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After Crawford Double-Speak: Testimony Does not Mean Testimony and Witness Does Not Mean Witness

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AFTER *CRAWFORD* DOUBLE-SPEAK: "TESTIMONY" DOES NOT MEAN TESTIMONY AND "WITNESS" DOES NOT MEAN WITNESS

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A controversy has raged since the U.S. Supreme Court altered the Confrontation Clause landscape in Crawford v. Washington. *There, the Court coined the term "testimonial" as a means of determining whether a person who makes an out-of-court statement is a witness against the defendant and must therefore testify in person. This Article advocates a new definition that would be more in keeping with the meaning of the word "testimony" and with the functions served by the Confrontation Clause. Currently the Court determines whether a hearsay declarant is a witness based upon what occurred at the time the person made his out-of-court statement. Instead, this Article proposes that the Court should decide if out-of-court statements constitute testimony based on whether the declarants functioned as witnesses against the defendant at trial. With the recent case of* Davis v. Washington, *the Supreme Court had a chance to refine the concept of "testimonial." This Article critiques* Davis *and illustrates how the application of the definition proposed here would have avoided* Davis' *confused and contradictory reasoning. Shifting the timeframe from the production of evidence to the use of the evidence in the courtroom will create a jurisprudence more in line with* Crawford's *promise to revive an important trial right for those accused of crimes.*

* Associate Professor of Law, Howard University School of Law. I am grateful to Dean Kurt Schmoke for providing ongoing support. Professor Andrew Taslitz and Professor George Fisher each earned my utmost appreciation for their comments on earlier drafts. I also wish to thank two law students that put in long hours this summer: Sherina Maye and Chelsey Rodgers. This Article grew out of a talk I gave at an AALS clinical conference, and for that I thank organizer Professor Michael Pinard.

I. INTRODUCTION: DOMESTIC VIOLENCE CASES AFTER *CRAWFORD*

> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with [a] jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.
>
> — Justice Scalia's majority opinion in *Crawford v. Washington*[1]

Two years after *Crawford v. Washington* created a wave of uncertainty regarding the significance of the newly defined Confrontation Clause, the Supreme Court issued a decision defining the terms "testimony" and "testimonial" that was intended to clarify *Crawford*'s ambiguities. The new case, *Davis v. Washington* (*Davis/Hammon*),[2] puts to rest some of *Crawford*'s ambiguity, but does not resolve *Crawford*'s central contradiction between its desire for more face-to-face confrontation and its limited reading of the scope of the Confrontation Clause.

Before *Crawford*, domestic violence cases had evolved in many states to the point that the government was presenting its case without testimony from the alleged victim or other eyewitnesses.[3] In lieu of the complainant, police officers would testify to what the complainant had told the police at the scene.[4] In many situations, the 911 call or the complainant's statement to police responding to the scene was the only evidence against the defendant.[5] These statements were labeled "excited utterances" or "spontaneous declarations" by prosecutors and judges, and were thus admissible as an exception to the hearsay rules.[6] Constitutional analysis

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[1] 541 U.S. 36, 62 (2004).

[2] 126 S. Ct. 2266 (2006). The decision reviewed two domestic violence convictions: *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126. S. Ct. 2266 (2006), and *State v. Davis*, 111 P.3d 844 (Wash. 2005), *aff'd*, 126 S. Ct. 2266 (2006). The Supreme Court's *Davis* opinion combined the two cases, so I will refer to it hereinafter as *Davis/Hammon*.

[3] Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171 (2002); *see also* Andrew King-Ries, Crawford v. Washington*: The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 309 (2005).

[4] *See* Peter R. Dworkin, *Confronting Your Abuser In Oregon: A New Domestic Violence Hearsay Exception*, 37 WILLAMETTE L. REV. 299, 301-03 (2001) (describing new statutes in Oregon and California to make witnessless prosecutions easier); David M. Gersten, *Evidentiary Trends in Domestic Violence*, FLA. BAR J., July/Aug. 1998, at 65. My experience in the courts of Massachusetts during the 1990s confirms what other commentators noticed elsewhere. *See also* Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 52-54 & n.45 (2000) (stating that many criminal prosecution offices were starting to use witnessless "prosecution strategies[,] thus necessitating creative application of the hearsay exceptions").

[5] Brief of Petitioner-Appellant Davis at 4, *Davis*, 126 S. Ct. 2266 (No. 05-5224) [hereinafter Brief of Petitioner Davis]; Friedman & McCormack, *supra* note 3, at 1177-80.

[6] FED. R. EVID. 803(2). Excited utterance is defined as: "A statement relating to a

before *Crawford* determined that once the hearsay rules were satisfied, so was the Sixth Amendment right to confront witnesses.[7] As a result, the government did not need to worry about obtaining the alleged victim's cooperation or summoning the witness to court. Men and women could be arrested, tried, and convicted by an accusation that was never subject to oath or cross-examination.

Crawford restored the constitutional right to confront witnesses from the rules of evidence, thus revitalizing the Confrontation Clause.[8] In so doing, the decision threatened to end the recent practice of relying on out-of-court statements rather than eyewitness testimony at trial in domestic violence prosecutions. In *Crawford*, the Supreme Court determined that even if a statement is admissible under a state's evidentiary rules, the statement may violate the Confrontation Clause if there is no opportunity to cross-examine the witness.[9] The Court announced that the Confrontation Clause guarantees live witness testimony unless the witness is unavailable, in which case only prior testimony subject to cross-examination is permitted.[10]

Criticism of *Crawford*'s ambiguity abounds.[11] One judge in New York put his frustration into writing when he was asked to admit an emergency call to the police under the excited utterance exception:

> Are such calls testimonial in nature, or not? Do they constitute "police interrogation" (because the caller answers questions posed by the police operator), or not? May they be admitted into evidence under various traditional exceptions to the hearsay rule? Or would their admission violate the Sixth Amendment? The *Crawford* decision is rich

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startling event or condition made while the Declarant was under the stress of excitement caused by the event or condition." *Id.*

[7] *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence" may be admitted upon "a showing of particularized guarantees of trustworthiness."); *see also* Crawford v. Washington, 541 U.S. 36, 60 (2004) (quoting *Roberts*, 448 U.S. at 66). *Roberts* was followed by a number of Supreme Court cases, including *United States v. Inadi*, 475 U.S. 387 (1986), and *White v. Illinois*, 502 U.S. 346 (1992).

[8] *Crawford*, 541 U.S. at 56-57.

[9] *Id.* at 53.

[10] *Id.* at 57.

[11] Chief Justice Rehnquist's concurrence was highly critical of the majority's break with the Court's prior jurisprudence. In determining the future of *Crawford* in Supreme Court jurisprudence, one must note that *Crawford*'s validity will not be threatened by the replacements of Chief Justice Rehnquist in 2005 and Justice O'Connor in 2006 since they wrote the critical concurrence, whereas all seven justices who joined the majority are still on the bench. The lone dissenter in *Davis v. Washington* was Justice Thomas. Davis v. Washington, 126 S. Ct. 2266, 2280 (2006) (Thomas, J., concurring in part and dissenting in part).

> in detail about the law of England in the 16th, 17th and 18th centuries, but—as the Chief Justice points out—it fails to give urgently needed guidance as to how to apply the Sixth Amendment right now, in the 21st century.[12]

To resolve the uncertainty, the United States Supreme Court consolidated two cases, *Davis v. Washington* and *Hammon v. Indiana*, and issued one decision officially known as *Davis v. Washington* that resolved both appeals.[13] *Hammon* questioned whether statements made to police responding to the scene of an alleged act of domestic violence are admissible at trial through the police officer when there is no opportunity to cross-examine the person who made the statements.[14] *Davis* challenged the admissibility of 911 calls accusing a person of a criminal act without the opportunity to cross-examine the person who made the out-of-court allegation.[15] Together, these cases covered the typical methods employed by the state to successfully prosecute domestic violence cases without the cooperation of a complaining witness, pitting the right to confront one's accusers against the expanded use of the excited utterance hearsay exception. Thus with *Davis/Hammon*, the Court had an opportunity to reaffirm *Crawford*'s preference for live witnesses at trial over hearsay accusations. This Article will discuss in-depth how the Court approached this opportunity.

Section II of this Article presents a domestic violence case handled by students at Boston College Law School before *Crawford* was decided to illustrate how the "excited utterance" exception worked in practice. The alleged victim did not appear, and the government attempted to base its case on statements made at the scene. The case helps explore the importance of cross-examination and the concept of "witness," concepts at the heart of the Confrontation Clause.

Section III explains how *Crawford* recognized the need to end hearsay-based prosecutions but failed to deliver a ruling that would ensure its demise. *Crawford* pulled in two inconsistent directions: one that required accusers to come to court to testify; and the other that limited the

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[12] People v. Moscat, 777 N.Y.S.2d 875, 877-78 (2004); *see also Crawford*, 541 U.S. at 75-76 (Rehnquist, J., concurring) ("[T]housands of federal prosecutors and . . . tens of thousands of state prosecutors need answers as to what beyond the specific kinds of 'testimony' the Court lists . . . is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.").

[13] 126 S. Ct. 2266.

[14] *See* Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126 S. Ct. 2266 (2006).

[15] *See* State v. Davis, 64 P.3d 661 (Wash. Ct. App. 2003), *aff'd*, 111 P.3d 844 (Wash. 2005), *aff'd*, 126 S. Ct. 2266 (2006).

scope of the Confrontation Clause to exclude many witnesses whose out-of-court accusations form the proof of criminal wrongdoing.

Section IV analyzes the recent Supreme Court case of *Davis/Hammon* that applied *Crawford*'s Confrontation Clause jurisprudence to domestic violence prosecutions. On the one hand, the Court's decision changed the practice in the trial courts to prevent a large range of hearsay from substituting for live testimony. On the other hand, the Court's reasoning was inconsistent and may be read as a road map for police and prosecutors to circumvent the confrontation requirement in domestic violence cases where statements fit the "excited utterance" doctrine. Ultimately there was a contradiction in *Davis/Hammon*, just as there was in *Crawford*. The Court wanted more confrontation but defined the scope of the Sixth Amendment right to confront witnesses in a way that allowed many witnesses to accuse others without testifying in person.[16]

Section V examines how other scholars have viewed the values and contours of the Confrontation Clause post-*Crawford*. Unlike previous scholarly works, this Article lays out a definition of "testimonial" that examines the role testimony had at trial rather than trying to decipher what occurred when the statement was originally uttered out-of-court. The Sixth Amendment is a trial right, but the Court insists on treating the Amendment as a question of police procedures more akin to Fourth and Fifth Amendment analysis. The Court misses the real meaning of the Sixth Amendment right of accused persons to confront the witnesses against them. Currently, post-*Crawford* jurisprudence threatens to drift away from an understanding of how evidence operates within the courtroom and may create new legal fictions so that "witness" does not mean witness and the term "testimonial" has little to do with testimony in court.

II. A DOMESTIC VIOLENCE CASE BEFORE *CRAWFORD*

> Indeed, one would shudder at the prospect of a criminal prosecution in which the evidence for the prosecution consisted solely of a police officer reading his or her report into the record.[17]

A. THE FACTS OF THE CASE

Let me start with a real case in which the government planned to use the excited utterance exception to the hearsay rule, a case I supervised as a professor in the Boston College Criminal Justice Clinic. The police report

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[16] *Davis*, 126 S. Ct. 2266; *see infra* Section IV.G.

[17] David W. Stuart, *Hearsay and the Confrontation Clause*, 41 FED. B. NEWS & J. 133, 137 (1994).

related what had occurred when the police arrived on the scene: "Upon arrival spoke to [the alleged victim] who stated he has a child with [the suspect]." The alleged victim told police that the suspect

> did knock on victim's door and at this time [the alleged victim] did step out of his apartment, and while talking to [the suspect] she attempted to stab him with a Black Handle Kitchen Knife, and after missing she did scratch him on the left side of the face causing a cut.[18]

The report went on to explain that the alleged victim refused medical attention and told police that the suspect threw the knife over the front porch railing. The police found the knife and brought a complaint for assault with a dangerous weapon.[19]

B. THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULES

In our case, if the alleged victim did not appear at trial to testify against the accused, the government would proceed anyway, asking the police officer to repeat the statements made at the scene under the excited utterance exception to the hearsay rules.

An excited utterance, sometimes referred to as a spontaneous utterance or spontaneous declaration, is a hearsay exception to the rules of evidence that generally forbids out-of-court statements from being introduced at trial.[20] To be admissible as an excited utterance, the government must show that the statement was made under "external circumstances of physical shock" before reasoned reflection was possible.[21] One Massachusetts case from 1994 described the purpose of the excited utterance:

> The excited utterance exception to the hearsay rule "is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which *stills the reflective faculties* . . . so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief

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[18] Incident Report, Boston Police, No. 90542845 (Oct. 5, 1999, 5:17 p.m.).

[19] The report says that the defendant was arrested but did not mention any statements taken from her. Later they alleged that she talked to them. No one besides the victim (and perhaps the defendant) was interviewed.

[20] FED. R. EVID. 803(2). *See* discussion *supra* note 6.

[21] *See, e.g.*, Commonwealth v. Santiago, 774 N.E.2d 143, 146 (Mass. 2002). Massachusetts cases also use the term "if the proponent shows that the statement was made under the influence of an exciting event" to substitute for Wigmore's more flowery language. Commonwealth v. King, 763 N.E.2d 1071, 1075 (Mass. 2002). Massachusetts interpreted its state constitutional right to confront witnesses in line with the Supreme Court's decision in *White v. Illinois*, 502 U.S. 346 (1992), that the government need not show the witness was unavailable to testify before introducing the excited utterance in place of live testimony. Commonwealth v. Whelton, 696 N.E.2d 540, 545 (Mass. 1998).

> period *when considerations of self-interest could not have been brought fully to bear by reasoned reflection*, the utterance may be taken as particularly trustworthy . . . and *may therefore be received as testimony* to those facts."[22]

Wigmore is liberally quoted above, and is generally credited with creating the hearsay exception in the early part of the twentieth century. The hearsay exception was expanded exponentially in recent years as prosecutors sought to improve the conviction rate for domestic violence cases.[23] Wigmore actually used the term "testimony" in the above quote, a term which became important after *Crawford*. Wigmore recognized that by allowing police to repeat accusations in court under the new hearsay rule, these accusations were "received as testimony" in court. Wigmore's use of the term testimony is an accurate description of the trial. Had the judge allowed the accusation that our client had a knife, it would have been testimony regardless of whether the statement was made at trial by the alleged victim, or by the police officer.

During the first fourteen years that I practiced criminal law, the excited utterance exception was notable in its absence. But starting in 1998, prosecutors began introducing statements as excited utterances in domestic violence cases.[24] By 1999, prosecutors were marking all pre-trial

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[22] *See, e.g.*, Commonwealth v. Grant, 634 N.E.2d 565, 568-59 (Mass. 1994) (citing Commonwealth v. McLaughlin, 364 Mass. 211, 222 (1973) (quoting 5 JOHN HENRY WIGMORE, EVIDENCE § 1747 (3d ed. 1940)) (emphasis added).

> The test to determine the admissibility of a statement under the excited utterance exception to the hearsay rule is as follows. "The utterance must have been [made] before there has been time to contrive and misrepresent. . . . [T]he statements need not be strictly contemporaneous with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated. . . . [T]here can be no definite and fixed limit of time."

Id. at 569 (citing Rocco v. Boston-Leader, Inc., 163 N.E.2d 157 (Mass. 1960) (quoting WIGMORE, *supra*, § 1750)).

[23] *See* JOHN HENRY WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF: AS GIVEN BY LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE AND ILLUSTRATED IN JUDICIAL TRIALS (1913); Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence*, 28 COLUM. L. REV. 432 (1928); *see also* Friedman & McCormack, *supra* note 3, at 1220 (noting that this expansion took place nationwide); Jeffrey S. Siegel, *Timing Isn't Everything: Massachusetts' Expansion of the Excited Utterance Exception in Severe Criminal Cases*, 79 B.U. L. REV. 1241 (1999).

[24] My experience arose in Boston, Massachusetts, starting in 1993, and before that in Worcester, Massachusetts, but other trial courts throughout the state may have had some differences in this regard. *See* Siegel, *supra* note 23 (documenting that expansion of excited utterance is occurring in key areas besides domestic violence, namely child abuse and murder).

The expansion of the excited utterance is probably a direct result of *White v. Illinois*, which upheld a conviction for abuse of a child based upon statements that were admitted as spontaneous declarations and statements made for purposes of medical treatment. 502 U.S.

conference sheets in domestic violence cases with the notation that they planned to introduce excited utterances.[25] The government would then plan on introducing the excited utterances with or without a live witness on the stand. As a professor, I made a point of teaching students that the police report was hearsay and was not admissible as evidence. Students were expected to read reports carefully to separate out which witnesses were necessary to establish the government's case. In 2002, a student told me I was wrong. With the expanded excited utterance she explained, the police report does come into evidence. She had a point; there were no eyewitnesses, and the officers had memorized their reports and could recite them in court. By the time *Crawford* was decided, the prospect of trial by police report had become a reality in many courts around the country.[26]

C. HOW THE CONFRONTATION CLAUSE DOCTRINE CORRUPTED THE CONCEPT OF WITNESS

Without the excited utterance exception, the case was doomed. Like many victims and alleged victims of domestic violence, the man answered

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346. *White* held that the government need not show unavailability of the witness as long as evidence fit a deeply rooted exception to the hearsay rule. *Id.* The *White* decision, as discussed in *Crawford*, assumed that the spontaneous declaration was deeply held:

> It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." In any case, the only question presented in *White* was whether the Confrontation Clause imposed an unavailability requirement on the types of hearsay at issue. The holding did not address the question whether certain of the statements, because they were testimonial, had to be excluded even if the witness was unavailable. We "[took] as a given . . . that the testimony properly falls within the relevant hearsay exceptions."

Crawford v. Washington, 541 U.S. 36, 58 n.8 (2004) (quoting *White*, 502 U.S. at 348-49; Thompson v. Trevanion, (1694) 90 Eng. Rep. 179 (K.B.)) (citations omitted).

[25] I supervised students in Dorchester District Court, a Boston court, from 1993 through 2004. There was a domestic violence court within Dorchester District Court where all the domestic violence cases in that court were handled. A few prosecutors were specially assigned to that court.

Another cause of the rise of the use of hearsay to convict in Boston was the creation of this "domestic violence court" in Dorchester that handled primary domestic violence charges. The use of the hearsay exception was foreshadowed by the presiding judge of the Dorchester court, who urged prosecutors to employ the evidentiary rule as a way to prevent dismissals of domestic violence cases. For the perspective of a judge outside of Massachusetts who admits that the evidence rules are changing as part of response to society's interest in combating domestic violence, see Gersten, *supra* note 4, at 67.

[26] Friedman & McCormack, *supra* note 3, at 1171, 1176-80 & n.23; Mark Hansen, *New Strategy in Battering Cases: About a Third of Jurisdictions Prosecute Even Without Victim's Testimony*, A.B.A. J., Aug. 1995, at 14; *see supra* note 4.

police questions at the scene about what happened, but later chose not to cooperate with the District Attorney's office. Before the expansion of the excited utterance rule, if the victim did not testify, the state would not be able to meet the elements of the charge. At trial, the police would only be able to testify that they went to the house, saw the alleged victim, and recovered a knife where he pointed. The State would not be able to prove that anyone assaulted the alleged victim, since there were no witnesses to testify to the assault. Thus, the knife would be the lone piece of evidence, useless when unconnected to any narrative. Thanks to the expanded excited utterance exception, however, the government planned to try this case with or without the alleged witness' cooperation. If the alleged victim did not show up or recanted, the officer would take the stand and testify to what the alleged victim had told him at the scene. Cases such as this one that would have been dismissed could now be prosecuted, resulting in many more guilty pleas as well as trials.

The disadvantages to the expanded excited utterance exception and the accompanying erosion of the accused's right to confront witnesses are more subtle but no less substantial. As this case illustrates, there is a corrupting influence when a police officer can testify merely by reciting what a witness told him some months before. Justice became corrupted when a shift occurred in the understanding of the term "witness." In our case, when the alleged victim's statements came into trial, that person was a witness in any real understanding of the term. Whether that person was lying or mistaken mattered; whether the alleged victim had a bias mattered. In fact, the case turned on whether the jury believed that the alleged victim was telling the truth beyond a reasonable doubt. Under the Sixth Amendment, counsel had a right to cross-examine witnesses. However, the shift in the law before *Crawford* allowed the police officer to become the key prosecution witness, even though he did not witness the event that allegedly occurred.

The corruption of the concept of witness became most evident when one considered cross-examination of the alleged victim. Had our students been able to cross-examine him, they would have brought out his motive in pinning the crime on the defendant and in negating his own guilt. The students could have attacked the alleged victim's story for inconsistencies. Finally, the jury would have had an opportunity to take the measure of the man when he testified. It was little comfort that the students could cross-examine the police officer. The officer was not an eyewitness to the crime, and no inconsistencies in the victim's stories could be extracted. Particularly galling to the truth function was that as a professional, the police officer would make a far more convincing witness than the alleged victim, and hence the alleged victim's story gained credibility in the retelling. The defendant in our case was unable to confront the witness

against her because her lawyer could cross-examine only the police officer and not the alleged victim.

This notion of a witness not being a witness played out in the clinic case during negotiations with the prosecutor. In our case, the alleged victim had a criminal record and was on a suspended sentence for selling drugs. Normally, a criminal defendant in Massachusetts has a right to impeach a witness with criminal convictions and current probation obligations that might show a desire to cooperate with the government to protect the witness's self-interest.[27] In this case, once the victim's record came to the jury's attention, the jury might be less likely to believe what the victim told police, and it would enhance the defendant's theory of the case that the witness had something to lose by shifting the blame. The student attorney showed the prosecutor a copy of the victim's record with the hope that this would encourage the prosecutor to consider dropping the charges. Instead, the prosecutor decided she would neither subpoena the victim to court nor call him to the stand at trial. That way, the prosecutor explained, she would be able to block the defense from introducing the victim's record.[28] In the prosecutor's mindset, criminal records were only allowed to impeach witnesses, and by keeping the victim off the stand, she thought the victim was no longer a witness. As a result, the police officer was the witness, and his credibility was at issue.[29] I do not intend this as a criticism of the particular prosecutor but of the Confrontation Clause doctrine. This was a veteran assistant district attorney who had garnered much respect because of her fairness and judicial temperament. This example illustrates the corroding influence of the pre-*Crawford* approach to confrontation rights and how quickly the deprivation of one civil liberty can spread to take away other rights. In this case, a trial without confrontation also threatened to become a trial without impeachment. The case also illuminated the need to

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[27] *See* MASS. GEN. LAWS ch. 233 § 21 (2000).

[28] The prosecutor was not on solid legal ground in thinking that the victim's record would not come in to impeach the declarant if she did not testify live. Massachusetts' rules of evidence were generally consistent with Federal Rule of Evidence 806, in providing that when a hearsay statement has been admitted into evidence, the credibility of the declarant may be attacked. PAUL J. LIACOS, MARK S. BRODIN & MICHAEL AVERY, HANDBOOK OF MASSACHUSETTS EVIDENCE § 8.4.3 (7th ed. 1999); *see* FED. R. EVID. 806.

[29] I did not expect a judge or appellate court to back up the prosecutor, but the prosecutor truly believed that she was right. Again we see the influence of Wigmore. In his writings, Wigmore reduced the confrontation right to no more than "a right to cross-examine the witnesses the prosecutor produced at trial." Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. LAW BULL. 99, 104 n.24 (1972) (quoting WIGMORE, *supra* note 22, at 131); *see also* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 572 & n.62 (1992).

interpret the *Crawford* opinion in a manner that revitalized the right to confront witnesses.

Another corrupting aspect of the excited utterance doctrine concerns police memory. For the victim's allegation of the knife assault to qualify as an excited utterance, the judge must find that the alleged victim made the statement under the shock of the event while the reflective faculties that allowed him to dissemble were stilled. When the student investigator interviewed one of the police officers, the officer used all the magic words that would trigger a court to find the statements were excited utterances. The officer spoke of the alleged victim being "definitely still under the shock of the event" and "definitely excited." However, at the interview, this officer could not remember if he arrived at the scene first or if another officer was at the scene and had already started the investigation. The interview raises questions of whether the officer really had a memory that the alleged victim was in shock and whether he could know he was under the influence of the exciting event when the officer had never met him before. The officer's words, repeated by police in multitudes of domestic violence cases since the excited utterance exception was expanded, were formulaic incantations to avoid the case getting thrown out. The legal fiction had corrupted the process of police memory.

It is doubtful that the prosecutor and police in our case really believed that the alleged victim had no capacity to lie because of the shock of the traumatic event. Through the decade preceding *Crawford*, statements introduced under the excited utterance exception were not really "verbal reflexes." Rather, they were incriminating statements made by someone who had the ability to lie, just like all human beings, though they might be less likely to lie. Government officials, including judges, were thus participating in a legal fiction and making an end run around the Sixth Amendment to reach the understandable goal of prosecuting people who may otherwise have escaped punishment.

In our case, the student attorneys made a motion for funds for an expert to help the court evaluate whether the statement in this case constituted a reliable statement under scientific theory. As a matter of science, people have the capacity to lie less than one minute after a shocking event.[30] There is some psychological literature from the 1920s that suggests that the danger of fabrication decreases when the declarant

[30] HAROLD BURTT, LEGAL PSYCHOLOGY 71-76 (1931) (a few seconds is enough for a person to create a falsehood); Stanley A. Goldman, *Distorted Vision: Spontaneous Explanations as a "Firmly Rooted" Exception to the Hearsay Rule*, 23 LOY. L.A. L. REV 453, 460 (1990); *see also infra* Section IV.B.2.a & notes 120-122 (discussing this issue in more depth).

makes a contemporaneous statement or a statement within a couple of seconds of an event.[31] But as one commentator noted about the early scientific studies: "[O]nce the number of seconds has increased even slightly the reliability of the description is substantially reduced. Thus, the hearsay statement would have to be spoken virtually simultaneously with the described event for even the slightest assurance of increased reliability."[32] In our case, the police arrived approximately five minutes after the 911 call. In Massachusetts, it was not extraordinary for statements made an hour or more after the event to qualify as excited utterances.[33] Time was not going to be a factor that the government would need to overcome unless we prevailed on our motion that asked the court to ignore precedent in favor of science.

The judge denied the students' motion for funds to hire an expert because legally, the issue of whether the statement fit the reliable verbal reflex requirement is a question for the judge and not the jury.[34] However,

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[31] Goldman, *supra* note 30, at 460.

[32] *Id.*

[33] *See, e.g.*, Commonwealth v. Jenkins, 752 N.E.2d 841 (Mass. 2001) (saying that the court need not decide whether a statement to police made almost seventeen hours after the declarant was free of the defendant's control was beyond the "outer limit[s]" of the spontaneous utterance exception); Commonwealth v. Tevlin, 741 N.E.2d 827, 839 (Mass. 2001) (holding that the distress of the underlying event had not dissipated when a statement was made approximately one-half hour after the robbery); Commonwealth v. DiMonte, 692 N.E.2d 45, 50-51 (Mass. 1998) (ruling that an eight hour interval between the event and the statement is "at an outer limit for qualifying" statement as a spontaneous exclamation, and facsimile should not have been allowed for it lacked indicia of reliability, although "there may be circumstances in which . . . stress continues over a long interval of time after the triggering exciting event," which would justify the admission of belated statements as excited utterances); Commonwealth v. Brown, 602 N.E.2d 575, 577 (Mass. 1992) (concluding that the statement of a three and one half-year-old made at the hospital approximately five hours after a severe beating was admissible as a spontaneous utterance); Siegel, *supra* note 23, at 1242. Massachusetts also dispensed with the requirement that the evidence must tend to "qualify, characterize and explain the underlying event." Commonwealth v. Santiago, 774 N.E.2d 143, 147 (Mass. 2002) (quoting and overruling Commonwealth v. Crawford, 629 N.E.2d 1332 (Mass. 1994)). The underlying exciting event may be proved by the excited utterance itself. *See* Commonwealth v. King, 763 N.E.2d 1071, 1075 (Mass. 2002); Commonwealth v. Nunes, 712 N.E.2d 88, 91 (Mass. 1999).

[34] *See, e.g.*, *Santiago*, 774 N.E.2d at 148 (reversing the appeals court because there was evidence to support the trial judge's decision to find the statement fit the spontaneous utterance requirement and was therefore sufficiently reliable: "The judge was within her discretion to admit the statement"); *see also* LIACOS, BRODIN & AVERY, *supra* note 28, § 8.16, at 554 (writing that judges may exclude statements as unreliable if "the circumstances do not demonstrate that a statement was spontaneous and made without an opportunity for reflection"). *But see* Commonwealth v. Moquette, 791 N.E.2d 294, 299 (Mass. 2003) ("The mere existence of such contrary evidence does not operate to add an

the students' work did pay off in this case. After a hearing, the judge ruled that he was not sufficiently satisfied of the reliability of the excited utterance, so the witness would have to testify in person. The case was dismissed on the trial date.[35] This was a highly unusual result, as any practicing attorney in domestic violence court in Boston would attest.[36] The rare disposition made the case highly memorable to me, so I use it for its capacity to illuminate the issues, despite the practically sui generis result.

The problem of fitting domestic violence crimes into the criminal justice model of the founding fathers has been difficult. Tom Lininger estimates that as many as 80 to 90% of domestic violence victims recant or do not come to court.[37] Our case fit the recanting mold. The alleged victim even wrote a letter denying his ex-girlfriend's guilt.

The clinic case illustrated the meaning of the term "witness" in a trial where the accuser is absent. When an alleged victim's accusations come into trial, that person is a witness in any real understanding of the concept. Whether that declarant was lying or mistaken matters; whether the witness had a bias matters; and whether the witness was leaving something out (such as pushing the defendant before she drew a knife) might make the

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additional requirement of corroboration in order for the spontaneous utterance to constitute evidence sufficient for conviction."); *King*, 763 N.E.2d at 1076 ("Our recognition of that broad discretion to determine whether the prerequisites for the exception are met does not suggest that a trial judge has the authority to exclude a spontaneous utterance that meets those prerequisites on the ground that, in light of other evidence, the statement no longer appears reliable. . . . Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy . . . and may therefore be received as testimony to those facts." (quoting WIGMORE, supra note 22, § 1747)).

[35] The dismissal was without prejudice, allowing the government to retry the case and summon the victim for a trial if it chose. One might want to speculate on the reason for the judge's decision. Perhaps it might be based on the fact that the victim's record was unsavory, or perhaps the squeaky wheel approach to criminal defense worked—better to let one knife-wielding female go than risk an appellate decision that experts have to be allowed in all these excited utterance cases. Then again, perhaps there was some gender aspect to the decision. Did the fact that the victim was male and the defendant female change the paradigm in a way that made the fiction of the excited utterance less palatable to the judge? Unfortunately, such issues are beyond the confines of this Article.

[36] In *King*, the trial judge admitted a statement even though the victim recanted, explaining that "once the foundational requirements had been met, he did not have discretion to decide that the spontaneous utterances were unreliable and thereby exclude them." 763 N.E.2d at 1075. The Supreme Judicial Court of Massachusetts agreed. *Id.* at 1076.

[37] Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 709 n.76 (2003). This statistic is cited in cases showing that appellate courts are aware of the problem, and it affects their decisions regarding admitting evidence. *See, e.g.*, Fowler v. State, 809 N.E.2d 960, 965 (Ind. 2004).

difference between a guilty verdict and an acquittal. In fact, the case turned on whether the jury believed the witness was telling the truth beyond a reasonable doubt. As Richard Friedman has pointed out, the notion that this type of hearsay is so reliable that nothing could be gained from cross-examination is like allowing a judge to decide that a witness' testimony on direct was so reliable that we can fairly dispense with cross-examination.[38] Owing to the expanded excited utterance rules, people whose accusations served to convict a criminal defendant were not necessarily witnesses and the right to cross-examine witnesses was applied to in-court witnesses only. This was the state of affairs when *Crawford* was decided.

III. *CRAWFORD*'S PROMISE

> So what is all the fuss about? A paradigm shift in confrontation clause analysis, that's what.[39]

The text of the Sixth Amendment uses the term witnesses. It states: "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the *witnesses* against him."[40] How should the courts define "witnesses" against an accused? Do criminal defendants only have a right to cross-examine those witnesses who actually appear at trial or is the term so broad that it includes all hearsay declarants? Before *Crawford* was decided, *Ohio v. Roberts* controlled the interpretation of the clause.[41] Theoretically, any declarant was a witness for Sixth Amendment purposes under *Roberts*.[42] However, because the Sixth Amendment did not require

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[38] Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1028 (1998) [hereinafter Friedman, *Confrontation*] ("If a witness delivers live testimony at trial, the court does not excuse the witness from cross-examination on the ground that the evidence is so reliable that cross-examination is unnecessary to assist the determination of truth.").

[39] People v. Cage, 15 Cal. Rptr. 3d 846, 851 (Cal. Ct. App. 2004), *cert. granted*, 99 P.3d 2 (Cal. 2004) (still pending on appeal; consolidated with *People v. Kilday*, 105 P.3d 114 (Cal. 2005)) (analyzing *Crawford*). Note that the California court still held that a statement to a police officer at the scene was not "testimonial." *Id.* at 848 ("We will hold that the statement to the police officer at the hospital was not testimonial because the interview was not sufficiently analogous to a pretrial examination by a justice of the peace; among other things, the police had not yet focused on a crime or a suspect, there was no structured questioning, and the interview was informal and unrecorded.").

[40] U.S. CONST. amend. VI (emphasis added).

[41] Ohio v. Roberts, 448 U.S. 56, 63 (1980). For an in-depth discussion of the *Roberts* jurisprudence, see Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 575-91 (2003).

[42] *Roberts*, 448 U.S. at 63; Graham, *supra* note 29 (stating that in his writings, Wigmore reduced the confrontation right to no more than "a right to cross-examine the witnesses the prosecutor produced at trial").

confrontation of particularly reliable evidence, in practice, there was no absolute right to confront one's accuser under *Roberts*—only a right to confront those witnesses whose hearsay statements did not seem trustworthy to a trial judge.[43]

Crawford announced a paradigm shift, threatening to end the recent practice in domestic violence prosecutions of relying on out-of-court statements rather than live witnesses. Sylvia Crawford had implicated her husband, Michael Crawford, in a killing and declined to take the stand, citing Washington's marital privilege.[44] Her statements were introduced as a statement against penal interest, an exception to the hearsay rules, and because the judge found them particularly reliable, he admitted them as evidence.[45] The Supreme Court resolved the question of whether the absent Ms. Crawford was a witness for Sixth Amendment purposes in the affirmative.[46] As Justice Scalia wrote, the term "witnesses" applies to those who "bear testimony."[47]

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[43] *Roberts*, 448 U.S. at 64-66 (noting that competing interests in effective law enforcement and in the development and precise formulation of the rules of evidence applicable in criminal proceedings may warrant dispensing with confrontation at trial in certain instances. The Court concluded there is no need to confront evidence that bears specific "indicia of reliability." Instead, reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.).

[44] Crawford v. Washington, 541 U.S. 36, 36-40 (2004). The declarant, Ms. Crawford, told police about a killing in which she and her husband were involved. *Id.* at 38-39. Her statement named her husband as the person primarily responsible for the murder. *Id.* at 38. At trial, the prosecutor sought to introduce this statement against the accused, Mr. Crawford, even though Ms. Crawford was not available to testify. *Id.* at 40. The judge allowed the statement to be introduced, finding it particularly reliable as a statement against penal interest, an exception to the hearsay rules. *Id.* Ms. Crawford was the "witness" in the *Crawford* trial, not the police officer who repeated her statement in court. *Id.* Her statements operated like testimony at the trial and were the only eyewitness evidence against the defendant. *Id.* Thus, she was the accuser at her husband's trial in the Sixth Amendment sense. Had Ms. Crawford testified in person for the government, defense counsel would have probed her bias through cross-examination, and may have been successful in suggesting to the jury that she had every reason to minimize her own involvement in order to avoid being charged with murder as well. Perhaps she would even have admitted that she lied to save herself.

[45] *Id.* at 40. Following the *Roberts* jurisprudence, Mr. Crawford's trial judge made the determination that the declarant's statements were so reliable that cross-examination was unnecessary to determine reliability. *Id.* The only witness the defense counsel could cross-examine about the statement was the police officer who heard Ms. Crawford make the statement but who would have been ignorant as to Ms. Crawford's motivation.

[46] *Id.* at 53.

[47] *Id.* at 51 (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

The key term in the *Crawford* decision is "testimonial."[48] In *Crawford*, the concept of testimonial is intrinsically intertwined with the concept of "witness." The terms witness and testimonial are flip sides of the same coin in the new jurisprudence: because Ms. Crawford bore testimony, she was the witness. Whether a statement was testimonial is the same as asking whether the person who made the statement was a witness against the defendant at the trial. However, the majority famously declined to define its newly minted term "testimonial," except to say that "[v]arious formulations of [the] core class of 'testimonial' statements exist" and "[w]hatever else the term covers, it applies at a minimum to . . . police interrogation" repeated at trial.[49] Although there are many ways to interpret what the Court planned to accomplish with the word testimonial, one interpretation is that it offers a functional approach to the term witness. Under this definition, courts could no longer pretend that a witness is not a witness just because he was not summoned to court, for his accusatory statement could be repeated at trial under an exception to the hearsay rules.[50]

That was the promise of *Crawford*. No longer would changing hearsay exceptions determine constitutional rights. No longer would a judge determine that cross-examination of a witness was unnecessary because her statement fell into a hearsay exception that was considered particularly reliable. It was now the jury's role to determine the credibility of the person who made the statement and the reliability of the statement. Judges would no longer be empowered to remove the right to cross-examine declarants just because the judges found their statements to be reliable. Assuming the witness was available for trial, *Crawford* announced that the Constitution required nothing less than cross-examination of that witness for all testimonial statements.[51]

Despite this strong promise to reinvigorate the Confrontation Clause, *Crawford* is flawed. The *Crawford* opinion pulls in two inconsistent directions. In one direction is its demand for more face-to-face confrontation.[52] The case seeks to ensure that henceforth, juries will determine reliability through observing direct and cross-examination of live

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[48] *See, e.g., id.* at 51-52.

[49] *Id.* at 51, 68.

[50] "Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court." *Id.* at 51.

[51] *Id.* at 68. If the witness is unavailable, the Constitution allows prior testimony where there was an opportunity for cross-examination.

[52] *Id.* at 62.

witnesses.[53] In the other direction, however, *Crawford* implies a narrow reading of the Confrontation Clause where only some evidence that is the equivalent of trial testimony will be deemed "testimonial," and all other evidence against an accused will not even be governed by the Sixth Amendment.[54] If the clause only applies to a narrow class of out-of-court witness statements, then for all other out-of-court witness statements, judges will continue to determine if the statement is so reliable that cross-examination adds nothing for the factfinder.

The Court's goal of reinvigorating the Sixth Amendment can be gleaned through numerous historical quotes that flow throughout the *Crawford* opinion. "The common-law tradition is one of live testimony in court subject to adversarial testing," the Court wrote.[55] The *Crawford* court quoted a case decided in 1794, three years after the adoption of the Sixth Amendment: "[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine."[56] The Court criticized *Roberts* for allowing a jury to hear evidence "untested by the adversary process, based on a mere judicial determination of reliability."[57] Instead, the Confrontation Clause "reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined."[58] The majority opinion sounded a note of incredulity at the state of the American criminal trial where police read in the statements of witnesses because a judge decides they are reliable.[59] When the majority

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[53] *Id.* at 61-62 ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. *Cf.* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (1768) ('This open examination of witnesses . . . is much more conducive to the clearing up of truth.')").

[54] *Id.* at 68 ("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.").

[55] *Id.* at 43 (citing BLACKSTONE, *supra* note 53, at 373-74).

[56] *Id.* at 49 (citing State v. Webb, 2 N.C. (1 Hayw.) 103, 104 (1794)). Similarly, before the Confrontation Clause was adopted, the complaint about one state's constitutional convention was that it was still not determined whether an accused "is to be allowed to confront the witnesses and have the advantage of cross examination." *Id.* at 48.

[57] *Id.* at 62.

[58] *Id.* at 61.

[59] *Id.* at 66. For example:

> Each of the courts also made assumptions that cross-examination might well have undermined. The trial court, for example, stated that Sylvia Crawford's statement was reliable because she was an eyewitness with direct knowledge of the events. But Sylvia at one point told the police

wrote that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with [a] jury trial because a defendant is obviously guilty,"[60] the Court condemned the practice of allowing judges to determine reliability, a practice which deprived juries of their duty to make determinations based on the jurors' own observations as to how witnesses answer questions.

Through statements like these, the majority signaled its intent to require juries rather than judges to determine credibility and to give juries the traditional tools to make these determinations, namely through observing the witness answer questions on direct and cross-examinations. These broad pronouncements denote a Court bent on breathing new life into a neglected constitutional right.

In contrast, there is plenty of language in the opinion that suggested the Court was concerned primarily with the historical abuses that the Framers of the Sixth Amendment probably had in mind when they penned the clause near the end of the eighteenth century.[61] When the Court listed three possible core definitions of "testimonial" statements, the list was made up primarily of formalized documents, for example, "extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[62] These categories listed types of statements by how they were assembled, rather than by taking a functional approach to the statements to see if they became the functional equivalent of testimony at trial.

Another way to frame *Crawford*'s contradiction is by asking whether the Confrontation Clause should look at historical rights or historical abuses. Is the goal of the clause to give current criminal defendants the same rights as they would have had when the Amendment was ratified, or

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that she had "shut [her] eyes and . . . didn't really watch" part of the fight, and that she was "in shock." The trial court also buttressed its reliability finding by claiming that Sylvia was "being questioned by law enforcement, and, thus, the [questioner] is . . . neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant." The Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by "neutral" government officers. But even if the court's assessment of the officer's motives was accurate, it says nothing about Sylvia's perception of her situation. Only cross-examination could reveal that.

Id. (citations removed).

[60] *Id.* at 62.

[61] *Id.* at 46, 51, 54, 56. *But see* John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1853-54 ("The history of the Confrontation Clause is notoriously unilluminating . . . . Able Scholars have sifted through that history, with few conclusive results.").

[62] *Crawford*, 541 U.S. at 51-52 (citing White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

should the Confrontation Clause be interpreted only to prevent the introduction of evidence that the Framers feared would be introduced? Depending upon how the term "testimonial" is defined, these two competing forces within *Crawford* may be irresolvable. After all, a narrow interpretation of the term testimonial would cede much more discretion to judges to make the type of reliability determinations of testimony that the Court condemned.

Justice Thomas called for a narrow reading of the Sixth Amendment in his concurrence in *White v. Illinois*,[63] so that only abuses that were known to the Framers from previous English experience with inquisitorial systems would be considered "testimonial," meaning "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[64] Under Thomas' viewpoint, new methods of introducing out-of-court statements, such as the expanded excited utterance doctrine, would be peripheral to core Confrontation Clause concerns because they were not "the abuses targeted by the Confrontation Clause."[65] Although Justice Thomas called for such a limited reading in his concurrence in *White*, *Crawford* did not follow this path.[66] Despite the focus on historical abuses, *Crawford*'s majority

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[63] *White*, 502 U.S. at 365-66 (Thomas, J., concurring in part and concurring in the judgment).

[64] *Id.* at 365 (Thomas, J., concurring in part and concurring in the judgment) (citing Mattox v. United States, 156 U.S. 237, 242-43 (1895)).

[65] Justice Thomas interpreted the Confrontation Clause in *White* narrowly to apply only to formal types of hearsay introduced during certain historical periods and condemned by the Framers, such as "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Crawford*, 541 U.S. at 51-52 (citing *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment)). Justice Thomas broadened his narrow definition of testimonial in *Davis/Hammon* a bit to include statements that the prosecution introduced in bad faith to circumvent "the literal right of confrontation." *See* Davis v. Washington, 126 S. Ct. 2266, 2283 (2006) (Thomas, J., concurring in part and dissenting in part). Still, Justice Thomas dissented in the *Hammon* result because the statements made informally at the scene were not the types of abuses the clause was intended to prevent: "The Court's determination that the evidence against Hammon must be excluded extends the Confrontation Clause far beyond the abuses it was intended to prevent." *Id.* at 2284 (Thomas, J., concurring in part and dissenting in part). Similarly, Thomas criticized the objective purpose test for being "disconnected from the prosecutorial abuses targeted by the Confrontation Clause." *Id.* at 2283-84 (Thomas, J., concurring in part and dissenting in part).

[66] *See* discussion *supra* note 65. Although Scalia's majority opinion in *Crawford* listed Justice Thomas' limited reading of the clause as one possible definition of testimonial, elsewhere Scalia rejected this narrow reading, writing that the clause should be read to prohibit not just the practices disapproved by the Framers, but also practices they would have disapproved of if the hearsay practice had been known to them:

> Any attempt to determine the application of a constitutional provision to a phenomenon that did

resolved this issue by determining that the clause prohibits what the Framers *would have prohibited* had they known it would come to pass, not just what the Framers specifically feared at the time the clause was drafted.[67]

Although Justice Thomas' narrow viewpoint did not prevail in *Crawford*, state court decisions, such as *Hammon* and *Davis*, have pulled out examples of core abuses from *Crawford* to conclude that the Confrontation Clause only applies to formalized equivalents of testimony, such as affidavits or recorded custodial interrogations, in order to justify the introduction of statements without the opportunity to cross-examine the witnesses.[68] *Davis/Hammon* gave the Court a chance to revisit the contradictions in *Crawford* and determine whether the new jurisprudence would indeed bring back live witnesses or whether the new approach to the Confrontation Clause would allow the government to continue to circumvent the live witness requirement by training police to gather less formal types of evidence.

If a narrow reading of testimonial prevailed, other accusations served up as testimony at trial would be deemed not to be witness testimony, even if the missing witness was the only eyewitness, the only source of the accusation against the defendant. If the term "testimonial" was read narrowly, then in most cases judges, not juries, would decide what is reliable. At the heart of *Crawford*'s inconsistency between its promise of trials based on live witnesses subject to cross-examination and its tendency to define testimonial statements narrowly lay the Court's implicit assumption that the term "testimonial" should turn on how evidence was gathered at trial rather than the role the evidence plays at trial. We must examine *Davis/Hammon* to determine which strain of *Crawford*'s message prevailed: its promise of more confrontation of the witnesses against the accused, or its suggestion that the clause applies only to those accusations that were gathered in a particular manner.

> not exist at the time of its adoption (here, allegedly, admissible unsworn testimony) involves some degree of estimation—what The Chief Justice calls use of a "proxy," . . . —but that is hardly a reason not to make the estimation as accurate as possible. Even if, as The Chief Justice mistakenly asserts, there were no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been.

Crawford, 541 U.S. at 52 n.3 (emphasis added) (citations removed).

[67] *Id.* Justice Scalia, again writing for the majority in *Davis/Hammon*, affirmed the reading of testimonial to include evidence not contemplated at the time of the Framers, thus refuting Thomas' dissent: "Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction." *Davis*, 126 S. Ct. at 2278.

[68] Hammon v. State, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126. S. Ct. 2266 (2006); State v. Davis, 111 P.3d 844 (Wash. 2005), *aff'd*, 126 S. Ct. 2266 (2006).

IV. WHAT'S WRONG WITH THE *DAVIS/HAMMON* DECISION

A. THE FACTS OF *HAMMON* AND *DAVIS*

In *Hammon v. Indiana*, police responded to a home minutes after a call reporting domestic violence.[69] There, police officers encountered Amy Hammon who, when asked, first responded that nothing was wrong.[70] Inside the apartment, police found broken glass from a heater, and one officer questioned Ms. Hammon again while the other officer tried to keep her husband, Hershel Hammon, in another room, away from the alleged victim.[71] This time, Ms. Hammon told the police that Mr. Hammon had assaulted her.[72] Before the police left, the officer had Ms. Hammon fill out and sign a battery affidavit.[73] Although the complainant did not appear at trial, the government successfully introduced her oral statement as an excited utterance.[74] The trial took place before the Supreme Court's *Crawford* decision was announced, so the trial judge followed the rules set forth in *Roberts* and *White*.[75] The judge determined that the statement constituted an "excited utterance," considered one of the deeply rooted exceptions to the rule against hearsay, which made the statement inherently reliable.[76] Therefore, before *Crawford*, direct and cross-examination of the declarant in front of the jury was unnecessary to satisfy the Confrontation Clause analysis.

After *Crawford* was decided, the Indiana Court of Appeals reviewed *Hammon* and affirmed the conviction.[77] The statements at issue were not "testimonial," the court held, because they were gathered in an informal manner.[78] Unlike *Crawford*, where the interrogation took place in police custody and was taped, the questioning in *Hammon* did not take place in the police station, the interview was not recorded, and it was too unstructured

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[69] *Hammon*, 829 N.E.2d at 446-47.

[70] *Id.*

[71] *Id.* at 447.

[72] *Id.*

[73] *Id.*

[74] *Id.* The trial judge also allowed the witness' signed affidavit memorializing her excited utterance as a "present sense impression." *Id.* On appeal, the government conceded that the Confrontation Clause would apply to the written statement so that it should have been excluded in the absence of the victim. Davis v. Washington, 126 S. Ct. 2266, 2280 (2006).

[75] *See* Hammon v. State, 809 N.E.2d 945, 950 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126 S. Ct. 2266 (2006).

[76] *Hammon*, 829 N.E.2d at 448.

[77] *Hammon*, 809 N.E.2d at 953.

[78] *Id.* at 952-53.

to merit the term "interrogation."[79] On further appeal, the Indiana Supreme Court affirmed the conviction.[80] That court categorized the exchange between the officer and the declarant as a "preliminary investigation" in which the officer was responding to an emergency, so the oral declaration was non-testimonial.[81] Although the admission of the written affidavit violated the Confrontation Clause, the state court concluded that admitting it was harmless error.[82] The U.S. Supreme Court in *Davis/Hammon* reversed the Indiana Supreme Court's decision.

In *Davis v. Washington*, the declarant called the emergency response number, hung up, and the operator called back.[83] In answer to the operator's questions, declarant Michelle McCottry told the operator that a man was "jumpin' on me again."[84] The operator asked a number of questions, including the identity of the alleged assailant.[85] To establish Adrian Davis' identity, the operator asked for the last name of the alleged assailant, then the first name, then his middle initial. The operator also asked for Mr. Davis' date of birth.[86] At one point, the declarant told the operator that her assailant had left.[87] Although further questioning occurred after this, the answers to the later questions were not at issue on appeal to the Supreme Court.[88] In the end, the operator decided to send a squad car to find and arrest Mr. Davis before the police proceeded to the caller's

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[79] *Id.* at 952.

> [W]e hold the statement A.H. gave to Officer Mooney was not a "testimonial" statement. It appears to us that the common denominator underlying the Supreme Court's discussion of what constitutes a "testimonial" statement is the official and formal quality of such a statement. A.H.'s oral statement was not given in a formal setting even remotely resembling an inquiry before King James I's Privy Council; it was not given during any type of pre-trial hearing or deposition; it was not contained within a "formalized" document of any kind. . . . Whatever else police "interrogation" might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred. Such interaction with witnesses on the scene does not fit within a lay conception of police "interrogation," bolstered by television, as encompassing an "interview" in a room at the stationhouse.

Id.

[80] *Hammon*, 829 N.E.2d 444.

[81] *Id.* at 457-58.

[82] *Id.* at 459.

[83] State v. Davis, 111 P.3d 844, 846 (Wash. 2005), *aff'd*, 126 S. Ct. 2266 (2006).

[84] *Id.*

[85] *Id.*

[86] Joint Appendix to the Petition of Certiorari at 10-11, Davis v. Washington, 126 S. Ct. 2266 (2006) (No. 05-5224) [hereinafter Joint Appendix, Petition].

[87] *Davis*, 111 P.3d at 846.

[88] *Davis*, 126 S. Ct. at 2277-78 ("[T]he Washington Supreme Court concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.").

residence to get a further statement from the caller.[89] At Mr. Davis' trial, the accuser did not appear, and the government played the recording of the 911 call after the judge determined that it was especially reliable under the excited utterance exception to the hearsay rule.[90]

Crawford was decided after the Washington Court of Appeals had affirmed Mr. Davis' conviction but before the Washington Supreme Court issued its ruling.[91] The Washington Supreme Court affirmed, holding that 911 calls must be scrutinized to determine if the declarant made the call "to be rescued from peril" or out of a desire to bear witness.[92] Initially the purpose of Ms. McCottry's 911 call was "to be rescued from peril," and therefore those statements were non-testimonial.[93] Although the court found some of the 911 call to be testimonial in nature, these later statements constituted harmless error.[94] The U.S. Supreme Court affirmed the Washington Supreme Court's *Davis* decision.

B. *DAVIS/HAMMON* CREATES A TEST FOR TESTIMONIAL HEARSAY THAT IS VAGUE AND INCONSISTENT

1. Davis/Hammon Creates a Primary Purpose Test to Distinguish Between Testimonial and Non-Testimonial Hearsay

The *Davis/Hammon* decision created a primary purpose test to determine whether statements made in response to police questioning constitute "testimony" under the Sixth Amendment—and are therefore not admissible at trial without an opportunity to cross-examine the witness, unless the trial judge finds that the defendant has forfeited his right by wrongfully ensuring the witness' absence.[95] Statements are "testimonial when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[96] However, the *Davis/Hammon* Court

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[89] Joint Appendix, Petition, *supra* note 86, at 11-13.

[90] *Davis*, 111 P.3d at 847.

[91] *Id.* The appeals court decision came down in 2003. State v. Davis, 64 P.3d 661, 665 (Wash. Ct. App. 2003), *aff'd*, 111 P.3d 844 (Wash. 2005), *aff'd*, 126 S. Ct. 2266 (2006).

[92] *Davis*, 111 P.3d at 849.

[93] *Id.*

[94] *Id.* at 851.

[95] Davis v. Washington, 126 S. Ct. 2266, 2273-74 (2006); *see* Crawford v. Washington, 541 U.S. 36, 62 (2004). *See generally* James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 WM. & MARY BILL RTS. J. 1193, 1196 (2006) (arguing that forfeiture rule discussed in *Crawford* should have been named a "waiver by wrong-doing").

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

simultaneously carved out an exception to *Crawford*'s holding that police interrogations repeated at trial are clearly testimonial. The Court held that statements are "non-testimonial" when "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[97]

The Supreme Court held that the statements in *Hammon* were testimonial and should have been excluded at trial, in the absence of a live witness.[98] Although less formal than the interrogation in *Crawford*, the questioning of Ms. Hammon nevertheless constituted interrogation.[99] The Court found no emergency in progress and concluded that the interrogation was part of an investigation into past criminal conduct. "Objectively viewed, the primary . . . purpose of the interrogation was to investigate a possible crime."[100] In essence, the Court decided that the declarant was a witness under the Confrontation Clause,[101] which requires that the fact finder be given the tools to determine the accuser's credibility based upon live testimony or, if the witness was unavailable, through prior recorded testimony where counsel was given an opportunity for cross-examination.

The Supreme Court resolved the *Davis* facts differently from those of *Hammon*. The Court ruled that the trial judge in *Davis* was correct in admitting much of the 911 call without a witness to cross-examine.[102] Statements given to the 911 operator before the declarant stated that the assailant had left the home were not "testimonial."[103] The primary purpose of the early questions, including questions that sought to determine the identity of the person the witness was accusing, was "to enable police assistance to meet an ongoing emergency"[104] and not "to establish or prove past events potentially relevant to later criminal prosecution."[105] The Court assumed that the 911 operator served as an agent of the police. The Court held that the questions and answers fell outside the purview of the Sixth

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[97] *Id.* at 2274.

[98] *Id.* at 2278-80.

[99] *Id.* at 2278.

[100] *Id.*

[101] *Id.* at 2279-80.

[102] *Id.* at 2276-78.

[103] *Id.* at 2277-78. The Supreme Court agreed with the Washington Supreme Court that Ms. McCottry's early statements identifying Mr. Davis as her assailant were not testimonial, and stated that if later parts of the conversation were testimonial, then their admission was a harmless error. *Id.* at 2278.

[104] *Id.* at 2277.

[105] *Id.* at 2274.

Amendment because of their emergency purpose, and therefore Davis did not have a right to confront the person who accused him.[106]

Justice Thomas, the lone dissenter, complained that the Court had created a fiction.[107] He criticized the Court's primary purpose test of testimonial that requires a trial judge and appellate courts to assign a dominant purpose to questions asked by the police when police may have more than one motive for asking questions:[108]

> In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence. . . . Assigning one of these two "largely unverifiable motives," . . . requires constructing a hierarchy of purpose that will rarely be present—and is not reliably discernible. It will inevitably be, quite simply, an exercise in fiction.[109]

After *Davis/Hammon*, trial judges must determine the primary purpose of the questioning that led to the incriminating statement that the prosecution seeks to introduce sans witness. Judges are expected to determine this objectively, looking at all the circumstances to find what a reasonable police officer or a reasonable agent of the police would intend. Answers to questions by police officers or agents "are testimonial when the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[110] Statements are admissible without a witness if the primary purpose of the questions that elicited the statements were to meet an ongoing emergency.[111]

2. Davis/Hammon *Creates a New Exercise in Ficton*

There are many problems with the Court's reasoning in *Davis/Hammon*. The new decision fails to give a satisfactory explanation of why the two cases, *Davis* and *Hammon*, merit different results. The opinion is confusing because it appears to recommend one method of determining whether statements qualify for Sixth Amendment protection while simultaneously basing its decision on other methods. Police and prosecutors will be encouraged to alter their methods of gathering evidence and describing the investigation in such a way that statements will be

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[106] *Id.* at 2274 & n.2.

[107] *Id.* at 2280, 2283 (Thomas, J., concurring in part and dissenting in part).

[108] *Id.* at 2283 (Thomas, J., concurring in part and dissenting in part).

[109] *Id.* (Thomas, J., concurring in part and dissenting in part).

[110] *Id.* at 2273-74.

[111] *Id.*

deemed responses to emergency situations, which will result in fewer live witnesses, contrary to *Crawford*'s purpose in announcing a new jurisprudence. Most problematic is the fact that the decision creates a disconnect between what the terms "witness," "testimony," and "testimonial" mean in the context of a trial and how the Court is using the words.

How broadly or narrowly to interpret *Davis/Hammon*'s emergency exception is its chief ambiguity.[112] One reading is that the emergency exception applies every time a police officer needs to know who to arrest and how violent that person might be. If so, then this exception could take care of the majority of witnessless prosecutions in domestic violence cases. Another reading is that the emergency exception applies only to statements made when the alleged victim says she is currently being abused and the police are not there to protect her. If so, that is a much narrower reading of the case that will require confrontation rights for all interviews at the scene of the crime. However, it is difficult to know how the Court will eventually resolve this ambiguity because the tests created by the Court to determine whether a missing witness constitutes a witness under the Sixth Amendment are fictional, unmoored from the concept of a witness at trial.

a. Excited Utterance Is a Legal Fiction

The more narrowly the Court defines the term testimonial, the more admissibility of evidence against a defendant will be determined by hearsay rules of that individual jurisdiction without any constitutional protection. One article Richard Friedman wrote with Bridget McCormick describes the dangers of abandoning the Confrontation Clause to the vagaries of hearsay:

> Imagine a judicial system that advertised to the public as follows:
>
> > If you want to make a criminal accusation against a person, make the statement however you wish and present it to us in a way that we can pass it on to the fact-finder. If you want, you can make it in person to the fact-finder, but you don't have to. You can make it on audio or video tape, you can make it in writing (no need for a signature), you can make it by telephone (we've set up a special number, 911, for just that purpose), or you can make it to any person you want, with the request that he or she pass it on to us. And you don't have to take an oath. In fact, if you want to do the whole thing anonymously, that's OK, too. We can use the statement at trial however you make it.[113]

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[112] *See id.* at 2273.

[113] Friedman & McCormack, *supra* note 3, at 1247. In this quote, Friedman and McCormack are also driving at the fact that the lack of formality should not make the statements any less problematic from a Sixth Amendment perspective. "The lack of formality would not make the statement less testimonial. Instead, the lack of formal requirements would make this system for the creation of testimony appalling." *Id.* The

One lower court bristled at this vision of hearsay unchecked by constitutional supervision.[114] This would never happen, the District of Columbia Court of Appeals wrote, because the statements must satisfy a rule of evidence to be admissible.[115] As *Crawford* recognized, the changing rules of hearsay provided scant protection to the accused when the government wished to introduce proof without a witness present. Nowhere is this more apparent than the excited utterance or spontaneous declaration exception to the hearsay rule.[116]

Hammon is a good example of how courts know that the excited utterance is a fiction but they use it because it allows prosecutors to proceed to trial in the absence of witnesses. Recall that excited utterances are supposed to encompass only those statements where "self-interest could not have been brought full to bear by reasoned reflection."[117] In *Hammon*, the declarant first tells the police officer at the scene that nothing happened, and then once she is brought to another room away from the accused, she explains what he did.[118] This is the normal action of a reasoning, rational person capable of self-interest. The prosecutor's theory must have been that the earlier denial was not true even though it was made under the excitement of the startling event and before the later "excited utterance." Hence, judges acting as gatekeepers may allow in a good deal of evidence that is not especially reliable, and judges cannot be expected to screen in only reliable hearsay, when the notion that excited people cannot fabricate is simply a legal fiction.

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authors also make the point that callers will eventually know that this system allows their calls to serve as evidence at trial. They seek to exclude these witness statements because the callers should know how their statements will be used, *see id.*, while in this Article, I seek to exclude these witness statements regardless of what the callers should know if the statements would serve as accusations against the accused at trial and therefore constitute statements of witnesses against the accused.

[114] *See* Stancil v. United States, 866 A.2d 799, 810 (D.C. 2005) (stating that Friedman and McCormack's "parade of horribles" repeated by defense counsel, was "less than convincing. After all, the Confrontation Clause is not the *only* safeguard against the admission of out-of-court statements. Unless such statements fall within a recognized hearsay exception, they continue to be inadmissible . . . .").

[115] *Id.*

[116] The 911 call in *Davis* and the statement given at the scene in *Hammon* were both introduced under this rule. Hammon v. State, 829 N.E.2d 444, 449 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126 S. Ct. 2266 (2006); State v. Davis, 64 P.3d 661, 664 (Wash. Ct. App. 2003), *aff'd*, 111 P.3d 844 (Wash. 2005), *aff'd*, 126 S. Ct. 2266 (2006).

[117] *See* WIGMORE, *supra* note 22, § 1747.

[118] Hammon v. State, 809 N.E.2d 945, 947 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126 S. Ct. 2266 (2006).

Scholars who have considered the psychological underpinnings of the excited utterance have nearly universally criticized it.[119] Some of the criticism has been aimed at the fact that trauma distorts understanding, and other criticism has noted that the capacity to dissemble is not so easily disturbed.[120] As Aviva Orenstein has written:

> Today, Wigmore's description of the effect of stress seems primitive and one-sided. His analysis of the effect of stress—that it stills conscious thought—undervalues other factors in the complicated process of perception. From a functional as well as a philosophical point of view, Wigmore's theory underestimates the vast cognitive processes that transpire as part of any utterance. Even as a declarant spontaneously yells, "MY GOD, the car ran the red light!" he is thinking, making choices, processing images, translating those images, and choosing words. It is, therefore, hard to divine what part of that complicated process is deliberate and what part is "instinctive" or "impulsive."[121]

Since the early 1900s, psychologists have found that statements would have to be made simultaneously or virtually simultaneously with a described event for any increased reliability.[122] When psychologists measure hesitation in verbal responses to gauge the time it takes to falsify answers, psychologists use fractions of seconds, not minutes.[123] Stanley Goldman noted the existence of empirical studies "confirm[ing] that the

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[119] *See, e.g.*, Goldman, *supra* note 30; James D. Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L.A. L. REV. 203 (1995); Aviva Orenstein, *"MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159, 180 (1997) ("For decades, scholars have attacked the wisdom of fashioning an exception to the hearsay rule that depends upon the excited and stressful state of the speaker.").

[120] *See* Goldman, *supra* note 30, at 460-62; Hutchins & Slesinger, *supra* note 23, at 436-37.

[121] Orenstein, *supra* note 119, at 178; *see also id.* at 178 n.70 (citing CHARLES G. MORRIS, PSYCHOLOGY: AN INTRODUCTION 232-38 (9th ed. 1996) (discussing "sensation, perception, encoding, and retrieval")).

[122] Herbert Sidney Langfield, *Psycho-Physical Symptoms of Deception*, 15 J. ABNORMAL PSYCH. 319 (1920); William Moulton Marston, *Reaction Time Symptoms of Deception*, 3 J. EXPERIMENTAL PSYCH. 72 (1920); *see* Douglas D. McFarland, *Present Sense Impressions Cannot Live In The Past*, 28 FLA ST. U. L. REV. 907, 916-17 (2001). McFarland wrote about another hearsay rule derived from res gestae, the present sense impression, but the scientific issues are the same:

> Two relatively recent studies confirm that response latency, that is, the time between the event and the statement, can be less than one second for a lie. One research team reported the following response latency times: for a previously prepared lie, .8029 seconds; for a truthful statement, 1.6556 seconds; and for a spontaneous lie, 2.967 seconds. That means the truth took longer to get out than a previously conceived lie, and that even a lie fabricated on the spur of the moment required less than three seconds to create and utter.

Id. (footnote omitted).

[123] BURTT, *supra* note 30, at 71-76.

danger of fabrication is decreased where only a matter of seconds or fractions of seconds separate a particular event and an individual's description of that event," but proving no particular reliability "once the number of seconds has increased even slightly."[124] Wigmore's decoupling of the excited utterance from res gestae and his emphasis on excitement rather than timing was based on inaccurate science even at the time.

In practice, judges have stretched the timing of the excited utterance well past any near-simultaneous event. Judges have qualified statements as excited utterances hours after the underlying event.[125] Police may report to judges that a witness seemed agitated, still under the shock of the exciting event and then describe witnesses the officers had never met before and events the officers only know about because the witness told them. In turn, trial judges find that statements like the ones in *Hammon* and *Davis* must be truthful because the witnesses had no opportunity to fabricate their responses to the police. When judges admit statements under the excited utterance exception—typically statements made to police arriving at the scene ten minutes or more after the event was completed—judges are not basing their decision on science at all. Rather, judges are knowingly employing Wigmore's fictional construct.[126]

Although the reversal of the *Hammon* conviction appeared to signal a reaffirmation of *Crawford*'s bold emphasis on live testimony, we may soon marvel at how quickly another fiction was created to accompany the excited utterance fiction. *Davis/Hammon* simply invites judges to apply a second layer of fiction on top of the excited utterance fiction. The Supreme Court is scornful of the notion that constitutional rights could turn on how police investigations are carried out or described, but the Court should consider how manipulation has succeeded in the excited utterance context to avoid live witness testimony.[127] Judges that ruled that statements like the ones in

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[124] Goldman, *supra* note 30, at 460 nn.62-63 (citing Teree E. Foster, *Present Sense Impressions: An Analysis and a Proposal*, 10 LOY. U. CHI. L.J. 299, 315 (1979)); Hutchins & Slesinger, *supra* note 23, at 436-37. *See generally* Charles W. Quick, *Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4)*, 6 WAYNE L. REV. 204 (1960).

[125] *See supra* note 33 for collected cases.

[126] For example, in the case described in Section II, *supra*, the judge expressed disinterest in a memorandum submitted by students arguing that scientists think that statements made under the excitement of an event do not really prevent a person from lying. I have found no case where a judge or court excluded an excited utterance based on scientific evidence of the statement's potential unreliability.

[127] The Court stated in *Davis/Hammon* that: "The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision. . . . [T]estimonial statements are what they are," thereby denying the possibility of manipulation by police. 126 S. Ct. 2266,

Hammon and *Davis* must be truthful because fabrication is physically impossible are likely also to find that an officer's primary purpose in taking the statement was "to enable police assistance to meet an ongoing emergency."[128]

In contravention of *Crawford*, the Court allowed the *Davis* trial judge to decide that a witness' statement was sufficiently reliable that cross-examination was unnecessary. In *Davis*, the judge decided that the witness against Davis need not come to court because her initial statement was inherently reliable, so the jury would gain little from viewing her testify live,[129] and the Supreme Court affirmed the judge's ability to make this call.[130] In fact, one might say that the Court made it easier for prosecutors to introduce statements against the accused because it did away with the reliability test, or at least deleted the test from the Confrontation Clause. *Roberts* and its progeny set a reliable standard for hearsay evidence that, although roundly criticized, at least purported to provide protections to criminal defendants from unreliable statements. Eliminating *Roberts* entirely from its post-*Crawford* jurisprudence, the Court wrote:

> We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies. . . . A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its "core," but its perimeter.[131]

In other words, once the Court concluded that the *Davis* hearsay was not testimonial, then it did not need to decide whether or not the statements were particularly reliable. Thus unreliable statements repeated at trial do not offend the Confrontation Clause, only testimonial statements do. Citing *Davis/Hammon*, future lower courts may decide that statements to 911 operators and to police at the scene are not testimonial, and then use the hearsay rules to decide that such a statement is so reliable that cross-examination is unnecessary. In the future, hearsay rules may be altered to allow statements to be admitted without a judge determining reliability and without offending the Sixth Amendment.[132]

2279 (2006).

[128] *Id.* at 2274.

[129] *Id.* at 2271.

[130] *Id.* at 2277.

[131] The Court explicitly wrote in *Davis/Hammon* that *Crawford* overruled *Roberts*. *Id.* at 2275 n.4. ("*Roberts* condition[ed] the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.' We overruled *Roberts* in *Crawford* by restoring the unavailability and cross-examination requirements.") (citations omitted).

[132] As an alternative, Professor Taslitz suggests a residual due process analysis of testimonial statements separate from the Confrontation Clause. This approach may provide

With reliability determinations banished, there is all the more reason for the Court to make sure that it is not defining testimonial too narrowly. It becomes exceedingly important that the Court not eliminate statements that a jury might evaluate differently if it heard the witness answer questions on the stand, statements where credibility determinations would make a difference between a guilty verdict and a not guilty verdict.

b. Reasoning and the Four Part Test

The primary problem with the *Davis/Hammon* decision is that its reasoning conflicts with the test it claims to set forth. Although the primary purpose test sounds like the Court is basing its decision on the intent of the police, the Court's primary purpose test is hardly straightforward. Inexplicably, the Court combines the intent of the officer with the state of mind of the declarant and the formality of the questioning, setting forth a four-part distinction between the testimonial statements in *Crawford* and the non-testimonial ones in *Davis*.

The Court names four differences between the statements in *Davis* and those in *Crawford* that signify that the accusations against *Davis* are exempt from the Confrontation Clause.[133] Note that only one of the factors named seems to consider the officer's intent (the third one). The factors that the Court finds persuasive are:

1. Immediacy: unlike *Crawford*, the declarant in *Davis* "was speaking about events *as they were actually happening* . . . ."[134]
2. State of mind of the declarant: the phone call in *Davis* "was plainly a call for help against bona fide physical threat."[135] (Note that the Court assumed the truth of the matter asserted despite the lack of cross-examination to determine credibility.)
3. Objective intent of the questioner: "the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the

some protection for non-core testimony where the witness/declarant is absent. Andrew Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process after* Crawford v. Washington, 20 CRIM. JUST., Summer 2005, at 39, 39. The Supreme Court did not mention any due process or reliability analysis in its opinion in *Crawford* or in *Davis/Hammon*. However, that does not mean that the Court might not carve out such an exception if it wished. *Davis/Hammon* was not the right case because the Court clearly viewed the evidence as particularly reliable. 126 S. Ct. at 2277. The Court even discusses the facts in *Davis* by assuming that what the declarant told the operator was true. *Id.* at 2276.

[133] *Davis*, 126 S. Ct. at 2276-77.

[134] *Id.* at 2276.

[135] *Id.*

elicited statements were necessary to be able to *resolve* the present emergency . . . ."[136]

4. Formality: the *Davis* interview was less formal than the one in *Crawford*.[137]

Despite *Davis*' holding that what is testimonial turns on the objective primary intent of the officer gathering the information, this inquiry is only one factor out of four in the Court's reasoning. The test includes many other alternative factors, making it difficult to pin down the Court's new test and easier for the Court to avoid having to deal with the problems integral to each factor set forth. Simultaneously, the multiple factors will make it easier for future judges and prosecutors to differentiate any new interrogation evidence from the testimonial evidence in *Crawford*. Thus, the government can now harness all these factors—the declarant's state of mind, formality, immediacy, as well the officer's intent—to deny confrontation rights.

c. "State of Mind of the Speaker" Rationale Was Originally Meant to Ensure More Confrontation

Although *Davis* held that the test for determining "testimonial" turned on the objective intent of the officer, the Court's discussion of the 911 statements in *Davis* primarily emphasizes the state of mind of the declarant when she made the phone call. The state of mind rationale sets forth a different test for determining whether it is within the scope of the Confrontation Clause than the intent of the officer or intent of the person taking down the statement. Instead of examining the police or the 911 operator's purpose in asking questions, the intent of the officer test looks at the declarant's purpose in making the statement.

Ms. McCottry's emergency call in *Davis* was a cry for help, the Court explained, evoking the state of mind test for determining what is "testimonial."[138] "No 'witness' goes into court to proclaim an emergency and seek help," declared the Court.[139] By classifying Ms. McCottry's phone call as a cry for help, the Court implied that statements fall outside the scope of the Confrontation Clause when a declarant makes a statement not knowing that her statement will be used to help prosecute the defendant, or at least without this as the speaker's primary motivation.

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[136] *Id.*

[137] *Id.* at 2276-77.

[138] *Id.* at 2277.

[139] *Id.*

In *Crawford,* the state of mind theory of testimonial appeared as one of three possible definitions of core testimonial statements. The *Crawford* Court said one possible core definition was "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," citing to the amicus brief of the National Association of Criminal Defense Lawyers (NACDL).[140] That brief intended that all statements to police would be testimonial since the person making an accusatory statement would have reason to believe that the statement would be used to charge or prosecute someone for the crime.[141] The goal of the proposed state of mind test was to expand the Confrontation Clause beyond statements to police in order to include statements to non-government officials where the witness knew these statements would be repeated at trial. In contrast, the Washington Supreme Court and now the U.S. Supreme Court employed the state of mind reasoning to take away Confrontation Clause protections from statements made to agents of the police.[142]

It is not clear whether the state of mind test exempts statements when the declarant knows that he is getting someone into trouble with the police but does not realize that the statement will actually be used at trial. *Crawford* described the core theory as statements the witness would reasonably believe were "available for use at a later trial."[143] Many state courts, including Washington's highest court in *Davis*, have used the words "available for use at a later trial" literally to exempt many statements made to 911 operators or at the scene to police officers, because the witness most likely would not have known whether his accusation would be repeated at trial.[144] In contrast, the NACDL brief used the phrase "available for use at a later trial" synonymously with these other phrases: "will lead the State to punish the accused person"; "condemn the accused as a criminal and restrain his or her liberty"; and the statement was "aimed at law

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[140] Crawford v. Washington, 541 U.S. 36, 52 (2004); *see* Brief for The Nat'l Ass'n of Criminal Def. Lawyers et al. as Amici Curiae Supporting Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02-9410) [hereinafter NACDL Brief, *Crawford*].

[141] NACDL Brief, *Crawford*, *supra* note 140, at 3.

[142] State v. Davis, 111 P.3d 844, 850 (Wash. 2005), *aff'd*, 126 S. Ct. 2266 (2006) (noting that there was no evidence that Ms. McCottry knew her 911 call would later be used to prosecute Mr. Davis or that it influenced her decision to call 911).

[143] *Crawford*, 541 U.S. at 52.

[144] *Davis*, 111 P.3d at 850 ("[S]tatements made without reflection or deliberation are not made in contemplation of their 'testimonial' use in a future trial." (quoting People v. Corella, 18 Cal. Rptr. 3d 770, 777 (Cal. Ct. App. 2004))); *id.* at 851 ("There is no evidence McCottry sought to 'bear witness' in contemplation of legal proceedings.").

enforcement."[145] A more commonsense question, and one in keeping with its genesis in the NACDL brief, is whether it is reasonable to expect that the information will be used against the accused in some way by law enforcement.

Ms. McCottry may have known that naming Mr. Davis would result in arrest and prosecution. However, it is difficult for the Court to ascertain what Ms. McCottry's intent was, since she was not on the stand to explain her motivations and be cross-examined about them. The operator told Ms. McCottry during the conversation that she was sending out a cruiser to arrest the man the caller fingered, and the caller did not object or express any surprise.[146] While people dialing 911 may not know the exact use their statements will be put to, generally people know that it is a method to summon the police and will likely result in arrest or prosecution. This state of mind factor also invites judges to partake in an exercise in fiction.

The Court's conclusion that the statements given to the 911 operator in *Davis* were different from what a witness does in court ignores the fact that the questions and answers regarding the identity of the alleged perpetrator in *Davis* sound very much like what a witness does on the stand: "Please state the last name of the person who did this to you." "Please state his first name." "What's his date of birth?"[147] That sounds more like in-court testimony than a "girl's screams for aid as she was being chased by her assailant."[148] Furthermore, when the Court writes that no witness goes into

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[145] NACDL Brief, *Crawford*, *supra* note 140, at 24-25.

> By and large statements made to law enforcement officials about a crime will be testimonial. And by and large, statements made to friends, relatives, accomplices or anyone outside of criminal justice system will not be testimonial.
>
> There will be exceptions to these broad and general rules, of course. A witness to a crime may make a statement to a friend knowing that the friend will subsequently contact police. Such a statement is *aimed at law enforcement and would therefore be testimonial.*

Id. at 25 (emphasis added); *see also* Brief for The Nat'l Ass'n of Criminal Def. Lawyers et al. Supporting Petitioner, Davis v. Washington, 126 S. Ct. 2266 (2006) (No. 05-5224); Brief for The Nat'l Ass'n of Criminal Def. Lawyers and The Pub. Defenders Serv. for D.C. Supporting Petitioner, Hammon v. Indiana, *Davis*, 126 S. Ct. 2266 (No. 05-5705).

[146] Transcript of Oral Argument at 10-11, *Davis*, 126 S. Ct. 2266 (No. 05-5224) [hereinafter Transcript, *Davis*]. Ms. McCottry also declined an ambulance. Joint Appendix, *supra* note 86, at 10.

[147] *See* Joint Appendix, *supra* note 86, at 8-13.

[148] *See Davis*, 126 S. Ct. at 2277:

> Davis seeks to cast McCottry in the unlikely role of a witness by pointing to English cases. None of them involves statements made during an ongoing emergency. In *King v. Brasier*, for example, a young rape victim, "immediately on her coming home, told all the circumstances of the injury" to her mother. The case would be helpful to Davis if the relevant statement had been *the girl's screams for aid as she was being chased by her assailant.* But by the time the victim

court to proclaim an emergency and seek help, the Court overlooks restraining order requests where people, particularly women, seek protection from their abusers through temporary and permanent orders. Every week in this country, thousands of people file into court seeking emergency protection from their abusers.[149] Although many restraining order requests could be categorized as a cry for help, the witnesses know that their words will be used against the person they name. Like Ms. McCottry, they may be asked the last name of the person whom they accuse, the first name, and the suspect's date of birth. Thus, the only real difference between the restraining order cases and Ms. McCottry's 911 call is that she "was speaking about events *as they were actually happening*,"[150] assuming that the caller was telling the truth. Immediacy is the first prong in the test the majority uses, but it is only one of three prongs. The fact that the Court sets forth these other prongs makes it unlikely that the Court intended to carve out only a narrow exception, even though the immediacy factor would constitute a narrow exception to the Confrontation Clause less vulnerable to manipulation.

The Washington court used the state of mind test in determining that the 911 call in *Davis* was non-testimonial.[151] Brushing aside the argument that the caller "reasonably knew her 911 call would later be used to prosecute Davis," the *Davis* court placed the burden on the defense to prove actual intent, concluding that "there is no evidence that McCottry had such knowledge or that it influenced her decision to call 911."[152] The Supreme Court uses the "call for help" language without fully analyzing the state of mind test. By burying the state of mind factor within the primary purpose test, the Supreme Court in *Davis* sidesteps the appeals court's burden-

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got home, her story was an account of past events.

Id. (emphasis added) (citations removed).

[149] All fifty states have laws allowing judges to issue temporary and permanent restraining orders. It is estimated that approximately 850,000 final restraining orders are issued in the United States every year (approximately 342 orders per 100,000 persons), and the number of temporary restraining orders is much greater. *See* Neal Miller, Inst. for Law and Justice, What Does Research and Evaluations Say About Domestic Violence Laws? A Compendium of Justice System Laws and Related Research Assessments 40 n.110 (2005) (draft manuscript), *available at* http://www.ilj.org/publications/dv/DomesticViolence LegislationEvaluation.pdf (citing to Virginia, where permanent restraining orders accounted for only 16% of the total number of restraining orders). While over 600,000 permanent restraining orders are entered into the national registry, the FBI National Crime Information Center (NCIC), many states either do not participate in the NCIC registry or their participation is incomplete. *Id.*

[150] *Davis*, 126 S. Ct. at 2276.

[151] State v. Davis, 111 P.3d 844, 849 (Wash. 2005), *aff'd*, 126 S. Ct. 2266 (2006).

[152] *Id.* at 850 (emphasis added).

shifting error and avoids the pretense that callers have no idea that 911 calls instigate prosecution.

The Indiana appeals court in *Hammon* also used the state of mind test as a runner-up theory to formality to explain why confrontation requirements were unnecessary. The appeals court hinted that perhaps all excited utterances are non-testimonial:

> We further note that the very concept of an "excited utterance" is such that it is *difficult to perceive how such a statement could ever be testimonial.* The underlying rationale of the excited utterance exception is that such a declaration from one who has recently suffered an overpowering experience is likely to be truthful. To be admissible, an excited utterance "must be unrehearsed and made while still under the stress of excitement from the startling event." . . . An unrehearsed statement made without time for reflection or deliberation, as required to be an "excited utterance," is not "testimonial" in that such a statement, by definition, has not been made in contemplation of its use in a future trial.[153]

Post-*Crawford*, the state of mind exception threatened to take away confrontation rights from all cases where a judge concluded that the evidence fit the excited utterance exception. The *Davis/Hammon* Court's "cry for help" language is similar to the excited utterance definition that statements made without time for reflection or deliberation are not testimonial. After *Davis/Hammon*, what is there to stop a lower court from concluding that statements like the one made at the scene in *Hammon* represent a cry for help?

It is hard to reconcile the state of mind factor with the *Crawford* decision, for the Supreme Court never applied the state of mind test to Ms. Crawford's statement to police. The *Crawford* decision labeled Ms. Crawford's statements testimonial because they were in response to police interrogation; the Court did not write that in speaking to the police, the defendant's wife was motivated by a desire to prosecute her husband, nor did the Court mention that a reasonable person in her situation would have known her statement would come in against him at trial. Neither does *Crawford* order the trial court to make these factual determinations on remand.[154]

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[153] Hammon v. State, 809 N.E.2d 945, 952-53 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126 S. Ct. 2266 (2006) (quoting Hardiman v. State, 726 N.E.2d 1201, 1204 (Ind. 2000)) (emphasis added) (citations removed).

[154] *Crawford* was remanded to the trial court to determine what the trial court should do given that Ms. Crawford's statements were improperly admitted in violation of the Confrontation Clause. Crawford v. Washington, 541 U.S. 36, 69 (2004). The issue of harmless error was a possible avenue for the lower courts, but not a decision that the statement was in fact non-testimonial, because Ms. Crawford's primary motivation in making the statement was not to help prosecute her husband.

The state of mind test was therefore not pronounced in *Crawford* as a limitation upon statements that were otherwise testimonial. In addition, it is not clear what a court would decide if it applied the state of mind exception to Ms. Crawford. Would she have known that the statement would be "available for use at a later trial?" *Bruton v. United States*, decided in 1968, had augmented the rule that the admission of an accomplice cannot come in against the defendant by requiring severance of the defendant's case from the accomplice whenever a confession or admission against the accomplice will implicate a co-defendant.[155] A layperson such as Ms. Crawford could hardly be expected to know that the long-established *Bruton* rule was being replaced in some jurisdictions by a new "interlocking confessions" rule that *Crawford* itself roundly rejected as a misinterpretation of Supreme Court precedent.[156]

By switching to the intent of the officer test instead of fully applying the state of mind test, the Court avoids the central inconvenience with the state of mind exception: namely, that most people know that when they talk to 911 operators their answers will be used against those that they are accusing of criminal behavior.

d. "Intent of the Officer" Rationale Allows Manipulation by Police

The primary purpose test awards confrontation rights based on the intent of the officer asking questions. It allows police officers to structure their questioning in order to maximize the chances that the evidence will be introduced. The majority disliked the notion that confrontation rights could be manipulated by police procedures. "The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision. . . . [T]estimonial statements are what they are."[157] According to the majority, facts are facts, and there is no way that the police can alter the facts to allow evidence that evades the constitutional guarantee.

The majority used the term "objective" to modify "intent" in an effort to prevent police from depriving defendants of face-to-face confrontation. Yet, the resolution of *Hammon* turned on the police officer's subjective intent as evidenced by the officer's own words. The "interrogation was part of an investigation into possibly criminal past conduct—as, indeed, *the testifying officer expressly acknowledged*,"[158] the majority wrote regarding

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[155] Bruton v. United States, 391 U.S. 123, 136-37 (1968).

[156] *Crawford*, 541 U.S. at 58 (discussing the misreading of *Lee v. Illinois*, 476 U.S. 530, (1986)). *Crawford* also cites *Bruton* with approval. *Id.* at 57.

[157] Davis v. Washington, 126 S. Ct. 2266, 2279 n.6 (2006).

[158] *Id.* at 2278 (emphasis added).

the officer's questioning of the victim at the scene. Words like "investigate" could easily be avoided in future situations similar to *Hammon*, and in its place the phrase "wanting to know whether I would be encountering a violent criminal" could be asserted.

Police officers responding to a scene after the *Davis/Hammon* decision will be careful to note all the ways that their call could be interpreted as an emergency response to an ongoing situation. Instead of asking "what happened," they will ask "what is happening?" Instead of letting things calm down before gathering important details, the officers will talk to the parties early on, before the situation is clear. When the officers come to court, they will speak of ongoing emergencies, not past investigations, and about their need to know the identity and violent tendencies of the person they are arresting. It will be easy for police to make these changes in their testimony because officers ask questions for multiple reasons—they will merely need to pay more attention to one of these reasons. In addition, since memory is self-serving, details that help their goal of admitting the powerful evidence will spring to mind.[159] With these changes, judges may decide a case with facts identical to *Hammon* and come out with the opposite result, determining that the primary purpose was not to investigate past conduct so the Confrontation Clause would not apply.

Although the *Davis/Hammon* majority seemed not to believe that police can structure their testimony to convince a judge that evidence is non-testimonial, consider the recommendations of Cindy Dyer, the chief prosecutor of the Family Domestic Violence Unit in Dallas.[160] The chief prosecutor recommends that police answer the following questions during a hearing:

> Were the statements taken "during the course of an interrogation"?
>
> What was the purpose of your questions?
>
> Were your questions to her an interrogation or merely part of your initial investigation?
>
> Were these questions asked to determine if a crime had even occurred?[161]

The purpose of Dyer's questions is to convince a judge to allow the introduction of incriminating hearsay statements.[162] These guidelines help

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[159] STEFAN H. KRIEGER ET AL., ESSENTIAL LAWYERING SKILLS 134 (1999).

[160] Cindy Dyer, Chief of the Family Domestic Violence Unit in Dallas, as quoted in The Confrontation Blog. Posting of Richard D. Friedman to The Confrontation Blog, http://confrontationright.blogspot.com/2005/01/american-prosecutors-research.html (Jan. 27, 2005, 10:47 p.m.).

[161] *Id.*

the officer fit his response into the exception to the Confrontation Clause and permit the evidence to be introduced regardless of the declarant's appearance at trial.

Good police work would entail following Dyer's suggestions above, changing practices to ensure that evidence is introduced and to ensure that cases are not dismissed for a lack of witnesses.[163] Every successful alteration by prosecutors and police means fewer live witnesses and more trials that are nothing more than police reciting out-of-court statements. This is the dilemma created by the *Crawford* and *Davis/Hammon* decisions. The cause of the dilemma is the definition of testimonial. An accused should be able to confront his accuser and challenge the credibility of the witness against him, whether or not the statements were uttered in response to questions designed to help the police decide whom they should arrest and whether or not the man or woman they arrest may be violent. Changing the way a police officer discusses a crime scene and the motives for gathering incriminating evidence does not change the fact that the defendant is being prosecuted based on statements made by his or her accuser with no opportunity for the fact finder to determine the credibility of the accuser.

e. The Majority's Formality Rationale Ignores the Fact that Questioning in *Hammon* Was Less Formal than in *Davis*

Davis/Hammon provided an opportunity for the Supreme Court to reject the formality litmus test that the lower courts were using to affirm the denial of confrontation rights. *Crawford* had confused its readers by using the term interrogation, which implies formality, while noting that "[w]e use the term 'interrogation' in its colloquial, rather than any technical legal, sense."[164] Instead of rejecting the formality test, *Davis/Hammon* sent mixed messages.

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[162] *See also* Adam M. Krischer, *"Though Justice May Be Blind, It Is Not Stupid"; Applying Common Sense to* Crawford v. Washington *in Domestic Violence Cases*, VOICE, Nov. 2004, at 1, 10, *available at* http://www.law.umich.edu/library/spotlight/confrontationclause/otherauthorities/articles/thevoice.pdf; *Sample* Crawford *Predicate Questions*, VOICE, Nov. 2004, at 8, 8-9, *available at* http://www.law.umich.edu/library/spotlight/confrontationclause/otherauthorities/articles/thevoice.pdf.

[163] *See* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 47 & n.192 (2006) (noting that "prosecutors are trained to draft DV complaints using hearsay exceptions, such as the victim's excited utterances at the scene" and that "[t]his drafting practice will undoubtedly have to be modified after *Davis v. Washington*").

[164] *Id.* at 53 n.4 ("Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.").

On the one hand, the Supreme Court reversed the Indiana court in *Hammon*, sending a signal that informality did not bar application of the Confrontation Clause.[165] The Indiana appeals court's *Hammon* decision was one of the earlier pioneers of the formality approach.[166] According to the Indiana appeals court, statements given to police with minimal questioning, such as the questioning at the scene in *Hammon*, are not the formal interrogations encompassed by the *Crawford* decision.[167] The court pointed to the fact that, unlike the *Crawford* case, the alleged victim was not in custody when the police questioned her but was questioned at the scene in response to an emergency call.[168] Indeed, the police questioning in *Hammon* was open ended, unlike the measured question and answer method employed during a direct examination at trial, a deposition, or a formal interrogation.[169]

On the other hand, formality is one of the four factors the *Davis/Hammon* Court named in explaining why the 911 call in *Davis* fell outside of Confrontation Clause guarantees.[170] Moreover, the Court wrote: "We do not dispute that formality is indeed essential to testimonial utterance."[171] Thus, despite the fact that *Davis/Hammon* reversed the Indiana court, formality lives on. The new decision affirmed its colloquial definition of interrogation, finding that the term interrogation is broad enough to cover less formal questioning by police outside the stationhouse without a recording or note taking.[172] Yet, one way to understand the

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[165] *See* Davis v. Washington, 126 S. Ct. 2266, 2280 (2006).

[166] *Hammon* has been widely followed. *See, e.g.*, State v. Alvarez, 107 P.3d 350 (Ariz. Ct. App. 2005). Over a third of the states used the formality reasoning found in *Hammon* to deny application of the Confrontation Clause. *See* Josephine Ross, Crawford*'s Short-Lived Revolution: How* Washington v. Davis *Reins In* Crawford*'s Reach*, 83 N.D. L. REV. (publication pending Spring 2007).

[167] Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126 S. Ct. 2266 (2006).

[168] *Id.*

[169] Hammon v. State, 829 N.E.2d 444, 447 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126 S. Ct. 2266 (2006) ("Officer Richard remained with Hershel in the kitchen while Mooney returned to the porch and again asked Amy what had occurred.").

[170] *Davis*, 126 S. Ct. at 2269 ("Finally, the difference in the level of formality is striking. Crawford calmly answered questions at a station house, with an officer-interrogator taping and taking notes, while McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even safe.").

[171] *Id.* at 2278 n.5 ("We do not dispute that formality is indeed essential to testimonial utterance. But we no longer have examining Marian magistrates; and we do have, as our 18th-century forebears did not, examining police officers . . . who perform investigative and testimonial functions once performed by examining Marian magistrates.") (citations removed).

[172] *Id.* at 2278.

emergency exception created by *Davis/Hammon* is that questioning in emergency responses is less formal than interrogations, where the police try to prove past events for later criminal prosecution. Emergency questioning is not like "extrajudicial statements contained in formalized 'testimonial' materials, such as affidavits, depositions, prior testimony, or confessions" that constituted the type of evidence targeted by the Framers because that was the type of statement that was allowed in without confrontation in the era leading up to the creation of the Sixth Amendment.[173]

It is hard to reconcile the divergent results in *Hammon* and *Davis* using the formality approach. The statements given to the 911 operator in *Davis* are less formal than the questioning in *Crawford* and therefore merit a different result, reasoned the *Davis/Hammon* Court. But the interrogation in *Hammon* is also less formal than the interrogation in *Crawford.* Ironically, the interrogation in *Hammon* is even less formal than the interrogation in *Davis*,[174] yet this informality did not benefit the prosecution.

In *Hammon*, the police arrived at the scene and were trying to take a statement from the declarant when the alleged abuser was in the same house and kept trying to interrupt.[175] Unlike *Davis*, the statement in *Hammon* was not taped. Although the police eventually asked the declarant to write an affidavit, the officer may not have taken notes during the initial stage of questioning.[176] Indeed, the officer in *Hammon* may only have asked "What happened?" in comparison with the 911 operator in Davis who asked thirty-six detailed questions.[177] If the fact that there was less formality in the

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[173] Crawford v. Washington, 541 U.S. 36, 51-52 (2004) (citing White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

[174] *See infra* notes 176-177 and accompanying text.

[175] Hammon v. State, 809 N.E.2d 945, 947-48 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126 S. Ct. 2266 (2006); *see also* Brief of Respondent (State of Indiana) at 4, Hammon v. Indiana, *Davis*, 126 S. Ct. 2266 (No. 05-5705) [hereinafter Brief of Respondent (State of Indiana), *Hammon*] ("Officer Mooney also testified that Hershel tried at least twice to enter the living room, and that each time Amy became quiet, 'almost afraid to speak.'") (citation omitted).

[176] The government's brief in *Hammon* lays out what occurred during the conversation between Officer Mooney and the victim, Ms. Hammon, that took place in the living room. Brief of Respondent (State of Indiana), *Hammon*, *supra* note 175, at 2-4. There is no mention in the brief of police taking notes when the oral statement was provided. The brief for Petitioner Hammon does not claim otherwise. *See* Brief of Petitioner Hammon, *Davis*, 126 S. Ct. 2266 (No. 05-5705) [hereinafter Brief of Petitioner Hammon]. Rather, the petitioner's brief focused on the affidavit that the officer asked the alleged victim to complete and sign. *Id.* at 2 ("The affidavit was on a prepared fill-in-the-blank form that Mooney apparently had with him and that tracked the language of the battery statute, ...").

[177] Joint Appendix, *supra* note 86, at 8-13; *see also* Brief of Respondent (State of Indiana), *Hammon*, *supra* note 175, at 12 ("[Ms. Hammon] was obviously frightened and

Davis questioning than in *Crawford* supports the conclusion that the *Davis* evidence was not testimonial, then a fortiori it should support a similar conclusion in *Hammon*. However, the Court's formality prong in *Davis/Hammon* simply does not square with its decision on the *Hammon* facts.

In reversing the Indiana Supreme Court's decision in *Hammon*, the Supreme Court used logic that could have applied equally to the facts of Mr. Davis' case. Although interrogation in *Hammon* is less formal than in *Crawford*, the questioning is formal enough, for it "imports sufficient formality, in our view, that lies to such officers are criminal offenses."[178] In other words, because witnesses may be charged for making false accusations, their statements are sufficiently formal. However, the Court ignores the fact that the alleged victim in *Davis* would also be subject to criminal offense if she lied in her call to the 911 operator.[179]

Professor Friedman has cogently argued against what he calls the "formality bugaboo."[180] Formality is precisely what the Sixth Amendment requires, he explained.[181] Swearing an oath, taking the stand, and being subject to cross-examination are all formalities required by the Sixth Amendment.[182] Yet, evidence does not become more trustworthy the less formal it gets. The statements permitted into evidence in *Crawford* were faulty precisely because they lacked this formality. Hence, courts misinterpret *Crawford* and the Sixth Amendment when they read a formality requirement into the opinion.[183]

Historically, most crimes were privately prosecuted, and "there was nothing resembling our modern police force," yet the right to confrontation was guaranteed.[184] Therefore, Friedman argued, a statement may be

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Officer Mooney took more action because he was concerned for her safety. The transcript does not show any further questioning, but even if some minimal questioning did occur, there is no evidence of any sort of 'interrogation.'")

[178] *Davis*, 126 S. Ct. at 2278.

[179] *See, e.g.*, City of Yakima v. Irwin, 851 P.2d 724, 727 (Wash. Ct. App. 1993) (affirming conviction based on false 911 call by citing city ordinance that provides in relevant part: "It is unlawful for any person to cause or make any willfully untrue, false, misleading, unfounded or exaggerated statement or report to the police department.").

[180] Posting of Richard D. Friedman, The Formality Bugaboo, to The Confrontation Blog, http://confrontationright.blogspot.com/2005/01/formality-bugaboo.html (Jan. 2, 2005, 12:55 p.m.).

[181] *Id.*; *see also* Friedman & McCormack, *supra* note 3, at 1246-47.

[182] U.S. CONST. amend. VI.

[183] *See* Brief of Petitioner Hammon, *supra* note 176.

[184] *Id.* at 16 (citing LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 67 (1993)). The *Hammon* brief submitted by Richard Friedman expands on this point, that history shows that you do not need police questioning in the production of the

testimonial even if the government had no part in its creation.[185] Indeed, *Crawford* recognized Friedman's point that informal statements, such as unsworn hearsay, while less formal than sworn statements, were equally important to the Sixth Amendment:

> But even if, as [the Chief Justice] claims, a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn testimonial statements a moot point, that would merely change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference. We find it implausible that a provision which concededly condemned trial by sworn ex parte affidavit thought trial by unsworn ex parte affidavit perfectly OK.[186]

By establishing formality as one prong of the test of testimonial statements, the *Davis/Hammon* Court undercut the *Hammon* decision, and rendered an internally contradictory decision. Moreover, this will encourage fewer confrontations by inviting lower courts to use the formality rationale to conclude that statements are beyond the purview of the Confrontation Clause, thereby failing to fulfill the full promise of *Crawford*.

f. *Davis/Hammon* Is Vague and Invites Multiple Interpretations

Davis/Hammon sets out to clarify the term testimonial from *Crawford*, but in doing so created additional questions. For example, it is not clear how a judge should determine if hearsay satisfies the formality requirements of *Davis/Hammon* because, although the case held that formality was a prong to be considered, the decision was internally inconsistent.[187] Nor is it clear whether a judge should consider the state of mind of the speaker, or only the effect the speaker's state of mind has upon the state of mind of the police in taking a statement.[188]

Judges must also divine whether the emergency exception is broad enough to include situations where the police respond to a scene or whether it only applies to 911 calls. When the police are at the scene, the person is no longer "unprotected by the police." The Supreme Court distinguished the facts in *Davis* from *Hammon* in part because the alleged victim in *Davis*

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statement to offend the confrontation right. *See also* Richard D. Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection*, CRIM. JUST., Summer 2004, at 4, 9 (2004) [hereinafter Friedman, *Adjusting to* Crawford].

[185] Friedman, *Adjusting to* Crawford, *supra* note 184, at 9 (writing that historically, the "prosecutor plays no essential role in the violation" of the Confrontation Clause). The term interrogation in *Crawford* has provided lower courts "an excuse" rather than a valid reason to deny confrontation rights to statements made knowingly to police officers. *Id.*

[186] Crawford v. Washington, 541 U.S. 36, 52 n.3 (2004).

[187] *See* discussion *supra* Section IV.B.2.v.

[188] *See* discussion *supra* Section IV.B.2.c.

was "alone, unprotected by the police."[189] Yet the Court does not specifically confine its holding in *Davis* to emergency calls. Another ambiguity regarding the emergency exception is whether it applies to all information that will help police learn about a potentially dangerous situation. Describing a crime that just occurred may help to inform the police whether an arrest is required and whether the person to be arrested has a weapon or may be violent or dangerous. This is a broad reading of the emergency exception. Or, perhaps once an event is over the emergency exception only applies to the identification of a suspect. In *Davis*, the name of the alleged perpetrator was not testimonial because "the operator's effort to establish the identity of the assailant" was "so that the dispatched officers might know whether they would be encountering a violent felon."[190] The majority supported this conclusion by citing to *Hiibel v. Sixth Judicial District Court of Nevada*, which affirmed the constitutionality of a Nevada statute empowering police to arrest suspects who refuse to identify themselves.[191] In *Hiibel*, the Court had expressed a more relaxed constitutional standard towards obtaining a suspect's name as compared to other information, noting that the information "serves important government interests" while rarely raising Fifth Amendment testimonial concerns.[192] The *Hiibel* Court explained the particular importance of identification in domestic violence cases:

> Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in cases such as this, where the police are investigating what appears to be a domestic assault. Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.[193]

Thus, although the emergency exception could be interpreted broadly, the citation to *Hiibel* coupled with the reversal of *Hammon*, implies that the emergency exception is limited in situations that are not ongoing to obtaining the name of the alleged perpetrator.

Justice Thomas' criticisms of the primary purpose test also point to weaknesses in the decision. Consider the identification testimony at the *Davis* trial. The Supreme Court must divine the operator's purpose in

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[189] Davis v. Washington, 126 S. Ct. 2269, 2273-74 (2006).

[190] *Id.* at 2276.

[191] *Id.* (citing Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177, 186 (2004)).

[192] *Hiibel*, 542 U.S. at 186.

[193] *Id.*

asking for the full name of the perpetrator, starting with his last name. The operator was following instructions on handling 911 crime reports, but the record is silent as to the purpose behind the policy, whether it was to help prosecute when witnesses did not appear or simply to allow police to research criminal records of the suspect on route to the scene.[194] There is no discussion in *Davis/Hammon* of the actual policy in Washington, and the actual intentions of the individual operator are unknown. Instead, the Court guesses that the operator's identification questions were aimed towards helping police "know whether they would be encountering a violent felon."[195] Yet police would already know they might encounter a potentially violent felon at the scene based on the allegations made.[196] The Court has no way to determine that the questions on identity were designed primarily to protect themselves in an emergency rather than to help the police arrest, charge, and prosecute the alleged perpetrator. If the latter reason was the primary purpose of the questions, presumably they should

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[194] In the reply brief for Mr. Davis, the defense identified different training materials used by the law enforcement community that prioritized generating evidence from crime victims for use in prosecutions. Reply Brief of Petitioner at 2-5, *Davis*, 126 S. Ct. 2266 (No. 05-5224). Certain recommended protocols even advised 911 dispatchers dealing with domestic violence calls to collect as much evidence as possible on the expectation that victims would later recant their statements. *Id.* at 3. Recommendations included determining details of the crime, prior threats, and details of the injury, including how the injury occurred and when it occurred. *Id.* The protocols also recommended recording victim statements that would qualify as excited utterances. *Id.* at 2-3 (citing Powerpoint Presentation, Navin Sharma et al., Domestic Violence: Break the Silence, Break the Cycle at slides 10-22, *available at* http://www.doh.wa.gov/hsqa/emstrauma/OTEP/domviolence.ppt). The defense also alleged the protocols recommended that 911 operators not immediately calm down the victim in order to preserve the excited utterance exception. *Id.* at 2-5.

[195] *Davis*, 126 S. Ct. at 2276. This is the full text of *Davis*'s third prong, differentiating the statement in *Davis* from that in *Crawford*:

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

Id. (citing *Hiibel*, 542 U.S. at 186).

[196] Another way to understand this identification exception is that the Court is creating an identification exception, placing identification concerns outside the purview of the Confrontation Clause. For example, at the oral argument, the State of Washington argued:

> [T]hey can be determining whether or not the defendant has a criminal history. They can determine whether or not, from their records available to them in their police car, whether or not the defendant has a history of assaults against police officers, whether or not he has a—a history of carrying weapons, et cetera.

Transcript, *Davis*, *supra* note 146, at 38.

be deemed testimonial under *Davis*' primary purpose test.[197] As Justice Thomas wrote, fitting the facts to the definition of testimonial provided will entail "an exercise in fiction."[198]

Because the Court created an exercise in fiction, other judges might reach opposite conclusions on similar facts in both *Davis*- and *Hammon*-type situations. A ready example can be found in the *Hammon* facts, where the police came to the scene and questioned the alleged victim after witnessing evidence that there had been destruction. It is easy to imagine another court resolving the facts in *Hammon* differently than the Supreme Court did. Although the Court decided that the primary purpose of talking to the alleged victim at the scene of the broken glass was to resolve past events, another court might have found there was an ongoing emergency at the home. The alleged victim in *Hammon* was arguably so scared of her abuser that she told the police nothing happened at first and became quiet whenever the defendant tried to interfere with her conversation with the officer. Police in this type of situation would presumably want to know whether the defendant was a violent criminal, and whether he should be removed from the home. Arguably the information provided by the alleged victim was necessary for the police to determine how to help her, and whether it would be dangerous to leave her and the defendant in the home. One of the by-products of defining testimonial so that it is unrelated to the role the evidence plays at trial is that any conclusions appear arbitrary.

To the extent that we should treat the new *Davis/Hammon* test as one that looks at the intent of the officer, as the opinion declared, the case produces some anomalous results. If a witness calls 911 in the hope that the person she accuses will be arrested and charged, the statement she leaves is presumably non-testimonial if the operator simply states, "Tell me everything I would need to know to answer your emergency." After all, the operator's intent is simply to gather information to respond to an emergency. Similarly, if a witness writes a letter alleging that someone committed a criminal act and sends it to the prosecutor's office, that would appear to be non-testimonial under the *Davis/Hammon* decision because again there was no intent by law enforcement to obtain incriminating evidence. Surely the Court did not wish for either of these results, and

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[197] Another judge could view the whole call as not a call for help since the caller did not want an ambulance. Transcript, *Davis*, *supra* note 146, at 10. The 911 operator actually asked thirteen questions prior to asking Ms. McCottry if she needed an aid car and receiving a response of "I'm all right" from Ms. McCottry. Joint Appendix, Petition, *supra* note 86, at 8-10.

[198] *Davis*, 126 S. Ct. at 2283 (Thomas, J., concurring in part and dissenting in part).

perhaps that is why the majority dilutes the intent of the officer test even as they create it.[199]

The Supreme Court floundered with multiple rationales for its conclusions on the *Davis* and *Hammon* facts, just as it had cast about in *Crawford* for a definition of testimonial. The multiple factors for determining whether a statement is testimonial invite a lack of uniformity in applying the new test. Trial judges may weigh the factors in any way they wish to support their conclusion that statements may or may not be admitted without the witness. The root of the ambiguity in *Davis/Hammon*, like the ambiguity in *Crawford*, stems from an incorrect postulation of what the term testimonial should mean. In Section V.A, I will show how the Court could have avoided the ambiguities and problems with fictional standards if it had adopted a functional approach to the term testimonial, employing a definition that looked at whether the evidence functioned as testimony against the accused at the trial, regardless of the manner of collecting the information prior to the trial.

g. The Shadow of *Roberts*

There is an echo of *Roberts* in *Davis/Hammon*'s twin rulings. One way to read the *Davis/Hammon* decision is that it reestablished true res gestae statements as an exception to the Confrontation Clause because that hearsay exception is deeply rooted. The origins of the excited utterance are res gestae, but excited utterances have stretched res gestae beyond its historic roots. The Court suggested that truly immediate statements would have been permissible at the founding of the Constitution and therefore should continue to be introduced under the new testimonial analysis.[200] By

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[199] Justice Scalia, during the oral argument of Davis asked the Senior Prosecuting Attorney a hypothetical about an affidavit going directly to the police. It is "such an obvious violation of your right to confront your accuser," Justice Scalia remarked. Transcript, *Davis*, *supra* note 146, at 32-24.

[200] Justice Scalia implied in *Crawford* that res gestae evidence would have come in at the time of the framers. Crawford v. Washington, 541 U.S. 36, 53-54 (2004). *Crawford* cites to *Thompson v. Trevanion*, (1694) 90 Eng. Rep. 179 (K.B.), a civil case, but one of the first known cases to apply res gestae. *Crawford*, 541 U.S. at 58. In *Davis*, Scalia also gave the example of a "girl's screams for aid as she was being chased by her assailant." *Davis*, 126 S. Ct. at 2277. But this is not really a hearsay exception at all. As James Moorehead wrote in 1995, the term res gestae has been used to include two different categories of statements: (1) exceptions to the hearsay rules that include excited utterances and present sense impression, and (2) those words that constitute "the details of an act, occurrence or transaction which in itself is relevant and provable" but by definition are not hearsay evidence because they are "not admitted for the purpose of proving the truth of what was said, but for the purpose of describing the relevant details of what took place." James Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L.A. L. REV. 203, 246 (1995).

allowing the 911 call in *Davis*, the Court placed res gestae evidence with dying declarations in exempting them from the Confrontation Clause because of their long history.[201] The reason the Court would not do this explicitly is that this would signal a return to *Roberts*, where deeply rooted exceptions escaped the clause's requirement. This shadow of *Roberts* is an indication that the Court has not found a solid framework for re-interpreting the Confrontation Clause.

Another indication that the Court may have unconsciously descended down the *Roberts* reliability path the justices so recently abandoned occurred when the majority discussed the strength of the hearsay evidence.[202] The *Davis/Hammon* Court wrote that the alleged victim in *Davis* was not acting like a witness when she spoke to the operator, for her words were "not 'a weaker substitute for live testimony' at trial." It is interesting that the Court would use the words "weaker substitute" implying that the Confrontation Clause allows stronger substitutes for live witness testimony but not weaker ones.[203] To the contrary, Wigmore did not think that excited utterances were a weaker substitute for live testimony, but rather a stronger replacement.[204] *Roberts*, in turn, did not allow weaker

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In *Crawford*, the Court wrote:

> It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage."

541 U.S. at 58 (quoting *Thompson*, 90 Eng. Rep. 179).

[201] *Crawford* reads as if dying declarations were sui generic, although the decision also recognized some historical basis for res gestae evidence: "We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is sui generis." *Id.* at 56; *see also* discussion *supra* note 200. In Michael J. Polelle's *The Death of Dying Declarations in a Post-*Crawford *World*, she posits that although there is scant evidence for any hearsay exceptions at the time of the framers, the res gestae exception was actually better documented than the dying declaration. 71 MO. L. REV. 285, 289-96 (2006).

[202] Some of the discussion during the oral argument of *Davis* supported the assertion that some Justices were thinking about res gestae. Justice Souter asked Jeffrey L. Fisher, counsel for Mr. Davis, about his state of mind theory: "[D]o you distinguish, for example, between the—the expectation that lies behind a merely excited utterance, on the one hand, and . . . in a true res gestae statement in the very strict sense?" Transcript, *Davis*, *supra* note 146, at 15. Mr. Fisher answered that "it can be important to distinguish between a modern-day excited utterance and what would have been considered res gestae type statement at common law." *Id.* at 16. When the Court wrote that the 911 information in *Davis* was not a weaker substitute for live witness testimony, it hinted that the Court perceived the information as particularly reliable. *See Davis*, 126 S. Ct. at 2277.

[203] *Davis*, 126 S. Ct. at 2277 (citing United States v. Inadi, 475 U.S. 387, 394 (1986)).

[204] WIGMORE, *supra* note 22, § 1748.

substitutes, but allowed reliable, strong substitutes.[205] Thus, the reasoning here sounds more like *Roberts* than the paradigm shifting reasoning that *Crawford* pledged.

Whether evidence is weak or strong is important for harmless error analysis but not to determine a constitutional violation. The right to confront one's accusers should not turn on how likely a jury is to believe the evidence without an opportunity to view the live witness. As I will set forth in Section V.A, the scope of the clause should turn on whether the declarant served as a witness at trial and whether the declarant's credibility mattered to the outcome of the charges. After all, Amar posited that the Confrontation Clause should only be concerned with stronger evidence since weaker evidence will not be believed.[206] Justice Stewart, writing for a plurality in a case that pre-dated *Roberts*, similarly determined that the defendant had no right to confront a jail house informant, in part because a jury would find the statement attributed to the informant incredible.[207] Justice Marshall articulated the point well when he pointed out that the defense would certainly benefit from "fuller factual development which the corrective test of cross-examination makes possible."[208] Indeed, as trial attorneys know, strong evidence will generally be made weaker by cross-examination and weak evidence will be made even weaker. The issue under *Crawford*'s new era should not be whether the substitute is weak or strong, but whether it is in fact a substitute.

V. COURTS SHOULD DETERMINE WHETHER EVIDENCE IS TESTIMONIAL BASED UPON ITS FUNCTION AT TRIAL

A. A PROPOSAL FOR A DEFINITION OF TESTIMONIAL FOCUSED ON THE ROLE THE EVIDENCE PLAYS AT TRIAL

> [I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.[209]

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[205] Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[206] Akhil Reid Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 694 (1996).

[207] Dutton v. Evans, 400 U.S. 74 (1970); *id.* at 100 (1970) (Marshall, J, dissenting) ("Mr. Justice Stewart's opinion for reversal characterizes as 'wholly unreal' the possibility that cross-examination of Williams himself would change the picture presented by Shaw's account. A trial lawyer might well doubt, as an article of the skeptical faith of that profession, such a categorical prophecy about the likely results of careful cross-examination. Indeed, the facts of this case clearly demonstrate the necessity for fuller factual development which the corrective test of cross-examination makes possible.").

[208] *Id.* at 103 (Marshall, J., dissenting).

[209] Crawford v. Washington, 541 U.S. 36, 49 (2004) (quoting State v. Webb, 2 N.C. (1

This Article takes the position that the concept of testimonial must be tied to the role that the evidence at issue plays at trial in order for the clause to serve its original purpose—namely, to allow face-to-face accusations with the opportunity to cross-examine. "Testimonial" should mean statements that function as testimony during the trial. The primary purpose of the clause is to make sure that witnesses make their accusations openly in court and are subject to cross-examination, as well as to make sure that those determining the truth of the testimony have the opportunity to assess the witnesses' demeanor. If the veracity or reliability of the declarant is immaterial to the charges before the court, then the evidence at issue would clearly be non-testimonial. Whatever else this would include, the term testimonial should apply to all statements repeated at court that are accusatory in the context of the criminal trial, that are introduced for the truth of their assertion, and where the reliability of the declarant could affect the truth of the charges in that particular case. In other words, the concepts of witness and testimony should be tied to the concept of an accusation. By "accusation," I mean that the out-of-court witness must have alleged that something criminal occurred or that the defendant committed an act that is now the subject of this prosecution.

The Supreme Court should not discriminate among accusations based upon the intent of the police in gathering the out-of-court statement, the formality of the investigation, or the state of mind of the person making the initial statement. Instead, the Court should consider how the out-of-court words are being used in the particular trial. If the words constitute an accusation of criminal wrongdoing, then even if the declarant does not identify the defendant as the person that committed the crime, he is still the true witness in the case. An allegation that a person committed a crime would be non-testimonial if it were brought into a different case. For example, if the declarant states that the defendant was driving under the influence of alcohol, and the state wants to use this information in a murder prosecution to disprove an alibi, then the evidence would not offend the Confrontation Clause. Although the declarant may have intended to accuse the defendant, the accusation was not being used to set forth the elements of the offense, but rather to disprove the defense case.[210] In such a case, the jurisdiction's rules of evidence would apply rather than the Confrontation Clause.

I disagree with the Court's assumption that the Confrontation Clause is more concerned with preventing abuses in the creation of evidence than in

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Hayw.) 103, 104 (1794)).

[210] It would be admissible if it fit some hearsay exception available at the time the case went to trial, such as Federal Rule of Evidence 803.

preventing abuses at trial. The Confrontation Clause is a trial right, unlike the Fourth and Fifth Amendments that concern the creation of evidence.[211] The Sixth Amendment guarantees the right to a speedy trial, a public trial by jury, the right to be informed of the nature of the accusation, the right to counsel, the right to compulsory process (for defendant to call witnesses), as well as the right to confront witnesses.[212] None of these rights primarily involve police or the gathering of evidence. Rather, all primarily involve the manner in which cases proceed in court. The Confrontation Clause is particularly linked with the right to a jury trial and the right to counsel.[213] As the Supreme Court stated in 1899:

> [A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.[214]

It is the trial that matters, not how the evidence was gathered.

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[211] Even Margaret Berger, a pronounced advocate of the theory that the Confrontation Clause's core concern is police involvement in the gathering of evidence, seems to suggest that there is more likelihood of unreliable verdicts where police have the ability to manipulate evidence. *See* Berger, *supra* note 29. She argues that a child's statement to a prosecutorial agent "should not be admitted regardless of whether it is reliable or the child is produced, unless a contemporaneous recording is available . . . [to] ensure that the jury hears the child's version rather than the witness's paraphrase." *Id.* at 612. This argument is particularly interesting because it opposes the position taken by courts employing the formality rationale.

[212] U.S. CONST. amend. VI.

[213] *See generally* Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77 (1995) (examining in depth the history of defense counsel and public prosecution in the United States and in England). Jonakait also argues that the Confrontation Clause must be analyzed in relationship to the other rights contained within the Sixth Amendment. *Id.* at 82. *Howser v. Commonwealth* explained the history of the Confrontation Clause this way: "When the common law of England was transported to these colonies," it failed to provide the same rights that Englishmen had. 51 Pa. 332, 337 (1865).

> To remedy this state of the law, our constitutions all declared—what statutes had then provided in England—that the accused should have an impartial trial by jury, should have process for witnesses and be entitled to counsel to examine them, and to cross-examine those for the prosecution in the presence of (confronting) the accused.

Id. (cited in WIGMORE, *supra* note 22, at 151). The development of counsel for the defense elevated the importance of cross-examination. Jonakait, *supra*, at 87-94

[214] Kirby v. United States, 174 U.S. 47, 55 (1899).

B. *DAVIS/HAMMON* SHOULD HAVE USED A FUNCTIONAL APPROACH

Had the Supreme Court applied this proposed theory to the Hammon facts, it would have reached the same result it did but in a much cleaner way. While the result in *Hammon* affirmed *Crawford*'s promise of face-to-face confrontation of those whose accusatory statements are presented in place of live testimony, the Court flounders around with multiple rationales for determining whether a statement to a police officer is testimonial. None of the tests they propose are satisfactory, either separate or combined, because the court is asking the wrong questions and looking at the wrong timeframe. *Hammon*'s holding would make more sense if the Court had looked at the trial and asked the right questions: (1) In the context of the charges and other evidence introduced, did the declarant's statements serve as an accusation against the defendant at the time these statements were repeated at trial? (2) Was the credibility of the declarant important to the resolution of the case, or just the credibility of the person who repeated the declarant's statement at trial?

The answer to these questions is clear: Ms. Hammon's statements served as an accusation against Mr. Hammon at trial, so Ms. Hammon's credibility was of utmost importance to the resolution of the charges against her husband. Her statements established all the essential elements of the charge against the accused. While the police provided evidence of the state of the apartment, it was the declarant's credibility that was important to the outcome of the trial. Without her accusation, there would be no case against Mr. Hammon. From a functional or trial perspective, Mr. Hammon's accuser was the "witness against him" even though she never came to court. The Court must therefore conclude that Ms. Hammon, was a witness in Mr. Hammon's case and that the declarant's statements served as testimony at trial.

Had the Supreme Court applied this proposed theory to the *Davis* facts, it would have reversed the *Davis* conviction and held that the statements to the operator were testimonial. From a functional approach, there is no difference between the hearsay in *Davis* and the hearsay in *Hammon*. After all, the declarant in *Davis* was the key accuser at trial. To convict the defendant, the jury must have decided that Ms. McCottry was telling the truth to the operator when she said, "He's here jumpin' on me again" and then named Mr. Davis as the perpetrator.[215] If, after direct and cross-examination of the accuser, the fact finder determined that the declarant was not telling the truth about the allegation, then Mr. Davis should have been acquitted. No matter what the declarant was thinking at

[215] State v. Davis, 111 P.3d 844, 846 (Wash. 2005), *aff'd*, 126 S. Ct. 2266 (2006).

the time she accused the defendant or what the operator's motivation was at the time the statement was recorded, at trial the prosecutor used the statement the same way a real witness would be used. Ms. McCottry's statements served as an accusation against Mr. Davis at trial, and her credibility was of utmost importance to the resolution of the charges. The statement made by the missing victim served the function of testimony at Mr. Davis' trial. For purposes of the Confrontation Clause, Ms. McCottry was a witness against the accused.

The Supreme Court should have paid attention to the way the concept of testimony was used at trial. During the closing argument in the *Davis* trial, the government lawyer argued that the jury had heard the victim's testimony.[216] Rebutting the defense lawyer's assertion that the statement admitted in the 911 tape should not be credited because it was not under oath or subject to cross-examination, the government counsel argued:

> [Defense counsel] would like you to believe that . . . no one you heard from saw the crime. That is not true. You have the voice of Ms. McCottry on the 911 tape. She reported it right when it happened. . . . [J]ust consider that there was a person present and that person is Ms. McCottry and although she is not here today to talk to you she left you something better. *She left you her testimony* on the day that this happened, February 1st, 2001, this shows that the defendant, Adrian Davis was at her home and assaulted her. It is right here in her voice . . . .[217]

The alleged victim "left you her testimony," the prosecutor told the jury. Clearly, trial lawyers and jurors have an understanding of the concepts of witness and testimony. The lawyers understood who the witness was against Mr. Davis. Under a trial definition, the statements were testimonial.

The prosecutor had ample reason to argue that the jury heard the witness's "testimony." After closing arguments, a trial judge instructs the jury that it should consider the testimony together with the physical evidence in the case to decide the facts. Therefore, trial courts permit jurors to give the same weight to out-of-court statements as they do to live testimony.[218] By calling the out-of-court statements "testimony," the prosecutor was trying to show the accuser's words were every bit as important, official, and convincing as evidence given in response to direct

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[216] Brief of Petitioner Davis, *supra* note 5, at 8.

[217] *Id.*

[218] *See* Commonwealth v. Crawford, 629 N.E.2d 1332, 1337 (Mass. 1994) (noting that "the jury were entitled to credit the evidence of" declarant's statements and the defendant was not entitled to a missing witness instruction). It is worth noting the use of the word "testimony" in the *Commonwealth v. Crawford* court's opinion: "This is not a case in which the jury heard nothing from a witness the Commonwealth would have been expected to call. The jury heard the substance of [declarant's] *testimony* in the form of her extrajudicial statements." *Id.* (emphasis added).

and cross-examination.[219] It was important to the prosecutor that jurors recognize that they could weigh the statement as heavily as live testimony, and that they could even decide to convict based on that statement alone. Courts have much to learn from the prosecutor's use of the term in the *Davis* trial.

Looking at how the Washington Supreme Court dealt with this issue illustrates how the concept of witness and testimony becomes fictionalized when the Supreme Court defines testimonial by how evidence is gathered rather than the role it serves at trial. On appeal, the Washington Supreme Court dismissed the defense's argument that the government had conceded that the evidence was testimonial, noting that the argument had been made before *Crawford*'s decision was handed down.[220] The court treated the closing argument as immaterial to the question of whether the evidence was in fact "testimonial."[221] The court explained: "[T]he statement [by the prosecutor describing the victim's 911 call as her testimony] was made before the *Crawford* decision focused Confrontation Clause analysis on the word 'testimonial.' Since *Crawford*, 'testimony' has acquired a specific meaning that should not be attributed to the State pre-*Crawford*."[222]

The *Davis/Hammon* decision unraveled the connection between the concepts of witness and testimony established in *Crawford*. The Court created a new legal fiction by using the terms "witness" and "testimony" in a way that conflicted with what the terms mean in a trial.[223] In both *Davis* and *Hammon*, the real witness at trial was the declarant. Unless the Supreme Court connects the terms "witness" and "testimonial" to the role the statements play at trial, future prosecutors will quite rightly explain to the jury that they heard the testimony from the witness while arguing to the judge that the evidence is not testimonial under the Sixth Amendment.

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[219] Another way in which the prosecutor can ensure that the jury does not value the out-of-court testimony less than the in-court testimony is by successfully blocking defense efforts for a missing witness instruction informing the jury that they could make an inference in favor of the defense from the absence of the witness at trial. *See* State v. Davis, 64 P.3d 661, 665 (Wash. Ct. App. 2003), *aff'd*, 111 P.3d 844 (Wash. 2005), *aff'd*, 126 S. Ct. 2266 (2006).

[220] State v. Davis, 111 P.3d 844, 851 (Wash. 2005), *aff'd*, 126 S. Ct. 2266 (2006).

[221] *Id.*

[222] *Id.*

[223] In the oral argument in *Hammon*, Justice Stevens returned to this issue. He inquired of Irving L. Gornstein, Assistant to the Solicitor General, "[B]ut the real question is who's the witness under the text of the Constitution?" Transcript of Oral Argument at 58, Hammon v. Indiana, Davis v. Washington, 126 S. Ct. 2266 (2006) (No. 05-5705). Justice Stevens later added, "I think I am trying to help you." *Id.* at 58-59.

C. SCHOLARS HAVE INCORRECTLY FOCUSED ON EVIDENCE PRODUCTION RATHER THAN THE TRIAL

Scholars have proposed a number of definitions of testimonial to help guide the Court.[224] None has focused on the role that the evidence at issue plays at trial. This section will examine the works of two influential scholars who embrace a liberal reading of the Confrontation Clause and of *Crawford*, but whose reasoning is marred in the same way as *Davis/Hammon* by placing too much emphasis on the manner of obtaining evidence. In proposing a new definition of testimonial, this Article builds on some of the work of these noted scholars while moving the discussion in a new direction.

Robert Mosteller has written that the Supreme Court should be concerned about accusatory statements more than non-accusatory statements.[225] However, his theory is quite different from the one posed in this Article. Mosteller uses the term accusatory to mean that at the time the person was making the statement, she intended to accuse the defendant by causing the police to investigate or charge the defendant.[226] He does not look at the role that the statement plays in the trial, as this Article recommends.

While Mosteller's theory is broader than that of other scholars, it closely tracks the *Crawford* dicta on possible core definitions of testimonial.[227] Mosteller separates statements made to government officials

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[224] *See, e.g.*, Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996); Berger, *supra* note 29; Friedman, *Confrontation*, *supra* note 38.

[225] *See* Robert Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 514 n.18 (2005) [hereinafter Mosteller, Crawford] ("Somewhat inexplicably, in my judgment, one aspect that this historical treatment and preliminary definition leaves out is my particular focus on accusers and accusatory statements, as opposed to testimonial statements. I believe there should be a role for the concept of 'accusatory' hearsay in the analysis because it better describes the core concern of the Confrontation Clause than does the testimonial concept."); Robert Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenger of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 747-49 (1993) [hereinafter Mosteller, *Remaking Confrontation Clause*]; Robert Mosteller, *"Testimonial" and the Formalistic Definition—The Case for an "Accusatorial" Fix*, CRIM. JUST., Summer 2005, at 14, 16 (section titled "A better approach: Accusatorial terminology") [hereinafter Mosteller, *"Testimonial"*].

[226] Mosteller, *Remaking Confrontation Clause*, *supra* note 225, at 748; Mosteller, *"Testimonial,"* *supra* note 225, at 17 ("What I suggest is that accusatory statements are statements that are accusations, viewed at the time they were made, of conduct that is criminal.").

[227] Various formulations of this core class of testimonial statements exist. *See, e.g.*, White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment) (noting that "extrajudicial statements . . . contained in formalized testimonial

from statements to private parties. Mosteller proposes that the burden of proof to establish that a statement is testimonial be different depending on whether it is a statement to law officers or a statement to private parties.[228] He rejects the formality rationale and argues that most statements to police are testimonial because the person knows they will be used against the accused, and are therefore accusatory.[229] Mosteller argues that for private statements to be testimonial, they must be accusatory in nature and uttered with the intention that the private party would serve as a conduit to government agents.[230] Thus, an accusatory statement made to a private party may be testimonial, but only if "it was intended to be conveyed to those investigating the crime."[231]

Friedman used the term "testimonial statements" before *Crawford* established it as part of the Confrontation Clause lexicon.[232] In *Dial-in*

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materials, such as affidavits, depositions, prior testimony, or confessions"); Brief of Petitioner at 23, Crawford v. Washington, 541 U.S. 36 (2006) (No. 02-9410) ("*Ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."); NACDL Brief, *Crawford*, *supra* note 140, at 3 ("Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."). These formulations all share a common nucleus and then define the Confrontation Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing." *Crawford*, 541 U.S. at 51-52.

[228] Mosteller, Crawford, *supra* note 225, at 544-45. Mosteller suggests, as to private statements, that the requirement might be that a statement must be clearly or exclusively intended to be used as testimony whereas a statement to the police or another government official must be treated presumptively as testimonial, unless the evidence shows that it was clearly or exclusively intended for another purpose. *Id.*

[229] Mosteller, *"Testimonial," supra* note 225, at 19; Mosteller, Crawford, *supra* note 225, at 544 ("Indeed, all statements made knowingly to a police officer should be considered formally given, in that they should be expected to be admitted in evidence if of value to the government. Thus, every statement made to a police officer, whether formally recorded or not, could, and I contend should, be considered formal"); *id.* at 554 ("In fact, the possibility of governmental manipulation is even greater with informal statements because witnesses are not constrained by contemporaneous written records that may check additions and modifications.").

[230] Mosteller, Crawford, *supra* note 225, at 571-74.

[231] *Id.* at 544.

[232] Friedman, *Confrontation*, *supra* note 38, at 1026. Professor Richard Friedman has been particularly influential in delineating the failure of pre-*Crawford* jurisprudence to provide meaningful Sixth Amendment protections. Friedman requested certiorari in *Hammon*, Petitioner for Writ of Certiorari, Hammon v. State, 829 N.E.2d 444 (Ind. 2005) (No. 05-5705), authored the appellant's brief, *see* Brief of Petitioner Hammon, *supra* note 176, at i, and was cited by the majority opinion in *Crawford*. *Crawford*, 541 U.S. at 61 (citing Friedman, *Confrontation*, *supra* note 38); *see also* Douglass, *supra* note 61, at 1803

Testimony, Friedman and McCormack seek to expand upon the theories offered by Justice Thomas, Akhil Amar, and Margaret Burger, who all focus on the government's role in determining what statements are implicated by the Confrontation Clause.[233] Friedman and McCormick offer a state of mind approach in determining application of the Confrontation Clause: "If a statement is made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime, then the statement should be deemed testimonial."[234] This is very similar to Mosteller's recommendation, although Mosteller uses the term accusatory statements to narrow the reach of the clause rather than the term testimonial. However, Friedman and McCormack's theory suffers from the same problem as Mosteller's. In lamenting the lack of confrontation in the domestic violence cases they reviewed, Friedman and McCormack focused on the time the evidence was gathered, when their critique should have been framed around the manner in which trials were conducted.[235]

Both Friedman and Mosteller endorse an approach to 911 calls that would determine admissibility based on the declarant's point of view when making the statement.[236] One might reach the same result in *Davis/Hammon* using either Friedman's or Mosteller's views, but my test is more likely to secure the result that both scholars favor. Both Friedman and Mosteller seek to encourage in-court sworn statements subject to cross-examination. Mosteller wrote: "I suggest that the path of the law's development will be improved if the clause read as a positive command to afford the accused the right 'to be confronted with the witnesses against him' rather than principally as a negative restriction on the admission of certain out-of-court evidence."[237] Friedman and McCormack wrote: "We

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n.19 (writing that Richard Friedman and Margaret Berger filed an amicus brief in *Lilly v. Virginia*, 527 U.S. 116 (1999)).

[233] Friedman & McCormack, *supra* note 3, at 1246. Note that Friedman is also building on his own earlier theories. *See* Friedman, *Confrontation*, *supra* note 38; Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 HASTINGS L.J. 545 (1998).

[234] Friedman & McCormack, *supra* note 3, at 1240-41.

[235] *Id.* ("[I]f a person makes a statement in circumstances under which—but for the confrontation right—she would understand that the statement would likely be used as evidence against the accused, the person is acting as a witness against the accused, making a testimonial statement. . . . A standard somewhat easier to apply, but yielding similar results, would be: *If a statement is made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime, then the statement should be deemed testimonial.*").

[236] Mosteller, Crawford, *supra* note 225, at 613.

[237] Mosteller, Crawford, *supra* 225, at 514.

believe the best way of approaching the Confrontation Clause is to construe it to ensure the result at which it was aimed, that prosecution testimony be given in formal proceedings, subject to the oath and confrontation by the accused."[238] Hence, their theory arguably fits with the result in *Hammon* where the government was barred from introducing out-of-court statements instead of the accuser herself.

Although Mosteller and Friedman seek more confrontation, the result in *Davis*, allowing the 911 call to substitute for live evidence, is also arguably consistent with their views. In *Dial-in Testimony*, Friedman and McCormack exempt a cry for help from the scope of the Confrontation Clause. As the 911 call in *Davis* could easily be considered a cry for help, the result in *Davis* is consistent with Friedman's views even though the Court's rationale focusing on the intent of the officer is inconsistent with Friedman's theory.[239] Mosteller would also seem to tolerate the introduction of some emergency 911 calls into evidence, but only if a judge found that the 911 statements were made for purposes other than to report a crime and that the callers did not know they were calling law enforcement personnel.[240] This arguably fits with the result in *Davis* as well. Foreshadowing *Davis/Hammon*, Mosteller wrote: "At some point in a conversation, which initially began for a purpose other than establishing guilt in a criminal case, the purpose may change to the testimonial purpose of creating evidence."[241] Thus, although both scholars profess a positive command to produce live witnesses in the Confrontation Clause, their theories would admit hearsay evidence even when it serves as the functional equivalent of an in-court accusation and when guilt or innocence turns on the credibility of the absent accuser.

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[238] Friedman & McCormack, *supra* note 3, at 1252; *see also id.* at 1228 ("The willingness of courts to allow prosecutors to prove their cases through dial-in testimony, without even demonstrating why the caller has not been brought to court as a witness, demonstrates that something has gone very wrong with the jurisprudence of the confrontation right; a proper conception of the right would not tolerate the practice.").

[239] *Id.* at 1242. Friedman and McCormack explain this cry for help quite narrowly: cries for help are non-testimonial "at least to the extent they are not offered to prove the truth of what they assert." This sounds more like what this Article recommends: looking at the way the evidence is used at trial. The authors then continue by writing that "the more the statement narrates events, rather than merely asking for help, the more likely it is to be considered testimonial." *Id.*; *see also* Richard J. Friedman, *Grappling With The Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 255-56 (2005). *But see* Friedman, *supra* note 38, at 1039 ("If, by contrast, the declarant correctly understands that her statement will be presented at trial, than [sic] the statement does appear testimonial.").

[240] *See* Mosteller, Crawford, *supra* note 225, at 577.

[241] *Id.*

One problem with focusing on how evidence is gathered instead of the role it plays at trial is that it permits manipulation by police and police agents. As Mosteller notes, the government is all too happy to change its methods of gathering information to conform to admissibility requirements.[242] Field investigations will be manipulated in order to make it fit the definition of testimonial.[243]

Manipulation may be bad for confrontation rights but we should not blame the police for working to ensure that cases are not dismissed for a lack of witnesses.[244] After all, in the *Miranda* context, police have learned to give the warnings to suspects in such a way that they still manage to obtain statements, and alteration of confession-gathering is not perceived negatively.[245] On the contrary, altered police practices incorporating the Supreme Court rulings such as *Miranda* or those governing search and seizure are viewed as the proper adjustment mandated by resolution of the Confrontation Clause; it was a correction rather than manipulation.[246] The Fifth Amendment concern was with the manner in which evidence was gathered, not a hope that there would be fewer confessions at trial. Thus, it was hoped and expected that police would change their practices to adapt to

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[242] Mosteller, Crawford, *supra* note 225, at 568 ("[T]wo factors can easily be manipulated. Statements, once taken at the station house, could henceforth be made in the field, and they might not be formally recorded. Even as to the structured questioning, a bright line could sometimes be avoided. The first interview with a victim might be conducted by an officer using only a single or a few 'what happened?'-type questions.").

[243] *Id.* at 529-30, 539-40, 543-44, 566. This argument forms a large part of the *Hammon* brief before the Supreme Court. *See* Brief of Petitioner Hammon, *supra* note 176.

[244] *See* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 47 & n.192 (2006) (noting that "prosecutors are trained to draft DV complaints using hearsay exceptions, such as the victim's excited utterances at the scene" and that "[t]his drafting practice will undoubtedly have to be modified after *Davis v. Washington*").

[245] *See* Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 743 (1992) ("For the police, the *Miranda* procedure was relatively easy to incorporate into their standard arrest practices."). A report by the American Bar Association found that "[a] very strong majority of those surveyed—prosecutors, judges, and police officers—agree that compliance with *Miranda* does not present serious problems for law enforcement." AM. BAR ASS'N, SPECIAL COMM. ON CRIM. JUSTICE IN A FREE SOC'Y, CRIMINAL JUSTICE IN CRISIS 28 (1988); *see* Dickerson v. United States, 530 U.S. 428 (2000); *see also* Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 505 (1996). William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 985 (2001) ("[T]hese lax waiver decisions are a natural corollary to using Miranda to encourage good police questioning (and to discourage the bad kind). If that is Miranda's object, courts should give police a good deal of leeway to persuade suspects to talk—as long as those same courts strictly enforce the ban on post-invocation questioning."). *But see* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998).

[246] *See* Stuntz, *supra* note 245, at 976-77.

the new rules. The Sixth Amendment is different. Police adaptation to new Confrontation Clause jurisprudence will create bad outcomes in the confrontation context because the clause aspires to result in fewer absent witnesses and more in-court testimony. The fault does not lie with the police. Rather, the problem is the Court's focus on the gathering of statements to satisfy confrontation rights that confuses the Sixth Amendment Confrontation Clause, a trial right, with production rights that reside in the Fourth and Fifth Amendments.

By accepting that the clause is most concerned with the production of evidence rather than the recitation of evidence at trial, Mosteller fails to cure the problem he envisions because his definition of testimonial does not eliminate manipulation.[247] For example, if the testimonial nature of 911 calls is determined by whether the speaker is making a call for help or whether the official staffing the help line is seeking information to aid in prosecution, 911 operators can be trained to ensure maximum admissibility of calls made to them.[248] These operators can ask questions that obtain information essential to trial early in the conversation. Then, the operators can question the declarant about whether she feels safe or threatened at the time she phones in the accusation, so a judge might deem it part of the emergency response. Moreover, there is nothing to prevent a judge from interpreting 911 calls and statements to police at the scene as calls for help, even if Mosteller and other scholars would think that the evidence fits squarely in the accusatorial domain.

Similarly, Friedman and McCormack describe the reasonable state of mind standard broadly, and assume it will result in more live confrontation in criminal trials.[249] Friedman and McCormick note that most people who call the police know that the government is going to use the information to

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[247] Mosteller, *supra* note 225, at 529-30 ("by others that are similar in substantive result, but less clearly produce testimonial statements").

[248] As set forth Section IV.B.2.d, *supra*, there will be efforts underway to change practices after *Davis*, just as there were after *Crawford*.

[249] *See* People v. Cage, 15 Cal. Rptr. 3d 846, 855 (Cal. Ct. App. 2004) (noting that *Crawford* states "an objective, 'reasonable person' test," but the court still held the statements are non-testimonial since "no reasonable person in John's shoes would have expected his statements to Dr. Russell to be used prosecutorially, at defendant's trial . . . even if he thought the doctor might relay his statements to the police."). The reasonable person standard can (and arguably should) easily be converted into a reasonable victim standard, as we have seen in post-*Crawford* cases. *But see* United States v. Cromer, 389 F.3d 662, 673 (6th Cir. 2004) (accepting Friedman's view that "[a] statement made knowingly to the authorities that describes criminal activity is almost always testimonial," and applying it in a drug trafficking case, where the police testified that a confidential informant's description of the person who sold him drugs matched defendant) (citations omitted).

aid investigation and possible prosecution of the person they are accusing.[250] However, some calls are a cry for help.[251] Friedman and McCormack explain this cry for help quite narrowly: cries for help are non-testimonial "at least to the extent they are not offered to prove the truth of what they assert."[252] The authors then continue by writing that "the more the statement narrates events, rather than merely asking for help, the more likely it is to be considered testimonial."[253]

While scholars view the state of mind theory of confrontation as an expansive reading of the clause requiring more confrontation of witnesses, there is no assurance that the theory will actually result in more confrontation in practice. There is little incentive for judges to apply the same standards of reasonableness as Friedman and McCormack, and there is strong incentive for judges to rule in ways that allow a trial to proceed in the absence of witnesses.[254] After all, the defendant's case is likely to be dismissed if judges construe the statements as testimonial. If the statements are deemed non-testimonial, the only recourse for the defendant is an appeal after a conviction, for which the standard of review will be the deferential abuse of discretion.[255]

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[250] Friedman and McCormack, *supra* note 3, at 1250-51.

[251] *Id.* at 1240-44. Friedman and McCormack espouse an objective test, but sometimes the article lapses into subjective language, such as in the following instance: "If a person made a statement with the anticipation that it would be used in prosecuting the accused, and the statement were so used, then the person should be deemed to be testifying against the accused." *Id.* at 1240.

[252] *Id.* at 1242.

[253] *Id.* Although the authors propose a state of mind test generally, here the distinction they make between cries for help that are testimonial versus cries for help that are non-testimonial do not consider the mindset of the person making the call nor of a reasonable person making the call. Rather, the distinction they draw depends on the way the evidence is used at trial, even though they do not consciously endorse such a test. Where the statements are "not offered to prove the truth of what they assert," there is no confrontation problem, but where the narrative is used to prove what actually happened, then the evidence is testimonial. *Id.* That is a distinction this Article would draw, for it is based on how the evidence is used at trial—a functional theory that is less capable of manipulation and more connected to the purposes of the clause.

[254] *See infra* note 258.

[255] *See, e.g.*, Barbeck v. Twinsburg Twp., 597 N.E.2d 1204, 1207 (Ohio Ct. App. 1992) ("Given its superior vantage, the trial court enjoys broad discretion in the admission and exclusion of evidence and will not be reversed absent a clear abuse which had materially prejudiced an objecting party."). Rarely will a trial judge be overruled. *See, e.g.*, Commonwealth v. Santiago, 774 N.E.2d 143, 148 (Mass. 2002) (finding that a trial judge had the discretion to admit a statement made by the defendant's girlfriend upon his arrest); *id.* at 149 (Cowin, J. dissenting) (noting that the statement allowed by the majority was "not an emotionally generated outcry but an attempt to explain the incident").

Friedman has written about the Framers' distrust of judges in their gatekeeper function in determining whether a jury is entitled to see the accuser.[256] But his theory does not put sufficient safeguards in place to satisfy the Framers' distrust of judges as gatekeepers. Although he decried the lack of confrontation rights in domestic violence trials, the state of mind test that Friedman proposed was frequently misused after *Crawford* to deprive defendants of confrontation rights.[257] Many courts after *Crawford* have used the state of mind test as a way of depriving confrontation rights in domestic violence cases. Some courts have held that all excited utterances are, by definition, made without time to reflect and therefore are not made in contemplation of prosecution.[258] Other courts, such as the Indiana courts deciding *Hammon*, have looked at the state of mind of the victim in a case-by-case approach and still conclude that the declarant was not making the statement in contemplation of its use in the upcoming trial.[259] Post-*Crawford* opinions make it clear that regardless of whether courts employ an objective or subjective standard, as long as they apply a state of mind test, many courts will find that declarants would not have thought about the results of calling the police, so their statements to operators are not testimonial.

Only by forcing judges to look at the trial itself and the way evidence is used will manipulation become impossible. Mosteller's aspiration that the clause be read as a positive command to afford more confrontation will only be achieved if trial judges consider whether the evidence before them

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[256] Friedman, *Confrontation*, *supra* note 38, at 1029 ("If such a reliability test were applied rigorously—admitting a statement only if the courts were extremely confident that it was so clearly reliable that cross-examination would have done no good—very little evidence would satisfy it. But some courts, at least, are more inclined to treat the test as a generous doorway for prosecution evidence.").

[257] *See, e.g.*, People v. Corella, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (quoted approvingly in State v. Davis 111 P.3d 811, 849-50 (Wash. 2005), *aff'd*, 126 S. Ct. 2266 (2006)). *See generally* Friedman & McCormack, *supra* note 3.

[258] *See, e.g.*, State v. Ohlson, 125 P.3d 990, 995 (Wash. Ct. App. 2005) (deciding "to adopt a per se rule that excited utterances are not testimonial" because it "is not reasonable to regard an excited utterance as 'bearing witness' such that the declarant would know that it would be used in a later prosecution").

[259] Hammon v. State, 829 N.E.2d 444, 457 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126 S. Ct. 2266 (2006) ("[W]e believe that whether a statement from a declarant to a police officer is testimonial will hinge upon the intent of the declarant in making the statement and the purpose for which the police officer elicited the statement."); *see* Hammon v. State, 809 N.E.2d 945, 952-53 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* Davis v. Washington, 126 S. Ct. 2266 (2006) ("An unrehearsed statement made without time for reflection or deliberation, as required to be an 'excited utterance,' is not 'testimonial' in that such a statement, by definition, has not been made in contemplation of its use in a future trial.").

at trial functions as testimony and therefore requires the opportunity for cross-examination. This in-court analysis cannot be as readily manipulated by prosecutors and police or misapplied by judges.

While the test I propose is consistent with the views of Mosteller and Friedman, my test is more likely to secure the result that both scholars favor.

D. WHY SOME CASUAL STATEMENTS MAY BE TESTIMONIAL AND SOME STATEMENTS OBTAINED DURING STRUCTURED POLICE QUESTIONING ARE NOT

The definition of "testimonial" I propose is broader in some respects and narrower in others from that proposed by other commentators. It is broader than what any other commentator has adopted because it applies the clause to some statements made to non-police even though the declarant did not realize how the government would take and use his statement. Under my definition of testimonial, even a casual statement of one person to another should be subject to cross-examination if the prosecution intends to convict the defendant on the basis of that informal accusation and the judge recognizes that the credibility of the declarant is material to the outcome of the case. This proposed definition is arguably at odds with the *Crawford* decision, but only at odds with dicta in *Crawford* and is, in fact, congruous with *Crawford*'s holding.[260]

A hypothetical can illustrate why the clause is broad enough to include casual accusations made out-of-court and repeated at trial. Imagine if the government, upon hearing an allegation of domestic violence, searched e-mail databases and diaries and interviewed neighbors to learn about remarks and accusations concerning assaultive behaviors that were made without the purpose of alerting authorities. To convict on these statements without live witnesses would offend the notion that "no man shall be prejudiced by evidence which he had not the liberty to cross examine."[261] Similarly, imagine if the historic Salem witch trials had proceeded without the presence of the declarants, and their slanderous accusations had been simply repeated by other townspeople in court. The mere fact that someone has no intention that his remarks will end up in court is hardly proof that cross-examination is unnecessary to probe bias or mistake. Indeed, the very concept of face-to-face confrontation rests in part on the presumption that people are more likely to tell the truth if they realize that there are

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[260] *See supra* Section II.

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

consequences to their words, including the consequence of putting another in jeopardy of losing her liberty.

Casual statements played a role in the early abuses in England.[262] In the hated Court of High Commission in England, proceedings could be initiated by hearsay evidence that "the accused's guilt was 'blowen abroad' or 'bruited about' the community," or that mere rumors of heresy existed.[263] Foxe's *Book of Martyrs*, published abroad by the Marian exiles, recounted how during the reign of Queen Mary, "people were held on suspicion supported only by reports of informers or the tittle-tattle of neighbors and acquaintances."[264]

Much is made of Sir Walter Raleigh's trial in *Crawford* and many have opined that his famous conviction had an impact on the Confrontation Clause.[265] When Raleigh demanded that Lord Cobham be produced, the gravamen of Raleigh's objection was that the government had accused him based upon out-of-court allegations primarily by his alleged accomplice, Cobham, repeated in court.[266] The case's legacy has sometimes been understood as a critique of the way the government convinced Cobham to finger Raleigh. For example, some think that police falsely informed Cobham that Raleigh had snitched on him, but modern courts allow a certain amount of deception in gathering statements from suspects—hence the trickery of gathering evidence can hardly be as pronounced as the focus

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[262] *See* CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 30 FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6342 (1997 & Supp. 2006).

[263] *Id.* at 252 n.483.

[264] *Id.* at 247-48. Foxe's *Book of Martyrs*, published in 1554 and 1559, was devoted to accounts of the trials of the persecuted in England. "[C]opies were carried to America by the early settlers." *Id.* at 248 n.453.

[265] *Id.* at 258-59 nn.533-41 (discussing the range of claims concerning Raleigh's effect on the framing of the Confrontation Clause). Wright and Graham conclude that "Raleigh's tale is part of the story of the Confrontation Clause, but far from the whole story." *Id.* at 259. Sir Walter Raleigh was charged with conspiring with Lord Cobham and two others with treason against King James I. *Id.* at 260. Wright and Graham describe Raleigh as a combination of "[e]xplorer, poet, historian, proto-scientist, political adventurer" and "extravagant character." *Id.* at 258. After Raleigh was convicted in "less than 15 minutes" by a jury in 1603 and sentenced to death, he received a reprieve, spent thirteen years in the Tower, and was "paroled to go on a gold-seeking expedition," only to have his original sentence carried out:

> Thus, in what may well be the most ironic moment in the history of the right of a confrontation, a man who had gained fame fighting the Spanish, then was convicted of conspiring with them against his own government, was finally put to death to satisfy their demands. It is a fitting close to this chapter of the story.

Id. at 268-69; *see also* Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 & n.4 (1972).

[266] *Crawford*, 541 U.S. at 44.

of Raleigh's impassioned plea to "let my accuser come face to face and be deposed."[267] Although the Raleigh court received government-created evidence such as interrogatories, part of the evidence from the absent Cobham was in the form of letters that may have been unsolicited by the government.[268] The problem was not that Cobham must have known that the government would introduce his unsigned letter when he wrote it, but that the government introduced it instead of producing the declarant. In other words, it was not that the government lied about what Cobham said, but that Cobham may have lied in saying it; so his appearance at trial would be especially critical. It was the letter's use at trial, not its manufacture, that offended those interested in ensuring a right to confront witnesses in the United States.

Raleigh also complained about the other types of hearsay introduced at trial:

> [I]f witnesses are to speak by relation of one another, by this means you may have any man's life in a week; and I may be massacred by mere hearsay .... You say that Brooke told Watson what Cobham told Brooke, that I said to him;—what proof is this? To show that my Lord Cobham accuseth me truly, you vouch Watson and Brooke, men with whom I never had to do in my life ....[269]

Treatise authors Wright and Graham explained that hearsay rules were less developed then: "For the judges of the time, it was enough to instruct the jury that all the hearsay was only for 'corroboration.'"[270]

Professor Amar has written that casual statements need not be subject to cross-examination, as the jury is likely not to give them high value because they were made casually.[271] This assumption is disproved by the fact that casual admissions to jailhouse informants have helped to place men on death row.[272] Moreover, the Framers' distrust of government

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[267] WRIGHT & GRAHAM, *supra* note 262, at 265 & n.586 (citing DAVID JARDINE, 1 CRIMINAL TRIALS 427 (1832)).

[268] Mosteller, Crawford, *supra* note 225, at 545 ("While the voluntariness of the statements may be doubted, nothing in the proceedings indicated that the first letter was solicited by the Council and the second was stated to be unsolicited.").

[269] WRIGHT & GRAHAM, *supra* note 262, at 265-66 (citing JARDINE, *supra* note 267, at 429-30).

[270] JARDINE, *supra* note 267, at 430; Mosteller, Crawford, *supra* note 225, at 569 (writing "[t]he hearsay rule of that time did not have the ready exceptions available today").

[271] Amar, *supra* note 206, at 694 ("By contrast, a jury would be much more likely to discount friend B's tale, since B took no oath, and may have been speaking loosely ....").

[272] *See* NORTHWESTERN UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW (2005), *available at* http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf (describing in detail how the use of jailhouse informants contributed to the conviction of specific innocent defendants); Michael L. Radelet & Hugo

should be interpreted more broadly than a distrust in the manner of producing statements later brought into trial. The government's role is large in criminal cases: it brings the charges, interviews witnesses, arranges for these witnesses to appear at trial, and argues the case to the jury. The essence of the government's role in a criminal trial is to attempt to take away the liberty of another human being. Even where the government seeks some sanction less than incarceration, the conviction is almost certain to amount to a deprivation of rights. Since the most significant deprivation of rights comes after trial and not during the gathering of the evidence, it is the use of a statement at trial, rather than how the statement was garnered, that makes it a tool of the government. Perhaps the fact that casual statements are not generally admissible in criminal trials and their veracity is often doubted makes it seem like such a safe bet to banish them from the reach of the Confrontation Clause. However, if we could imagine a world in which people were generally hauled off to jail based on casual statements later forwarded to the police, the limitations on the clause endorsed by scholars Amar, Friedman, and Mosteller would make little sense. [273]

The Framers did not create the Confrontation Clause in order to change the manner in which the government gathers evidence or investigates a case.[274] Take grand jury testimony, for example. As *Crawford* states, one of the core abuses that the Confrontation Clause guards against is the possibility of grand jury testimony introduced in place of live testimony.[275] Yet the Framers were not opposed to grand jury proceedings nor would the Framers have wished the grand jury process to be replaced with a more casual gathering of statements. In fact, being

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Adam Bedau, *The Execution of the Innocent*, LAW & CONTEMP. PROBS., Aug. 1998, at 105; The Innocence Project: Jailhouse Snitches, http://www.innocenceproject.org/causes/snitches.php (last visited Nov. 6, 2006) ("The use of jailhouse informants, especially in return for deals, special treatment, or the dropping of charges, has proven to be a specious form of evidence, as has testimony that has only appeared after rewards were offered. Often, the testimony of these snitches and informants has been the key in sending an innocent man or woman to prison for a crime he or she did not commit. . . . In Canada, after the exoneration of Guy Paul Morin, a commission was established to review the causes of his conviction and propose remedies for similar situations. The Commission's findings can be downloaded at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/.").

[273] Although Friedman does not specifically address how the Framers would view a system where the government gathered informal statements that were originally made without any intention that they would later be used at trial, his focus on declarants knowing that they are testifying implicitly allows other informal statements to be introduced at trial, such as accusations that substitute for face-to-face testimony. This seems inconsistent with Friedman's own disparagement of the formality requirement, and his general arguments in favor of a system where informal accusations should not take the place of sworn testimony.

[274] Mosteller, Crawford, *supra* note 225, at 565.

[275] Crawford v. United States, 541 U.S. 36, 68 (2004).

indicted by a grand jury is a right that benefits the accused and the Framers mandated such a proceeding elsewhere in the Bill of Rights.[276] The Framers simply did not want that right to replace the confrontation right at trial.[277] Hence, it is not a distrust of the creation of the evidence that lies at the heart of the clause, but rather a concern that canned evidence not substitute for live testimony.

In sum, there is widespread agreement that the Sixth Amendment is connected to the Framers' distrust of government, but this distrust should not end when the government gathers seemingly casual comments, whose truth or falsity determines the validity of the charges, and turns them into the cornerstone of a trial. After all, the government's role in a criminal prosecution is hardly limited to producing information; the confrontation right is a trial right, and the government's biggest role at trial is in presenting its case against the accused. It is obviously easier and more efficient to do so without requiring the presence or cross-examination of witnesses, but as *Crawford* decrees, that is precisely what the clause requires.

The definition I propose is also narrower than many interpretations of *Crawford* because certain hearsay would need not be subject to cross-examination, even if such statements were gathered by law enforcement for law enforcement purposes. Even where a witness knows he is speaking to the police and gives a narrative, that evidence may not offend the Confrontation Clause if the evidence is used for some other purpose than to prove the events described therein.

For example, imagine that a fictional Ms. Crawford simply gave the interrogating officer the address where she and Mr. Crawford resided. This background information may be useful to the government in a number of ways, perhaps to show that a person seen near that residence was likely to be Mr. Crawford. Other theorists might claim this statement to be testimonial since it was obtained during police interrogation. Yet the functional approach would say that this information was not testimonial evidence; Ms. Crawford would not be Mr. Crawford's accuser in the way that Cobham was Raleigh's or the way she was in the actual *Crawford* case. In our hypothetical, it would be difficult for a prosecutor to argue that the jury knew Mr. Crawford was guilty because they have the words from "the witness."

For a more complicated example, imagine that a fictional Ms. Crawford gave some valuable information to the police, such as informing

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[276] U.S. CONST. amend. V.

[277] *Crawford*, 541 U.S. at 68.

them that she was raped and that her husband knew that she was raped because she told him. The government would like to use this information in her husband's trial because it helps them prove a motive for the subsequent killing of the rapist. Unlike the true *Crawford* situation, Ms. Crawford does not then say that the victim was killed or that her husband did the killing. Other theorists would allow this statement to be admitted in court if the police learned of it during a cry for help to a 911 operator or to a neighbor, but not if the police interviewed her more formally. The functional approach that I propose would decide whether or not Ms. Crawford constitutes an accuser under the Sixth Amendment based on the facts of this case. Proving a motive for a killing is very different from proving an element or all the elements of the charge. This information was helpful to the government, but it did not make Ms. Crawford an accuser at the trial. Thus, not every piece of information at trial would count as an accusation.

Another example would be a hospital record in which a victim said her arm hurts. This statement would be non-testimonial, whereas the statement "Betty hit me" would be testimonial in a trial against Betty for assault. While having a hurt arm is relevant to whether or not the victim was assaulted by Betty, it is not an accusation. For either situation, the trial judge need not worry about whether the physician who examined the patient did so primarily for the purpose of testifying for the state or whether the statement was similar to a cry for help. For the complaint about a sore arm, the admissibility of her medical condition may be decided by evidence law and does not offend the Constitution.[278] For the victim's accusation against Betty of criminal wrongdoing, this would only be admitted during a criminal trial if the alleged victim was there, in person, to cross-examine.

My proposed test is consistent with the test for admitting business records in criminal cases. Courts would look to the use of the evidence at trial rather than the purpose the officer had in asking the questions contained in the reports. Under my proposed functional theory, police reports would be admissible for non-accusatory purposes, such as proving that a police officer had been out in the field for four hours that day, or had

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[278] This definition of testimonial is consistent with the old rule regarding statements for the purpose of medical diagnosis or treatment. The majority rule before 1975 "prevented admission of testimony concerning the cause of the injury as not connected with treatment and excluded statements made to a physician who examined the patient solely for the purpose of testifying." United States v. Iron Shell, 633 F.2d 77, 83 n.8 (8th Cir. 1980). Federal Rule of Evidence 803(4) expanded upon prior practice based on the reliability of statements to doctors given a "patient's strong motive to tell the truth because diagnosis or treatment will depend in part upon what the patient says." *Id.* at 83-84. This federal rule allows statements to doctors that are "reasonably pertinent to diagnosis or treatment." *Id.* at 83 n.8.

just arrested a different person twenty minutes before the call came in the current case. However, the government could not introduce a report from Officer Smith that states "suspect admitted he assaulted victim" in the absence of Officer Smith. Officer Smith would be the accusing witness at trial, and his presence would be required. One might say that the rules of evidence already apply this functional approach to business records in criminal trials.[279]

Judges already look at how evidence functions in the context of a trial to determine relevancy, so it is well within their capabilities to determine the function the evidence plays at trial. Unlike the *Davis/Hammon* Court's jurisprudence that looks backwards, a jurisprudence based on the role that the evidence plays at trial will involve less speculation. It will also be capable of review by an appellate court because the record of the proceedings will preserve the role the evidence plays in the trial and it does not require a trial judge to weigh the credibility of the police officer in making this determination. This should result in less deference to a trial judge's findings than in the review of the reliability of evidence determinations under *Roberts*.

VI. CONCLUSION: THE TRIUMPH OF FORM OVER SUBSTANCE

Under the new Confrontation Clause jurisprudence announced in *Crawford*, asking whether a statement is testimonial is the same thing as asking whether an absent witness constitutes a witness for the purposes of the Confrontation Clause. This Article applauds the Court's connection between the concepts of "witness" and "testimony" and recommends that the connection be strengthened by looking at what these two terms mean in the context of a criminal trial.

When the Supreme Court granted certiorari for the cases of *Davis v. Washington* and *Hammon v. Indiana*, the Court had an opportunity to clarify *Crawford* and to reaffirm *Crawford*'s goal of live witnesses at trial. Instead, the Court's decision in *Davis/Hammon* created new uncertainties and continued *Crawford*'s contradiction between its stated goal for more confrontation and its analysis that shrinks the scope of the Confrontation

[279] Although the Federal Rule of Evidence 803(8) creates a hearsay exception for certain public records and reports, it specifically excludes reports of law enforcement personnel offered against the accused in a criminal case: "The legislative history of the rule makes it plain that Congress fully intended to exclude such reports against the accused." *See* GEORGE FISHER, EVIDENCE 503 (2002). Similarly, when the Supreme Court states that business records are likely exempt from the Confrontation Clause, *see Crawford*, 541 U.S. at 56, the Court does not mean that states may allow police reports into evidence against the person they were designed to convict. That would indeed be an end run around the Confrontation Clause.

Clause. Moreover, *Crawford*'s central contradiction was no longer just dicta. The Court in *Davis/Hammon* determined that whether accusatory statements fell within the Confrontation Clause depended on how the inculpating statements were gathered by the government, rather than whether the statements served the place of live testimony at trial, thereby cementing *Crawford's* contradiction.

The real witness in a trial is not the person who repeats the statement, such as the police officer in *Hammon* or the operator or tape recorder in *Davis*, but the person who made the statement accusing the defendant of a crime. It is the declarant's credibility that matters when the fact finders deliberate about the truth of the charges. Those accusations are "testimonial," for they constitute out-of-court statements that substitute for live testimony at trial. The original purpose of the Confrontation Clause was not to tell the government how to investigate cases but to allow criminal defendants to test the reliability of all testamentary evidence through direct and cross-examination. The Court can recognize this fundamental purpose of the clause without returning to *Roberts* and without turning its back on *Crawford*'s promise or its holding. In fact, this recognition is essential to fulfill *Crawford*'s promise.

The *Davis/Hammon* decision suffers in its reasoning and clarity because it did not take a functional approach to the evidence before it. The Court flounders around, grabbing different tests as it attempts to differentiate the "testimonial" statements introduced in the *Hammon* trial from the "non-testimonial" statements introduced in the *Davis* trial. In trying to find a principled way to distinguish the statements in *Davis* from *Crawford*, the Court used the state of mind of the witness at the time she made the statement, the immediacy of the crime, and the formality of questioning by the police in addition to analyzing the objective intent of the officer. The Court appears dissatisfied with any particular test to determine testimonial, and fails to provide a clear definition of core testimonial statements in *Davis/Hammon*.

While the multitude of tests hides some of the incongruities of any one test, it fails to provide true guidance for lower courts applying this new Confrontation Clause jurisprudence. Worse, the confused analysis allows future courts too much leeway in differentiating the statements before them from statements deemed testimonial in *Crawford* and *Hammon*, thereby encouraging judges to allow in substitutes for live testimony in future trials. Whenever statements fall outside the scope of the newly constituted Confrontation Clause, judges are free to make the same old reliability determinations and decide that having a live witness adds nothing to a

jury's ability to render an assessment of the truth of the charge.[280] Hence, the Court needs to be very particular about what type of evidence it excludes from the scope of the clause. With the *Davis/Hammon* case, the Court has arguably created a system in which judges decide the reliability of all accusations except those made in response to government officials whose primary purpose was to establish past events. The prosecutor in *Davis* used the term testimony in the correct sense when she informed the jury that the alleged victim "left you her testimony."[281]

As long as the Court casts its sights backwards, trying to divine the primary purpose that a reasonable officer would have in asking questions or divining the thought process of a reasonable absent witness in making statements, the Court will create a disconnect between the term "witness" as it appears in the Sixth Amendment and the term "witness" as it is commonly understood at trial, meaning a person whose credibility is at issue to the outcome of the charge. After *Crawford* and *Davis/Hammon*, witness no longer means witness and testimonial has become unmoored from the concept of testimony at trial.

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[280] James Duane, *The Cryptographic Coroner's Report On* Ohio v. Roberts, CRIM. JUST., Fall 2006, at 37, 37-38 (explaining how oblique the reference was when *Davis* overruled *Roberts*. From hereon in, whether hearsay evidence is unreliable is no longer a concern of the Confrontation Clause.).

[281] *See* discussion *supra* at Section III.B. The closing argument appeared in the *Davis* appellate brief. Brief of Petitioner Davis, *supra* note 5, at 8.