

# THE YALE LAW JOURNAL

DYLAN O. KEENAN

## Confronting *Crawford v. Washington* in the Lower Courts

**ABSTRACT.** *Crawford v. Washington* is arguably the most significant criminal procedure decision of the last decade. Critics have argued that the *Crawford* line is a doctrinal muddle that has led to arbitrary and unpredictable results in the lower courts. I respond to this critique by presenting results from the first large-scale empirical analysis of post-*Crawford* Confrontation Clause cases in the lower courts. The results show that courts have emphasized two factors—the presence of a state actor and the presence of an injured party—to evaluate whether a statement is testimonial under *Crawford*. I then argue that, contrary to conventional wisdom, these results are not ambiguous or contradictory but instead consistent with the reasoning of *Crawford* and the underlying purposes of the Confrontation Clause.

**AUTHOR.** Yale Law School, J.D. 2013; University of Michigan, B.A. 2008. Thanks to Professor Steven Duke for his suggestions and supervision during the drafting process, to *The Yale Law Journal* editorial staff (especially Chris Michel) for outstanding feedback and editing, and to Laura Pisarello for her constant support. Any errors are my own.



## NOTE CONTENTS

|  |     |
|--|-----|
| INTRODUCTION   | 784 |
| I. CONFRONTATION CLAUSE DOCTRINE BEFORE AND AFTER <i>CRAWFORD</i>                  | 788 |
| A. The Sixth Amendment Right of Confrontation Before <i>Crawford</i>               | 789 |
| B. <i>Crawford</i> 's Reformulation of Confrontation Clause Doctrine               | 792 |
| C. <i>Davis</i> 's Refinement of <i>Crawford</i>                                   | 797 |
| D. Further Refinements: <i>Melendez-Diaz</i> , <i>Bryant</i> , and <i>Williams</i> | 802 |
| II. EMPIRICAL EVIDENCE   | 809 |
| A. The Data Set  | 811 |
| B. Descriptive Statistics  | 813 |
| C. Stepwise Logistic Regression Analysis   | 818 |
| D. Limitations of the Data   | 824 |
| III. ANALYSIS  | 827 |
| A. The Confrontation Clause, Consistently  | 827 |
| B. Lower-Court Decisions and the Meaning of Confrontation                          | 829 |
| CONCLUSION   | 832 |
| APPENDIX A: CODING   | 833 |
| APPENDIX B: INTERCODER RELIABILITY   | 835 |

**INTRODUCTION**

The Supreme Court's decisions in *Crawford v. Washington*<sup>1</sup> and its progeny reshaped Confrontation Clause doctrine.<sup>2</sup> Repudiating the Court's earlier focus on the reliability of out-of-court hearsay, *Crawford* held that the Confrontation Clause<sup>3</sup> provides defendants with a right to cross-examine only those declarants who made "testimonial" out-of-court statements.<sup>4</sup> The Court did not, however, comprehensively define testimonial statements in either *Crawford* or any of its subsequent Confrontation Clause opinions.<sup>5</sup> Most academics and lower courts consider *Crawford*'s reformulation of Confrontation Clause doctrine to be a radical one.<sup>6</sup> A minority argues that *Crawford* did not depart quite so substantially from the pre-*Crawford* doctrine.<sup>7</sup>

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

2. Compare *id.* at 51 ("The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with . . . 'testimonial' statements . . ."), *Davis v. Washington*, 547 U.S. 813, 821 (2006) ("In *Crawford v. Washington*, we held that [the Confrontation Clause] bars 'admission of testimonial statements . . .'" (citation omitted) (quoting 541 U.S. at 53-54)), and *Whorton v. Bockting*, 549 U.S. 406, 420 (2007) ("Under *Crawford* . . . the Confrontation Clause has no application to [out-of-court nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability."), with *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (holding that when a hearsay declarant is unavailable for trial, "his statement is admissible only if it bears adequate 'indicia of reliability'"), *abrogated by Crawford*, 541 U.S. 36.

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

4. See *infra* Section I.B.

5. See *infra* Sections I.B-D.

6. See, e.g., *United States v. Brito*, 427 F.3d 53, 55 (1st Cir. 2005) ("*Crawford* . . . effected a sea change in the jurisprudence of the Confrontation Clause . . ."); *Anderson v. Jackson*, 567 F. Supp. 2d 973, 982 (E.D. Mich. 2008) (characterizing *Crawford*'s interpretation of the Confrontation Clause as a "radical transformation"); *People v. Pirwani*, 14 Cal. Rptr. 3d 673, 688 (Ct. App. 2004) ("*Crawford* radically alters the way we analyze claims of error under the Confrontation Clause . . ."); *State v. Snowden*, 867 A.2d 314, 322 (Md. 2005) (stating that *Crawford* "fundamentally altered" Supreme Court Confrontation Clause jurisprudence); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 626 (2005) ("After *Crawford*, the world of confrontation law has been radically altered."); Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, CRIM. JUST., Summer 2004, at 4, 5 (stating that *Crawford* "radically transformed" Confrontation Clause doctrine).

7. See, e.g., Charles F. Baird, *The Confrontation Clause: Why Crawford v. Washington Does Nothing More than Maintain the Status Quo*, 47 S. TEX. L. REV. 305, 320-24 (2005) (arguing that *Crawford* "guarantees the status quo—the continued admission of statements that the Confrontation Clause was meant to exclude," because it fails to define "testimonial statements" while vesting discretion in judges to decide which statements reach the jury);

The descriptive debate about the consequences of *Crawford* is supplemented by a lively debate about the normative desirability and legal reasoning of the decision.<sup>8</sup> Despite those disagreements, scholars generally agree that *Crawford*'s stated doctrine is vague and that lower courts have struggled to apply it.

---

Mark Dwyer, *Crawford's "Testimonial Hearsay" Category: A Plain Limit on the Protections of the Confrontation Clause*, 71 BROOK. L. REV. 275, 277 (2005) (arguing that based on a careful parsing of the case, "nothing in *Crawford* justifies this hope that virtually all hearsay statements are still within the reach of the Confrontation Clause"); John R. Grimm, Note, *A Wavering Bright Line: How Crawford v. Washington Denies Defendants a Consistent Confrontation Right*, 48 AM. CRIM. L. REV. 185, 205-11 (2011) (using the examples of 911 calls and medical diagnoses to argue that *Crawford*'s amorphous test will yield largely similar results to those arising under *Ohio v. Roberts*); cf. Lisa Kern Griffin, *Circling Around the Confrontation Clause: Redefined Reach but Not a Robust Right*, 105 MICH. L. REV. FIRST IMPRESSIONS 16, 19-21 (2006) (arguing that although *Crawford* facilitates much broader application of confrontation rights, those rights are hollow because other decisions have weakened the meaning of confrontation itself). Other commentators have argued that while *Crawford* held the potential to provide defendants with more robust confrontation rights, subsequent decisions have neutered that potential. See, e.g., Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 FORDHAM L. REV. 1301, 1312-17 (2011) (arguing that the Court's decision in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), undermined *Crawford* by reintroducing issues of reliability into Confrontation Clause analysis through the use of the rules of evidence to determine whether statements are testimonial).

8. Many critics of *Crawford* argue that the decision will undermine domestic violence prosecutions. See, e.g., Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 749-50 (2005) ("[W]ithin days—even hours—of the *Crawford* decision, prosecutors were dismissing or losing hundreds of domestic violence cases that would have presented little difficulty in the past. . . . In a survey of over 60 prosecutors' offices . . . 63 percent of respondents reported the *Crawford* decision has significantly impeded prosecutions of domestic violence." (footnotes omitted)). But see Michael Baxter, Note, *The Impact of Davis v. Washington on Domestic Violence Prosecutions*, 29 WOMEN'S RTS. L. REP. 213, 226 (2008) ("While the *Davis* decision is not the most satisfying for those who seek strong domestic violence prosecutions, it certainly does not terribly hinder the use of most effective and traditional forms of hearsay for domestic violence, namely the 911 call and excited utterance."). Other critics argue that *Crawford*'s originalist analysis of the Confrontation Clause is inaccurate. See, e.g., Thomas Y. Davies, Note "The Framers' Design": *How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y 349, 434 (2007) ("Hence, however 'reasonable' the originalist inferences that Justice Scalia drew in *Crawford* might have appeared when viewed in isolation, they collide head-on with the evidentiary doctrine that actually shaped the Framers' understanding of the confrontation right. Admitting unsworn, 'nontestimonial' hearsay was not part of 'the Framers' design.'" (footnote omitted)). But see Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 192 (2005) ("*Crawford* was a successful blend of originalism and formalism. . . . [*Crawford*'s] formalistic rule is not only clear, but also rooted in the historical record, giving it objective legitimacy. It serves the historical goal of constraining judicial discretion and testing evidence before jurors' eyes. And there is no easy way to evade the rule . . .").

In this Note, I focus on that final problem: the ambiguity of *Crawford*-line decisions. *Crawford* announced a new rule for evaluating Confrontation Clause challenges, but it offered three different tests for applying the rule.<sup>9</sup> Subsequent decisions added a fourth test but failed to eliminate any of the original ambiguity.<sup>10</sup> Not surprisingly, scholarly “[c]riticism of *Crawford*’s ambiguity abounds.”<sup>11</sup> The *Crawford* line has been described as “vague[],”<sup>12</sup> “uncertain,”<sup>13</sup> “unpredictable,”<sup>14</sup> a “mess,”<sup>15</sup> “almost arbitrary,”<sup>16</sup> “incoherent,”<sup>17</sup> and “an exercise in fiction.”<sup>18</sup> These descriptions appear reasonable. To apply *Crawford*, lower courts must decide whether a statement is testimonial. Yet the Court has repeatedly refused to define testimonial statements, and has instead gestured towards certain “clues” that might indicate whether a statement is testimonial.<sup>19</sup> Lower-court splits lend credence to these critiques. In the immediate wake of *Crawford*, states and circuits split

- 
9. *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004); see *infra* Section I.B.
  10. *Davis v. Washington*, 547 U.S. 813, 822 (2006) (stating the “primary purpose” definition of a testimonial statement); see *infra* Sections I.C–D; see also *Bryant*, 131 S. Ct. at 1153 n.2 (“We noted in *Crawford* . . . that ‘[j]ust as various definitions of “testimonial” exist, one can imagine various definitions of “interrogation,” and we need not select among them in this case.’ *Davis* did not abandon those qualifications; nor do we do so here.” (citation omitted)); *Crawford*, 541 U.S. at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).
  11. Josephine Ross, *After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 149 (2006). Some scholars have argued that this ambiguity undermines *Crawford*’s effectiveness in protecting criminal defendants. See, e.g., Grimm, *supra* note 7, at 190, 205–08, 210–11.
  12. Michael D. Cicchini, *Judicial (In)Discretion: How Courts Circumvent the Confrontation Clause Under Crawford and Davis*, 75 TENN. L. REV. 753, 764–67 (2008) (arguing that the ambiguity of the *Crawford* tests has left them open to manipulation by lower courts).
  13. Andrew Etter, Comment, *Embracing Crawford: The Rights of Defendants and Children Under the Confrontation Clause*, 77 U. CIN. L. REV. 1167, 1176 (2009).
  14. Clifford S. Fishman, *Confrontation, Forfeiture, and Giles v. California: An Interim User’s Guide*, 58 CATH. U. L. REV. 703, 750 (2009).
  15. Deborah Ahrens & John Mitchell, *Don’t Blame Crawford or Bryant: The Confrontation Clause Mess Is All Davis’s Fault*, 39 RUTGERS L. REC. 104, 105 (2012).
  16. Myrna S. Raeder, *Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?*, 15 J.L. & POL’Y 759, 775–76 (2007).
  17. Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801, 832 n.173 (2007).
  18. Cicchini, *supra* note 7, at 1316–17 (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011) (Thomas, J., concurring)).
  19. *People v. Rawlins*, 884 N.E.2d 1019, 1026 (N.Y. 2008) (distinguishing the *Crawford* line’s varying “formulations” of testimonial statements from the “clues” to help determine whether a statement is testimonial).

on how to apply *Crawford* in common circumstances: 911 phone calls,<sup>20</sup> statements by children,<sup>21</sup> and forensic analyses.<sup>22</sup> This criticism only intensified in the wake of *Michigan v. Bryant*<sup>23</sup> and *Williams v. Illinois*,<sup>24</sup> two of the Court's most recent Confrontation Clause cases.

This Note challenges the conventional wisdom about *Crawford*'s vagueness through a rare large-scale empirical analysis of post-*Crawford* decisions.<sup>25</sup> Although the Supreme Court's doctrine is quite muddled,<sup>26</sup> this Note presents empirical evidence that lower courts have reached predictable and consistent

- 
20. Compare *People v. Moscat*, 777 N.Y.S.2d 875 (Crim. Ct. 2004) (holding a 911 call to be nontestimonial), with *People v. Cortes*, 781 N.Y.S.2d 401 (Sup. Ct. 2004) (holding a 911 call to be testimonial).
  21. Compare *State v. Bobadilla*, 709 N.W.2d 243, 255-56 (Minn. 2006) (concluding that under the objective observer test a child witness's statement was nontestimonial), with *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 n.3 (Ct. App. 2004) (concluding that, in the case of a child witness's statement, the *Crawford* "objective witness" is not "an objective four year old").
  22. Compare *Martin v. State*, 936 So. 2d 1190 (Fla. Dist. Ct. App. 2006) (holding a laboratory report was testimonial), with *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005) (holding certificates of analysis were nontestimonial).
  23. 131 S. Ct. 1143.
  24. 132 S. Ct. 2221 (2012).
  25. There are a few empirical analyses of the post-*Crawford* Confrontation Clause. See Donald A. Dripps, *On Reach and Grasp in Criminal Procedure: Crawford in California*, 37 N.C. J. INT'L L. & COM. REG. 349 (2011) (classifying recent California Confrontation Clause cases by outcome and reasoning); Josephine Ross, *Crawford's Short-Lived Revolution: How Davis v. Washington Reins in Crawford's Reach*, 83 N.D. L. REV. 387, 460 (2007) (classifying post-*Crawford*, pre-*Davis* cases by the line of reasoning courts used to classify excited utterances as nontestimonial); Eleanor Simon, *Confrontation and Domestic Violence Post-Davis: Is There and Should There Be a Doctrinal Exception?*, 17 MICH. J. GENDER & L. 175, 185-99 (2011) (conducting an empirical analysis of 137 statements in eighty-two cases to determine whether there was a de facto "Domestic Violence 'Exception'" to the *Crawford/Davis* line). This Note is distinct from each of these analyses. Dripps focuses exclusively on California courts. His chief concern is federalism and state interests, rather than compliance by lower courts. Most importantly, his method depends on a subjective evaluation of the quality of each opinion's reasoning. Rather than classifying and evaluating opinions based on objective facts about each case, Dripps applies his own subjective judgment about whether each opinion is consistent with *Crawford*. See Dripps, *supra*, at 373-81. Ross's article categorizes state court decisions by their Confrontation Clause doctrine—for example, whether the decisions employ a primary purpose or a formality test—but Ross neither analyzes how the facts of those cases influence outcomes nor conducts any statistical analysis. See Ross, *supra*, at 460. Simon's analysis is empirical, large-scale, quantitative, and objective. But Simon focuses exclusively on domestic violence cases, and she does not present an overarching theory of the Confrontation Clause.
  26. See *infra* Sections I.B-D.

results in Confrontation Clause cases.<sup>27</sup> This evidence shows that lower courts effectively employ a two-step process.<sup>28</sup> First, lower courts almost never apply the Confrontation Clause to statements not made to a state actor, finding that such statements are nontestimonial under *Crawford*. Second, lower courts are much less likely to find even statements to state actors to be testimonial when those statements are made in the context of a medical emergency.

After presenting the results of my empirical analysis, I argue that this two-step approach to Confrontation Clause cases is not only consistent but also defensible. First, consistency among lower courts refutes common claims that *Crawford*'s doctrinal uncertainty borders on arbitrariness, leading to irrational and inconsistent decisions. Second, lower courts have converged on a doctrinally and textually grounded interpretation of the Confrontation Clause. Their framing reflects the underlying aims of the Clause, and the animating concerns of *Crawford*.

This Note proceeds as follows: Part I describes the Confrontation Clause before and after *Crawford*. Part II describes my method of analysis, including the data I collected and the method of multiple logistic regression. Part III argues from my analysis that *Crawford* in the lower courts is not the mess that some commentators have claimed. I conclude by suggesting that lower courts have made sense of *Crawford*, despite its muddled doctrine, by applying the Confrontation Clause to limit the state's coercive investigatory power.

## I. CONFRONTATION CLAUSE DOCTRINE BEFORE AND AFTER CRAWFORD

This Part describes the Court's Confrontation Clause doctrine before and after *Crawford*. The Court has refined the concept of "testimonial" hearsay through both dictionary-style definitions and factors that help courts apply those definitions. The Court has declined to choose among these sometimes-contradictory definitions, and it has failed to specify any relationship between factors and definitions or to prioritize particular factors. I hope to highlight the resulting complexity of the Court's present doctrine. The Court's main tests remain uncertain and cryptic, implying contradictory results when applied to particular fact patterns.

---

27. See *infra* Parts II, III.

28. See *infra* Part III.

A. *The Sixth Amendment Right of Confrontation Before Crawford*

The Confrontation Clause of the Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>29</sup> Courts have not faced great difficulty in applying the Confrontation Clause to statements made in court.<sup>30</sup> For example, suppose that *A* is on trial for murder. *B* testifies at *A*’s trial that he saw *A* commit the murder. The Confrontation Clause guarantees that *A* will have the opportunity to know *B*’s identity, to be present when *B* testifies, and to cross-examine *B* about his statements.<sup>31</sup> There is no plausible way to define “witness” under which *B* is not a witness against *A*.<sup>32</sup>

Applying the Confrontation Clause to out-of-court statements presents courts with a more challenging problem.<sup>33</sup> Under the most restrictive reading, the Confrontation Clause does not apply to any out-of-court statements.<sup>34</sup> The restrictive reading of the Clause finds support in a narrow definition of the word “witness.” If one defines a witness as a person testifying against the accused at trial, then the plain language of the Clause limits its application to in-court statements.<sup>35</sup> At the other extreme, one might extend the Clause’s reach to cover

---

29. U.S. CONST. amend. VI.

30. See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1011-12 (1998) (“For the most part, however, the boundaries of the confrontation right as applied to trial witnesses are tolerably clear.”).

31. See *Delaware v. Fensterer*, 474 U.S. 15, 18-19 (1985) (noting that while the “literal right to confront the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause,” the Confrontation Clause also guarantees a right to cross-examine the witness (quoting *California v. Green*, 399 U.S. 149, 157 (1970)) (internal quotation marks omitted)); see also Dwain White, Note, *Barber v. Page*, 390 U.S. 719 (1968), 47 TEX. L. REV. 331, 334 (1969) (“There has always been general agreement among courts and commentators that the primary right encompassed within the constitutional guarantee of confrontation was that of cross-examination.”).

32. See Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 647 (1996) (discussing the meaning of a “witness” in the Sixth Amendment).

33. See *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (“The Constitution’s text does not alone resolve this case.”); Friedman, *supra* note 30, at 1012 (“The more pervasive perplexity arises [when] . . . the declarant herself . . . does not testify at trial.”).

34. See *Crawford*, 541 U.S. at 42-43 (citing *Woodside v. State*, 3 Miss. 655, 664-65 (1837)). *Crawford*, of course, rejects this view. *Id.* at 50-51 (“Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony . . .”).

35. See *id.* at 42-43; cf. Amar, *supra* note 32, at 692 (“In ordinary language, when witness A takes the stand and testifies about what her best friend B told her out of court, A is the witness, not B.”). Professor Amar ultimately endorses a slightly broader definition of “witness,” one



all statements introduced at trial, whether or not they were first made outside of the court.<sup>36</sup> Most courts and commentators believe that the actual reach of the Confrontation Clause lies somewhere between these two extremes, covering some but not all out-of-court statements.<sup>37</sup> Because the text of the Clause does not resolve these disputes (it creates them), the scope of a defendant's confrontation rights depends on the historical meaning of the Clause.<sup>38</sup>

If the Confrontation Clause applies to some nonexhaustive subset of out-of-court statements, how is this subset defined? In *Ohio v. Roberts*, the Supreme Court first attempted to define the boundaries of this subset—that is, to specify exactly those out-of-court statements to which the Confrontation Clause applies.<sup>39</sup> In *Roberts*, the Court adopted a two-prong test for admitting out-of-court statements in a manner consistent with the Confrontation Clause.<sup>40</sup> First, the declarant of the statement must be unavailable to testify at trial.<sup>41</sup> Second, the statement must meet a threshold test of reliability, either by

---

that covers, for example, “videotapes, transcripts, depositions, and affidavits when prepared for court use and introduced as testimony.” *Id.* at 693.

36. See *Crawford*, 541 U.S. at 42-43 (“One could plausibly read ‘witnesses against’ a defendant to mean . . . those whose statements are offered at trial . . .” (citing 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 104 (2d ed. 1923))). This view is arguably quite close to the views of the Framers. See Davies, *supra* note 8, at 352 (“[F]raming-era sources indicate that the confrontation right itself prohibited the use of hearsay statements as evidence of the defendant’s guilt.”).
37. See Simon, *supra* note 25, at 177 (“The Court has always understood witness statements [subject to the Confrontation Clause] to include in-court testimony as well as some, but not all, out-of-court hearsay statements.”). Compare *Bourjaily v. United States*, 483 U.S. 171, 182 (1987) (rejecting the view that “the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable” as “unintended and too extreme” (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980))), with Sweta Patel, Comment, *The Right To Submit “Testimony” via 911 Emergency After Crawford v. Washington*, 46 SANTA CLARA L. REV. 707, 710 (2006) (“The U.S[.] Supreme Court has repeatedly rejected the proposition that the Confrontation Clause applies only to in-court testimony . . .”).
38. See *Crawford*, 541 U.S. at 42-43 (“The Constitution’s text does not alone resolve this case. . . . We must therefore turn to the historical background of the Clause to understand its meaning.”).
39. GEORGE FISHER, EVIDENCE 567 (2d ed. 2008) (“In the *Mattox* era, the Supreme Court issued a number of ad hoc judgments to resolve particular controversies, but made little attempt to systematize the Confrontation Clause’s impact on the admission of hearsay. The Court first undertook this task in earnest in *Ohio v. Roberts*.” (citation omitted)).
40. *Roberts*, 448 U.S. at 66 (summarizing the two requirements of unavailability and reliability for admitting hearsay without violating the Confrontation Clause).
41. *Id.* (“[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable.”). This requirement was gradually weakened following *Roberts*. See Friedman, *supra* note 30, at 1016 (“[T]he Court has cut back drastically on the unequivocal application of the unavailability

falling within a “firmly rooted hearsay exception” or by possessing “particularized guarantees of trustworthiness.”<sup>42</sup> Thus, under *Roberts*, an out-of-court statement could be admitted without violating the Confrontation Clause so long as the declarant was unavailable and the statement was found by the trial court to be sufficiently reliable.

*Roberts* was widely criticized. Critics argued that the *Roberts* doctrine was unclear and unstable,<sup>43</sup> insufficiently protective of defendants’ rights,<sup>44</sup> and contrary to the text<sup>45</sup> and history<sup>46</sup> of the Confrontation Clause itself. In a decision that recapitulated many of these criticisms,<sup>47</sup> the Court overruled *Roberts* in *Crawford v. Washington*.<sup>48</sup>

---

requirement.”); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 561 (1988) (“*United States v. Inadi* effectively abandoned *Roberts*’s unavailability branch.” (footnote omitted)).

42. *Roberts*, 448 U.S. at 66. (“[W]hen a hearsay declarant is not present for cross-examination at trial . . . [r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”).
43. See Bibas, *supra* note 8, at 189 (“*Roberts*’s tests for reliability proved to be murky, subjective, inconsistent, and unworkable.”); Friedman, *supra* note 30, at 1022 (“[The Supreme Court’s] approach [under *Roberts*] devalues the Confrontation Clause, treating it as a constitutionalization of an amorphous and mystifying evidentiary doctrine, the continuing value of which is widely questioned.”).
44. See Jonakait, *supra* note 41, at 622 (stating that under the *Roberts* line, “evidence law now controls the content of the confrontation clause, and the clause now offers an accused little protection”); Lininger, *supra* note 8, at 760 (“[T]he ‘*Roberts* test’ was not much of a test at all. . . . Under either [a firmly rooted hearsay exception or the indicia-of-reliability test] *Roberts* seemed to abdicate the Supreme Court’s responsibility for regulating the admission of hearsay that could violate a defendant’s confrontation rights.”).
45. See Amar, *supra* note 32, at 690-97 (arguing that the Court’s Confrontation Clause jurisprudence has overlooked the plain meaning of the Sixth Amendment by conflating the word “witness” with an out-of-court declarant under hearsay rules).
46. See Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 167-68 (1995) (attacking the *Roberts* Court’s theory that the Confrontation Clause is chiefly concerned with producing reliable evidence).
47. Justice Scalia’s *Crawford* opinion refers to the *Roberts* reliability test as “amorphous,” 541 U.S. 36, 63 (2004), “unpredictab[le],” *id.*, and “[v]ague,” *id.* at 68. Justice Scalia also argues that the reliability test is contrary to the intent of the Framers. *Id.* at 61 (“Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’”). Finally, Justice Scalia argues that because of its inherent vagueness, *Roberts*’s reliability test fails to provide “any meaningful protection” in politically charged cases. *Id.* at 68 (using the foil of Sir Walter Raleigh’s trial).
48. Although the majority does not state explicitly that it overrules *Roberts*, Chief Justice Rehnquist’s concurrence states that the majority does just that. *Id.* at 69 (Rehnquist, C.J.,

B. Crawford's Reformulation of Confrontation Clause Doctrine

Michael Crawford was convicted of charges stemming from an incident in which he stabbed a man who tried to rape his wife, Sylvia.<sup>49</sup> The police interviewed Sylvia, who generally corroborated Michael's version of events.<sup>50</sup> Sylvia did, however, state that the victim did not draw a knife before Michael stabbed him.<sup>51</sup> At trial, the State of Washington used Sylvia's tape-recorded interview to refute Michael's claims of self-defense.<sup>52</sup> Michael invoked Washington's spousal privilege law to prevent Sylvia from testifying against him at trial.<sup>53</sup> The trial court held that neither marital privilege nor the Confrontation Clause barred the prosecution from introducing Sylvia's recorded out-of-court statements and thus admitted those statements.<sup>54</sup>

The Washington Court of Appeals reversed, holding that the recording failed a nine-factor test for "guarantees of trustworthiness" under *Roberts*.<sup>55</sup> The Washington Supreme Court reinstated Michael's conviction, holding that Sylvia's tape-recorded statements were reliable under *Roberts*, even though they did not fall within a firmly rooted hearsay exception.<sup>56</sup>

Instead of "simply reweighing the 'reliability factors' under *Roberts* and finding that Sylvia Crawford's statement falls short,"<sup>57</sup> the U.S. Supreme Court used the opportunity to examine the basic principles of the Confrontation Clause.<sup>58</sup>

The Court began by reviewing the history of confrontation rights and abuses in England<sup>59</sup> and early American case law.<sup>60</sup> The Court noted that early

---

concurring). Any doubt was surely put to rest in *Whorton v. Bockting*, where the Court explicitly stated three times that *Crawford* overruled *Roberts*. 549 U.S. 406, 413, 416, 419 (2007).

49. *Crawford*, 541 U.S. at 38-41.

50. *Id.* at 38-39.

51. *Id.* at 39-40.

52. *Id.* at 40.

53. *State v. Crawford*, 54 P.3d 656, 658 (Wash. 2002), *rev'd and remanded*, 541 U.S. 36.

54. *Id.*; see *Crawford*, 541 U.S. at 40.

55. *Crawford*, 541 U.S. at 41.

56. *Id.* at 41-42.

57. *Id.* at 67.

58. See *id.* at 50-56 (discussing the principles that emerge from the test and history of the Confrontation Clause, the concerns of the Framers, and the case law at the time of the Founding).

59. *Id.* at 43-47.

60. *Id.* at 47-50.

American courts and common law courts in England had adopted fairly robust confrontation rights that ensured testimony against criminal defendants would be presented through live witnesses.<sup>61</sup> Early state constitutions formalized these guarantees even before the U.S. Constitution was adopted.<sup>62</sup>

The Founders, according to *Crawford*, were motivated to protect confrontation rights because of prominent abuses of those rights in England, most famously the trial of Sir Walter Raleigh.<sup>63</sup> Raleigh was convicted of treason.<sup>64</sup> The primary evidence against him was incriminating testimony given *ex parte* by Cobham, an alleged co-conspirator against the Crown, and then read in court.<sup>65</sup> Cobham's confession had been obtained after an examination by the Privy Council, raising the obvious concern that Cobham had implicated Raleigh under coercion and to save his own life.<sup>66</sup> Raleigh argued that questioning Cobham in person was the only way to expose the lie. But the court denied his demands to confront and question Cobham.<sup>67</sup>

Academic commentators have frequently cited Raleigh's trial and similar abuses as motivation for the Confrontation Clause.<sup>68</sup> On this view, the Confrontation Clause was not an evidentiary rule for securing only reliable evidence but a crucial check against state abuses of power.<sup>69</sup> Following this reasoning, *Crawford* concluded that the Confrontation Clause was primarily aimed at preventing the "evil . . . of *ex parte* examinations [used] as evidence

---

61. *Id.* at 45-50.

62. *Id.* at 48.

63. *See id.* at 50 ("It was these practices that the Crown deployed in notorious treason cases like Raleigh's . . . and that the founding-era rhetoric decried."); *infra* notes 256-259.

64. *Crawford*, 541 U.S. at 44.

65. *Id.*

66. *Id.*

67. *Id.*; *see also* FISHER, *supra* note 39, at 360-62 (quoting various transcripts of Raleigh's trial).

68. *See* Erwin N. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711, 712 (1971) (noting that the Confrontation Clause "is said to find its historical origin in the trial of Sir Walter Raleigh"); Todd H. Neuman, Note, *A Child's Well Being v. A Defendant's Right to Confrontation*, 93 W. VA. L. REV. 1061, 1072 (1991) ("[M]any legal historians cite the 1603 treason trial of Sir Walter Raleigh as the catalytic influence in the development of the right to confront one's accusers."). *But see* Kenneth W. Graham Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 n.4 (1972) ("My research gives me no reason to suppose that [the link between Raleigh's trial and the Sixth Amendment] represents anything other than a convenient but highly romantic myth, and I adhere to it for this reason.").

69. *See* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992).

against the accused.”<sup>70</sup>

Thus, the Court concluded, the Confrontation Clause was neither aimed exclusively at in-court testimony nor applicable to all out-of-court statements.<sup>71</sup> Rather, the Confrontation Clause “reflects an especially acute concern with a specific type of out-of-court statement.”<sup>72</sup> Those “specific . . . statement[s]” follow from the text of the Confrontation Clause itself.<sup>73</sup>

The text of the Confrontation Clause refers to “witnesses against” the accused.<sup>74</sup> The Court, searching for a historically grounded interpretation, adopted a nineteenth-century definition of a “witness” as someone who “bear[s] testimony.”<sup>75</sup> Therefore, to decide if any statement can be introduced against the accused at trial without violating the Confrontation Clause, one must know if the declarant was acting as a “witness” by “bearing testimony.”<sup>76</sup> Only some out-of-court statements bear testimony. Statements that bear testimony are the only statements that violate the Confrontation Clause if they are offered against the accused at trial without confrontation. *Crawford* offered three possible definitions “of this core class of ‘testimonial statements’” but declined either to choose between them or to provide a single comprehensive definition.<sup>77</sup>

Definition One: “[E]x 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 . . . .”<sup>78</sup>

---

70. *Crawford*, 541 U.S. at 50.

71. *Id.* at 50-53.

72. *Id.* at 51.

73. *Id.*

74. U.S. CONST. amend. VI.

75. *Crawford*, 541 U.S. at 51 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

76. *Id.*

77. *Id.* at 51-52. As I use the term, a “definition” is a dispositive test. By applying the definition to any particular statement, one can determine whether the statement is or is not testimonial. By contrast, I refer to other important considerations as “factors.” Factors play an important but not outcome-determinative role in establishing whether a statement is testimonial. For a similar dichotomy, see *People v. Rawlins*, 884 N.E.2d 1019, 1026 (N.Y. 2008), which distinguishes “formulations,” which I refer to as “definitions,” from the “additional clues,” which I refer to as “factors.”

78. *Crawford*, 541 U.S. at 51 (citation omitted).

Definition Two: “[E]xtrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . .”<sup>79</sup>

Definition Three: “[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 . . . .”<sup>80</sup>

The Court then found that Sylvia Crawford’s statements would count as testimonial under any of the three definitions;<sup>81</sup> thus, the Court reversed Michael Crawford’s conviction.<sup>82</sup>

Courts have generally concluded that Definition Three (the “objective witness” formulation) is the broadest of the *Crawford* definitions.<sup>83</sup> There are many statements that an objective observer would reasonably expect to be available for use at trial that are nonetheless made informally, without an affidavit, deposition, or interrogation. There are, however, a few cases in which statements are testimonial under Definition Two (“formalized” statements) but not under Definition Three (“objective witness”). Table 1 illustrates how courts might reach different conclusions about a statement’s testimonial nature by adopting different definitions.

---

79. *Id.* at 51-52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)). This definition was first proposed by Justice Thomas’s concurrence in *White*. The Court seems implicitly to have rejected a literal reading of this definition in later cases. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329-30 (2009) (Thomas, J., concurring) (describing how the majority approach inappropriately broadens the reach of the Confrontation Clause by not confining its scope to formal statements); *Davis v. Washington*, 547 U.S. 813, 830 n.5 (2006) (rejecting a formality-based definition of testimonial as easily circumvented).

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

81. *Id.* at 61.

82. *Id.* at 69.

83. See, e.g., *United States v. Hadley*, 431 F.3d 484, 500 n.11 (6th Cir. 2005) (referring to the Supreme Court’s third definition of testimonial as the “broadest”); *State v. Mizenko*, 127 P.3d 458, 466 (Mont. 2006) (describing the objective witness definition as “the broadest of the extant formulations acknowledged by *Crawford*”).

**Table 1.****CONFLICTS BETWEEN CRAWFORD DEFINITIONS TWO AND THREE**

|  | TESTIMONIAL UNDER THE<br>"OBJECTIVE WITNESS" TEST                                   | NONTESTIMONIAL UNDER THE<br>"OBJECTIVE WITNESS" TEST      |
|--|---|---|
| TESTIMONIAL UNDER THE<br>"FORMALITY" TEST    | - Police interrogations <sup>84</sup><br>- Prior grand jury testimony <sup>85</sup> | Videotaped statements by<br>child witnesses <sup>86</sup> |
| NONTESTIMONIAL UNDER THE<br>"FORMALITY" TEST | - Suicide notes <sup>87</sup><br>- Autopsy reports <sup>88</sup>                    | Statements to friends prior to<br>the crime <sup>89</sup> |

The *Crawford* Court probably did not set out to create intentionally vague and potentially contradictory standards for evaluating Confrontation Clause challenges. One might therefore view *Crawford* as an example of incrementalism; the Court wanted to feel its way through a new doctrinal

84. See *Crawford*, 541 U.S. at 52-53, 68.

85. *Id.* at 68.

86. Many interviews with child witnesses are formal and akin to the civil ex parte examination and are thus testimonial under Definition Two; these interviews are nontestimonial under Definition Three if and only if the objective witness used for comparison is an objective witness possessing the age and mental capacity of a child witness. Compare *People v. Vigil*, 127 P.3d 916, 925 (Colo. 2006) (en banc) ("If the *Crawford* Court had intended the objective witness test to be applied from the perspective of an objectively reasonable observer educated in the law, the *Crawford* Court would have labeled the co-conspirator's statement 'testimonial.' However, by labeling the statement non-testimonial, *Crawford* directs us to apply the objective witness test from the perspective of an objectively reasonable person in the declarant's position." (footnotes omitted)), with *State v. Snowden*, 867 A.2d 314, 328-29 (Md. 2005) ("[W]e are unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants.").

87. See *Miller v. Stovall*, 608 F.3d 913, 923-26 (6th Cir. 2010) (holding that a suicide note by a former police officer is testimonial under the third *Crawford* formulation, but declining to endorse a lower-court holding that the note was testimonial under the second *Crawford* formulation).

88. See, e.g., *United States v. Feliz*, 467 F.3d 227, 233-36 (2d Cir. 2006) (holding that although "*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial," autopsy reports do not qualify as testimonial because "this statement . . . should [not] be read to have adopted such an expansive definition of testimonial" (quoting *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004))).

89. See *Crawford*, 541 U.S. at 51; *State v. Mizenko*, 127 P.3d 458, 467-68 (Mont. 2006) (citing numerous state court cases to support the proposition that statements made to a "friend, family member or acquaintance" are nontestimonial "unless the declarant had clear reason to believe that they will be used prosecutorially").

framework while avoiding the need to subsequently retreat from an overly specific first decision.<sup>90</sup> Section III.B of this Note advances a different conclusion: *Crawford* in fact had a clear message, but not necessarily a clear doctrine. The telos of the decision—constraining state investigatory power—may not be clear to scholars, but it has been incorporated into the results of lower-court decisions. Whatever the Court’s motivation, *Crawford* was roundly criticized for establishing ambiguous tests that created great uncertainty among lower courts.<sup>91</sup>

### C. Davis’s *Refinement of Crawford*

Two years after *Crawford*, the Court used *Davis v. Washington* and its companion case, *Hammon v. Indiana*, to try to clarify the definition of “testimonial” statements.<sup>92</sup> Both *Davis* and *Hammon* involved domestic violence prosecutions. In *Davis*, the state prosecuted Adrian Davis for felony violation of a domestic no-contact order.<sup>93</sup> At trial, Davis’s alleged victim, Michelle McCottry, did not testify.<sup>94</sup> Instead, the prosecution introduced a recording of a 911 call in which McCottry accused Davis of physically abusing her.<sup>95</sup> Davis was convicted and appealed, arguing that since McCottry had not testified, introducing the 911 call violated his confrontation rights.<sup>96</sup> Both the Washington Court of Appeals and the Washington Supreme Court upheld Davis’s conviction, holding that the 911 call was nontestimonial.<sup>97</sup>

In *Hammon v. Indiana*, the police responded to a domestic disturbance call

---

90. The *Crawford* majority acknowledged that its “refusal to articulate a comprehensive definition in this case will cause interim uncertainty.” 541 U.S. at 68 n.10.

91. See, e.g., Triplett v. Hudson, No. 3:09-CV-01281, 2011 WL 976575, at \*6 (N.D. Ohio Mar. 17, 2011) (“[T]he extent to which *Crawford* applied to forensic laboratory reports created great confusion among lower federal and state courts and remained an unresolved issue until *Melendez-Diaz*.”); State v. Mason, 126 P.3d 34, 39 (Wash. Ct. App. 2005) (“*Crawford* addresses statements made to government officials during examinations or interrogations initiated by those officials. As soon as the focus moves to disputed out-of-court statements voluntarily made by the witness during witness-initiated contact, confusion arises.” (footnote omitted)); see also sources cited *supra* notes 11-18 (critiquing the *Crawford* line as vague, unclear, and inconsistent in its application).

92. See *Davis v. Washington*, 547 U.S. 813, 822 (2006) (“[T]hese cases require us to determine more precisely which police interrogations produce testimony.”).

93. *Id.* at 818.

94. *Id.* at 818-19.

95. *Id.*

96. *Id.* at 819.

97. *Id.*



and found a frightened Amy Hammon.<sup>98</sup> After observing physical damage to the property, the police officers separated Amy from her husband, Hershel, and asked her what had happened.<sup>99</sup> Amy stated that Hershel had beaten her, and signed a battery affidavit attesting to that fact.<sup>100</sup> At trial, the prosecution introduced the affidavit and Amy's statements, but Amy did not testify.<sup>101</sup> Hershel was convicted, and the Indiana Supreme Court affirmed the conviction, holding that Amy's statement was an excited utterance and nontestimonial.<sup>102</sup>

Ultimately, the U.S. Supreme Court held that the Washington trial court had properly admitted McCottry's 911 phone call,<sup>103</sup> but that the Indiana trial court had improperly admitted Hammon's statements and affidavit.<sup>104</sup> *Davis* is noteworthy because it introduced a fourth definition of "testimonial" out-of-court statements.

Definition Four: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."<sup>105</sup>

Just how consistent are *Crawford* and *Davis*? Certainly there are areas of convergence. *Davis* continued to accept *Crawford*'s description of the "core" forms of testimonial statements,<sup>106</sup> although it did refine some of the relevant terms.<sup>107</sup> Both cases express a concern with the degree to which a disputed

---

98. *Id.*

99. *Id.* at 819-20.

100. *Id.* at 820.

101. *Id.*

102. *Id.* at 821.

103. *Id.* at 820-22, 828.

104. *Id.* at 834.

105. *Id.* at 822.

106. *Id.* at 823.

107. *See id.* at 823-26 ("Moreover, as we have just described, the facts of [*Crawford*] spared us the need to define what we meant by 'interrogations.' The *Davis* case today does not permit us this luxury of indecision. . . . When we said in *Crawford*, that 'interrogations by law enforcement officers fall squarely within [the] class' of testimonial hearsay, we had

statement resembles an ex parte examination.<sup>108</sup> Although *Davis* omitted *Crawford's* lengthy historical discussion, it cited a string of Supreme Court precedent stretching back into the nineteenth century suggesting a historical and originalist foundation for its concern with testimonial statements.<sup>109</sup> Furthermore, the Court explicitly contrasted McCottry's statements with the statements used against Sir Walter Raleigh at his infamous trial, finding that her statements were meant to "seek help" rather than "substitute for live testimony" in the manner of Cobham's statements against Raleigh.<sup>110</sup> Finally, one can argue that *Davis's* definition of testimonial statements, even if distinct from *Crawford's* definitions, applies narrowly to the context of police interrogation, whereas *Crawford* remains applicable generally.<sup>111</sup> Some courts have adopted a hybrid test that combines *Crawford* and *Davis* by applying *Davis* to police interrogations and *Crawford* in other contexts.<sup>112</sup>

There are, however, great theoretical inconsistencies between *Crawford* and *Davis*. The most glaring inconsistency is the shift in focus between *Crawford's* "objective witness" definition and *Davis's* "primary purpose" definition. Definition Three in *Crawford* turned on the perception of an objective witness hearing the statement.<sup>113</sup> Definition Four in *Davis*, by contrast, turned on the perception of the interrogating party eliciting a statement.<sup>114</sup> Professor Lininger has compellingly explained the problems posed by this discrepancy:

This shift is theoretically inconsistent, and it is also problematic as a practical matter. For example, if an officer questions a clear-headed declarant while an emergency is pending and the declarant

---

immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." (citation omitted) (quoting *Crawford v. Washington*, 541 U.S. 36, 53 (2004)).

108. See *id.* at 828.

109. See *id.* at 824-25.

110. *Id.* at 828 (quoting *United States v. Inadi*, 475 U.S. 387, 394 (1986)).

111. Myrna S. Raeder, *Confrontation Clause Analysis After Davis*, 22 CRIM. JUST., Spring 2007, at 10, 12 ("I do not believe that *Davis* has totally displaced *Crawford* because *Davis* limited itself to police interrogation while *Crawford's* dicta reached statements made in judicial contexts, and both cases left unresolved whether statements to private individuals can be testimonial, and if so by what criteria.").

112. See, e.g., *State v. Gilfillan*, No. 08AP-317, 2009 WL 638264, at \*16 (Ohio Ct. App. Mar. 12, 2009) ("The 'primary purpose' test applies to determining whether statements in police interrogations are testimonial. The 'objective witness' test applies to determining whether statements in non-police interrogations are testimonial.").

113. See *Crawford v. Washington*, 541 U.S. 36, 52 (2004).

114. See *Davis*, 547 U.S. at 822.

contemplates the prosecutorial use of her statement, the statement may nonetheless fall outside the definition of “testimonial” under *Davis*. On the other hand, if a declarant subjectively believes that she is still in grave danger but the facts do not support this conclusion as an objective matter, a court might classify her statement as testimonial under *Davis* even though she lacks the state of mind that *Crawford* would have required.<sup>115</sup>

Several smaller discrepancies exist between *Crawford* and *Davis*. First, *Davis* appears to have repudiated *Crawford*'s emphasis on formality. Although the formality of a statement is still significant in determining whether the statement is testimonial, *Davis* stated that formality is not outcome determinative in Confrontation Clause cases.<sup>116</sup> Second, *Davis* collapsed the distinction between core and periphery under the scope of the Confrontation Clause.<sup>117</sup> Table 2 illustrates the tension between *Crawford*'s Definition Three and *Davis*'s “primary purpose” definition.

---

115. Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 280 (2006) [hereinafter Lininger, *Reconceptualizing*]; see also Tom Lininger, *Davis and Hammon: A Step Forward, or a Step Back?* 105 MICH. L. REV. FIRST IMPRESSIONS 28, 30 (2006) [hereinafter Lininger, *Forward*] (“The focus in *Davis* on police motives is theoretically inconsistent with *Crawford* . . . .”); Ross, *supra* note 25, at 404–05 (“*Davis v. Washington* must be understood as a retreat from the principles laid out in *Crawford*. . . . 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.”).

116. See *Davis*, 547 U.S. at 826.

117. See Ross, *supra* note 25, at 411 (“By using the word ‘core’ to identify a perimeter, the *Davis* Court collapsed the broad possibilities of the term core in *Crawford* . . . . [T]he core became the circumference or perimeter of the scope of the clause.”). *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), collapses this distinction more explicitly. Whereas *Crawford* described its three definitions as formulations of the “core” class of testimonial statements covered by the Confrontation Clause, *Melendez-Diaz* referred to those same three definitions as simply “the class of testimonial statements covered by the Confrontation Clause.” *Id.* at 309. Since the Confrontation Clause applies only to testimonial hearsay, the class of testimonial statements covered by the Confrontation Clause equals the entire class of statements covered by the Confrontation Clause.

**Table 2.**  
**CONFLICTS BETWEEN *CRAWFORD* DEFINITION THREE AND *DAVIS* DEFINITION**

|  | TESTIMONIAL UNDER THE<br>“PRIMARY PURPOSE” TEST                                       | NONTESTIMONIAL UNDER THE<br>“PRIMARY PURPOSE” TEST   |
|--|---|--|
| TESTIMONIAL UNDER THE<br>“OBJECTIVE WITNESS”<br>TEST | - Police interrogations <sup>118</sup><br>- Prior grand jury testimony <sup>119</sup> | - Spouse’s affidavit for a preliminary protective order <sup>120</sup><br>- Private business certifications of authenticity <sup>121</sup><br>- Veterinary technician and veterinarian report <sup>122</sup> |
| NONTESTIMONIAL UNDER THE “OBJECTIVE WITNESS” TEST    | Statements to undercover informants <sup>123</sup>                                    | Statements to friends prior to the crime <sup>124</sup>  |

Responses to *Davis* were decidedly mixed. Indeed, *Davis* has earned the distinction among criminal procedure cases of taking heavy criticism from both

<sup>118</sup>. See *supra* note 84.

<sup>119</sup>. See *supra* note 85.

<sup>120</sup>. See *Crawford v. Commonwealth*, 686 S.E.2d 557, 567-69 (Va. Ct. App. 2009) (holding that “[a]lthough the Supreme Court of the United States recently stated that affidavits fall within the ‘core class of testimonial statements’ subject to the Confrontation Clause,” an affidavit used “to obtain a civil, preliminary protective order” was not testimonial because it was made in anticipation of a civil action, and not a criminal trial (citations omitted)). This case seems anomalous and may well have been decided differently in the wake of *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011).

<sup>121</sup>. See, e.g., *United States v. Yeley-Davis*, 632 F.3d 673, 680-81 (10th Cir.), *cert. denied*, 131 S. Ct. 2172 (2011) (holding that certificates of authenticity and accompanying affidavits for cell phone records are nontestimonial).

<sup>122</sup>. See, e.g., *Holz v. State*, No. 06-09-00172-CR, 2010 WL 1041068, at \*1-2 (Tex. App. Mar. 23, 2010) (holding that veterinary reports were nontestimonial under the *Davis* primary purpose test even though the authors of the reports “could have reasonably believed that [their veterinary reports] would be available at a later trial”).

<sup>123</sup>. Cf. Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & POL’Y 553, 562 (2007) (“When we speak of the anticipation of a reasonable person in the declarant’s position, we are referring to a hypothetical person who has all the information about the particular situation that the declarant does, and no more. Thus, if the declarant is speaking to an undercover police officer, the hypothetical person would not know that her audience is collecting information for use in prosecution.”).

<sup>124</sup>. See *supra* note 89.

prosecutors and criminal defense attorneys.<sup>125</sup> Prosecutors are concerned that *Davis* complicates domestic violence prosecutions by narrowing the range of admissible hearsay statements from victims.<sup>126</sup> Those sympathetic to defendants, by contrast, argue that *Davis* weakened and misconstrued the central holding of *Crawford* by carving out malleable exceptions to confrontation rights.<sup>127</sup> An additional concern is that in an attempt to clarify the doctrine, *Davis* had the unintended side effect of providing police with a roadmap for circumventing confrontation rights.<sup>128</sup> In Section III.B, I argue that *Davis* and *Crawford* can in fact be recognized as sharing a common philosophical purpose. The differing definitions are not contradictory because they are illustrative, not definitive.

#### D. Further Refinements: *Melendez-Diaz*, *Bryant*, and *Williams*

The Court has decided several Confrontation Clause cases since *Davis*.<sup>129</sup> The three most important of these cases are *Melendez-Diaz v. Massachusetts*,<sup>130</sup> *Michigan v. Bryant*,<sup>131</sup> and *Williams v. Illinois*.<sup>132</sup> *Melendez-Diaz* considered the

---

125. See Lininger, *Reconceptualizing*, *supra* note 115, at 274.

126. See, e.g., *id.* at 284-85 (arguing that *Davis* reduced the value of the excited utterance exception, encouraged batterers to murder their victims, provided perverse incentives for police to prolong ongoing emergencies, and incentivized police to lock up victims using material witness warrants).

127. See Ross, *supra* note 25, at 404-05 (“*Davis v. Washington* must be understood as a retreat from the principles laid out in *Crawford*. . . . [The “primary purpose” test in *Davis*] 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.”).

128. See Lininger, *Forward*, *supra* note 115, at 29 (“[P]olice will likely try to adapt their practices so that they can accomplish the same goals by simply incanting the right rationale for their actions. For example, police will probably be much more careful in their reports to list circumstances supporting an inference of ‘ongoing emergency’ at the time the police question hearsay declarants.”). Professor Lininger concludes that this concern is overblown because the circumstances objectively must indicate an ongoing emergency. *Id.* at 29. Given the Court’s expansive interpretation of ongoing emergencies in *Bryant*, see *infra* notes 164-166 and accompanying text, Professor Lininger’s optimism might have been premature.

129. I will not discuss *Giles v. California*, 554 U.S. 353 (2008), or *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). The former considers the relationship between the Confrontation Clause and the “forfeiture by wrongdoing” doctrine, while the latter addresses the particular witness whom a defendant has a right to confront under *Melendez-Diaz*. Though interesting, these cases are not directly relevant to the central questions of this Note.

130. 557 U.S. 305 (2009).

131. 131 S. Ct. 1143 (2011).

specific application of *Crawford* to forensic analyses of criminal evidence. Defendant Luis Melendez-Diaz was convicted of distributing and trafficking cocaine.<sup>133</sup> At trial, the Government introduced certificates of analysis showing the results of a drug-sample test. The certificates indicated that evidence seized by the police was in fact cocaine.<sup>134</sup> Melendez-Diaz objected that the evidence was admitted without an opportunity for him to cross-examine the analysts who signed the certificate.<sup>135</sup> The Appeals Court of Massachusetts affirmed the conviction, and the Supreme Judicial Court denied review.<sup>136</sup>

The Supreme Court reversed, holding that Melendez-Diaz's Sixth Amendment rights had been violated.<sup>137</sup> Specifically, the Court reasoned that the "certificates of analysis" presented by the government were affidavits,<sup>138</sup> and "[t]he Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits."<sup>139</sup> Although the Court felt *Melendez-Diaz* "involve[d] little more than the application of . . . *Crawford*,"<sup>140</sup> the decision was novel in several respects. First, the testimony in *Melendez-Diaz*, which concerned analysis of evidence performed long after any crime was completed, was categorically different from the testimony in prior Confrontation Clause cases, which concerned direct observation of allegedly criminal acts. The witnesses in *Crawford*, *Davis*, and *Hammon*, in other words, were all conventional criminal-case witnesses of the type the Framers would have recognized.<sup>141</sup> Second, *Melendez-Diaz* contradicted a substantial number of

---

132. 132 S. Ct. 2221 (2012).

133. 557 U.S. at 308-09.

134. *Id.* at 308.

135. *Id.* at 309.

136. *Id.*

137. *Id.* at 329.

138. *Id.* at 310 ("The documents at issue here, while denominated by Massachusetts law 'certificates,' are quite plainly affidavits . . .").

139. *Id.* at 329.

140. *Id.*

141. The dissent in *Melendez-Diaz* emphasized this point. *Id.* at 343-44 (Kennedy, J., dissenting) ("Laboratory analysts are not 'witnesses against' the defendant as those words would have been understood at the framing. . . . [T]he [Confrontation] Clause refers to a conventional 'witness'—meaning one who witnesses . . . an event that gives him or her personal knowledge of some aspect of the defendant's guilt."). The majority argued that there is no constitutional basis for distinguishing between conventional and nonconventional witnesses. *Id.* at 315-16 (majority opinion). Even if the majority is ultimately correct that the Confrontation Clause ought to apply to laboratory analysts, I cannot agree that this conclusion is especially obvious. *Crawford*'s reasoning is conspicuously originalist. See Laird C. Kirkpatrick, *Nontestimonial Hearsay After Crawford, Davis and Bockting*, 19 REGENT U. L.

lower-court decisions<sup>142</sup> and surprised commentators, who did not expect the Court to apply such a robust confrontation right against forensic analyses.

*Melendez-Diaz* demonstrated that *Davis*'s "primary purpose" test did not displace the three *Crawford* tests except, possibly, in the context of police interrogations.<sup>143</sup> The Court relied explicitly on the "objective witness" formulation to explain why the certificates of analysis were testimonial.<sup>144</sup> Rather than offering any wholly new test for Confrontation Clause violations, the Court presented, in dicta, a number of novel factors for applying the *Davis* and *Crawford* definitions.

First, *Melendez-Diaz* clarified that *Crawford* meant what it said—affidavits are, almost absolutely, considered testimonial.<sup>145</sup> Second, *Davis* does not define the outer boundaries of testimonial statements, because a statement may be testimonial even though it was not made during a police interrogation.<sup>146</sup> Third, certain types of hearsay such as medical records<sup>147</sup> and business or public records are nontestimonial.<sup>148</sup>

*Michigan v. Bryant* considered the scope of *Davis*'s "primary purpose" and "ongoing emergency" tests for applying the Confrontation Clause to police interrogations. Defendant Richard Bryant was convicted of murdering Anthony Covington.<sup>149</sup> At Bryant's trial, the government introduced the

---

REV. 367, 382 (2007) (characterizing the *Crawford* opinion as a "model of originalist interpretation"). Thus, it makes good sense to carefully consider how the Framers would have regarded the hearsay testimony of forensic analysts.

142. See *Triplett v. Hudson*, No. 3:09-CV-01281, 2011 WL 976575, at \*6 (N.D. Ohio Mar. 17, 2011) ("Indeed, the courts who addressed this question generally found that the *Crawford* rule did not apply to these laboratory reports . . . . Many other courts addressing the issue also held that *Crawford* was not violated by the admission of laboratory reports where the technician who prepared the report was not available for cross examination."); *Commonwealth v. Williams*, 69 Va. Cir. 277, 280 (2005) ("This Court follows the majority of state courts and the direction of the Court of Appeals of Virginia and finds that the certificate of analysis is not testimonial."); *But see Garcia v. Roden*, 672 F. Supp. 2d 198, 208 (D. Mass. 2009) (noting that *Melendez-Diaz* was "clearly foreshadowed" by *Crawford*).

143. See 557 U.S. at 310 (quoting in full the three *Crawford* definitions).

144. *Id.* at 310-11.

145. See *supra* notes 138-139 and accompanying text.

146. *Melendez-Diaz*, 557 U.S. at 316.

147. *Id.* at 312 n.2 ("[M]edical reports created for treatment purposes . . . would not be testimonial under our decision today.").

148. *Id.* at 324 ("Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.").

149. *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011).

testimony of police officers who had questioned Covington on the night of the shooting.<sup>150</sup> The officers testified that when they asked Covington what had happened, he responded that “Rick” had shot him.<sup>151</sup> Bryant appealed his conviction, arguing that the admission of Covington’s statements through the officers violated his right to confront Covington.<sup>152</sup> The Michigan Court of Appeals affirmed his conviction; the Supreme Court of Michigan then remanded in light of *Davis*.<sup>153</sup> The Court of Appeals once again affirmed Bryant’s conviction, but the Supreme Court of Michigan reversed, holding that Covington’s statements were testimonial because the primary purpose of the officers who questioned Covington was to investigate the crime, rather than to respond to an ongoing emergency.<sup>154</sup>

The Supreme Court reversed, holding that the statements were nontestimonial because the primary purpose of the police was to respond to an ongoing emergency.<sup>155</sup> The *Bryant* Court did not rely on any imminent danger to the victim, Anthony Covington. Rather, *Bryant* emphasized the ongoing danger to the officers and the general public.<sup>156</sup> *Bryant* therefore expanded the scope of the ongoing-emergency reasoning first applied in *Davis*.<sup>157</sup>

As with *Melendez-Diaz*, *Bryant* did not offer any new definitions of testimonial statements. Because the victim’s statements were made during questioning by the police, the *Bryant* Court applied the *Davis* “primary purpose” test.<sup>158</sup> At the same time, the Court reiterated the original *Crawford* caveat that it did not intend to exhaustively classify all statements, or even all statements in response to police interrogation, as testimonial or nontestimonial.<sup>159</sup>

Although *Bryant* offered a fairly faithful recitation of the *Crawford-Davis* doctrine, its application impressed many commentators as novel. For the first

---

150. *Id.*

151. *Id.*

152. *Id.* at 1150-51.

153. *Id.* Covington’s statements were not introduced as dying declarations because the prosecution failed to establish the required factual predicates. *Id.* at 1151 n.1.

154. *Id.* at 1151.

155. *Id.* at 1166-67.

156. *Id.* at 1163-66 (explaining that an ongoing emergency existed because the officers knew a potential shooter with a gun was wandering the area and neither the police nor Covington knew the shooter’s location).

157. See *Langley v. State*, 28 A.3d 646, 652 n.3 (Md. 2011) (“[A]fter *Bryant*, the ‘ongoing emergency’ concept is no longer construed so narrowly.”).

158. *Bryant*, 131 S. Ct. at 1154.

159. *Id.* at 1155.



time in a *Crawford*-line case, Justice Scalia dissented. He began by attacking one of the key developments first implied in *Davis* but fully articulated in *Bryant*: the Court's focus on the intent of the interrogating officer alongside the intent of the declarant of the statement.<sup>160</sup> The shift in focus from declarant to both declarant and questioner might have seemed obvious in the wake of *Davis*,<sup>161</sup> but Justice Scalia felt this focus sounded the death knell for the *Crawford* revolution.<sup>162</sup> Nor was Justice Scalia alone in this opinion. Observers argued that *Melendez-Diaz* was a high-water mark for the Confrontation Clause, with *Bryant* reversing the trend of robust protection of the confrontation right.<sup>163</sup>

Critics of *Bryant* expressed particular concern with the decision's broad definition of an ongoing emergency. Under *Bryant*, response to an ongoing emergency may extend beyond merely helping a victim in distress. It may include a response to a broader threat to public safety.<sup>164</sup> The threat to public safety in turn depends on the injuries of the victim and the weapon used.<sup>165</sup> Critics fear that *Bryant* provided prosecutors with a game plan for admitting almost any statement without confrontation, simply by arguing that the officers eliciting the statement faced a potential threat to public safety.<sup>166</sup>

---

160. *Id.* at 1168-69 (Scalia, J., dissenting) (“[B]ecause the Court picks a perspective so will I: The declarant’s intent is what counts. . . . A declarant-focused inquiry is also the only inquiry that would work in every fact pattern implicating the Confrontation Clause.”).

161. See *supra* notes 115, 125-127 and accompanying text.

162. See *Bryant*, 131 S. Ct. at 1170 (Scalia, J., dissenting) (“The only virtue of the Court’s approach . . . is that it leaves judges free to reach the ‘fairest’ result under the totality of the circumstances. . . . Unfortunately, under this malleable approach ‘the guarantee of confrontation is no guarantee at all.’” (quoting *Giles v. California*, 541 U.S. 353, 375 (2008) (plurality opinion))).

163. See Cicchini, *supra* note 7; Kenneth W. Graham, Jr., *Michigan v. Bryant: The Counter-Revolution Begins* 1 (UCLA Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 11-07, 2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1798877](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1798877) (“[T]he majority of the [*Bryant*] [C]ourt, over a bitter dissent from Justice Scalia, effectively over-ruled *Crawford* and pushed confrontation doctrine back in the direction of *Roberts*.”).

164. *Bryant*, 131 S. Ct. at 1158 (“[The Michigan Supreme Court] employed an unduly narrow understanding of ‘ongoing emergency’ . . . . An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue.”).

165. *Id.* at 1158.

166. See Richard D. Friedman, *Preliminary Thoughts on the Bryant Decision*, CONFRONTATION BLOG (Mar. 2, 2011, 12:42 AM), <http://confrontationright.blogspot.com/2011/03/preliminary-thoughts-on-bryant-decision.html> (“So one of my concerns is that police officers will quickly learn that they can get statements characterized as non-testimonial if

*Bryant* also clarified certain dicta from earlier Confrontation Clause decisions. First, *Bryant* noted that the most important out-of-court statements for confrontation purposes are those that involve formal interrogations by state actors.<sup>167</sup> Second, *Bryant* instructed courts to determine the primary purpose of an interrogation objectively, accounting for all the surrounding circumstances including the characteristics of the speaker and questioner.<sup>168</sup> Third, formality continues to be an important but not decisive factor in determining whether a statement is testimonial.<sup>169</sup> Many factors tend to show a statement is not formal, including (1) questioning in a public area, (2) questioning prior to the arrival of emergency services, and (3) disorganized questioning.<sup>170</sup>

In June 2012, the Supreme Court decided *Williams v. Illinois*.<sup>171</sup> The State of Illinois used a DNA comparison to prosecute Sandy Williams.<sup>172</sup> Rather than introducing the comparison into evidence, Illinois offered the testimony of an expert witness who gave an opinion based on a laboratory report.<sup>173</sup> Illinois argued that the testimony of its expert witness offered only an opinion about the report and did not introduce the contents of the DNA comparison as a testimonial statement.<sup>174</sup>

*Williams* did not produce a majority holding. Four Justices, in an opinion written by Justice Alito, stated that the expert's testimony did not violate the Confrontation Clause because the expert's statements were not offered to prove the truth of the laboratory report's contents, and thus the Confrontation Clause was not implicated.<sup>175</sup> Moreover, Justice Alito reasoned that the

---

they testify, in effect, 'I came up to the scene and didn't know what was happening. My principal concern was securing the public safety.'").

167. *Bryant*, 131 S. Ct. at 1155 (“[T]he most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.”).

168. *Id.* at 1160-62 (“In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation. . . . Taking into account a victim's injuries does not transform this objective inquiry into a subjective one. The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim—circumstances that prominently include the victim's physical state.”).

169. *Id.* at 1160.

170. *Id.*

171. 132 S. Ct. 2221 (2012).

172. *Id.* at 2227.

173. *Id.* at 2229-30.

174. *Id.* at 2231.

175. *Id.* at 2238-41.

contents of the DNA comparison were themselves nontestimonial.<sup>176</sup> Justice Alito's plurality opinion defined testimonial statements as "having the primary purpose of accusing a targeted individual of engaging in criminal conduct" and "involv[ing] formalized statements."<sup>177</sup> Because the DNA comparison in *Williams* was prepared before any suspect had been identified, Justice Alito reasoned that its contents could not have been prepared for the purpose of targeting a specific individual engaged in criminal conduct.<sup>178</sup>

Justice Thomas concurred in the judgment but explicitly rejected the majority's reasoning, as did the dissent.<sup>179</sup> Justice Thomas reiterated his view that testimonial statements must be formalized,<sup>180</sup> and therefore concluded that the informal report at issue in *Williams* was nontestimonial.<sup>181</sup>

*Williams* did little to clarify the law, and there is little reason to believe it will have a lasting impact.<sup>182</sup> There are few reported opinions that cite *Williams*. Because Justice Alito's opinion did not secure the votes of a majority of the Court, his reasoning does not constitute binding precedent.<sup>183</sup> Moreover, the case itself has several unusual facts, such as the lack of a formal affidavit accompanying the laboratory report. These factual nuances may provide a further basis for lower courts to distinguish *Williams* when they disagree with its reasoning, because the specific factual circumstances of *Williams* will rarely be replicated.<sup>184</sup>

The *Crawford* line offers four overarching definitions of testimonial statements and many factors that courts should consider in applying those definitions. Although *Bryant* suggests that the "primary purpose" test has emerged as the Court's preferred definition, the Court has never explicitly abandoned the definitions of testimonial statements in *Crawford* or *Melendez-Diaz*. And the importance of formality—one of the *Crawford* tests—may be renewed in the wake of *Williams*.

---

176. *Id.* at 2242-44.

177. *Id.* at 2242.

178. *Id.* at 2243-44.

179. *Id.* at 2255 (Thomas, J., concurring in the judgment).

180. *Id.* at 2259-60.

181. *Id.* at 2260.

182. See Richard D. Friedman, *Thoughts on Williams, Part I: Reasons To Think the Impact May Be Limited*, CONFRONTATION BLOG (June 19, 2012, 7:52 AM), <http://confrontationright.blogspot.com/2012/06/thoughts-on-williams-part-i-reasons-to.html>.

183. See *id.*

184. See *id.* ("The case appears to stand for nothing more than the proposition that in the circumstances of this case there is no Confrontation Clause violation.").

Lower courts can thus evaluate post-*Crawford* Confrontation Clause cases in many ways, some of which are in tension with one another. Courts can generally narrow the scope of confrontation rights by requiring formality, especially in the wake of *Williams*, in which Justice Thomas's concurrence is arguably controlling.<sup>185</sup> Courts could alternatively emphasize the anticipated prosecutorial use of a statement to provide broader rights.<sup>186</sup> Judicial disagreements over how *Crawford* applies to child witnesses, 911 calls (initially), and forensic analyses arguably show that Confrontation Clause doctrine remains ambiguous after *Crawford*.<sup>187</sup>

A key question remains. If *Crawford*'s doctrine is incoherent and muddled, presenting frustrating legal puzzles in a few specific cases, how has *Crawford* been interpreted by lower courts? More precisely, have lower-court decisions applying *Crawford* been as inconsistent and ambiguous as *Crawford* itself?

## II. EMPIRICAL EVIDENCE

In order to assess the potential ambiguity of the *Crawford* line, I randomly sampled and coded lower-court decisions<sup>188</sup> and quantitatively analyzed the facts and outcomes of those decisions. This Part details the empirical methodology I employed and the results that this investigation produced.

Previous work has evaluated *Crawford* in the lower courts by closely analyzing select decisions.<sup>189</sup> While this is the standard method of legal reasoning, there are important reasons to prefer systematic empirical analysis of judicial opinions when surveying an area of law. First, empirical methods help to counteract the cherry-picking phenomenon of conventional case

---

<sup>185</sup>. Cf. *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (“[T]he holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .”). Justice Thomas's opinion, which decided that the statements in *Williams* were nontestimonial because they were not formalized, is arguably controlling because it is narrower than the majority's version of the primary purpose test. See Jeffrey Fisher, *The Holdings and Implications of Williams v. Illinois*, SCOTUSBLOG (June 20, 2012, 2:20 PM), <http://www.scotusblog.com/?p=147095>.

<sup>186</sup>. See *supra* Section I.B (explaining the relative breadth of the “objective witness” formulation).

<sup>187</sup>. See *supra* notes 20-22.

<sup>188</sup>. Specifically, I keycited all state court, federal district court, and federal appellate court opinions citing *Davis v. Washington* through October 17, 2011. This yielded a population of 2,095 cases. I then randomly generated three hundred numbers between 1 and 2,095, arranged the cases in chronological order, and read the cases with those three hundred numbers.

<sup>189</sup>. See, e.g., Cicchini, *supra* note 7; Cicchini, *supra* note 12; Ross, *supra* note 25.

analysis. This problem arises when scholars develop theories from a “small series of cases.”<sup>190</sup> While those theories can be thought provoking, they rarely provide a “robust explanation of how the law works.”<sup>191</sup> A handful of deliberately chosen cases cannot be considered a representative sample of the law. Conclusions are at best tentative or uncertain when drawn from an insufficiently large sample.<sup>192</sup> By randomly sampling cases, or by analyzing the entire pool of available cases on a subject, researchers can negate the biases of traditional case-analysis methods.<sup>193</sup>

Second, rigorous empirical methods help to discipline the researcher in reading selected cases. Proper quantitative analysis requires the researcher to develop a coding scheme before she reads the opinions.<sup>194</sup> A researcher develops a set of variables and criteria for valuing each variable for a given case.<sup>195</sup> When coding the cases, the researcher is forced to consider each variable as it applies to each case. Thus, the researcher is less likely to suffer from tunnel vision—picking and choosing the factors that subjectively stand out in a given opinion.<sup>196</sup>

---

190. Kay L. Levine, *The Law Is Not the Case: Incorporating Empirical Methods into the Culture of Case Analysis*, 17 U. FLA. J.L. & PUB. POL’Y 283, 300 (2006).

191. *Id.*

192. Cf. Russell V. Lenth, *Some Practical Guidelines for Effective Sample Size Determination*, 55 AM. STATISTICIAN 187, 187 (2001) (“[T]he study must be of adequate size, relative to the goals of the study. It must be ‘big enough’ that an effect of such magnitude as to be of scientific significance will also be statistically significant.”).

193. See Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 79-80 (2008) (“At the most basic level, empirically minded legal scholars can be more systematic in selecting cases for analysis . . . by specifying a reproducible selection of cases . . . such as reading every tenth case . . . or every federal appellate products liability case over three years. . . . Disciplined research . . . guards against subliminal biases in selecting only cases that prove the author’s point.”).

194. This is a specific manifestation of the scientific requirement of a prior research design. See KIMBERLY A. NEUENDORF, *THE CONTENT ANALYSIS GUIDEBOOK* 11 (2002) (“Too often, a so-called content analysis report describes a study in which variables were chosen and ‘measured’ after the messages were observed. This wholly inductive approach violates the guidelines of scientific endeavor. All decisions on variables, their measurement, and coding rules must be made before the observations begin.”).

195. See Hall & Wright, *supra* note 193, at 107-09 (explaining the coding process).

196. *Id.* at 80-81 (explaining how systematic empirical analysis disciplines the reader and hedges against confirmation bias in reading) (citing Charles M. Haar et al., *Computer Power and Legal Reasoning: A Case Study of Judicial Decision Prediction in Zoning Amendment Cases*, 2 AM. B. FOUND. RES. J. 651, 746 (1977)).

A. *The Data Set*

I compiled a random sample of cases from Westlaw, decided before October 17, 2011, that cite *Davis*.<sup>197</sup> These cases could be from any federal district court, federal court of appeals, or state court. The sample includes both reported and unreported decisions, as well as decisions that had been overturned on appeal. Of the 300 cases I sampled, I excluded 77. Those 77 were nonbinding magistrate judge recommendations and cases in which the court did not evaluate a Confrontation Clause challenge under *Crawford*'s testimonial framework. The remaining 223 cases included several instances in which a single court evaluated multiple statements under the *Crawford* framework. Thus, the final sample consisted of 278 statements from 223 cases.

For each statement, I coded nineteen independent variables and one dependent variable—whether the reviewing court found the statement to be testimonial or not. The coding rules are described in detail in Appendix A. Table 3 lists the name of each variable and gives a description. I chose variables that both captured the important factors cited in the *Crawford* line and could be coded objectively.

---

<sup>197</sup> I chose *Davis* rather than *Crawford* because *Davis* arguably began to stabilize the Court's Confrontation Clause doctrine. Moreover, *Davis* introduced explicitly the importance of an ongoing emergency—a fact that plays a significant role in recent Confrontation Clause cases.

**Table 3.**  
**VARIABLES**

| VARIABLE        | DESCRIPTION  | NUMBER OF STATEMENTS IN THE SAMPLE |
|-----------------|--|------------------------------------|
| Testimonial     | Whether the statement was classified by the court as testimonial   | 90                                 |
| Before          | Whether the statement was made before the charged offenses   | 42                                 |
| During          | Whether the statement was made during the commission of the charged offenses   | 26                                 |
| Cop             | Whether the statement was made to a law enforcement officer other than a 911 operator                                    | 128                                |
| Doc             | Whether the statement was made to a medical health professional such as an EMT, doctor, or nurse                         | 24                                 |
| Gov             | Whether the statement was made to a government official other than a law enforcement officer or 911 operator             | 14                                 |
| Excited         | Whether the statement was classified as an excited utterance   | 85                                 |
| Present         | Whether the statement was classified as a present sense impression   | 9                                  |
| Dying           | Whether the statement was classified as a dying declaration  | 8                                  |
| Record          | Whether the statement was classified as a business or government record  | 35                                 |
| Medical         | Whether the statement was made during medical treatment or contained in medical records                                  | 19                                 |
| Abuse           | Whether the statement was made during abuse counseling not performed by a medical professional (as with a social worker) | 9                                  |
| Forensic        | Whether the statement was contained in a forensic or laboratory analysis report  | 23                                 |
| Call            | Whether the statement was made during a 911 call   | 38                                 |
| Station         | Whether the statement was made in a government facility such as a police station, courthouse, or city hall               | 16                                 |
| Victim Speaking | Whether the declarant of the statement was the victim of the charged offenses  | 120                                |
| Injured         | Whether the statement was made with a significantly injured party nearby   | 74 (102 in alternative definition) |
| Taped           | Whether the statement was audio- or video-recorded   | 67                                 |
| Habeas          | Whether the opinion was in a case on habeas review   | 36                                 |

The variable for measuring an injured party involved some subjective judgment on my part about whether an injury was serious enough to warrant medical attention. To address this, I included an alternate, more objective definition of an injury. The results of the regression analysis are almost identical between the two definitions, but the descriptive statistics do show some differences between the definitions, which are discussed below.

*B. Descriptive Statistics*

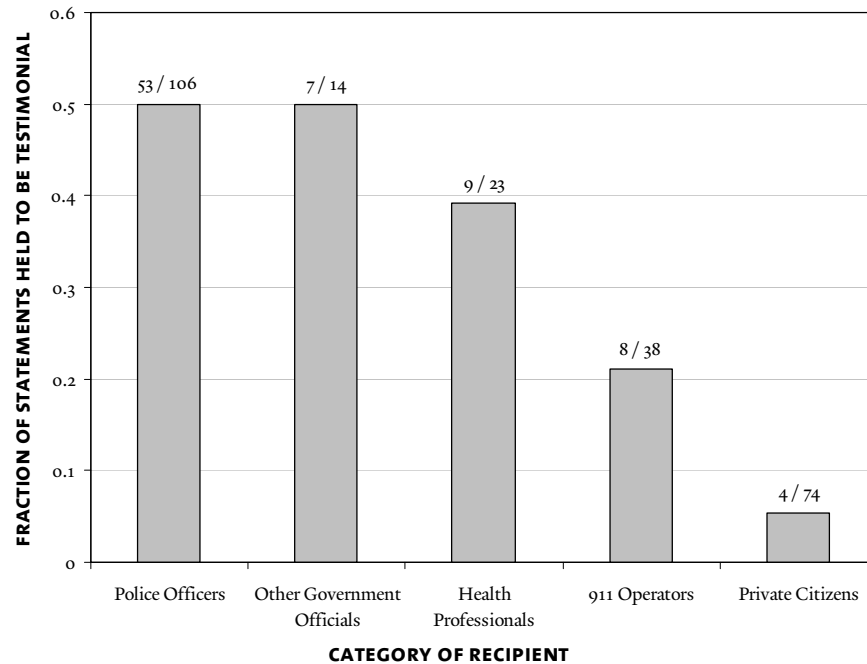
This Section presents descriptive statistics—statistics that summarize and explicate the data. Two conclusions were immediately obvious from the data. First, the government won the majority of cases. Overall, courts held that only 90 of the 278 challenged statements were testimonial.<sup>198</sup> Even this figure—that the defendants prevailed in only one-third of challenges—overestimates the success of defendants. In many of those 90 cases, courts ultimately gave judgment for the government on the basis of harmless error.<sup>199</sup> Second, the data showed a stark contrast in how courts evaluated statements made to different categories of recipients. For all of the graphs and data reported below, I did not include statements that were contained in forensic laboratory reports because the doctrine surrounding forensic analyses has become more refined than the general *Crawford* doctrine. This exclusion should have the effect of exaggerating any ambiguity or uncertainty in Confrontation Clause cases. Figure 1 plots the frequency with which statements to certain recipients were held to be testimonial.

---

<sup>198</sup>. This figure refers to total statements. For the remaining descriptive statistics and regression analysis, I excluded statements concerning forensic analyses. Out of 255 total statements not concerning forensic analyses, 81 were testimonial, a difference of less than one percentage point compared to the sample of all statements.

<sup>199</sup>. See, e.g., *Taylor v. State*, 248 P.3d 362, 375 (Okla. Crim. App. 2011) (holding that the trial court's error in admitting testimonial statements against the defendant was harmless). The flip side is that nearly all the cases evaluated were cases on appeal where the government had prevailed below. So the one-third figure, while it overestimates defendant success on appeal, may underestimate the overall success defendants have in mounting Confrontation Clause challenges at any stage of a criminal case.



**Figure 1.****FREQUENCY OF TESTIMONIAL STATEMENTS BY RECIPIENT**

Each of the listed categories is defined by the coded variables. “Health Professionals” includes EMTs, nurses, and doctors but not social workers. “Private citizens” is defined residually, as recipients who are not police, other government officials, health professionals, or 911 operators. They may include friends or family members.

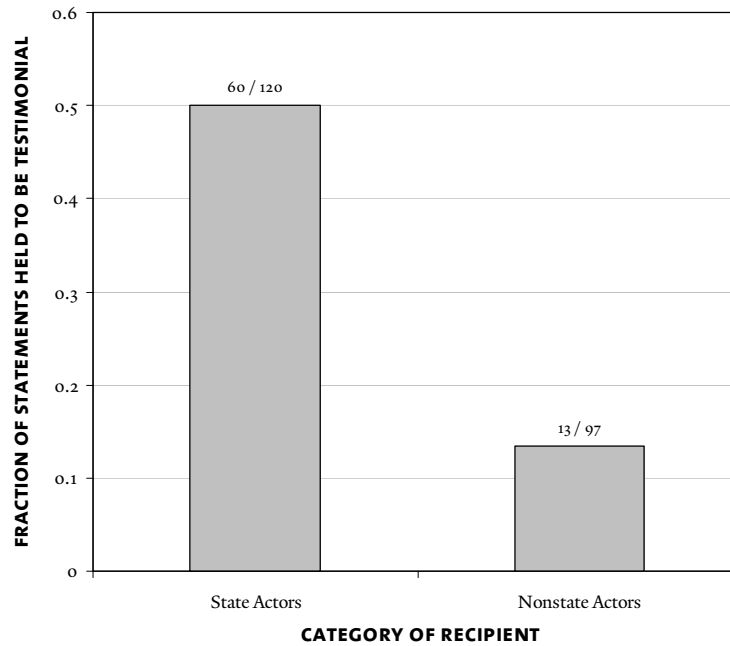
Figure 1 shows that statements are more likely to be held to be testimonial when made to police officers or other government officials. They are less likely to be held to be testimonial when made to health professionals or 911 operators and very unlikely to be held to be testimonial when made to private citizens. Whereas half of the challenged statements made to police officers and nonpolice government officials were held to be testimonial, only around five percent of statements to private citizens were held to be so. The most curious feature of the data is the relatively high frequency, almost forty percent, with which statements to health professionals were held to be testimonial. This result is partly driven by statements to Sexual Assault Nurse Examiners (SANE nurses) and other health practitioners who specialize in treating victims of sexual assault and sexual abuse. These individuals are mandatory reporters who are trained to collect evidence as well as provide medical treatment. As one

court explained, SANE nurse questioning is the “functional equivalent of police questioning.”<sup>200</sup> Statements made to SANE nurses thus draw great scrutiny from reviewing courts.

Figure 2 combines the categories listed in Figure 1 to show the dramatic difference in how courts treat statements to state actors and statements to nonstate actors.

**Figure 2.**

**FREQUENCY OF TESTIMONIAL STATEMENTS FOR STATE AND NONSTATE ACTORS**



“State Actors” includes statements made to police or other government actors, not including statements to 911 operators. “Nonstate Actors” includes any statement made to a recipient other than a police officer, other government official, or 911 operator.

Without controlling for other factors, a statement is over three times more likely to be held to be testimonial when it is made to a state actor. Section II.C shows that the results are not quite so pronounced when one controls for other variables. Nonetheless, considering that the *Crawford* line has not placed a great deal of explicit emphasis on state action, these results are striking.

Less strikingly, the data also reflect different outcomes in cases where an

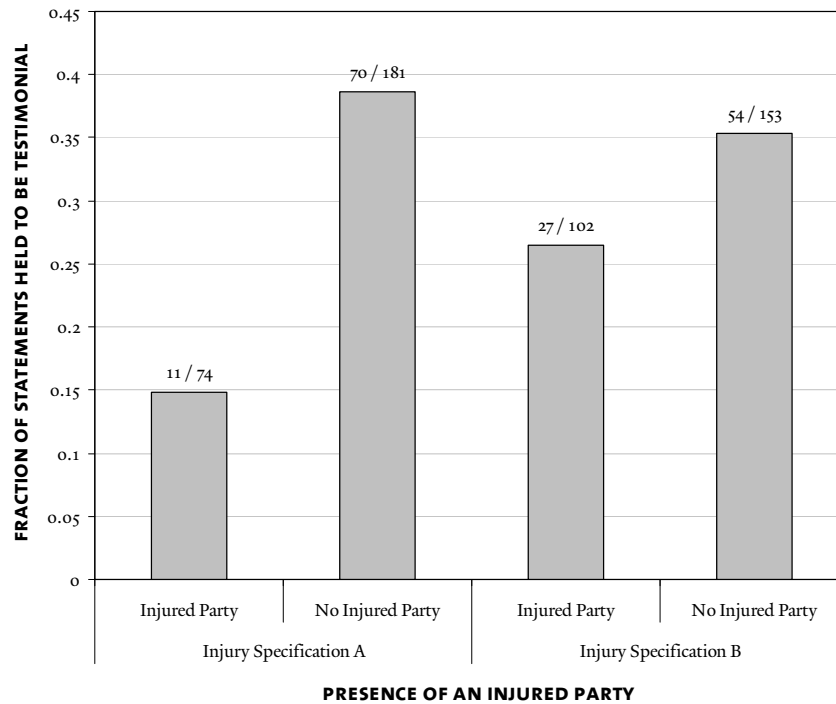
---

200. *Hartsfield v. Commonwealth*, 277 S.W.3d 239, 244 (Ky. 2009).

injured party is involved in the events surrounding the statement. Figure 3 shows the outcomes in injured-party cases relative to non-injured-party cases.

**Figure 3.**

**FREQUENCY OF TESTIMONIAL STATEMENTS BY PRESENCE OF AN INJURED PARTY**



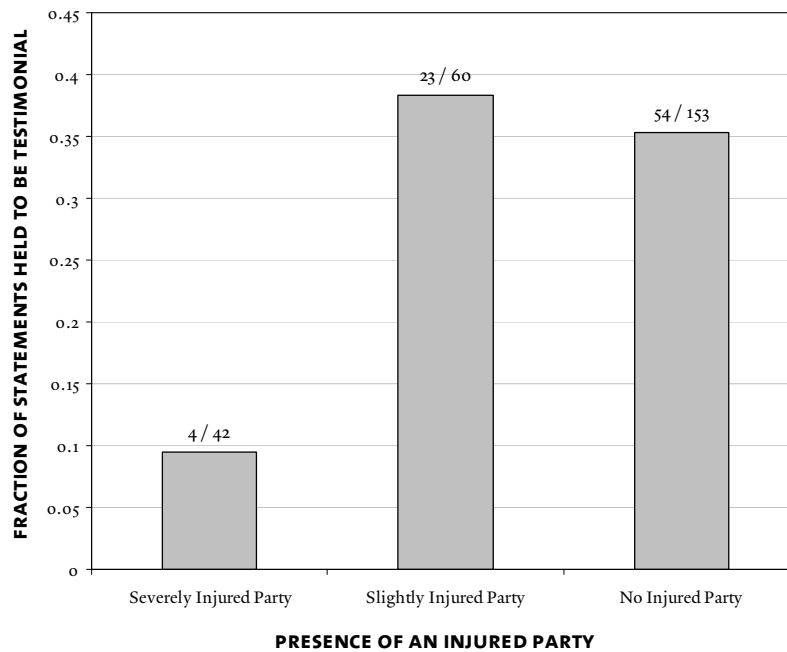
Specification A defined an injury as any shooting, stabbing, or other injury requiring immediate medical assistance. This necessarily involved subjective judgment, as explained above. Specification B coded the injury variable as 1 if a party was stabbed or shot, and 0.5 if a party was otherwise physically harmed (for example, punched, kicked or strangled). In this Figure, however, I included statements under “Injured Party” in Specification B if the variable was coded either 1 or 0.5. To put the matter simply, Specification B characterized more cases as having injured parties, and many of those injuries were rather less serious.

Figure 3 shows that statements are, without controlling for other factors, less likely to be held to be testimonial when an injured party is involved. The results are most pronounced under Specification A, where an injury is defined as a shooting, stabbing, or other injury requiring immediate medical assistance. The presence of an injury *should matter* if courts are following the *Crawford* line.

*Davis* stressed response to an ongoing emergency,<sup>201</sup> presumably in many cases a medical emergency. *Bryant* made this point explicit—emphasizing that physical injury plays a significant role in evaluating the testimonial status of statements.<sup>202</sup>

The reader might notice that the results in Figure 3 vary depending on how an injury is defined. When one includes not only shootings, stabbings, and other injuries requiring medical attention, but also kicks and punches, the results are weaker. Figure 4 explores the result further, showing the results by type of injury.

**Figure 4.**  
**FREQUENCY OF TESTIMONIAL STATEMENTS BY INJURY SEVERITY**



“No Injured Party” refers to situations in which no party to the events was injured in any way. “Slightly Injured Party” refers to situations in which the injury was coded as 0.5 under Specification B—in other words, where physical harm occurred but it was not a shooting or stabbing. “Severely Injured Party” refers to situations where the injury was coded as 1 under Specification B—a shooting or stabbing.

---

201. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

202. *Michigan v. Bryant*, 131 S. Ct. 1143, 1161-62 (2011).

*Crawford* provides some reason to view different injuries differently. If the police see a victim with a black eye, they might respond more calmly and with greater investigatory emphasis than if they had found a victim with a gunshot wound. Statements made under those circumstances look more like substitutes for live testimony produced through the kind of *ex parte* examinations that troubled the Framers and the *Crawford* Court.

The results in Figure 4 suggest something different—when there is a slight injury, statements are more likely to be held to be testimonial than when there is no injury at all. This seemingly odd result is plausibly explained by the role of state action. Statements made around a slight injury are more likely to be made to state actors than statements made when there is no injury.<sup>203</sup> The role of state action may be overwhelming the effect of an injured party. To more fully disentangle the relative effects of state action and injury requires something more than description. To control for state action and injury—to fully evaluate the interaction of all the variables at play—I employed logistic regression.

### C. Stepwise Logistic Regression Analysis

Regression analysis is a method for sorting and analyzing data.<sup>204</sup> The researcher assumes that a very general form of relationship exists between variables and attempts to estimate the parameters in that relationship. For example, a researcher might believe that an individual's salary depends on her level of education, gender, and height. Regression analysis allows the researcher to estimate, from a set of data about individuals' salaries, education levels, genders, and heights, how a change in one independent variable will affect salary.

Logistic regression is a particular type of regression.<sup>205</sup> Logistic regression is useful when the researcher hopes to explain the relationship between several

---

203. Out of 60 statements made near a slightly injured party, 37 (or about 62%) were made to state actors. Out of 176 statements made with no injured party nearby, 84 (or about 48%) were made to state actors. This comparison excludes statements made to 911 operators.

204. See DAVID R. ANDERSON ET AL., *STATISTICS FOR BUSINESS AND ECONOMICS* 562 (11th ed. 2010) (“[R]egression analysis can be used to develop an equation showing how [two or more] variables are related.” (emphasis omitted)); Ewout W. Steyerberg et al., *Stepwise Selection in Small Data Sets: A Simulation Study of Bias in Logistic Regression Analysis*, 52 J. CLINICAL EPIDEMIOLOGY 935, 935 (1999) (“Multivariable regression analysis is a valuable technique to quantify the relation between two or more covariables and an outcome variable.”).

205. For an explanation of how logistic regression differs from linear regression, see generally FRED C. PAMPEL, *LOGISTIC REGRESSION: A PRIMER* ch. 1 (2000).

explanatory variables and a *binary* dependent variable.<sup>206</sup> A binary variable is one that takes only two states. Whether someone has completed high school, for example, is a binary variable. A person either completes or does not complete high school. There is no third option. I employed logistic regression because the dependent variable in my analysis—whether a statement is found to be testimonial—takes only two values.

Stepwise regression adds a final nuance to regression analysis. Imagine a scenario where a researcher is addressing a new problem without background knowledge. For example, the researcher has collected a great deal of data about death penalty defendants and wishes to know which of several hundred characteristics affect the probability of an execution. The researcher may not have enough data to run a useful regression analysis with all the variables. Stepwise regression takes several iterative steps that narrow down the set of variables to those explanatory variables which have a statistically significant relationship with the dependent variable. There are several different methods of stepwise regression. Some methods select variables into the final specification. These methods, known as forward selection, add variables to the specification in descending order of significance. The selection process ends when all statistically significant variables have been added. Other methods select variables out of the specification until all statistically insignificant variables have been eliminated. Stepwise regression thus helps avoid sample size problems by reducing the number of independent variables in the final regression specification. With fewer variables, fewer observations are required to have confidence in the resulting estimates.<sup>207</sup> Stepwise regression has been used frequently in empirical legal scholarship. Without using stepwise regression, the sample size here would be relatively small. There would be

---

206. See NEUENDORF, *supra* note 194, at 169, 170-71 box 8.1.

207. The general rule for logistic regression analysis is that one wants ten or more events per variable. See, e.g., Peter Peduzzi et al., *A Simulation of the Number of Events per Variable in Logistic Regression Analysis*, 49 J. CLINICAL EPIDEMIOLOGY 1373, 1373 (1996) (recommending at least ten events per variable); Chao-Ying Joanne Peng et al., *An Introduction to Logistic Regression Analysis and Reporting*, 96 J. EDUC. RES. 3, 10 (2002) (same). Events are defined as the less likely dependent variable category. In my sample, eighty-one statements were held to be testimonial—fewer than were held to be nontestimonial. With 10 variables, I had 8.1 events per variable—less than ideal, but not fatal or even severely damaging to the results. See Eric Vittinghoff & Charles E. McCulloch, *Relaxing the Rule of Ten Events per Variable in Logistic and Cox Regression*, 165 AM. J. EPIDEMIOLOGY 710, 717 (2007) (“[S]ystematic discounting of results, in particular statistically significant associations, from any model with 5-9 EPV [events per variable] does not appear to be justified.”). To the extent that low sample size matters, it increases the variance of the estimated coefficients and makes a Type II error more probable. *Id.* The danger of low sample size is usually a false negative and not a false positive.

fewer than five events per variable—i.e., fewer than five occurrences of a statement being found testimonial for each independent variable. A sample that small would dramatically reduce confidence in the results. Stepwise regression eliminated statistically insignificant variables, resulting in more events per variable—more occurrences of a testimonial statement for each independent variable—in the final regression specification, thus allowing me to more accurately estimate the true relationship between the variables.

Table 4 presents the results of the regression analysis. I did not include in the regression analysis statements contained in forensic laboratory analyses for the same reasons that I excluded those statements from the descriptive statistics. The stepwise regression process eliminated several additional variables that were not statistically significant.<sup>208</sup> The middle column is the most important.<sup>209</sup> It shows how a change in the associated variable changes the probability that a statement will be found to be testimonial by the court, holding other variables constant. For example, other factors equal, the fact that a statement is made to a police officer makes it about 75% (between 60% and 89%, with 95% confidence) more probable that the statement will be found to be testimonial. Similarly, other factors equal, the fact that a statement is made while one of the parties is injured decreases the probability that it will be found to be testimonial by about 18% (between 8% and 28%, with 95% confidence).

---

<sup>208</sup>. The nonsignificant variables are those for the following: statement made before the crime, opinion in a habeas petition, statement was a present sense impression, statement was a dying declaration, statement was made by the crime victim, and statement was made in a government building. I excluded all forensic analyses from the sample, so this variable could not be significant.

<sup>209</sup>. The right-hand column shows how a change in each independent variable changes the natural logarithm of the event that a statement is held to be testimonial (the dependent variable). This effect is constant, regardless of the values of other independent variables, whereas the percentage values in the middle column have a clearer practical meaning but can vary depending on the values of different independent variables.

**Table 4.**  
REGRESSION RESULTS

| VARIABLE   | CHANGE IN PROBABILITY THAT A STATEMENT IS FOUND TESTIMONIAL | LOGGED ODDS COEFFICIENT |
|--|---|-------------------------|
| Recipient is a nonpolice government official ***       | +82.3%<br>(0.051)   | 5.258<br>(1.315)        |
| Recipient is a police officer ***                      | +75.1%<br>(0.074)   | 4.711<br>(0.814)        |
| Statement is made during abuse counseling ***          | +65.8%<br>(0.175)   | 3.158<br>(1.233)        |
| Statement is made during a 911 call **                 | +40.7%<br>(0.191)   | 1.980<br>(0.874)        |
| Recipient of the statement is a health professional ** | +39.7%<br>(0.214)   | 1.881<br>(0.938)        |
| Statement is audio- or video-recorded                  | +26.2%<br>(0.160)   | 1.434<br>(0.797)        |
| Statement is made during the commission of the offense | -13.9%<br>(0.058)   | -1.272<br>(0.744)       |
| Statement is made while a party is injured ***         | -18.2%<br>(0.051)   | -1.437<br>(0.443)       |
| Statement is an excited utterance ***                  | -21.1%<br>(0.055)   | -1.628<br>(0.433)       |
| Statement is a business or government record ***       | -21.2%<br>(0.043)   | -3.874<br>(1.390)       |

This table presents the results from a stepwise logistic regression. Three variable selection processes—stepwise regression, forward elimination, and backward elimination—all yielded the same set of variables, which had a statistically significant correlation with a statement being found testimonial at the .15 level or better. Standard errors for each term are in parentheses below the term. All listed variables are statistically significant at the .10 level. Variables with \*\* are significant at the .05 level and variables with \*\*\* are significant at the .01 level.

What conclusions can we draw from the regression results? First, state action matters. A lot. A given statement is almost twice as likely to be found to be testimonial, all else equal, when it is made to a state actor. The fact that the recipient of a statement is either a police officer or a nonpolice government official (for example, a fire marshal, prosecutor, or judge) substantially increases the likelihood that a court will find that statement to be testimonial. This is consistent with the descriptive statistics in Section II.B. It is also consistent with the scholars and lower courts who have emphasized the



Confrontation Clause as a protection against abuses of state power.<sup>210</sup> It is even consistent with the subtext of *Crawford* and the history of confrontation abuses in England.<sup>211</sup> State action, however, has only been explicitly emphasized by the Court in *Bryant*.<sup>212</sup> And even *Bryant* only made a comparative statement of priority; it did not state that the Confrontation Clause is exclusively or nearly exclusively concerned with statements made to state actors.

*State v. Parker*, a case decided by Tennessee's Court of Criminal Appeals, demonstrates the important role of state action in Confrontation Clause cases.<sup>213</sup> There, the victim of a home invasion was sexually assaulted and fled to her neighbor's house.<sup>214</sup> She recounted her attack to her neighbor, who dialed 911.<sup>215</sup> The police arrived several minutes later and questioned the victim, whose statements were "parallel[]" to those she had initially made to her neighbor.<sup>216</sup> Hours later, the victim told a nurse at the hospital that her son's friend had attacked her.<sup>217</sup> The *Parker* court, after reciting an eight-factor test for testimonial statements, concisely noted that "[s]tatements describing past events to law enforcement officers are testimonial" except "when [those] statements . . . are meant to assist the officers in meeting an ongoing emergency."<sup>218</sup> On that basis, the court held that the victim's statements to her neighbor, a nonstate actor, were nontestimonial while nearly identical statements made by the same victim minutes later were testimonial because they were made in response to police questioning.<sup>219</sup>

Second, some of the results are quite consistent with *Davis*'s emphasis on emergency response. For example, statements made during a crime—in the midst of an emergency with uncertain outcomes—are slightly less likely to be found to be testimonial. The same is true of statements held to be excited utterances and those made while a party is injured.

---

210. See *infra* Section III.B.

211. *Id.*

212. *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) ("[T]he most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.").

213. No. E2008-02541-CCA-R3-CD, 2010 WL 3706090 (Tenn. Crim. App. Sept. 22, 2010), *aff'd in relevant part*, 350 S.W.3d 883 (Tenn. 2011).

214. *Id.* at \*1-2.

215. *Id.*

216. *Id.* at \*2, \*16.

217. *Id.* at \*5.

218. *Id.* at \*15.

219. *Id.* at \*15-18.

Several results are more ambiguous. For example, statements made during 911 calls are forty percent more likely to be testimonial. This makes some sense, because 911 operators are state agents, although they are not police officers.<sup>220</sup> Without controlling for other factors, 911 operators confront courts with conflicting indicators. They are state actors, yet they act, almost by definition, during emergencies. Regression isolates the effect of a 911 operator, independent of the emergency during which the operator acts. The data suggest that courts recognize 911 operators as state actors. This fact can be hidden because so many 911 calls occur during medical emergencies, but when one controls for that effect, the emphasis that courts place on state action becomes clear.<sup>221</sup>

The results for health professionals are also somewhat ambiguous. The abuse-counseling results seem to fit the state-action theory. Courts are often critical of social workers' interviews of children because they view these interviews as means to collect evidence,<sup>222</sup> and because the interviews sometimes occur at the instigation of the police. That skepticism might also partly explain the result for other health professionals. Health professionals include not only EMTs and doctors but also SANE nurses. As explained above, these professionals draw greater scrutiny from courts.<sup>223</sup>

*State v. Steele*, decided by the Ohio Court of Appeals, illustrates the complex interplay of medical emergencies, police interrogations, and discussions with health professionals.<sup>224</sup> Police arrived at the apartment of Virginia Austin to find her lying on the ground, partially disrobed and crying.<sup>225</sup> She had also been struck on the head.<sup>226</sup> Austin told the officers that that she had been assaulted.<sup>227</sup> The police called an ambulance, and Austin told the arriving EMT

---

220. See *Davis v. Washington*, 547 U.S. 813, 823 n.2 (2006) (noting that 911 operators are agents of law enforcement when they are questioning 911 callers).

221. See, e.g., *State v. Camarena*, 176 P.3d 380, 387-88 (Or. 2008) (holding that the first half of a 911 call was nontestimonial but the second half of the call was testimonial because the questions and responses "were directed at establishing facts only relevant to a subsequent criminal action").

222. See, e.g., *State v. Bentley*, 739 N.W.2d 296 (Iowa 2007) (describing in detail how interviews by the Child Protection Center are testimonial because they are formal and intertwined with the evidence-gathering functions of the police).

223. See *supra* note 200 and accompanying text.

224. No. 91571, 2009 WL 2894472 (Ohio Ct. App. Sept. 10, 2009).

225. *Id.* at \*1.

226. *Id.*

227. *Id.*

that she had been attacked<sup>228</sup> and repeated that statement to the police.<sup>229</sup> Finally, Austin gave a more detailed report to police at the hospital.<sup>230</sup> The court applied the “primary purpose” test to hold that Austin’s initial statement to the police was nontestimonial; there was an ongoing emergency when she first spoke.<sup>231</sup> Her subsequent statements to police, however, were made after the medical emergency had passed and were therefore testimonial.<sup>232</sup> Although Austin’s statement to the EMT was nearly contemporaneous with her second statement to the police, the court applied the “objective witness” test to the nonpolice EMT and thus held that statement to be nontestimonial.<sup>233</sup>

To summarize, the regression results show that two considerations matter—and in a specific, ordered way. First, statements made to nonstate actors are almost never testimonial statements. If a statement is not made to a police officer, government official, 911 operator, or mandatory reporter (such as a doctor or SANE nurse), the Confrontation Clause usually does not apply.

Second, assuming the statement is made to a state actor, courts consider factors showing an emergency. The greater the indication of a medical or public safety emergency, the more likely courts are to find a statement to be nontestimonial. Those two factors—a state actor and the presence of an emergency—do not perfectly predict every case outcome. But they explain most outcomes.

#### *D. Limitations of the Data*

Like all regression analysis and content analysis of judicial opinions, my data are subject to limitations. As explained above, using stepwise regression eased sample-size problems, but the sample size was still less than ideal.<sup>234</sup> A related concern, multicollinearity of the independent variables, was not a problem.<sup>235</sup> Multicollinearity refers to high correlation among independent variables. As an example, multicollinearity might confound a researcher

---

228. *Id.*

229. *Id.*

230. *Id.* at \*2.

231. *Id.* at \*4.

232. *Id.* at \*5, \*7.

233. *Id.* at \*5-6.

234. *See supra* note 207.

235. *See* ARTHUR S. GOLDBERGER, A COURSE IN ECONOMETRICS 248-51 (1991) (noting that the consequences of a small sample size are exactly as serious and have the same effect—increased variance of the parameter estimates—as multicollinearity).

attempting to estimate the effects of GPA and LSAT scores on law school admissions. Because higher LSAT scores and higher GPAs may frequently occur together, teasing out the effect of a change in one factor or the other could be difficult. The effect of multicollinearity is the same as the effect of a small sample size: it reduces the statistical significance of the regression coefficients for a given sample size and specification.<sup>236</sup> Both multicollinearity and small-sample-size problems do not bias the results in one direction or another. Rather, their effects are to reduce the confidence a researcher can have in her estimates. No variable here had a variance inflation factor (VIF) greater than three, while multicollinearity is usually a problem only with VIF scores of greater than ten.<sup>237</sup>

Sample-selection bias is also unlikely to be a problem. Sample-selection bias occurs when the sampling procedures yield a sample that is not representative of the population being analyzed.<sup>238</sup> In this case, the population is lower-court decisions in Confrontation Clause cases. The only criterion for selection was citing *Davis*. I chose *Davis* rather than *Crawford* for two reasons. First, *Davis* was decided two years after *Crawford*. Thus, lower courts had had time to adjust to the Supreme Court's new Confrontation Clause framework. Second, *Davis* helped resolve some common but ambiguous fact patterns (911 calls and excited utterances), but it also heightened important ambiguities in the *Crawford* line.<sup>239</sup> Because *Davis*, unlike *Crawford*, dealt with domestic violence and 911 calls, it is possible that domestic violence cases could be overrepresented in the sample because courts would be less likely to cite *Davis* in other types of cases. This possibility seems unlikely (but not completely improbable). In my experience reading cases and developing the coding mechanisms, most courts seriously considering Confrontation Clause cases cite both *Davis* and *Crawford*. There is one small possibility of selection bias, stemming from the difference between the sampling unit and the unit of analysis. While I sampled cases, I analyzed statements. Thus, statements from cases where the court evaluated several statements would be slightly underrepresented. This would only matter if statements contained in cases

---

236. *Id.* at 248-52.

237. See Robert M. O'Brien, *A Caution Regarding Rules of Thumb for Variance Inflation Factors*, 41 *QUALITY & QUANTITY* 673, 674 & n.2 (2007) ("Not uncommonly a VIF of 10 or even one as low as 4 . . . have been used as rules of thumb to indicate excessive or serious multicollinearity."); see also JAMES P. STEVENS, *INTERMEDIATE STATISTICS: A MODERN APPROACH* 235 (3d ed. 2007) (discussing the rule of ten for VIF).

238. See James J. Heckman, *Sample Selection Bias as a Specification Error*, 47 *ECONOMETRICA* 153, 153 (1979) (modeling sample selection bias).

239. See *supra* Section I.C.

with multiple statements systematically differed from other statements. I do not believe there is any particular reason that would be true.

A more substantial concern is coding reliability. The coding rules are explained in Appendix A. These rules are generally objective. For example, a court says a statement is either testimonial or is not testimonial—if the court does not give any indication on that issue, then the case was excluded. Similarly, a statement was or was not made during a 911 call. At the same time, I did have to make a few judgment calls during the coding process.<sup>240</sup> The only variable that raised a concern of consistently requiring subjective evaluation was the “injured party” variable. This variable was too important to drop, so I developed an alternative and more objective coding method. Instead of judging whether an injury was medically serious, the alternative coding treated stabbings and shootings one way, and other physical injuries another way. Although reliable and consistent coding is important, some inconsistency or uncertainty is not fatal. For example, seventy-five to eighty percent agreement between coders is generally considered acceptable in content analyses.<sup>241</sup> After I completed my analysis, several students, unfamiliar with my coding or results, recoded a sample of the cases. Their results indicated that the initial coding is relatively reliable. The details and results of this reliability check are explained in Appendix B.

A final troubling problem is endogeneity. Endogeneity could refer to one of two problems. First, reverse causality could occur if an independent variable not only causes a dependent variable (for example, a 911 call causes an increased probability that the statement will be found to be testimonial) but is also caused by the dependent variable. That is unlikely here for the simple reason of time. The properties of a statement occur first, and the statement is classified as testimonial later by a reviewing court. That review cannot change the prior events. A second form of endogeneity, omitted-variable bias, is more troubling. There is no test for omitted-variable bias. While I have attempted to test for the factors reflected in the *Crawford*-line decisions, it is possible that other facts about each case—the characteristics of the offender and victim, the heinousness of the charged crime, and the strength of other evidence—have a role to play. It is quite difficult to code for some of these variables. To the extent that one has a coherent theory about why they would matter, evaluating their effects is a project for future researchers.

---

240. For a particularly frustrating case requiring that I determine how to code a veterinarian, see *Holz v. State*, No. 06-09-00172-CR, 2010 WL 1041068 (Tex. Crim. App. Mar. 23, 2010).

241. See NEUENDORF, *supra* note 194, at 143.

### III. ANALYSIS

This Part offers a normative take on the data presented in Part II. I offer two primary arguments. First, critics have exaggerated the incoherence of *Crawford* in the lower courts. Even if the Court has failed to clarify its doctrine, lower courts have responded admirably, bringing consistency to Confrontation Clause doctrine. Second, lower courts have been not only consistent but also correct in how they have approached the Confrontation Clause. By focusing on the state's investigatory power, lower courts have captured not only the concerns that animated the adoption of the Clause, but also the deep concerns of *Crawford* itself.

#### A. *The Confrontation Clause, Consistently*

*Crawford* and its progeny have a problem of doctrinal vagueness. Part I explained how certain statements might or might not be testimonial depending on the definition applied by the courts. Scholars have argued the same point.<sup>242</sup> Courts have emphasized those concerns as well.<sup>243</sup> The result, according to critics, is that lower courts are left unable to make heads or tails of the Confrontation Clause.<sup>244</sup> This problem is exacerbated, according to a much smaller group of scholars, by the politically motivated desires of some courts to seize on any excuse for diminishing the scope of the Confrontation Clause.<sup>245</sup>

The results presented in this Note suggest that problems with *Crawford*'s

---

242. See sources cited *supra* notes 11-18, 25; see also Isley Markman, *The Admission of Hearsay Testimony Under the Doctrine of Forfeiture-by-Wrongdoing in Domestic Violence Cases: Advice for Prosecutors and Courts*, CRIM. L. BRIEF, Spring 2011, at 9 (“The *Crawford* decision failed to provide a clear definition of ‘testimonial.’”).

243. See *United States v. Brito*, 427 F.3d 53, 55 (1st Cir. 2005) (“*Crawford* . . . produced a miasma of uncertainty.”).

244. See *Fowler v. State*, 809 N.E.2d 960, 966 (Ind. Ct. App. 2004) (Crone, J., concurring in the result) (noting that “fallout from Justice Scalia’s ‘clarification’ of the Confrontation Clause in *Crawford* will reverberate through the evidentiary landscape for some time to come and will create countless dilemmas for trial and appellate courts”), *vacated*, 829 N.E.2d 459 (Ind. 2005); Markman, *supra* note 242, at 12 (“[Lower] courts read the vague *Davis* standard to admit a significant amount of hearsay evidence as non-testimonial and therefore as unaffected by *Crawford*.”).

245. See Cicchini, *supra* note 7, at 1320 (noting that “lower courts continued to abuse their discretion” in the wake of *Davis*); Cicchini, *supra* note 12, at 754-55 (arguing for a “bright-line” Confrontation Clause test as the “only viable solution to the problem of judicial manipulation” by judges who do not “honestly attempt to uphold the Constitution”); Ross, *supra* note 25, at 449-57 (describing how lower courts “strain[] the leash” by pushing the limits of ambiguous Confrontation Clause doctrine).

vagueness, coherence, and consistent applicability have been exaggerated. The evidence presented in Part II indicates that lower courts effectively engage<sup>246</sup> in a bifurcated analysis. The first step is relatively clear. Courts ask whether the recipient of a challenged statement was a state actor. If the answer is no, then the Confrontation Clause is almost never relevant. If the answer is yes, and the recipient is a state actor, then step two applies. In step two, lower courts consider the circumstances surrounding the challenged statement. The most important circumstance appears to be the existence of an emergency, especially a medical emergency, a result entirely consistent with *Davis*. The objective factors present in any case thus have significant predictive power. Knowing whether a statement is made to a police officer or a friend<sup>247</sup> or whether a nearby party is injured<sup>248</sup> tells us a lot about how a court will classify that statement. If *Crawford* were truly the mess that critics claim,<sup>249</sup> no factors should have much success in predicting case outcomes.

Critics might respond that there is another way to read my results. We can predict a great deal just from the involvement of a state actor and a medical emergency, but we cannot predict everything. Or nearly everything. And if many cases are unexplained by the data, doesn't that mean *Crawford* is doctrinally problematic?

I think this response demands too much. Judges are not computers, and judging is not computing. *Crawford* challenges involve guessing about subjective motivation (why did the police officer ask a question?), grading the seriousness of a problem (just how bad was the victim's injury?), and assessing the objective risk to a community. Since subjective assessment cannot be quantitatively measured, one cannot use it to statistically predict case outcomes. But that sort of uncertainty is not unfair to litigants. Litigants need

---

246. I say "effectively engage" because most courts are not following these steps explicitly. Rather, courts are resolving Confrontation Clause challenges as if they had followed this process. An analogy from welfare economics might be familiar to some readers. Economists generally recognize that consumers do not consciously think about maximizing utility when they make consumption choices, but they may nonetheless behave as though they were rational utility-maximizers. WALTER NICHOLSON & CHRISTOPHER SNYDER, MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS 92 (8th ed. 2002) ("[T]he utility-maximization model predicts many aspects of behavior even though no one carries around a computer with his or her utility function programmed into it. To be precise, economists assume that people behave *as if* they made such calculations . . .").

247. See *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (contrasting testimonial, formal statements to government officials with nontestimonial, casual remarks to a friend).

248. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1160-62 (2011) (describing the role of injury in determining whether a statement is testimonial).

249. See *supra* notes 242-245.

to know what questions the court will ask and what evidence is relevant. The results in Part II provide litigants with good answers to those questions. They should argue about the role of a state actor in procuring a statement and the existence of a medical emergency.

I do not deny that outliers exist. In a few cases, courts probably got it wrong.<sup>250</sup> But a focus on selected individual cases can obscure the important large-scale patterns.<sup>251</sup> Lower courts sometimes flout the Supreme Court's stated doctrine, but practitioners and scholars should be concerned with the grand run of cases rather than curious outliers.<sup>252</sup> When one considers that larger population of Confrontation Clause cases, the results are more encouraging. Critics overstate the issue when they call the state of affairs "arbitrary"<sup>253</sup> or "confusing."<sup>254</sup>

*B. Lower-Court Decisions and the Meaning of Confrontation*

Accepting my results, a different set of critics might respond that if lower courts have converged, they have converged at the wrong site. Lower courts may have adopted a common framework for Confrontation Clause challenges, but this framework is wrong—either as a matter of history or when measured against *Crawford*'s reasoning.

As explained above,<sup>255</sup> courts applying *Crawford* look first for the presence of a state actor, and second for the presence of a medical emergency in deciding whether a statement is testimonial. In other words, the Confrontation Clause

---

250. See, e.g., *People v. Blacksher*, 259 P.3d 370, 410-11 (Cal. 2011) (holding that a statement "made while [the declarant] was in a police car, in the presence of a city mental health worker, and with multiple officers nearby" was nontestimonial); *Crawford v. Commonwealth*, 686 S.E.2d 557, 567-69 (Va. Ct. App. 2009) (holding that a civil protective order affidavit was nontestimonial); Ross, *supra* note 25, at 443-49 (citing cases where courts have selectively emphasized statements in *Crawford* and *Davis* to minimize Confrontation Clause protections).

251. Levine, *supra* note 190, at 300 (arguing that although theories from a "small series of cases" can be "thought-provoking," they rarely provide a "robust explanation of how the law works").

252. See Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 813-15 (1999) (arguing that empirical research allows scholars to "better maintain neutrality," leading to more accurate descriptions of the legal system and sounder normative theories); cf. Hall & Wright, *supra* note 193, at 79-80 (explaining how the approach of systematically reading a representative sample of cases differs from the conventional "leading case" approach).

253. Raeder, *supra* note 16, at 775-76.

254. Etter, *supra* note 13, at 1168.

255. See *supra* Section III.A.



applies most stringently to statements made to state actors acting in their investigative capacity. It applies less stringently to state actors acting in their emergency-response or public-safety capacity, and rarely to nonstate actors.

This theory already has scholarly support.<sup>256</sup> Proponents argue that without confrontation, state actors can manipulate evidence in both production and presentation to obtain a politically motivated or otherwise false conviction.<sup>257</sup> This theory also has a historical foundation: the concern of the Framers with the abuses of inquisitorial-style prosecutions in England, such as the Star Chamber and the trial of Raleigh.<sup>258</sup> Moreover, this interpretation is textually plausible. The Confrontation Clause is situated among other constitutional protections that can be read, as a whole, to form a bulwark against government abuses.<sup>259</sup> And the Clause applies only to criminal trials as a protection for the accused, not for the government.<sup>260</sup>

This theory reflects the underlying principles of *Crawford*. The *Crawford* majority extensively detailed the history of English abuses and the early American concern with the civil ex parte mode of examination.<sup>261</sup> And, “[i]t is only after this discussion that the Court set forth its three formulations of testimonial hearsay.”<sup>262</sup> *Crawford*’s three definitions and *Davis*’s definitions thus play a distinctly secondary role in how we should properly read the decision. They are illuminative or exemplary. They should be read through the lens of the history. The definitions “should [be] construe[d] [as] three formulations . . . directed at the same concern: preventing the government from using hearsay statements at trial if the statements were obtained through a method that resembles a civil-law mode of interrogation.”<sup>263</sup>

---

256. See Berger, *supra* note 69; see also Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1048 (1998) (“[T]he Constitution is mainly addressed to *state* action . . . . The Sixth Amendment is triggered when [a defendant] is ‘accused’ by the state . . .”).

257. Berger, *supra* note 69, at 586 (“Confrontation was part of an arsenal designed . . . to restrain the government in criminal trials from acting in a covert, repugnant manner that would be concealed from the people.”).

258. *Id.* at 568-81 (describing the English antecedents and roots of the Confrontation Clause and the way that history influenced the Framers).

259. *Id.* at 560-63.

260. U.S. CONST. amend. VI.

261. See *Crawford v. Washington*, 541 U.S. 36, 43-56 (2004).

262. *United States v. Brito*, 427 F.3d 53, 68 (1st Cir. 2005) (Howard, J., concurring in part and concurring in the judgment) (citing *Crawford*, 541 U.S. at 51-52).

263. *Id.*; see also *People v. Hurtado*, No. Fo47195, 2006 WL 1364999, at \*4-5 (Cal. Ct. App. May 19, 2006) (stating that *Crawford*’s three definitions should be read not as distinct but as sharing a common goal to exclude civil ex parte examinations).

Scholars, and sometimes courts, have a tendency to overread *Crawford*'s definitions. For example, if one adopts the "objective witness" definition, it is natural to view almost every interaction between private citizens and law enforcement as testimonial. After all, anything a person says to the police that is uncoerced can potentially end up in court.<sup>264</sup> For this reason, defense attorneys often advise clients to say nothing to the police. And one would therefore think that every statement to the police would, objectively, be expected to be used in a criminal trial. However, if one reads the "objective witness" definition purposively, with the purpose being the exclusion of ex parte examinations, then lower-court decisions make more sense. All statements to police officers might end up in court. But not all statements to police officers are ex parte examinations.

A person not speaking to a state actor is almost never participating in anything like a civil ex parte examination. Thus the distinct role of state action in lower-court decisions. Moreover, a police officer who arrives at the scene of an emergency and tends to a wounded victim has little resemblance to an interrogator. By contrast, SANE nurses are trained to collect evidence and assess sexual assault. Their structured questioning has much more in common with the ex parte examinations that concerned the Framers than does the conduct of a police officer who arrives along with the ambulance. Lower courts, by excluding testimony from SANE nurses, or by excluding post-*Miranda* statements but including statements to first-responding police, are hewing closely to *Crawford*'s contours.

Scholars often want *Crawford* to stand for a favored principle—a generically strong Confrontation Clause,<sup>265</sup> the need for evidence to be reliable,<sup>266</sup> or a repudiation of judicial discretion in confrontation decisions<sup>267</sup>—without allowing the decision to stand on its own terms. The Court was not trying to compromise competing interests or gesture nebulously in the direction of robust or weak confrontation rights. *Crawford* provided a specific protection to defendants to confront, live and in court, accusers who make testimonial statements against them. Defendants can ask for no more, and the government can provide no less. This may or may not provide more protection on the whole than the pre-*Crawford* regime. But it is a mistake to attack lower courts

---

264. See *Miranda v. Arizona*, 384 U.S. 436, 469 (1966) (“[A]nything said can and will be used against the individual in court.”).

265. See, e.g., Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 273-74 (2005).

266. See, e.g., Josephine Ross, *What’s Reliability Got To Do with the Confrontation Clause After Crawford?*, 14 WIDENER L. REV. 383, 384-85, 403-05 (2009).

267. See, e.g., Cicchini, *supra* note 7, at 1316-20.

for failing to provide defendants with robust protection. The courts are, by and large, providing defendants exactly the protection the Constitution requires.<sup>268</sup>

## CONCLUSION

This Note is one of the first attempts to understand empirically how lower courts have applied *Crawford*. The *Crawford* line of cases made a clear doctrinal break with *Roberts*. Post-*Crawford* doctrine, however, has not been terribly clear. Indeed, the doctrine has appeared contradictory at times. Lower courts could theoretically achieve different outcomes by stressing different elements of the doctrine. Scholars have cited these facts to argue that lower courts can effectively ignore *Crawford* and pursue their own policy preferences. Moreover, even lower courts that act in good faith and try to comply with *Crawford* can still issue inconsistent outcomes.

This Note investigated the lower courts empirically. I presented data showing that lower-court decisions are not random or arbitrary, as *Crawford*'s critics would suggest. Instead, two factors—whether a statement is made to a state actor and whether a statement is made during a medical emergency—undergird the actions of lower courts. Not every lower-court decision can be predicted entirely by absolutely objective variables. But the grand run of lower-court Confrontation Clause decisions is far from arbitrary or unpredictable.

Finally, I argued that lower courts are not only deciding Confrontation Clause challenges consistently, but they are also doing so in a manner that squares with the text and history of the Confrontation Clause, and with the *Crawford* Court's theory of that Clause. Lower courts are regulating the state's coercive power, and they are doing so in those circumstances in which *Crawford* calls for them to do so.

---

268. Cf. *Crawford v. Washington*, 541 U.S. 36, 61, 67 (2004) (“[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.”). I quote Justice Scalia's point extensively because it is a fitting and decisively less pro-defense statement than scholars assume. When lower courts admit evidence that scholars perceive to be unreliable, they often argue that these courts are circumventing *Crawford*. But Justice Scalia's language shows the flaw in this reasoning. The Clause prevents the government from introducing testimonial statements without allowing cross-examination, but it also provides defendants with no guarantees that they will be able to cross-examine declarants whose statements were made in nontestimonial circumstances. This is true even when those statements are probably unreliable.

**APPENDIX A: CODING**

**Table 5.**  
**CODING**

| VARIABLE                 | CODED 1 IF . . .  | CODED 0 IF . . .  |
|--------------------------|---|---|
| Irrelevant               | (1) The opinion did not address the Confrontation Clause, (2) the opinion was a nonbinding magistrate judge recommendation, or (3) the opinion did not rule on or offer an opinion on a Confrontation Clause challenge. | The opinion evaluated a Confrontation Clause challenge, including if the opinion stated how the court viewed the matter but ruled primarily on harmless error or another procedural question. |
| Testimonial              | The statement was held by the court to be testimonial, including if the court said the statement was likely testimonial but did not resolve the issue with certainty.   | Otherwise.  |
| During                   | The statement was made during commission of the charged crimes, or immediately after the crimes were completed.   | Otherwise, including statements made between overt acts of a conspiracy.  |
| Before                   | The statement was made before the commission of any of the charged crimes.  | Otherwise.  |
| 911                      | The statement was made during a 911 call or was a Computer-Aided Dispatch report of a 911 call.   | Otherwise, including if (1) the statement was a classification of a 911 call by a 911 operator or (2) the statement was a report of a 911 dispatcher to a police officer.                     |
| Police Station/Court     | The statement was made at (1) a police station, (2) a courthouse, or (3) another government building.   | Otherwise.  |
| Abuse                    | The statement was made at a facility for treatment of sexual abuse or domestic abuse during an interview by a trained professional.   | Otherwise, including if the statement was made at a hospital or other general medical establishment.  |
| Medical                  | The statement was made (1) in a medical record, (2) in medical notes that do not formally qualify as a medical record, or (3) during medical treatment.   | Otherwise.  |
| Recorded                 | The statement was audio- or video-recorded. 911 calls were coded as 1 unless the opinion explicitly indicated to the contrary.  | Otherwise.  |
| Dying Declaration        | The statement was found to be a dying declaration.*   | Otherwise.  |
| Excited Utterance        | The statement was found to be an excited utterance.*  | Otherwise.  |
| Present Sense Impression | The statement was found to be a present sense impression.*  | Otherwise.  |

Table 5 continued.

| VARIABLE                       | CODED 1 IF . . .  | CODED 0 IF . . .  |
|--------------------------------|---|---|
| Government/<br>Business Record | The statement was found to be a government or business record.* Forensic analyses and laboratory reports were coded as 1 unless the opinion explicitly indicated to the contrary.                                     | Otherwise.  |
| Cop                            | The statement was made to a police officer other than a 911 operator or an undercover agent. Certificates of no report and forensic analyses were coded as 1 unless the opinion explicitly indicated to the contrary. | Otherwise, including business or government records not kept with specific police involvement (such as DMV records).  |
| Doctor                         | The statement was made to a health professional including a doctor, nurse, or EMT. If multiple parties were present, the statement was coded as a 1 if a health professional was present.                             | Otherwise, including if the statement was made to a veterinarian or social worker.  |
| Government                     | The statement was made to a government official other than a police officer or 911 operator.  | Otherwise.  |
| Victim Speaking                | The declarant of the statement was the victim of the crimes charged in the case, where the crime charged had a defined victim. Those crimes included murder, assault, battery, robbery, and criminal sexual conduct.  | The declarant of the statement was not the victim of the crimes charged in the case, including crimes that were treated as having no identifiable victim: drug crimes, financial crimes, record-keeping violations, and crimes not resulting in bodily contact with another person. |
| Injured—<br>Specification A    | Declarant or a known nearby party was (1) shot or stabbed, or (2) treated by emergency medical technicians or treated at a hospital for injuries, and those injuries were medically serious.                          | Otherwise, including if a party was injured but not seriously enough to warrant medical treatment. Absent other physical injury, sexual assaults and rapes were coded as 0.   |
| Injured—<br>Specification B    | Declarant or a known nearby party was shot or stabbed. Coded as 0.5 if declarant or a known nearby party was physically battered but not shot or stabbed.   | Otherwise, including in cases of sexual assault or rape without other injury.   |

\* For all hearsay codings, I applied several rules: (1) absent some indication in the opinion, briefing, or lower-court opinions that the court applied an exception, I coded the variables as 0; (2) I coded the variables as 1 if the trial court held the statement to fall within the relevant hearsay exception so long as the reviewing court did not overturn that holding; and (3) I coded closely labeled state equivalents for the same variable (for example, California's Spontaneous Utterances were treated as Excited Utterances).

**APPENDIX B: INTERCODER RELIABILITY**

During the editing process, I checked the reliability of my initial coding of the cases. Approximately eighty statements from the sample, or slightly less than one-third, were recoded by individuals who did not know the original results. I then compared the results of the recoding to my initial coding, using Cohen's Kappa<sup>269</sup> to measure the level of agreement. Cohen's Kappa is one of several measurements designed to account for chance agreement between coders.<sup>270</sup> Accounting for chance is particularly important in this case, because certain fact patterns, such as a dying declaration, occur infrequently. Thus, agreement by chance will be quite common even if coders are guessing (provided that they are guessing with roughly the same distributions of responses).

Table 6 lists values of Cohen's Kappa for each variable. Unfortunately, there is no general agreement about the level of agreement required. Whereas some scholars suggest that only values greater than 0.7 or 0.8 are acceptable, others accept values as low as 0.4.<sup>271</sup>

Variables listed in the left-hand column are identical to those listed in Table 3, but are listed in descending order based on the value of Cohen's Kappa. Values in the right-hand column have been rounded to three digits.

Several conclusions can be drawn from the reliability analysis. First, coding for many of the important variables is fairly reliable. Those variables most important to the analysis—for example, the dependent variable or that a statement is made to a police officer—had high Cohen's Kappa values.

Second, some variables are less reliable, and a few (the temporal variables during and before, and the abuse counseling variable) are downright untrustworthy. Fortunately, the least reliable variables were relatively unimportant to the descriptive analysis of Section II.B. Several more important variables, however, were also less than ideally reliable. In particular, the government actor (nonpolice) and injury variables both had Kappa values less than 0.6. These low values are not fatal to my analysis, but they do make the results a bit more tentative.

---

269. See Jacob Cohen, *A Coefficient of Agreement for Nominal Scales*, 20 *EDUC. & PSYCHOL. MEASUREMENT* 37, 40 (1960) (proposing *K* as a measure of “the proportion of agreement [between two coders of a nominal variable] after chance agreement is removed from consideration”).

270. See NEUENDORF, *supra* note 194, at 150.

271. See *id.* at 143.

**Table 6.**  
VALUES OF COHEN'S KAPPA

| VARIABLE                           | VALUE OF COHEN'S KAPPA |
|------------------------------------|------------------------|
| Present                            | 1                      |
| Dying                              | 1                      |
| Habeas                             | 0.940                  |
| Excited                            | 0.904                  |
| Testimony                          | 0.892                  |
| Victim Speaking                    | 0.847                  |
| Taped                              | 0.824                  |
| Injured, Alternative Specification | 0.794                  |
| 911                                | 0.789                  |
| Forensic                           | 0.749                  |
| Cop                                | 0.747                  |
| Doc                                | 0.707                  |
| Injured                            | 0.588                  |
| Medical                            | 0.586                  |
| Gov                                | 0.475                  |
| Station                            | 0.431                  |
| Before                             | 0.410                  |
| Record                             | 0.304                  |
| During                             | 0.204                  |
| Abuse                              | -0.017                 |

Finally, it is worth noting that the alternative specification of an injury was in fact far more reliable than the initial definition with a Cohen's Kappa value of nearly 0.8, versus a value of 0.6 for the initial definition.

There are also reasons to be somewhat cautious about the reliability analysis itself. First, the recoders had fairly little training. It is possible that some of the disagreements between their recoding and the original coding may be due to misinterpretation of a rule. Second, certain variables occurred relatively infrequently in the data. Thus, the reliability analysis would show chance agreement to be common, and even a low number of disagreements could produce a very low Kappa. This, for example, is the case with the nonpolice government agent variable and the abuse counseling variable.