discussion *infra* Section VI.A. (discussing that the test derives from a misreading of *Crawford*'s third possible core definition).

135. See Chart in Appendix. The following cases affirmed convictions where statements given to the police at the scene were repeated without the witness testifying in person:

Alaska: *Anderson v. State*, 111 P.3d 350 (Alaska Ct. App. 2005)

Arizona: *State v. Alvarez*, 107 P.3d 350 (Ariz. 2005)

Colorado: *People v. King*, 121 P.3d 234 (Colo. Ct. App. 2005)

D.C.: *Stancil v. United States*, 866 A.2d 799 (D.C. 2005)

Maine: *State v. Barnes*, 854 A.2d 208 (Me. 2004)

Massachusetts: *Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005)

Michigan: *People v. Bryant*, 2004 WL 1882661 (Mich. Ct. App. 2004)

Minnesota: *State v. Warsame*, 701 N.W.2d 305 (Minn. 2005)

Nebraska: *State v. Hamberdt*, 696 N.W.2d 473, 483 (Neb. 2005)

New York: *New York v. Mackey*, 785 N.Y.S.2d 870 (N.Y. 2004). For 911 cases, there was a split of opinion. Compare *New York v. Moscat*, 777 N.Y.S.2d 875 (N.Y.

decisions can be divided into three lines of reasoning in reaching the conclusion that the excited utterance statements to police at issue are not “testimonial.”

1. The “formality” rationale. Only statements given to police officers during interrogation are formal enough to constitute “testimonial” statements; therefore, statements made at the scene of the crime are informal and not subject to the Confrontation Clause. [Section V below]
2. The “state-of-mind” rationale. Unless the declarant intends that the statements will be used at trial, statements given to police officers or private citizens do not constitute “testimonial” statements. Some cases that read a “state-of-mind” requirement into *Crawford* opine that all excited utterances are exempt from the Confrontation Clause because by definition excited utterances are made without reflection so the speaker could not have intended that the statements be used to prosecute the accused. [Section VI below]
3. The “intent-of-the-officers” rationale. This set of cases looks at the intent of the officers in asking questions of the witness to determine what constitutes interrogation. Information gathered as part of an emergency response falls outside the dictates of the Confrontation Clause. [Section VII below]

The chart in Appendix A indicates that out of the thirty-two states that have developed a theory in response to *Crawford*, thirty of these states have interpreted *Crawford* narrowly, to exempt accusatory statements introduced at domestic violence trials from the scope of the Confrontation Clause.¹³⁶

2004) (illustrating a narrow reading of testimonial under state-of-mind rationale) *with* *People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. 2004) (illustrating a broad reading of testimonial).

North Carolina: *North Carolina v. Forrest*, 596 S.E.2d 22 (N.C. Ct. App. 2004)

This case was granted certiorari, judgment vacated and remanded for further proceedings when the Court decided *Davis*. 126 S. Ct. 2977 (2006).

Ohio: *Ohio v. Mills*, 2006 WL 1132543 (Ohio Ct. App. 2006).

Pennsylvania: *Commonwealth v. Gray*, 867 A.2d 560, 577 (Pa. Super. Ct. 2005).

Tennessee: *State v. Maclin*, 183 S.W.3d 335, 352 (Tenn. 2006).

Texas: *Key v. Texas*, 173 S.W.3d 72 (Tex. 2005).

Washington: *State v. Ohlson*, 125 P.3d 990 (Wash. 2005).

Wisconsin: *Wisconsin v. Searcy*, 709 N.W.2d 497 (Wis. 2005).

136. Two courts have taken a broad view of the Confrontation Clause, Georgia and Hawaii. *Moody v. State*, 594 S.E.2d 350, 354 (Ga. 2004); *State v. Grace*, 111 P.2d 28, 37 (Haw. Ct. App. 2005). In addition to the cases mentioned in *supra* note 135, the following cases have also interpreted *Crawford* narrowly. *People v. Cage*, 15 Cal. Rptr.3d 846 (Cal. App. Dep’t Super. Ct. 2004); *State v. Johnson*, 2005 WL 1952939 (Del. Super. Ct. 2005); *Bartee v. Florida*, 922 So.2d

Although all three rationales gather support from the language in *Crawford*, this article will demonstrate that all three theories were incorrect interpretations of the seminal decision and missed the policy behind the *Crawford* holding.¹³⁷ The following sections will review these rationales one by one and discuss whether they survived the *Davis* decision.

1065 (Fla. 2006); *People v. West*, 823 N.E.2d 82, 89 (Ill. 2005) (“M.M.’s statement to Officer Harrell at Jackson’s house is not testimonial in nature. When the officer arrived at Jackson’s house, she did so in response to a ‘call for help’ and the ‘questions posed by the officer were preliminary in nature and for the purpose of attending to M.M.’s medical concerns.”); *Talley v. State*, 2005 WL 387443, *3 (Ky. 2005) (unpublished opinion) (“A 911 call does not implicate the principal evil at which the Confrontation Clause was directed” and is therefore “not a testimonial statement.”); *State v. Jefferson*, 922 So.2d 577, 598 (La. 2005) (agreeing with the Supreme Court of Minnesota that “it would be an exceptional occasion with a statement made by a caller during the course of a 911 call would be classified as testimonial.”); *State v. Mann*, 2005 WL 2714531, *4 (N.H. Super. Ct. 2005) (“Statements made on a 911 tape are not made under ‘circumstances that would cause a reasonable witness to believe they could be used at trial’”); *Salt Lake City v. Williams*, 128 P.3d 47, 53-54 (Utah 2005) (finding that statement made to a 911 dispatcher was nontestimonial because it was “made while the incident was occurring and during a call placed to 911 for the purpose of seeking protection from immediate danger.”); *Hammon v. Indiana*, 829 N.E.2d 444, 458 (Ind. 2005) (“Officer Mooney, responding to a reported emergency, was principally in the process of accomplishing the preliminary task of securing and assessing the scene. Amy’s motivation was to convey basic facts and there was no suggestion that Amy wanted her initial responses to be preserved or otherwise used against her husband at trial”). In addition, the following non-domestic violence cases are included in the chart because their reasoning fits within the mold of the domestic violence reasoning and provides precedent. *See State v. Greene*, 874 A.2d 750, 775 (Conn. 2005)

[W]here a victim contacts a police officer immediately following a criminal incident to report a possible injury and the officer receives information or asks questions to ensure that the victim receives proper medial attention and that the crime scene is properly secured, the victim’s statements are not testimonial in nature because “they can be seen as part of the criminal incident itself, rather than as part of the prosecution that follows.”

Id.; *South Carolina v. Davis*, 613 S.E.2d 760, 785 (S.C. 2005) (considering post-*Crawford* domestic violence cases for definitions of testimonial).

137. *Crawford* provides three possible definitions of core “testimonial” rights:

Various formulations of this core class of “testimonial” statements exist: “*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,” “extrajudicial statements . . . contained in formalized “testimonial” materials, such as affidavits, depositions, prior testimony, or confessions,” “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[.]” These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.

Crawford v. Washington, 541 U.S. 36, 51-52 (2004) (internal citations omitted).

V. FORMALITY RATIONALE CASES WERE WRONGLY DECIDED UNDER *CRAWFORD*

Many courts interpreted *Crawford* to apply Sixth Amendment protections only to formal police questioning and not to informal statements given to police.¹³⁸ These decisions permitted the police to recite what the alleged victim told them under the excited utterance exception without the opportunity to cross-examine the witness, holding that this informal type of hearsay was not “testimonial” and therefore there was no right to confront the declarant.¹³⁹

Hammon v. Indiana, the case reversed by the Supreme Court in *Davis v. Washington*, was one of the early and influential decisions that used the formality rationale.¹⁴⁰ *Hammon*'s reasoning was widely adopted by other jurisdictions. Many jurisdictions specifically cited to the Indiana appeals court decision,¹⁴¹ while other jurisdictions used the same formality logic.¹⁴²

138. See, e.g., *Anderson v. State*, 111 P.3d 350, 354-55 (Alaska 2005) (“We have reviewed numerous decisions which have interpreted *Crawford*. The great majority of courts which have considered this question have concluded that an excited utterance by a crime victim to a police officer, made in response to minimal questioning, is not ‘testimonial.’”). See also *State v. Warsame*, 701 N.W.2d 305, 310 (Minn. Ct. App. 2005) (noting that a majority of post-*Crawford* cases involving initial police-victim interactions at the scene held that the situations did not involve interrogation and that resulting statements were not “testimonial”).

139. See, e.g., *United States v. Hadley*, 431 F.3d 484, 506 (6th Cir. 2005). The nontestimonial nature of those statements to the police was demonstrated by (1) the statements being “made within only a few short minutes after Defendant” and his wife were involved in a domestic dispute; (2) the “police intervention was initiated by someone within the Hadley residence,” and not by the authorities or by the wife; (3) “when the police arrived at the residence, Mrs. Hadley [the wife] immediately emerged and blurted out the challenged statements without any questioning or prompting whatsoever;” and (4) “her statements were not overly detailed or ‘testimonial’ in nature but were limited to the information necessary for the police officers to address the immediate exigencies of the situation.” *Id.*

140. *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004), *aff’d* by 829 N.E.2d 444 (Ind. 2005), *rev’d sub nom. Davis v. Washington*, 126 S. Ct. 2266 (2006). *Hammon* is sometimes referred to as *Hammon-Fowler*. See, e.g., *Stancil v. United States*, 866 A.2d 799, 809 (D.C. 2005). *Hammon* and *Fowler* use the same reasoning and apply identical language in part and they were written by the same judge (on behalf of different panels of the court) and were released the same day. *Stancil*, 866 A.2d at 809 n.20.

141. The following cases cite *Hammon* or *Fowler* (two overlapping opinions of the Indiana Supreme Court): *Rogers v. State*, 814 N.E.2d 695 (Ind. 2004); *Beach v. State*, 816 N.E.2d 57 (Ind. 2004); *United States v. Webb*, 2004 WL 2726100, at *3-5 (D.C. Super.); *State v. Alvarez*, 107 P.3d 350, 355 (Ariz. Ct. App. 2005); *State v. Wright*, 686 N.W.2d 295, 302, 310 (Minn. Ct. App. 2005); *People v. King*, 121 P.3d 234, 239-40 (Colo. 2005); *State v. Veessenmeyer*, 2005 WL 623277, at *3 (Minn. App. 2005); *Anderson v. State*, 111 P.3d 350, 355 (Alaska 2005); *Davis v. State*, 169 S.W.3d 660, 670 (Tex. 2005); *State v. Hembertt*, 696 N.W.2d 473, 482-83 (Neb. 2005); *People v. King*, 7 Misc. 3d 1028A, at *9 (N.Y. 2005); *City of Akron v. Hutton*, 2005 WL 1523880 (Ohio 2005); *Mason v. State*, 173 S.W.3d 105, 110 (Tex. 2005); *People v. Nieves*, 8 Misc. 3d 1020(A), at *2 (N.Y. 2005); *State v. Ohlson*, 125 P.3d 990, 995 (Wash. 2005); *United States v. Hadley*, 431 F.3d 484, 505-06 (6th Cir. 2005).

142. See full chart in Appendix. For example:

The facts in *Hammon* were that a police officer responded to a domestic disturbance call and spoke to the alleged victim, asking if there was a problem. When she said no, he brought her to another room, away from the defendant where she described how the defendant had punched her and thrown her down.¹⁴³ Those statements were admitted into evidence without the witness taking the stand because the trial judge found that the statements were admissible as excited utterances despite some time delay between the alleged incident and the time of the statement.¹⁴⁴

The appeals court affirmed the admissibility of the statements as excited utterances and concluded that *Crawford's* new jurisprudence did not apply to these facts. The Indiana appeals court distinguished *Hammon* from *Crawford* by focusing on the ways in which the questioning at issue was less formal than in *Crawford*.¹⁴⁵ In *Hammon*, the court noted that the

Alaska: *Anderson v. State*, 111 P.3d 350, 354-55 (Alaska 2005) (determining that an officer's question to the declarant of "What happened?" did not seem to fall within the category of formal, official, and systematic questioning" and the statement that the defendant hit him with a pipe was therefore not testimonial);

Maine: *State v. Barnes*, 54 A.2d 208 (Me. 2004) (refusing to characterize a statement as "testimonial" unless it meets a restrictive definition of interrogation as "structured police questioning." Nontestimonial even though declarant drove herself to police station to report her son threatened to kill her.);

Washington: *State v. Ohlson*, 125 P.3d 990, 995 (Wash. 2005) ("Although D.L.'s statements were made in response to questioning by a police officer, Officer Gray's minimal questioning was not an 'interrogation' as Crawford contemplated.");

Third Circuit: *United States v. Hendricks*, 395 F.3d 173 (3d Cir. 2005) (Title III wiretap recordings are not "testimonial" statements for purposes of Crawford in part because (1) the recorded conversations neither fell within nor were analogous to any of the specific examples of "testimonial" statements mentioned by the Crawford Court; and (2) each of the examples referred to by the Crawford Court or the definitions it considered entails a formality to the statement absent from the recorded statements in Hendricks.)

Sixth Circuit: *United States v. Hadley*, 431 F.3d 484 (6th Cir. 2005) (The non-testimonial nature of those statements to the police was demonstrated by (1) the statements being made within only a few short minutes after defendant and his wife had engaged in a domestic dispute; (2) the police intervention was initiated by someone within the residence, and not by the authorities or by the wife herself; (3) when the police arrived at the residence, the wife immediately emerged and blurted out the challenged statements without any questioning or prompting whatsoever; and (4) her statements were not overly detailed or "testimonial" in nature but were limited to the information necessary for the police officers to address the immediate exigencies of the situation.)

Ninth Circuit: *Leavitt v. Arave*, 383 F.3d 809, 831 n.22 (9th Cir. 2004) (determining that when police responded to 911 calls, a victim's statements were admissible because she "was in no way being interrogated by the police").

143. *Hammon*, 809 N.E.2d at 947.

144. *Id.* at 949.

145. *Id.* at 952. *Hammon* also addressed the state-of-mind issue, but was much briefer in that analysis. *Id.* at 952-53 ("An unrehearsed statement made without time for reflection or deliberation, as required to be an 'excited utterance,' is 'not testimonial' in that such a statement, by definition, has not been made in contemplation of its use in a future trial.").

interview did not take place in a police station, and instead of conducting a lengthy, structured interview the police asked questions such as “what happened.”¹⁴⁶ The Indiana court concluded that statements given to police with “minimal questioning” are not the formal interrogations encompassed by the *Crawford* decision.

One can certainly follow the logic of *Hammon* and its progeny. Indeed, there is something formal in the term “interrogation” as opposed to police “questioning.” Nevertheless, the formality rationale misreads *Crawford*. First, it makes no sense on a policy level that a person’s right to confront an accuser only applies if the accusations repeated in court were initially gathered in a particular manner. In *Hammon*’s case, he was tried and convicted based on out-of-court evidence, “prejudiced by evidence which he had not the liberty to cross examine.”¹⁴⁷ These formality cases limited *Crawford* to its facts, where there was in fact a formal police interrogation, ignoring the thrust of *Crawford* that conveyed a sweeping change in Sixth Amendment jurisprudence. Moreover, the formality rationale was specifically contradicted by other language in the *Crawford* opinion. The sections below will address the faulty logic of reading a formality test into the *Crawford* opinion.

- A. Limiting the Confrontation Clause to statements formally taken ignores other language in the majority opinion that indicates that statements to police outside of the formal setting of the police station also constitute “testimonial” statements.
- B. The formality rationale misinterprets Justice Scalia’s use of historical background to erroneously conclude that *Crawford* did not prevent new abuses of the Confrontation Clause but only abuses that were deeply rooted in history. Because the Confrontation Clause is designed to create formality in the manner evidence is presented to a jury, it is illogical to conclude that less formality satisfies the constitution.
- C. The formality theory is in conflict with the evidentiary theory that excited utterances are deeply rooted in this nation’s history.

A. IGNORING BROAD HINTS IN *CRAWFORD*’S FOOTNOTES

Crawford was self-consciously opaque about why it chose the term “interrogation” except that the out-of-court testimony in *Mr. Crawford*’s

146. *Id.* at 952.

147. *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (citing *State v. Webb*, 2 N.C. (1 Hayw.) 103, 104 (1794)).

trial happened to come from a police interrogation. The Court flaunted the decision's ambiguity, writing: "Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case."¹⁴⁸ However, the opinion did drop an important footnote. In footnote four, Justice Scalia gave a broad hint that statements outside the police station are testimonial. "We use the term 'interrogation' in its *colloquial*, rather than any technical legal, sense" the Court advises.¹⁴⁹

To arrive at their formality requirement, courts have had to ignore or twist Scalia's admonishment that the term "interrogation" is to be understood "in its colloquial, rather than any technical legal, sense."¹⁵⁰ Instead of dissuading *Hammon* from its conclusion that informal statements to police officers fall outside of *Crawford*'s holding, courts have twisted the term "colloquial" to support a formality requirement. Since the dictionary defines "interrogation" as "[t]o examine by questioning formally or officially," the court in *Hammon* concluded that the lay conception or "colloquial sense" of "interrogation" required formality.¹⁵¹ In fact, the court reasoned that lay conceptions of interrogation may be even more formal than the dictionary definition because television shows portray stationhouse interviews as structured formal interviews.¹⁵²

It makes no sense to interpret the words "colloquial sense" to mean a formal sense. One of the antonyms of the term "colloquial" in the dictionary is the term "formal."¹⁵³ Thus colloquial is the opposite of formal.¹⁵⁴ This shows how far lower courts have gone to avoid having to grant constitutional protections to criminal defendants, at least where an opinion

148. *Crawford*, 541 U.S. at 53 n.4.

149. *Id.* at 53 ("Just as various definitions of "testimonial" exist, one can imagine various definitions of "interrogation," and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.).

150. *Id.*

151. *Hammon*, 809 N.E.2d at 948.

152. *See id.* (declaring that "a lay conception of police 'interrogation' bolstered by television . . . [would encompass] an interview in a room at the stationhouse").

153. Thesaurus.com, <http://thesaurus.reference.com/browse/colloquial> (last visited Nov. 20, 2007). The antonym for colloquial lists "correct" then "formal," followed by other words. *Id.*

154. Most likely, the *Crawford* majority uses the description "colloquial sense" to distinguish the term from the formal definition of interrogation used in *Miranda* jurisprudence. *Crawford*, 541 U.S. at 53 n.4. The police questioning at issue in *Crawford* was a formal, custodial interrogation. *Id.* at 66. If Justice Scalia intended the term "interrogation" to be read in a formal sense, he would not have needed to have written any description about how the term was to be interpreted. Hence, Justice Scalia could not have meant a "colloquial" understanding of "interrogation" to be a narrow, limited definition referring primarily to custodial or custodial-like interrogations. It would be illogical for Justice Scalia to write that he intended the term to be interpreted in a less technical sense if he meant it to apply to the facts of *Crawford* and no further.

seems to invite them to draw their own conclusions about the meaning of different terms.

In addition to the “colloquial sense” reference, the decision offered another broad hint that statements given to police in less formal settings are “testimonial” and, therefore, subject to Sixth Amendment protections. In footnote eight, the Court wrote that *White v. Illinois* was “arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial.”¹⁵⁵ *White v. Illinois* was the only Supreme Court case to deal with the excited utterance exception to the hearsay rule in the context of the Sixth Amendment, and here the Court was calling it into question. In *White*, an investigating officer came to the home of a child victim and took a statement from her that was later used in court under the excited utterance or spontaneous declaration exception to the hearsay rule.¹⁵⁶ It was the very type of excited utterance exception at issue in *Hammon*.¹⁵⁷ There was nothing in the *White* opinion or in *Crawford*'s discussion of *White* to suggest that the questioning in *White* constituted formal police interrogation. Nothing that a court would say resembled an inquiry before King James's Privy Council. Not only did the interview take place in the home, but one would expect police officers to be less formal when questioning a child. If *Crawford* called *White* into question then formality should not determine the scope of the Confrontation Clause. Surprisingly, the Indiana appeals court never mentioned this spontaneous utterance footnote. *Hammon* and its progeny ignore *Crawford*'s broad hints in footnotes four and eight that almost all statements to police constitute “testimonial” statements and simply cherry pick the language that supports the conclusion that informal questioning falls outside the scope of the Confrontation Clause.

B. HISTORIC APPROACH IN THE OPINION SUPPORTS EXPANSIVE CONFRONTATION RIGHT

The formality conclusion reached by the courts was bound up with the historical detail that pervaded the *Crawford* opinion. The Indiana appeals court backed up its formal reading of the term “interrogation” in *Hammon* by pointing to the other types of possible core “testimonial” statements discussed in *Crawford*, much of which detailed historical abuses. For

155. *Id.* at 58.

156. *White v. Illinois*, 502 U.S. 346, 349-50 (1992).

157. *Crawford*, 541 U.S. at 58 n.8. The only issue that *White* addressed is whether the Sixth Amendment requires a declarant to be unavailable before the government is permitted to introduce firmly rooted hearsay that would be admissible under the *Roberts*' framework. *White*, 502 U.S. at 349.

example, the Indiana court stated that the complainant's "oral statement was not given in a formal setting even remotely resembling an inquiry before King James I's Privy Council."¹⁵⁸ The Indiana appeals court read *Crawford* to mean that the Confrontation Clause is only concerned with the evils contemplated by the founders. In other words, since the Framers did not expect anything as informal as an excited utterance to be used as the basis for prosecuting someone in the end of the eighteenth century, then this was not one of the evils contemplated by the Framers. However, it will be shown that this was not how the *Crawford* opinion viewed new abuses of the Confrontation Clause.

Crawford proffered three possible definitions of testimonial: (1) *ex parte* in-court testimony or its functional equivalent, "such as affidavits, custodial examinations, prior testimony;" (2) extrajudicial statements . . . contained in formalized "testimonial" materials; and (3) statements made under circumstances that would lead an objective witness to believe that the statements would be available for use at a later trial.¹⁵⁹ The first definition used formal examples, the second was expressly formal, and only the third definition was non-formal. The abuses described in the opinion—sworn affidavits and depositions—are more formal because Justice Scalia was describing the abuses prevalent in England in the eighteenth century and earlier.¹⁶⁰

In 1791, when the Sixth Amendment was ratified, the prosecution would not have tried to introduce the excited utterance statements to the police without opportunity to cross-examine the declarant, both because the excited utterance is a newer invention and because even when hearsay was allowed in, the conviction could not be based upon hearsay evidence.¹⁶¹

158. *Hammon v. State*, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004).

159. *Crawford*, 541 U.S. at 51-52:

Various formulations of this core class of "testimonial" statements exist: "*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, extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, 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 These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.

Id. (internal citations omitted).

160. *Id.* at 44.

161. *White*, 502 U.S. at 358 (Thomas, J., concurring); *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring). "[O]ut-of-court statements made by someone other than the accused and not

Informal out-of-court statements were generally not introduced in early trials as the basis upon which to convict, historians have noted.¹⁶² Hence, these out-of-court statements at trial were not likely to be one of the evils contemplated at the time of the founding.¹⁶³

Should modern courts determine the scope of the Confrontation Clause by what the Framers intended trials to look like, or should the scope of the Confrontation Clause be determined by what abuses the founders were afraid might be imposed? This lies at the heart of the disagreement over formality requirements. If the Supreme Court intended to limit the reach of the Sixth Amendment only to those abuses practiced in England before the signing of the Sixth Amendment, then less formal hearsay such as excited utterances would not be included.¹⁶⁴ This position represents Justice Thomas' viewpoint, as memorialized in his 1992 concurrence in *White v. Illinois* and later in his separate opinion in *Davis*.¹⁶⁵ The *Crawford* opinion actually took a stand on whether the Court meant to prohibit only what the Framers knew was a threat, or whether the Clause prohibited what the Framers would have prohibited had they known it would come to pass. Writing for the majority, Justice Scalia refused to limit the Confrontation Clause to abuses known or thought about at the time:

But even if, as he[,] [the Chief Justice,] claims, a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn "testimonial" statements a moot point, that would merely change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference. We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly

taken under oath, unlike *ex parte* depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based." *Id.*

162. CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 30 FEDERAL PRACTICE AND PROCEDURE: EVIDENCE §6342, 22 n.7 (1997 & Supp. 2006).

163. *Crawford*, 541 U.S. at 50 ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure."); see also Mosteller, *supra* note 32, at 569 ("The hearsay rule of that time did not have the ready exceptions available today.").

164. See Randolph N. Jonakait, "Witnesses" In *The Confrontation Clause: Crawford v. Washington, Noah Webster, And Compulsory Process*, 79 TEMP. L. REV. 155, 182 (2006) (rejecting *Crawford's* "dubious" assertion that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding" (citing *Crawford*, 541 U.S. at 54 (2004))).

165. *White*, 502 U.S. at 365 (1992) (Thomas, J. concurring in part); see also *Davis v. Washington*, 126 S.Ct. 2266, 2281-82 (2006) (Thomas, J., concurring in part and dissenting in part). Note that in *Crawford*, the second possible core definition (out of three possible core definitions) sets forth Justice Thomas' definition: "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Crawford*, 541 U.S. at 51-52.

OK. Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly, admissible unsworn testimony) involves some degree of estimation--what [the Chief Justice] calls use of a "proxy," *post*, at 1375--but that is hardly a reason not to make the estimation as accurate as possible. Even if, as [the Chief Justice] mistakenly asserts, there were no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been.¹⁶⁶

This quotation from *Crawford* lays to rest any doubt that the majority intended the Confrontation Clause to bar hearsay that was too informal to have been admissible in common law England.¹⁶⁷ The Framers would have focused on unsworn testimony as the Chief Justice noted in his dissent, since unsworn testimony was not permitted even in the civil-law *ex parte* examinations of England, the primary horrors that the Framers addressed by the Clause.¹⁶⁸ In this quotation, Justice Scalia explained that whether the government introduced or did not introduce unsworn statements during the founding era was immaterial to the question of the scope of the Confrontation Clause.¹⁶⁹ The question should be what the application of the clause would have been at the time of the founders. Thus, although the formality language derived from the formal abuses described possible definitions of testimonial statements, the notion that the clause is only interested in abuses perpetrated in the past flies in the face of this specific reasoning in *Crawford*.

There is little doubt that a government official who tried to introduce an unsworn, unwritten statement into a trial based on the witness being excited by an event, would have found that the Confrontation Clause barred the statement. Again we see the lower courts cherry picking the language that supports their conclusion and ignoring the reasoning within the *Crawford* decision.

C. THE NOTION THAT EXCITED UTTERANCES ARE TOO RECENT TO CONSTITUTE HISTORIC ABUSES CONTRADICTS THE EVIDENTIARY THEORY OF DEEPLY ROOTED HEARSAY EXCEPTIONS

Reading *Crawford* as only prohibiting historic abuses creates an unintended irony in the area of excited utterances. The formality rationale

166. *Crawford*, 541 U.S. at 52.

167. *Id.*

168. *Id.* at 70; *Davis*, 126 S. Ct. at 2278.

169. *Crawford*, 541 U.S. at 52 n.3.

excludes excited utterances from the scope of testimonial evidence because excited utterances are not deemed deeply rooted enough to qualify as the abuses with which the founders were concerned. Before *Crawford*, courts admitted excited utterances precisely because they were viewed as “deeply rooted” exceptions to the hearsay rules.¹⁷⁰ “Deeply rooted” exceptions were deemed inherently reliable under *Roberts*’ reasoning, and therefore admissible without face-to-face confrontation. Under *Roberts*, courts need not question the specific reliability of these statements once a trial judge qualified them as excited utterances.¹⁷¹ For example, the Supreme Court of Washington in *Davis* noted approvingly, “the Court of Appeals held that the trial court properly classified the 911 call as an excited utterance, which is a *firmly rooted exception* to the hearsay rule and thus satisfies the requirement of reliability.”¹⁷² By firmly rooted, the Washington Supreme Court meant that it had historical roots.¹⁷³ Hence, excited utterances are deeply rooted under evidence law, but not rooted enough to be deemed “testimonial” by courts that side with Justice Thomas’ view of the clause that it should only apply to abuses contemplated by the Framers of the Sixth Amendment.¹⁷⁴

Thanks to dicta in *Crawford*, courts are now recognizing that the excited utterance exception has expanded so much that it cannot really be considered deeply rooted. The District of Columbia Court of Appeals in *Stancil v. United States* was concerned with “the apparent expansion in recent years of the kinds of statements which fall under the rubric of the hearsay exception for excited utterances.”¹⁷⁵ The District of Columbia

170. See, e.g., *People v. Cage*, 15 Cal. Rptr. 3d 846 (Cal. App. Dep’t Super. Ct. 2004) (holding that hearsay statement made at the hospital to police that defendant had cut him was not “testimonial” because the interview was unstructured, informal, and unrecorded). “The hearsay exception for spontaneous statements is firmly rooted.” *Id.* at 851 (citing *White*, 502 U.S. at 355, n.8 (1992)); see also *Idaho v. Wright*, 497 U.S. 805, 820 (1990) (citing the excited utterance as an example of such trustworthy hearsay).

171. *White*, 502 U.S. at 355 n.8.

172. *State v. Davis*, 111 P.3d 844, 847 (Wash. 2005).

173. *Id.*; see also *White*, 502 U.S. at 355 n.8 (“There can be no doubt that the two exceptions we consider in this case are ‘firmly rooted.’ The exception for spontaneous declarations is at least two centuries old.”).

174. *Davis*, 126 S. Ct. at 2281 (Thomas, J., concurring in part and dissenting in part); *White*, 502 U.S. at 365 (Thomas, J., concurring in part).

175. *Stancil v. United States*, 866 A.2d 799, 809 (D.C. 2005). Note that *Stancil* was vacated for rehearing. *In re Stancil*, 878 A.2d 1186, 1187 (D.C. 2005).

[T]he majority of the judges of this court has voted to grant the petition for rehearing en banc, it is FURTHER ORDERED that appellant’s petition for rehearing en banc in appeal no. 03-CM-444 is granted. It is FURTHER ORDERED, *sua sponte*, that appeal no. 03-CM-605, which was argued before a division on June 7, 2005, is hereby consolidated with appeal no. 03-CM-444, for argument and the Clerk shall schedule these matters for argument in tandem before the court sitting en banc for the month of October.

Court of Appeals wrote that historically, excited utterance statements were admissible if they were “practically reflex actions . . . or images of the contents of the brain . . . likely to be made without any calculation as to their potential effect and without regard to their possible consequences.”¹⁷⁶ Historically, *Stancil* noted that the statement must be contemporaneous with the startling event and would not have included responses to police questioning.¹⁷⁷ This does not mean that courts such as *Stancil* wish to rethink admitting these hearsay statements as excited utterances. Rather, the lower courts wish to use this fact against the criminal defendants since it follows that excited utterances would not have been the abuses the founders had in mind when they adopted the Confrontation Clause. Ironies aside, the fact that the excited utterance is not deeply rooted cuts two ways. That certain hearsay evidence was not admitted in the years after the Sixth Amendment was ratified is a fairly good indicator that the Confrontation Clause barred that type of evidence, or at least indicates that the Framers would have found it objectionable to substitute excited out-of-court statements for sworn in-court testimony.

The appellant’s brief in *Davis* argued that there was no excited utterance exception in the Framers’ time, there was only *res gestae*; as soon as the statement became descriptive of something that happened in the past, it fell outside of the exception.¹⁷⁸ *Davis*’ appellate brief to the Supreme Court described the “hue and cry” of victims to local constables or bailiffs as the forerunners of 911 calls.¹⁷⁹ *Davis*’ appellants argued that the fact that the evidence rules precluded “hue and cry” evidence from getting before the jury proved that the Confrontation Clause applied to these early oral accusations.¹⁸⁰ Since the Framers interpreted the Sixth Amendment as precluding “hue and cry” evidence, *Davis* argued, this Court must likewise

Id. As this article went to press no further action was taken.

176. *Stancil*, 866 A.2d at 811.

177. *Id.* (citing *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep 179 (K.B. 1694); *Packet Co. v. Clough*, 87 U.S. 528, 542 (1874)).

178. Brief of Petitioner, *supra* note 79, at 23-24. Note that the brief does not state the source of this assertion. *Id.* Cf. *Crawford v. Washington*, 541 U.S. 36, n.8 (2004) (citing *Thompson*, 90 Eng. Rep.). Note that *Thompson* was a civil case, so the clause was not an issue.

179. Brief of Petitioner, *supra* note 79, at 23-24 (citing 2 SIR MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: A HISTORY OF THE PLEAS OF THE CROWN* 98-100 (1st Am. ed. 1847)).

180. See Graham, *The Right to Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 104 (1972) (“[T]he Court never made clear when it relied on the common-law hearsay rule and when its decision was based on the constitutional right of confrontation” before the right was held binding on the States through the Fourteenth Amendment (until the Supreme Court made the Sixth Amendment applicable to the states through the Fourteenth Amendment in *Pointer v. Texas*, 380 U.S. 400 (1965)).

hold that the Sixth Amendment precludes the modern day hue and cry, namely, the 911 call and other oral statements to police.

If *Crawford* is understood to return our courts to a system of live testimony rather than repeated statements, then the historical recency of this hearsay exception actually negates the argument that formality is key to whether evidence is “testimonial.” As scholar Richard Friedman argues, the Framers wanted formality when they required that witnesses take the stand and answer questions under oath.¹⁸¹ In his Supreme Court brief in *Hammon*, Friedman argued that this history of formality requirements at the time of the founding of this country means that courts misinterpret *Crawford* when they read a formality requirement into the definition of “testimonial.”¹⁸²

It is impossible to square this seminal decision with the restrictive formality requirement imposed by so many lower courts that construed *Crawford*. By selectively choosing language that suggests formality, lower courts turn a blind eye to the irony in holding that the Confrontation Clause welcomes informal out-of-court statements to substitute for live witnesses who answer questions under oath based on the fact that such a trial by hearsay accusation would never have occurred to the Framers.

D. DOES FORMALITY SURVIVE THE SUPREME COURT'S *DAVIS* DECISION?

This section set forth several reasons why *Crawford* should not be read to limit the term testimonial to formal statements. If unsworn statements are as bad, if not worse, as sworn statements, how can formality be a factor in determining whether a statement is testimonial? Such a reading ignores footnote four where the Court uses the term “colloquial” to describe the type of interrogation it envisions, and most importantly, it ignores the edict to construe the Sixth Amendment so that it conforms to what the Framers would have thought had the evidence been introduced were they transported into the future.¹⁸³ There is positively no evidence that the Framers preferred informal evidence over formal evidence; on the contrary, there is evidence that formal evidence was preferred for witnesses testifying against

181. As scholar Richard Friedman argued, what history is known suggests that the Framers valued formality when they required that witness take the stand and answer questions under oath. Friedman, *Confrontation*, *supra* note 24, at 1025; Richard D. Friedman, *Grappling With the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 269 (2005) [hereinafter Friedman, *Grappling*] (“Formality is an ideal, an aspect of testimony given in the optimal way.”).

182. See Friedman, *Grappling*, *supra* note 181, at 269.

183. See *Crawford*, 541 U.S. at 52 n.3 (looking at what “application” of the Clause “would have been” had an issue arisen at the time of the founding of this country and not “how the Sixth Amendment originally applied.”).

a defendant. In truth, the formality prong established in *Davis* contradicts *Crawford*'s broad mandate for accusers to come to court where the fact-finder may judge the credibility and relevance of the evidence by observing the witness testify.¹⁸⁴

Davis is confusing because it both adopts formality and rejects it. The Supreme Court appeared to have rejected formality for it reversed *Hammon v. Indiana*, a lower court decision built primarily upon the formality framework.¹⁸⁵ The Court decided that the statements made by the complaining witness in *Hammon* were "testimonial" even though they took place at a kitchen table rather than at a police station and even though they were not recorded.¹⁸⁶ Although the police officer did not use structured questioning in *Hammon*, *Davis* held that Mrs. Hammon's statements were "testimonial."¹⁸⁷ On the other hand, it would be premature to assert that Justice Thomas' formality viewpoint is dead. Despite reversing *Hammon*, the Supreme Court presents formality as one criterion it considered when differentiating the statements in *Davis v. Washington* from those in *Crawford*.¹⁸⁸ Comparing the demeanor of the absent witness in *Davis*, Ms. McCottry, to the demeanor of the absent witness in *Crawford* at the time they initially made their statements against their significant others, the Court draws a connection between their demeanor and the formality of the questioning.

Finally, the difference in the level of *formality* is striking. *Crawford* calmly answered questions at a station house, with an officer-interrogator taping and taking notes, while McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even safe. Thus, the circumstances of her interrogation objectively indicate that its primary purpose was to enable police assistance to meet an ongoing emergency.¹⁸⁹

Formality lives on as a prong upon which to compare testimonial with nontestimonial statements. The less formal the statement, the more likely that its primary purpose was to enable police to meet an ongoing emergency. As you can see from the quotation above, the formality in *Davis* is

184. *Crawford v. Washington*, 541 U.S. 36, 53 (2004)

185. *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006).

186. *Id.* at 2273.

187. *Id.* at 2275.

188. *Id.* at 2278 ("We do not dispute that formality is indeed essential to testimonial utterance.") Elsewhere in the opinion, however, the Supreme Court denied that formality was essential to returning the Confrontation Clause to its original meaning. *Id.* at 2276. "But the English cases that were the progenitors of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions." *Id.* (internal citation omitted).

189. *Id.* at 2269.

intertwined with the demeanor of the witness. The same frantic nature that qualified the statement as an excited utterance now qualified it as a nontestimonial utterance. This makes it possible for lower courts to conclude that virtually all excited utterances fall outside the scope of the confrontation right.¹⁹⁰

Davis is also inconsistent in how it evaluates how formal police officers or police agents were in gathering testimony. The statements in *Davis* that the Court deemed nontestimonial were in fact more formal than those in *Hammon* that the Court deemed testimonial. In *Davis*, the statements at issue were recorded while in *Hammon* the statements were not recorded. It was not even clear whether the officer in *Hammon* took notes while gathering the statements.¹⁹¹ Although the operator in *Davis* asked a multitude of questions to obtain the statements at issue, it is not clear that the officers in *Hammon* asked anything beyond a simple “what happened?”¹⁹² Nevertheless, the Supreme Court gave weight to the informal nature of the questioning in *Davis* while rejecting the relevance of the informal nature of the questioning in *Hammon*.¹⁹³

By creating confusion in *Davis* over the role of formality in determining the application of the Confrontation Clause the Supreme Court creates an opportunity for lower courts to continue to apply the formality prong in a manner that helps them reach the result they wish. We have seen how the ambiguity in *Crawford* over formality was used to restrict the scope of the Confrontation Clause. Again, after *Davis*, we can expect courts to continue to use formality as a rationale for distinguishing future statements from those in *Crawford* and *Hammon*. While it no longer will be the sole basis for denying confrontation rights, formality will continue to be a method for lower courts to conclude that statements are not testimonial.¹⁹⁴

Formality was created by the lower courts to distinguish the facts in *Crawford* from other fact patterns. These lower courts wrongly decided, missing the policy behind *Crawford* for extending confrontation rights to modern day trials. *Davis* then adopted this language in its reasoning. Hence, we see the dragging effect that the state courts had on the Supreme

190. See *infra* note 198 and accompanying text (“Some early cases interpreted *Crawford* as excluding all excited utterances from. . .”).

191. *Davis*, 126 S. Ct. at 2275.

192. *Hammon v. State*, 829 N.E.2d 444, 447 (Ind. 2005).

193. *Davis*, 126 S. Ct. at 2268, 2275.

194. See, e.g., *State v. Camarena*, 145 P.3d 267, 275 (Or. 2006) (“Finally, we consider the ‘level of formality’ of the 9-1-1 call. Here, as in *Davis*, Carders answers to the 9-1-1 operator’s initial questions were ‘frantic.’”).

Court. Even though *Hammon* was reversed, the formality rationale lives on to prevent future defendants from being able to face their accusers in court.¹⁹⁵

VI. “STATE-OF-MIND OF THE SPEAKER” RATIONALE CASES ARE WRONGLY DECIDED UNDER *CRAWFORD*

Another rationale post-*Crawford* cases employed to deny confrontation rights is the state-of-mind test. These cases examined the state-of-mind of the person making the statement at the time it was uttered limiting “testimonial” statements to those statements where the speakers intended to bear witness. To be deemed “testimonial” and for the Confrontation Clause to apply, the speaker had to have contemplated that his words will be used in a future trial.¹⁹⁶

This state-of-mind test for deciding post-*Crawford* domestic violence cases is particularly widespread in appeals regarding the admission of 911 calls.¹⁹⁷ In *Washington v. Davis*,¹⁹⁸ the case affirmed by the Supreme Court, the caller hung up and the 911 operator called back and asked the witness a series of questions starting with the last name and then the first name of the person who had assaulted the caller.¹⁹⁹ On appeal, the Washington Supreme Court held that the telephone calls must be “scrutinized to determine whether it is a call for help to be rescued from peril or is generated by a desire to bear witness.”²⁰⁰ While some of the later questions and answers were “testimonial,” the Washington high court held that it was proper to admit the most important aspect of the call in *Davis*, the identification of the defendant as being in her home, thereby establishing a violation of a restraining order against him.

195. This point will be developed in Section VII.A *infra*.

196. *People v. Corella*, 122 Cal. App. 4th 461, 469 (2004).

197. *See, e.g., New York v. Moscat*, 777 N.Y.S.2d 875, 879 (N.Y. 2004).

A 911 call was typically initiated by the victim of a crime. It was generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather, the 911 call had its genesis in the urgent desire of a citizen to be rescued from immediate peril.

Id.; *Moscat* has been followed by many other jurisdictions: *State v. Caudillo*, 19 Cal. Rptr. 3d 574, 590 (Cal. Ct. App. 2004) (including long list of cases that allow 911 calls); *United States v. Hinton*, 423 F.3d 355, 362 (3rd Cir. 2005). “[S]tatements made during the 911 call neither fall within nor are analogous to any of the specific examples of testimonial statements mentioned in *Crawford*. Emergency calls are nontestimonial absent ‘exceptional circumstances’ where there is ‘specific information bearing upon the caller’s motive to bear testimony.’” *Id.* at 361-62, n.4.

198. *State v. Davis*, 111 P.3d 844 (Wash. 2005), *aff’d by Davis v. Washington*, 126 S. Ct. 2266 (2006).

199. Brief of Petitioner, *supra* note 79, at 5.

200. *Davis*, 111 P.3d at 849. *Cf. Washington v. Powers*, 99 P.3d 1262, 1266 (Wash. Ct. App. 2004) (stating that a 911 call is “testimonial”).

Even though an emergency 911 call may assist police in investigation or assist the State in prosecution, *where the call is not undertaken for those purposes*, it does not resemble the specific type of out-of-court statement with which the Sixth Amendment is concerned.²⁰¹

Brushing aside the argument that the caller “reasonably knew her 911 call would later be used to prosecute *Davis*,” the *Davis* court puts the burden on the defense to prove actual intent, concluding that “there is no evidence that McCottry [the caller] had such knowledge or that it influenced her decision.”²⁰² Hence, even though the assault in *Davis* was completed and the caller specifically declined an ambulance or other aid, the high Court defined the out-of-court statement as a call for help, falling outside the purview of the Confrontation Clause.²⁰³ This “state-of-mind of the witness” test threatened to exclude all excited utterances from Sixth Amendment protection because excited utterances are by definition made without opportunity for the speaker to reflect.²⁰⁴ As one early California opinion stated: “Moreover, it is difficult to identify any circumstances under which a . . . spontaneous statement would be ‘testimonial’ . . . [S]tatements made without reflection or deliberation are not made in contemplation of their

201. *Davis*, 111 P.3d at 849 (emphasis added).

202. *Id.* at 850.

203. See Petition for Writ of Certiorari at 2, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (No. 05-5224) (giving the facts of declining an aid car and that defendant had just left). Many courts have concluded that a hearsay statement made in a 911 call is not “testimonial,” because the statement is not made in response to police questioning, and because the purpose of the call is to obtain assistance, not to make a record against someone. See *Caudillo*, 19 Cal. Rptr. 3d at 587-90; *State v. Wright*, 686 N.W.2d 295, 303 (Minn. App. 2004); *Corella*, 18 Cal. Rptr. 3d at 776. But see *Lopez v. State*, 888 So.2d 693, 699 (Fla. 2004) (“A statement is more likely to have been made with the expectation that it would be used as evidence if it was given in response to questioning by a government official than it would if it had been volunteered.”). The reasoning in *Lopez* shows how many assumptions lower courts are making about how men and women’s thought processes. Courts could easily have concluded the reverse, namely that someone who dials the police must intend for the police to become involved while someone questioned by the police at the scene of a crime might simply be trying to deflect police interest in them.

204. Some early cases interpreted *Crawford* as excluding all excited utterances from the term “testimonial.” *E.g.*, *State v. Moscat*, 777 N.Y.S.2d 875 (N.Y. 2004).

The 911 call—usually, a hurried and panicked conversation between an injured victim and a police telephone operator—is simply *not* equivalent to a formal pretrial examination by a justice of the peace in Reformation England. If anything, it is the electronically augmented equivalent of a loud cry for help. The Confrontation Clause was not directed at such a cry.

Id. See also *Ohio v. Canaday*, 2005 WL 736583 (Ohio Ct. App. 2005) (holding *Crawford* did not apply to excited utterances, but rather only applies to hearsay statements that are not subject to common-law exceptions).

‘testimonial’ use in a future trial.”²⁰⁵ The state-of-mind theory is also not exclusively used in 911 cases.²⁰⁶

Hammon flirted with the idea of ruling that all excited utterances are nontestimonial as a matter of law:

We further note that the very concept of an “excited utterance” is such that it is difficult to perceive how such a statement could ever be “testimonial.” The underlying rationale of the excited utterance exception is that such a declaration from one who has recently suffered an overpowering experience is likely to be truthful.²⁰⁷

One problem with the state-of-mind test is that it has been built upon the excited utterance, which is a legal fiction that requires judges to make findings that nobody takes literally. The speaker does not have the capacity to formulate a lie because the shock “stills the reflective faculties and removes their control.”²⁰⁸

Consider how similar the state-of-mind test is to the excited utterance test. Under the excited utterance exception, trial judges were determining that speakers were making statements while under the shock of the event; now judges also have to also ask if the speakers who were overcome by traumatic events are likely to have known at the time they spoke to police that their words will be used against the person they have accused. Judges have already answered the second question when they decided the statements constituted an excited utterance.²⁰⁹ “Their demonstrated emotional distress—the very quality that justified the admission of their statements as excited utterances—is inconsistent with a determination that they were made with a belief that such statements ‘would be available for use later at

205. *Corella*, 122 Cal. App. 4th at 469. “Mrs. Corella’s statements were ultimately used in a criminal prosecution, but statements made without reflection or deliberation are not made in contemplation of their ‘testimonial’ use in a future trial.” *Id.*

206. *See Hammon v. State*, 829 N.E.2d 444, 455 (Ind. Ct. App. 2005) (placing less emphasis on state-of-mind than formality); *State v. Greene*, 874 A.2d 750, 775 (Conn. 2005) (regarding a non-domestic shooting, the Connecticut court concluded that “[u]nder the circumstances of the present matter, we conclude that an objective witness reasonably would not believe that the statements would be available for use at a later trial”).

207. *Hammon*, 829 N.E.2d at 952 (citing *Hardiman v. State*, 726 N.E.2d 1201, 1204 (Ind. 2000)).

208. 6 JAMES H. CHADBURN, EVIDENCE ON TRIALS AT COMMON LAW § 1747 (Chadburn rev. 1976).

209. *See State v. Byrd*, 828 N.E.2d 133, 136-37 (Ohio Ct. App. 2005).

All of the foundational requirements for admission of this 911 call as an excited utterance were satisfied in the present case: the existence of a startling or shocking event, the declarant’s possessing firsthand knowledge of that event and being under the stress or excitement caused by the event when her statement was made, and the declarant’s statement that relates to that startling event.

Id. (internal citations omitted).

trial.”²¹⁰ Both the objective and subjective state-of-mind standard invites the government to build upon the excited utterance myth. A reasonable woman still under the influence of the overpowering event will not be found to have been motivated by a desire to prosecute. If the first step is wrong as a matter of science, psychology and logic, then why should the court build on it by creating a state-of-mind exception? Nor should readers console themselves with the fact that most courts apply a case-by-case test instead of a per se rule towards excited utterances.

Most courts, including the jurisdictions that decided *Hammon* and *Davis*, rejected the conclusion that all excited utterances are by definition nontestimonial in favor of a case-by-case approach to determine from the circumstances of the statements to authorities whether the speaker of the excited utterance would reasonably have contemplated the use of the statement to prosecute the defendant at the time it was made.²¹¹ The case-by-case approach still resulted in the exclusion of most, if not all excited utterance statements from the clause.²¹² Judges that admit the statements as excited utterances have already determined that the statement was “made while still under the stress of excitement from the startling event” and “made without time for reflection or deliberation.”²¹³ As the early California case of *People v. Corella* reasoned, “statements made without reflection or deliberation are not made in contemplation of their ‘testimonial’ use in a future trial.”²¹⁴ The state-of-mind fiction will be applied

210. See, e.g., *State v. Wright*, 686 N.W.2d 295, 297 (Minn. Ct. App. 2004), *aff’d* by 701 N.W.2d 802, 814 (Minn. 2005) (discussing an officer who responds to a 911 call and interviews two female victims for half an hour, which the court held was not “testimonial”).

211. *Id.* Interestingly, public defenders O’Toole and Easterly observe that in “all but one of the 8 cases in which the Court GVR’d [granted certiorari, vacated judgment and remanded for further proceedings when the Court decided *Davis*] the lower courts had improperly relied upon to some extent, the ‘excited’ emotional state of the witness when making the statement in order to find that the right was not triggered.” See Timothy O’Toole & Catharine Easterly, *Davis v. Washington: Confrontation Wins the Day*, THE CHAMPION 20, 34 (Mar. 2007).

212. *Salt Lake City v. Williams*, 128 P.3d 47 (Utah 2005) (“Other courts have concluded that the inquiry into whether statements made during a 911 call are ‘testimonial must be made on a case-by-case basis.”); *United States v. Brito*, 427 F.3d 53, 62-63 (1st Cir. 2005) (illustrating a non-domestic violence case where a 911 call was nontestimonial because “the circumstances that made the anonymous 911 call an excited utterance were significant enough to overwhelm the caller’s capacity to appreciate the potential long-range use of her words”); *New York v. Moscat*, 777 N.Y.S.2d 875, 878-80 (N.Y. 2004); *Campos v. Texas*, 186 S.W.3d 93, 97 (Tex. 2005).

213. E.g., *State v. Mann*, 2005 WL 2714531, at *1 (N.H. Super. Ct. 2005) (“The ‘excited utterance’ exception to the hearsay rule is based upon the theory that the declarant’s statements must be true because the declarant, caught up in a startling event, lacks ‘the capacity of reflection, thereby producing utterances free of conscious fabrication.”). Later, when the court considers the Confrontation Clause, the court reasons, “[d]uring the initial portion of the 911 tape, Ashley was screaming and crying. Her statements are readily distinguishable from those at issue in *Crawford*.” *Id.* at *4.

214. *People v. Corella*, 122 Cal. App 4th 461, 469 (Cal. Ct. App. 2004); see also *State v. Davis*, 111 P.3d 844, 850 (Wash. 2005) (approving the *Corella* decision).

by the same judges that have first determined that statements were made before the senses have stilled, despite the fact that science fails to support their conclusions. It is hardly the principled rule envisioned by *Crawford* when it rejected *Roberts* in favor of a test more in keeping with the Framers' intent.

A. THE TEST DERIVES FROM A MISREADING OF *CRAWFORD*'S THIRD POSSIBLE CORE DEFINITION

Ironically, the theory that the state-of-mind of the speaker should guide a court in determining whether a statement is “testimonial” was a broad theory of confrontation now being employed by the courts as a rationale to narrow the Confrontation Clause below what *Crawford* defines as a minimum. The state-of-mind formulation was intended to expand the statements at issue beyond those given to police officers, not to exclude statements to police officers from Sixth Amendment coverage.²¹⁵ The state-of-mind of the speaker should not matter in a situation such as *Davis* or *Hammon* when statements were made in response to *police* questions, just as the state-of-mind of Ms. Crawford was immaterial to the determination of whether the clause applied to her incriminating statements.²¹⁶

The state-of-mind of the speaker analysis was introduced by the National Association of Criminal Defense Lawyers (NACDL) in their Supreme Court amicus brief to encourage the Court to expand “testimonial” statements beyond those given to police officers.²¹⁷ The brief was then quoted in *Crawford* where Justice Scalia wrote that at least three formulations of core classes of “testimonial” exist, including “statements that were made under circumstances which would lead an *objective* witness

215. See Brief for The Nat'l Ass'n of Criminal Def. Lawyers et al. as Amici Curiae Supporting Petitioner 25, *Crawford v. Washington*, 541 U.S. 36 (2003) (No. 02-9410) (discussed in following paragraph) [hereinafter NACDL Brief, *Crawford*] (“And calls to 911 call for some judgment in the application of the testimonial approach. That is because 911 serves a dual role in our society. It is both a component of our law enforcement system (suggesting that statement to 911 are testimonial) and an emergency response system (suggesting that statement to 911 are not testimonial); see also Friedman & McCormack, *supra* note 82, at 1240-41 (“If a statement is made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime, then the statement would be deemed testimonial.”). The authors show how this applies to exclude many 911 calls. *Id.* at 1242-43.

216. See *Crawford*, 541 U.S. at 53; see *Davis v. Washington*, 126 S. Ct. 2266, 2271 (2006) (involving a 911 operator who asked multiple questions); *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005) (involving a police officer who asked “what happened?”).

217. NACDL Brief, *Crawford*, *supra* note 215, at 3.

reasonably to believe that the statement would be available for use at a later trial.”²¹⁸

Many courts, such as the Washington appeals court in *Washington v. Davis*, employed a subjective rather than an objective state-of-mind test.²¹⁹ That formulation is at odds with the “objective witness” language in *Crawford* set forth in the above quotation. A subjective approach creates a notably difficult burden where the witness in question is not in court to testify to his or her state-of-mind, which is per force the situation in all these cases. One wonders how defense counsel might be expected to prove what a missing witness actually knew or intended and what the witness’ motivations were at the time the statement was made.²²⁰

Some courts have read the state-of-mind exception to mean that it is not enough that the speaker made statements to police knowing that they might cause the arrest of the alleged perpetrator; she or he must also believe that the statements will be used at trial.²²¹ However, turning to the source, the NACDL brief uses the phrase “available for use at a later trial” synonymously with these other phrases: “will lead the State to punish the accused person,” “condemn the accused as a criminal and restrain his or her liberty” and the statement was “aimed at law enforcement.”²²² A more common sense question, and one in keeping with its genesis in the NACDL brief, is whether it is reasonable to expect that the information will be used against the accused in some way by law enforcement. Here is a quote from the NACDL brief:

By and large statements made to law enforcement officials about a crime will be “testimonial.” And by and large, statements made to friends, relatives, accomplices or any outside of criminal justice system will not be “testimonial.” There will be exceptions to these broad and general rules, of course. A witness to a crime may make a statement to a friend knowing that the friend will subsequently

218. *Crawford*, 541 U.S. at 52. The NACDL brief itself uses various formulations of the notation that statements will be used to help prosecute including the form Justice Scalia inserts into the majority opinion. See NACDL brief, *supra* note 215, at 24-25.

219. *State v. Davis*, 111 P.3d 844, 849-50 (Wash. 2005); *Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005).

220. Friedman, *Grappling*, *supra* note 181, at 253. Friedman has argued strenuously that the test should be objective, not subjective. *Id.*

221. See, e.g., *People v. Cage*, 15 Cal. Rptr. 3d 846, 855 (Cal. App. Dep’t Super. Ct. 2004) (“No reasonable person in John’s shoes would have expected his statements to Dr. Russell to be used prosecutorially, at defendant’s trial. This is true even if he thought the doctor might relay his statements to the police.”).

222. NACDL Brief, *Crawford*, *supra* note 215, at 24-25.

contact police. Such a statement is *aimed at law enforcement and would therefore be “testimonial.”*²²³

As we see, NACDL did not intend to restrict the Confrontation Clause where statements were made to government officials. NACDL’s state-of-mind theory broadens the reach of the Sixth Amendment beyond statements to law enforcement personnel to certain private conversations aimed at law enforcement.

In adopting the NACDL proposal as one of its three possible definitions of “testimonial,” the *Crawford* majority was expanding the application of the clause, not narrowing it. *Crawford* could not possibly have intended such a restrictive reading of “testimonial.” A narrow reading would conflict with footnote eight where *Crawford* questioned the admission of the excited utterance in *White v. Illinois* without confrontation even though the statement was made by a four-year old child.²²⁴ The Supreme Court could not have meant that a reasonable four-year-old would have known her statement would be used in lieu of testimony at trial. The ambiguity *Crawford* offered to allow an expansion of the clause beyond statements to police officers has been fashioned into an argument to restrict the clause so that most excited utterances made to police officers are not covered by the Sixth Amendment. In this way, we see how the lower courts exploited the ambiguity in *Crawford* to narrow its holding and to reach certain results. The next section will show how a restricted reading would even conflict with the holding that Sylvia Crawford’s confession was testimonial.

B. THE SUPREME COURT NEVER ADDRESSED WHAT SYLVIA CRAWFORD WAS THINKING

The state-of-mind test as a limit to the scope of the Confrontation Clause does not square with the *Crawford* opinion because the Supreme Court never applied the state-of-mind test to Ms. Crawford’s statement to police. The *Crawford* decision labeled Sylvia Crawford’s statements “testimonial” because they were in response to police interrogation; the Court did not write that in speaking to the police, the defendant’s wife was motivated by a desire to prosecute her husband nor that she knew or should have known that her statement would come in against him at trial. Neither does *Crawford* order the trial court to make these factual determinations on

223. *Id.* at 25 (emphasis added).

224. *Crawford*, 541 U.S. at 58 n.8. *Davis* also reiterates that *White v. Illinois* is the “one arguable exception” where testimonial statements may have been allowed into evidence under the old framework. *Davis*, 126 S.Ct. at 2275.

remand.²²⁵ The state-of-mind test was therefore never intended as a limitation upon statements that were otherwise “testimonial.”

Had the Court decided the application of the clause in *Crawford* based on his wife’s state-of-mind at the time she made the statement, the Court might have come out with the opposite result. In *Crawford*, the police arrested Mr. Crawford and brought his wife, Sylvia Crawford to the police station where they gave her *Miranda* warnings and interviewed her twice.²²⁶ During these stationhouse interviews she gave statements to police that helped prove that the defendant did not act in self-defense. When she made those statements, Sylvia Crawford may not have been motivated by a desire to give testimony against her husband nor would she reasonably know that her statement would be used at trial against him. Rather, one might expect that the declarant in *Crawford* was motivated by a desire to help herself, to go home or to be let alone. After all, she was in custody and had been cautioned that whatever she said could be used against her, but no one told her that her statement could be used against the defendant.²²⁷ If she did not intend the statements to be used in court, then under the theory used by several courts after *Crawford*, they would be able to be used. Notice the paradoxical reasoning of this state-of-mind rationale that courts use. If interlocking confessions were used in court regularly, it would soon become common knowledge that they could be so used. Once a reasonable witness knows that his statement to police can be used to prosecute a co-conspirator, then the interlocking confession constitutes a testimonial statement and cannot be used.

225. *Crawford* was remanded to the trial court to determine what the trial court should do given that Sylvia Crawford’s statements were improperly admitted in violation of the Confrontation Clause. *Crawford*, 541 U.S. at 69. The issue of harmless error was a possible avenue for the lower courts, not a decision that the statement was in fact nontestimonial because Ms. Crawford’s primary motivation in making the statement was not to help prosecute her husband. *Id.* at 42 n.1.

226. *Crawford*, 541 U.S. at 38.

227. In fact, even if she had been a lawyer and digested the Supreme Court’s prior opinions on that issue, she might have thought it unlikely that her statement could be used against her husband. See *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (noting that it was “highly unlikely” that accomplice confessions implicating the accused could survive *Roberts*); *Bruton v. United States*, 391 U.S. 123, 136-37 (1968) (stating that separate trials of defendants are required so that the confession of one conspirator may not be heard by a jury considering the guilt of a co-conspirator). A lay person, such as Sylvia Crawford, could hardly be expected to know that the long-established *Bruton* rule was being replaced in some jurisdictions by a new “interlocking confessions” rule that *Crawford* itself roundly rejected as a misinterpretation of Supreme Court precedent. *Crawford*, 541 U.S. at 58 (discussing the misreading of *Lee v. Illinois*, 476 U.S. 530 (1986)). *Crawford* also cites *Bruton* with approval. *Id.* at 57. Also note that in *Crawford*, Chief Justice Rehnquist and Justice O’Connor concurred, reasoning that Sylvia’s statement was inadmissible under the old *Robert* line of cases. *Id.* at 71 (Rehnquist & O’Connor, C.J.J., concurring).

Much has been made about the distinction between the subjective state-of-mind approach and the reasonable person test, but Ms. Crawford's statement loses under either test. We have just determined that Mr. Crawford would not prevail if the Supreme Court had imposed an objective state-of-mind approach upon Sylvia Crawford's statements. The subjective Confrontation Clause violation is even harder to prove than the reasonable person approach since Ms. Crawford was not available to answer questions, a problem courts would always encounter when dealing with statements made by witnesses who do not appear at trial or who claim a privilege.²²⁸ Under the individual or subjective state-of-mind approach established by Washington in *Davis*, a judge must determine what the missing witness actually thought about her statement being used as testimony at trial at the time she made the statement rather than what a reasonable person in her position would have thought. Had *Crawford* applied the Washington Supreme Court's reasoning, the Court would likely have concluded that "there is no evidence" that the declarant, Sylvia Crawford, knew at the time she made the statement that her words would later be used to prosecute her husband "or that it influenced her decision" to talk to the police.²²⁹ Thus, the decision in *Davis* and other lower court applications of the state-of-mind approach are manifestly erroneous for the approach contradicts the holding in *Crawford*. Hence, had the Supreme Court employed the state-of-mind approach as a method of limiting which statements to police are "testimonial," Mr. Crawford might have lost. More importantly, that analysis was never undertaken, proving that the state-of-mind test was not intended to limit the scope of which police interrogations are testimonial.

C. DOES THE STATE-OF-MIND TEST SURVIVE THE SUPREME COURT'S *DAVIS* DECISION?

This section has demonstrated that the "state-of-mind" test, which was developed by lower courts to circumvent confrontation, was derived from a misinterpretation of *Crawford*'s dicta about possible core definitions of testimonial. It has also shown how this rationale threatened to undo most confrontation rights because judges may often conclude as a finding of fact that a particular declarant—or reasonable declarants in their position—did make the statement intending it to be introduced at trial.

The *Davis* decision is confusing because it both rejects the state-of-mind test and embraces it. One must distinguish the state-of-mind of the

228. Sylvia Crawford claimed the marital privilege and was therefore deemed unavailable at trial. *Crawford*, 541 U.S. at 40.

229. *State v. Davis*, 111 P.3d 844, 850 (Wash. 2005).

person making a statement from the intent of the officers in taking the statement. While the state court decision in *Davis* was based on the state-of-mind of the declarant, the Supreme Court decision was based on the intent of the officers, *to wit*, the primary purpose of the officers in asking questions. Nevertheless, it would be premature to decide that the state-of-mind rationale is dead. Although the Court never uses the term “state-of-mind of the declarant” in its decision, the reasoning section discusses the state-of-mind of the witness as if that were critical to its conclusion. In its *Davis* opinion, the Supreme Court opined that the alleged victim who phoned 911 did so “to proclaim an emergency and seek help.”²³⁰ Therefore, the Supreme Court reasoned, the statements were not testimony because “no ‘witness’ goes into court to proclaim an emergency and seek help.” This is quintessential state-of-mind of the declarant reasoning. Unlike *Crawford* where the Court proposed a state-of-mind test to expand the concept of testimonial to statements to non-government officials, here, the *Davis* Court invoked the state-of-mind of the caller as a rationale that limits—not expands—the scope of what is testimonial.

In its reasoning, the *Davis* Court assumed that the caller was undergoing an emergency because the caller told the police she was in an emergency. The Court assumed that the assailant was still in her home because that is what she told the police. Her accusation was deemed to be true without the benefit of cross-examination or oath and without her repeating the allegation before a judge. The lack of confrontation rights rests on the dubious assumption that people who call 911 never lie about whether there is an ongoing emergency. In other words, if a 911 caller does not indicate he is calling 911 to seek immediate help, then the truth of his accusation may be tested at trial through live testimony under oath subject to cross-examination, but if calls and claims to be in danger at the time of the call, then courts should assume this is true and his accusation need not be tested through confrontation.

One cannot discuss the veracity of 911 callers without remembering the Charles Stuart case. On national television, Americans heard one of the most moving emergency calls where a white man, bleeding from the abdomen, used his cell phone to tell the police that he and his pregnant wife were shot by a black assailant who entered their car, killing his pregnant wife in Boston in 1989. Later, it turned out that what he told the police in the 911 call was false, fortunately for a particular black man who was well

230. *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006).

on his way to paying for this horrific crime.²³¹ Stuart's desperate call for help should have reminded the Court that the Confrontation Clause was adopted because alleged victims sometimes shade the facts or fabricate whole lies and that the emergency response system is not protected from misuse. *Davis* can be harnessed by future trial courts that wish to use the state-of-mind of the declarant as a reason to deny the application of the Confrontation Clause in future cases. Just as *Crawford*'s ambiguity was used to limit confrontation rights, so will *Davis*' ambiguity provide ammunition for limiting rights in future cases.

Again, we see the Supreme Court in *Davis* borrowing a rationale from lower court decisions that was used to restrict the reach of the Confrontation Clause. *Crawford* introduced the state-of-mind exception as a rationale to expand the reach of the clause not to restrict it. When *Davis* uses the state-of-mind exception to restrict the scope of the clause so that statements to police officers are not covered, then it is not following *Crawford*. In fact, such a limited state-of-mind test contradicts *Crawford*'s holding as well as its reasoning. Thus, the Supreme Court's broad vision seems to be shrinking with the help of the resistance from domestic violence decisions from lower courts.

VII. "INTENT OF THE OFFICERS" RATIONALE CASES ARE WRONGLY DECIDED UNDER *CRAWFORD*

The primary holding in *Washington v. Davis* is that what is testimonial turns upon the intent of the police officers and agents of the police in taking the statements. Before *Davis*, many state courts used the formality rationale and many courts used the state-of-mind of the declarant rationale to permit witnessless prosecutions in domestic violence cases, but a few other courts looked at the reasons the officer took the out-of-court statement.²³² This

231. This is the case of alleged victim Charles Stuart, whose brother Michael Stuart, ultimately revealed that there was no black assailant. Sean P. Murphy, *Stuart Murders Bedevil Bennett, Still in Custody*, BOSTON GLOBE, Sept. 12, 1990, at A1. Michael revealed that Charles Stuart killed his own wife and Michael helped by wounding his brother Charles to make the unknown assailant accusation more believable. *Id.* The police were closing in on a particular black male suspect, Willie Bennett, and they brought Charles Stewart to a line-up, where coincidentally or with the help of the police, Bennett was picked out. *Id.*

232. See Appendix (illustrating cases that adopt the intent-of-the-officers' rationale).

D.C.: *Stancil v. United States*, 866 A.2d 799, 809 (D.C. 2005); see *United States v. Webb*, 2005 WL 2726100, at *4 (D.C. Super. 2005) (stating that officer's testimony as to the victim's statements at the scene of the incident was nontestimonial). In *Webb*, the officer's main concerns were to investigate and to ascertain what was happening and the victim offered the information without considering whether it could be used later at trial. *Id.*

intent-of-the-officers approach rejects the broad proposition of some jurisdictions that only formal police station interrogations are covered by the Confrontation Clause or that all excited utterances are nontestimonial.²³³ Instead, these cases carve out a middle ground where the statements to law enforcement are evaluated on a case-by-case basis to determine if law enforcement gathered statements as part of an investigation of a crime and are therefore “testimonial,” or were made during an initial phase of a response call when police were responding to emergency or medical issues rather than investigating a crime.²³⁴ Because of its case-by-case approach, this rationale may seem more in keeping with *Crawford*'s promise of more confrontation rights but in fact, few courts interpreted *Crawford* to mean that excited utterances are nontestimonial by definition. Most courts adopted a case-by-case approach—at least in theory—regardless of whether their analysis fell under the formality, state-of-mind or intent-of-the-officers' rationale or some combination of the three.²³⁵ The first jurisdiction to adopt the intent-of-the-officers approach, looking at the particular circumstances in which the statement was made, was the District of Columbia in *Stancil*.²³⁶ *Stancil* focused on the intent of those taking the statement rather

MASSACHUSETTS: *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 561 (Mass. 2005) (providing that statements are testimonial because on the record “[t]he questioning does not appear intended or necessary to secure a volatile scene”).

MINNESOTA: *State v. Warsame*, 701 N.W.2d 305 (Minn. 2005). Trial judge held that where officer encountered victim in the street, initial statement accusing boyfriend was admissible but judge excluded further comments by the victim as she “went into great detail about defendant striking her with a cooking pot, and his chasing her with a knife while threatening to kill her.” *Id.* at 307, 311. The court of appeals overruled the exclusion of later statements, holding that judge clearly erred when he concluded they were not excited utterances. *Id.* at 311.

TEXAS: *Key v. Texas*, 173 S.W.3d 72 (Tex. Ct. App. 2005) (indicating that the officer was not producing evidence in anticipation of a criminal prosecution when he encountered the victim, but was instead responding to a call and trying to assess the scene).

233. *See, e.g., State v. Ohlson*, 125 P.3d 990, 991 (Wash. Ct. App. 2005) (adopting a “per se rule that excited utterances cannot be testimonial”).

234. *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005) (rejecting the notion that all excited utterances are nontestimonial by definition); *see also Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005) (leaving one important question unanswered: whether courts are creating an intent-of-the-officers exception to the confrontation clause or actually instituting a necessity rationale akin to search and seizure exceptions); *People v. Kilday*, 123 Cal. App. 4th 406, 421 (Cal. Ct. App. 2004) (describing officers responding to a call from a hotel manager and encountering a victim in lobby when area was unsecured and the situation uncertain).

235. The overwhelming majority of courts do not use a categorical approach to determining the admissibility of these statements; rather, they determine whether the statements are admissible by examining, on a case-by-case basis. *E.g., Davis v. State*, 169 S.W.3d 660, 671 (Tex. Ct. App. 2005). Note that both domestic violence trials reviewed by the Supreme Court were decided in favor of the government on the case by case basis, and they were litigated before police and prosecutors had time to frame the issue in terms of the new post-*Crawford* requirements.

236. *Stancil v. United States*, 866 A.2d 799, 809 (D.C. Cir. 2005).

than the state-of-mind of the person making the statement. *Stancil* held that statements made to the police when they are trying to calm the situation are nontestimonial while statements made once the police have focused on a suspect and are in the investigation state are “testimonial.” *Stancil* divided the police response into two stages. In Stage I, police secure the scene, separating the parties and calming people down; in Stage II, police question the participants. Massachusetts also took this approach in *Commonwealth v. Gonsalves*.²³⁷ “We hold that statements made in response to questioning by law enforcement agents are per se ‘testimonial,’ except when the questioning is meant to secure a volatile scene or to establish the need for or provide medical care.”²³⁸

The underlying facts in *Stancil* are exceptional in that these two stages may truly have occurred. After all, the trial took place before *Crawford*, before police had an opportunity to shade their testimony to conform to the new jurisprudence. At the initial hearing in *Stancil*, the police officer testified that when she got to the scene she saw a child with a knife who was screaming.²³⁹ Note that these screams constitute the historic type of excited utterance and that no one questioned the admissibility of these statements from the child at trial or on appeal. At issue were later statements made by the girl’s mother (the alleged victim) that were admitted into trial without benefit of cross-examination.

At the initial hearing before the trial court in *Stancil*, the police officer testified that she calmed everyone down and separated them before obtaining statements. *Stancil* held that statements made after everyone was calmed down and separated would be subject to Sixth Amendment requirements. Hence, one would expect that the appellate court would disallow the mother’s statements, the accusatory statements made in Stage II when everyone calmed down, which would reverse the conviction because these constituted the primary evidence at trial against Mr. Stancil. Nevertheless, the appeals court did not reverse the conviction, but remanded the case, noting a contradiction in the testimony and allowing the trial court to determine on remand whether or not the challenged statements actually occurred after everyone calmed down or whether the questioning occurred instead as part of Stage I and therefore the statements were not subject to

237. *Commonwealth v. Gonsalves*, 833 N.E.2d 549 (Mass. 2005). Unless police were involved in community caretaking or stabilizing a volatile situation, statements made to them in the course of their investigation were “testimonial” per se and subject to exclusion in the absence of an opportunity to cross-examine. They were not “testimonial” per se, but the trial court after remand would have to determine whether they were in fact made with a view toward future prosecution. *Id.*

238. *Gonsalves*, 833 N.E.2d at 552.

239. *Stancil*, 866 A.2d at 802.

Sixth Amendment constraints.²⁴⁰ The appeals court found it difficult to reconcile the officer's testimony that the victim only talked to police "after we got all the parties involved separated and calmed down" with testimony elsewhere that when the officer spoke to the victim, the victim "was "shaking and crying." The logical explanation for the disparity in testimony is that when the officer spoke of shaking and crying, the officer was giving the necessary incantation to convince the judge to admit the statement as an excited utterance. But, that possibility was not addressed. The appeals court's reaction to the record before it illustrates the artificiality of this two-stage analysis where courts can classify Stage II questioning as Stage I questioning. Even this clear testimony that the parties were separated and questioned was deemed subject to interpretation by a court finding a way not to reverse a conviction.

Stancil points to how easily police may shape their testimony to make the hearsay admissible. In remanding the case, the District of Columbia court gave the officers a chance to explain that the alleged victim was not yet calm and therefore that the questions and answers should constitute Stage I statements. Under the new rule announced in *Stancil*, all the police officers have to do to convince District of Columbia trial judges to allow a statement in as nontestimonial is add a new incantation that "while the complainant was shaking and crying I asked her some questions." The District of Columbia court thereby created a loophole large enough to ferry most excited utterances through.

The intent-of-the-officers cases were wrongly decided under *Crawford*. The intent-of-the-officers rationale is a means of narrowing the holding in *Crawford* that "at a minimum" defendants must not be tried by absent witnesses who gave their out-of-court testimony against the defendant to police during interrogation. In trying to narrow the definition of interrogation, these cases abrogate the third possible core definition of testimony set forth in *Crawford*, namely statements made by witnesses knowing they will be used to help prosecute.²⁴¹ Thus, a person may call the police planning to start a prosecution (core testimonial), but these courts will find the statements to be deemed nontestimonial because the police asked questions

240. *Id.* at 815 (remanding the case to the trial judge to determine what statements were made within Stage I, and were therefore properly admitted in addition to what statements were made within Stage II, and should have been excluded).

241. See *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004) (evidencing one possible core definition of testimonial as "[s]tatements 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").

intending to help that person (intent-of-the-officers).²⁴² Given that *Crawford* announced that the Confrontation Clause applied “at a minimum” to police interrogation, lower courts are not applying *Crawford*’s reasoning when they seek to limit the application of the clause by carving an exception to the rule, an exception that threatens to swallow the rule itself, at least for trials in domestic violence cases.

In addition, the determination of whether accusations were made during an emergency or calm situation hardly seems a proper distinction for whether to apply our “common-law tradition . . . of live testimony in court subject to adversarial testing.”²⁴³ For example, *Stancil*’s accuser may have been telling the complete truth to the police or may have been lying, or her allegations may rest somewhere in-between. Traditionally, whether the witness is telling the truth would be determined by the factfinder who listens to the witness testify under oath. Traditionally, a defense lawyer will cross-examine the witness in front of the jury to flesh out possible motives for her to dissemble and to help jurors determine her credibility. After *Stancil*, the jury will only have an opportunity to determine the witness’ credibility if a trial judge decides that her statements were made during Stage II of the police response. Of course Stage I and Stage II have nothing to do with whether the witness was lying or whether confrontation rights lead to better assessments of credibility. The intent of the police in asking questions has really nothing to do with the underlying purpose of requiring witnesses to appear in court and repeat or recant their initial accusations.²⁴⁴

One problem with the intent-of-the-officers test is that it tends to confuse the officer’s intent with the state-of-mind of the declarant, and does so in such a way that it bypasses the original state-of-mind principle articulated in *Crawford* that those that know they are implicating someone

242. See *Davis v. Washington*, 126 S. Ct. 2266, 2274 n.1 (2006) (giving up lip service to a Confrontation Clause that extends beyond police interrogation).

This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly not the result of sustained questioning. *Raleigh’s Case*, 2 How. St. Tr. 1, 27 (1603).) And of course even when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.

Id. This quote is absolutely true as a principle of Sixth Amendment history but it is at odds with the rest of the Court’s opinion because the Court never considered any other theory whereby Ms. Davis’ incriminating statements were evaluated aside from the question of interrogation.

243. *Crawford*, 541 U.S. at 43 (citing WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (1768)).

244. See Ross, *supra* note 4, at 162 (providing a larger discussion of this issue).

to authorities are giving testimony.²⁴⁵ Another fault with the intent-of-the-officer cases is that the category does not comport with reality because emergency systems are set up to help arrest and prosecute as well as to help callers and police have a dual role when they respond to a scene of a possible crime.²⁴⁶ As a result, the rationale invites courts to create fictions of the term witness and testimony.²⁴⁷ Moreover, the rationale encourages police to change their investigative techniques so that more information is gathered at the emergency stages of investigation. For example, instead of asking Mrs. Hammon to sit down before asking her what happened, police will have this conversation on the front step.²⁴⁸ This alteration will help avoid confrontation rights, the opposite goal of that expressed in *Crawford*.²⁴⁹ The lower courts addressed in this section also failed to implement the Supreme Court's policy as they applied *Crawford* to different fact patterns. Instead, these courts sought ways to narrow *Crawford*'s holding by picking out the word interrogation and ignoring the policy set forth in the opinion of increasing confrontation beyond *Crawford*'s particular factual situation of a station house interview.

A. DAVIS INVITES LOWER COURTS TO CONTINUE TO INTRODUCE OUT OF COURT ACCUSATIONS IN PLACE OF LIVE TESTIMONY

When the Supreme Court adopted the intent-of-the-officers test in *Davis v. Washington*, one could say the Court followed *Stancil* and *Gonzales*. *Crawford* never focused on the intent of the officers, either generally or in regards to the specific facts of the case. The intent-of-the-

245. Why should it matter in *Stancil* whether the witness was upset or calm when she spoke? The theory seems to be that if the witness sounds upset, the officer's intent would be different than if the witness is not upset. Still, whether the witness was upset sounds like it goes to the state-of-mind of the declarant. Moreover, even if the declarant was upset, under the original *Crawford* state-of-mind test, the statements would still be testimonial as long as the witness realized that he or she was giving information that would likely lead to arrest or prosecution of the person he or she accused.

246. See *Davis*, 126 S. Ct. at 2280, 2283 (Thomas, J., concurring in part and dissenting in part) (providing one of Justice Thomas' observations in *Davis*).

247. See Ross, *supra* note 4, at 174-76, 216-17.

248. See, e.g., *Ohio v. Colon*, 2007 WL 179082 (Ohio Ct. App. 2007) (involving a police officer who elicited information about what had happened while a victim was sitting on a curb after the perpetrator had left). Statements gathered in the manner involved in *Colon* were deemed nontestimonial unlike *Hammon* where "the police interrogation of the victim and the suspect occurred in separate rooms." *Id.* Note that the arrest in *Colon* occurred after *Crawford* was decided, so police may have already started to shift their tactics to less formal information-gathering.

249. See Mosteller, *supra* note 32, at 514 ("I suggest that the path of the law's development will be improved if the clause read as a positive command to afford the accused the right 'to be confronted with the witnesses against him' rather than principally as a negative restriction on the admission of certain out-of-court evidence.").

officers test constitutes a limit on *Crawford*'s declaration that police interrogations are core testimonial statements. "Whatever else the term covers, it applies at a minimum . . . to police interrogations," the *Crawford* court decreed.²⁵⁰ Now with *Davis*, this minimum has an exception. The Supreme Court set out in *Davis* to clarify *Crawford* but ended up undercutting the breadth of the earlier decision, both in tone and in substance.²⁵¹

While *Davis* appeared to adopt the test posed by the small number of courts that based admissibility on the intent-of-the-officers, the decision also referenced the other two tests described above as reasons to determine that accusations to police are nontestimonial. In this way *Davis* chooses ambiguity over bright line determinations, such as the bright line rule that all statements made to police are testimonial. The *Davis* test allows many different circumstances to influence a trial judge's conclusion. Because of its multiple focus, the intent-of-the-officer approach is unavoidably malleable.²⁵² Throughout this article, we have seen how ambiguity and malleability end up helping the government introduce evidence without live witnesses. The incentive to allow a trial to proceed or to affirm a conviction are great, while the interest in giving a defendant the opportunity to confront her accuser will often take a back seat, particularly if courts presume that the defendant is guilty and that the absent witness told the truth to police. Thus, while *Davis* could be read broadly to require confrontation except in situations almost factually identical to the *Davis* facts,²⁵³ lower courts are ultimately likely to end up interpreting *Davis* to exclude all 911 calls from Sixth Amendment protection and many statements taken at the scene of the crime.²⁵⁴ *Davis*' case-by-case approach is hardly the bright

250. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

251. That may seem counter-intuitive given that in reversing the *Hammon* decision, the *Davis* Court refused to constrict the Confrontation Clause to statements taken at the police station. However, *Hammon* should have been an easy case for reversal for the Indiana Courts as well as for the Supreme Court. Like the facts in *Crawford*, the statements implicating *Hammon* were made to a police officer after a crime was committed. The *Hammon* case thus fell easily within the scope of *Crawford*'s broad sweeping mandate that accusers give testimony in open court.

252. See Mosteller, *supra* note 32, at 568 (describing how police will change their procedures in order for evidence to become admissible at trial); see also Ross, *supra* note 4, at 205-06 ("The Confrontation Clause in no way governs police conduct, because it is the trial use of, not the investigatory collection of, *ex parte* testimonial statements which offends that provision. . . testimonial statements are what they are.")

253. O'Toole & Easterly, *supra* note 211, at 253 ("*Davis* thus classifies as testimonial a huge category of statements—all post-crime statements to law enforcement officers . . .").

254. See, e.g., *State v. Anderson*, 163 P.3d 1000, 1004 (Alaska Ct. App. 2007) (parenthetical). After Supreme Court reversed and remanded *Anderson* back to Alaska, 126 S. Ct. 2983, the Court again affirmed the conviction even though the questioning took place after one officer "remained with" the defendant while the other officer went with one accuser back to her apartment where the officer questioned the alleged victim. All these statements were deemed non-testimonial because "the circumstances objectively indicate that the primary purpose of the

line rule that the *Crawford* opinion declared was needed when it overruled the *Roberts*' line of cases precisely because the rules were too malleable and allowed courts to bend the rules to allow in "testimonial" hearsay. How malleable the case-by-case approach is, turns on the definition of emergency. If the emergency exception applies whenever police are trying to find out the identity of the person who committed the offense in order to know if the police may have to deal with someone who may be a danger to them, then the exception is broad. If it only applies when the police are not there to protect the witness, such as when they ask questions over the telephone, then that would be much narrower. When the Supreme Court affirmed the Washington court, it concluded that the operator asked the last name, first name and middle initial of the defendant in order to let police officials "know whether they would be encountering a violent felon."²⁵⁵ Davis never stated whether this inquiry was reserved for 911 calls or whether police at the scene might have questions to learn if they are encountering a violent felon in the house or when they leave the house. After *Davis*, courts do not know whether the emergency response exception includes statements made to help arrest the person responsible for the alleged act or whether it is narrow, including only those statements where the declarant asserts that he is still in danger and the police are not there to protect him. After studying the decisions that interpreted the Supreme Court's first ambiguous decision, *Crawford v. Washington*, readers will now predict that lower courts will exploit the ambiguity in the second Supreme Court decision to restrict confrontation rights.

interrogation was to enable police to resolve an on-going emergency." *But see* State v. Wright, 701 N.W.2d 802, 814 (Minn. 2005), *vacated and remanded*, Wright v. Minnesota, 126 S.Ct. 299 (2006) (illustrating a case where the Supreme Court accepted certiorari the same year as *Davis* and vacated the judgment and remanded to the Supreme Court of Minnesota for further consideration in light of *Davis*). On remand, the Court affirmed that two 911 calls were nontestimonial but held that the statements at the scene were testimonial under *Davis* because they were made after the defendant was already in custody. *Id.* at 474, 476. The Court remanded the case so that lower courts could determine whether the client had forfeited his right of confrontation by procuring the witnesses' unavailability. *Id.* at 482.

255. *Davis v. Washington*, 126 S.Ct. at 2276. This is the full third prong differentiating the two statements:

Third, the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon.

Id.; *see, e.g.*, *Hiibel v. Sixth Judicial Dist. Ct. of Nev., Humboldt Cty.*, 542 U. S. 177, 186 (2004) ("Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.").

B. POST-*DAVIS* DECISIONS

Indeed, many courts have interpreted *Davis* broadly. In the 911 context, *Davis* relied on the fact that the abuser was in the home at the time of the call,²⁵⁶ but lower courts after *Davis* have decided that 911 calls where the alleged abuser is no longer in the same location as the caller are also beyond the scope of the Confrontation Clause.²⁵⁷ The lower courts are also expanding *Davis*' intent-of-the-officers rationale to conclude that statements made at the scene are beyond the scope of the Confrontation Clause.²⁵⁸ Many lower courts permit on-cite interviews with police. Some cases hold that the fact that the assailant was not present at the scene means that the evidence is nontestimonial.²⁵⁹ Conversely, some cases hold that the fact that the assailant was present means that the evidence is nontestimonial.²⁶⁰

256. *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006). "In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when *Davis* drove away from the premises) It could be readily maintained that, from that point on, *McCottry*'s statements were testimonial." *Id.*

257. In fact, courts have also decided that 911 calls where the alleged abuser was no longer in the same location as the caller are beyond the Confrontation Clause's scope. *See, e.g., State v. Camarena*, 145 P.3d 267, 274-75 (Or. 2006) (involving a 911 call where the caller "explained that her 'boyfriend' hit her but that he since left the house"). *Camerana* held that the 911 call was nontestimonial because, "although *Carder* was referring to 'past' events, the danger of a renewal of the domestic assault had not necessarily or fully abated. Defendant had just left; he could easily have returned before the police could arrive." *See also Ohio v. Colon*, 2007 WL 179082 (Ohio Ct. App. 2007) (finding that statements were nontestimonial even though police were at the scene and defendant had left because "the defendant had just fled the scene and not been secured by police."); *People v. Brenn*, 60 Cal. Rptr. 3d 830, 837 (Cal. Ct. App. 2007) (involving an accuser who left the home after the alleged crime and called the police from a neighbor's home and told operator he wanted to press charges, which the court held were not testimonial in part because the statements were made "in rapid-fire questioning from dispatcher").

258. *E.g., People v. Bradley*, 862 N.E.2d 79, 81 (N.Y. 2006). Only testimony introduced at trial that defendant through the victim through a glass door was police officer repeating statement made by the victim at the scene. The police officer testified he responded to a 911 call and asked the victim "what happened" at the door of the apartment. *Id.* Accusation against the defendant was nontestimonial because "Asking *Dison* 'what happened' was a normal and appropriate way to begin" the task of finding out what had caused the injuries so that he could decide what, if any, action was necessary to prevent further harm." *Id.*

259. *See, e.g., State v. Washington*, 725 N.W.2d 125, 133 (Minn. 2007) (indicating that statements at scene are admissible because "the assailant was still at large" unlike *Hammon* where he was in the home with the police).

260. *E.g., State v. Vinson*, 221 S.W. 256, 265-66 (Tex. 2007). In *Vinson*, the statement at scene answering questions nontestimonial because, "[f]irst, [the missing witness] 'was present during the making of all of [the accuser's] remaining statements.'" *Id.* Other reasons a live witness need not be produced included (1) that the witness identified the accuser as her assailant; (2) that the police officer testified he did not feel safe until the accused was placed in a police cruiser after the interview concluded; (3) "the record simply does not reveal what the deputy's questions were" and (4) the witness was badly injured yet the deputy waited to call medical personnel to help the accuser until all the statements were gathered. *Id.* at 266-67.

One example of a lower court continuing to allow statements taken at the scene despite the Court's ruling in *Hammon* is *State v. Rodriguez*,²⁶¹ where the alleged victim did not appear at trial and police repeated the contents of extensive conversations with her at the scene. The alleged victim told of the time that her boyfriend, the defendant, had come home the night before, what he said to her, and extensive testimony about the horrible types of punishment she allegedly endured at his hands.²⁶² Even her statement that "the police can't help me" came in as part of the narrative of what she talked about with the officer that night. The statements were the backbone of the prosecution against him for battery and intimidation.²⁶³ The Wisconsin appeals court began its analysis with the words: "Every defendant in a criminal case is entitled to confront his or her accusers." The decision ends by determining that all the statements were properly admitted without a live witness because under *Davis*, the confrontation guarantee does not apply to this accuser because of the way the accusations were gathered by police. The Court starts with the state-of-mind analysis, writing that "when police talk to an attack-victim when the stress and cognitive disruption caused by the attack is still dominant," there is no confrontation right "because the key consideration . . . focuses on an objective analysis of the out-of-court declarant's expectation as to how what he or she tells law enforcement will be used."²⁶⁴ The Court then proceeds to the intent-of-the-officers and the formality test:

It also cannot be said that, objectively, the officers intended to record past activities rather than assess the then-current situation. Moreover, there is nothing in the Record that indicates that anything either Ms. LaMoore or her daughter told the officers during that first encounter was in response to any sort of structured interrogation to questioning beyond simple inquiries. Simply put, Officers Sterling and Kurtz did not go to the LaMoore house looking for evidence with which to prosecute Rodriguez, and, after they arrived their focus was not on building a case against him but, rather, trying to ensure the safety of Ms. LaMoore and her

261. 722 N.W.2d 136 (Wis. Ct. App. 2006)

262. *Rodriguez*, 722 N.W.2d at 140-41.

263. *Id.* at 140. There were plenty of supporting facts such as redness on the side of the victim's face, a bruise on the top and back of her head and the incriminating fact that defendant was found a couple of days later hiding from the police underneath a couch in his home with a knife, and another witness' out-of-court testimony also admitted without confrontation, bolstered the primary witness' account. *Id.* at 140. These facts might lead a court to wish to affirm the conviction but the facts do not determine the outcome of the Confrontation Clause analysis. *Id.*

264. *See id.* at 147 (citing *Davis*, 126 S.Ct. at 2272-73); *Manuel*, 697 N.W.2d at 82.

daughter, and other members of the community. Thus, those out-of-court declarations were not testimonial.²⁶⁵

This analysis conveniently neglects the *Hammon* decision and the Supreme Court's discussion surrounding *Hammon*. *Davis* encourages lower courts to read *Hammon*'s outcome as an anomaly for on the scene domestic violence calls, opining that "officers called to investigate . . . need to know whom they are dealing with in order to assess the situation."²⁶⁶ In *Hammon*, like *Rodriguez*, the officers also did not go to the home looking for evidence with which to prosecute a particular defendant, but were also answering a domestic violence call and objectively understood, they would need to assure the safety of members of the community and talk to the alleged victim to determine how next to proceed. Also in *Hammon*, there was no structured police questioning but only the question "what happened."

The only real difference between *Hammon* and the Wisconsin case is the different conclusions the two courts reached on similar facts. The Supreme Court concluded that the police in *Hammon* were establishing past facts while *Rodriguez* concluded that the police were not. With just a different conclusion on similar facts, the Wisconsin court expands the *Davis* case holding to the point that it contradicts the holding in *Hammon*. Owing to the Supreme Court's ambiguity, the newly announced rejuvenation of confrontation jurisprudence will not cause the demise of trial by out-of-court accusation.

Davis was the Court's opportunity to correct lower courts in the domestic violence area that had flouted *Crawford*'s mandate for a meaningful opportunity for juries to determine the reliability of the witnesses against the accused, namely face-to-face confrontation with cross-examination. Instead of correcting the ambiguities of *Crawford* that had tacitly permitted such a limited reading of *Crawford*, the *Davis* Court instead provided additional ambiguities, inviting lower courts to continue sanctioning trials by out-of-court accusation. With *Davis*, the Court replaced its broad pronouncements of two years before with narrow theories of confrontation

265. *Id.* at 147.

266. *Davis v. Washington*, 126 S. Ct. 2266, 2279 (2006).

Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial . . . we do not hold the opposite—that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." . . . Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements.

Id. (internal citations omitted).

rights derived from the lower court decisions that had failed to implement *Crawford's* broad policy pronouncements.²⁶⁷

VIII. STRAINING AT THE LEASH: A JURISPRUDENCE PERSPECTIVE

Most researchers adopt a principal-agent approach to lower court decision-making, in which lower courts are expected to implement the decisions of the Supreme Court.²⁶⁸ The principle-agent theory is a normative theory of how lower courts are supposed to function, where judges do not vote based on their own values or political persuasion.²⁶⁹ Social scientists and other theorists interested in finding out what actually happens in practice have established that in reality, lower courts are influenced to some degree by judges' own ideological preferences when they apply Supreme Court doctrines.²⁷⁰ As Barry Friedman succinctly noted: "Outside the legal

267. See *People v. Brenn*, 152 Cal. App. 4th 166, 178, (Cal. Ct. App. 2007) (providing that *Davis* was viewed as a capitulation to lower court's narrow construction of *Crawford* by relying on a pre-*Davis* case for defining the term testimonial); see also *People v. Corella*, 122 Cal. App. 4th 461, 469 (Cal. Ct. App. 2004) (illustrating a pre-*Davis* case that read *Crawford* to exclude almost all domestic cases, opining "it is difficult to identify any circumstances under which a . . . spontaneous statement would be 'testimonial'"). *Brenn* wrote: "Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation.' Such unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police 'interrogation' as that term is used in *Crawford*." *Brenn*, 152 Cal. App. 4th at 178 (quoting *Corella*, 122 Cal. App. 4th at 469). In other words, never mind that *Davis* held that the unstructured interaction in *Hammon* was testimonial; California continues to construe the clause otherwise.

268. Kim, *supra* note 15, at 386-87 n.13. The principal-agent approach is summed up in an article by George & Yoon as follows:

Since the Supreme Court is formally at the apex of the judicial pyramid, the Court's decisions can be conceptualized as a principal directing (or attempting to direct) its agents, the lower courts. The Supreme Court has limited resources to monitor the actions of lower federal courts and state courts; therefore, the possibility arises that judges will not comply with Supreme Court preferences. The Court obviously wishes to check these inconsistent rulings, but monitoring and enforcement is costly.

Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819, 819 (2003). See also Mathew D. McCubbins, et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 243-44 (1987); Barry M. Mitnick, *The Theory of Agency: The Policing "Paradox" and Regulatory Behavior*, 24 PUB. CHOICE 27, 40 (1975); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 770 (1984); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal-Agent Perspective*, 44 PUB. CHOICE 147, 154-58 (1984).

269. See Friedman, *Confrontation*, *supra* note 10, at 258 ("Constitutional theory is all about cabinining law from politics, both to ensure that judges are constrained by law (and thus do not simply vote their own values) and to prevent politics from influencing law.").

270. *Id.*; Kim, *supra* note 15, at 394-95. See also Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1515 (2003) (concluding that appellate judges follow both the legal model and the political or ideological model of decisionmaking). Cross summarizes the empirical literature including a researcher named Daniel A. Pinello. *Id.* at 1481. Pinello analyzed 79,000 decisions and concluded that the political model of decision-making explain just under one quarter of circuit court decisions. *Id.* at 1481. Cross then does his

academy, the interest in how judges behave is more ‘positive.’ That is to say, the focus in other disciplines is not so much on how judges should behave, as on how they do and why.”²⁷¹ By reviewing data from a closed network of judicial decisions, social scientists concluded that judicial attitudes have demonstrably affected appellate decisionmaking of federal circuit courts in a significant subset of cases.²⁷²

Social scientists have several theories about when lower courts resist applying Supreme Court doctrines, and they all resonate in the Confrontation Clause arena. One theory is that judges are more likely to follow their own attitudes in “controversial civil libert[ies] cases.”²⁷³ A second theory is that judges are less likely to follow the high court decision when the judges have their own policy preference and have already made decisions based on this policy.²⁷⁴ The third theory looks at the Supreme Court decision that provides the precedent, finding that judges are less likely to follow the high court when the Supreme Court is ambiguous and the case law is overly complex.²⁷⁵

All of these situations were at play following *Crawford v. Washington*. The right to confront one’s accuser is a civil liberty that remains controversial. There are many countervailing policy arguments to be made against the right to confront one’s accusers. One realistic concern is that domestic violence cases will be dismissed if the Confrontation Clause requires the complainant to testify at trial.²⁷⁶ Many domestic violence victims choose not to prosecute, and where there is a history of abuse, there is always a possibility that the person was threatened into not proceeding with the case.²⁷⁷ That means that some people who commit crimes will get away

own research and concludes that ideology influences the outcome thirty-three percent or more in certain situations. *Id.* at 1506. He also concluded that the political model of decisionmaking is most likely underestimated in empirical measurements. *Id.* at 1514. For a prime example of scholarship by non-lawyers see Songer et al., *supra* note 11, at 688-89. Songer concluded that in the search and seizure area, circuit court panel decisions were influenced both by precedent and the ideology of the judges on the appeals court panels. *Id.*

271. Friedman, *supra* note 10, at 258.

272. Kim, *supra* note 15, at 394-95.

273. Songer et al., *supra* note 11, at 676.

274. *See id.* (providing that “the lower judges’ own policy preferences and whether their prior actions have created a commitment to an alternative interpretation will affect the nature of their response”).

275. *See id.* (“Johnson and Canon (1984) suggests that lower courts will be most responsive when the Supreme Court’s policy is clear, unambiguous, not overly complex, and readily available.”).

276. Linger, *supra* note 5, at 709-10 n.76 (estimating that eighty to ninety percent of domestic violence victims recant or do not come to court).

277. The doctrine of forfeiture is supposed to protect the government in instances where the absence of the witness is caused by improper conduct on the part of the defendant. *See Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006) (“One who obtains the absence of a witness by

with them if witnesses do not show up for trial. Even if the person charged is factually innocent, there is a deterrence value in not dismissing charges. Another problem for lower courts is judicial economy. A system of justice based upon live witnesses who testify under oath subject to cross-examination takes time and court resources. It is much more efficient to truncate trials. Of course dismissing cases will also improve judicial economy, but given public attitudes towards domestic types of crime, it is more likely that a stronger confrontation right will often mean continuances of trial dates and a dispatch of police investigators to the home of missing witnesses, thereby consuming more judicial resources. Additionally, appellate judges generally prefer affirming criminal convictions and disfavor excluding evidence necessary for conviction.²⁷⁸ Implementing the Confrontation Clause, therefore, certainly constitutes a controversial civil liberty. Even if certain reasons are not explicitly stated in an opinion, they nevertheless can help shape the contours of the post-*Crawford* Confrontation Clause.²⁷⁹

The second theory above, that judges who have already made decisions based on their own policy preferences are less likely to follow high court decisions, also plays out in domestic abuse cases. Common sense would

wrongdoing forfeits the constitutional right to confrontation.”). This doctrine is beyond the scope of this article. However, the doctrine is not designed to bar the application of the Confrontation Clause in instances where witnesses freely choose not to cooperate. Thus, in *Crawford*, the Court did not apply the forfeiture doctrine where the witness asserted the husband-wife privilege. See generally Michael J. Polelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 MO. L. REV. 285, 307-13 (2006). In *Davis*, the Court writes: “We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard.” *Davis*, 126 S. Ct. at 2280.

278. See Songer et al., *supra* note 11 at 678.

279. *Davis* addresses this issue directly thus:

Respondents in both cases, joined by a number of their *amici*, contend that the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.

Davis v. Washington, 126 S.Ct. at 2280. Brief of Amici Curiae the National Network to End Domestic Violence, Indiana and Washington Coalitions Against Domestic Violence, Legal Momentum, et al. in Support of Respondents, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (Nos 05-522A, 05-5705), 2006 WL 284229 (arguing that the forfeiture doctrine does not adequately solve the problem of prosecuting domestic violence cases and seeking a narrow definition of testimonial so that prosecutions can proceed in the domestic violence arena). See generally Douglas E. Beloff & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 10-22 (2002); Mark Hansen, *New Strategy in Battering Cases: About a Third of Jurisdictions Prosecute Even Without Victim's Testimony*, 81 A.B.A. J. 14, 14 (1995) (providing an earlier article proposing the expansion of hearsay exceptions in domestic violence cases).

predict that the Confrontation Clause would be an area where judges would have strong preferences or attitudes, particularly as these rights apply to domestic abuse trials. Some judges are likely to have a strong due process perspective, but the policy arguments in favor of confrontation rights may seem too abstract to many judges, particularly if they assume that those convicted without the opportunity to confront their accusers are factually guilty. Before *Crawford*, many appellate courts had been affirming the use of excited utterances in place of live testimony, possibly reflecting the policy preferences of the judges on those courts. Finally, as the third theory would predict, the *Crawford* opinion is notoriously ambiguous and complex. Hence, social scientists would predict that lower courts would resist implementation of broad rights for confrontation in domestic violence cases.

One important article by positivist theorists looked at how the Supreme Court would respond when lower courts resist implementing Supreme Court decisions. The researchers assumed that lower court judges are likely to resist implementation of Supreme Court rulings with which they disagree.²⁸⁰ Even if judges accept the norms of deference and precedent as one of their motivations in reaching a decision, “we assume that judges do not check their political ideologies at the courthouse door” they wrote.²⁸¹ The article was written by two political scientists and a professor of public policy who combined their names into the name “McNollgast.”²⁸² McNollgast theorized that the Supreme Court induces lower courts to adhere to its choice of doctrine by broadening or narrowing the scope of its rulings.²⁸³ Where most lower courts generally agree with the Court’s doctrine in an area of law, the Court can create a narrow doctrine that gives lower courts less flexibility in implementing the decision.²⁸⁴

In contrast, when most lower courts differ substantially from the preferred doctrine of the Supreme Court, the problem of noncompliance becomes important. Our theory suggests that the Supreme

280. McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1641-47 (1995).

281. *Id.* at 1636-37.

282. McNollgast is a combination of three people: Matthew McCubbins, Professor of Political Science, University of California, San Diego; Roger Noll, Morris M. Doyle Professor of Public Policy, Stanford University; Senior Fellow, Hoover Institution; and Barry Weingast, Professor, Department of Political Science, Stanford University. McNollgast, *supra* note 280, at n.a.1. Jonathan R. Macey, *Separated Powers And Positive Political Theory: The Tug Of War Over Administrative Agencies*, 80 GEO. L.J. 671, 672 (1992).

283. McNollgast, *supra* note 280, at 1634.

284. *Id.*; see also McNollgast, *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105, 110 (2006).

Court will expand the range of lower court decisions that it finds acceptable when faced with substantial noncompliance by the lower courts. By expanding the latitude allowed under its precedents, the Court both cajoles some lower bench jurists to abide by the new precedents and isolates those who do not. The Court can then focus its attention on the most egregiously nonconforming lower court decisions, and on the issues it most cares about.²⁸⁵

By broadening the scope of a doctrine, the Supreme Court induces lower courts to obey, because there will be fewer noncompliant courts and these become isolated and are possible targets for review and reversal. McNollgast coins the term “doctrinal interval” to mean “the range of particular, perhaps inconsistent rules that are acceptable to the Supreme Court when reviewing decisions by a lower court.”²⁸⁶ Under the McNollgast theory, lower courts subtly shape Supreme Court doctrine, not by changing the choice of doctrine, but by convincing the Supreme Court to create greater leeway within the new doctrine. Lower court resistance, therefore, creates larger doctrinal intervals.

This theory fits the recent interplay between the lower courts and the Supreme Court in Confrontation Clause doctrine. First, there is what McNollgast called a shock, a new ruling in some cases inspired by new legal theories.²⁸⁷ Indeed, the *Crawford* shock to Confrontation Clause doctrine was occasioned by the writings of several scholars.²⁸⁸ Second, once the Supreme Court chooses to accept a case and announces a new legal doctrine, “each lower court in future cases decides whether to comply with the new doctrine.”²⁸⁹ This article has examined the cases after *Crawford*. Third, the Supreme Court decides which appeals to hear as a means of forcing compliance on lower courts and decides whether to alter its doctrine. In the Confrontation Clause arena, the Supreme Court accepted certiorari in two domestic violence cases and *Davis* altered the legal doctrine. The McNollgast theory also looked at another step in the process beyond the scope of this article, namely decisions of the legislature and federal branch of government whether to intervene. This article focuses on the influence the lower courts exert on the Supreme Court by resisting a

285. McNollgast, *supra* note 280, at 1634.

286. *Id.* at 1639.

287. *Id.* at 1640.

288. In *Crawford*, the Court writes “Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause.” *Crawford v. Washington*, 541 U.S. 36, 60 (2004) (citing A. AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 125-31 (1997)).

289. McNollgast, *supra* note 280, at 1640.

new doctrine and testing the validity of the McNollgast theory in the context of confrontation rights and challenging the new normative theory of Pauline Kim, who encourages lower court judges to follow their own policy leanings.²⁹⁰

While the McNollgast article has been well respected,²⁹¹ empiricists have found that most courts do not resist Supreme Court precedents.²⁹² Social scientists have demonstrated that by-in large, lower federal courts conform to the principal-agent model and faithfully implement Supreme Court precedent.²⁹³ The number of cases where researchers found incongruence between the Supreme Court and lower courts is but a fraction of the number of cases where judges conform to Supreme Court precedent.²⁹⁴ However, the lower court decisions analyzed in this article suggest that these empiricists may be mistaken about the level of noncompliance.

To social scientists gathering data, the Confrontation Clause area of law may look very different from the way it appears to lawyers and legal scholars. It would be unlikely for a social scientist to decide that lower courts were not following the Supreme Court's *Crawford* decision when the Supreme Court then turned around and adopted the reasoning of the lower courts. Those trained in the law must determine whether, as I suggest, the lower courts in *Davis* failed to implement the policy doctrine announced in *Crawford*, or whether lower courts did precisely what they were expected to do, namely, they took a new fact pattern (the 911 caller or informal police questioning at the scene) and applied the precedent (*Crawford*) as best as they could.²⁹⁵ For example, social scientists would code the Washington court decision in *Davis* as compliant with precedent because the conviction was affirmed on appeal, but this would be misleading because in fact, the doctrine changed on appeal. If I am right that this was a case of the lower

290. Kim, *supra* note 15, at 408-26.

291. See, e.g., Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2101 n.207 (2002); David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 497 n.97 (2005); Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1208 n.272 (2005).

292. Kim, *supra* note 15, at 394-95. See, e.g., Evan Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decision-Making*, 73 TEX. L. REV. 1, 4 (1994).

293. Kim, *supra* note 15, at 394-95.

294. Chad Westerland et al., *Lower Court Defiance of (Compliance With) The U.S. Supreme Court*, 4, 16 (2006), <http://www.princeton.edu/~ccameron/Defiance.pdf> (last visited Sept. 9, 2007). See also Donald R. Songer & Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes: Miranda and New York Times in the United States Courts of Appeals*, 43 W. POL. Q., 297, 297-316 (1990).

295. See Kim, *supra* note 15, at 442 (questioning the normative assumption that "lower courts should also conform to the policy preferences of the Supreme Court, even when not expressed in binding decisional law").

court causing the Supreme Court to alter its doctrine, this would be invisible to empirical researchers. Thus, the extent of lower court resistance may be precisely as the McNollgast team assumed.

One key question not addressed by the McNollgast team is, assuming that lower courts were resisting the large policy shift, was this behavior legitimate? The answer turns in part on how one defines the role of the lower courts. Traditional legal theory forbids a court from taking into account its own preferences.²⁹⁶ Professor Kim argued that our system should expect lower courts to follow their own policy attitudes when the Court gives them latitude to do so.²⁹⁷ Kim's normative view did not embrace full-scale resistance by the lower courts. Instead, Kim theorized that lower courts must conform their rulings to Supreme Court precedent.²⁹⁸ It is only where the Court allows discretion that lower court judges may assert their own policy preferences in deciding cases rather than adopting the policy enunciated by the Supreme Court. Nevertheless, Kim's theory breaks with the traditional constitutional theory where judges are expected to implement the policy of the Supreme Court and not act on their own politics and values.²⁹⁹ Kim's theory also reflects a different understanding of how resistance works in practice from the theory announced by the McNollgast team. Kim assumed that the lower courts shirk precedent without violating the legal rules of precedent. In contrast, the McNollgast team theory assumed that judges will follow their own policy prerogatives, and that the ideals instilled during law school of following precedent and the rule of law only form some of the attitudinal preferences of judges.

One problem with Kim's theory is that she too facilely distinguished between courts that fail to follow precedent from those that follow precedent but do not follow Supreme Court policy. This distinction is easier to make theoretically than to apply in an actual set of cases such as the Confrontation Clause decisions. Applying her theory to Confrontation Clause doctrine, empiricists may conclude the lower courts were behaving correctly when they refused to apply *Crawford's* broad mandate. After all, *Crawford* was vague about the contours of its new jurisprudence, inviting lower appellate courts to implement the new rules according to their own policy perspectives. Lower courts had a great deal of discretion, empiricists

296. Cross, *supra* note 270, at 1463. See also Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 64-65 (1992) (“Courts are to stick to law, judgment, and reason in making their decisions and should leave politics, will, and value choice to others.”).

297. Kim, *supra* note 15, at 442.

298. *Id.*

299. Sullivan, *supra* note 296, at 64-65.

might conclude, because *Crawford* only decided the case before it and left to another day a comprehensive view of the new jurisprudence. Indeed, all the language in *Crawford* about the deeply embedded right to face one's accusers represents mere policy. Lower courts instituted their own policy preferences in favor of less confrontation rights and less change from recent trial practices. Therefore, one may conclude the lower courts were following Kim's model, legitimately resisting the Court's views—"shirking" as the social scientists label it—but all legitimately, without violating any textbook model of judicial behavior.³⁰⁰

On the other hand, other empiricists could draw the opposite conclusion and find that lower courts were not following precedent after *Crawford*. Lower courts implementing a formality rationale cannot have been correct when they decided that colloquial interrogation meant station-house interviews nor could *Crawford* have meant that the Framers would have wanted to encourage less formality in obtaining statements for trial. Lower courts implementing a state-of-mind rationale also could not have been correct given that *Crawford* itself likely would have come out differently if the Supreme Court had utilized the this lower court approach to Mrs. Crawford's state-of-mind.³⁰¹ Nor could lower courts implementing the intent-of-the-officers rationale have been correct when the *Crawford* opinion itself did not propose the intent of the questioner as a possible core definition and the Court could not have intended to base confrontation rights on whether conversations with police occurred on doorsteps or at the kitchen table. Hence, empiricists may conclude, as this article does, that most lower courts were not following *Crawford*'s precedent when they applied the case to domestic violence prosecutions.

I coin the term "straining at the leash" in order to avoid having to determine whether the lower courts were following precedent or not. Post-*Crawford* cases demonstrate that empiricists would have difficulty determining whether lower courts legitimately resisted Supreme Court policy arguments or whether their resistance violated precedent. Kim's assumption that lower courts follow precedent even when they shirk the policy is

300. Justice Scalia wrote the following in a law review article reviewing a book on legal philosophy:

[T]he fact that the "holding" of a judicial opinion—the portion of its text or the aspect of its disposition that binds later courts—is almost infinitely expandable or contractable, ranging from the mere prescription that these particular facts produce this particular result to the broad "rationale" expressed by the court to justify that prescription.

Antonin Scalia, *Review of Steven D. Smith's Law's Quandary*, 55 CATH. U. L. REV. 687, 688 (2006).

301. See *supra* text accompanying notes 134-37 (discussing what Ms. Crawford was thinking).

difficult to verify and is probably inaccurate given this article's dissection of the case law arising between *Crawford* and *Davis*.

In trying to classify lower court domestic abuse Confrontation Clause decisions after *Crawford* as legitimate or illegitimate under Kim's theory, we find it almost impossible to sort out *Crawford*'s policy from its value as precedent. *Crawford* is a particularly apt example of a case that cries out for lower courts to implement the policy behind the decision. By its very ambiguity and lofty language it begged lower courts to employ the new policy considerations to help the Court determine the full scope of the opinion. To reduce *Crawford*'s precedential value to a reversal of a conviction because a statement was wrongly introduced under the declaration against interest exception is to miss *Crawford*'s decision altogether. In this situation, for lower courts to introduce their own policy is the same thing as not following precedent, resisting implementation, as McNollgast calls it, or not conforming, as other theorists describe it. Even if one concludes that the decisions followed precedent, it seems fair to call what the lower courts did shirking. This calls into question Kim's normative suggestion that law benefits when lower courts employ their own values rather than following the Supreme Court.

Most disturbing about giving the green light to value-driven decisions by lower courts is that Kim suggests it as an approach to all areas of law, including Supreme Court decisions on the protections in the Bill of Rights. Even if Kim is generally correct that lower courts may improve upon case law development if they employ their own policy preferences, when it comes to criminal justice issues this is not true. Rights for the accused are politically unpopular and this is precisely the reason for constitutional amendments designed to protect these rights. Whenever there is a decision that favors the rights of the accused, there is likely to be resistance from the lower courts and perhaps from the public and political branches as well. But this resistance is not to be celebrated. The resistance of the lower courts should not be viewed as acceptable when it concerns implementation of constitutional rights for those without much power in the legislative system.

IX. CONCLUSION

State court decisions interpreted *Crawford v. Washington* too narrowly, especially in domestic violence cases. These decisions exploited *Crawford*'s ambiguities to limit the reach of *Crawford* so that trial courts could continue to allow the government to repeat prior accusations at trial in place of live testimony. State and lower courts used three different rationales to exclude statements made to 911 operators or to police at the scene from the

scope of the Sixth Amendment. In the wake of *Crawford*, some courts looked at the formality of the statements at issue to determine if they were within the scope of the Confrontation Clause while other courts considered the state-of-mind of the person making the statement to narrow the reach of statements made to 911 operators or to police at the scene. A few courts looked at the intent of the officers in gathering the statements. The rationales were wrong for different reasons, but all deny *Crawford*'s vision of a return to the principle that "no man shall be prejudiced by evidence which he had not the liberty to cross-examine."³⁰²

In a period of two years, we observed the Supreme Court announce an ambitious albeit ambiguous plan to restore confrontation rights to criminal defendants followed by a second Court decision, *Davis*, which retreated from its earlier pronouncements and actually adopted much of the analysis of the lower courts. This suggests that at least part of the explanation for this retreat from *Crawford*'s bold pronouncement of a return to trial by witness is that the Court was responsive to the lower court resistance. Other law reviews may look to the internal dynamic between the Supreme Court justices to determine outcome, but this inquiry may not explain how the theories developed to rationalize a shrunken confrontation right that took root in *Davis* but not in *Crawford*. This article traces how these rationales appeared in the lower courts before they were adopted at least in part, by the Supreme Court. It appears that the dog strained on the leash and the owner changed direction almost back to where it was before.³⁰³

Pauline Kim's recent normative theory embraces the idea that lower courts should employ their own policy prerogatives when implementing Supreme Court precedent. The domestic violence cases examined in this article challenge Kim's theory. The decisions challenge the notion that lower courts can faithfully implement a Supreme Court decision when they are guided by policy considerations drastically different than those articulated by the Court. The decision challenges the notion that when a Supreme Court decision is strong on policy but weak on specifics, whether there is any way to follow precedent without following the newly articulated Supreme Court policy. In addition, the domestic violence cases challenge the notion that it is normatively preferable for lower courts to ignore Supreme Court policy preferences when the cases involve the constitutional

302. *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (citing *State v. Webb*, 2 N.C. 103 (Super. L. & Eq. 1794)).

303. This straining at the leash is different in kind from the normal principal-agent perspective where lower courts "can influence the Court's agenda by anticipating or moving ahead of the Court on certain issues, taking the lead on new legal questions or new approaches." George & Yoon, *supra* note 268, at 825.

rights of those accused of crimes. Because criminal defendants have so little power in the legislative system they rely on the courts to implement the Fourth, Fifth and Sixth Amendment protections. If lower courts make decisions that promote efficiency at the expense of the right to face one's accusers, the only likely redress is the Supreme Court. When the Supreme Court tells the lower courts that under the Sixth Amendment the policy should favor the right to confront one's accusers, the decision means little if lower courts do not follow the policy. There are so few cases that actually end up before the Supreme Court that the Court's only real power in the system is the institutional systems of precedent and rule of law. When lower courts did not adopt *Crawford's* policy preference in favor of trial by live witness and instead focused on factual distinctions between the *Crawford* case and the cases before them in order to affirm convictions based on allegations repeated at witnessless trials, *Crawford* became toothless. There are too few cases to reach the Supreme Court for the Court to be able to withstand such widespread resistance. Clothed in wonderful phrases that harkened back to the days when witnesses had to come to court, take the oath, and testify live before a jury, *Crawford* actually became a decision that narrowed the scope of the Confrontation Clause.³⁰⁴ What we learn from examining this subset of cases is that when the Supreme Court broadens constitutional rights, lower courts should strive to implement the policy behind the new decision.

304. Although *Crawford* prevented an ever expanding array of reliable hearsay from being introduced without live witnesses, *Crawford* also narrowed the scope of the Confrontation Clause by allowing unreliable statements to be introduced at trial without the usual tools to determine reliability, namely confrontation. *Crawford*, 541 U.S. at 68. See also W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After Crawford v. Washington: Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1, 3, 19 (2005); Davis v. Washington, 126 S. Ct. 2266, 2268 (2006) ("A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter.").

STATE	CITATION	MANNER OF EVIDENCE At The Scene Or 911 Call	-----REASONING-----			
			Formality	State-of-mind	Officer Intent	Other
Alaska	<i>Anderson v. State</i> , 111 P.3d 350 (Alaska Ct. App. 2005) ⁷	Scene	Formality			
Arizona	<i>State v. Alvarez</i> , 107 P.3d 350 (Ariz. 2005)	Scene	Formality			
California	<i>People v. Cage</i> , 15 Cal. Rptr.3d 846 (Cal. App. Dep't Super. Ct. 2004)	Other ¹¹	Formality			
Colorado	<i>People v. King</i> , 121 P.3d 234 (Colo. Ct. App. 2005)	Scene	Formality			
Connecticut	<i>State v. Greene</i> , 874 A.2d 750 (Conn. 2005) (not DV)	Scene		State-of-mind		Other ¹¹
Delaware	<i>State v. Johnson</i> , 2005 WL 1952939 (Del. Super.)	Other ¹²		State-of-mind		Officer Intent
DC	<i>Stancil v. United States</i> , 866 A.2d 799 (D.C. 2005)	Scene				Officer Intent
Florida ³	<i>Bartee v. State</i> , 922 So.2d 1065 (Fla. Dist. Ct. App. 2006)	911 (& Scene) ¹¹	Formality			
Illinois	<i>People v. West</i> , 823 N.E.2d 82 (Ill. 2005)	911 & Scene ¹¹				Officer Intent
Indiana	<i>Hammon v. Indiana</i> , 829 N.E.2d 444 (Ind. 2005)	Scene	Formality	State-of-mind		
Kentucky	<i>Talley v. State</i> , 2005 WL 387443 (Ky.)	911	Formality			
Louisiana	<i>State v. Jefferson</i> , 922 So.2d 577 (La. 2005)	911				Other ¹¹
Maine	<i>State v. Barnes</i> , 854 A.2d 208 (Me. 2004)	Scene	Formality			
Massachusetts	<i>Commonwealth v. Gonsalves</i> , 833 N.E.2d 549 (Mass. 2005)	Scene				Officer Intent
Michigan	<i>People v. Bryant</i> , 2004 WL 1882661 (Mich. App. 2004)	Scene	Formality			
Minnesota	<i>State v. Warsame</i> , 701 N.W.2d 305 (Minn. 2005)	Scene	Formality	State-of-mind		
Nebraska	<i>State v. Hembert</i> , 696 N.W.2d 473, 483 (Neb. 2005)	Scene	Formality	State-of-mind		Officer Intent
New Hampshire	<i>State v. Mann</i> , 2005 WL 2714531 (N.H. Super.)	911		State-of-mind		
New Mexico	<i>State v. Dedman</i> , 136 N.M. 561, 102 P.3d 628 (N.M. 2004)	Other ¹³	Formality			
New York	<i>People v. Mackey</i> , 785 N.Y.S.2d 870 (N.Y. 2004) ⁸	Scene	Formality			
North Carolina	<i>State v. Forrest</i> , 596 S.E.2d 22 (N.C. Ct. App. 2004) ¹¹	Scene	Formality	State-of-mind		
Ohio	<i>Ohio v. Mills</i> , 2006 WL 1132543 (Ohio App. 2 Dist.)	Scene	Formality			
Oklahoma	<i>Miller v. State</i> , 98 P.3d 738 (Okla. 2004) (Non DV)	Other ¹¹	Formality			
Pennsylvania	<i>Commonwealth v. Gray</i> , 867 A.2d 560, 577 (Pa. Super. 2005)	Scene	Formality			
South Carolina	<i>State v. Davis</i> , 613 S.E.2d 760 (S.C. 2005) (not DV)	Other ¹¹	Formality	State-of-mind		
Tennessee	<i>State v. Maclin</i> , 183 S.W.3d 335, 352 (Tenn. 2006)	Scene	Formality			
Texas	<i>Key v. State</i> , 173 S.W.3d 72 (Tex. Ct. App. 2005)	Scene	Formality			Officer Intent
Utah	<i>Salt Lake City v. Williams</i> , 128 P.3d 47 (Utah Ct. App. 2005)	911		State-of-mind		
Washington ¹⁴	<i>State v. Ohlson</i> , 125 P.3d 990 (Wash. Ct. App. 2005)	Scene	Formality			
Wisconsin	<i>State v. Searcy</i> , 709 N.W.2d 497 (Wis. Ct. App. 2005)(not DV)	Scene	Formality	State-of-mind		
Total 30 states ¹⁵			22	9	7	1

¹ Certiorari was granted in this case, the judgment vacated and the case remanded for further proceedings when the Court decided *Davis*. *Anderson v. Alaska*, 126 S. Ct. 2983 (2006). On remand, the Alaska court affirmed the conviction. "We conclude that the victim's statement was non-testimonial because the circumstances surrounding the making of that statement objectively indicate that the primary purpose of Officer Nelson's question was to enable her to respond to an ongoing emergency." *Anderson v. State*, 163 P.3d 1000, 1001-1002 (Alaska Ct. App. 2007).

² Police talked to the missing witness at the hospital. *People v. Cage*, 15 Cal.Rptr.3d 846, 855-56 (Cal. App. Dep't Super. Ct. 2004).

³ *State v. Greene*, 874 A.2d 750, 775 (Conn. 2005) ("[W]here a victim contacts a police officer immediately following a criminal incident to report a possible injury and the officer receives information or asks questions to ensure that the victim receives proper medical attention and that the crime scene is properly secured, the victim's statements are not testimonial in nature because they can be 'seen as part of the criminal incident itself, rather than as part of the prosecution that follows.'").

⁴ *State v. Johnson*, 2005 WL 1952939 (Del. Super.) was a rape case where the alleged victim had died before trial.

⁵ Florida is less narrow than many states. See *Lopez v. State*, 888 So.2d 693, 700 (Fla. 2004) (in non-domestic violence allegation, accuser gave a statement to police at the scene that was held to be testimonial based on the state-of-mind of the declarant: "While it is true that Ruiz was nervous and speaking rapidly, he surely must have expected that the statement he made to Officer Gaston might be used in court against the defendant.").

⁶ *Bartee v. State*, 922 So.2d 1065 (Fla. Dist. Ct. App. 2006) (providing a broad reading of at the scene statements, but harmless error).

⁷ *People v. West*, 823 N.E.2d 82 (Ill. 2005), a non domestic violence case, also dealt with statements to police officers at the hospital after the witness had already talked to officers at the scene, and the defendant had already been taken into custody. The case was reversed because these statements were deemed testimonial in nature. Some of the 911 transcript would be inadmissible without confrontation rights at retrial while statements to emergency room personnel were nontestimonial as were the victim's statements to the 911 dispatcher concerning the nature of the alleged attack and the statements made to officers at the place from which she went after the alleged attack.

⁸ *State v. Jefferson*, 922 So.2d 577, 598 (La. 2005) (suggesting what could be said to have adopted the reasoning of *State v. Wright*, 701 N.W.2d 802, 811 in Minnesota that looked at all three rationales to determine that "it would be an exceptional occasion when a statement made by a caller during the course of a 911 call would be classified as testimonial"). This language was quoted approvingly in *Jefferson*.

⁹ *State v. Dedman*, 136 N.M. 561, 102 P.3d 628 (N.M. 2004) (citing *Hammon* in affirming the admissibility of a blood alcohol report submitted on a charge of driving while intoxicated because the report was generated by State laboratory personnel, not law enforcement, and the report was not investigative or prosecutorial).

¹⁰ For 911 cases, there was a split of opinion. Compare *People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004) (providing a narrow reading of testimonial under state-of-mind rationale) with *People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004) (providing a broad reading of testimonial).

¹¹ This case was granted certiorari, judgment vacated and remanded for further proceedings when the Court decided *Davis*. *North Carolina v. Speight*, 126 S. Ct. 2977 (2006). Note that on remand, the supreme court of North Carolina vacated the judgment and dismissed the case as moot since the defendant had died. *State v. Forrest*, 636 S.E.2d 565 (N.C. 2006). See *State v. Lewis*, 648 S.E.2d 824 (N.C. 2007) (providing a case that was also remanded by the Supreme Court, and the state court reversed itself based upon *Davis*). The case involved an assault and robbery trial and when the victim made statements to an officer, the victim confronted no immediate threat, the officer wanted to determine "what happened" rather than "what is happening," the officer's questioning contained the required formality because it was a part of his investigation, and not in the defendant's presence, and the questioning occurred after the events described had ceased. *Id.* at 829.

¹² *Miller v. State*, 98 P.3d 738 (Okla. Crim. Ct. App. 2004) is a non-domestic violence case involving a statement by a jail informant based on the statement against penal interest exception to the hearsay rule.

The court held to be nontestimonial under the formality rationale; nevertheless, the court reversed under the old reliability standard of *Roberts and Lilly*.

³⁰³ *State v. Davis* was a murder trial where a declarant warned another person not to buy a gun used in the murder. 613 S.E.2d 760, 779 (S.C. 2005).

³⁰⁴ See also *Washington v. Davis*, 111 P.3d 844 (Wash. 2005) (911 calls for State of mind).

³⁰⁵ Of the twenty states not listed in this chart, two states are intentionally omitted because they are broad:

Georgia and Hawaii.

The following eighteen states are unclear about their interpretation of *Crawford* (before *Davis* was decided):

Alabama, Arkansas, Iowa, Kansas, Maryland: [State v. Snowden, 867 A.2d 314, 325 (Md. 2005)

(providing interviews of child witnesses by sexual assault counselor that were done “subsequent to initial questioning of them by the police and after the identity of a suspect was known” were testimonial). The court relied on the formality of the interrogation and the fact that police made sure that the witnesses were aware of the prosecutorial purpose of the interviews. Based on the facts of the case, it is possible that Maryland is not a broad state and would treat the statements differently had the questioning been less formal.]; **Mississippi, Missouri, Montana:** [State v. Mizenko, 127 P.3d 458 (Mont. 2006) (when a declarant knowingly spoke to a government agent, statements are presumed “testimonial.” Affirmed conviction based on harmless error doctrine because 911 calls were admitted without objection at trial and statements to officer were cumulative of 911 call.). I spoke to the head of the office in Butte, Montana.

From her experience, domestic violence cases did not actually proceed to trial if the alleged victim did not show up and there were no other witnesses to the event. This was also true before *Crawford* was decided.) **Nevada, New Jersey, North Dakota:** [State v. Lee, 687 N.W.2d 237 (N.D. 2004) (avoiding the question in a 911 tape because trial attorney failed to object at trial.) No other cases in ND could be found.], **Oregon:** [State v. Torres, 136 P.3d 1132, 1134 (Or. App. Ct. 2006) ((indicating that at a domestic violence trial, the court allowed in first responder recitation of statement by victim and statement by child witness). The court never reached the issue of whether these statements violated the Sixth Amendment under *Crawford*

because it reversed the case based on notice requirements instead. Thus, the Court left open the possibility that excited utterances by alleged victim would continue to be admissible post-*Crawford*.). See also *State v. Camarena*, 145 P.3d 267, 270 (Or. App. Ct. 2006) (providing a case decided after *Davis*, allowing in 911 recording and holding that the introduction of statements given to police at the scene “was, at worst, harmless error”)], **Rhode Island:** [State v. Harris, 871 A.2d 341 (R.I. 2005) (indicating that the defendant in this case waived his Sixth Amendment right to confrontation)], **South Dakota:** (I spoke to the head of the office in Sioux Falls, South Dakota. While she could not speak about the policy of the DA’s office regarding witnessless prosecutions in violence cases, she could attest that since she started working in that office in 1999, she had never had a case actually go to trial where the victim did not appear to testify.)

Tennessee, Vermont: [State v. Wilkinson, 879 A.2d 445 (Vt. 2005) (indicating that the statement at issue in this case was not given to the police but to the witness’s cousin and did not occur during the course of the police investigation)], **Virginia:** [Blackman v. Commonwealth, 613 S.E.2d 460 (Va. Ct. App. 2005) (hinting at formality and state of mind rationale, but does not decide the question because the witness actually testified)], **West Virginia:** (I spoke to the head of the office in Jackson County, West Virginia who told me that since *Crawford*, prosecutors were dismissing domestic violence cases at the magistrate level when the alleged victim did not want to proceed with the case unless there was enough corroborating evidence that they really did not need the victim’s statements. This was a change from before *Crawford*. Although other jurisdictions in West Virginia may be handling the cases differently, the attorney explained that it is difficult to find out because there is no intermediate appellate court and no appeal as of right).