

CONVOLUTING THE CONFRONTATION RIGHT: *Davis v. Washington*, 126 S. Ct. 2266 (2006)

Sixth Amendment Confrontation Clause jurisprudence has undergone dramatic retooling in recent years, with the Supreme Court jettisoning the reliability-focused test of *Ohio v. Roberts*¹ as “permanently[] unpredictable” and lacking historical justification.² In an effort to restore coherence to the doctrine, the banner decision of *Crawford v. Washington* introduced a new analytical framework: the Confrontation Clause protects the criminally accused against the admission of out-of-court statements that are testimonial in nature, unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine him.³ *Crawford* was heralded as “a return to constitutional roots”⁴ and “a successful blend of originalism and formalism,”⁵ even as it declined to articulate a comprehensive definition of “testimonial.”⁶ Last Term, in the consolidated cases *Davis v. Washington* and *Hammon v. Indiana*,⁷ the Court held that statements are testimonial when “circumstances objectively indicate” that the interrogation’s primary purpose is “to establish or prove past events potentially relevant to later criminal prosecution,” and are nontestimonial when the pri-

1. 448 U.S. 56 (1980). Under the *Roberts* reliability standard, a defendant’s confrontation right did not bar admission, at a criminal trial, of an unavailable witness’s statement against the defendant if the statement fell “within a firmly rooted hearsay exception” or contained “particularized guarantees of trustworthiness.” *Id.* at 66.

2. *Crawford v. Washington*, 541 U.S. 36, 68 n.10 (2004) (emphasis omitted).

3. *Id.* at 53–54.

4. Ariana J. Torchin, Note, *A Multidimensional Framework for the Analysis of Testimonial Hearsay Under Crawford v. Washington*, 94 GEO. L.J. 581, 583 (2006).

5. Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants*, 94 GEO. L.J. 183, 192 (2005).

6. The *Crawford* Court did identify some core forms of testimonial statements, noting that the term applied “at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” 541 U.S. at 68. Based upon these generalities, the Court determined that Sylvia Crawford’s recorded statements made during a custodial interrogation at a stationhouse would qualify as testimonial “under any conceivable definition.” *Id.* at 53 n.4.

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

mary purpose is “to enable police assistance to meet an ongoing emergency.”⁸ Although providing a crucial elaboration on the framework for addressing testimonial statements, the Court’s opposing outcomes in *Davis* and *Hammon* muddy the originalist, bright-line spirit of *Crawford*.⁹ Rather than providing clear guidance for police and lower courts, the Court advanced distinctions that are illusory and inadministrable and that encourage police to circumvent the confrontation right at a heavy cost to victims.

Davis, a domestic violence case in which the complainant later refused to testify, brought into focus the extent to which prosecutions may proceed without confrontation. On February 1, 2001, a 911 dispatcher received a hang-up call from Michelle McCottry in the midst of a domestic dispute with her former boyfriend, Adrian Davis.¹⁰ When the emergency operator traced the call and reached McCottry, she learned that Davis was “[t]here jumpin’ on [McCottry] again.”¹¹ McCottry told the operator that Davis had been “usin’ his fists”¹² to beat her and described him running out of the door.¹³ Within minutes, two police officers arrived on the scene and witnessed McCottry’s frantic efforts to gather her belongings and her children while displaying what looked like “fresh injuries on her forearm and her face.”¹⁴

Davis was charged with violating a no-contact order.¹⁵ Because McCottry failed to appear at trial,¹⁶ the State’s only witnesses were the responding officers. The officers were unable to testify as to how McCottry’s injuries had been inflicted; the sole evidence attributing her injuries to Davis was the tape-

8. *Id.* at 2273–74.

9. Cf. Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1508–09 (“Instead of establishing an evidentiary principle enforced by a general, case-by-case standard, the [post-*Crawford*] Confrontation Clause now erects a nonnegotiable tenet of trial procedure that is enforced by a bright-line exclusionary rule.”).

10. *Davis*, 126 S. Ct. at 2270–71.

11. *Id.* at 2271.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Davis*, 126 S. Ct. at 2271.

16. *Id.* Hearsay and confrontation problems are prevalent in domestic violence prosecutions because female victims frequently cooperate initially but recant or refuse to testify before trial due to emotional pressures, physical threats, and fears of financial reprisals, among other reasons.

recorded exchange between her and the emergency operator.¹⁷ The trial court, despite Davis's objections, deemed the tape recording admissible, and Davis was found guilty.¹⁸ The Washington Court of Appeals affirmed the conviction, holding that the trial court's admission of the recording was appropriate and consistent with Davis's confrontation right.¹⁹ The Supreme Court of Washington affirmed en banc.²⁰ Applying the *Crawford* framework, the court concluded that McCottry's naming of Davis as her assailant on the recording was nontestimonial, and dismissed any hypothetical error in admitting the remainder of the recording as harmless beyond a reasonable doubt.²¹

Hammon involved another domestic violence case, reported to responding police officers on-the-scene rather than to a 911 operator. On February 26, 2003, two officers were dispatched to the residence of Indiana couple Hershel and Amy Hammon.²² Amy stood by herself on the front porch, and although she "told them that 'nothing was the matter,'" she "appear[ed] 'somewhat frightened.'"²³ The officers secured Amy's consent to their entry into the house, where they observed "a gas heating unit in the corner of the living room with flames coming out of the . . . partial glass front,"²⁴ as well as broken objects scattered on the ground.²⁵ Hershel insisted that "'everything was fine now' and [that] the argument 'never became physi-

17. See *id.* The admitted recording contained the first portion of the 911 call in which McCottry identified Davis, before the operator learned that Davis had left the premises.

18. *Id.*

19. See *State v. Davis*, 64 P.3d 661, 665 (Wash. Ct. App. 2003) ("[W]e conclude that the trial court properly admitted the 911 tape as an excited utterance, and its admission does not offend Davis' right to confrontation because the statements fall within a firmly-rooted hearsay exception.").

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

21. *Id.* at 851. In his dissent, Justice Sanders contended that 911 calls are structured by agents and "constitute an interrogation just as effective as if a police officer were questioning the absent witness directly." *Id.* at 854 (Sanders, J., dissenting). Because McCottry's statements were the "result of government-initiated interrogation" rather than "a 'cry for help,'" Justice Sanders maintained that the 911 recording was testimonial and that its admission violated the Confrontation Clause. See *id.* at 854–55.

22. *Davis*, 126 S. Ct. at 2272.

23. *Id.* (quoting *Hammon v. State*, 829 N.E.2d 444, 446 (Ind. 2005)).

24. *Davis*, 126 S. Ct. at 2272.

25. *Id.* (quoting *Hammon*, 829 N.E.2d at 447).

cal.”²⁶ While one officer remained with Hershel, Amy told the other officer in the living room that Hershel had thrown her down into the shattered heater glass and punched her twice in the chest.²⁷ According to one officer, Hershel grew irate and made several aborted attempts to participate in the conversation;²⁸ in each instance, Amy “became quiet and seemed afraid.”²⁹ Amy also completed an affidavit, in which she wrote: “Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn’t leave the house. Attacked my daughter.”³⁰

Hershel was charged with domestic battery and violation of probation.³¹ Like Michelle McCottry, Amy Hammon did not testify at trial.³² The responding officer relayed Amy’s on-the-scene account of her injuries and authenticated the affidavit.³³ At the bench trial, the court admitted, over Hershel’s objections, both the testimony recounting Amy’s statement and the affidavit, and found Hershel guilty.³⁴ The Indiana Court of Appeals affirmed the conviction, finding that *Crawford* did not alter the admissibility of the on-the-scene statement because the statement was not delivered in a sufficiently formal or adversarial setting to be testimonial.³⁵ The Indiana Supreme Court also affirmed.³⁶ Holding that “the motivations of the questioner and declarant are the central concerns” in determining which statements are testimonial,³⁷ the court characterized Amy’s statement as part of a “preliminary investigation in which the officer was essentially attempting to determine whether anything requiring

26. *Davis*, 126 S. Ct. at 2272.

27. *Hammon v. State*, 809 N.E.2d 945, 948 (Ind. Ct. App. 2004).

28. *Davis*, 126 S. Ct. at 2272.

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

30. *Davis*, 126 S. Ct. at 2272.

31. *Id.*

32. *See id.*

33. *Id.*

34. *Hammon*, 829 N.E.2d at 447.

35. *Hammon*, 809 N.E.2d at 952–53. The court admitted Amy’s statement under the hearsay exception for excited utterances. The court declined to determine whether the affidavit was properly admitted because, even if erroneously admitted, the affidavit was cumulative of the officer’s testimony and thus harmless. *Id.* at 948 n.1.

36. *Hammon*, 829 N.E.2d at 459.

37. *Id.* at 457.

police action had occurred and, if so, what.”³⁸ The court conversely found Amy’s affidavit to be testimonial, having been secured with the purpose of aiding potential prosecution, but held its improper admission to be harmless beyond a reasonable doubt.³⁹

The Supreme Court affirmed *Davis* and reversed *Hammon*. Writing for the Court, Justice Scalia held that statements are testimonial when circumstances “objectively indicat[e] . . . that the primary purpose of the interrogation is to establish or prove completed events potentially relevant to later prosecution,” and are nontestimonial when circumstances “objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.”⁴⁰ The Court recognized that in *Crawford*, it had “sufficed for resolution of the case” to hold that historical background established the Confrontation Clause’s “primary object” to be testimonial hearsay, and that “interrogations by law enforcement officers f[e]ll squarely within that class.”⁴¹ The Court thus noted that the character of a 911 call and an on-the-scene statement required a more precise specification of which police interrogations produce testimonial statements.⁴²

The Court proceeded to hold McCottry’s 911 call to be nontestimonial, concluding that its primary purpose was to seek help in resolving an ongoing emergency.⁴³ The Court detailed the differences between the interrogations in *Davis* and *Crawford*: McCottry discussed events as they unfolded, rather than after-the-fact; her 911 call was “a call for help against bona fide physical threat,” rather than a narrative account of a crime; it elicited information needed to resolve the emergency, rather than to construct what had happened; and it was frantic in character, rather than calmly recorded at a stationhouse.⁴⁴ The Court, however, did not rule out the possibility that 911 calls and other exchanges for emergency assis-

38. *Id.* at 458.

39. *Id.* at 458–59.

40. *Davis*, 126 S. Ct. at 2273–74.

41. *Id.* at 2274 (quoting *Crawford v. Washington*, 541 U.S. 36, 53 (2004)).

42. *See id.*

43. *Id.* at 2277.

44. *Id.* at 2276–77.

tance may “evolve [midway] into testimonial statements,” once the primary purpose is achieved.⁴⁵

Turning to *Hammon*, the Court rebuffed comparisons to *Davis* and reached the opposite outcome. According to the Court, no emergency was in progress; the responding officers “had heard no arguments or crashing and saw no one throw or break anything.”⁴⁶ Moreover, Amy’s “narrative of past events was delivered at some remove in time from the danger she described,”⁴⁷ she was protected by police at the time of the narrative, and she was not alone when she gave it.⁴⁸ Characterizing the primary purpose of the on-the-scene interrogation as “investigat[ing] a possible crime,” the Court concluded that Amy’s oral statement to the responding officer was testimonial.⁴⁹

Justice Thomas dissented from the Court’s holding in *Hammon*. Likening the primary-purpose test to pre-*Crawford* doctrine, Justice Thomas criticized the majority for “yield[ing] no predictable results to police officers and prosecutors attempting to comply with the law.”⁵⁰ Justice Thomas found the test “needlessly overinclusive” and “disconnected” from the historical targets of the Confrontation Clause: formalized testimonial materials and dialogues.⁵¹ In his view, it made little sense to conceive of ongoing emergencies and completed events as discrete purposes because “[i]n many, if not most, cases where police respond to a report of a crime,” the purposes of an interrogation “are *both* to respond to the emergency situation *and* to gather evidence.”⁵² Justice Thomas warned that “[p]ronouncement of the ‘primary’ motive behind the interrogation calls for nothing more than a guess by courts.”⁵³

45. *Davis*, 126 S. Ct. at 2277.

46. *Id.* at 2278.

47. *Id.* at 2279.

48. *Id.*

49. *Id.* at 2278.

50. *Davis*, 126 S. Ct. at 2283 (Thomas, J., dissenting). Justice Thomas offered the examples of affidavits, depositions, prior testimony, or confessions extracted by police in a formal manner, as “bear[ing] a ‘striking resemblance’ to the examinations of the accused and accusers under the Marian statutes.” *Id.* at 2282 (citations omitted).

51. *Id.* at 2282–83.

52. *Id.* at 2283.

53. *Id.* at 2285.

The Court's opposing outcomes in *Davis* and *Hammon* introduce an illusory distinction prone to police manipulation and inconsistent judicial application. Two years ago in *Crawford*, Justice Scalia proclaimed that "[v]ague standards are manipulable,"⁵⁴ warning of the potential abuses of prosecutorial discretion by government officers⁵⁵ and judicial discretion by lower courts in interpreting the Confrontation Clause.⁵⁶ At the time, the decision was hailed for implementing a categorical rule that was "clear, simple, and hard to evade."⁵⁷ Commentators took note of the Court's "strident originalist terms" as it stated that "the 'very reason' the Framers put the Confrontation Clause . . . in the Sixth Amendment was because they did not trust judges to guarantee these rights on a case-by-case basis."⁵⁸ In excluding all testimonial hearsay unless the defendant has the opportunity for cross-examination, *Crawford* thus targeted a discrete set of statements closely approximating the civil-law abuses and ex parte examinations at which the Confrontation Clause was originally directed.⁵⁹ Although *Davis* and *Hammon* marked a welcome attempt to flesh out the parameters of this

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

55. *Id.* at 56 n.7 ("Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . .").

56. *Id.* at 67 ("[The Framers] knew that judges . . . could not always be trusted to safeguard the rights of the people . . ."); see also Fisher, *supra* note 9, at 1520–21 ("Lower courts applying *Roberts* were finding almost anything and everything to indicate trustworthiness sufficient to overlook the inability to cross-examine. Even when a court conceded a circumstance actually did indicate a statement's unreliability, it could simply search the record for other facts that suggested trustworthiness and allow the admission of the statement." (footnote omitted)).

57. Bibas, *supra* note 5, at 185; cf. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1172 (2002) ("[T]he confrontation right . . . should apply only to a limited category of out-of-court statements, but as to those it should be deemed categorical, not subject to balancing or ringed with exceptions.").

58. Fisher, *supra* note 9, at 1516. See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) ("[T]he main danger in judicial interpretation . . . is that the judges will mistake their own predilections for the law.").

59. See *Crawford*, 541 U.S. at 53–54. The Court noted that the term "testimonial" applied "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations," *id.* at 68, and compared "interrogation" to official pre-trial examinations of witnesses by English magistrates or justices of the peace under the Marian statutes in sixteenth- and seventeenth-century England, *id.* at 52. In the ex parte examination system, justices of the peace would interrogate defendants and witnesses in private chambers, later introducing the statements as evidence at trial. See Torchin, *supra* note 4, at 603–04.

targeted set of statements, the primary-purpose test ultimately muddies *Crawford's* originalist, bright-line approach with new indeterminacies.

The Court's primary-purpose test creates a distinction that is both illusory and invariably manipulable because it is pegged to the police's own presence and participation. In attributing discrete primary purposes to each set of statements—resolving an ongoing emergency in *Davis*, and verifying a completed event in *Hammon*—the Court overlooked not only how the two purposes are interrelated, as Justice Thomas noted in his dissent,⁶⁰ but also how the situation in *Hammon* likewise boded potential emergency. The Court emphasized, in the context of the 911 call, that the “emergency appear[ed] to have ended (when Davis drove away from the premises).”⁶¹ In the context of the on-the-scene statement, however, Hershel Hammon at no point left the premises. In fact, Hershel remained nearby while Amy gave her statements, attempted to speak for her as he insisted that the argument “never became physical” (in contradiction of the broken glass on the scene), “made several attempts to participate in Amy’s conversation with the police,” and “became angry” when rebuffed.⁶² Hershel’s attempts at intimidation, along with Amy’s frightened appearance, rendered the situation highly volatile. At the very least, the circumstances suggested to a reasonable observer that a “flare up of violence” was likely as soon as the police departed.⁶³

Accordingly, circumstances at the Hammon household would have objectively indicated a crisis situation *but for* the presence of the responding officers. The Court deemed the circumstances at McCottry’s residence to be indicative of an emergency because all the “reasonable 911 operator could make out” was that McCottry was alone, unprotected by police.⁶⁴ Conversely, at the Hammons’ residence, all the reason-

60. See *Davis*, 126 S. Ct. at 2283 (Thomas, J., dissenting).

61. *Id.* at 2277.

62. *Id.* at 2272.

63. Cf. Brief for the United States as Amicus Curiae Supporting Respondent at 11, *Hammon*, 126 S. Ct. 2266, No. 05-5705, 2006 WL 303913, at *11 (“An officer who responds to a potential domestic abuse emergency cannot content himself with ‘securing the scene’ while he is there, but must consider the potential for a flare up of violence when he leaves.”).

64. *Davis*, 126 S. Ct. at 2277.

able responding officers could make out was that no harm would come to Amy in the short-term—because *they* stood in the way. The Court’s distinction, which depends upon the existence of an ongoing emergency, thus rings hollow. Rather than an objective assessment of circumstances to gauge the level of emergency, the assessment is colored by the very presence or absence of police. When the need for police intervention is pegged to the proximity of police themselves, the inquiry irreparably loses force.

Formality, moreover, is an illusory measure of the level of emergency. The Court emphasized the unstructured character of a 911 call, noting that “McCottry’s frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.”⁶⁵ By contrast, the Court found it “formal enough that Amy’s interrogation was conducted in a separate room, away from her husband (who tried to intervene).”⁶⁶ The problem with this distinction is aptly illustrated by the irony that the very reason to forcibly separate Hershel from Amy—namely, his belligerent attempts to intrude on her statements—is perversely used by the Court to *downgrade* the level of emergency. From the victim’s perspective in domestic violence investigations, the formality of the police questioning does not mean the danger is over; it is entirely possible the police will leave and the emergency will resume regardless of what specific setting or tone of questioning is employed.

Formality is also an inaccurate gauge of urgency because all exchanges, even 911 calls, are structured by police participation. Although initiated by the victim, 911 calls still find the police posing the questions—in this case, the operator ordered McCottry to “[s]top talking and answer my questions”⁶⁷—with the victim or witness answering. The Supreme Court of Washington acknowledged this practice: “Most 911 calls today are conducted according to a ‘script’ composed and directed by agents for investigating authorities These ‘scripts’ constitute an interrogation just as effective as if a police officer were questioning the absent witness directly.”⁶⁸ The Court’s focus on

65. *Id.*

66. *Id.* at 2278.

67. *Id.* at 2271.

68. *State v. Davis*, 111 P.3d 844, 854 (Wash. 2005).

formality, therefore, largely boils down to fine distinctions between how police choose to structure and participate in each exchange.

Police presence and participation are thus the implicit foci of the primary-purpose test. Although the Court maintained that “it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate,”⁶⁹ the Court’s inquiry is heavily dependent upon what information the officer possesses as a reasonable listener and hence what questions he or she might ask. This appears logical from the standpoint that abuses by English magistrates and justices of the peace were, as acknowledged in *Crawford*, the original target of the confrontation right as conceived in 1791.⁷⁰ But rather than providing police with clear guidance for avoiding impermissible practices, the Court’s decisions induce police to provoke statements that are immune from later *Crawford* challenges, at heavy cost to victims. With the evidentiary stakes so high, the *Davis-Hammon* distinction creates incentives for police to avoid invoking confrontation rights by delaying or avoiding direct questions that establish whether the assaulter is still present.⁷¹ It also gives police incentives to avoid calming down the victim—lest the statements inordinately increase the formality quotient—and to engage in damaging practices such as questioning the victim in the same room as her assaulter. In effect, police officers are encouraged to make the circumstances *appear* to be an emergency, thereby prolonging the risk of an *actual* emergency.

Finally, the Court’s distinction between testimonial and non-testimonial statements is prone to inconsistent application. In the wake of *Crawford*, lower courts were split over whether 911 calls and on-the-scene statements made to responding officers

69. *Davis*, 126 S. Ct. at 2274 n.1.

70. See Torchin, *supra* note 4, at 603–04.

71. To be sure, some police officers will prioritize quieting the situation for the victim’s sake or his or her own safety over securing a conviction. Nonetheless, police incentives to adapt and manipulate their practices to obtain accusatory statements have been well-documented, even in the wake of *Crawford*’s holding. See Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 249 (2005) (“As a result [of a characteristic-based approach to the question of what is trial testimony] we have seen police advised to try to secure accusatory statements before beginning what would necessarily be deemed a formal interrogation.”).

were testimonial.⁷² Because the Court declined to advance a categorical rule under which all 911 calls are nontestimonial and on-the-scene statements are testimonial,⁷³ there is further reason to be skeptical of Justice Scalia's confidence that "[lower] courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial" and accordingly redact those portions.⁷⁴ Just as the decision offers no clear direction to police, it offers dubious parameters for judicial discretion as judges grapple with applying *Crawford* to increasingly varied interrogation scenarios.⁷⁵ One likely fallout is that trial courts will deem an expanding range of statements testimonial. Because the Court held 911 calls and on-the-scene statements to responding officers about completed events to be testimonial, most fresh accusations will be testimonial given that most crimes are invariably reported after the fact.⁷⁶ Moreover, the Court's indication that a 911 call may become testimonial midway places strict limits on a when an emergency ends, further circumscribing the range of nontestimonial statements.

Ultimately, the opposing outcomes in *Davis* and *Hammon* mark a watering down of the originalist, bright-line spirit of *Crawford*. The Court squandered an opportunity to provide clear direction to law enforcement and lower courts on which statements fall under the testimonial parameter and which practices violate the confrontation right. The primary-purpose test introduces an illusory distinction that induces counter-productive police practices at great cost to victims. The confused framework for identifying which statements best approximate the ex parte communications originally targeted by

72. See Major Robert Wm. Best, *To Be or Not To Be Testimonial? That Is the Question: 2004 Developments in the Sixth Amendment*, 2005 ARMY LAW. 65, 75–87 (detailing various lower court positions on whether 911 calls for help and statements to responding officers at the scene of a disturbance are testimonial).

73. See *Davis*, 126 S. Ct. at 2279 ("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 . . . that *no* questions at the scene will yield nontestimonial answers." (citation omitted)); see also *id.* at 2277 ("This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme Court put it, 'evolve into testimonial statements,' once that purpose has been achieved." (citation omitted)).

74. *Id.* at 2277.

75. See generally Best, *supra* note 72.

76. See Posting of Jeffrey Fisher to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2006/06/more_on_davisha.html (June 19, 2006, 14:38 EST).

the Confrontation Clause, moreover, encourages rather than constrains case-by-case adjudication and arbitrary exercises of judicial discretion. Whereas *Crawford* sought to remedy the “murky, subjective, inconsistent, and unworkable”⁷⁷ state of Confrontation Clause doctrine, *Davis* and *Hammon* revisit both the unpredictability and overinclusiveness of the former doctrine.

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77. Bibas, *supra* note 5, at 189.