



11-1-2012

Overruling *Crawford v. Washington*: Why and How

David Crump

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

Recommended Citation

David Crump, *Overruling Crawford v. Washington: Why and How*, 88 Notre Dame L. Rev. 115 (2012).
Available at: <http://scholarship.law.nd.edu/ndlr/vol88/iss1/3>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

OVERRULING *CRAWFORD V. WASHINGTON*: WHY AND HOW

*David Crump**

The stars are aligned today for the overruling of *Crawford v. Washington*.¹ Although Justice Scalia's opinion in that Confrontation Clause case omitted analysis of most of the recognized factors justifying its sharp departure from *stare decisis*,² by now those factors have developed in a way that justifies departure from *Crawford* itself.³ For example, even commentators who support the apparent goal of that decision, namely, broad exclusion of evidence on Confrontation Clause grounds, describe *Crawford* and its progeny as unstable.⁴ The underpinnings of the decision are dubious and, in some instances, provably wrong.⁵ *Crawford* has led to a series of decisions by closely

© 2012 David Crump. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

* A.B., Harvard College; J.D., University of Texas School of Law. John B. Neibel Professor of Law, University of Houston.

1 541 U.S. 36 (2004).

2 See *infra* Part II of this Article (discussing criteria developed by Supreme Court for departure from *stare decisis*).

3 See *infra* Conclusion (discussing the fit between overruling *Crawford* and the criteria for departure from *stare decisis*).

4 E.g., Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 *FORDHAM L. REV.* 1301, 1310 (2011) (arguing that progeny of *Crawford* "incorporate[] every single . . . flaw[]" that preexisted); *The Supreme Court 2010 Term: Leading Cases: I. Constitutional Law: D. Sixth Amendment: Confrontation Clause*, 125 *HARV. L. REV.* 251, 258–260 (2011) (characterizing one of *Crawford*'s progeny as reaching "correct outcome" by excluding evidence but as showing a "lack of agreement" and as making doctrine "unclear"); Jason Widdison, *Michigan v. Bryant: The Ghost of Roberts and the Return of Reliability*, 47 *GONZ. L. REV.* 219, 240 (2011) (characterizing results as "unstable"). Many other Articles also criticize the confusion that has followed *Crawford*. See, e.g., authorities cited *infra* in footnotes 18, 19, 108, and 164–75.

5 See *infra* Part III.A (showing that Justice Scalia's historical analysis is wrong in its assertion that dying declarations were the only exception to the exclusion of testimonial hearsay).

divided Courts⁶ that have left important issues heavily discussed but unresolved.⁷ To reach decisions that make sense after *Crawford*, the Justices have resorted to transparent judicial fudging.⁸ In summary, the *Crawford* approach is neither faithful to the Constitution nor workable. And by now, remarkably, a majority of the Court is united in rejecting that approach⁹ and preferring differing alternatives that easily could be reconciled and that would produce results more congruent with the purposes of the Confrontation Clause.¹⁰

The regime that preceded *Crawford* did not feature the kind of indeterminacy that has followed that decision. The principal earlier decision, *Ohio v. Roberts*,¹¹ was imperfect, to be sure, but contrary to statements in *Crawford*, its rationale was traceable to the history of the Confrontation Clause.¹² Decisions made under its approach did not require judicial legerdemain to come to reasonable conclusions.¹³ Furthermore, *Crawford* ignores the justifications recognized by the Court for departure from *stare decisis*, in this instance by its jettisoning

6 Some of the late decisions have featured four-Justice dissents as well as separate concurrences, meaning that only a minority of Justices agreed to the most important statements of the prevailing rationales. See *infra* Part VI.B.

7 See *Leading Cases*, *supra* note 4, at 259–260 (citing “lack of agreement” and “unclear” doctrine).

8 See *infra* Part IV (describing the judicial fudging).

9 See *infra* Part IV (describing cases in which Justice Thomas concurred separately, with a separate rationale, and in which four Justices dissented); see also Part VI (describing *Williams v. Illinois*, in which the coalition to overrule *Crawford* formed and in which the Court arguably has already overruled it).

10 See *infra* note 145 and accompanying text.

11 448 U.S. 56, 66 (1980) (holding that Confrontation Clause does not bar hearsay that “bears adequate ‘indicia of reliability’” (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 212 (1972))).

12 See *infra* Part II.B (showing, contrary to the *Crawford* rationale, that the *Roberts* reliability rationale was historically accurate)e.

13 See, e.g., *Idaho v. Wright*, 497 U.S. 805, 814–15, 827 (1990) (excluding evidence, with four dissenters who relied, as did the majority, on *Roberts*); *Bourjaily v. United States*, 483 U.S. 171, 182, 186 (1987) (excluding evidence, with three dissenters who relied, as did the majority, on *Roberts*); *United States v. Inadi*, 475 U.S. 387, 392, 401 (1986) (admitting evidence, with two dissenters who relied, as did the majority, on *Roberts*). Finally, in *White v. Illinois*, 502 U.S. 346, 352 (1992), the United States, as *amicus curiae*, argued a theory roughly similar to the theory later accepted in *Crawford*— that application of the Confrontation Clause should be confined to historical concerns about testimonial hearsay. The majority rejected this theory. *Id.* at 352–53. Justices Thomas and Scalia accepted its general idea. *Id.* at 358–59.

of *Roberts*,¹⁴ and overruling *Crawford* would replace that decision with satisfactory doctrine even if the Court failed to update *Roberts*.¹⁵

Articles discussing *Crawford* are numerous, as might be expected. They are generally uncomplimentary,¹⁶ featuring descriptions ranging from “unstable”¹⁷ to “unspeakable.”¹⁸ Few of them, however, discuss whether *Crawford* should be overruled,¹⁹ and none analyzes this question in light of the Court’s doctrine that governs departures from *stare decisis*. That is the ultimate purpose of this Article. The reason for this void in the scholarship may be the recent rendition of Supreme Court decisions that most persuasively demonstrate the need for rejecting *Crawford*.²⁰ In other words, although *Crawford* itself has been around for some time and has been the subject of several analyses, it is only recently that this Article can be written in convincing terms, and its subject is new.

The Article begins with descriptions of *Roberts* and *Crawford*, the two opposing decisions considering the Confrontation Clause. It then analyzes the manner in which the *Crawford* Court overruled *Roberts* and compares the Court’s reasoning to criteria it has developed for departures from *stare decisis*. Next, the Article considers defects in the *Crawford* decision, with particular attention to errors in its rationale, later decisions attempting to follow it, issues that have remained unresolved, and the practical effects that have resulted. The sixth section of the Article discusses *Williams v. Illinois*, in which a coalition formed to reject the *Crawford* rationale—and in which the Court arguably has overruled that decision by implication. A final section sets out the author’s conclusions, which include the propositions that the overruling of *Roberts* was not justified by the reasoning in *Crawford*,

14 See *infra* Part II.

15 See *infra* notes 76–77 and accompanying text (containing Justice Scalia’s statement that results under *Roberts* were “largely consistent” with his own views of the Confrontation Clause); see also *supra* text accompanying note 4 (showing the contrast to criticism of doctrine after *Crawford*); text accompanying note 13 (showing the consistency of basic doctrine after *Roberts*).

16 See *supra* sources and text accompanying note 4.

17 Widdison, *supra* note 4, at 240.

18 Jennifer E. Rutherford, *Unspeakable! Crawford v. Washington and Its Effects on Child Victims of Sexual Assault*, 35 Sw. U. L. REV. 137 (2005).

19 One notable exception is John Scott, “Confronting” *Foreign Intelligence: Crawford Roadblocks to Domestic Terrorism Trials*, 101 J. CRIM L. & CRIMINOLOGY 1039, 1073, 1076 (2011) (stating that *Crawford* poses “challenges” for trials of accused terrorists and arguing that it is a “priority . . . to overturn *Crawford*”).

20 See *infra* Part IV.B (citing recent decisions and showing instability, judicial fudging, and dubious results after *Crawford*).

but that the overruling of *Crawford* is amply justified by criteria expressed in the Court's *stare decisis* decisions.

I. THE CONFRONTATION CLAUSE, *OHIO v. ROBERTS*, AND
CRAWFORD v. WASHINGTON

The Sixth Amendment to the Constitution provides that in criminal prosecutions, the accused shall enjoy the right “to be confronted with the witnesses against him.”²¹ The Court has interpreted this clause as providing various guarantees to the criminal defendant, including the right of “vigorous cross-examination,”²² the right to face-to-face presentation of witnesses,²³ and the right to severance if a codefendant’s confession is to be introduced before the jury.²⁴ Probably the most expansive application of the Confrontation Clause, however, is its use to exclude some kinds of hearsay. The hearsay rule and the Confrontation Clause are said to embody overlapping principles that spring from similar concerns, although it is well established that the two are not coterminous. In other words, some evidence that would be admitted under the hearsay rule may be excluded by the Confrontation Clause, and some that would be admitted under the Confrontation Clause may be excluded by the hearsay rule, but they have intertwined purposes and jurisprudence.²⁵

Before 2004, the Court interpreted the Confrontation Clause as a guarantee that hearsay evidence would meet criteria tending to show reliability. The leading case was *Ohio v. Roberts*,²⁶ which excluded unconfrosted hearsay unless it was supported by indicia of reliability. *Roberts* also held that evidence admitted under a “firmly rooted” hearsay exception was considered to exhibit these indicia.²⁷ *Roberts* was part of a long chain of reliability-based decisions that excluded evidence from preliminary hearings unless the declarant was unavailable,²⁸ disapproved newly minted hearsay exceptions that did not depend upon sufficient indications of reliability,²⁹ and outlawed code-

21 U.S. CONST. amend. VI.

22 *Perry v. New Hampshire*, 132 S. Ct. 716, 721 (2012).

23 *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

24 *Bruton v. United States*, 391 U.S. 123, 131 (1968).

25 *See Coy*, 487 U.S. at 1016 (stating that “most” of the Court’s confrontation cases have involved either hearsay admissibility or scope of cross examination); *see also United States v. Inadi*, 475 U.S. 387, 393 n.5 (1986) (showing overlap, but showing that the overlap is not complete).

26 448 U.S. 56, 66 (1980).

27 *Id.*

28 *Pointer v. Texas*, 380 U.S. 400, 407 (1965).

29 *Bourjaily v. United States*, 483 U.S. 171, 183 (1987).

endants' confessions under some conditions,³⁰ among other kinds of evidence. On the other hand, the reliable-and-firmly-rooted approach resulted in the reception of evidence such as excited utterances and statements during medical examinations: evidence conforming to established hearsay exceptions.³¹

Then came *Crawford v. Washington*, which rejected the long line of decisions that included *Ohio v. Roberts*.³² Reliability, which had been the touchstone of hearsay admissibility, suddenly was irrelevant. The Confrontation Clause, wrote Justice Scalia for the Court, "is a procedural rather than a substantive guarantee."³³ It "commands," he said, "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."³⁴ The Confrontation Clause is a guarantee about "witnesses," and Justice Scalia therefore needed to define "witnesses." He asserted that witnesses provide "testimony," which in turn, he inferred, meant statements repeated by witnesses at trial.³⁵ But it meant only some kinds of statements, namely, those that provide "testimony."³⁶ An out-of-court statement that was not testimonial could be repeated by a witness without violating the Confrontation Clause, no matter how unreliable it might be.³⁷ The Court failed to provide a definition of the key word, "testimonial," but it referred to the resulting quantity, "testimony," as "typically a solemn declaration or affirmation made for the purpose of establishing . . . some fact."³⁸

In reaching these conclusions, Justice Scalia purported to rely on textual, historical, and prudential justifications.³⁹ The reasoning in *Crawford* supporting these rationales, however, is dubious and in some particulars simply wrong.⁴⁰ Furthermore, although the Court has protected the principle of *stare decisis* with the requirement that the over-

30 *Lilly v. Virginia*, 527 U.S. 116, 139 (1999).

31 *White v. Illinois*, 502 U.S. 346, 356–57 (1992).

32 *Crawford v. Washington*, 541 U.S. 36, 60–61 (2004).

33 *Id.* at 61.

34 *Id.*

35 *Id.* at 51–52.

36 *Id.* at 51.

37 *See id.* at 68 (allowing states "flexibility" in applying hearsay rules to statements that are not testimonial).

38 *Id.* at 51 (internal citation omitted). The testimony, however, is likely to violate state rules or even the Due Process Clause if it is seriously unreliable.

39 *Id.* at 42 (considering the text, but stating that it did not "alone" resolve the case); *id.* at 43–57 (citing historical sources); *see id.* at 63 (alluding to the prudential concern that the *Roberts* test was "amorphous").

40 *See infra* Part III.A–B (pointing out assertions that are demonstrably erroneous and historically incomplete).

ruling of an existing decision meet certain specified criteria, Justice Scalia failed to analyze any of those criteria. The next section of this article will consider this aspect of the *Crawford* decision.

II. COMPARING *CRAWFORD* TO THE SUPREME COURT'S REQUIREMENT FOR DEPARTURE FROM *STARE DECISIS*

A. *Criteria for Overruling Earlier Decisions: Can Crawford's Departure from Stare Decisis Be Justified?*

In such decisions as *Payne v. Tennessee*⁴¹ and *Planned Parenthood v. Casey*,⁴² the Supreme Court has attempted to protect the principle of *stare decisis* while at the same time allowing for the overruling of bad decisions. Without this protection, stability of decisions would be difficult to maintain, and arguably the ultimate result would be destruction of the judicial function.⁴³ An excessive protection, however, would enshrine demonstrably erroneous decisions in an impregnable fortress forever, so that *Brown v. Board of Education*⁴⁴ could never overturn the separate-but-equal principle of *Plessy v. Ferguson*.⁴⁵ The Court's criteria for departure from *stare decisis* are malleable, as are most judicial doctrines, and they result in different statements by different Justices. Nevertheless, Justice Scalia's omission even to consider these criteria in *Crawford* is an unfortunate aspect of the decision.

Payne v. Tennessee is one of the cases that sets out the criteria. There, the Court overruled its earlier decisions in *Booth v. Maryland*⁴⁶ and *South Carolina v. Gathers*.⁴⁷ Those cases had produced an odd doctrine: that the result of the crime—the harm done—was irrelevant to a convicted perpetrator's sentence.⁴⁸ Specifically, *Booth* and *Gathers* had held, contrary to reason, history, and policy,⁴⁹ that the impact of the crime upon the victim was not a proper consideration in the fashioning of the sentence. The Court posited that a criminal defendant

41 501 U.S. 808 (1991).

42 505 U.S. 833 (1992).

43 Cf. *Payne*, 501 U.S. at 827 (“*Stare decisis* . . . promotes the evenhanded, predictable, and consistent development of legal principles, . . . and contributes to the actual and perceived integrity of the judicial process.”).

44 347 U.S. 483 (1954).

45 163 U.S. 537 (1896).

46 482 U.S. 496 (1987).

47 490 U.S. 805 (1989).

48 *Payne*, 501 U.S. at 817–20.

49 *Id.* at 819–20, 826 (using history in overruling *Booth* and *Gathers*, reason by stating that the history is “understandabl[e],” and policy in concluding that the overruled decisions produced “unfairness”).

must be treated as a “uniquely individual human bein[g],”⁵⁰ which by itself was an unremarkable observation, although its connection to the result was distant. The next step in the reasoning, one that exhibited little in the way of logic, was that the only proper considerations in sentencing were “the character of the individual and the circumstances of the crime.”⁵¹ The word “circumstances” might seem to have suggested that the harm done to the victim was a proper element, but again, the Court’s logic was more scattered than that. To the extent that victim impact evidence presented “factors about which the defendant was unaware, and that were irrelevant to the decision to kill,” said the Court, this evidence had nothing to do with the “blame-worthiness of a particular defendant.”⁵²

In *Payne*, which overruled *Booth* and *Gathers*, the Court had little trouble in characterizing this logic as erroneous. The assessment of harm caused by the defendant as a result of the crime “has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment,” wrote Chief Justice Rehnquist for the Court. In fact, “two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm.”⁵³ For example, “[i]f a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater.”⁵⁴

There remained, however, the question whether *stare decisis* required following *Booth* and *Gathers*, “despite these numerous infirmities.”⁵⁵ The Court therefore proceeded to explain its departure from *stare decisis* by reference to five criteria. First, the rejection of precedent could be justified “when governing decisions are unworkable or are badly reasoned.”⁵⁶ Second, departure from precedent can be justified more readily in constitutional cases, because in such cases “correction through legislative action is practically impossible.”⁵⁷ Third, the presence or absence of reliance interests was important. “Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are

50 *Id.* at 818 (citations omitted) (internal quotation marks omitted).

51 *Id.*

52 *Id.*

53 *Id.* at 819.

54 *Id.* (citations omitted) (internal quotation marks omitted).

55 *Id.* at 827.

56 *Id.*

57 *Id.* at 828 (citations omitted) (internal quotations marks omitted).

involved [T]he opposite is true in cases such as the present one involving procedural and evidentiary rules.”⁵⁸ Fourth, the narrowness of deciding votes and the existence of “spirited dissents” contributed to the case for departure from precedent.⁵⁹ Fifth and finally, departure could be justified more easily for decisions that “have been questioned by Members of the Court in later decisions and have defied consistent application by the lower courts.”⁶⁰ Consideration of these factors led the Court to conclude that *Booth* and *Gathers* “were wrongly decided and should be, and now are, overruled.”⁶¹

Planned Parenthood v. Casey applied a roughly similar analysis to reach the opposite conclusion: that the decision under consideration, which happened to be *Roe v. Wade*,⁶² should be retained rather than overruled. First, the Court reasoned that *Roe* had not “proven unworkable.”⁶³ Second, the Court evaluated “reliance interest[s],” concluding that many people had “organized intimate relationships” in a manner that depended upon a right to abortion.⁶⁴ Third, no “evolution of legal principle” had left *Roe*’s central rule an “anachronism,” as might have happened if other legal rules had produced results clashing with that decision or its reasoning.⁶⁵ Fourth, no change had occurred in *Roe*’s “factual underpinning” requiring a different decision; there was no technological change, for example, that undermined the decision.⁶⁶ Fifth, comparison with other decisions that had overruled earlier principles did not show an equal need for overruling *Roe*.⁶⁷ And sixth and finally, overruling *Roe* might appear to be the result of political considerations, and this perception might weaken the judicial power.⁶⁸

But the apparent clarity of these criteria is at variance with reality. Some of the *Planned Parenthood* Court’s applications of its criteria to

58 *Id.* (citations omitted).

59 *Id.* at 829.

60 *Id.* at 829–30.

61 *Id.* at 830.

62 410 U.S. 113 (1973).

63 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (citations omitted) (internal quotation marks omitted).

64 *Id.* at 855–56. In these pages, the Court also observed that *Roe* had facilitated the “ability of women to participate equally in the economic and social life of the Nation,” which, although a valid concern, does not appear to fit the same niche as “reliance interest[s]” in “organiz[ing] intimate relationships.” *Id.* at 856.

65 *Id.* at 855, 857–59.

66 *Id.* at 860.

67 *Id.* at 861–64.

68 *Id.* at 865–70. This rationale is, to say the least, controversial. See *infra* note 87 and accompanying text.

Roe v. Wade seemed dubious, or at least the dissenters thought so.⁶⁹ They disagreed with the idea that a constitutional decision ought to rest on alleged “reliance interests” in a continuation of the right to abortion because of the way that some people had “organized intimate relationships.”⁷⁰ At its most generous, this argument would seem to require only a nine-month delay in the implementation of an overruling decision,⁷¹ and furthermore, the argument is subject to the objection implied in the question, “who on Earth ‘organizes’ their ‘intimate relationships’ in reliance on Supreme Court decisions, and especially, on the right to abortion in particular?” Then too, several of the criteria could have been answered in the opposite way, because the *Planned Parenthood* Court actually rejected the basic premise of *Roe*, according to the dissenters, by holding that abortion was not a “‘fundamental’ right[],”⁷² and indeed, the Court restructured the entire apparatus of protections for pregnancy termination.⁷³ Even the “factual underpinnings” of *Roe* could be said to have been undermined by technology; Justice O’Connor, one of the authors of *Planned Parenthood*, had written in another case that technology had set *Roe* on a “collision course with itself.”⁷⁴ Furthermore, *Planned Parenthood* omitted to analyze some of the criteria in other decisions. If close votes and spirited dissents like those in *Roe* were indeed justifications for overruling that decision, as *Payne* suggests, perhaps Justice O’Connor should have reached the opposite result.⁷⁵

But mushiness is a frequent characteristic of constitutional decisions, and unavoidably so.⁷⁶ In any event, *Payne* and *Planned*

69 *Planned Parenthood*, 505 U.S. at 993–95 (Scalia, J., concurring in part and dissenting in part).

70 *Id.* at 956 (Rehnquist, C.J., concurring in part and dissenting in part).

71 The majority, through Justice O’Connor, did address this question, largely by expanding the reliance criterion beyond what might easily be called reliance interests. See *supra* note 58 and accompanying text.

72 *Planned Parenthood*, 505 U.S. at 951 (Rehnquist, C.J., concurring in part and dissenting in part) (quoting *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).

73 *Id.* at 993–95 (Scalia, J., concurring in part and dissenting in part) (recounting the dismantling of various alleged protections in *Roe*).

74 *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 458 (1983) (O’Connor, J., dissenting).

75 *Planned Parenthood* was a five-to-four decision. *Roe* itself involved a splintered Court, two separate concurrences, and “spirited” dissents by Justices Rehnquist and White.

76 Cf. David Crump, *Takings by Regulation: How Should Courts Weigh the Balancing Factors?*, 52 SANTA CLARA L. REV. 1, 3 (2012) (arguing that an unrelated constitutional doctrine—the ad hoc balancing test for takings under the Fifth Amendment’s Takings Clause—is “vague” and “mushy,” but that a test for this issue will “necessarily” be expressed in a “multifactor balancing test, however vague it may be”).

Parenthood both suggest that the overruling of an existing decision should not be undertaken without careful consideration of the criteria expressed in those opinions. In the present context, the application of those criteria can readily justify the overruling of *Crawford*, as the conclusion in this article will show. But by way of contrast, Justice Scalia did not consider those criteria in overruling *Roberts*, the decision that *Crawford* itself overruled. Perhaps his reason was that the criteria would not have supported the result he reached, as the next section will show.

B. Did the Criteria Justify the Overruling of Roberts in Crawford?

One might think that in jettisoning a decision such as *Ohio v. Roberts*, one that was part of such a long chain of similarly reasoned cases, the Court would have examined the *Payne-Planned Parenthood* factors carefully. But in *Crawford*, Justice Scalia undertook no analysis whatsoever of these criteria. The only occasions upon which he mentioned any of the factors was in offering support for his own conclusions. For example, he criticized *Roberts* as producing “unpredictable” results, but not in the context of the factors that *Payne* and *Planned Parenthood* had identified; in fact, he did not cite those opinions.⁷⁷ Furthermore, he acknowledged that the *Roberts* line of decisions had produced results “largely consistent” with his own view of the Confrontation Clause,⁷⁸ a conclusion that hardly fits with the label of unpredictability. And an examination of the *Payne* and *Planned Parenthood* factors, had Justice Scalia performed it, would have required retaining the *Roberts* holding.

First, the *Roberts* line of decisions had not proved to be “unworkable.” The reliability rationale had supported a significant series of holdings, and Justice Scalia himself admitted that the decisions were not inappropriate. “[I]n their outcomes,” he conceded, the cases had “hew[ed] close[] to the . . . line” that his own analysis would draw.⁷⁹ As for whether these decisions were “badly reasoned,” that criticism had not been leveled at the reliability doctrine before, and their conformity to what even Justice Scalia admitted were sensible results con-

⁷⁷ *Crawford v. Washington*, 541 U.S. 36, 63 (2004). See *infra* Conclusion (discussing the application of the *Payne-Planned Parenthood* factors).

⁷⁸ *Crawford*, 541 U.S. at 57.

⁷⁹ *Id.* at 58; see also *id.* at 59 (stating that “[o]ur cases have . . . remained faithful to the Framers’ understanding”); *id.* at 60 (repeating that decisions have been “faithful” to the original meaning).

tradicts the conclusion.⁸⁰ Second, the *Roberts* line of cases did concern constitutional decisions of a kind that were difficult for a legislature to overturn. This factor must be one of the lesser considerations, however, because otherwise, most constitutional decisions would be due little deference under the doctrine of *stare decisis*. Third, reliance interests were significant, at least as compared to those recognized in *Planned Parenthood* as sufficiently forceful to tip the scale. If reliance on the availability of abortion beyond nine months in the “organiz[ing of] intimate relationships” could be evaluated as a weighty consideration in *Planned Parenthood*, then surely the reliance of every jurisdiction in creating its criminal codes, training investigators, collecting evidence for prosecution—processes that take years to mature—qualify more obviously as significant reliance interests, despite their fitting the category of procedure and evidence regulations.⁸¹

Fourth, although some precise holdings had produced divided Courts, the reliability rationale itself had been neither the subject of narrowly prevailing votes nor of many “spirited dissents;” the replacement of reliability with the testimonial-nontestimonial criterion was not a major consideration until *Crawford*,⁸² and it did not surface until long after the reliability test had been well established. Fifth, the *Roberts* approach had not been a particular subject of confusion in the lower courts. In fact, when the lower courts “got it wrong” by admitting evidence that the reliability approach should have excluded, as in *Crawford* itself, the proper result was not difficult for the Court to identify.⁸³ As the *Crawford* dissenters pointed out, the exclusion of the evidence in *Crawford* itself followed easily from the reliability rationale of *Roberts*.⁸⁴ Justice Scalia did not need to depart from *Roberts*, even in *Crawford*, to produce the result he preferred.

Thus, the retention of *Roberts* in *Crawford* should have resulted from a faithful following of the *stare decisis* factors identified in *Payne*. The same holding would have resulted if Justice Scalia had applied

80 In *White v. Illinois*, 502 U.S. 346, 364–66 (1992), Justice Thomas, joined by Justice Scalia, introduced the testimonial-nontestimonial distinction in a concurring opinion but did not label the decisions following *Roberts* as “badly reasoned.”

81 Cf. *infra* notes 157–63 and accompanying text (describing “chaotic” effects on organization of state data collection efforts and on testimony concerning evidence).

82 See *supra* note 80 and accompanying text (describing the introduction of the distinction by two Justices in one opinion).

83 Cf. *White*, 502 U.S. at 346 (basing the majority holding on the *Roberts* reliability test); *id.* at 358–66 (Thomas, J., concurring) (basing his concurrence on the testimonial-nontestimonial distinction to reach same result).

84 Justice Scalia wrote, in fact, “[w]e readily concede” this point. *Crawford*, 541 U.S. at 67.

the additional factors in the later *Planned Parenthood* decision. No “evolution of legal principle” comparable to the decisions between *Plessy v. Ferguson* and *Brown v. Board of Education* had turned the reliability rationale into “an anachronism.” On the contrary, *Crawford* was an abrupt departure, not made necessary by any principles other than those created by Justice Scalia’s reasoning in *Crawford* itself.⁸⁵ There had been no technological revolution that had undermined the “factual underpinnings” of the reliability rationale.⁸⁶ And finally, there were no political considerations that would have made the Court appear weak if it had retained *Roberts*, even assuming that there is any validity whatsoever in this dubious factor,⁸⁷ which consults political appearances as a criterion for overruling or refusing to overrule, as opposed to accurate reasoning.

As has been observed repeatedly, *stare decisis* is not “an inexorable command.”⁸⁸ Even if most of these factors counseled retention of existing doctrine, the overruling of an egregiously bad decision might be justified. Thus, if Justice Scalia’s creation of the testimonial-nontestimonial criterion as the key to Confrontation Clause jurisprudence were highly persuasive in demonstrating the error of earlier ways, and if it had rationalized later decisions in a substantially more predictable way, it might have supported the overruling of *Roberts*. Unfortunately, however, the *Crawford* decision is itself deeply flawed, as the next section of this article will demonstrate.

III. FLAWED REASONING IN THE *CRAWFORD* OPINION

The reasoning in *Crawford* uses textual and prudential methods, but its principal reliance is on history.⁸⁹ Justice Scalia examines law before the adoption of the Bill of Rights to determine that the motivation of the Confrontation Clause was not reliability as a substantive value, but the distinction between testimonial and nontestimonial

85 See *supra* notes 80, 82 and accompanying text (discussing the scarcity of suggestions about the testimonial rationale before *Crawford*).

86 In other words, changes in the technological nature of evidence had occurred, but they had not changed the way that *Roberts* fit the jurisprudence. In fact, their change was arguably less relevant than changes in technology were to *Roe*. See *supra* note 74 and accompanying text.

87 See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 996–1001 (1992) (Scalia, J., concurring in part and dissenting in part) (containing Justice Scalia’s criticism of this factor). The vehemence of this part of the dissent has to be read to be believed.

88 *Planned Parenthood*, 505 U.S. at 854 (citations omitted) (internal quotations omitted); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

89 See *supra* authority cited in note 39.

hearsay, together with the procedural protection of cross examination for the former.⁹⁰ But as the next section of this article will show, Justice Scalia's examination of history is selective and, in some instances, demonstrably wrong.

A. *The Admissibility of Numerous Kinds of Testimonial Hearsay,
Contrary to Assertions in Crawford*

One unambiguous example of erroneous reasoning in *Crawford* concerns the assertion that testimonial evidence was excluded by blanket application under pre-constitutional law in the absence of cross examination. The only exception to this principle, Justice Scalia claims, was dying declarations⁹¹—which might be considered testimonial, but were admitted on grounds of the two main criteria of hearsay admissibility: reliability and necessity.⁹² Unfortunately, Justice Scalia is flatly wrong in this assertion. There are (and were) other such exceptions. For example, admissions of a party opponent were another species of hearsay that often were obviously testimonial under Justice Scalia's proffered test, but voluntary confessions were admitted liberally through a hearsay exception under pre-constitutional procedures.⁹³ Confessions of criminal defendants have continued to be an exception to hearsay exclusion, just as surely as dying declarations, from the adoption of the Constitution to the present day. If confessions comply with other requirements of the Fifth and Sixth Amendments, the Confrontation Clause is not an obstacle.⁹⁴ Justice Scalia's omission of this additional testimonial variety of admissible hearsay might, conceivably, have resulted from the treatment of admissions under the current Federal Rules of Evidence, which define them as

90 *Crawford v. Washington*, 541 U.S. 36, 50–54 (2004).

91 *Id.* at 56 & n.6.

92 *E.g.*, *State v. Chaplin*, 286 A.2d 325, 329–31 (Me. 1972) (citing *State v. Bordeleau*, 108 A. 464, 465 (Me. 1920)) (stating that reliability flows from the “circumstantial guaranty” of trustworthiness in the knowledge that declarant is about to die and discussing necessity of evidence which is “sometimes the strongest and even the only” proof).

93 *See Griffin v. State*, 496 S.E.2d 480, 483–84 (Ga. 1998) (reviewing history of voluntary confession admissibility, which was “transplanted to the American colonies”); *Harris v. State*, 342 A.2d 305, 309 (Md. Ct. Spec. App. 1975) (citing *Lambros v. Coolahan*, 45 A.2d 96, 98 (1945)) (observing that oral admissions of a party are “universally” admissible); *Commonwealth v. Babbitt*, 723 N.E.2d 17, 23 (Mass. 2000) (observing that even adoptive admissions being treated as an exception to the hearsay rule is a practice that is at least two centuries old); 4 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §§ 1048–49 (James J. Chadbourne ed., 1972).

94 *See supra* note 92 and accompanying text.

exemptions from the hearsay definition rather than exceptions.⁹⁵ In other words, the Rules now categorize confessions as non-hearsay. But the definitional treatment of admissions is irrelevant to their character as testimonial evidence⁹⁶ that has not been cross-examined and that should, therefore, be excluded then and now, by Justice Scalia's reasoning, although they were not and are not. And if that is not enough, the treatment of admissions and confessions at the threshold of the Constitution was actually as hearsay, but as excepted from the hearsay rule, just as were dying declarations.⁹⁷ The *Crawford* opinion reserves the question whether admitting dying declarations violates the Confrontation Clause.⁹⁸ Perhaps it also should have reserved the question whether admissions and confessions are unconstitutional evidence, except that this reservation would have revealed an intolerable flaw in the opinion.

And admissions and confessions are by no means the only kind of testimonial hearsay that has been admitted for many centuries. Business records, public records, and recorded recollection also sometimes can be testimonial, but it would make no sense to exclude them for this reason. Imagine, for example, a prosecution of a defendant for allegedly practicing medicine without a license. The underlying facts are that the defendant once held a physician's license, but it was revoked. The prosecution of this case will require the reception of public records⁹⁹ showing these facts. But the records were made precisely for the purpose of evidencing what they assert, and thus, they are testimonial. The reasoning in *Crawford* would exclude this evidence. And since it is unlikely that living declarants can be found to testify to the chain of events leading to the memorialization of the evidence, *Crawford* would make the crime of practicing medicine without a license unprosecutable—in fact, it would make any crime depending on the absence of a license, permit, or similar governmental action requiring memorialization unprosecutable.

Similar examples could be constructed from scenarios in which the serial numbers of drug buy money are written into public records, precisely because they are expected to become evidence that no live witness can remember, or in which they are written into field notes

95 FED. R. EVID. 801(d).

96 PAUL F. ROTHSTEIN, MYRNA S. RAEDER & DAVID CRUMP, EVIDENCE: CASES, MATERIALS & PROBLEMS 522 (3d ed. 2006) (“[C]onceptually it is just as possible to treat [admissions] as hearsay and ask whether there should be an exception for them.”).

97 See *supra* note 92 and accompanying text.

98 *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004).

99 These are excepted from the hearsay rule of exclusion by FED. R. EVID. 803(6).

that become recorded recollection;¹⁰⁰ and there could be situations in which business records memorialize events or numbers to furnish proof of crimes involving fraudulent uses of credit cards. In fact, many other kinds of hearsay exceptions are potentially admissible on reliability grounds even when they contain elements indicating a motivation to create or preserve evidence. Consider an unavailable victim of domestic violence who breathlessly tells a 911 operator what the perpetrator has done to her, pleads for immediate help, and then adds, “I want to see him put away where he can’t do this to me ever again!” or a now-deceased third-party witness to an ongoing crime who provides an in-time narrative to police through a wire. Reception of these items of evidence historically could have been supported by reference to the excited utterance and present sense impression exceptions, even if they have testimonial aspects. Justice Scalia’s assertion that only the dying declaration exception contravened his selective history was simply wrong.

Furthermore, contrary to the reasoning of *Crawford*, these examples of proper evidence historically were not admitted on the basis of a testimonial-nontestimonial distinction, even if the declarants were not cross-examined. Instead, they resulted from applications of the most common rationales for admitting categories of hearsay: trustworthiness and necessity.¹⁰¹ The trustworthiness prong of this policy is exactly the long-historied feature of *Roberts* that Justice Scalia claimed in *Crawford* was irrelevant to history: the testing of categories of admissible hearsay by the existence of circumstantial indicia of reliability. These examples, in addition to the example of dying declarations that Justice Scalia treated as aberrational, demonstrate a serious flaw in the reasoning that supports *Crawford*. Since the straightforward application of *Crawford* would make important categories of evidence inadmissible and some crimes unprosecutable, they also expose failures in that decision on prudential grounds.

100 The author was involved in such a case. The officer’s field notes recorded serial numbers from a number of \$100 bills. Few people could remember the serial number of a single bill, much less numerous ones. Therefore, the officer’s notes of the numbers were admitted pursuant to a state-law equivalent of FED. R. EVID. 803(5), as a Recorded Recollection. But the notes were written precisely to create evidence that could be used in a later prosecution, although Justice Scalia’s approach would have made them inadmissible—and the crime virtually unprosecutable.

101 See *supra* note 92 for a discussion of *State v. Chaplin* and the reliability basis of dying declarations as an exception to the hearsay rule and note 93 for a discussion of *Griffin v. State*, which shows that reliability is the historical basis for admissions and confessions. As to reliability as the basis, also, for admitting recorded recollection, business records, and public records, see ROTHSTEIN ET AL., *supra* note 96, at 607–10, 616–31, 635–39.

B. Additional Historical Issues in Crawford: The Persistence of the Reliability Inquiry

Justice Scalia grounded his analysis of history on the trial of Sir Walter Raleigh for conspiracy against the crown.¹⁰² That case was indeed a shameful episode that tarnishes the tradition of English criminal procedure, but it does not demonstrate the irrelevance of reliability in the admissibility of evidence. On the contrary, the potential criticisms of that trial go well beyond the concerns of the Confrontation Clause, and they include an important concern with the reliability of evidence.

Justice Scalia reported about only that part of Raleigh's trial involving written accusations by Lord Cobham, who was Raleigh's alleged accomplice and was in custody nearby.¹⁰³ Raleigh asked for Cobham to be produced,¹⁰⁴ and this part of the story is indeed about cross-examination. The Court overruled Raleigh and received Cobham's affidavit. But Justice Scalia omitted another part of the story, in which Raleigh objected on reliability grounds instead. The testimony at issue repeated the statement of an unidentified "Portugal gentleman" who accused Raleigh of treason: "Don Raleigh will cut [the King's] throat"¹⁰⁵

When Raleigh objected to the repetition of that extrajudicial remark made in Portugal by an absent person who could not be clearly identified, he spoke only about reliability. The hearsay statement accusing Raleigh of treason, he argued, had been made by an unknown "beggarly Priest" or "wild Jesuit," but, as Raleigh put it, "[W]hat proof is it against me?"¹⁰⁶ Justice Scalia omitted this passage from his recounting of the case in *Crawford*, perhaps because it does not fit his theory. The concern that Raleigh expressed was not that he was unable to cross-examine the Portuguese declarant or that the remark had been testimonial; instead, it was that the hearsay in question was unreliable: "what proof" did it provide? This omitted part of *Raleigh's Case*, in other words, would have supported retaining the *Roberts* reliability approach, which Justice Scalia was determined to reject.

Furthermore, *Raleigh's Case* is distasteful for still other reasons unrelated to the testimonial-nontestimonial distinction. The crime at issue was one that was incompatible with modern or democratic think-

102 *Crawford*, 541 U.S. at 44–45.

103 *Id.*

104 *Raleigh's Case*, 2 HOWELL'S ST. TR. 1, 15–16, 24 (1603); see also 1 D. JARDINE, CRIMINAL TRIALS 435–520 (1832).

105 See 1 D. JARDINE, *supra* note 104, at 436.

106 *Id.*

ing, in that it charged a vague kind of criticism of the government, and, further, it was prosecuted in front of judges who were controlled by the king rather than independent. This factor was as much a reason for condemnation of the trial as its procedures. Then, too, the trial featured the reception of written materials, here in affidavit form, made under judicial or prosecution supervision, which was far more a concern arising from *Raleigh's Case* than a generalized testimonial-nontestimonial distinction.¹⁰⁷

This is not to suggest that the testimonial nature of evidence, or the cross-examination of its declarant, was historically irrelevant. Cross-examination was an important factor that tended to guarantee reliability. The foundation of many of the criteria for hearsay exceptions is the so-called sincerity risk, or the concern that the declarant might deliberately falsify his statement to create evidence.¹⁰⁸ Thus, excited utterances are admissible because they are considered reliable on the ground that spontaneity operates to prevent mendacity.¹⁰⁹ In fact, the historical examples that Justice Scalia offers can, by and large, be explained by the principle that reliability (or reliability and necessity) is the touchstone of hearsay exceptions, including dying declarations, confessions, and business or public records prepared to memorialize facts that may become objects of litigation, and cross-examination is one of the factors that may indicate reliability. But historically, reliability also could be shown by the absence of a sincerity risk even without cross-examination. Perhaps the part of *Raleigh's Case* that Justice Scalia selected does not show a concern for receiving hearsay, but only with relying on hearsay that is unreliable by reason of the sincerity risk.

107 In fact, Justice Scalia's opinion reflects this historical fact: ex parte depositions and affidavits produced the most abuses. See *Crawford*, 541 U.S. at 43–49.

108 *Stoddard v. State*, 850 A.2d 406, 422 (Md. Ct. Spec. App. 2004) (“[T]he sincerity risk . . . is the major concern of the hearsay rule.”); see Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 486–87 (1992); Peter F. Valori, *The Meaning of “Bad Faith” Under the Exceptions to the Hearsay Rule*, 48 U. MIAMI L. REV. 481, 504 (1993).

109 See, e.g., *Taylor v. State*, 248 P.3d 362, 370 (Okla. Crim. App. 2011) (“Excited utterances are excepted from the rule against hearsay because ‘the spontaneity of the statement[s] in relation to the exciting event gives rise to trustworthiness.’” (quoting *McCalip v. State*, 778 P.2d 488, 490 (Okla. Crim. App. 1989)); *State v. Echols*, No. 2010AP2626–CR, 2011 WL 4445635, at *6 (Wis. Ct. App. Sept. 27, 2011) (“[The excited utterance exception] ‘is based upon spontaneity and stress’ which, like the bases for all exceptions to the hearsay rule, ‘endow such statements with sufficient trustworthiness to overcome the reasons for exclusion of hearsay.’” (quoting *State v. Huntington*, 575 N.W.2d 268 (Wis. 1998))).

IV. THE CASES FOLLOWING *CRAWFORD*: JUDICIAL FUDGING TO REACH SENSIBLE RESULTS

These considerations, together with the dissent in *Crawford*, show the dubious reasoning upon which that decision stands. But another reason for overruling *Crawford*, perhaps a greater reason, is that it has proven unworkable. The later decisions have reached sensible results only through the most transparent kind of judicial fudging—so transparent, in fact, that Justice Scalia himself has denounced it. Commentators, including those who seem to support the *Crawford* decision itself, have described the results with terms such as “unstable” and “chaos.”¹¹⁰

A. *The Court’s Subjective-Objective Inquiry into Mixed Motives of Declarants: How Workable?*

One fundamental problem with the testimonial-nontestimonial distinction is that the declarant may have mixed motives. The victim of domestic violence may wish to be rescued from her predicament, while at the same time she would like to ensure future safety, and she may consider that this future result may be attained by the confinement of a perpetrator for a long time. This mixed-motive problem arose in the companion cases of *Davis v. Washington* and *Hammon v. Indiana*.¹¹¹ Both cases involved domestic violence, but perhaps to prove that it knew the difference, the Court held that the victim’s statement in *Hammon* was testimonial but that the statement in *Davis* was not. In the latter case, Michelle McCottry called 911 and stated that she had just been assaulted by Davis, her former boyfriend, who had beat her with his fists and had just fled the scene.¹¹² According to the Court, this statement was nontestimonial. It was to be considered, however, not by whether it really was testimonial—by the subjective intentions of the declarant, that is—but instead by objective indicators of those intentions,¹¹³ because the subjective mind of the declarant was too difficult to investigate in court and would produce too much variance in results. The objective factors that the Court referred to were that the statement concerned “ongoing” events, “as they were

110 See Michael H. Graham, *Confrontation Clause—Crawford/Davis/Melendez-Diaz: 2010 Application Summary—Recent Chaos*, 46 CRIM. L. BULL. 1334 (2010) (noting the resulting “chaos”); Widdison, *supra* note 4, at 240 (calling the results “unstable”).

111 547 U.S. 813, 829–830 (2006).

112 *Id.* at 817–20. This and other statements from the evidence, below, are taken from this section of the majority opinion.

113 *Id.* at 826–827.

actually happening,” even though this assertion was untrue.¹¹⁴ The use of the statement as evidence was completely confined to events in the past, i.e., the assault. In fact, the declarant said, “He’s runnin’ now,”¹¹⁵ a statement that shows the judicial fudging necessary to reach the result.

Furthermore, said the Court, the environment was “not tranquil” or even safe.¹¹⁶ And McCottry’s statement was not the result of a formal inquiry,¹¹⁷ even though the 911 operator forcefully told the declarant, “Stop talking and answer my questions.”¹¹⁸ Davis was convicted of felony violation of a domestic no-contact order, and the Court left his conviction undisturbed.

Amy Hammon made a similar kind of statement to police officers, and although the circumstances differed in a few particulars, the question remained whether those differences should have made a difference. For one thing, when the officers arrived and Amy was in front of her husband, she told them that nothing was wrong.¹¹⁹ The officers separated the two, and Amy then made a statement describing the assault upon her, with her husband still present in the next room. (She also completed an affidavit after making the statements, and the affidavit should have been inadmissible under traditional law.)¹²⁰ An officer’s repetition of Amy’s statements was part of the evidence against Hammon, and so was her (less likely to be properly admissible) affidavit.¹²¹ The Indiana Supreme Court held that Amy’s statements met the criteria for an excited utterance,¹²² and this holding seems unremarkable. The United States Supreme Court, however, held that Amy’s statements, unlike those in *Davis*, were testimonial and therefore not admissible.¹²³

This result allegedly followed from the test that the Court had used to analyze *Davis*’s statements. This test, said the Court, depended upon the “primary purpose” of the declarant.¹²⁴ Because the state of mind of a declarant may include mixed motives, it is only by focusing on the primary purpose of the statement that the court

114 *Id.* at 827.

115 *Id.* at 818.

116 *Id.* at 827.

117 *Id.* at 828.

118 *Id.* at 818.

119 *Id.* at 819.

120 *Id.* at 821.

121 *Id.* at 820.

122 *Id.* at 821.

123 *Id.* at 830.

124 *Id.* at 822.

can achieve consistent results and, not coincidentally, avoid appearing as a collection of amateur mind-readers. Furthermore, as *Davis* had required, the primary purpose was to be tested by objective factors: again, to avoid inquiry into the unknowable realm of subjective motivations. The trouble with this reasoning, as is borne out by the Court's analysis in *Hammon*, is that the allegedly objective factors are likely to be so mushy, and the primary purpose so mixed with other purposes, that the decision whether the statement is testimonial is likely to be arguable either way with equal validity.

Following these principles, the Court decided that Amy Hammon's motive was testimonial because it was backward-looking, describing an event as part of a potential prosecution, rather than a part of an ongoing situation in which the basic question was whether some sort of protection of the declarant was needed.¹²⁵ But why? The officers might have decided that the proper solution was to move Amy to a women's shelter, or to undertake some similar measure; in fact, the Court hinted at the likelihood that officers might need to remove a victim from "possible danger."¹²⁶ If the Court had considered, it might have realized that often, in situations such as these, officers historically have merely separated the two people without prosecuting. In fact, Justice Thomas explicitly analyzed this likely police response in his dissent.¹²⁷

The Court's reliance on Amy's false statement that "things were fine" and on its description of the atmosphere as "at some remove in time from the danger" is flatly farfetched.¹²⁸ After being assaulted, calling the police, waiting for them to arrive, being confronted by the officers entering her home, feeling forced to lie by her assailant's presence, being separated from him but still close to him, and having to admit to strangers that an offensive and embarrassing episode of domestic violence had injured her, Amy Hammon could have been labeled "not tranquil," exactly as McCottry was, by any honest analyst purporting to use "objective" methods. The more realistic assessment of the situation was that of the Indiana Supreme Court, which recognized the stress under which Amy was speaking and characterized her statement as an excited utterance. In short, the Court's distinction between Michelle McCottry's statements and those of Amy Hammon is arbitrary. A court easily could have made a pair of opposite conclu-

125 *Id.* at 829–30.

126 *Id.* at 832. The affidavit, it should be added, seems much more likely to have been a substitute for testimony and more likely to have implicated core historical concerns. See *supra* note 119 and accompanying text.

127 *Hammon*, 547 U.S. at 841 (Thomas, J., dissenting).

128 *Id.* at 830, 832 (majority opinion).

sions by considering such factors as the continued presence of the assailant in Amy's case, whereas in *Davis*, the assailant was gone; or the fact he was her husband, which therefore could have been the cause of motives that were mixed more than usual; or the objective indication of her fright expressed in her initial falsehoods.

Justice Thomas dissented as to the exclusion of Amy's oral statements. The majority's approach, he concluded, was "neither workable nor a targeted attempt to reach the abuses forbidden by the [Confrontation] Clause."¹²⁹ An approach that dealt with those abuses by excluding trial by *ex parte* affidavit (or by similar formal declarations such as depositions) would have been more consistent with the purpose of the clause.¹³⁰ Assigning a label such as testimonial to the "largely unverifiable motives" of a declarant to divine which thought was "primary" implied a search for a "hierarchy of purpose that will rarely be present—and is not reliably discernible." The attempt to do so by purposely "objective" factors, Justice Thomas added, amounts to "an exercise in fiction."¹³¹

Just how unworkable was the *Davis* clarification of *Crawford*? The answer came in *Michigan v. Bryant*.¹³² There, the victim, mortally wounded, identified and described the man who had shot him in a statement to police.¹³³ Using the objective test for primary purpose that the Supreme Court had created in *Davis*, the Michigan Supreme Court held that the victim's statement was testimonial, and it reversed Bryant's murder conviction. The Michigan court reasoned that the statement was backward-looking, like the label imposed on Amy Hammon's statement: a description of past events, designed to establish facts rather than facilitate present action.¹³⁴ Although this result departed from history and tradition, and although the statement would readily and sensibly have been admitted under a reliability test as an excited utterance, dying declaration, or residual hearsay qualifying for reception, the Michigan court excluded it under *Crawford* by reasoning that, although dubious, it was faithful to that decision and to *Davis*.¹³⁵ Unfortunately, the United States Supreme Court's approach in those cases misled the Michigan court and made that court produce a result that fit neither the Constitution nor common sense. Ultimately, the United States Supreme Court disagreed with

129 *Id.* at 842 (Thomas, J., dissenting).

130 *Id.* at 835–37.

131 *Id.* at 839.

132 131 S. Ct. 1143 (2011).

133 *Id.* at 1150.

134 *Id.* at 1151.

135 *Id.* at 1150–51.

the outcome that its reasoning had produced, by recognizing an “ongoing emergency” exception to the testimonial characterization.¹³⁶ In doing so, the Court distinguished its decision in *Hammon v. Indiana* in part on the dubious ground that *Hammon* concerned a domestic dispute whereas the present case concerned a nondomestic dispute.¹³⁷

The *Bryant* Court also listed a number of factors that lower courts could consult to determine the existence of an ongoing emergency, including the type of weapon (gun versus fists; apparently, police officers do not need to know that a suspect is likely to assault them by hand), the victim’s injuries (if the assailant shot and missed, the statement is less likely to be testimonial than if his aim had been true), whether an interrogation took place (a search for a perpetrator is less likely to involve testimonial statements if the victim initiates the description than if police officers first ask, “What happened?”), and the formality of the setting (a doctor’s structured inquiry into the causes of an emergency department patient’s injuries might be more likely testimonial).¹³⁸ Whether these dicta would prove helpful to the lower courts remained to be seen.

In any event, *Michigan v. Bryant* is a compelling illustration of the unworkability that is built into the *Crawford* rationale. It is sophistry to claim that police officers who pursue a domestic abuser are relatively safe and that those who pursue an assailant who lives elsewhere from his victim are not. In fact, domestic abuse calls are dangerous for police officers. As for the extent of the victim’s injuries, it is nonsense to suggest that the public and officers are safer if the assailant shot and missed rather than happening to kill the victim. The idea that fists are less dangerous than firearms may be true in most cases, but how that factor becomes an objective indicator of nontestimonial motivation behind a victim’s statement is a mystery. The only factor mentioned by the Court that seems to have any validity is formality. But no one needed a Supreme Court opinion to tell them that a formal setting such as a police interrogation room was an indicator of excludable hearsay, and indeed this conclusion would have followed more clearly from a reliability test.

The trouble with the testimonial-nontestimonial distinction as applied in *Michigan v. Bryant* is that it focuses, as did *Crawford*, on subjective motivation, which is impossible to discern consistently, and that it attempts to determine subjective motivation by objective fac-

136 *Id.* at 1156 (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

137 *Id.* at 1158–59.

138 *Id.* at 1158–62.

tors, following *Davis*, in spite of the ambiguity that objective factors produce. In other words, the Supreme Court attempted to read the deceased victim's mind from the distant view of a courtroom, and it used factors that can always be argued either way, as the discussion above shows. Again, Justice Thomas concurred only in the judgment, reiterating his statement in *Davis* that the primary purpose test was an "exercise in fiction" and calling for a return to the historical concern of the Confrontation Clause: *ex parte* witness examinations.¹³⁹ Justice Ginsburg, in dissent, focused on the intent of the officers, concluding that because they "viewed their encounter with [the victim as] an investigation," the victim's statements became testimonial, even though she pronounced that the intent of the victim was "what counts."¹⁴⁰ The decision, she said, "confounds our recent Confrontation Clause jurisprudence" by bringing back a focus on reliability.¹⁴¹

Finally, Justice Scalia's dissent almost has to be read to be appreciated in its vitriol. It accuses the Court of using an "active imagination" to produce a "story . . . so transparently false that professing to believe it demeans this institution."¹⁴² Justice Scalia's dissent lacks only his recognition that the otherworldly quality of the majority reasoning was produced by Justice Scalia's own creation of an unworkable and misguided doctrine. It was only by judicial fudging that the majority was able to wedge a sensible result into something that conformed to the testimonial-nontestimonial approach.

*B. The Court's Approach to Multiple-Author Technical Documents:
How Workable?*

An entirely different sort of challenge to *Crawford's* workability appeared in *Melendez-Diaz v. Massachusetts*.¹⁴³ The defendant was convicted of cocaine distribution, with the fact that the substance in his possession was cocaine being proved by "certificates" from chemical analysts. A plurality of the Court, in an opinion by Justice Scalia, reasoned that this practice violated the Confrontation Clause because the certificates were testimonial. The plurality rejected the state's argument that the certificates were not those of "conventional" witnesses on the ground that there was no basis for distinction between facts

139 *Id.* at 1167 (Thomas, J., concurring).

140 *Id.* at 1176 (Ginsburg, J., dissenting) (citing *id.* at 1168, 1172–73 (Scalia, J., dissenting)).

141 *Id.* at 1176–77 (Ginsburg, J., dissenting).

142 *Id.* at 1168, 1172 (Scalia, J., dissenting).

143 557 U.S. 305 (2009).

observed at the crime scene and those observed in the laboratory.¹⁴⁴ Predictions that this holding would result in skyrocketing costs of prosecutions were “irrelevant,” and, in any event, were belied, according to the plurality, by the practice in many states, which allegedly complied already with the plurality’s requirements.¹⁴⁵

After *Crawford*, the holding in *Melendez-Diaz* seemed unremarkable, even if its result was debatable. The testimonial character of the certificates there seemed mandated by the definition of testimonial statements in *Crawford* as those seeking to “establish facts.”¹⁴⁶ Nevertheless, the unworkability of the *Crawford* testimonial-nontestimonial distinction became evident in the surprising fact that five members of the Court—a majority—rejected the reasoning that supported the holding. Justice Thomas concurred only on the separate ground that he had staked out earlier: that the Confrontation Clause should be interpreted as extending primarily to trial by affidavit, which the use of certificates resembled.¹⁴⁷ And four Justices dissented, in an opinion by Justice Kennedy. The dissenters pointed out, first, that the contraband in question might have been handled by at least four different persons in the chemist’s office, “[a]nd each of the four has power to introduce error.”¹⁴⁸ There often is a sampler, an interpreter, a calibrator (who might be an outside contractor), and a supervisor who certifies the procedures used to obtain the result.¹⁴⁹ Must all four appear? If not, which of the four must appear? As the dissenters pointed out, the *Crawford* opinion suggests that all four must testify live because “the testimonial statement of one witness [cannot] enter into evidence through the in-court testimony of a second”¹⁵⁰ If so, the Court had, “for all practical purposes, forbidden the use of scientific tests in criminal trials.”¹⁵¹

Furthermore, the dissenters pointed out that the plurality had fudged the results in its consideration of chain-of-custody evidence and authentication of documents. Both of these essential functions traditionally had depended upon evidence made unlawful by the plu-

144 *Id.* at 306.

145 *Id.* at 328. The Court also rejected arguments to the effect that the affidavits were not “prone to . . . distortion or manipulation” because they resulted from “scientific testing,” *id.* at 317, that they resembled business records, *id.* at 321, and that the defendant could have subpoenaed the analysts, *id.* at 324.

146 *Id.* at 310.

147 *Id.* at 329 (Thomas, J., concurring).

148 *Id.* at 333 (Kennedy, J., dissenting).

149 *Id.*

150 *Id.* at 334.

151 *Id.* at 333.

ality's reasoning. Since time immemorial, the chain of custody had been provable without "each human link" being demonstrated through live witnesses.¹⁵² The plurality finessed this inconvenient fact by observing that it was "up to the prosecution to decide what steps in the chain are so crucial as to require evidence;"¹⁵³ but this was judicial fudging because, as the dissenters observed, the "case itself determines" the required proof.¹⁵⁴ Yet, the plurality was forced into this fudging by the disaster that otherwise would occur because often "the crucial link . . . will not be available."¹⁵⁵ As for documents traditionally certified by clerks—a kind of authentication that does not seem possible if every human handler must appear live—the plurality described this clerical function as "narrowly circumscribed."¹⁵⁶ The dissent regarded this conclusion as "tell[ing] us that something is very wrong" with the Court's opinion.¹⁵⁷ And a clerk-certified document may prove an essential element of a crime by itself, such as the fact of prior conviction in a prosecution for gun possession by a felon; and the same reasoning, presumably, would need to apply to affidavits authenticating business or public records, which require a much more complex sequence of testimony.

The plurality's treatment of the disruption and cost arguments also contained judicial fudging according to the dissenters. Some jurisdictions, for example, required live testimony only if the defense disputed the analyst's result. But this procedure was disqualified by the plurality's reasoning, which disallowed shifting the burden to the defense. Thus, the assertion that most states already complied with the plurality's opinion was untrue.¹⁵⁸ And the potential costs were staggering. State courts saw 18,000 drug cases in a year, with many of those cases resulting in guilty pleas only immediately before trial—meaning that the analyst had to be immediately available to testify. The FBI laboratory at Quantico, Virginia, had 500 analysts who conducted over a million tests a year in state and federal courts nationwide. "The Court's decision means that before any of those million tests reaches a jury, at least one of the laboratory's analysts must board a plane, find his or her way to an unfamiliar courthouse,

152 *Id.* at 336

153 *Id.* at 311 n.1 (majority opinion).

154 *Id.* at 336 (Kennedy, J., dissenting).

155 *Id.*

156 *Id.* at 332.

157 *Id.* at 337. FED. R. EVID. 902(4) and 902(11) allow authentication of business and public records by certificates.

158 *Melendez-Diaz*, 557 U.S. at 354.

and sit there waiting to read aloud notes made months ago.”¹⁵⁹ Furthermore, there was the additional difficulty, not considered by the plurality, that the analyst may be unavailable. Then, the costs would exceed monetary outlays. “Guilty defendants will go free, on the most technical grounds, as a direct result of today’s decision, adding nothing to the truth-finding process.”¹⁶⁰

But the dissenters’ disagreement was far deeper even than this analysis would suggest. They believed that the plurality’s “fundamental mistake” was to accept the *Crawford* reasoning in the first place: “The [Confrontation] Clause does not refer to kinds of statements. Nor does the clause contain the word ‘testimonial.’”¹⁶¹ Instead, the dissenters wrote, the clause should be applied only to the kind of witness with which the clause is concerned. Historically, that witness was “one who perceived an event that gave rise to a personal belief in some aspect of the defendant’s guilt.”¹⁶² In this respect, the dissenters’ proposed test was closely related to Justice Thomas’s preferred approach, which focused on trial by arranged statements of witnesses. Both approaches are related to the sincerity risk. The infamous trial of Sir Walter Raleigh was one of the “most notorious instances” that led to the adoption of the Confrontation Clause, but the offensiveness of that case proceeded from the use of hearsay statements that repeated what witnesses who actually saw the alleged “crime” had said.¹⁶³ A chemical analyst, by way of contrast, “observes neither the crime nor any human action related to it.”¹⁶⁴

Whether this substitute test would be more workable than the approaches of either the plurality or Justice Thomas is subject to debate. But the significant point is that there now were fully five votes for overruling *Crawford*: Justice Thomas, Justice Kennedy, and the other three dissenters. The unworkability of *Crawford* is shown by the surprising fact that in *Melendez-Diaz*, the basis of the plurality decision was *Crawford*, but a majority of the Court rejected *Crawford*.

The issues that the plurality swept under the rug in *Melendez-Diaz* were certain to surface again. And they did, in a case called *Bullcoming v. New Mexico*.¹⁶⁵ That case was a driving-while-intoxicated prosecution in which the operator of the gas chromatograph that tested the defendant’s blood did not testify. The operator had signed a certifi-

159 *Id.* at 342.

160 *Id.*

161 *Id.* 343.

162 *Id.* at 344.

163 *Id.* at 344–45.

164 *Id.* at 346 .

165 131 S. Ct. 2705 (2011).

cate describing the test and reporting the instrument-produced results, and the trial court admitted it under the business records exception to the hearsay rule. Another operator who performed similar duties appeared before the jury, sponsored the exhibit, and was available for cross-examination. The record showed only that the first operator had been “placed on unpaid leave for an undisclosed reason.”¹⁶⁶ A fractured Court reversed the conviction.

In an opinion by Justice Ginsburg, the Court rejected the argument that the operator was a “mere scrivener” and that the gas chromatograph performed the real test.¹⁶⁷ In addition to reporting the numerical result, the operator had to certify that the sample seal was unbroken and that there was “no circumstance or condition . . . [that] affect[ed] the integrity of the sample or . . . the validity of the analysis.”¹⁶⁸ His certification was “formalized in a signed document,” a fact that the Court seemed to view not as a circumstance indicating reliability, but as indicative of a Confrontation Clause violation.¹⁶⁹ The Court concluded that these factors made the first operator a witness and that the ability to cross-examine a witness equally familiar with the certification process was insufficient. The Court conceded that the operator “would not recall a particular test”—in other words, his response to cross-examination about the particular test would consist of “I don’t know,” just as the substitute witness’s probably did—but observed that he could answer questions about factors such as his own proficiency.¹⁷⁰ The Court failed to recognize that, presumably, the fellow operator provided as a substitute witness also could do so, and might have been more forthcoming with criticism. In Part IV of the opinion, Justice Ginsburg included assertions that undue costs were not relevant and that predictions of bad consequences were “dubious.”¹⁷¹ This Part IV was not the opinion of the Court, however, because Justices Thomas, Sotomayor, and Kagan, as well as the dissenters, declined to join in it.¹⁷²

Justice Sotomayor wrote a separate concurrence. She agreed with the Court’s assertions that the operator was not a mere scrivener and that substitute cross-examination was insufficient.¹⁷³ Perhaps the most significant aspect of her concurrence, however, is her observa-

166 *Id.* at 2710–12, 2714.

167 *Id.* at 2714–15.

168 *Id.* at 2714 (internal citations omitted).

169 *Id.* at 2714, 2717.

170 *Id.* at 2715 n.7.

171 *Id.* at 2717–19.

172 *Id.* at 2709.

173 *Id.* at 2721 (Sotomayor, J., concurring).

tion that “this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue.”¹⁷⁴ She also suggested that “machine-generated results, such as a printout from a gas chromatograph,” might present a different case.¹⁷⁵ And she concluded that it was not necessary “for every person noted on the [test] report [to] testify.”¹⁷⁶

Four justices dissented, in an opinion by Justice Kennedy. Apart from their objections in *Melendez-Diaz*, the dissenters contended that the extension of that holding in this case was a “serious misstep.”¹⁷⁷ First, the certifying operator’s role here was “no greater than that of anyone else in the chain of custody,” and the Court had held that chain-of-custody issues did not trigger a requirement of confrontation.¹⁷⁸ “Up to 40 analysts” may handle a single sample inside a state’s testing laboratory.¹⁷⁹ Must the prosecution call them all? Second, the analysis is mechanically completed by the gas chromatograph itself. “In these circumstances, requiring the State to call the technician who filled out a form and recorded the results of a test is a hollow formality.”¹⁸⁰ Furthermore, although the Confrontation Clause was concerned with reliability as its ultimate goal, the Court’s opinion here ironically treated reliability as a “reason to exclude” evidence rather than receive it. The formality and signature of the certification were, in the Court’s view, a reason to view it as testimonial and therefore prohibited.¹⁸¹ The reliability test of *Roberts* had as its purpose the protection of the ultimate confrontation goal, while allowing the states to explore and develop sensible evidence rules. Instead, the Court now had linked the Confrontation Clause to the earliest, most rigid, and least refined versions of the hearsay rules. “For instance, recent state laws allowing admission of well-documented and supported reports of abuse by women whose abusers later murdered them must give way,” unless the state can prove that the murder was motivated specifically by the foreclosing of testimony.¹⁸²

Then, there were the “chaotic” effects of the decision on drunk-driving trials. From 2008 to 2010, presumably as a result of confronta-

174 *Id.* at 2722.

175 *Id.*

176 *Id.* at 2721 n.2.

177 *Id.* at 2723 (Kennedy, J., dissenting).

178 *Id.* at 2724.

179 *Id.*

180 *Id.*

181 *Id.* at 2725.

182 *Id.* at 2727.

tion decisions, subpoenas requiring New Mexico operators to testify in impaired-driving cases “rose 71%, to 1,600—or 8 or 9 every workday,” in that single state. Operators “now must travel great distances on most working days.” Although the dissenters did not analyze the practical effects on other types of prosecutions, many of which require technical evidence, they added, “Scarce state resources could be committed to other urgent needs in the criminal justice system.”¹⁸³

Bullcoming shows not only adverse practical effects and doctrinal inconsistencies, but also the unworkability of the *Crawford* approach. The Court split four ways, if one counts Justice Thomas, who rejects many results of the *Crawford* holding. Justice Sotomayor is the only justice who suggested the use of substitute witnesses but did not tell us precisely what kinds would suffice. Joined with the dissenters, she could produce a five-justice majority for the reception of evidence that the positions of Justice Thomas and the rest of the majority would not adopt. Or another coalition could result in an unpredictable way. The result is that crucial issues, such as when an instrumental printout is sufficient or what kinds of surrogate witnesses are permissible, are not only left open, but left open without any indication of future consensus on the Court. This confusion adds to the waste of resources that is an unavoidable product of the *Crawford* approach.

C. *Descriptions by Commentators of “Chaos” and the Like as Results of Crawford: How Workable Is Crawford?*

Recent descriptions of the *Crawford* line of cases by commentators are uniformly uncomplimentary. Professor Michael Graham, who is one of our most prolific and careful evidence scholars, refers to the condition of this jurisprudence as “chaos.”¹⁸⁴ Schnapper-Casteras and Ellis describe what they see as “[t]he trouble with testimoniality,” which, in their view, includes “the [s]ubjective-[o]bjective [a]mbiguity and [o]ther [p]roblems.”¹⁸⁵ Other writers, some of whom favor the reinforcement of confrontation rights, nevertheless charge that lower courts’ efforts to comply with the decisions are “deeply problematic,”¹⁸⁶ that the jurisprudence is “unstable,”¹⁸⁷ that the doctrine rests

183 *Id.* at 2728.

184 Graham, *supra* note 110, at 1334.

185 JP Schnapper-Casteras & David Ellis, *The Trouble with Testimoniality: Subjective-Objective Ambiguity and Other Problems with Crawford’s Third Formulation*, 47 CRIM. L. BULL. No. 6 (Winter 2011).

186 Jesse J. Norris, *Who Can Testify About Lab Results After Melendez-Diaz and Bullcoming?: Surrogate Testimony and the Confrontation Clause*, 38 AM. J. CRIM. L. 375, 393 (2011).

on a “shaky foundation,”¹⁸⁸ that, without modification, these doctrines will enable “guilty defendants to circumvent the law,”¹⁸⁹ that the decisions are “surround[ed]” by “intricacies” so that determining proper results is “anything but easy,”¹⁹⁰ that the “ghost of *Roberts*” has produced a confusing “return of reliability” to conflict with the testimonial-nontestimonial distinction in such a way that the jurisprudence is “unsettling” and “poses practical difficulties in criminal proceedings across the country,”¹⁹¹ that “[d]ue to this lack of consensus and to the fact-intensive nature of the testimonial inquiry, the Court may take varied positions before a consistent doctrine emerges,”¹⁹² that the decisions have “sharply divided” the Court and “likely will continue to do so,”¹⁹³ that it is “odd” that the Court regards confrontation as having “nothing to do” with the “ultimate goal” of reliability,¹⁹⁴ and even that the results of *Crawford* are “unspeakable.”¹⁹⁵

In fact, recent commentators who offer strong praise for the *Crawford* approach must be few in number.¹⁹⁶ Even those who see merit in the line of decisions express doubts about its consistency, stability, and effects. The commentators’ appraisals of the decisions, in summary, support the conclusion that *Crawford* is unworkable.

187 Andrew W. Eichner, Note, *The Failures of Melendez-Diaz v. Massachusetts and the Unstable Confrontation Clause*, 38 AM. J. CRIM. L. 437 (2011).

188 Scott, *supra* note 19, at 1077.

189 Amy Ma, *Mitigating the Prosecutors’ Dilemma in Light of Melendez-Diaz: Live Two-Way Videoconferencing for Analyst Testimony Regarding Chemical Analysis*, 11 NEV. L.J. 793, 814 (2011). For reasons that are beyond the scope of this Article, the author here doubts that videoconferencing is a viable solution.

190 Marcia G. Cooke, *Hearsay After Crawford: A Practitioner’s Guide*, 23 ST. THOMAS L. REV. 509, 530 (2011).

191 Widdison, *supra* note 4, at 240.

192 *Leading Cases*, *supra* note 4, at 261.

193 Robert K. Kry, *Confrontation at a Crossroads: Crawford’s Seven-Year Itch*, 6 CHARLESTON L. REV. 49, 49 (2012).

194 Josephine Ross, *What’s Reliability Got to Do with the Confrontation Clause After Crawford?*, 14 WIDENER L. REV. 383, 425 (2009).

195 Rutherford, *supra* note 18.

196 In the past, there were commentaries that approved some aspects of *Crawford*. See e.g., Richard D. Friedman, *Forfeiture of the Confrontation Right After Crawford and Davis*, 19 REGENT U. L. REV. 489, 491–92 (2007) (approving these decisions); Christopher B. Mueller, *Cross-Examination Earlier or Later: When Is It Enough to Satisfy Crawford?*, 19 REGENT U. L. REV. 319, 320 (2007) (“*Crawford* was right to shift the focus . . . away from reliability . . .”). Recently, the commentary has been more unified in criticizing *Crawford*. See *supra* notes 4, 164–75 and accompanying text.

V. PRUDENTIAL CONCERNS: THE PRACTICAL EFFECTS OF THE
CRAWFORD LINE OF CASES

A. *Disastrous Results: Does the Constitution Allow the
Courts to Avoid Them?*

Justice Scalia, the author of *Crawford*, suggests that results do not matter in constitutional interpretation. For example, in *Melendez-Diaz*, he disapproved of considering “the necessities of trial and the adversary process.” He refused to evaluate whether the *Crawford* approach might make prosecutions “more burdensome,” putting that issue in the same category as burdens caused by the right to jury trial or the privilege against self-incrimination.¹⁹⁷

This reasoning conflated the issues. Once it is determined that a particular procedure or result is mandated by the Constitution, it arguably does not matter whether it is burdensome. A bill purporting to be a law that has been adopted by only one house of Congress, for example, does not become law merely because it is said to embody important or even crucial legislation. But in determining whether the Constitution in fact applies in such a way as to require a disastrous process or result, the courts do consider the result.¹⁹⁸ In refusing to do so—not in considering whether a mandated interpretation must apply, but in considering whether that interpretation is to be reached—Justice Scalia departed from sound reasoning and created legitimate ground for overruling *Crawford* under the Court’s stare decisis decisions.

Professor Loewy says that Justice Scalia “reject[s] . . . the relevance of consequences.”¹⁹⁹ He gives two examples: the retention of *Miranda v. Arizona*, as to which he argues that Justice Scalia would ignore the consequences for law enforcement or individual rights, and the constitutionality of capital punishment, as to which he sees Justice Scalia as indifferent to the possibility of execution of innocent persons. He concludes that “opinions reaching such results are fine

197 *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009) (quoting Brief for Respondent at 59).

198 The cases are many, but citing two landmark Supreme Court cases will advance the point. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (relying on result in the form of “detriment[s] . . . upon the pregnant woman” to justify statement that the right of privacy is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 & n.11 (1954) (considering results in the form of psychological studies demonstrating severe negative effects of segregation on African-American children).

199 Arnold H. Loewy, *A Tale of Two Justices (Scalia and Breyer)*, 43 TEX. TECH. L. REV. 1203, 1208 (2011).

as dissenting opinions. . . . But, I do not believe that historically the Court has ever ignored consequences.”²⁰⁰ To the extent that Justice Scalia’s *Crawford* opinion does so, it is vulnerable to Professor Loewy’s criticism. The Constitution, it has often been said, “is not a suicide pact.”²⁰¹ It does not require that courts ignore bad results, and the Supreme Court’s jurisprudence often considers consequences that are far less than disastrous. The results of *Crawford* are bad enough to support the conclusion that the decision is unworkable. For one thing, Justice Scalia’s approach would admit vast realms of unreliable hearsay because it means that lack of reliability is irrelevant to the Confrontation Clause.

B. Free Allowance of Unreliable Hearsay as a Result of Crawford

The *Crawford* rule is based on a testimonial/nontestimonial divide. Testimonial hearsay is subject to the Confrontation Clause. But by the same token, nontestimonial hearsay is freely admissible as far as the *Crawford* opinion is concerned, and the Confrontation Clause is not sensitive to how bad it is as evidence. “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”²⁰² Not only does this consequence of *Crawford* present a result important enough to amount to a constitutional consideration, it also is inconsistent with the historical concerns of the Confrontation Clause.²⁰³

For example, one commentator gives the example of a state’s creation of an “injured person” hearsay exception. Imagine that the only evidence of guilt is the repetition of a victim’s statement, made to a friend, that “last week [the accused] assaulted me [H]e punched me and broke my arm.” “Meeting no currently-existing hearsay exception, may the statement nonetheless be admitted and serve as the basis for conviction if a legislature were to create an ‘injured person’ hear-

200 *Id.* at 1209.

201 See *The Constitution Is Not a Suicide Pact*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_Constitution_is_not_a_suicide_pact (last visited Oct. 14, 2012) (citing formulations by Presidents Jefferson and Lincoln, Justices Jackson and Goldberg, and Judge Posner).

202 *E.g.*, *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31 (1981) (holding that the state’s “relatively weak pecuniary interest” together with its interest in informal procedures overcame the parent’s “important” interest in appointed counsel in termination proceeding that was not “complex[]”).

203 See *supra* Part III (showing that the historical basis of the Clause included concern for hearsay reliability).

say exception?”²⁰⁴ The partial answer is that *Crawford*'s interpretation of the Confrontation Clause apparently would permit this strange and historically jarring outcome. The possibility exists that another provision, such as the Due Process Clause, might countermand the conviction,²⁰⁵ but there is scant authority for such a result in connection with hearsay because the problem has been resolved, traditionally, by reference to the Confrontation Clause.

But the effects of *Crawford* are even worse than this. Justice Scalia's opinion turns the evaluation of evidence upside down. In the topsy-turvy world of *Crawford*, as Josephine Ross correctly points out, “the government is free to introduce many types of unreliable accusations without any right of confrontation attaching,” but “[i]n contrast, the government is prevented from introducing more reliable types of out-of-court accusations without producing the live witness[es]”²⁰⁶ For example, in *Whorton v. Bockting*, the Court held that a statement two days after the crime, which was admitted under a special statute with no antecedent in the common law, was not to be tested for reliability after *Crawford*.²⁰⁷ At the same time, the holding in *Bullcoming* means that statements that pose relatively little hearsay risk, and where there is less to be gained from cross examination of the specific declaration than with many valid hearsay exceptions, are inadmissible.²⁰⁸ Furthermore, the Court's requirements are overbearing enough to make four Justices express the concern that scientific evidence may be admissible only upon the testimony of as many as forty (40) witnesses, so that as a practical matter they would “forbid[] the use of scientific tests in criminal trials.”²⁰⁹

In fact, *Raleigh's Case* depended in part on testimony that closely resembles the “injured person” hearsay hypothetical. In addition to the affidavit evidence that it received, the judges there permitted the jury to consider the unconfrosted repetition of a chance remark made in Portugal by an unidentified person who incriminated Raleigh. The circumstances indicate that the remark was not testimo-

204 Jules Epstein, *Avoiding Trial by Rumor: Identifying the Due Process Threshold for Hearsay Evidence After the Demise of the Ohio v. Roberts “Reliability” Standard*, 77 U.M.K.C. L. REV. 119, 121 (2009).

205 See *id.* at 131 (suggesting the possibility that another provision, such as the Due Process Clause, might countermand the conviction).

206 Ross, *supra* note 194, at 385.

207 549 U.S. 406, 411 & n.1, 418 (2007) (announcing review only of question whether *Crawford* conformed to circumstances for collateral attack, not including reliability issues under *Crawford*).

208 See *supra* notes 157–63.

209 *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 333 (2009) (Kennedy, J., dissenting).

nial; it simply was gossip for all that appears.²¹⁰ Raleigh did not object to it on any ground that had to do with any testimonial-nontestimonial distinction. His objection went to the unreliability of the evidence.²¹¹ It is telling that Justice Scalia omitted this part of Raleigh's Case from his *Crawford* opinion. Contrary to his reasoning there, the trial of Sir Walter Raleigh—which the Justice treated as a weighty historical concern—shows that reliability was indeed a core concern of the Confrontation Clause.

C. *Pernicious Effects on Crucial Categories of Cases*

The destructive effects of *Crawford* on important kinds of cases have been discussed thoroughly and require only brief mention here. The commentators have pointed out that the decision may make some terrorism trials impossible,²¹² will have “unspeakable” effects on child abuse prosecutions,²¹³ and will prevent use of some statements by victims murdered by the defendants.²¹⁴ Supreme Court Justices have pointed out the destructive effects in drunk driving cases, and indeed, in all cases requiring scientific evidence.²¹⁵

D. *Consequences of the Crawford Line of Cases for the Vanishing Trial*

And then, there is the issue of the vanishing trial. Among the anomalous statements in the *Crawford* line of cases, there is one concerning this issue that stands out as particularly inappropriate. In *Bullcoming*, Justice Ginsburg suggested that the impact of the decision would be minimal because only a “small fraction of . . . cases . . .

210 See *supra* note 103 and accompanying text.

211 See *supra* note 104 and accompanying text.

212 See Scott, *supra* note 19, at 1078.

213 See Rutherford, *supra* note 18, at 137. Rutherford documents a case in which a child witness required psychiatric treatment after being placed on the witness stand and breaking down. *Id.* Breakdowns from severe stress on children must be relatively common, because the author has also seen such a case. See DAVID CRUMP & GEORGE O. JACOBS, *A CAPITAL CASE IN AMERICA* 157–163 (Carolina Academic Press ed. 2000).

214 In fact, this was the holding in *Giles v. California*, 554 U.S. 353, 360–61, 377 (2008), because the state had not held that the murder was motivated by prevention of testimony, so as to invoke the forfeiture by wrongdoing doctrine. See Graham, *supra* note 110 (discussing the *Giles* holding); Paul W. Grimm & Jerome E. Deise, *Hearsay, Confrontation, and Forfeiture by Wrongdoing: Crawford v. Washington, a Reassessment of the Confrontation Clause*, 35 U. BALT. L.F. 5, 32 (2004) (explaining the requirement of intent to make witness unavailable).

215 *Bullcoming v. New Mexico*, 134 S. Ct. at 2724, 2726 (2011) (Kennedy, J., dissenting).

actually proceed to trial.”²¹⁶ It is true that the number of jury trials has decreased to such a point that they are vanishing,²¹⁷ but that fact hardly justifies procedures that will decrease them even more. No one knows with certainty the reason for the vanishing trial, but surely one can conjecture that a major reason is ever more complicated processes.²¹⁸ It is particularly unfortunate when Supreme Court Justices add to these complexities by referring to the already-small number of jury trials to justify decisions that will reduce them even further.

Fortunately, a clear majority of the Court declined to adopt this reasoning. Justices Thomas, Sotomayor, and Kagan refused to join this part of Justice Ginsburg’s opinion.²¹⁹ Four justices dissented, again in an opinion by Justice Kennedy. These justices were concerned about the doctrinal aspects of the Ginsburg opinion, but also they were affected by its consequences for trials.²²⁰

Justice Ginsburg also suggested, strangely, that defendants regularly will “[stipulate] to the admission of [the] analysis.”²²¹ The basis of this dubious conclusion was a statement by a group of law professors as *amici curiae*, whose own basis was not given. On the contrary, in several years of both prosecuting and defending cases like the *Bullcoming* trial, I never, ever saw a defendant go to trial and stipulate to the admissibility of an intoxication test. In fact, since my jurisdiction required live witnesses, the need to present these witnesses created a defensive strategy that had nothing to do with stipulation, but that surely must have helped create the vanishing trial. It was common for defendants to demand a trial setting and plead guilty only after seeing that the prosecution could bodily present all necessary witnesses. The tactic was ethical; the question remains whether a rule that required this waste of resources was appropriate. The four dissenters’ treatment of this issue makes more sense than relying on law professors as *amici*. As the dissenters put it, “if the defense raises an objection and the analyst is tied up in another court proceeding [or is otherwise unavail-

216 *Id.* at 2718.

217 The phrase, “vanishing trial” is by now so familiar that a Westlaw search of law journals produces 696 citations. One important, often-cited work is Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

218 See Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571, 573 (2004) (speculating as to causes but denying that data can determine them accurately).

219 *Bullcoming*, 134 S. Ct. at 2709.

220 See *supra* notes 157–63 and accompanying text.

221 *Bullcoming*, 134 S. Ct. at 2718.

able], the defense gets a windfall.”²²² Therefore, “good defense attorneys will object in ever-greater numbers” to the absence of an analyst.”²²³ Justice Ginsburg’s assertions about defensive stipulations are harmful nonsense.

If the gain was worth these costs, the calculus would be different, of course. But a majority of the Court now believes that the values secured by the Confrontation Clause would be protected more accurately if the testimonial-nontestimonial approach was replaced by one that focused on hearsay from perceptual witnesses or on preventing trial by affidavit.²²⁴ Similarly, it would seem that a return to the reliability test of *Roberts* would result in better protection of confrontation values. First, *Crawford* concedes that that approach produced actual results largely consistent with these values.²²⁵ Second, the *Roberts* test would countermand the anomaly by which *Crawford* would admit unreliable testimony of a kind that was at issue in *Raleigh’s Case*.²²⁶

VI. THE OVERRULING COALITION FORMS: *WILLIAMS V. ILLINOIS*

The Court’s most recent confrontation decision shows, in operation, the coalition that can overrule *Crawford*—and arguably, this decision does, in fact, overrule it. In *Williams v. Illinois*,²²⁷ the state offered DNA evidence from semen residue left in a rape survivor. Two expert witnesses sponsored the evidence: first, Karen Abbinanti, who had produced the profile from a known sample of defendant Sandy Williams’s blood, and second, Sandra Lambatos, who testified that a profile of the semen residue received from Cellmark, a well-known DNA laboratory, matched the known profile from Williams. The prosecution also offered evidence showing the chain of custody from Chicago to Cellmark and back, but there was no witness who explained what had happened at Cellmark. Specifically, Lambatos had no personal knowledge of the steps taken at Cellmark to produce the profile.²²⁸

The questioned evidence arose when Lambatos referred to the Cellmark report as covering the unknown sample and to Cellmark’s role in producing the results. Williams’s lawyer objected to this evi-

222 *Id.* at 2728 (Kennedy, J., dissenting).

223 *Id.*

224 *See supra* notes 133–34 and accompanying text.

225 *See supra* note 76 and accompanying text.

226 *See supra* notes 100–04, 191–92 and accompanying text.

227 1332 S. Ct. 2221 (2012).

228 *Id.*

dence on Confrontation Clause grounds.²²⁹ The jury convicted Williams, and the Illinois courts upheld the conviction.

In a fractured decision, the United States Supreme Court also upheld Williams's conviction. The majority included a plurality, which expressed itself in an opinion by Justice Alito, in which the Chief Justice and Justices Kennedy and Breyer joined. The fifth Justice was Justice Thomas, who concurred separately. Four Justices dissented.

The plurality reasoned, first, that the testimony did not violate the Confrontation Clause because it was not hearsay.²³⁰ It had been offered to show the basis of Lambatos's expert opinion, not as substantive evidence. The Federal Rules of Evidence allow an expert to testify on the basis of information that is not itself admissible, and some courts allow evidence of the inadmissible basis to be admitted to show the derivation of the expert's opinion. The plurality reasoned that it should preserve this established tradition.²³¹ But the plurality's reasoning went further. Even if the Cellmark report had been offered as hearsay, it concluded, it would not have been a violation of the Confrontation Clause, because the plurality followed an approach that differed from that of *Crawford*.²³²

The plurality started with the assertion that not every kind of testimonial evidence implicated the clause.²³³ Only the kind of evidence featured in abuses that had led to the adoption of the clause could trigger it. And that kind of evidence exhibited two elements. "The abuses that the Court has identified as prompting the adoption of the Confrontation Clause shared the following two characteristics: (a) they involved out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involved formalized statements such as affidavits, depositions, prior testimony, or confessions."²³⁴ In this case, the plurality reasoned that the Cellmark report did not accuse a "targeted individual." An individual working in a DNA laboratory to produce a profile does not usually target a single individual but produces a profile of an unknown subject, and indeed, the purpose of the profile may even be to exonerate a subject, rather than to target him.²³⁵

229 *Id.* at 2231.

230 *Id.* at 2239–40.

231 *Id.*

232 *Id.* at 2242.

233 *Id.*

234 *Id.*

235 *Id.* at 2243–44.

Justice Thomas made the rest of the five-member majority by following the approach he had developed in the other cases following *Crawford*.²³⁶ First, contrary to the reasoning of the majority, he concluded that the evidence was hearsay, offered for its truth.²³⁷ But according to Justice Thomas, it was not the kind of evidence that triggered the Confrontation Clause. The abuses that led to the adoption of the clause involved formal testimony substitutes such as affidavits or depositions. And therefore, he wrote, “I reach this conclusion [that the clause does not apply] . . . solely because Cellmark’s statements lacked the requisite ‘formality and solemnity’ to be considered “‘testimonial’” for purposes of the Confrontation Clause.”²³⁸

From this combination of opinions, one can hazard the guess (and it is a guess, given the zigs and zags of post-*Crawford* jurisprudence) that the Confrontation Clause will exclude hearsay evidence only if it “involve[s] formalized statements such as affidavits, depositions, former testimony, or confessions,” as the plurality put it, or if it exhibits the requisite “formality and solemnity” to be considered testimonial for confrontation purposes, in Justice Thomas’s turn of phrase.²³⁹ The plurality would also, apparently, allow even formal statements if they did not accuse a targeted individual, and if a fifth Justice could be found to accept this approach, it too could avoid exclusion. To contribute to the uncertainty, however, one might add that Justice Breyer, although he concurred in the plurality opinion, wrote a separate concurrence emphasizing the unreasonableness of insisting on testimony from every participant in the production of DNA results.²⁴⁰ Justice Breyer’s complex diagram of the process and its many essential individuals has to be viewed to be believed,²⁴¹ and perhaps it shows that Justice Breyer would hesitate to exempt a particular item of hearsay from the confrontation requirement in a case in which producing live testimony is more reasonable.

Justice Kagan wrote a dissent in which Justices Scalia, Ginsburg, and Sotomayor joined.²⁴² As Justice Kagan saw it, this was a clear case in which the Court should not have hesitated to find a Confrontation Clause violation:

Under our Confrontation Clause precedents, this is an open-and-shut case. The State of Illinois prosecuted Sandy Williams for rape

236 *Id.* at 2255–56 (Thomas, J., concurring).

237 *Id.* at 2257.

238 *Id.* at 2255.

239 *Id.*

240 *Id.* at 2244–45 (Breyer, J., concurring).

241 *Id.* at 2252–54.

242 *Id.* at 2264 (Kagan, J., dissenting).

based in part on a DNA profile created in Cellmark's laboratory. Yet the State did not give Williams a chance to question the analyst who produced that evidence. Instead, the prosecution introduced the results of Cellmark's testing through an expert witness who had no idea how they were generated. That approach . . . deprived Williams of his Sixth Amendment right to "confron[t] . . . the witnesses against him."²⁴³

One of the flaws in the decision, according to the dissenters, was the absence of a single coherent theory to support it. The Court, the dissenters pointed out, "cannot settle on a reason why" the evidence did not violate the Confrontation Clause:

Justice Alito, joined by three other Justices, advances two theories—that the expert's summary of the Cellmark report was not offered for its truth, and that the report is not the kind of statement triggering the Confrontation Clause's protection. . . . I call Justice Alito's opinion "the plurality," because that is the conventional term for it. But in all except its disposition, his opinion is a dissent: Five Justices specifically reject every aspect of its reasoning and every paragraph of its explication.²⁴⁴

The dissent exhibits several different kinds of flaws. First, the Confrontation Clause does not guarantee that the prosecution will produce witnesses to explain "how [its evidence was] generated."²⁴⁵ It applies to "witnesses" against the accused. The prosecution's production of some witnesses and nonproduction of others is a common event, and in fact it occurs in nearly every case because at some point there has to be an end to testimony. Perhaps a failure by the prosecution adequately to explain its theories of the evidence could become a violation of the Due Process Clause at some point, but calling it a violation of the right to "confront the witnesses" against the defendant seems doubtful.

Second, as the plurality pointed out, the defense could test the match with the Cellmark profile by cross-examining Lambatos, and it was extraordinarily unlikely that the wrong match could have been produced by either malice or mistake.²⁴⁶ Especially in light of the large number of potential witnesses in a typical DNA case, it seems unreasonable to require the prosecution to produce every person that

243 *Id.* at 2265.

244 *Id.*

245 The plurality made this point in concluding that the question presented was whether the Sixth Amendment had been violated, "not whether the State offered sufficient foundational evidence to support the admission of Lambatos's opinion about the DNA match." *Id.* at 2238 (Alito, J., plurality opinion).

246 *Id.* at 2239.

could have had a role in influencing the result. Third, the concept that Lambatos's reference to Cellmark was not hearsay is far more defensible than the dissent recognized. The ability of one declarant to give a description that, by separate and independent evidence, matches the evidence of another declarant who testifies in a way that defies coincidence has arisen in some cases that have reasoned that this evidence, even if it is the repetition of a statement from a nontestifying declarant, is not hearsay.²⁴⁷

But the dissenters' criticism of the Court's decision on the ground that it lacks a single basis is the most remarkable aspect of their reasoning. In the first place, some of the dissenters themselves joined prior decisions following *Crawford* that also were made up of pluralities with separate concurrences.²⁴⁸ It is not unusual today to find this kind of fracturing in the Supreme Court, even if it may be unfortunate. In the second place, the fracturing is an indication of the unworkability of the *Crawford* reasoning, especially in light of the fudging and inconsistency in the decisions that preceded it. It hardly advances the argument of the dissent to demonstrate, once again, how *Crawford* splits the Court. In the third place, the dissenters' assertion that five justices "specifically reject every aspect of [the plurality's] reasoning" is flatly incorrect.²⁴⁹

A single theory that replaces *Crawford* does appear to be shared by five justices, even though it is expressed in opinions that disagree in other respects. Justice Thomas and the plurality made up a majority that, in fact, agreed upon the single most basic feature of both opinions: an insistence that exclusion under the Confrontation Clause extends only to "formalized" or "solemn[]" out-of-court declarations that are generated by the state as evidence.²⁵⁰ In fact, one can argue that the Court now has overruled *Crawford's* wholesale exclusion of testimonial evidence—in *Williams*, *sub silentio*, by a majority that excludes only the narrower category of manufactured statements. An

247 See, e.g., *Bridges v. State*, 19 N.W.2d 529 (Wis. 1945). In that case, police officers testified to statements by a child who was molested, describing the room to which the defendant had abducted her. Independent evidence established a match between the child's descriptions and a room where the defendant lived. The court recognized that the repetition of the statements would have been hearsay if the purpose had been to establish the characteristics of the room, but held that it was not hearsay because of the fact that the child's description matched the independently proved reality. The reasoning in *Bridges* parallels a line of analysis that is equally applicable in *Williams*. The plurality, in fact, used similar reasoning. *Williams*, 132 S. Ct. at 2221.

248 See *supra* Part IV.

249 *Williams*, 132 S. Ct. at 2265.

250 See *supra* notes 235–38 and accompanying text.

explicit opinion discarding the old regime would be preferable, but perhaps the reality that *Crawford* has been overruled already exists.

CONCLUSION: CONSIDERING THE OVERRULING OF *CRAWFORD* UNDER
THE *PAYNE-PARENTHOOD* FACTORS

The *Payne-Parenthood* factors support the overruling of *Crawford*.²⁵¹ First, although this kind of conclusion is always debatable, there is ample ground for asserting that *Crawford* is wrongly reasoned. Justice Scalia's pivotal claim that there is only one historical hearsay exception contrary to his new testimony-based theory, dying declarations, is simply erroneous. The clear example of confessions either did not occur to him or was excluded from consideration for some odd reason, and the examples of public records, business records, and recorded recollection memorializing litigation-related facts also contradict his assertion.²⁵² The anti-reliability history recited in *Crawford* is so selective that it can justifiably be labeled revisionist, beginning with the example of the trial of Sir Walter Raleigh, who objected to parts of the evidence on reliability grounds of precisely the kind that Justice Scalia pronounced irrelevant to history (a passage that Justice Scalia omitted from his opinion).²⁵³ The centuries-old approach of admitting hearsay under exceptions based on reliability and necessity implies the weakness of *Crawford's* treatment of reliability as irrelevant, since the history of the hearsay rule and the Confrontation Clause are intertwined, even if they are not identical. Furthermore, the repeated judicial fudging that has been necessary for post-*Crawford* results to avoid nonsense is indicative that the decision is unworkable, and so is the consensus of commentators.²⁵⁴ Finally, by departing from *stare decisis* without analyzing whether the departure could be justified under the Court's decisions authorizing it,²⁵⁵ Justice Scalia arguably engaged in reasoning that ought itself to be rejected.

Second, as a constitutional decision, and one dealing with procedure or evidence, *Crawford* qualifies more readily for overruling. Third, reliance interests would be disturbed less in the overruling of *Crawford* than most changes of law because the alternative interpretive theories that the Court might adopt would exclude less of the reliable evidence that would likely be preserved. The application of theories

251 This Conclusion relies generally on the criteria from *Payne* and *Parenthood* that are documented *supra* in Part II.A of this Article.

252 See *supra* Part III.A.

253 See *supra* notes 100–04, 191–92 and accompanying text.

254 See *supra* Part IV.

255 See *supra* Part II.

such as that of Justice Thomas or of the dissenters in *Melendez-Diaz*, focused on the true purposes of the Confrontation Clause, would interfere less with reliance interests because they would exclude less evidence that all jurisdictions have set up systems to collect,²⁵⁶ and a return to reliability would focus on evidence that evidence-gatherers would expect they should have preserved, that is, reliable evidence. Fourth, *Crawford* has produced a number of “spirited dissents.”²⁵⁷ And as for “narrow margins” of decision, although *Crawford* itself produced only two dissenting justices, the later cases have featured not merely a narrow margin of decision, but an actual majority that would reject the *Crawford* approach.²⁵⁸ Fifth, the later decisions have produced outcomes not merely in the lower courts, but in the Supreme Court itself, that are so inconsistent that Justice Scalia has charged that they “demean” the Court.²⁵⁹

Consideration of the later factors added by *Planned Parenthood* supports the same result. Seventh, comparison of other decisions that have overruled precedent to *Crawford* does not show a lesser justification for overruling this decision. There was no greater inconsistency in the decisions preceding *Payne*, nor was the decision any more unworkable. Eighth, although “evolution of legal principles” rendering a prior decision an “anachronism” is not an easy factor to apply to this controversy, the judicial fudging that was necessary in later decisions shows that the *Crawford* approach is difficult to reconcile with principles that the Court later generated.²⁶⁰ Ninth, although it is similarly difficult to consider whether changes in “factual underpinnings” have weakened *Crawford*, the application of that decision to later-arising technological issues has produced still more judicial fudging.²⁶¹ Tenth and finally, assuming this factor is legitimate (as it arguably is not), overruling *Crawford* would not create political fallout that would harm the judiciary. Judging from the reactions of commentators, who use labels ranging from “unstable” to “unspeakable,” overruling *Crawford* would more likely earn respect for the courts.²⁶²

The *Crawford* approach has created enough confusion. It has required enough judicial fudging. It has elicited enough demonstrations that it is the wrong interpretation of the Constitution. It has

256 See *supra* notes 157–163 and accompanying text.

257 See *supra* Part IV.B (describing the *Melendez-Diaz* and *Bullcoming* dissents, as well as concurrences).

258 See *supra* Part IV.B.

259 See *supra* notes 128–29 and accompanying text.

260 See *supra* Part IV.

261 See *supra* Part IV.B.

262 See *supra* Part IV.C.

produced enough strange and harmful results. The time has come for the Court to consign *Crawford* to the burial it merits. It can be argued that, in the *Williams* decision, the Court has overruled *Crawford* by implication, but an explicit rejection would be better.

