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Publication Date

2006-07-11

The Revolution Revised: A Guided Tour of Davis v. Washington

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Two years after it revolutionized its interpretation of the Confrontation Clause of the Sixth Amendment in Crawford v. Washington, the Supreme Court returned to look at

some issues spawned by that opinion.¹ In *Davis v. Washington*, the Court reviewed decisions of the Supreme Courts of Indiana and Washington that applied *Crawford* to create categorical exceptions for “investigatory interrogations” and 911 calls.² With Justice Scalia writing again (this time for all but one of his colleagues) the Court revised *Crawford* to reduce its revolutionary impact and tone down its rhetoric.³ In addition, the Court drove a stake through the heart of *Ohio v. Roberts* to make sure it does not rise again to bedevil prosecutors.⁴ This essay begins with the narrow holdings in *Davis*, works its way outward through the implications of *Davis* for issues not decided (including which of the three *Crawford* “formulations” the Court likes), and floats off into outer space with some speculations on the Court’s jurisprudential approach to the right of confrontation.⁵

The facts: Davis

Like its companion case, *Davis* arose from a domestic dispute. Shortly after the assault, the victim dialed 911 and in response to the operator’s query “what’s going on?”, said “[h]e’s here jumping on me again.”⁶ The operator then asked a series of questions that elicited the name of the assailant, the location and method of the assault, and that alcohol played no role in the crime.⁷ The victim then began to describe defendant’s flight (apparently then taking place) when the operator cut her off with a sharp “[s]top talking and answer my questions.”⁸ Though the victim insisted that the defendant was leaving with another person, the operator never asked her to identify this witness.⁹

¹ 2004, 124 Sup.Ct. 1354, 541 U.S. 36, 158 L.Ed.2d 177.

² 2006, 126 Sup.Ct. 2266, 547 U.S. ___, ___ L.Ed.2d ___.

No. 05-5705 reviewed *Hammon v. Indiana*, 2004, 809 N.E.2d 945.

No. 05-5224 reviewed *Davis v. Washington*, 2005, 111 P.3d 844, 154 Wash.2d 291.

³ In *Davis*, Justice Thomas wrote a concurring and dissenting opinion. Chief Justice Rehnquist and Justice O’Conner, who wrote concurring opinions in *Crawford*, were no longer on the Court when *Davis* was decided. How much of the change in *Davis* can be attributed to their replacements, Chief Justice Roberts and Justice Alito is beyond the scope of this paper.

⁴ 1980, 100 S.Ct. 2531, 448 U.S. 56, 65 L.Ed.2d 597, discussed in 30A FPP § 6367, p. 822.

⁵ See the Contents on p. 1, above.

⁶ 2006, 126 Sup.Ct. 2266, 2271, 547 U.S. ___.

⁷ The facts have been arranged in logical order; the questions began with the location, the use of weapons and alcohol and only then asked for the identity of the assailant. 126 Sup.Ct. at 2271, 547 U.S. at ___. At oral argument, Chief Justice Roberts asked the Department of Justice Representatives what these questions had to do with the emergency the prosecutors claimed justified treating the statement as “nontestimonial”, pointing out that the officers did not need to know the perpetrators name to stop him from beating the victim. *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, pp. 52-53.

⁸ 126 Sup.Ct. at 2271, 547 U.S. at ___.

⁹ The police learned that the man’s name was “Mike”, that he had indeed witnessed the beating, but the officers did not pursue the matter---facts that surfaced at oral argument. *Davis v. Washington*, No. 05-

Instead, the operator pressed for more details about the defendant and the facts of the crime.¹⁰ Meanwhile, police officers were cruising the neighborhood trying to spot the defendant's car.¹¹ Four minutes into the call, the officers arrived and took over the investigation.¹²

As is typical in domestic violence cases, the victim told the prosecutors she did not want defendant prosecuted and she did not appear at trial.¹³ Instead, the state presented a so-called "evidence-based prosecution", calling the two police officers to describe declarant's acts, appearance, and demeanor when they arrived in response to her call, and playing (over defense objections) the recording of the 911 call.¹⁴ In argument to the jury, the prosecution characterized the tape as the victim's "testimony."¹⁵

--- Hammon

In what the Department of Justice would later claim was a typical case of spousal abuse¹⁶, police responding to a report of a "domestic disturbance" at the home of defendant and his wife, found the frightened wife alone on the front porch but she insisted that "nothing was the matter."¹⁷ Entering the home with her permission, the police saw evidence of a struggle and found her husband, who insisted that while the couple had been arguing, "everything was fine now"; he denied that the "argument" had included

5224, Oral Argument, March 20, 2006, p. 27 (raised by defendant in arguing against the need for a domestic violence exception to the right of confrontation). When Justice Stevens asked for some explanation, the prosecutor responded that they did not seek the witness because the victim did not know his last name and because as a friend of the defendant he seemed unlikely to be an effective witness for the state. *Id.* at pp. 39-40. See also Brief for Petitioner, *Davis v. Washington*, No. 05-5524, Dec. 22, 2005 2005 WL 3598182, pp. 7-8 (officers testified at trial that the defendant assaulted her after she got into an argument with "Mike" but they had never sought out this witness).

¹⁰ 126 Sup.Ct. at 2271, 547 U.S. at _____. The information included defendant's date of birth and his reasons for being on the premises.

¹¹ Brief for The United States as Amicus Curiae Supporting Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 303911, p. 3.

¹² 126 Sup.Ct. at 2271, 547 U.S. at ____.

¹³ Brief for Petitioner, *Davis v. Washington*, No. 05-5524, Dec. 22, 2005 2005 WL 3598182, p. 7 (during pretrial hearing prosecutor revealed that the victim told the authorities that "she wasn't happy that we were proceeding with this case.")

¹⁴ 126 Sup.Ct. at 2271, 547 U.S. at ____.

For a discussion of the origins and use of "evidence-based" or "victimless" prosecutions, see Raeder, *Remember The Ladies and Children Too: Crawford's impact on Domestic Violence and Child Abuse Cases*, 2005, 71 *Brook.L.Rev.* 311, 327-330.

¹⁵ Brief for Petitioner, *Davis v. Washington*, No. 05-5524, Dec. 22, 2005 2005 WL 3598182, p. 8.

¹⁶ Brief of Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 271825, p. 1.

¹⁷ 126 Sup.Ct. at 2272, 547 U.S. at ____.

any violence.¹⁸ Over the husband's objection, the officers separated the couple "so that we can investigate what happened."¹⁹ Under renewed questioning apart from her husband, the wife accused him of battering her.²⁰ At the request of the officers, she filled out and signed a "battery affidavit" repeating this accusation.

At the defendant-husband's bench trial for domestic battery and probation violation, the victim-wife did not appear despite being served with a subpoena.²¹ Instead, the trial judge admitted her "battery affidavit" under the "present sense impression" exception to the hearsay rule and allowed the police officers to testify to her oral accusations as "excited utterances."²² The judge found the defendant guilty and on appeal the conviction was affirmed by both the Indiana Court of Appeals and the Indiana Supreme Court.²³ The state supreme court found that the wife's oral statements were not "testimonial" under what has been called the doctrine of "investigatory interrogations."²⁴ It found the affidavit "testimonial" but held that its admission was harmless error.

Holdings

After stating the facts and quoting the Confrontation Clause, Justice Scalia begins his majority opinion by affirming the reading of most lower courts that the threshold determination in applying the Crawford interpretation of the right of confrontation to hearsay is whether the declarant's statement is "testimonial."²⁵ He repeats his insistence in Crawford that only "testimonial" hearsay makes the declarant a "witness against" the defendant within the meaning of the Sixth Amendment, once again ignoring

¹⁸ The defendant-husband said the argument "never became physical", which did not square with the destruction seen nor the wife's later statement that the defendant had broken the furniture and shoved her onto the broken glass on the floor. 126 Sup.Ct. at 2272, 547 U.S. at ____.

¹⁹ 126 Sup.Ct. at 2272, 547 U.S. at _____. The defense reply brief cited domestic violence protocols suggesting that the purpose of separating the spouses was to enable the officers to get the wife to make accusations in a form that would be usable at trial. Reply Brief of Petitioner, Hammon v. Indiana, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 11 n. 17.

²⁰ 126 Sup.Ct. at 2272, 547 U.S. at _____. She said "he hit me in the chest and threw me down" and "tore up my van" so she could not leave. She also accused him of attacking her daughter.

²¹ 126 Sup.Ct. at 2272, 547 U.S. at _____. The defendant was on probation for a prior battery conviction. Brief of Petitioner, Hammon v. Indiana, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 3.

²² 126 Sup.Ct. at 2272, 547 U.S. at _____. The trial court's distortion of these two exceptions typifies the conduct of judges in domestic violence and child abuse cases. Apparently Indiana courts have stretched the excited utterance exception because the state did not adopt the "wild card" exception in Evidence Rule 807. Brief of Petitioner, Hammon v. Indiana, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 21.

²³ Hammon v. State, Ind.App.2004, 809 N.E.2d 945 affirmed 2005, 829 N.E.2d 444.

²⁴ See 30A FPP § 6371.2 (Supp.2006).

²⁵ "A critical portion of [the Crawford] holding, and the portion central to resolution of the two cases now before us, is the phrase 'testimonial statements.'" 126 Sup.Ct. at 2273, 547 U.S. at _____. The difficulty that as intelligent a jurist as Justice Alito had grasping this point suggests the artificiality of the Crawford analysis. Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, pp. 7-9.

the history suggesting that word “witness” was intended by the Founders to include “accusers.”²⁶ Perhaps the Court declined the invitation of counsel to rework Crawford in that direction out of a desire to take a more modest approach in order to insure a near-unanimous opinion.²⁷

In any event, Justice Scalia concedes that Crawford offered a smorgasbord of potential definitions of “testimonial” without giving the lower courts any guidance on how to choose among them but justifies this once again on the ground that the Court did not have to choose because “some statements qualify under any definition.”²⁸ Crawford involved one such class of “testimonial” hearsay; namely “[s]tatements taken by police officers in the course of interrogations.”²⁹ This presented a secondary definitional problem, one that the Crawford Court evaded on similar grounds; i.e., the statement at issue in that case qualified “under any conceivable definition” of the word “interrogation.”³⁰ But, Justice Scalia continues, “these cases require us to determine more precisely which police interrogations produce testimony.”³¹ Apparently having learned from the response to Crawford of the dangers of loose rhetoric³², the majority opinion prefaces its holdings with a disclaimer designed to alert lawyers and judges to the limits of those holdings.³³

--- 911 calls³⁴

²⁶ 126 Sup.Ct. at 2273, 547 U.S. at _____. For a sampling of the historical evidence that the Confrontation Clause was meant to apply to “accusers”, see Graham, *Confrontation Stories: Raleigh on The Mayflower*, 2005, 3 Ohio St.J.Crim.L. 209. The defendants in both cases offered variants of an “accusatorial” take on the meaning of “testimonial”---a point to which we will return later in this essay.

²⁷ Since the statements in both cases were “accusations”, the Court would have had to decide both cases the same way rather than bifurcating the baby to placate those who wanted to enlist the Court in the “war on wifebeating.”

²⁸ 126 Sup.Ct. at 2273, 547 U.S. at _____. The Court in Davis also does not choose among the formulations but the opinion does contain some clues as to which remain viable. See p. 19, below.

²⁹ 126 Sup.Ct. at 2273 547 U.S. at ____ (quoting from Crawford, 124 S.Ct. 1364, 541 U.S. at 52).

³⁰ 126 Sup.Ct. at 2273, 547 U.S. at _____, quoting from 124 S.Ct. 1365 n. 4, 541 U.S. at 53 n. 4.

³¹ 126 Sup.Ct. at 2273, 547 U.S. at _____.

³² Professor Friedman began his argument for the defendant in Hammon by inviting the Court to decide the case on narrow grounds. Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, p. 3.

³³ “Without attempting to produce an exhaustive classification of all conceivable statements---or even all conceivable statements in response to police interrogation. . . it suffices to decide the present case to hold. . .” 126 Sup.Ct. at 2273, 547 U.S. at _____. We shall say more about these limitations below.

³⁴ Though in its brief, the state seemed to be asking for categorical treatment of 911 calls akin to that recognized by some state and lower federal courts, see Brief for Respondent, Davis v. Washington, No. 05-5524, Feb. 2, 2006, 2006 WL 284228, p. 9 (“I. Emergency 911 Calls are Not Governed by the Confrontation Clause”), at oral argument, under questioning from Chief Justice Roberts, the state conceded that some 911 calls might be “testimonial.” Davis v. Washington, No. 05-5224, Oral Argument, March 20, 2006, p. 31. As the Davis “holding” suggests, the Court did not adopt a categorical approach.

In what some might read as a suggestion that “testimonial” is a residual category, the Davis opinion begins with the the definition of what is not “testimonial”:

“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”³⁵

But before applying this definition to the facts of Davis, the opinion detours into another question left hanging in Crawford that Justice Scalia says must be decided in Davis---the consequences of a finding that a hearsay statement is not “testimonial”; does Roberts still apply or is nontestimonial hearsay free from any constitutional restrictions on its use?³⁶ As Justice Scalia puts it: “[w]e must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay. . . .”³⁷ This must have come as a surprise to the parties since none of them suggested in briefs or in oral argument that the Court address the question.³⁸ Since that question requires separate discussion, we put it aside for the moment.³⁹

When the majority opinion returns to the application of its definition of “nontestimonial” to a 911 calls, it returns again to Crawford to explain what it meant in that opinion when it said that “interrogations by law enforcement officers fall squarely within [the] class” of “testimonial hearsay.”⁴⁰ But the application of this “holding” from Crawford to 911 calls raises yet another definitional problem: who are “law enforcement officers”?⁴¹ The state argued that a 911 operator was not a “governmental agent.”⁴² At oral argument in Hammon, the defense agreed with the state’s characterization in Davis of the operator as a “conduit” between the declarant and the police.⁴³ However, the discussion

³⁵ 126 Sup.Ct. at 2273, 547 U.S at. ____.

³⁶ Ohio v. Roberts, 1980, 100 S.Ct. 2531, 448 U.S. 56, 65 L.Ed.2d 597, discussed in 30A FPP § 6367, p. 822.

³⁷ 126 Sup.Ct. at 2274, 547 U.S at. ____.

³⁸ See, e.g., Brief for The United States as Amicus Curiae Supporting Respondent, Davis v. Washington, No. 05-5524, Feb. 2, 2006, 2006 WL 303911, p. 8 (noting in passing that Crawford overruled Roberts only as to “testimonial” hearsay, but not suggesting that the Court consider that question despite the interest of the Justice Department in having the question resolved).

³⁹ We return to this at p. 16, below.

⁴⁰ 126 Sup.Ct. at 2276, 547 U.S at. ____, quoting 124 S.Ct. at p. 1365, 541 U.S. at 53.

⁴¹ Many lower courts have held that Crawford does not apply to “private” citizens such as friends, family members, co-workers, and even doctors and social workers questioning a child about sexual abuse. See 30A FPP § 6371.2.

⁴² Brief for Respondent, Davis v. Washington, No. 05-5524, Feb. 2, 2006, 2006 WL 284228, p. 23.

⁴³ Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, p. 26.

then moved on to whether a doctor in a state hospital was “a law enforcement officer.”⁴⁴ In its brief the Justice Department seemed to argue that an informant used by the police to interrogate someone was also not a “law enforcement officer” within the meaning of Crawford.⁴⁵ Faced with the potential breadth of the issue, the Court, in keeping with its desire to carefully confine the scope of the Davis opinion, recognizes the problem in a footnote and avoids the issue by simply assuming that the 911 operator was a “law enforcement officer.”⁴⁶

In what looks like a retroactive limitation on Crawford or a professorial lecture on the doctrine of *stare decisis*, Justice Scalia explains that the Crawford classification of police interrogations as “testimonial” had in mind the facts of “the case [then] before us”--- that is, a police interrogation “solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.”⁴⁷ By contrast, a “911 call. . . and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to ‘establis[h] or prov[e]’ some past fact, but to describe current circumstances requiring police assistance.”⁴⁸ Note carefully the words that limit the scope of this dictum.⁴⁹

The careful reader might suppose that Justice Scalia here applies the “official inducement” Crawford “formulation”; in other words, what counts in the “testimonial” determination is the intent of the 911 operator in questioning the victim.⁵⁰ But in an earlier footnote, the opinion suggests that is the purpose of the declarant that counts: “even when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogators questions, that the Confrontation Clause requires us to evaluate.”⁵¹ This sounds something like the other Crawford “formulation”, the so-called “declarant’s objective intent test.”⁵² As the meticulous reader may note, the Davis opinion seems to

⁴⁴ Ibid. Professor Friedman opined that the doctor was not.

⁴⁵ Brief for The United States as Amicus Curiae Supporting Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 303911, p. 12.

⁴⁶ “If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For the purposes of this opinion (and without deciding the point), we consider their acts to be the acts of the police.” 126 Sup.Ct. at 2274 n.2, 547 U.S. at ____ n.2.

⁴⁷ 126 Sup.Ct. at 2276, 547 U.S. at ____.

⁴⁸ 126 Sup.Ct. at XXXX 547 U.S. at _____. But see, Brief for Petitioner, *Davis v. Washington*, No. 05-5524, Dec. 22, 2005 2005 WL 3598182, p. 3 (collecting quotations from the police departments operational manual for 911 operators that might suggest a different conclusion).

⁴⁹ We return to these below, p. 10.

⁵⁰ We discuss the fate of the Crawford “formulations” below, pp. 19, 25.

⁵¹ 126 Sup.Ct. at 2274 n. 1, 547 U.S. at ____, n. 1.

⁵² See 30A FPP, § 6371.2 (2006 Supp.).

vacillate between these two Crawford “formulations” without ever overtly endorsing either.⁵³

The majority opinion then embarks on a comparison of Davis with Crawford that sheds some light on the Court’s refurbished definition of “testimonial.”⁵⁴ First, Justice Scalia imports a temporal dimension to the word: in Davis the victim “was speaking about events *as they were actually happening*, rather than ‘describ[ing] past events.’”⁵⁵ The “testimonial” statement in Crawford “on the other hand took place hours after the events she described had occurred.”⁵⁶ The stringency of the temporal limitation appears in the Court’s dismissal of the defendant’s citation of an English case in which a rape victim reported the crime “‘immediately on her coming home’” as simply an “account of past events.”⁵⁷ The cited case might support the defense argument, according to Justice Scalia, “if the relevant statement had been the girl’s screams for aid as she was being chased by her assailant.”⁵⁸

The Davis majority brings in the “declarant’s objective intent” formulation of Crawford when it points out that the declarant in Davis, unlike the declarant in Crawford, “was facing an ongoing emergency”⁵⁹ This is significant because “[a]lthough one *might* call 911 to provide a narrative report of a crime absent any imminent danger, [the wife’s statement in Davis] was plainly a call for help against a bona fide physical threat.”⁶⁰ Tying this to the Crawford formulation, the majority opinion adds: “the nature of what was asked and answered. . .viewed objectively. . .was such that the elicited statements were necessary to *resolve* the present emergency, rather than simply to learn. . .what had happened in the past.”⁶¹ But what about the questions posed by the 911 operator asking the declarant to flesh out her identification of the perpetrator?⁶² No problem, Justice Scalia tells us, because “the operator’s effort to establish the identity of the assailant,

⁵³ The third Crawford fomulation, which Justice Thomas in dissent wanted to apply in Hammon, seems to have been implicitly rejected by the majority---at least as the outer limit of “testimonial”.

⁵⁴ 126 Sup.Ct. at 2276, 547 U.S at. ____.

⁵⁵ 126 Sup.Ct. at 2276, 547 U.S at. ____ [emphasis in original].

⁵⁶ 126 Sup.Ct. at 2277, 547 U.S at. ____.

⁵⁷ Brief for Petitioner, Davis v. Washington, No. 05-5524, Dec. 22, 2005 2005 WL 3598182, pp. 28-29. The case is King v. Brasier, 1779, 1 Leach 199, 168 Eng.Rep. 202. For historical evidence that the English cases like this one were probably not known to the Founders, see FPP § 6371.2 (2006 Supp.).

⁵⁸ 126 Sup.Ct. at 2277, 547 U.S at. ____.

⁵⁹ 126 Sup.Ct. at 2276, 547 U.S at ____.

⁶⁰ 126 Sup.Ct. at 2276, 547 U.S at _____. [emphasis in original].

⁶¹ 126 Sup.Ct. at 2276, 547 U.S at _____. [emphasis in original]

⁶² The majority opinion quotes these. 126 Sup.Ct. at 2271, 547 U.S at ____.

[was not for the purpose of prosecuting Davis but] so that the dispatched officers might know whether they would be encountering a violent felon.”⁶³

This nod to the “official inducement” formulation continues when the majority opinion adds its final comparison of Davis and Crawford by adding that “the difference in the level of formality between the two interviews is striking.”⁶⁴ The declarant in Crawford was “responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers” but in Davis the declarant gave “frantic answers. . . over the phone, in an environment that was not tranquil, or even (so far as a reasonable 911 operator could make out) safe.”⁶⁵

Finally the Court ties all this to its conclusion in Crawford about the historical purpose of the right of confrontation.⁶⁶ The 911 tape in Davis was not “a weaker substitute for live testimony at trial.”⁶⁷ Since the opinion cites *Inadi* here, apparently what the Court means is that the victim’s frightened statements on the tape provided the prosecutor with more powerful “testimony” than her reluctant statements from the witness box.⁶⁸ But in *Inadi* the statements were those made by the conspirators in the course of the conspiracy, so they were neither hearsay nor “accusations”; one would suppose that if the Court is right about the evidentiary power of the hearsay accusations in Davis, then the need for cross-examination would be even greater.⁶⁹ Instead, the majority opinion says that the defendant in Davis has no right to cross-examine the declarant because her statements to the 911 operator did not resemble those of Lord Cobham in Raleigh’s trial.⁷⁰ In thus bowing to the “resemblance test” proposed by the prosecutors, Justice Scalia ignores the defense argument that her “cry for help” resembles the ancient “hue and cry” whose practice did not allow the use of the statements as evidence.⁷¹ Instead, because “the circumstances of [the victim’s] interrogation objectively

⁶³ 126 Sup.Ct. at 2276, 547 U.S at ____.

⁶⁴ 126 Sup.Ct. at 2276-2277, 547 U.S at ____.

⁶⁵ 126 Sup.Ct. at 2277, 547 U.S at _____. During oral argument in *Hammon*, Justice Ginsberg noted that Crawford required some “kind of formal statement”, not “an agitated women calling 911.” *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 12.

⁶⁶ We shall say more about the Court’s policy justifications below, p. 44.

⁶⁷ The Justice Department made a similar argument. Brief for The United States as Amicus Curiae Supporting Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 303911, p. 17.

⁶⁸ In *Inadi*, the statement at issue was a set of wire-tapped recordings of conversations among dope dealers in the course of a drug conspiracy; Justice Powell argued that testimony at trial would not have the “evidentiary values” for the prosecution that the tapes had. *U.S. v. Inadi*, 1986, 106 S.Ct. 1121, 1126, 475 U.S. 387, 395, 89 L.Ed.2d 390, discussed in FPP § 6368 at notecall 29.

⁶⁹ Compare Reply Brief for Petitioner, *Davis v. Washington*, No. 05-5524, March 2, 2006, 2006 WL 542177, p. 5 (arguing that lesser formality of 911 calls makes the need for confrontation greater).

⁷⁰ 126 Sup.Ct. at 2277, 547 U.S at ____.

⁷¹ Brief for Petitioner, *Davis v. Washington*, No. 05-5524, Dec. 22, 2005 2005 WL 3598182, pp. 18-20.

indicate its primary purpose was to enable police assistance to meet an ongoing emergency”, the defendant has no right to confront his accuser.⁷²

The majority opinion disappointed those who hoped that Davis would follow the lower courts in treating 911 calls as categorically “nontestimonial.”⁷³ The careful reader will doubtless have noticed Justice Scalia’s suggestion that “one *might* call 911 to provide a narrative report of a crime absent any imminent danger” with its implication that such a call might be “testimonial.”⁷⁴ Indeed, the Crawford majority explicitly rejects categorical treatment of 911 calls: “[t]his is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot. . . ‘evolve into testimonial statements’ . . . once that purpose has been achieved.”⁷⁵

In fact, the Court holds that the 911 call at issue in Davis contained both “testimonial” and “nontestimonial” statements because as it reads the record “[i]n this case. . . the emergency appears to have ended (when [defendant] drove away from the premises)” because “[t]he operator then told [the victim] to be quiet, and proceeded to pose a battery of questions.”⁷⁶ Hence, “from that point on, [the victim’s] statements were testimonial, not unlike the ‘structured police questioning’ . . . in Crawford.”⁷⁷ The majority says that the trial court should have redacted the “testimonial” portions of the call but agrees with the Washington Supreme Court that such error was harmless.⁷⁸

--- “investigatory interrogations”

The Court found it “much easier” to reject categorical treatment for statements elicited during so-called “investigatory interrogations.”⁷⁹ The formal holding in Hammon reverse mirrors the holding in Davis: statements made under police interrogation “are

⁷² 126 Sup.Ct. at 2277, 547 U.S at ____.

⁷³ See note 34, above. See also, FPP § 6371.2 (2006 Supp.).

⁷⁴ 126 Sup.Ct. at 2276, 547 U.S at ____.

⁷⁵ 126 Sup.Ct. at 2277, 547 U.S at ____ (quoting the Indiana Supreme Court in Hammon).

⁷⁶ 126 Sup.Ct. at 2277, 547 U.S at ____.

⁷⁷ The majority seems thus to have rejected the Department of Justice’s expansive “emergency doctrine” that would have made statements “nontestimonial” until there was no longer any possibility that the defendant might return to the locus and resume his abuse of the victim. Brief for The United States as Amicus Curiae Supporting Respondent, Davis v. Washington, No. 05-5524, Feb. 2, 2006, 2006 WL 303911, p. 17. When this argument was advanced at oral argument, the response of the Court was something less than enthusiastic. Davis v. Washington, No. 05-5224, Oral Argument, March 20, 2006, p. 53 and following.

⁷⁸ 126 Sup.Ct. at 2278, 547 U.S at ____.

⁷⁹ See FPP § 6371.2 (2006 Supp.). The only member of the Court to express much interest in the doctrine was Justice Alito, who suggested that since the police can “resolve” the emergency by arresting the perpetrator, the window for “nontestimonial” statements might close once the police had probable cause to seize the perpetrator. Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, pp. 50-51.

testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”⁸⁰ Hammon was an “easier” case because the statements of the wife “were not much different from the statements we found to be testimonial in *Crawford*.”⁸¹ To highlight the similarity, Court compared the Hammon interrogation with the 911 call in *Davis*; “there was no emergency in progress”, the officers “heard no arguments or crashing and saw no one throw or break anything”, and the wife-victim “told them things were fine.”⁸² When the Justice Department and the state prosecutors wanted to evoke the “emergency doctrine” at oral argument, Justice Scalia pointed out that when the accusations were uttered, the victim was sitting at a table with the officer drinking coffee.⁸³ So “[w]hen the officer questioned [the wife-victim] for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) ‘what is happening,’ but rather ‘what happened.’” As a result, the Court concluded, “[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation [in Hammon] was to investigate a possible crime. . . .”⁸⁴ Adding “which is, of course, precisely what the officer *should* have done”---a point suggested by the defendant’s brief as part of an argument that the purpose of the Confrontation Clause is not to regulate police conduct.⁸⁵

Responding to the dissent, Justice Scalia conceded that while the interrogation in Hammon was less formal than the one in *Crawford*, the *Crawford* formalities---stationhouse locale, giving of Miranda warnings, and tape-recording of the statement---were not “essential” to the Court’s holding.⁸⁶ After listing the similarities between the *Crawford* and Hammon questioning, the majority concluded that “[s]uch statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.”⁸⁷

⁸⁰ 126 Sup.Ct. at 2273-2274, 547 U.S at ____.

⁸¹ 126 Sup.Ct. at 2278, 547 U.S at ____.

⁸² 126 Sup.Ct. at 2278, 547 U.S at _____. This is significant because some of the courts treating “investigatory interrogations” categorically reason back from cases involving 911 calls. See FPP § 6371.2 (2006 Supp.).

⁸³ Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, pp. 28-29, 50.

⁸⁴ 126 Sup.Ct. at 2278, 547 U.S at _____. P. 15.

⁸⁵ Reply Brief of Petitioner, Hammon v. Indiana, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 10. The jurisprudential significance of this will be discussed below, text at notecall 379.

⁸⁶ 126 Sup.Ct. at 2278, 547 U.S at _____. We shall have more to say more about formality when we discuss the future of the official inducement test, below, p. 22.

⁸⁷ 126 Sup.Ct. at 2278, 547 U.S at _____. Pp. 15-16 [emphasis in original]

The prosecutors urged the court to stretch the emergency doctrine to cover police officers responding to 911 calls⁸⁸ as some state and lower federal courts have done.⁸⁹ The Department of Justice argued that the same standard should apply to 911 calls and “investigatory interrogations”; that is, the statements are not “testimonial” if the questions were reasonably necessary for the officers to determine if an emergency exists.⁹⁰ When the state made this argument, Justice Scalia poured contempt on it.⁹¹ He thought the doctrine was too broad because the prosecutors wanted the doctrine to cover not only the present emergency but the possibility of a further recurrence.⁹² In addition, he and Justice Stevens found it nonsensical that the prosecutors conceded that the accusation was “testimonial” when incorporated in an affidavit, but wanted the Court to hold that the oral version of the accusation was not “testimonial.”⁹³

To no one’s surprise, the majority opinion by Justice Scalia found the extended emergency argument “unpersuasive.”⁹⁴ The statements in *Davis* were made when the declarant was alone and unprotected by police, while the *Hammon* declarant was drinking coffee at a table with two police officers.⁹⁵ The *Davis* declarant was seeking aid, not telling a story about the past---she spoke in the present tense.⁹⁶ The *Hammon* declarant gave a narrative of past events long after the danger had ceased.⁹⁷ Finally, Justice Scalia tossed the affidavit back at the prosecutors as evidence that the officers in *Hammon* were seeking to “establish events that . . . occurred previously.”⁹⁸

⁸⁸ Brief for The United States as Amicus Curiae Supporting Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 303913, pp. 5-6.

⁸⁹ See FPP § 6371.2, text at notecall 184 (Supp. 2006).

⁹⁰ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 48.

⁹¹ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, pp. 28-29.

⁹² *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 29. See also, Brief for The United States as Amicus Curiae Supporting Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 303913, pp. 10-11 (making the recurrence argument).

⁹³ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, pp. 40-41 (Justice Scalia), 48 (Justice Stevens when the Department of Justice continued to insist on the doctrine).

⁹⁴ 126 Sup.Ct. at 2279, 547 U.S at ____.

⁹⁵ 126 Sup.Ct. at 2279, 547 U.S at ____.

⁹⁶ 126 Sup.Ct. at 2279, 547 U.S at _____. Justice Scalia seemed less captivated by this argument when it was advanced at oral argument in *Davis*. *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, pp. 28-29. So perhaps another member of the majority found it more persuasive.

⁹⁷ 126 Sup.Ct. at 2279 547 U.S at _____. The Justice Department suggested this distinction in *Davis*, *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, p. 44, but retreated from it in *Hammon*. Brief for The United States as Amicus Curiae Supporting Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 303913, pp. 10-11.

⁹⁸ 126 Sup.Ct. at 2279, 547 U.S at ____ (quoting the testimony of the officer at trial).

But this time it was the defense that was denied the categorical rule it sought; namely, that any accusation made to the police was “testimonial.”⁹⁹ This standard would have made the 911 call in Davis “testimonial”, but only Justice Scalia seemed to like that result.¹⁰⁰ The oral argument suggests that categorical arguments from both sides repelled the Court because of the arbitrary nature of the lines the parties wanted drawn.¹⁰¹

The majority opinion emphasized that in rejecting the lower court’s categorical treatment of “investigatory interrogations”, it did not intend to create a reverse category.¹⁰² “Although we necessarily reject the Indiana Supreme Court’s implication that virtually any ‘initial inquiries’ at the crime scene will not be testimonial, we do not hold the opposite---that *no* questions at the scene will yield nontestimonial answers.”¹⁰³ Officers responding to domestic violence calls “need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.”¹⁰⁴ These “exigencies may *often* mean that “initial inquiries” produce nontestimonial statements.”¹⁰⁵ However, the emphasized word and other qualifications elsewhere in the opinion again suggest that the Davis majority does not intend to encourage categorical determination of confrontation questions.¹⁰⁶

---domestic violence exception

Nothing sparked more interest during oral argument than the effect the Court’s ruling in Davis-Hammon would have on “victimless” or “evidence-based” prosecution of domestic violence cases.¹⁰⁷ The question took on added urgency because the prosecutors alluded to the difficult problems Crawford posed for child sexual abuse prosecu-

⁹⁹ Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 7.

¹⁰⁰ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, pp. 17-19 (Justice Breyer asks about a 911 call offered under the present sense impression exception in Rule 803(1); when defense says under proposed test it would be inadmissible, Justice Scalia interjects enigmatically “I should hope not.”)

¹⁰¹ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, pp. 51-52, 57-60.

¹⁰² The defense attack on the emergency doctrine might have suggested the converse category. Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, pp. 11-17.

¹⁰³ 126 Sup.Ct. at 2279, 547 U.S. at ____ (quoting 829 N. E. 2d, at 453, 457; 829 N. E. 2d, at 453, 457) [emphasis in original].

¹⁰⁴ 126 Sup.Ct. at 2279, 547 U.S. at ____ (quoting *Hiibel v. District Court*, 2004, 124 S.Ct. 2451, 2458, 542 U.S. 177, 186, 159 L.Ed.2d 292).

¹⁰⁵ 126 Sup.Ct. at 2279, 547 U.S. at _____. [emphasis in original]

¹⁰⁶ For example, “[t]his is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial.” p. 7 n. 1

¹⁰⁷ Brief for Petitioner, *Davis v. Washington*, No. 05-5524, Dec. 22, 2005, 2005 WL 3598182, pp. 1-2 (describing “victimless prosecution” origins).

tions.¹⁰⁸ The state brief in Hammon took the strongest position; arguing that domestic violence cases were unique because the defendant was complaining about his inability to cross-examine a witness under his influence, the state prosecutors urged the Court to allow them to use hearsay accusations free from confrontation scrutiny so long as the state fulfilled its obligations under the Compulsory Process Clause.¹⁰⁹ Professor Friedman, from the other side, countered gloomy predictions of the effects of Crawford with a laundry list of methods for effective prosecution of spouse-beaters.¹¹⁰

At oral argument, the Court's "liberal" wing seemed more sympathetic to the prosecutorial arguments than did the supposedly statist Justices associated with the Federalist Society.¹¹¹ Justice Ginsberg tried to get Professor Friedman to concede the state's claims about the extent of witness intimidation in domestic violence cases.¹¹² Justice Breyer thought that spousal abuse cases revealed a flaw in Crawford that the Court needed to repair.¹¹³ Justice Souter wanted to know if the facts in Davis typified domestic violence cases or if Davis was a sport.¹¹⁴ Moreover, other members of the Court shared Justice Ginsberg's concerns about witness intimidation.¹¹⁵

Professor Friedman resisted the intimidation claims, pointing out that the state conceded that victims refused to aid in the prosecution of their abusers for many other reasons.¹¹⁶ Noting that in Hammon the prosecution did not bother to enforce the subpoena, he argued that the problem in domestic violence cases was not the right of confrontation but the desire for "justice-on-the-cheap."¹¹⁷ Justice Scalia agreed with his ar-

¹⁰⁸ Brief for Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 284228, p. 22 n. 9 (hints also need exception for child abuse cases).

¹⁰⁹ Brief of Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 271825, pp. 11, 40-42.

¹¹⁰ Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, pp. 17-20.

¹¹¹ As a result, when Justice Scalia sarcastically suggested that maybe the Court should "just suspend the Confrontation Clause in spousal abuse cases", counsel for the state at first took this suggestion seriously. *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, p. 25.

¹¹² *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 13-14.

¹¹³ *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, pp. 26-27.

¹¹⁴ *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, p. 41. Justice Souter assumed, contrary to the record, that the prosecution tried to enforce the subpoena but did not succeed in getting the victim to trial despite reasonable efforts to do so.

¹¹⁵ *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, p. 21.

¹¹⁶ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 14.

¹¹⁷ Professor Friedman did not use this term; it refers to the need for prosecutors to cut corners in cases of real crimes in order to have time to feed the prison-industrial complex's insatiable need for even more convicts to fill already over-crowded prisons. Instead, Professor Friedman referred more decorously to the failure of states to provide "resources" for effective enforcement of domestic violence cases. *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, pp. 15-16.

gument that reversal would provide an incentive for states to put more resources into domestic violence, but Justice Ginsberg feared that rather than “put money” into the programs suggested by the defense, states would simply cut back on efforts to abate domestic violence.¹¹⁸ She seems to have been more impressed by the defense claim that in Cook County, Illinois, (which includes the City of Chicago) where subpoenas are enforced, 80% of the victims testify at trial.¹¹⁹ Perhaps other members of the majority shared Justice Scalia’s view that there had to be a better way to solve the problem of domestic violence than distorted interpretation of the Confrontation Clause.¹²⁰

But distortion has been the response of state and lower federal courts to concerns about spousal abuse; Crawford involved two such distortions---911 calls and “investigatory interrogations.”¹²¹ So when prosecutors in Davis, the Department of Justice, and several victim advocate groups filed briefs urging the Supreme Court to follow suit, no one would have been shocked had the Court given prosecutors the desired “flexibility.”¹²² But after noting the desires of these groups, Justice Scalia boldly replied that “[w]e may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.”¹²³ Taken at face value, the majority seems to repudiate Justice Brown’s dictum in an oft-cited 19th Century confrontation case that the right “must occasionally give way to considerations of public policy and the necessities of the case.”¹²⁴

But a cynical reading of the majority opinion might suggest that the Court has in fact given lower courts the desired “flexibility.”¹²⁵ First, the Davis opinion has ratified the “call for help” rationale that lower courts have used to admit unconfronted accusations made in 911 calls.¹²⁶ Second, the Court, while refusing to approve the “investigatory interrogation” in this case, has left the door open for lower courts to continue to use it in

¹¹⁸ Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, p. 16.

¹¹⁹ Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, pp. 15 (argument made), 39-40 (Justice Ginsberg presses state about failure to enforce subpoena against declarant).

¹²⁰ Davis v. Washington, No. 05-5224, Oral Argument, March 20, 2006, p. 25.

¹²¹ FPP § 6371.2, text at notecalls 152, 180 (Supp.2006).

¹²² “Respondents in both cases, joined by a number of their *amici*, contend that the nature of the offenses charged in these two cases-domestic violence-requires greater flexibility in the use of testimonial evidence.” 126 Sup.Ct. at 2279, 547 U.S at ____.

¹²³ 126 Sup.Ct. at 2280, 547 U.S at ____.

¹²⁴ Mattox v. U.S., 1895, 15 S.Ct. 337, 340, 156 U.S. 237, 243, 39 L.Ed. 409, discussed in FPP § 6357, text at notecall 478. The Davis majority opinion cites Mattox with approval at 126 Sup.Ct. at 2275, 547 U.S at ____.

¹²⁵ One does not have to read many state and lower federal court opinions to suspect that the possibility of “allowing the guilty to go free” has driven them to the narrowest possible readings of Crawford. Only the reality-impaired could hope they will not do the same with Davis.

¹²⁶ See above, text at notecall 49.

other cases of domestic violence.¹²⁷ Finally, as we shall see shortly, the majority opinion invites lower courts to expand even further their use of the forfeiture exception.¹²⁸

It remains to be seen whether the Court will show similar “flexibility” when it faces a case of child sexual abuse or whether it will forthrightly create an exception based on “public policy and the necessities of the case.”¹²⁹

Roberts retired?

In *Crawford*, Justice Scalia’s majority opinion condemned the Court’s reasoning in *Ohio v. Roberts* but was coy about the future of the decision itself.¹³⁰ Since the Court refused to “definitively resolve” the status of *Roberts*, most lower courts took the safer course and treated *Roberts* as still alive, applying the *Roberts* standards to nontestimonial hearsay.¹³¹ Only a handful of courts treated *Crawford* as overruling *Roberts*.¹³² Those courts may have felt vindicated when they read a footnote in the *Davis* opinion stating that “[w]e overruled *Roberts* in *Crawford*” but Justice Scalia apparently meant “overruled only as to testimonial statements”---the position taken by most lower courts.¹³³

In *Davis*, after suggesting that the actual holding in *Crawford* was quite narrow, Justice Scalia writes “we must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay. . . .” ; in other words, whether there is any work left for *Roberts* to do.¹³⁴ He continues: “The answer [to this question] was suggested in *Craw-*

¹²⁷ “We have already observed of domestic disputes that ‘[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.’” 126 Sup.Ct. at 2279, 547 U.S. at ____.

¹²⁸ For the expansion of the exception pre-*Davis*, see FPP § 6371.2, text at notecall 249 (Supp. 2006).

¹²⁹ The case for a child abuse exception seems more compelling than the case for a wife-beating exception. See the supplement to FPP § 6371.2 forthcoming in 2007.

¹³⁰ “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law---as does *Roberts*, and as would an approach the exempted such statements from Confrontation Clause scrutiny altogether.” 124 S.Ct. at 1374, 541 U.S. at 68.

“Although our analysis in this case casts doubt on that holding [rejecting argument in *White* that *Roberts* be repealed and nontestimonial hearsay be left to state law], we need not definitively resolve whether it survives our decision today.” 124 S.Ct. at 1370, 541 U.S. at 61.

¹³¹ See 30A FPP § 6371.2 (Supp.2006), text at notecall 256.

¹³² The cases are collected *ibid.* in note 260.

¹³³ “We overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements.” 126 Sup.Ct. at 2275 n.4 547 U.S. at ____ n. 4. See also, 126 Sup.Ct. at 2280, 547 U.S. at ____: “*Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings.”

¹³⁴ 126 Sup.Ct. at 2274, 547 U.S. at ____.

ford, even if not explicitly held. . .¹³⁵ He finds this “suggestion” in a paragraph in Crawford discussing the text of the Confrontation Clause that attempts to define “witness.”¹³⁶ He concludes that a “limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core’, but its perimeter.”¹³⁷

But before Crawford, no one on or off the Court, thought this “limitation” was “clearly reflected” in the text of the Sixth Amendment.¹³⁸ Indeed, as recently as 1992, a majority of the Rehnquist court explicitly rejected this reading when it was first proposed by Justices Scalia and Thomas.¹³⁹ And in that case, the dissenting justices did not claim their new reading was “clearly reflected” in the text but only that it could be extracted from the text when read in the light of history.¹⁴⁰ But the “history” drawn on in that opinion and in Crawford overlooks the fact that several of the state clauses relied on by Madison when drafting what would become the Sixth Amendment provided a right to confront both “witnesses” and “accusers.”¹⁴¹ Indeed, the majority opinion in Davis hints that the real appeal of the Crawford reading of the Sixth Amendment is that it frees most hearsay from any confrontation limitations.¹⁴²

Since Davis never says Roberts is “overruled”, it remains to be seen whether the state and federal courts will now leave “nontestimonial” hearsay free from constitutional restraint.¹⁴³ Perhaps those courts who read Davis to hold that the Sixth Amendment only applies to “testimonial hearsay” will now give that phrase a more expansive reading

¹³⁵ 126 Sup.Ct. at 2274, 547 U.S at ____.

¹³⁶ “The text of the Confrontation Clause reflects this focus. It applies to ‘witnesses’ against the accused--in other words, those who ‘bear testimony.’ 1 N. Webster, An American Dictionary of the English Language (1828). ‘Testimony,’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.” 126 Sup.Ct. at 2274, 547 U.S at ____ (quoting 124 S.Ct. at 1364 [key number 3], 541 U.S. at 51).

¹³⁷ 126 Sup.Ct. at 2274, 547 U.S at ____.

¹³⁸ For the herky-jerky nature of the Court’s modern confrontation jurisprudence, see 30A FPP §§ 6360-6360.

¹³⁹ *White v. Illinois*, 1992, 112 S.Ct. 736, 740-741, 502 U.S. 345, 352, 116 L.Ed. 848.

¹⁴⁰ *Id.* at 744, 502 U.S. at 359.

¹⁴¹ *Graham*, *Confrontation Stories: Raleigh on the Mayflower*, 2005, 3 Ohio St.J.Crim.L. 209.

¹⁴² “It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.” 126 Sup.Ct. at 2273, 547 U.S at ____.

¹⁴³ Ironically, since most courts hold that the Due Process right to confrontation that applies in non-criminal proceedings has not been touched by Crawford, convicts in prison disciplinary hearings may have greater confrontation rights than presumably innocent defendants. See FPP § 6371.2, text at note-call 285 (Supp. 2006).

than they did when they could fall back on Roberts to limit the most egregious uses of hearsay accusations of crime.¹⁴⁴ In addition, hearsay accusations might still be regulated by state confrontation clauses or by the “due process right of confrontation” the Supreme Court developed for civil cases.¹⁴⁵

Implications of Davis beyond its “holdings”

Despite the attempts of the Scalia opinion to state the holdings in Davis narrowly, if the experience under Crawford is any indication, lower courts will go “dumpster diving” through the majority’s language for “bits and morsels” to resolve other confrontation issues.¹⁴⁶ Consider, for example, the Crawford opinion’s three “formulations” of the meaning of “testimonial”; language in Davis suggests that two of the three “formulations” retain their viability.¹⁴⁷ Since Justice Thomas in his dissent embraced the third formulation--- “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”¹⁴⁸--- we can infer that the majority rejected that one as the outer limit of the right of confrontation; but presumably any thing that would qualify as “testimonial” under the Thomas formulation would also satisfy whatever standard the majority employed.¹⁴⁹ However, Davis spawned two new “formulations”---the “resemblance test” and a weak “accusation plus” doctrine.¹⁵⁰ Though both of these seem “dead on arrival”, each will require some discussion after we see what the court had to say about the still viable “formulations”.

---rule of thumb analysis; “the official inducement test”

Lower courts after Crawford used two different techniques in determining whether a given statement was “testimonial”: “rule of thumb” analysis and “categorical” determi-

¹⁴⁴ Indeed, one can infer that the broader scope given to Crawford in Davis may have been part of the deal that made the Court unanimous in overruling Roberts.

¹⁴⁵ See, e.g., Taslitz, What Remains of Reliability: History and Freestanding Due Process After Crawford v. Washington, 2005, 20-SUM Crim.Just. 39).

¹⁴⁶ Pitler, Introduction: Symposium: Crawford and Beyond, 2005, 71 Brook.L.Rev. 1, 6

¹⁴⁷ For example, this passage seems to invoke the “declarant’s objective intent” formulation: “[a]nd of course even when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogators questions, that the Confrontation Clause requires us to evaluate.” 126 Sup.Ct. at 2274 n. 1, 547 U.S at _____. 1.

¹⁴⁸ 124 S.Ct. at 1364, 541 U.S. at 51-52 (quoting the concurring opinion in White v. Illinois, 1992, 112 S.Ct. 736, 502 U.S. 346, 365, 116 L.Ed.2d 848).

¹⁴⁹ 126 Sup.Ct. at 2282, 547 U.S at _____. This conclusion gains strength from the attempt by the state in Davis to invoke the Thomas-Scalia “formulation.” Brief for Respondent, Davis v. Washington, No. 05-5524, Feb. 2, 2006, 2006 WL 284228, p. 16 (test “hews closest to the text and the historical roots” of the Confrontation Clause).

¹⁵⁰ See below, pp. 28, 31.

nation.¹⁵¹ “Rule of thumb” analysis tried to develop one or more of the three Crawford “formulations.”¹⁵² One form of rule of thumb analysis has been called “the official inducement test.”¹⁵³ Because of the way in which Justice Scalia chose to cast its holdings, the Davis opinion implies more about this one than it does about the “declarant’s objective intent” test.¹⁵⁴ However, because of the complementary nature of these techniques---if the police are inducing the statement, the declarant can more readily believe what she says will be used as evidence at trial---what the Court says about the “official inducement” strand has ramifications for the other as well.¹⁵⁵

-----policy

Courts and lawyers generally assume that the “official inducement” test reflects a policy of preventing police abuse, but Davis reveals some ambiguities in that rationale.¹⁵⁶ Crawford suggests to some that the “abuse” that the right of confrontation aims to limit is the ability of the questioner to shape the declarant’s statements to advance prosecutorial interests.¹⁵⁷ However, in Davis, that rationale first grew to cover shaping the statements so that they would be admissible against a hearsay or confrontation objection.¹⁵⁸ From there it was only a slight extension to cover the prosecutor shaping the testimony of the officer to make the statement look admissible under Crawford.¹⁵⁹ By

¹⁵¹ While some opinions used one or the other exclusively, most opinions used some mixture of the two techniques.

¹⁵² Since the “formulation” borrowed from the White concurrence, see text at notecall 148 above, was actually a kind of categorical technique, it figured less prominently in rule of thumb analysis.

¹⁵³ See FPP § 6371.2, text at notecall 101 (Supp. 2006)

¹⁵⁴ *Id.* at notecall 119.

¹⁵⁵ Consider, for example, a case that flits around in Davis, *Bourjaily v. U.S.*, 1987, 107 S.Ct. 2775, 483 U.S. 171, 97 L.Ed. 144, discussed in FPP § 6369. A government undercover agent “induced” the making of a number of hearsay statement but the declarants were unaware they were providing evidence to be used at trial. So under the first test, the statement is “testimonial” but under the second it is not.

¹⁵⁶ As we shall discuss at p 44 below, a weakness in the Davis opinion is the failure to articulate a policy basis for its holdings.

¹⁵⁷ Brief for The United States as Amicus Curiae Supporting Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 303911, p. 5 (one of the “central features” of the civil law method was that “the government could readily exploit the situation to shape the statements.”); *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, p. 48 (in case of “investigatory interrogations”, the ability to shape statements far less than in civil law tribunals); Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 13 (arguing 911 operators follow a script designed to shape statements of callers). See also, Brief for Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 284228, pp. 15-17 (quoting Blackstone to provide historical basis for claim that evil of ex parte interviews is that they “markedly enhance. . .the power to shape the witness’s answers in accordance with [the prosecution’s] theory of the case.”)

¹⁵⁸ Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 14 (quoting from police manuals on how to dress-up accusations as “excited utterances”).

¹⁵⁹ Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 40 n. 57.

this point, the Confrontation Clause begins to look like a regulation of police and prosecutorial conduct akin to the Fourth and Fifth Amendments.¹⁶⁰

However, in *Davis* the briefs and arguments shift from talk of “abuse” to talk of “incentives”¹⁶¹; for example, that the “investigatory interrogation” doctrine is a bad rule because it provides an incentive for the police to dilute the pursuit of community safety by delaying the arrest of the defendant in order to gather evidence that falls outside the Confrontation Clause.¹⁶² While one might suppose that the source of “abuse” is the judiciary when the party objects that a proposed rule is “manipulable”¹⁶³, in fact what started out as the “policy” of the Confrontation Clause has ended up as just another instrumental argument.¹⁶⁴ So rather than resting interpretation of the Sixth Amendment on empirical evidence, the Court is invited to make policy decisions like law-and-economics professors; i.e., by making up facts to support the desired result.¹⁶⁵ Whatever one may think of scholars who want to reform the hearsay rule on the basis of questionable factual assumptions, one would expect important constitutional decisions to rest on facts that can at least be judicially noticed.¹⁶⁶ After hearing another set of posited factual assumptions to support it, Justice Scalia challenged the notion that the sole purpose of the Confrontation Clause was to prevent prosecutorial abuse.¹⁶⁷ As Justice Kennedy suggested, the Founders might also have worried that even an honest policeman might be fooled by a declarant who wanted to frame the defendant for some crime.¹⁶⁸

-----merits of the test

¹⁶⁰ Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 41 (arguing this misconstrues the nature of the right of confrontation).

¹⁶¹ *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, pp. 19 (defendant argues that reversal would provide an incentive for prosecutors to call victim-declarants as witnesses) 42 (state argues that reversal would provide incentive for defendants to pressure victims not to appear)

¹⁶² Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, pp. 12-13. See also *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, p. 58 (same argument).

¹⁶³ Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, pp. 33-34.

¹⁶⁴ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, pp. 10 (Court’s holding might deter state legislators from adopting statutes to make accusations to the police admissible), 43 (if Court excludes affidavits and admits excited utterances, then police will gather excited utterances rather than affidavits).

¹⁶⁵ Brief for The United States as Amicus Curiae Supporting Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 303911, pp. 12-13 (two pages of unsubstantiated empirical claims).

¹⁶⁶ While the standard for “legislative facts” does not require “indisputability”, see FPP § 5103.2, it certainly requires more certainty than the facts bandied about in *Davis*. See, e.g., *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, pp. 19-20 (debating whether prosecutors would prefer to call victims as witnesses or whether they are better off with their hearsay statements).

¹⁶⁷ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 53.

¹⁶⁸ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 33.

The state in *Hammon* relied heavily on the “official inducement test”, vamping on the “structured” dictum in *Crawford* with everything from Professor Fred “Freddy, The Cop” Inbau to *NYPD Blue*.¹⁶⁹ So in his reply brief Professor Friedman, usually credited as the originator of the “declarant’s objective intent test”, used his “bully pulpit” before the Supreme Court to launch an attack on the rival “official inducement test”.¹⁷⁰ He argued that latter test rested on the mistaken assumption that the Sixth Amendment, like the Fourth and Fifth Amendments, was designed to regulate police conduct.¹⁷¹ Instead, he argued that the Framers intended the Sixth Amendment as a check on judicial power; or in more diplomatic terms, the right of confrontation is not violated when the declarant’s statements are gathered, but when they are introduced in court without an opportunity for cross-examination.¹⁷² He noted that in the *Raleigh* case, prominently invoked by the prosecutors, the accusations came in a letter and statements not produced by structured questioning.¹⁷³ He posed the hypothetical case of an accuser who prepared and signed her own affidavit and mailed it to the police; under the “official inducement test” this would be “nontestimonial”, whereas under his proposed test the affidavit would be “testimonial.”¹⁷⁴ In oral argument, Justice Scalia used this hypothetical to question the state’s reliance on the “official inducement” test.¹⁷⁵

The prosecutors differed in their treatment of the “official inducement test.”¹⁷⁶ Though the *Hammon* prosecutors had convinced the Indiana Supreme Court to adopt that test, by the time they reached the U.S. Supreme Court they repudiated both tests in favor of a new “resemblance test.”¹⁷⁷ The Justice Department, on the other hand, vacillated between the two tests though apparently favoring the “official inducement test.”¹⁷⁸

¹⁶⁹ Brief of Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 271825, pp. 23-25.

¹⁷⁰ Professor Amar of Yale School is usually credited with developing the “official inducement” test. See, e.g. *U.S. v. Cromer*, C.A.6th, 2004, 389 F.3d 662, 673. In his opening brief, Professor Friedman was content to point out that the “official inducement test”, unlike his test, did not square with the Court’s earlier holding that statements “induced” by an undercover police agent raised no confrontation problems. Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, pp. 14-15 n. 10. In *Crawford*, the Supreme Court had cited *U.S. v. Bourjaily*, 1987, 107 S.Ct. 2775, 483 U.S. 171, 97 L.Ed. 2d 144 as a case involving “nontestimonial” hearsay. See 124 S.Ct. at 1368, 541 U.S. at 58.

¹⁷¹ Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 6.

¹⁷² Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 10.

¹⁷³ Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 13.

¹⁷⁴ Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 15.

¹⁷⁵ *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, pp. 32-33.

¹⁷⁶ As we shall see later, they were united in their attack on Professor Friedman’s “formulation.”

¹⁷⁷ Brief of Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 271825, pp. 7-8.

¹⁷⁸ Brief for The United States as Amicus Curiae Supporting Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 303911, pp. 13-15.

As a result, during oral argument the Justices questioned features of both tests without seeming to repudiate either.¹⁷⁹

Assuming the “official inducement test” remains viable, we now turn to how the Court developed certain elements of that test.¹⁸⁰

----- the “formality” of the statement

In response to Justice Thomas’ charge that the Davis majority had abandoned it, Justice Scalia insisted that “[w]e do not dispute that formality is indeed essential to testimonial utterance.”¹⁸¹ He also conceded “that the *Crawford* interrogation was more formal [than the one in *Hammon*].”¹⁸² But after repeating the dictionary definition quoted in *Crawford* of “testimony” as a “solemn declaration or affirmation”, Justice Scalia adds that “[t]he solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood. . . .”¹⁸³ In a footnote response to the dissent, the majority opinion ties this to the requirement of “formality”: “It imports sufficient formality, in our view, that lies to such officers are criminal offenses.”¹⁸⁴

The majority opinion adds other indicia of “formality” such as the method of interrogation: “It was formal enough that [the wife-declarant’s] interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his ‘investigat[ion].’”¹⁸⁵ And in distinguishing the holding in *Davis* from that in *Crawford*, the majority notes that “the difference in the level of formal-

¹⁷⁹ *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, pp. 12 (Chief Justice Roberts asks if the test should be whether officers were trying to prevent the present crime or prove a past one), 14 (Justice Stevens asks whose purpose controls if the police and the declarant have different motives), 36-37 (Justice Scalia asks about defense claims that 911 operators are taught to elicit evidence for trial). *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, pp. 41 (Chief Justice Roberts opines that the officers had mixed motive, we just don’t know which was primary; when state responds that so long as an emergency lasts the primary motive is protection, Justice Scalia asks why we care about the motives of the officer since the issue is whether the declarant is trying to function as a “witness”) 52 (Justice Department seeks categorical rule to eliminate the need to inquire into the particular officer’s motives).

¹⁸⁰ For discussion of these elements, see FPP § 6371.2, text at notecalls 101-118 (Supp. 2006)

¹⁸¹ 126 Sup.Ct. at 2278 n. 5, 547 U.S at ____ n. 5.

¹⁸² 126 Sup.Ct. at 2278, 547 U.S at ____.

¹⁸³ 126 Sup.Ct. at 2276, 547 U.S at ____ (citing cases, state and federal, showing that one can be convicted of obstruction of justice and other statutory offenses for lying to the police).

¹⁸⁴ 126 Sup.Ct. at 2278 n. 5, 547 U.S at ____ n. 5.

¹⁸⁵ 126 Sup.Ct. at 2278, 547 U.S at _____. The defense pointed out that separation of the warring spouses in order to facilitate the wife’s accusation was part of some protocols for investigation of domestic abuse cases. Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 11 n. 17.

ity between the two interviews is striking.”¹⁸⁶ In the one case the declarant was “responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers” while the other gave “frantic answers. . . over the phone, in an environment that was not tranquil, or even (so far as a reasonable 911 operator could make out) safe.”¹⁸⁷

----- mode of questioning

In addition to pointing out that the declarant in Hammon was separated from the defendant during questioning, the majority looks to the nature of the questioning to determine whether the responses are “testimonial.”¹⁸⁸ The Court finds the Hammon questioning similar to that in Crawford because “[b]oth statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed.”¹⁸⁹ Though this speaks more of the response, earlier the majority explained that when the Court said in Crawford “that ‘interrogation by law enforcement officers falls squarely within [the] class’ of testimonial hearsay, we had immediately in mind . . . interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.”¹⁹⁰ The opinion leaves it unclear whether the purpose of the interrogating officer makes the statement “testimonial” even if the declarant does not foresee its use at trial---probably a common scenario in domestic abuse cases.¹⁹¹

-----temporal test

Finally, the Davis majority suggests that time plays an important role in determining whether a statement is “testimonial.”¹⁹² First, the time the interrogation takes place can determine whether or not it is “testimonial”; the majority opinion notes that “both

¹⁸⁶ 126 Sup.Ct. at 2276-2277, 547 U.S at ____.

¹⁸⁷ 126 Sup.Ct. at 2277, 547 U.S at _____. In questioning the prosecutors during oral argument Justice Scalia repeatedly portrayed the officers and the declarant sitting around the kitchen table drinking coffee. Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, pp. 28-29, 50.

¹⁸⁸ “Both declarants were actively separated from the defendant---officers forcibly prevented [the defendant] from participating in the interrogation.” 126 Sup.Ct. at 2278, 547 U.S at ____.

¹⁸⁹ 126 Sup.Ct. at 2278, 547 U.S at ____.

¹⁹⁰ 126 Sup.Ct. at 2276, 547 U.S at ____.

¹⁹¹ Some statements might be read as saying “yes” but they are quite murky. E.g., “[a]nd of course even when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogators questions, that the Confrontation Clause requires us to evaluate.” 126 Sup.Ct. at 2274 n. 1, 547 U.S at ____ n.1.

¹⁹² This was inevitable because both 911 calls and “investigatory interrogations” can be seen as “nontestimonial” because they take place at such an early point in the standard chronology of a criminal prosecution.

[Hammon interrogations] took place some time after the events described were over.”¹⁹³ And in Davis, the court rhetorically marked the end of the nontestimonial part of the 911 call temporally: after the 911 “operator then told [the victim] to be quiet, and proceeded to pose a battery of questions. . . [the victim’s] statements were testimonial, not unlike the ‘structured police questioning’. . . in Crawford.”¹⁹⁴ Second, the Court emphasizes the temporal stance of the declarant; that is, do the statements describe events in the present or do they look back at the past.¹⁹⁵

-----dueling metaphors

Though we may doubt that the justices who joined the majority opinion thought they were endorsing Justice Scalia’s metaphors, it is useful to compare them.¹⁹⁶ In Davis, the Court looked on the question from the declarant’s point of view: she was “facing an ongoing emergency” so her statements were “plainly a call for help” rather than an accusation of crime.¹⁹⁷ But the Court also looked at the facts from the prosecutorial perspective: “we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition.”¹⁹⁸ These contrasting metaphors reflect the Court’s uncertain stance regarding the policy of the Confrontation Clause: does it impose a duty on those who would assume the public role of “accuser” or does the duty arising from the defendant’s right run against the state?¹⁹⁹ If the latter, then is it “conceivable that the protections of the Confrontation Clause can readily be evaded” by having an informer interrogate the declarant instead of having a justice of the peace do the job?²⁰⁰

---rule of thumb analysis: the “declarant’s objective intent test”

¹⁹³ 126 Sup.Ct. at 2278, 547 U.S at ____.

¹⁹⁴ 126 Sup.Ct. at 2277, 547 U.S at ____.. Since the Court thought it only needed to classify the declarant’s early statements accusing the defendant of beating her, it did not actually have to draw the line.

¹⁹⁵ The “testimonial” statements in Crawford and Hammon “deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed” whereas the declarant in Davis “was speaking about events *as they were actually happening*, rather than ‘describ[ing] past events’ so her statements were “nontestimonial.” 126 Sup.Ct. at 2276, 2278, 547 U.S at _____. Pp. 12, 15.

¹⁹⁶ As we shall see shortly, the lower courts seized upon similarly colorful phrases in Crawford.

¹⁹⁷ 126 Sup.Ct. at 2276, 547 U.S at ____.

¹⁹⁸ Sup 126.Ct. at 2276, 547 U.S at ____.

¹⁹⁹ The latter view is more common. See FPP § 6341. The former is suggested by President Eisenhower’s oft-quoted description of the “Code of Abilene” in his denunciation of McCarthyite faceless informers: “if someone dislikes or accuses you, he must come up front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind.” See FPP § 6360, text at notecall 872.

²⁰⁰ See the discussion below at notecall 210.

As we have seen, in *Hammon* the defendant attacked the “official inducement test” , suggesting that the Indiana Supreme Court erred because it used that standard rather than Professor Friedman’s “declarant’s objective intent test.”²⁰¹ The state prosecutors in both *Davis* and *Hammon* retaliated by attacking Professor Friedman’s test on grounds it lacked support in either the history or the text of the Confrontation Clause.²⁰² Of course, one could say the same thing about the “official inducement test” but consistency was not a prominent feature of the arguments in *Davis-Hammon*.²⁰³ The state in *Davis* conceded that it had urged the Friedman test on the Washington Supreme but recanted before the U.S. Supreme Court.²⁰⁴

Ironically, the Department of Justice supplied the strongest support for the Friedman test, arguing that one of the hallmarks of the civil law system was that the declarant’s knew their statements would be used as evidence against the accused.²⁰⁵ It pointed out that the Friedman test explained the results in *Dutton v. Evans* and *U.S. v. Bourjaily* (the latter cannot be squared with the official inducement test).²⁰⁶ *Dutton* admitted a statement that a co-defendant made to a cellmate; *Bourjaily* found no confrontation violation in the admission of statements induced from coconspirators by a police undercover agent.²⁰⁷

The Department of Justice argument pinpoints the flaw in Professor Friedman’s “formulation”; namely, it rests less on policy and more on a desire to conform to the Court’s pre-Crawford cases.²⁰⁸ Consider, for example, his reiteration in *Davis* that the result in *Bourjaily* was correct.²⁰⁹ This means the police can devise a system to evade the right of confrontation by using undercover agents rather than uniformed officers to

²⁰¹ Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 14.

²⁰² Brief for Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 284228, p. 10; Brief of Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 271825, p. 11.

²⁰³ The state in *Hammon*, however, did reject both tests on the same ground. Brief of Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 271825, pp. 7-8. But that position was inconsistent with the position it took before the Indiana Supreme Court.

²⁰⁴ Brief for Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 284228, p. 36 n. 14.

²⁰⁵ Brief for The United States as Amicus Curiae Supporting Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 303911, p. 11.

²⁰⁶ Brief for The United States as Amicus Curiae Supporting Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 303911, p. 12.

²⁰⁷ The two cases are described and discussed in the analysis of the category of “private conversations”, below, text at notecall 294. As the reader will see, neither of the cases involved an “accusation.”

²⁰⁸ Friedman, *The Confrontation Clause Re-rooted and Transformed*, 2004, 2004 *Cato Sup.Ct.Rev.* 439, 452 (Professor Friedman and his allies “went to some pains to assure the Supreme Court that adoption of the testimonial approach would alter the results of few, if any, of the Court’s own precedents.”).

²⁰⁹ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, pp. 4-6.

interrogate suspects and witnesses, a possibility Professor Friedman decries elsewhere in his Hammon brief.²¹⁰

But a more serious flaw in the Friedman test is that it privileges irresponsible over responsible accusations.²¹¹ Suppose, for example, a neighbor tells the victim that her husband was just seen buying a gun and the victim replies in apparent seriousness “I think he’s planning to kill me.”²¹² According to Professor Friedman, the jury gets to hear the “reverberating clang” of the questionable accusation but a similar but more responsible accusation by the wife to a police officer who had just discovered a gun in the family’s SUV must be excluded.²¹³ Just how one could reconcile this with Professor Friedman’s set of confrontation “values” does not readily appear.²¹⁴

Second, the prosecutors correctly argued that the Friedman test was “too broad.”²¹⁵ It would exclude many trivial bits of evidence that bear little resemblance to an “accusation” of crime.²¹⁶ For example, a certificate of a police technician that a breath machine was working properly or an affidavit of a clerk that the files of the Immigration and Naturalization Service do not contain permission for an alien to enter the country would be treated the same as an accusation of murder.²¹⁷

Finally, to apply the Friedman test to cognitively-impaired declarants one must make use of grotesque arguments or twisted fictions.²¹⁸ Professor Friedman recognizes

²¹⁰ Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, pp. 37-40; Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, pp. 2-5 (arguing the 911 emergency call number is just such a system).

²¹¹ This flaw would not be cured even if we read the “accusation” gloss that Professor Friedman put on the test in his Hammon brief.

²¹² The neighbor may be able to opine that the victim was not joking, but she cannot tell us whether the wife had any basis for her suspicions or whether she was just blowing off steam or blowing off a nosy neighbor.

²¹³ Friedman, *The Confrontation Clause Re-rooted and Transformed*, 2004, 2004 *Cato Sup.Ct.Rev.* 439, 458 (“If the declarant does not recognize she is creating evidence that may be used in a criminal proceeding, then the nature of what she is doing in making the statement is not testimonial.”)

²¹⁴ Friedman, *The Confrontation Clause Re-rooted and Transformed*, 2004, 2004 *Cato Sup.Ct.Rev.* 439, 441-442. Arguably the statement to the policeman is more “open” than the statement to the neighbor and the presence of the badge and the sanctions the Court mentions in *Davis* would discourage falsehood more than the neighbor’s willing ear.

²¹⁵ Brief of Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 271825, pp. 36-38.

²¹⁶ The “accusation” gloss placed on the test in Professor Friedman’s Hammon brief would fix this.

²¹⁷ Friedman, *The Confrontation Clause Re-rooted and Transformed*, 2004, 2004 *Cato Sup.Ct.Rev.* 439, 463. For the evasions lower court have had to resort to escape this trap, see FPP § 6371.2, text at notecall 204.

²¹⁸ See FPP § 6371.2, text at notecall 142. An amicus brief in *Crawford* made the grotesque argument that an accusation by a child could be analogized to “the barking of a dog.” Amicus Brief on Behalf of Cer-

the problem: if you hold children incapable of admissible accusations, you make them a target population for predators.²¹⁹ He seems to endorse the suggestion that children (and presumably adults with the mental capacity of children) be allowed to testify without assuming the obligations of an accuser just as we allow children to engage in grown-up activities without taking on the responsibilities imposed by the law of torts.²²⁰ This has the advantage of reversing whatever incentives confrontation doctrine provides pedophiles to hang around nursery schools rather than middle schools.²²¹

Since Professor Friedman was pushing an “accusation-based” version of the “declarant’s objective intent test” in *Hammon*, the Court’s opinion tells us little about the future of the test.²²² Moreover, when asked by Justice Breyer to compare his test with the “official inducement test”, Professor Friedman soft-pedaled the differences between them---at least as applied in *Hammon*.²²³ On a couple of occasions Justice Scalia asked questions that presupposed that the “declarant’s objective intent” test was in his mind but his opinion for the majority says little about the application of the test to either case.²²⁴

---the “resemblance test”

As previously mentioned, the state prosecutors in *Davis* cast a pox on both Professor Friedman’s test and that of his rival; it proposed instead that “[a] statement is ‘testimonial’ only if it was produced using investigative practices the closely resemble the historical abuses addressed by the Confrontation Clause.”²²⁵ The Indiana prosecutors endorsed the “resemblance test” but put enough glosses on the test to suggest that

tain Law Professors, 2003, 2003 WL 21754958, p. 22 n. 12. Professor Friedman has made the same argument. Friedman, *The Confrontation Clause Re-rooted and Transformed*, 2004, 2004 Cato Sup.Ct.Rev. 439, 461 (“bark of a bloodhound”).

²¹⁹ A similar problem erupted during the Gold Rush years in California after the legislature adopted a statute making people of color incompetent witnesses. Robbers began to boldly prey on non-Caucasian miners. XXX

²²⁰ Friedman, *The Confrontation Clause Re-rooted and Transformed*, 2004, 2004 Cato Sup.Ct.Rev. 439, 461-462.

²²¹ However, it also requires Professor Friedman to expand his list of confrontation policies. See Friedman, *The Confrontation Clause Re-rooted and Transformed*, 2004, 2004 Cato Sup.Ct.Rev. 439, 441-442.

²²² It also makes it difficult to be certain during oral argument exactly which test is under discussion.

²²³ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, pp. 24-25 (suggesting that Professor Amar’s test places more emphasis on “formality”).

²²⁴ *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, p. 10 (asking the purpose of the victim’s call to 911 if it was not for assistance in dealing with an emergency); *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 42 (when state argues that purpose of officer was to deal with an emergency that presented itself, Justice Scalia suggests that it is the declarant’s purpose---not that of the officer---that should be determinative).

²²⁵ Brief for Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 284228, p. 16.

they had little faith in it.²²⁶ The Department of Justice also endorsed the test but would limit it to statements that displayed what the it called “the three hallmarks” of statements produced by the civil law system of justice.²²⁷ To escape the problem that while the Supreme Court had relied on history to justify the “testimonial” limit on the Confrontation Clause, it had never suggested that courts should determine whether a statement was testimonial by comparing the behavior of the interrogator to that of Torquemada (or Judge Jeffries)²²⁸, the proponents of the test played dueling dictionaries²²⁹ and invoked a truncated version of the “holistic Sixth Amendment.”²³⁰ They also leaned on the authority of Professor Michael Graham, citing a proposed test of his that does not appear in the matter cited.²³¹

Perhaps because they also wanted to make historical arguments themselves, lawyers for defendants in the two cases treated the “resemblance test” gingerly.²³² The defense in Davis argued that as applied in that case, the “resemblance test” stood the Confrontation Clause on its head; that is, like the Friedman test it bars responsible accusations made under highly formal circumstances while admitting irresponsible accusations based on “third-stool” rumors.²³³ Professor Friedman in Hammon responded similarly but added that the proposed test invites courts and lawyers to distort history to obtain the desired result.²³⁴ Building on his earlier argument that the hostility of the

²²⁶ Brief of Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 271825, pp. 1 (invoking test), p. 8 (advocates “the following general rule: Extrajudicial statements are ‘testimonial’ only when they resemble the forms of extrajudicial statements that were produced by the abusive inquisitorial practices that gave rise to the Confrontation Clause”), 8-9 (adding Amar gloss---such statements had “formal qualities”), 9-10 (adding “corollary” that makes statements during an emergency “nontestimonial”).

²²⁷ Brief for The United States as Amicus Curiae Supporting Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 303911, pp. 5 (“three hallmarks”), 10 (endorses test); Brief for The United States as Amicus Curiae Supporting Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 303913, p. 9 (applying test to Hammon facts).

²²⁸ Lower courts have used this technique, but without suggesting the Supreme Court had endorsed it as an alternative to the three “formulations.” See FPP § 6371.2 (Supp. 2006) at notecall 117.

²²⁹ Brief for Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 284228, p. 20.

²³⁰ Brief for Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 284228, p. 13 (arguing that word “witness” in the Confrontation Clause should have the same meaning as in the Compulsory Process Clause, quoting Professor Amar, a leading proponent of “the holistic Sixth Amendment”) This argument ignores the rather different histories of the two provisions; e.g., that the Confrontation Clause as originally drafted applied to “accusers and witnesses.”

²³¹ Brief for Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 284228, p. 21 n. 8 (citing 30B FPP § 7032 at pp. 75-76 (Supp. 2005)).

²³² They may have also wished to avoid offending Justice Scalia and other members of the Court given to so-called “originalist” interpretation of the Constitution.

²³³ Reply Brief for Petitioner, *Davis v. Washington*, No. 05-5524, March 2, 2006, 2006 WL 542177, pp. 1, 6-7. For those unfamiliar with rural vernacular, a “third-stool” rumor is something overheard in a public restroom that is supposed to bear the stink of its origins.

²³⁴ Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, pp. 9-10.

Framers to the civil law system does not mean that they would have approved every other system for prosecuting cases²³⁵, he calls the “resemblance” test fallacious because it assumes that Crawford meant to approve any abusive system of interrogation not specifically condemned in the majority opinion.²³⁶

The oral argument began ominously for the proponents of the “resemblance test” when Justice Scalia seemed more skeptical of the lawyers’ historical arguments than he had been of his own in Crawford.²³⁷ Moreover, he seemed willing to take technological change into account when he suggested that the tape of the 911 call was a more devastating form of “accusation” than an accusatorial affidavit.²³⁸ When the state finally had the temerity to advance the “resemblance test” under the prodding of Chief Justice Roberts, Justice Scalia pounced, accusing the prosecutors of “over-reading” Crawford.²³⁹ Echoing Professor Friedman’s brief, he pointed out that the Framers had a broader universe of abuse in mind than merely the trial of Sir Walter Raleigh.²⁴⁰ When Justice Scalia proposed a hypothetical case designed to show the flaws in the argument, the state prosecutor could only complain that the hypothetical was “unrealistic.”²⁴¹ Nonetheless, the Department of Justice lawyers continued persistently but pathetically to push their version of the “resemblance test.”²⁴²

By the time the state prosecutors in Hammon got their chance to argue, the rout of the “resemblance test” was on.²⁴³ When the state first floated the argument, Justice Souter noted that the Court in Crawford had only been concerned with the “core” of the right of confrontation.²⁴⁴ Justice Scalia, picking up on the Friedman brief, doubted that

²³⁵ Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 11 n. 4.

²³⁶ Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, pp. 5-6.

²³⁷ *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, pp. 16-18 (questioning exclusion of “hue and cry” statements as precedent without some evidence exclusion was based on right of confrontation).

²³⁸ *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, p. 29.

²³⁹ *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, pp. 30-32.

²⁴⁰ *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, p. 32-33.

²⁴¹ *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, p. 33-34.

²⁴² The members of the Court showed little interest in the DOJ argument and when they did pose questions about it, the DOJ lawyer quickly showed that he was in over his head in dealing with historical materials, at one point begging the Court to find an “intuitive” differences between the procedure of the court that tried Sir Walter Raleigh, the practice of a 17th Century English Justice of the Peace, and modern police interrogators. *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, pp. 43, 49, 52.

²⁴³ One indicia of this is Chief Justice Roberts’ effort when the lawyers were under siege to lob up a question they could knock out of the park. *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 37.

²⁴⁴ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 31.

the Framers were as much concerned with negating the civil law system as they were desirous of affirming an adversary system of trial “where the person has a right to cross-examine his accuser.”²⁴⁵ After the state agreed that affidavits were “testimonial” under Crawford, Justice Stevens remarked that they could not explain that response by resort to Marian practice.²⁴⁶ Justice Scalia asked about a recording of an accusation that the accuser sent to the court; when the prosecutor responded that it was “testimonial”, Justice Scalia denounced his argument as “the worst kind of formalism.”²⁴⁷ Later Justice Stevens asked about an unsworn letter containing an accusation and the state answered that since Raleigh’s case involved a letter, the letter was “testimonial”; asked to reconcile that with his response to the tape-recording hypothetical, the prosecutor replied limply that they did not have tape-recorders at common law.²⁴⁸

This should suffice to show that the Court rejected the “resemblance test”; those who enjoy watching a cat toy with a mouse can read more in the note below.²⁴⁹ Since nothing in the Davis opinion specifically mentions the state’s proposal, the Court would be free to embrace it in a subsequent case.²⁵⁰ However, as we shall see later, the Court’s more cautious approach to historical argument does not suggest that it will be receptive to some more sophisticated version of the “resemblance test.”²⁵¹

---the “accusation-plus test”

As we have asserted *ad nauseum*, the historically correct way to deal with hearsay under state and federal confrontation clauses is to take account of the use by the Foun-

²⁴⁵ Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, p. 32.

²⁴⁶ Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, p. 34.

²⁴⁷ Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, p. 35.

²⁴⁸ Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, pp. 36-37.

²⁴⁹ Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, pp. 38-39 (Justice Ginsberg asks why the state does not just adopt the DOJ version of the Friedman test; state responds follows from our test; Ginsberg doubts it follows from the “resemblance test” and state answers that it falls under the corollary to that test and adds that the police did not behave like Torquemada in questioning the victim), 45 (Souter: you assume that Founders were not concerned about the ability of the court to test the truth of the statement; state: the hearsay rule covers that and Due Process in egregious cases), 46 (Souter: weren’t they concerned about more than Raleigh, like people with grudges who gave false testimony?; state: not according to Crawford), p. 47 (Souter: but Crawford looked at paradigms and was not limited to the precise evils of those paradigms), p. 48 (state: no historical evidence of that); pp. 61-62 (Breyer: what do you think of the “resemblance test”?; Friedman: “not much, your honor.” [Laughter] But seriously, it’s too vague---the accusation test I propose is more clearcut).

²⁵⁰ One can expect to see prosecutors in lower courts, who presumably know about the test from the prosecutorial grapevine, to try to convince ignorant judges to adopt it. Or so we justify this rather long discussion of something that does not appear on the face of the Davis opinion.

²⁵¹ See below, p. 41.

ders of the word “accusers” in the original clauses.²⁵² Under this reading, a hearsay statement triggers Confrontation Clause scrutiny only if it is an “accusation.”²⁵³ Defense counsel in both *Davis* and *Hammon* tried to sell the court a needlessly complex version of this interpretation.²⁵⁴ As Professor Friedman phrased it, “[a] statement made to a known police officer (or other governmental agent with significant law enforcement responsibilities) and accusing another person of a crime is testimonial within the meaning of *Crawford*.”²⁵⁵ Or to put it schematically:

accusation + police recipient= “testimonial” = accuser must be confronted²⁵⁶

But a true understanding of history requires only the last clause: e.g., “accuser” = must be confronted. As will appear shortly, the insistence on the Neo-Wigmorean history and the additional complexity required to fit the test into the misbegotten *Crawford* scheme provoked most of the opposition to the “accusation-plus” test.

The defendant in *Davis* relied exclusively on English sources for its claim that “accusatory statements have always rested at the heart of the right to confrontation.”²⁵⁷ According to the opening brief the “fundamental objective” of the right of confrontation was to require “accusations of criminal conduct to be leveled in court proceedings subject to adversarial testing”---a fair if incomplete statement of the the policy of the Sixth Amendment.²⁵⁸ Professor Friedman’s brief for the defendant in *Hammon* skimps on the history but does provide an interesting collection of quotations from Supreme Court opinions describing the right of confrontation which refer to the right to confront “accusers” rather than using the language of the Sixth Amendment.²⁵⁹ However, he provides a limiting definition of “accusation” when he tries to fit the true meaning of the Confronta-

²⁵² Several state constitutions gave the defendant the right to confront the “accusers and witnesses”, including the Virginia provision that Madison used as one of the models for the federal provision. Indeed, the draft Madison submitted used this language, but it was later changed to the present from without any explanation in the historical record. See Graham, *Confrontation Stories: Raleigh on The Mayflower*, 2005, 3 Ohio St.J.Crim.L. 209, 218-220.

²⁵³ While this historical support for this reading is far from overwhelming, it is far stronger than the evidence supposed to support *Crawford*’s rickety “testimonial” interpretation. Moreover, except for some difficult questions about the meanings of “accuse” and “accusation”, it is more clean and clear.

²⁵⁴ Brief for Petitioner, *Davis v. Washington*, No. 05-5524, Dec. 22, 2005 2005 WL 3598182, pp. 11, 15-19; Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, pp. 9-15.

²⁵⁵ Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 7.

²⁵⁶ The added terms are why we call this test “accusation plus.”

²⁵⁷ Brief for Petitioner, *Davis v. Washington*, No. 05-5524, Dec. 22, 2005 2005 WL 3598182, pp. 15-17. The brief also devotes much space to the “hue and cry” without any evidence that this procedure ever took root on this side of the Atlantic. *Id.* at pp. 18-22.

²⁵⁸ Brief for Petitioner, *Davis v. Washington*, No. 05-5524, Dec. 22, 2005 2005 WL 3598182, p. 38.

²⁵⁹ Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 13 n. 8.

tion Clause into the misguided Crawford schema: a statement that “transmits information for use in the investigation or prosecution of crime” to a “known police officer.”²⁶⁰

The prosecutors exploited Professor Friedman’s skimpy history by claiming that neither the text nor the history of the Sixth Amendment supports the “accusation-plus” test.²⁶¹ Exploiting the Neo-Wigmorean history, they claimed that “the Confrontation Clause does not protect the right to confront ‘accusers’, it protects the right to confront ‘witnesses.’”²⁶² Since he embraced the same impoverished history, Professor Friedman had no response to this ignorant argument, though he quite correctly pointed out that an “accuser-based” approach to the Confrontation Clause is both simpler and more intelligible than the Crawford “testimonial” reading.²⁶³

The prosecutors in Davis correctly saw the threat that the “accuser” reading of the Sixth Amendment posed to the Crawford analysis on which they relied and they attacked it on that ground.²⁶⁴ They also argued that “accusation-plus” test was “too broad.”²⁶⁵ The Department of Justice echoed that complaint²⁶⁶, but perhaps recognizing the threat of even the truncated set of historical materials in the Davis brief²⁶⁷, the DOJ lawyers tried to sidestep the thrust of the defense history.²⁶⁸ They used a dictionary to argue that when Raleigh and other English defendants demanded the right to confront their “accusers”, what they had in mind were “formal accusers.”²⁶⁹ The DOJ cited no historical evidence for this claim, perhaps because they knew that nothing in history supports it.²⁷⁰ Moreover, even if the DOJ could read Raleigh’s mind centuries later, they

²⁶⁰ Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 13.

²⁶¹ Brief of Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 271825, pp. 10-11.

²⁶² Brief of Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 271825, p. 32.

²⁶³ Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 1.

²⁶⁴ Reply Brief for Petitioner, *Davis v. Washington*, No. 05-5524, March 2, 2006, 2006 WL 542177, p. 31.

²⁶⁵ Brief for Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 284228, p. 34.

²⁶⁶ Brief for The United States as Amicus Curiae Supporting Respondent, *Davis v. Washington*, No. 05-5524, Feb. 2, 2006, 2006 WL 303911, p. 6.

²⁶⁷ By contrast, their reply to Professor Friedman seems to shrug off his arguments rather than respond to them, content to let the state prosecutors do the dirty work of dismissing his historical claims. Brief for The United States as Amicus Curiae Supporting Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 303913, pp. 7-8.

²⁶⁸ Brief for The United States as Amicus Curiae Supporting Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 303913, p. 6 (claiming the “accusers” the Framers had in mind were “formal accusers”).

²⁶⁹ Brief for The United States as Amicus Curiae Supporting Respondent, *Hammon v. Indiana*, No. 05-5705, Feb. 2, 2006, 2006 WL 303913, pp. 6, 21.

²⁷⁰ In fact, in Raleigh’s case Lord Coke called a sailor to testify to a hearsay accusation of Raleigh by a “Portugal gentleman.” See FPP § 6342, text at notecall 605.

provide no reason to suppose that John Adams was thinking of “formal accusers” when he complained that John Hancock should be afforded the right to confront his.²⁷¹

When Professor Friedman offered the “accusation-plus” test during oral argument, Justice Alito probed the meaning of “accusation”; does it include an incriminating statement that does not identify the perpetrator?²⁷² Instead of answering with a straightforward “no”, Professor Friedman appeared to waffle; he first gave a reluctant “yes”, then when pressed by Justice Alito, he opined that an “accusation” has to “describe the crime or identify the perpetrator or . . . both.”²⁷³ A bad answer.²⁷⁴ “Who killed Cock Robin?” describes a crime but no one who understands the language would call it an “accusation.”²⁷⁵ Justice Alito then asked a tough question: suppose someone calls 911 and says “I just saw a blue Toyota with Ohio plates commit a hit and run.”²⁷⁶ Though reasonable people might differ on this one, Professor Friedman seemed to consider this an “accusation”.²⁷⁷

Shortly thereafter the argument began the slide to the periphery.²⁷⁸ First, Chief Justice Roberts posed another hypothetical case; a victim runs out of the house screaming [an accusation?] to her neighbor and a passing policeman overhears her.²⁷⁹ Boxed in by the “accusation-plus” test, Professor Friedman can only answer that if the declarant does not know the officer is within earshot, it fails the “plus” part of the test.²⁸⁰ This presents an obvious question and Justice Kennedy poses it: why should it make any difference whether the accusation is to a neighbor or a policeman?²⁸¹ Professor

²⁷¹ See FPP § 6345, text at notecall 613. The Crown’s case against Hancock rested on the claim of a customs informer that the (now deceased) captain of Hancock’s ship offered him a bribe to permit the landing of wine without paying the required customs duties. *Id.* at notecall 604.

²⁷² *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 6.

²⁷³ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, pp. 6-7.

²⁷⁴ Since Professor Friedman must have recognized that the definitions of “accuse”, “accuser” and “accusation” were central to his argument, he cannot have been unprepared for the question. Perhaps he was just startled when it appeared so early in his argument.

²⁷⁵ For most questions that arise, the common sense meaning of “accuse” should suffice. The historical record does not contain any cases where the response to a demand for “accusers” was met with the first year law professor’s question: “what do you mean by ‘accuser’?”

²⁷⁶ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, pp. 7-8.

²⁷⁷ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 8. The uncertainty in the text arises from the fact that by this point the two had drifted off into Crawfordian language of “testimonial” and away from talking of “accusations.”

²⁷⁸ While this seems to be a common characteristic of appellate argument, one cannot but suspect that in this case it resulted from the defendant’s loading up the true “accuser” rationale with Crawford junk.

²⁷⁹ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 25.

²⁸⁰ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 26.

²⁸¹ *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 27.

Friedman replies that the police officer is a direct conduit to the court.²⁸² We are with Justice Kennedy on this one; “it doesn’t make any sense.”²⁸³ Moreover, it seems to clash with Professor Friedman’s claim elsewhere in his brief that the right of confrontation is violated when the hearsay is admitted at trial, not when it is gathered or uttered.²⁸⁴

During his stint at the podium, the man from DOJ attacked Professor Friedman’s test because statements it calls “testimonial” don’t fall within “any ordinary understanding of . . . testimony.”²⁸⁵ Chief Justice Roberts responded that “the Sixth Amendment doesn’t use the word testimony.” When the DOJ man tried to lecture him on Crawford, the Chief Justice cut him off with a variant of Professor Friedman’s argument; maybe the hearsay declarant becomes a “witness” when the statement is introduced at trial.²⁸⁶ Mr. DOJ retorted that’s not what the Court said in Crawford, ignoring the possibility that the Chief Justice, like Justice Stevens wanted to move beyond Crawford.²⁸⁷

Justice Scalia does not mention the “accusation-plus” argument in his majority opinion so the argument appears dead for the moment.²⁸⁸ Though its demise may be due to the attempt to link it with the Crawford analysis, given the recency of that case, the Court’s history of zigs and zags on the right of confrontation, and the desire of the Roberts Court to demonstrate institutional continuity and stability, the lawyers may have been doing the prudent thing in hitching their star to the creaky Crawford wagon.²⁸⁹ Perhaps, however, now that the Supreme Court has so drastically narrowed the federal right, lawyers may try to convince state supreme courts, particularly in states with confrontation clauses reading “accusers and witnesses”, to resurrect that distinction under state constitutions.²⁹⁰

---categorical analysis: generally

²⁸² Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, p. 28.

²⁸³ Hammon v. Indiana, No. 05-5705, Oral Argument, March 20, 2006, p. 27.

²⁸⁴ Reply Brief of Petitioner, Hammon v. Indiana, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 10.

²⁸⁵ Reply Brief of Petitioner, Hammon v. Indiana, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 53.

²⁸⁶ Reply Brief of Petitioner, Hammon v. Indiana, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 54.

²⁸⁷ Reply Brief of Petitioner, Hammon v. Indiana, No. 05-5705, March 9, 2006, 2006 WL 615151, pp. 54, 58.

²⁸⁸ It seems unlikely that any lawyer who knows this story will try to revive it in the near future.

²⁸⁹ Justice Scalia probably has too much reputational capital invested in his Neo-Wigmorean history to confess error, the new Federalist members of the Court were probably not prepared to take him on yet, and the members of the “liberal” wing probably would not have cared for an analysis that would have denied them of the partial victory they won for victim’s rights advocates.

²⁹⁰ Given that most state courts are now dominated by business libertarians of the Federalist Society sort, one cannot predict success for such efforts.

In addition to, or in place of, the “rule of thumb” analysis discussed above, many state and lower federal courts have resorted to “categorical” analysis; for example, 911 calls or “investigatory interrogations” are per se “nontestimonial.”²⁹¹ These two exemplify “practical categorization” which relies on recurrent fact patterns. But courts also engage in “doctrinal categorization” in which hearsay admitted under particular hearsay exceptions gets the per se nontestimonial treatment.²⁹² Though much of the Davis opinion seems hostile to the use of categories that make certain statements per se “nontestimonial”, it will probably take more than Justice Scalia’s attitude to change the behavior of state and federal judges.²⁹³ Hence, it may be useful to point out some of the implications of Davis for a couple of the categories the state and lower federal courts have used to decide whether or not a statement is “testimonial.”²⁹⁴

-----“private conversations”

In reliance on a dictum in Crawford that “an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not”, some courts have held that “private conversations” are categorically “nontestimonial.”²⁹⁵ In Davis, the majority found it “unnecessary to consider whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’”²⁹⁶ Moreover, since many accusations to friends and family are “volunteered” rather than asked for, we should add that the Davis majority did not wish “to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial.”²⁹⁷ These dicta might suggest that the “testimonial” nature of accusations in private conversation remains an open question.²⁹⁸

On the other hand, during the part of the opinion overruling Roberts, in attempting to argue that the Roberts-era cases were consistent with Crawford, the majority claims

²⁹¹ See FPP § 6371.2, text at notecall 91 (Supp.2006)

²⁹² The two can overlap. For example, some courts hold 911 calls per se nontestimonial because they are “excited utterances.” See FPP § 6371.2, text at notecall 188 (Supp.2006).

²⁹³ By “hostile”, I mean that the majority was at pains to insist that some 911 calls or parts thereof could be “testimonial” and that some “investigative interrogations” could produce “nontestimonial” statements.

²⁹⁴ The Davis opinion could have implications for other categories not mentioned here but this treatment is limited to the more obvious implications.

²⁹⁵ FPP § 6371.2, text at notecall 163. The quotation from Crawford appears at 124 S.Ct. 1364, 541 U.S. at 51.

²⁹⁶ P. 8, n.2.

²⁹⁷ P. 7, n.1.

²⁹⁸ As we have argued above, making such statements “nontestimonial” suggests that the defense has less need to confront irresponsible accusations than it does to confront those made in more formal circumstances. See above, text at notecall 209.

that the statements admitted in *Bourjaily v. U.S.* and *Dutton v. Evans* “were clearly non-testimonial.”²⁹⁹ In *Bourjaily*, instead of having the declarant interrogated by a justice of the peace, the F.B.I. sent a wired informant posing as a big time drug dealer to elicit incriminating hearsay statements.³⁰⁰ However, the implications for the claim that communications to “confidants” are per se “nontestimonial” is substantially weakened by the fact that the statements in *Bourjaily* were admitted as declarations of coconspirators; hence, Justice Scalia may have meant that they fell outside of *Crawford* because they were not “hearsay.”³⁰¹

In *Dutton v. Evans*, the person who testified to the statement was the declarant’s cellmate---not exactly a “confidant” but the statement was made “in private.”³⁰² In response to the question, “how did you make out in court?”, the declarant replied “[i]f it hadn’t been for that son-of-a-bitch Alex Evans, we wouldn’t be in this now.”³⁰³ This looks more like “casual remark” than the statements in *Bourjaily* so it lends some support to the categorical treatment of “private conversations.”³⁰⁴

----- Rule 803(4) statements for medical diagnosis

In prosecutions for child abuse, one of the two most common routes for admissibility of accusations by the victim lies through the hearsay exception in Evidence Rule 803(4) for statements made for medical diagnosis.³⁰⁵ Courts borrow the rationale for the hearsay exception and insert it into the “declarant’s objective intent test”; i.e., the child does not intend to make an accusation but intends to obtain medical assistance.³⁰⁶ To the extent that *Davis* severely limits the “seeking help” rationale for 911 calls, it tends to undermine this category.³⁰⁷ Similarly, when the Court ended the “nontestimonial” portion of the 911 call when the operator started her “structured questioning”, it also casts doubt

²⁹⁹ P. 10. It is unclear how many of the Justices accept that. See *Davis v. Washington*, No. 05-5224, Oral Argument, March 20, 2006, pp. 10-11 (Chief Justice Roberts wonders whether defense argument applies if police officer simply overhears a statement; reply, “no” because of *Bourjaily*). *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, pp. 4-6 (Justice Breyer raises *Bourjaily* hypothetical with unsatisfactory results). See above at note 280 (Justice Kennedy says *Bourjaily* distinction makes no sense).

³⁰⁰ 1987, 107 S.Ct. 2775, 2778, 483 U.S. 171, 173-174, 97 L.Ed.2d 144, discussed in FPP § 6369.

³⁰¹ See FPP § 6371.2, text at notecall 174 (Supp.2006).

³⁰² 1970, 91 S.Ct. 210, 400 U.S. 74, 27 L.Ed.2d 213, discussed in FPP § 6365.

³⁰³ *Id.* at 214, 400 U.S. at 77-78.

³⁰⁴ On the other hand, one might argue that since the statement in *Dutton* was arguably not an “accusation”, see text at notecall 272 above, *Dutton* does not apply to private “accusations”.

³⁰⁵ The other is for statements made in “private conversations” with friends, family member, or teachers.

³⁰⁶ See FPP § 6371.2, text at notecall 194.

³⁰⁷ Putting aside the problems in applying the “declarant’s objective intent” test to very young children, see *id.* at notecall 142, the child does not make the appointment with the doctor but is taken there by parents, social workers, or police---often after having made accusations of abuse to these people.

on categorical analysis of statements to medical personnel, especially those who use an interrogation “protocol” designed to elicit accusations of abuse.³⁰⁸

In addition to undermining the application of the “declarant’s objective intent” test to child witnesses, the court has left open the possibility that statements to medical personnel might be “testimonial” under the “official inducement test.”³⁰⁹ Although it disclaimed deciding “whether and when statements made to someone other than law enforcement personnel are ‘testimonial’”, the majority opined that “[i]f 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers.”³¹⁰ Though this strengthens the case for finding statements to medical personnel “testimonial” where the child goes to the hospital under the advice or at the direction of police officers, it may not extend so far as turning doctors police “agents” simply because state statutes require them to report child abuse cases to the police.³¹¹

---forfeiture exception

After stating that domestic violence cases are “notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial”, Justice Scalia reminds the reader of what the Court said about the forfeiture exception in *Crawford*.³¹² In what sounds like an invitation to trial judges to exploit the exception, the majority opinion says that “when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.”³¹³ Given the way in which lower courts have expanded the exception in domestic violence cases, one shudders to think what they will do with the majority’s suggestion that the exception applies in any case where the defendant acts in “ways that destroy the integrity of the criminal-trial system.”³¹⁴

Procedure for adjudicating confrontation claims

³⁰⁸ Indeed, courts that reject this categorization sometimes note that the child was questioned using techniques and protocols specifically designed to elicit usable evidence of child abuse. *Ibid*.

³⁰⁹ That is, the Court makes it more difficult to argue that the statements to the doctor or social worker were part of a “private conversation.”

³¹⁰ 126 Sup.Ct. at 2274 n. 2, 547 U.S at ____ n. 2.

³¹¹ The statutes are discussed in 25 FPP § 5549, text at notecall 32.

³¹² “We reiterate what we said in *Crawford*: that ‘the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds.’” 126 Sup.Ct. at 2279-2280, 547 U.S at ____.

³¹³ 126 Sup.Ct. at 2280, 547 U.S at ____.

³¹⁴ 126 Sup.Ct. at 2280, 547 U.S at _____. As originally stated, the forfeiture exception was limited to acts intended by the defendant to suppress evidence; after *Crawford* some lower courts apply it whenever the effect of defendant’s acts make the witness unavailable even if the defendant did not act with intent to suppress evidence. See FPP § 6371.2, text at notecall 249 (Supp. 2006).

With the exception of the standards for appellate review, state and lower federal courts have generally applied the procedural provisions of the Evidence Rules and their state clones in adjudicating confrontation questions.³¹⁵ The Davis opinion seems to ratify that practice.³¹⁶

---motions in limine

Though the Supreme Court has generally been hostile to the motion in limine in its prior opinions, in Davis the majority opinion states that when trial courts “recognize the point at which. . . statements in response to interrogations become testimonial”, then through “*in limine* procedure they should redact or exclude portions of any statements that have become testimonial” just as they do with other prejudicial or inadmissible evidence.³¹⁷ Though a trial court’s ruling redacting the statement is presumably “definitive” under Rule 103(a)(2), trial counsel would be wise to object again at trial to prevent hostile appellate courts from holding that the confrontation objection was waived.³¹⁸

---preliminary questions of fact

Given the fact-specific way in which the Davis majority treats the “testimonial” inquiry, findings of preliminary questions of fact by the trial court become crucial to vindication of the Sixth Amendment right.³¹⁹ In Davis, the majority opinion touches on two features of Evidence Rule 104 in its discussion of the forfeiture doctrine. The first is the burden of proving the preliminary facts: “[w]e take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard. . . .”³²⁰ Notice that the majority here embraces the view of most courts that burden of proof is on the party seeking to have the disputed evidence admitted.³²¹

³¹⁵ See FPP § 6371.2, text at notecall 269 (Supp. 2006). However, only a handful of appellate courts apply the “abuse of discretion” standard of review for evidentiary rulings to Crawford; the overwhelming majority of state and federal courts review the application of Crawford *de novo*. Id. at notecall 276.

³¹⁶ For example, the Court states that since the defendant did not raise the propriety of the Washington Supreme Court’s finding that the lower court’s error in admitting the “testimonial” portions of the 911 call was “harmless beyond a reasonable doubt”, the Court need not address that issue. 126 Sup.Ct. at 2277-2278, 547 U.S. at ____.

³¹⁷ 126 Sup.Ct. at 2277, 547 U.S. at _____. The Court’s hostility to the motion is documented in vol. 21, § 5037.12, p. 782.

³¹⁸ See vol. 21, § 5037.15.

³¹⁹ See generally, vol. 21A, § 5052.

³²⁰ 126 Sup.Ct. at 2280, 547 U.S. at _____. [adding that “[S]tate courts tend to follow the same practice”]. See also, vol. 21A, § 5053.6, p. 109.

³²¹ See, vol. 21A, § 5053.6, p. 107.

The second procedural matter addressed by the Davis majority is the application of the Rules of Evidence to determinations of preliminary questions of fact.³²² Justice Scalia writes that if a hearing on forfeiture is required. . . ‘hearsay evidence, including the unavailable witness’s out-of-court statements, may be considered.’”³²³ Knowledgeable readers will appreciate that this confirms what is implicit in the Court’s other discussion of procedure; i.e., that the judge, not the jury, determines the preliminary facts needed to admit or exclude evidence under the Sixth Amendment.³²⁴

Implications of Davis for confrontation jurisprudence

The opinions in Davis tend to confirm recent trends in the theory and practice of constitutional adjudication as applied to the right of confrontation.³²⁵

--- “law office history”³²⁶

Like his Crawford opinion, Justice Scalia’s opinion for the majority in Davis makes copious use of “law office history”---that is, an account of the past that is driven by the rhetorical needs of the court or counsel at the moment.³²⁷ Sometimes history simply provides metaphors to justify the Court’s holding; e.g., [unlike] “Lord Cobham’s statements in *Raleigh’s Case*” [the victim’s 911 call was not] “ ‘ a weaker substitute for live testimony’ at trial. . .”³²⁸ While this may seem like a harmless conceit, it invites lawyers and judges to focus on a kind of antiquarianism rather than on the policy of the Sixth Amendment.³²⁹

³²² See vol. 21A, § 5055.

³²³ 126 Sup.Ct. at 2280, 547 U.S at _____. [quoting *Commonwealth v. Edwards*, 2005, 444 Mass. 526, 542, 830 N. E. 2d 158, 172].

³²⁴ See vol. 21A, § 5055.

³²⁵ Though we discuss only the majority opinion, the dissent does not differ on any of these trends.

³²⁶ Compare Eisenach, Book Review, 2006, J.Am.Hist. 194, 195 (“Forensic history is the use of history in legal argument. As such it is a brief to persuade; the lawyer seeks authority, not evidence; his need is to find the law, not the truth.”).

³²⁷ This practice began in earnest with an amicus brief filed by the Department of Justice in *White v. Illinois*, 1992, 112 S.Ct. 736, 740, 502 U.S. 346, 352, 116 L.Ed.2d 848, discussed in FPP § 6370, text at notecall 70. Before that the Court had subscribed to a “faded parchment” doctrine; that is, the belief that the Confrontation Clause had no useful history. See Justice Harlan’s opinion in *California v. Green*, 1970, 90 S.Ct. 1930, 1943, 399 U.S. 149, 173-174, 26 L.Ed.2d 489 (“ . . . the Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope [of the Clause].”

³²⁸ 126 Sup.Ct. at 2277, 547 U.S at _____. See also 126 Sup.Ct. at 2278, 547 U.S at ____: “What we called the ‘striking resemblance’ of the Crawford statement to civil-law *ex parte* examinations, 541 U. S., at 52, is shared by [the victim’s] statement here.”

³²⁹ In the Davis case itself, the brief on behalf of the defendant devoted a good deal of space to comparing a 911 call with the old English “hue and cry”---space that might better have been devoted to pointing

The briefs in Davis-Hammon amply demonstrate this point. The opening brief in Davis made history the central part of its argument, wandering through the law of ancient Rome, the Jewish practice of having the accuser “cast the first stone” in the execution of an adultress, the English “hue and cry” system, and the history of the “res gestae” doctrine.³³⁰ The state’s brief responded in kind; e.g., describing practice under the Marian statutes, claiming the excited utterance exception to the hearsay rule existed in 1791, and arguing that the “hue and cry” was nothing like the defense portrayed it.³³¹ The defense fired back with Blackstone and Hale.³³² The brief for the state in Hammon probably broke the Olympic record for the number of historical sources it threw in to support its application of the “resemblance test.”³³³ In this farrago of historical references, only one referred to the history of the United States---the nation whose Constitution is supposedly being expounded.³³⁴

Despite all this “assistance of counsel”, the Davis opinion repeats some of the mistakes made in Crawford; e.g., supposing that right of confrontation was imported from England rather than arising as an indigenous product.³³⁵ Given Justice Scalia’s vociferous opposition to the use of “foreign precedents”³³⁶, one can only smile with amusement when he writes of “the English cases that were the progenitors of the Confrontation

out the limits of the criminal sanction in ending the scourge of domestic violence. Brief for Petitioner, Davis v. Washington, No. 05-5224, pp. 18-23, 2005 WL 3598182.

³³⁰ Brief for Petitioner, Davis v. Washington, No. 05-5524, Dec. 22, 2005 2005 WL 3598182, pp. 15-16 (Roman and Jewish law, and tossing in Raleigh), 18-22 (hue and cry), 25-32 (excited utterances). Though we are not experts in all these fields, some of the claims strike us as doubtful; e.g., the claim that Wigmore invented the excited utterance exception.

³³¹ Brief for Respondent, Davis v. Washington, No. 05-5524, Feb. 2, 2006, 2006 WL 284228, pp. 16-17 (Marian practice), 32 (excited utterances and hue and cry).

³³² Reply Brief for Petitioner, Davis v. Washington, No. 05-5524, March 2, 2006, 2006 WL 542177, pp. 6-7. The brief also tosses in a couple of very early English evidence treatises, Gilbert and Starkie.

³³³ Brief of Respondent, Hammon v. Indiana, No. 05-5705, Feb. 2, 2006, 2006 WL 271825, pp. 8-9 (civil law practice, the prerogative courts, the Marian statutes, Raleigh, Star Chamber, justices of the peace) 15-19 (same plus The Inquisition, the vice-admiralty courts and the Privy Council).

The Justice Department brief set another kind of record for “lawyer’s history”, writing the entire history of the right of confrontation out of the Supreme Court’s opinion in Crawford. Brief for The United States as Amicus Curiae Supporting Respondent, Davis v. Washington, No. 05-5524, Feb. 2, 2006, 2006 WL 303911, pp. 8-11.

³³⁴ Reply Brief for Petitioner, Davis v. Washington, No. 05-5524, March 2, 2006, 2006 WL 542177, p. 7 (quoting a remark of Chief Justice Marshall, sitting as the trial judge in the conspiracy trial of former Vice-President Aaron Burr).

³³⁵ On the Crawford use of history, see Graham, Confrontation Stories: Raleigh on The Mayflower, 2005, 3 Ohio St.J.Crim.L. 209.

³³⁶ See, e.g., Mauro, Scalia Tells Congress to Stay Out of High Court Business, Legal Times, May 19, 2006 (online) (reporting on the Justice’s response to a proposed statute that would codify his views).

Clause. . .³³⁷ But those familiar with the Progressive Procedural Paradigm will recognize this as part of the Anglophilia that dominates American law schools and leads its acolytes to forget that the United States is no longer an English colony.³³⁸

The flaws in his “law office history” become clearer when Justice Scalia uses it in *Davis* to justify excluding most hearsay from the restrictions of the Confrontation Clause.³³⁹ In *Crawford*, the Court had looked at the word “witnesses” in the Sixth Amendment to derive the theory that “testimonial” hearsay fell within the Confrontation Clause.³⁴⁰ Had the Court looked at the real history of the Clause, it would have seen that the “progenitors” of the right were state constitutional provisions that gave the defendant the right to confront both “witnesses” and “accusers.”³⁴¹ The concept of “accuser” would have captured the kinds of hearsay that should be subject to a constitutional ban far better than the Court’s newly-minted “testimonial” category.³⁴² But at least *Crawford* seemed to leave “nontestimonial” hearsay under the governance of *Ohio v. Roberts*.³⁴³

But now Justice Scalia wants to use history to justify overruling *Roberts*, stating that “[w]e are not aware of any early American case invoking the Confrontation Clause or the common law right of confrontation that did not clearly involve testimony as thus defined [that is, “testimonial” hearsay].”³⁴⁴ Apparently the Court is “unaware” that in 1807, Chief Justice Marshall in the trial of Aaron Burr “invoked” the right of confrontation as a ground for excluding the declarations of Herman Blennerhasset, one of Burr’s supposed co-conspirators.³⁴⁵ And while the majority cites an impressive collection of ante-

³³⁷ 126 Sup.Ct. at 2276, 547 U.S at ____.

³³⁸ See Graham, *The Persistence of Progressive Proceduralism*, 1983, 61 *Texas L.Rev.* 929, 940. See also, vol. 21, § 5001, pp. 32-40.

³³⁹ See above, text at p. 16.

³⁴⁰ The relevant passage is quoted in note 136, above.

³⁴¹ In fact, as originally drafted by James Madison, the Sixth Amendment gave the defendant the right “to be confronted with his accusers, and the witnesses against him.” FPP § 6347, text at notecall 785.

³⁴² Ironically, the defendant in *Davis* tried to convince the court to read “accuser” back into the definition of “testimonial”, an argument the majority rejected, apparently because it would have derived the concept of the desired “flexibility.” Brief for Petitioner, *Davis v. Washington*, No. 05-5224, pp. 15-18, 2005 WL 3598182.

³⁴³ Or so most state and lower federal courts held. See FPP § 6371.2, text at notecall 259 (Supp.2006).

³⁴⁴ 126 Sup.Ct. at 2274, 547 U.S at ____.

³⁴⁵ See *U.S. v. Burr*, C.C.A. Va., 1807, 25 *Fed.Cas.* 187, 193, discussed in FPP § 6356, text at notecall 748. This is a significant oversight because this case was one of the few citations to U.S. history in the *Davis* briefs. See Reply Brief for Petitioner, *Davis v. Washington*, No. 05-5524, March 2, 2006, 2006 WL 542177, p. 7. Perhaps when Justice Scalia says “invoked” he means “relied on as the sole ground of decision; in the *Burr* ruling, Chief Justice Marshall “invoked” the confrontation right as a justification for interpreting the hearsay rule to, as we would say today, “avoid the constitutional question.”

bellum state cases invoking the right of confrontation for “testimonial” hearsay, it does not mention cases in which the right was “invoked” against “nontestimonial” hearsay.³⁴⁶ Justice Scalia’s history is correct only if “invoked” means “used by the court to justify excluding evidence”, not “relied on by judges and lawyers.”³⁴⁷ This narrower reading explains his failure to cite the Salinger case in connection with his claim that “[w]ell into the 20th Century, our own Confrontation Clause jurisprudence was carefully applied only in the testimonial context.”³⁴⁸ While some may think this is just picking at historical nits, given the way in which states and lower courts have been coming up with other versions of “history”³⁴⁹, the Supreme Court might have been less extravagant in its claims about how much history can teach us about the right of confrontation.

On the bright side, the majority does seem to recognize the limits of history when Justice Thomas in dissent tries to turn it against them.³⁵⁰ When the Justice Thomas argues that the statements in Hammon lack the formality of “depositions taken by Marian magistrates”³⁵¹, Justice Scalia testily replies: “[b]ut we no longer have examining Marian magistrates; and we do have, as our 18th-century forebears did not, examining police officers ---who perform investigative and testimonial functions once performed by examining Marian magistrates.”³⁵² He concludes with a characteristic bang: “[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”³⁵³ We applaud that sentiment and hope that judges and lawyers will keep it in mind when turning to history to resolve contemporary confrontation issues.³⁵⁴

³⁴⁶ *Woodsides v. State*, 1837, 2 How.(3 Miss.) 655 (holding maker of dying declaration not a “witness against” defendant); *Anthony v. State*, 1838, 19 Tenn. 265 (apparently holding dying declarations an exception to the right of confrontation); *Hill v. Commonwealth*, 1845, 2 Va. (Gratt.) 594, 607 (similar to *Woodsides*). See also FPP p. 107 n. 22 (collecting similar antebellum cases).

³⁴⁷ The latter would tell us what lawyers and judges in the period before the Civil War thought the right meant better than what courts said in upholding convictions.

³⁴⁸ 126 Sup.Ct. at 2274-2275, 547 U.S. at _____. *Salinger v. U.S.*, 1926, 47 S.Ct. 173,174, 272 U.S. 542, 547 71 L.Ed. 398 involved “letters, bank deposit slips, and book entries” but the Court’s discussion of hearsay and confrontation was dicta because the issue was whether the Court had jurisdiction of the appeal. See FPP § 6359, text at notecall 666.

³⁴⁹ See FPP § 6371.2, text at notecall 117 (Supp. 2006).

³⁵⁰ Justice Thomas wanted to limit “testimonial” hearsay to those proposed by the Justice Department and accepted in his and Justice Scalia’s opinion in *White v. Illinois*---“formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” P. 4.

³⁵¹ 126 Sup.Ct. at 2281-2282, 547 U.S. at ____.

³⁵² 126 Sup.Ct. at 2278 n. 5, 547 U.S. at ____ n. 5.

³⁵³ 126 Sup.Ct. at 2278 n. 5, 547 U.S. at ____ n. 5.

³⁵⁴ For more on this point, see FPP § 6348.

--- “small bites, well-chewed”³⁵⁵

Another praise-worthy feature of the majority opinion in *Davis* is Justice Scalia’s attempts to keep the scope of the Court’s decision within narrow bounds.³⁵⁶ In the modern era, many of the Supreme Court’s confrontation cases consist of taking back something said in an earlier opinion.³⁵⁷ While part of this flux results from the Court’s changing membership rather than changed minds, even that could have been limited had the opinions taken smaller bites of the problem and chewed them better.³⁵⁸ Apparently have seen the consequences of sweeping opinions like *Ohio v. Roberts*, the majority has abandoned the effort to engage in conceptual model-building and resigned itself to the need to regularly review what the lower Courts are doing with the Sixth Amendment.³⁵⁹

--- confrontation policy

Perhaps the most remarkable feature of the *Davis* opinion is how little it has to say about the policy of the Confrontation Clause.³⁶⁰ Except for those who regard preventing “governmental abuse” as the sole policy of the right of confrontation³⁶¹, many readers will see the majority opinion as mostly arid conceptualizing supported by a dubious historicism.³⁶² But now that Crawford has abandoned “reliability” as the touchstone for confrontation policy, lower courts need to know what the Court thinks are the ends of the Sixth Amendment in order to work out the means.³⁶³ Without meaning to disparage oth-

³⁵⁵ A mother’s advice on how to avoid stomach aches. Compare, Comment, A Bad Case of Indigestion: Internalizing Changes in The Right to Confrontation After *Crawford v. Washington* Both Nationally and in Wisconsin, 2006, 89 Marq.L.Rev. 625.

³⁵⁶ See, e.g., 126 Sup.Ct. at 2273, 547 U.S. at ____: “Without attempting to produce an exhaustive classification of all conceivable statements---or even all conceivable statements in response to police interrogation. . .it suffices to decide the present case to hold. . .”

³⁵⁷ See FPP §§ 6361-6370.

³⁵⁸ This would also leave states and lower federal courts more freedom to contemplate and experiment with policy rather than simply dictum mongering when faced with novel questions.

³⁵⁹ Over the last 40 years the Supreme Court has issue around 20 confrontation opinions, most of them in the two decades after *Roberts*. While we have undertaken no scientific study, we have the impression that the Court decides many more Fourth Amendment cases, most of which have little to do with the guilt or innocence of defendants.

³⁶⁰ Perhaps this results from the Court’s decision to write more modest opinions. But a policy ought to reflect fundamental values that need to be constantly refurbished but do not require the constant structural tinkering that a conceptual apparatus entails.

³⁶¹ The “government abuse” rationale is discussed above, p. 19.

³⁶² History can be a source for policy but except for the dedicated “originalist” it cannot itself be a policy.

³⁶³ For one attempt to derive a set of policies, see Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004, 2004 Cato Sup.Ct.Rev. 439, 443.

ers or claiming this one is exhaustive, here is a list of confrontation policies drawn from history that courts might use to work out the implications of Davis and Crawford:

- **anti-fusion:** Crawford culminates a long effort to sever the right of confrontation from the hearsay rule³⁶⁴; hence, categorical analysis based on hearsay exceptions should probably be avoided.³⁶⁵
- **separation of functions:** one of the vices of inquisitorial procedure was the way it combined the role of prosecutor, witness, judge, and jury.³⁶⁶ The common law system departed from this model with the introduction of the jury and its switch from a group likely to know the facts to a group that judged the evidence provided by other witnesses.³⁶⁷ One of the functions of the right of confrontation is to firm up the separate role of the witness.³⁶⁸
- **prescribing the obligations of an accusing “witness”:** one cannot become a “witness against” a criminal defendant without assuming a role and the obligations that go with it---coming into the presence of the defendant and the jury, assuming the liabilities imposed by an oath, and submitting to cross-examination.³⁶⁹ One of the ways the Sixth Amendment separates the functions of the various participants in a jury trial is by describing the functions of each.³⁷⁰
- **openness (a.k.a. “transparency”):** long before anyone ever heard of a “freedom of information act”, the English dissenter John Lilburne objected to his prosecutors speaking to the judges “in my absence, or in hugger-mugger or by private whisperings.”³⁷¹ Eventually the Confrontation Clause, working in tandem with the right to a public trial, constitutionalized the “blank pad rule”---or as it is known to jurisprudes,

³⁶⁴ See, e.g., *California v. Green*, 1970, 90 S.Ct. 1930, 1933-1934, 399 U.S. 149, 155, 26 L.Ed.2d 489 (while the hearsay rule and the Confrontation Clause protect similar values, they are not identical).

³⁶⁵ See above, p. 35. But see *Hammon v. Indiana*, No. 05-5705, Oral Argument, March 20, 2006, p. 11 (Justice Freyer worries that Crawford’s business records “exception” would be wiped out by “accusation plus” test).

³⁶⁶ See FPP § 6342, text at notecall 23.

³⁶⁷ See FPP § 6342, text at notecall 183.

³⁶⁸ As we shall see, the Confrontation Clause describes the obligations and role of the witness and distinguishes that role from that of the institutional “accuser”---the prosecutor.

³⁶⁹ Clark, *An Accuser-Obligation Approach to The Confrontation Clause*, 2003, 81 Neb.L.Rev. 1258. Compare Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 2 (a variant of this argument).

³⁷⁰ A glance at the text of the Sixth Amendment will see that it mentions all the participants except the judge and the prosecutor. The latter role was ill-developed in 1791 and the former was the target of the Amendment.

³⁷¹ FPP § 6342, text at notecall 197.

“the principle of the exclusivity of the record.”³⁷² While modernly we tend to think of the “blank pad rule” in terms of whispering bailiffs or “trial by newspaper”³⁷³, historically it served to guard against the ultimate form of “government inducement”; that is, statements obtained by torture.³⁷⁴ In its broader form, the blank pad rule helps preserve both the independence and neutrality of the jury.³⁷⁵

- **support for an adversary system of justice:** the framers saw the right of confrontation as part of a collection of rights that together defined the contours of a system of justice that they called “trial by jury.”³⁷⁶ Viewed narrowly as the Supreme Court did in *Crawford*,³⁷⁷ confrontation enhances the power of the jury to assess the trustworthiness of the prosecution evidence by insisting that the witnesses against the defendant testify in their presence and subject to cross-examination by the defense.³⁷⁸ Viewed holistically, as the Court did in *Chambers v. Mississippi*,³⁷⁹ the right of confrontation can override state rules, such as rules of privilege, that hinder the defense from showing the jury the unreliability of the prosecution’s evidence.³⁸⁰
- **enhances the privilege against self-incrimination:** the history of the right of confrontation entwines deeply with the development of the Fifth Amendment.³⁸¹ By requiring the prosecution to produce the witnesses against the defendant, the right of con-

³⁷² FPP § 5102.1, text at notecall 7.

³⁷³ FPP § 6362, text at notecall 25.

³⁷⁴ Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004, 2004 *Cato Sup.Ct.Rev.* 439, 441. Hence, while the Department of Justice was writing memos justifying the use of torture, it simultaneously drew up plans for secret tribunals to use the statements extracted.

³⁷⁵ Jurors made aware of hearsay accusations through news stories must either allow themselves to be biased by what they have heard or become biased in attempting to take on the role of defense counsel with regard to that hearsay.

³⁷⁶ FPP § 6348, text at notecall 23.

³⁷⁷ The Confrontation Clause “is a procedural than a substantive guarantee. It commands, not the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” 124 S.Ct. at 1370, 541 U.S. at 61.

³⁷⁸ Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004, 2004 *Cato Sup.Ct.Rev.* 439, 441.

³⁷⁹ 1973, 93 S.Ct. 1038, 410 U.S. 284, 35 L.Ed.2d 297, discussed in FPP § 6366, text at notecall 15.

³⁸⁰ For cases on the overriding of privilege claims, see FPP § 5436, text at notecalls 26 and 27.

³⁸¹ For a typical example of witnesses before inquisitorial courts insisting that they will not answer questions of the judges until they are confronted with the prosecution witnesses, see FPP § 6341, text at notecall 34.

frontation allows the defendant to make a defense without waiving the privilege against self-incrimination.³⁸²

- **places the burden of proof on the prosecution:** since the Fifth Amendment bars calling the defendant to the stand and the duty to confront the defendant falls on the prosecution, the Fifth and Six Amendments provide two of the pillars that support requiring the prosecution to bear the burden of proving the defendant's guilt.³⁸³
- **gives meaning to the grand jury and indictment clauses:** the grand jury system is supposed to serve as a check on the prosecution decision to proceed from accusation to prosecution but to protect the innocent against slanderous accusers, the grand jury proceeds in secrecy. The indictment serves to limit the crimes the prosecution can prove and allows the defendant to prepare for cross-examination of the accusers.³⁸⁴
- **allows the jury to hear the witnesses directly rather than through intermediaries:** one of the noteworthy features of the civil law system is that the judges did not hear from the witnesses directly but only through depositions taken by subordinate judicial officials.³⁸⁵ Similarly, hearsay allows a "witness" to testify through an intermediary--- either the witness who testifies to his oral statement or a writing containing his "testimony."³⁸⁶ The right of confrontation requires that accusations be delivered directly to the defendant's face, not via an intermediary.³⁸⁷
- **limits the power of judges:** this policy is implicit in the Supreme Court's notion that the Confrontation Clause rejected the civil law inquisitorial model with its all powerful judge.³⁸⁸ The Court seemed to recognize this policy when it embraced the view that the Sixth Amendment, unlike the Fourth and Fifth Amendments, regulates the admission of evidence in court, not its gathering by the police; in other words, the right of confrontation is violated, not when the police obtain accusatorial hearsay, but when the judge admits it at trial.³⁸⁹ This also explains why the Court rejected the Robert's

³⁸² See FPP § 6341, text at notecall 33.

³⁸³ See FPP § 6341, text at notecall 31 and § 5142, text at notecall 31.

³⁸⁴ See FPP § 6341, text at notecall 52.

³⁸⁵ The dissenting religions that provided much of the impetus for the right of confrontation did not like intermediaries. A major reason for translating the Bible into the vernacular was so believers could read the sacred texts themselves rather than having to rely on priests to tell them what the Bible said. See FPP § 6343, text at notecall 148.

³⁸⁶ Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004, 2004 *Cato Sup.Ct.Rev.* 439, 442.

³⁸⁷ FPP § 6370, text at notecall 6.

³⁸⁸ "[T]he principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure. . . ." Crawford, 124 S.Ct. at 1363, 541 U.S. at 50. Fear of the federal judiciary drove much of the Anti-Federalist demand for a Bill of Rights. FPP § 6348, text at notecall 60.

“reliability” test in favor of the Crawford “bright line” rules.³⁹⁰ It also provides a clue as to why state and lower federal courts resist such rules.³⁹¹

- **legitimizes judicial power:** by tapping into the popular morality “that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution’”³⁹², the Confrontation serves to legitimate the convictions that result from such trials.³⁹³ Speaking of morality and the Constitution in the same breath makes some lawyers and judges uncomfortable.³⁹⁴ One of the best reasons for adopting the “accuser” reading rather than Crawford’s “testimonial” gloss is that the former makes the Court’s reasoning “intelligible” to the public and enhances the legitimacy of the Court’s confrontation rulings.³⁹⁵
- **limits use of the criminal sanction to advance public policy:** most of the demands for confrontation arose in political prosecutions or religious persecutions³⁹⁶; indeed, many of the Founders would have been hung had the Revolution failed.³⁹⁷ Hence, the Sixth Amendment in general and the Confrontation Clause in particular appear as a procedural backstop for the First Amendment.³⁹⁸ Today we are more likely to see calls for “justice-on-the-cheap” by prosecutors who claim that courts are too busy feeding

³⁸⁹ “The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of *ex parte* testimonial statements which offends that provision. 126 Sup.Ct. at 2279 n. 6, 547 U.S. at ___ n. 6. (emphasis in original). See also, Brief of Petitioner, Hammon v. Indiana, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 17 (making this argument).

³⁹⁰ 124 S.Ct. at 1371, 541 U.S. at 62-63 (Roberts test so “amorphous” that if “fails to provide meaningful protection from even core confrontation violations.”).

³⁹¹ Brief of Petitioner, Hammon v. Indiana, No. 05-5705, Dec. 23, 2005, 2005 WL 3597706, p. 19 n. 19 (collecting cases showing how state courts manipulate the meaning of “testimonial” in order to uphold convictions).

³⁹² *Coy v. Iowa*, 108 S.Ct. 2798, 2801, 487 U.S. 1012, 1017, 101 L.Ed.2d 857, discussed in FPP § 6370, text at notecall 6.

³⁹³ FPP § 6341, text at notecall 13.

³⁹⁴ For a rare exception, see Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004, 2004 *Cato Sup.Ct.Rev.* 439, 442 (Confrontation Clause expresses “the moral responsibility of witnesses and society at large” if that society sees itself as “the kind of people who decline to countenance or abet. . .the cowardly and ignoble practice of hidden accusation”, quoting Clark, *An Accuser-Obligation Approach to The Confrontation Clause*, 2003, 81 *Neb.L.Rev.* 1258.).

³⁹⁵ Reply Brief of Petitioner, Hammon v. Indiana, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 1.

³⁹⁶ FPP § 5341, text at notecall 16.

³⁹⁷ See generally, FPP §§ 6342-6345, The Framers’ state of mind appears in Franklin’s oft-quoted remark at the signing of the Declaration of Independence that “[w]e must indeed all hang together, or most assuredly, we shall all hang separately.” *Oxford Dictionary of Quotations*, 3d ed. 1979, p. 218.

³⁹⁸ FPP § 6341, text at notecall 57.

the maw of the prison-industrial complex to waste time confronting defendants with their accusers.³⁹⁹

This list by no means exhausts the potential policy bases of the Confrontation Clause as part of the “holistic Sixth Amendment” but it should suffice to show that the “governmental abuse” rationale the judges and lawyers invoked in *Davis-Hammon* is an impoverished version of the real thing. Perhaps the next time the Supreme Court decides to reconsider the right of confrontation it will invite the advocates to spend at least as much time on the policy of the Sixth Amendment as the lawyers in this case did on history.

³⁹⁹ Reply Brief of Petitioner, *Hammon v. Indiana*, No. 05-5705, March 9, 2006, 2006 WL 615151, p. 18 (showing that prosecution of domestic violence cases within constitutional constraints takes money). On the latest manifestation of “prison-industrial complex” see Nossiter, *With Jobs to Do, Louisiana Parish Turns to Inmates*, *New York Times*, July 5, 2006 (Louisiana, with one of the highest per capita rates of incarceration in the nation, rents prisoner labor to local businesses).