View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Kentucky

Kentucky Law Journal

Volume 94 | Issue 1 Article 8

2005

Testimonial or Nontestimonial? The Admissibility of Forensic Evidence after Crawford v. Washington

John M. Spires
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Criminal Procedure Commons, and the Evidence Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Spires, John M. (2005) "Testimonial or Nontestimonial? The Admissibility of Forensic Evidence after Crawford v. Washington," *Kentucky Law Journal*: Vol. 94 : Iss. 1 , Article 8.
Available at: https://uknowledge.uky.edu/klj/vol94/iss1/8

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Testimonial or Nontestimonial? The Admissibility of Forensic Evidence after *Crawford v. Washington*

John M. Spires[1]

I. Introduction

WHILE forensic investigations and evidence have long been key elements of criminal prosecutions across the nation, current trends show that the importance of scientific data is rising. In 2001, for example, more than two-thirds of prosecutors' offices in the United States used DNA evidence during plea negotiations or felony trials, compared to one-half of such offices only five years before.[2] Also, in a recent retrial for the murder of casino heir Ted Binion, legal experts surmised that the defense's presentation of scientific experts to rebut the prosecution's theory of the case was the most important factor in the defendants' acquittals.[3] Perhaps most interestingly, popular television programs such as *CSI* and *Cold Case* lead juries to routinely expect the use of scientific evidence against criminal defendants, inducing many prosecutors to have "negative evidence witnesses" testify that it is "not unusual for real crime-scene investigators to fail to find DNA, fingerprints and other evidence at crime scenes."[4] For better or for worse, scientific evidence is not only valuable to a successful criminal prosecution, but it may also be indispensable in the eyes of many jurors.

Before a jury even sees forensic evidence, prosecutors must first establish its admissibility. Often, such evidence is proffered in the form of a laboratory report, and the preparer is not called as a witness by the prosecution. The defense cannot cross-examine the preparer, and the prosecution must satisfy the requirements of both evidence law and constitutional law

1 J.D. expected 2006, University of Kentucky; B.A. 2001, Wake Forest University. The author would like to thank Professors William H. Fortune and Robert G. Lawson for their assistance in formulating this topic and in writing this note. The author would also like to thank his parents, Stephen and Susan Spires, for their love and support.

2 Bureau of Justice Statistics, *Prosecution Statistics*, June 13, 2005, http://www.ojp.usdoj.gov/bjs/pros.htm.

3 Glenn Puit, *Binion Forensic Evidence Crucial*, LAS VEGAS REVIEW-JOURNAL, Nov. 27, 2004, at 1A.

4 Richard Willing, *'CSI Effect' Has Juries Wanting More Evidence*, USA TODAY, Aug. 5, 2004, at 1A; *see also* Jane Ann Morrison, *'CSI Effect' May Have Led Binion Jurors to Demand Harder Evidence*, LAS VEGAS REVIEW-JOURNAL, Dec. 2, 2004, at 1B.

before the report is admissible as evidence.[5] Evidence law requires that a report offered at trial without testimony from its preparer be classified as hearsay, and the report must fit under a hearsay exception before it is admissible.[6] Constitutional law requires that the admission of the evidence not run afoul of the Confrontation Clause of the Sixth Amendment.[7]

Until recently, the reliability-based test of *Ohio v. Roberts* determined whether the Confrontation Clause had been satisfied.[8] However, in *Crawford v. Washington*,[9] the United States Supreme Court rejected the *Roberts* analysis and altered Confrontation Clause principles significantly. Under *Crawford*, the Confrontation Clause is implicated when the proffered evidence is testimonial.[10] In that situation, the evidence is inadmissible unless the declarant is unavailable and the defendant has had an opportunity to cross-examine him or her.[11] However, if the evidence is seen as nontestimonial, *Crawford* allows the states greater flexibility in their development of the hearsay law applicable to such statements.[12]

The sticking point in *Crawford* is that the Court expressly declined to finely detail what evidence the term *testimonial* encompasses,[13] meaning the admissibility of crucial forensic evidence when the defendant is afforded no opportunity for cross-examination is uncertain. This lack of information is not a matter of idle concern, and the *Crawford* majority immediately received criticism on this point:

> [T]he thousands of federal prosecutors and the 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.[14]

Clearly, shedding light on the admissibility of forensic evidence in the post-*Crawford* era is a necessity.

5 *See* Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671, 673 (1988) [hereinafter Giannelli, *Admissibility*] ("When the report is used as a substitute for expert testimony, however, cross-examination is foreclosed and important hearsay and confrontation issues are raised.").

6 *See infra* notes 28–30 and accompanying text.

7 U.S. CONST. amend. VI.

8 Ohio v. Roberts, 448 U.S. 56 (1980), *overruled by* Crawford v. Washington, 541 U.S. 36 (2004); *see also infra* notes 31–34 and accompanying text.

9 Crawford v. Washington, 541 U.S. 36 (2004).

10 *Id.* at 51.

11 *Id.* at 68.

12 *Id.*

13 *Id.*

14 *Id.* at 75–76 (Rehnquist, C.J., concurring in the judgment).

The following presents an examination of whether and in what circumstances lab reports and other forensic evidence are testimonial. Specifically, Part II addresses the origins of the Confrontation Clause and the various interpretations the Supreme Court has accorded it.[15] Part III considers the Supreme Court's opinion in *Crawford* and the work of commentators on constitutional law (particularly Professors Akhil Reed Amar and Richard D. Friedman) in formulating a workable definition of the term testimonial.[16] In Part IV, this definition is applied to the discrete topic of forensic evidence.[17] These parts show that the issue of whether forensic evidence is testimonial is to be determined in much the same way the issue is considered for any other piece of evidence. Part V examines how *Crawford* is likely to affect the trial of criminal cases and also analyzes some unanswered questions.[18] This part will discuss some of the finer points of forensic evidence practice post-*Crawford*. It ends with the conclusion that the effects of *Crawford* in the majority of cases are likely to be less dramatic than expected, but that refinement of the *Crawford* approach is necessary to deal with cases in which the theoretical uncertainty created by the opinion makes decisions difficult.

II. The Development of Confrontation Clause Jurisprudence

A. *Background*

The Confrontation Clause of the Sixth Amendment states, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...."[19] The United States Supreme Court later held that the right of confrontation was "essential and fundamental ... for the kind of fair trial which is this country's constitutional goal," and applied the Confrontation Clause to the States as well as the federal government.[20] Indeed, in an early decision, Chief Justice Marshall said of the Clause, "I know of no principel [sic] in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered."[21]

15 *See infra* notes 19–51 and accompanying text.

16 *See infra* notes 52–92 and accompanying text.

17 *See infra* notes 93–124 and accompanying text.

18 *See infra* notes 125–40 and accompanying text.

19 U.S. CONST. amend. VI.

20 Pointer v. Texas, 380 U.S. 400, 405–406 (1965).

21 United States v. Burr, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694); *see also* California v. Green, 399 U.S. 149, 158 (1970) (stating that cross-examination is "the greatest legal engine ever invented for the discovery of truth." (quoting 5 JOHN H. WIGMORE, EVIDENCE § 1367 (3d ed. 1940))).

But even though the Confrontation Clause is lauded as a necessary element of the American criminal justice system, application of the confrontation right[22] in criminal trials is often problematic. This is largely because, as Justice Thomas has stated, "[t]here is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean."[23] For example, the right to confrontation could be seen as extending only to those witnesses that actually appear and testify at trial.[24] The Supreme Court, however, abandoned this view as inconsistent with much of the history surrounding the development of the confrontation right.[25] Alternatively, the Clause could be read more expansively as a bar on the admissibility of any statement presented without the defendant having had the opportunity to cross-examine its speaker.[26] This theory was also abandoned due to the certain negative impact such a rule would have on the ability of the justice system to successfully administer criminal prosecutions.[27]

B. *Hearsay Law and* Ohio v. Roberts

One of the major problems that would result from a broad reading of the Confrontation Clause would be an impairment of the use of hearsay evidence. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[28] It is common knowledge that hearsay is presumptively inadmissible, a notion supported by the right to cross-examination guaran-

22 The United States Supreme Court has noted that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination," Davis v. Alaska, 415 U.S. 308, 315 (1974) (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965)), and the Court has "treated the accused's right to be brought 'face-to-face' with the witness as secondary to his right of cross-examination." Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1011 (1998) [hereinafter Friedman, *Confrontation*]. Hereinafter, the terms *confrontation* and *cross-examination* will be used interchangeably for simplicity.

23 White v. Illinois, 502 U.S. 346, 359 (1992) (Thomas, J., concurring in part and concurring in the judgment); *see also Green*, 399 U.S. at 176 n.8 (Harlan, J., concurring).

24 *White*, 502 U.S. at 359 (Thomas, J., concurring in part and concurring in the judgment); *see also* Giannelli, *Admissibility*, *supra* note 5, at 686.

25 *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 50–51 (2004) ("[W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'" (citation omitted)); *White*, 502 U.S. at 360–61 (discussing the prosecutorial abuses in England that led to the desire for defendants to have the right to confront their accusers).

26 *See* Giannelli, *Admissibility*, *supra* note 5, at 685–86.

27 *See, e.g.*, Mattox v. United States, 156 U.S. 237, 243 (1895) ("The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.").

28 FED. R. EVID. 801(c).

teed by the Confrontation Clause.[29] Nonetheless, much hearsay is actually admitted in criminal trials by virtue of hearsay exceptions,[30] provided the requirements of the Confrontation Clause are also met. Hearsay declarants can easily be seen as "witnesses" that the defendant in a criminal trial has had no opportunity to cross-examine. Thus, an expansive reading of the Clause would spell the end for nearly all hearsay exceptions. Because the admission of hearsay into evidence is often essential to a successful prosecution, the Court was determined to avoid that result in *Ohio v. Roberts*.[31]

Roberts sought to strike a balance between the constitutional protections the Confrontation Clause affords and the criminal justice interests that are served by the hearsay exceptions.[32] After proclaiming that the key purposes of the Confrontation Clause are the furtherance of "face-to-face accusation" and "accuracy in the fact-finding process,"[33] the *Roberts* Court formulated a test based on the reliability of the proffered hearsay evidence.

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." 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.[34]

C. Dissatisfaction with Roberts *and the Decision in* Crawford v. Washington

Although *Roberts* remained controlling authority for nearly twenty-five years, the rule announced in the decision generated harsh criticism from the legal community. First, although the Court had previously resisted meshing the requirements of the Confrontation Clause with hearsay law,[35]

29 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.1 (2d ed. 1999).

30 *See, e.g.*, FED. R. EVID. 803, 804.

31 Ohio v. Roberts, 448 U.S. 56, 63 (1980), *overruled by* Crawford v. Washington, 541 U.S. 36 (2004) ("But, if [the Confrontation Clause were applied literally], the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.").

32 *Id.* at 64.

33 *Id.* at 65.

34 *Id.* at 66.

35 *See, e.g.*, Dutton v. Evans, 400 U.S. 74, 86 (1970) ("[T]he Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now."); California v. Green, 399 U.S. 149, 155–56 (1970) ("[W]e have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.... The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation

the decision in *Roberts* was attacked for unnecessarily entangling the two.[36] Second, the reliability formula espoused in *Roberts* was seen as "a poor criterion to determine whether admissibility of the evidence will advance the truth-determination process.... It puts the cart before the horse, essentially asking whether the assertion made by the statement is true as a precondition to admissibility."[37]

Finally, commentators questioned the implicit assumption in *Roberts* that the Confrontation Clause applied to all hearsay and argued that it, in fact, applied only to a narrower class of evidence.[38] This latter argument was directly addressed and rejected by the majority in *White v. Illinois* as "foreclosed by [the Court's] prior cases."[39] In his concurrence, however, Justice Thomas suggested that the Court's understanding of the Confrontation Clause had "evolved in a manner that [was] perhaps inconsistent with the text and history of the Clause itself"[40] and that the Court should reconsider its reasoning "in an appropriate case."[41]

As it turned out, *Crawford v. Washington*[42] became Justice Thomas's "appropriate case." In his opinion for the Court in *Crawford*, Justice Scalia presented a detailed analysis of the prosecutorial abuses in English and early American law that led to the Framers' inclusion of the Confrontation Clause in the Sixth Amendment.[43] He also noted that the Court had previously found, contrary to *Roberts*, that "[t]he primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination ...."[44] The Court gleaned two conclusions from this research. "First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused."[45] Thus, the Court went on to hold that the primary (and perhaps even the sole) concern

---

rights have been denied.").

36 *See* White v. Illinois, 502 U.S. 346, 358 (1992) (Thomas, J., concurring in part and concurring in the judgment); Friedman, *Confrontation, supra* note 22, at 1016.

37 Friedman, *Confrontation, supra* note 22, at 1027–28.

38 *See* Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045 (1998); Friedman, *Confrontation, supra* note 22.

39 *White*, 502 U.S. at 352–53.

40 *Id.* at 358 (Thomas, J., concurring).

41 *Id.* at 366.

42 Crawford v. Washington, 541 U.S. 36 (2004).

43 *Id.* at 42–50.

44 Mattox v. United States, 156 U.S. 237, 242 (1895); *see also* California v. Green, 399 U.S. 149, 156 (1970) ("[T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions....").

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

of the Confrontation Clause was out-of-court statements by "witnesses" who "bear testimony"; in other words, "testimonial statements."[46]

The second conclusion reached by the Court was that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[47] This hard-line approach to the Clause translated into the Court's holding that, "[w]here testimonial evidence is at issue,... the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[48] When the evidence at issue is nontestimonial, the Court's opinion grants the states the liberty to regulate its admission through their hearsay law.[49] Thus, under the *Crawford* approach, establishing whether a statement is testimonial is of paramount importance.

Crawford was immediately hailed as a landmark decision,[50] and its effect on forensic evidence practice is readily apparent. When the preparer of forensic evidence does not testify, his or her laboratory report itself is hearsay if it is offered into evidence.[51] If forensic evidence is seen as testimonial, then, per *Crawford*, the prosecution must produce the technician or other expert who prepared it for cross-examination by the defense.

III. Defining Testimonial Hearsay

Because the admissibility of laboratory reports into evidence may now hinge on whether they are testimonial or nontestimonial, resolving what exactly is meant by the term *testimonial* is imperative. Fortunately, commentators (many of whom influenced the decision in *Crawford*) have theorized on the proper application of the Confrontation Clause. Furthermore, while *Crawford* did not deliver a precise definition of what constitutes testimonial hearsay,[52] the opinion did describe the broad outlines of the term. So, while guidance from the Supreme Court is required to pinpoint what evidence

46 *Id.* at 51.

47 *Id.* at 53–54.

48 *Id.* at 68.

49 *Id.*

50 *See, e.g.*, Bruce Kapsack & Steven Oberman, Crawford v. Washington: *The DUI Defense Practitioner's Perspective*, Champion, Sept.–Oct. 2004, at 25 (stating that *Crawford v. Washington* is "perhaps the most important case on cross-examination to date.").

51 *See, e.g.*, United States v. Oates, 560 F.2d 45, 65 (2d Cir. 1977) (holding that a laboratory "report and worksheet were 'written assertions' constituting 'statements' which were 'offered... in evidence... to prove the truth of the matters asserted (in them)'" and were, therefore, hearsay).

52 *Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

is properly the subject of the Confrontation Clause (i.e., what evidence is testimonial), a tentative framework based on scholarly research and case law is still practicable.

A. *Pre-*Crawford *Analyses of the Confrontation Clause*

In *White v. Illinois*,[53] the Supreme Court declined to reexamine the Confrontation Clause, but, by addressing the issue, the Court appeared to at least spark new interest in the debate over the Clause's application. In his concurrence, Justice Thomas argued that the focus of the Clause should be narrowed, suggesting that it apply to "extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[54] Thomas was joined in his challenge to the *Roberts* approach to Confrontation Clause jurisprudence by Professors Akhil Reed Amar and Richard D. Friedman, who each promote a slightly different interpretation of the phrase "witnesses against" in the Clause.[55]

1. Amar's Understanding of the Confrontation Clause.—Professor Amar's analysis of the Confrontation Clause is defined by two distinct premises. First, Amar argues that "the word 'witnesses' in the Confrontation Clause means in-court 'witnesses' who testify rather than out-of-court... eyewitnesses who do not."[56] Amar's interpretation is supported, first and foremost, by what he refers to as the "ordinary, everyday, common-sense understanding of the word 'witness': someone who testifies in the courtroom."[57] In addition, every other clause of the Sixth Amendment refers specifically to trials, prosecutions, juries, etc.; thus, an expanded reading of the Confrontation Clause "blurs the sharp focus of the Sixth Amendment generally."[58] Finally, this construction of the term *witness* in the clause is more harmonious with the word's meaning as it is used elsewhere in the Constitution.[59]

Having determined that the Confrontation Clause was intended to apply only to in-court witnesses, Amar turned to the problem presented when the government deposes a party before trial without any opportunity for defense cross-examination and then seeks to introduce that testimony at trial. Amar claimed that the historical bases of the Clause and the text

53 White v. Illinois, 502 U.S. 346 (1992).

54 *Id.* at 365 (Thomas, J., concurring in part and concurring in the judgment).

55 U.S. CONST. amend. VI.

56 Amar, *supra* note 38, at 1046. For a more detailed discussion of Amar's theories on the Confrontation Clause, see Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 688–97 (1996).

57 Amar, *supra* note 38, at 1046.

58 *Id.* at 1046–48.

59 *Id.* at 1047.

of the Constitution support the extension of the right of confrontation to this form of testimony as well: "when the government prepares [a witness'] statements as testimony, and introduces them as such to the jury, the government is estopped from claiming that [he or she] is somehow not a formal testifying 'witness.'"[60] Thus, Amar's position can be summarized as follows: "the Clause encompasses only those 'witnesses' who testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like."[61] Amar's treatment of out-of-court testimony is notably similar to the formulation proposed by Justice Thomas in *White*.

2. *Friedman's Understanding of the Confrontation Clause.*—In most respects, Professor Friedman's perspective on the Confrontation Clause is similar to Professor Amar's and Justice Thomas's. Friedman agrees that the Confrontation Clause does not apply to all out-of-court statements, but that the Clause is implicated by in-court testimony and "formalized" or government prepared ex parte affidavits or other testimony.[62] But, while Amar's approach requires the participation of the government in the collection of a statement before the Confrontation Clause is triggered, Friedman would extend the definition of testimonial to include statements made between private individuals.[63]

Friedman sees his framework as necessary in a system of criminal justice which admits out-of-court statements at trial even when the statements were not made to government authorities.[64] "[I]n this setting, if the complainant makes the statement and it is indeed presented at trial, she is acting as a witness—notwithstanding that the statement is not made to the authorities, or even at their instigation, or under oath."[65] While acknowledging the "difficult factual issues" his methodology presents, he defends his approach as necessary to avoid violations of the Confrontation Clause via informal testimony.[66] Thus, Friedman's position can be summarized as

60 *Id.* at 1049.

61 *Id.* at 1045.

62 Friedman, *Confrontation*, *supra* note 22, at 1038.

63 *Id.* at 1038–43.

64 *Id.* at 1039–41.

65 *Id.* at 1041.

66 *Id.* at 1043. While Amar acknowledges Friedman's concern, he notes that "the Constitution is mainly addressed to *state* action. The document ... seeks to prevent state misconduct and manipulation, not private trickery." Amar, *supra* note 38, at 1048. Amar's comment is accurate, but it should be noted that the Supreme Court, in other contexts, has refused to allow private conduct to interfere with a party's constitutional rights. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that judicial enforcement of private racially restrictive covenants was a denial of equal protection in violation of the Fourteenth Amendment: "State action ... refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.").

follows: "[i]f... the declarant correctly understands that her statement will be presented at trial, than [sic] the statement does appear testimonial."[67]

In comparing Amar's and Friedman's respective arguments, it is helpful to note the differing approaches each would take to determine whether a given piece of evidence is testimonial. Amar would likely frame the issue as a matter of how, why, and by whom the evidence was collected; the analytical starting point is on the reception of the statement.[68] Friedman, on the other hand, focuses on how the speaker understood (or perhaps should have understood) the use to which his or her statement would be put.[69] In most circumstances, the two formulations should yield the same result,[70] which explains the general agreement between Amar and Friedman. However, when a statement is made with the understanding that it will be used at trial, but the government is not involved in the making of the statement, the two commentators would differ in their conclusions as to its admissibility.[71]

B. The Crawford *Approach to Testimonial Hearsay*

Despite its failure to deliver a complete definition of testimonial hearsay, *Crawford* did make it abundantly clear that ex parte affidavits and other official testimony produced with an eye toward litigation are the precise evil at which the Confrontation Clause is directed and are therefore testimonial. In part III.A of the opinion, Justice Scalia noted that the Framers "certainly would not have condoned" the admission of ex parte examinations[72] and that ex parte testimony at a preliminary hearing would qualify as testimonial "under any definition."[73] In the same section, the Court also presented

67 Friedman, *Confrontation*, *supra* note 22, at 1039.

68 *See* Amar, *supra* note 38.

69 Richard D. Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection*, CRIM. JUST., Summer 2004, at 9 [hereinafter Friedman, *Adjusting*].

70 For example, assume the statement of an eyewitness to a murder is taken by police officers or at a preliminary hearing to assist with a suspect's prosecution. The fact that the statement is taken by government officers would satisfy the Amar test and render the statement testimonial under his approach. Further, because one in the situation of our hypothetical eyewitness also should expect that his statement will be presented at the suspect's trial, the statement satisfies the Friedman test and is also testimonial under his approach.

71 Following the example in the previous footnote, assume now that the eyewitness makes the same statement to the victim's family. The eyewitness suspects that the family members will want to use this information at the defendant's trial. Because the family is not associated with the government, this statement would not be considered testimonial under Amar's test, but because the statement was made with the reasonable expectation that it would be used in prosecuting a criminal defendant, it would likely be testimonial under Friedman's test.

72 Crawford v. Washington, 541 U.S. 36, 51 (2004).

73 *Id.* at 52.

some tentative formulations of the term *testimonial* which directly implicate official testimony, including:

> 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 pre-trial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.[74]

The Court also stated that the Confrontation Clause applies "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[75] Finally, the Court also emphasized the requirement that a statement have been prepared in anticipation of litigation for it to be deemed testimonial, commenting that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse ...."[76]

The Court, however, presented another possible standard for determining what is testimonial. This formulation included "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."[77] In making this statement, the Court potentially extended the protection afforded by the Confrontation Clause beyond what was indicated in the other parts of the opinion.

In its analysis of the proper interpretation of the Confrontation Clause, *Crawford* reflects the influence of Justice Thomas, Amar, and Friedman on the Court.[78] All of them would likely agree with the Court's holdings that statements made to a government official without an opportunity for cross-examination are testimonial.[79] Only Friedman, however, would be expected to concur with the proposition that the right to confrontation extends to statements in which the government played no part, so long as the speaker reasonably believed his or her statements would be used in a criminal trial.[80] At the moment, it is uncertain which standard will prevail, but, "the impact of [*Crawford*] may be much different depending upon whether the Supreme Court eventually adopts a relatively broad or relatively narrow understanding of the term 'testimonial.'"[81]

74 *Id.* at 51–52 (citations omitted).

75 *Id.* at 68.

76 *Id.* at 56 n.7.

77 *Id.* at 52.

78 *Id.* at 60–61 (citations omitted).

79 *See supra* notes 53–71 and accompanying text.

80 In fact, Friedman has described this formulation as the "most useful and accurate" of the possible definitions of testimonial. Friedman, *Adjusting*, *supra* note 69, at 9.

81 Friedman, *Adjusting*, *supra* note 69, at 13.

C. Crawford*'s Description of Nontestimonial Statements*

Though *Crawford* only sketched out the meaning of the word *testimonial*, it did provide some examples of nontestimonial evidence. In Part III.B of the opinion, Justice Scalia stated that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy."[82] Taken literally, this statement would provide for the admission of any hearsay statement that fit into either of those two hearsay exceptions. Further, critical commentary has suggested that

> many statements that were admissible under *Roberts* will still be admissible under *Crawford*, though the grounds of decision will be different.... [U]nder *Roberts*, business records and conspirator statements were deemed reliable because they fell within "firmly rooted" hearsay exceptions. Under *Crawford*, almost all such statements will be considered nontestimonial, and therefore the Confrontation Clause will impose little, if any, obstacle to their admissibility.[83]

Professor Edward J. Imwinkelried stresses, however, that *Crawford* also stands for the proposition that, "in classifying hearsay as 'testimonial' or 'non-testimonial,' the trial judge should consider the specific circumstances surrounding the making of the statement."[84] For support, Professor Imwinkelried cites footnote six from *Crawford*, which states that, "many dying declarations may not be testimonial."[85] Similarly, Justice Scalia states in footnote seven that the risk of prosecutorial abuse "does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances."[86]

Finding significance in the *Crawford* Court's refusal to generalize about statements falling within the dying declaration exception, Professor Imwinkelried postulates that:

> [i]f the lower courts accept this interpretation of *Crawford*, prosecutors will be unable to generalize that "all" dying declarations, "all" excited utterances, or "all" business records are automatically nontestimonial. Rather, the classification will turn on the particular facts of the case. When those facts show that law enforcement officers played a role in the "production"

82 *Crawford*, 541 U.S. at 56. The business records exception for hearsay statements is found in FED. R. EVID. 803(6). The coconspirator statement exception is found in FED. R. EVID. 801(d)(2)(E).

83 Friedman, *Adjusting*, *supra* note 69, at 7.

84 Edward J. Imwinkelried, *The Treatment of Prosecution Hearsay Under* Crawford v. Washington*: Some Good News, But....*, CHAMPION, Sept.–Oct. 2004, at 18.

85 *Id.* at 17-18 (citing *Crawford*, 541 U.S. at 56 n.6.).

86 *Id.* at 56 n.7.

of the statement and that the declarant probably realized the distinct possibility that his or her statement would later be put to prosecutorial use, the statement should be categorized and treated as "testimonial."[87]

In light of the novelty of the issues decided in *Crawford*, Professor Imwinkelried's point is well taken. Courts should not assume a proffered lab report is testimonial based merely on how the evidence is classified under hearsay law.

D. Synthesis of the Varying Definitions of Testimonial

Piecing together a workable definition of the term *testimonial* from *Crawford* and its influences is a difficult task, but some broad, reliable guidelines are undeniably apparent. First, ex parte testimony or other statements prepared by government officials for use in a criminal trial are clearly testimonial. *Crawford* and each of the commentators profiled herein are unanimous in reaching that conclusion,[88] though the Court in *Crawford* did not seem as focused on the role played by the government in the collection of a testimonial statement as were Thomas and Amar.[89] Second, according to *Crawford*, business records, co-conspirator statements, and many dying declarations are nontestimonial,[90] creating the impression that perhaps the Court did not intend *Crawford* to lead to a drastic departure from modern hearsay law.

Between these two broad extremes, *Crawford* leaves a great deal of uncertainty as to the finer details of its application. Most notably, it is difficult to ascertain the weight that should be accorded to the Court's cryptic statement that a declaration made under the reasonable belief it will be used in a criminal prosecution (i.e., made with testimonial intent) should be considered testimonial.[91] A proper application of this standard would no doubt require a stringent analysis to determine what the preparer of a given statement knew or should have known about the effect the statement would have in a criminal prosecution. Further, as noted by Professor Imwinkelried, the Court seemed hesitant to classify any broad category of declarations or documents as testimonial or nontestimonial.[92] Therefore, until the Supreme Court maps out a comprehensive definition of the term *testimonial*, the preferable methodology for determining whether a given statement is testimonial involves a case-by-case resolution of the issue and focuses not only on the expectations of the prosecution as to how the state-

87 Imwinkelried, *supra* note 84, at 18.

88 *See supra* notes 52–71 and accompanying text.

89 *See supra* notes 52–81 and accompanying text.

90 *See supra* notes 82–84 and accompanying text.

91 *See supra* note 77 and accompanying text.

92 *See supra* notes 84–87 and accompanying text.

ment will be used or the hearsay rules applicable to the statement but on the expectations of the statement's preparer as well.

IV. THE APPLICATION OF THE CRAWFORD TESTIMONIAL APPROACH TO FORENSIC EVIDENCE: THEORETICAL ANALYSES

When a lab report or other forensic evidence is presented at trial, *Crawford* suggests that whether the evidence is testimonial will factor heavily on its admissibility. It is doubtful that a clear-cut method for answering this question is even possible given the present uncertainty following *Crawford.* Moreover, many different types of lab reports are used in criminal cases. They have been treated differently in the past and will likely be treated differently in the post-*Crawford* era.[93] Therefore, the following is meant to be an extension of the issues and concerns previously delineated to the specific context of forensic evidence, not as a foolproof litmus test that establishes forensic evidence as either testimonial or nontestimonial.

A. *Testimonial Forensic Evidence*

1. Forensic Evidence Prepared in Advance of Litigation as Testimonial.—Legal commentary on the subject supports the notion that, at least in some cases, laboratory reports should be seen as testimonial. For his part, Friedman argues this should be the case in "most circumstances."[94] Other experts have opined that "such reports seem obviously testimonial in nature, since they are prepared in an effort to aid law enforcement and prosecution."[95] As Professor Paul C. Giannelli points out:

> it is ... valid to begin the analysis by characterizing lab reports as nothing more than an "affidavit of an expert." Lab reports share the attributes of affidavits; they are typically prepared by the prosecution in anticipation of trial. Moreover, due to their aura of "expertise" and the "official" imprimatur of the government, lab reports are a particularly dangerous affidavit. The effect of the use of the expert's affidavit by the prosecution is to shift the burden to the defendant, who, due to indigency, is often not equipped to contest the reliability of scientific evidence.[96]

93 *See* Paul C. Giannelli, *Admissibility of Lab Reports: The Right of Confrontation Post-*Crawford, CRIM. JUST., Fall 2004, at 26 [hereinafter Giannelli, *Lab Reports*].

94 Friedman, *Adjusting, supra* note 69, at 11.

95 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES § 8.93, at 204 (2d ed. Supp. 2004).

96 Paul C. Giannelli, *Expert Testimony and the Confrontation Clause*, 22 CAP. U. L. REV. 45, 83 (1993).

Further, lab reports are accorded great weight by juries in modern criminal prosecutions,[97] so the admission of a piece of forensic evidence can often mean the difference between success and failure in a case. If *Crawford* and its predecessors are correct that the Confrontation Clause was inserted into the Bill of Rights to prevent trial by ex parte affidavit, then it would seem that the Framers would not look kindly on the admission of lab reports created for use in a criminal prosecution either.

Crawford made it clear that witnesses' statements in pretrial proceedings and other ex parte testimony are testimonial by any standard.[98] Cases decided after *Crawford* support the extension of that reasoning to forensic evidence as well. *People v. Rogers*, a New York appellate decision, held that because a blood alcohol content test "was initiated by the prosecution and generated by the desire to discover evidence against defendant, the results were testimonial.... Admission of the ... test without the ability to cross-examine the report's preparer was a violation of defendant's rights under the 6th Amendment's Confrontation Clause...."[99] Similarly, in *City of Las Vegas v. Walsh*, the Nevada Supreme Court held that an affidavit of a nurse who withdrew blood for a blood alcohol content test was testimonial, commenting that "an affidavit prepared for use at trial is testimonial."[100] Even a cursory reading of *Crawford* and other commentary supports the decisions in these cases.

Interestingly, treating reports prepared in advance of litigation as testimonial reconciles well with the treatment of such evidence under the hearsay exceptions in the Federal Rules of Evidence and its state counterparts. Laboratory reports may be admitted pursuant to the public-records exception[101] or the business-records exception.[102] But, importantly for the subject at hand, neither exception will apply if "the source of information ... indicate[s] lack of trustworthiness."[103] Many courts have held that "untrustworthiness" is demonstrated when there is evidence that the statement was procured for its potential litigation value. For example, in *United States v. Blackburn*, the Seventh Circuit refused to admit a lensometer

97 *See supra* notes 3–4 and accompanying text.

98 Crawford v. Washington, 541 U.S. 36, 51–52, 68 (2004).

99 People v. Rogers, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004); *see also* People v. Hernandez, 794 N.Y.S.2d 788, 789 (2005) (holding that a fingerprint report was testimonial, even when not collected at the prosecution's request because it was taken with the "ultimate goal of apprehending and successfully prosecuting a defendant").

100 City of Las Vegas v. Walsh, 91 P.3d 591, 595 (Nev. 2004); *see also* State v. McIntosh, No. W2003-02359-CCA-R3-CD, 2005 WL 729145, at *2 (Tenn. Crim. App. Mar. 30, 2005), *appeal denied* (Tenn. Aug. 30, 2005) (holding that a government agent's "forensic chemistry report" analyzing cocaine was testimonial).

101 FED. R. EVID. 803(8).

102 *Id.* at 803(6).

103 *Id.* at 803(6), 803(8).

reading offered into evidence pursuant to the business-records exception because it was "prepared at the request of the FBI, in anticipation of a prosecution ...."[104] In *State v. Henderson,* the issue was the admissibility of laboratory reports determining the identity of substances purported to be LSD and marijuana. In holding the reports inadmissible, the Court directly addressed the Confrontation Clause, stating:

> [T]he records here realistically cannot be said to have been prepared for any reason other than their potential litigation value. Therefore, when they are produced at trial in lieu of personal testimony, ... they fall into the category of the dreaded ex parte affidavit. It was to prevent the use of just such documents that the Confrontation Clause was adopted.[105]

The Confrontation Clause and hearsay law are not interchangeable, but the Supreme Court has noted that the Confrontation Clause and "the evidentiary hearsay rule stem from the same roots."[106] Also, *Crawford* suggested that statements, including business records, that were admissible under the hearsay rules would still be so after that decision because they were nontestimonial,[107] implying that evidence not admissible pursuant to a particular exception may be testimonial. Therefore, considering the novelty of the legal rule presented in *Crawford,* the denial of admissibility of forensic evidence prepared in anticipation of a criminal prosecution under hearsay law lends strong support for the conclusion that such evidence should be seen as testimonial as well.

2. *Criticism of Treating Laboratory Reports as Testimonial.*—Not all courts agree that a laboratory report is testimonial. In fact, some courts even seem to question the idea that scientific evidence can be testimonial.[108] For example, in *United States v. Evans,* the court stated "[w]e are not persuaded that a chemical examiner's report is made principally for the purpose of prosecution.... [The examiner] does no more than seek to establish an in-

104 United States v. Blackburn, 992 F.2d 666, 670–72 (7th Cir. 1993). The lensometer reading was ultimately admitted on other grounds. *Id.* at 672; *see also* People v. McDaniel, 670 N.W.2d 659, 661 (Mich. 2003) (excluding a police laboratory report because it was prepared in anticipation of litigation); State v. Kennedy, 7 S.W.3d 58, 67 n.8 (Tenn. Crim. App. 1999) (excluding a DNA report prepared "for no other purpose" but litigation).

105 State v. Henderson, 554 S.W.2d 117, 120 (Tenn. 1977).

106 Dutton v. Evans, 400 U.S. 74, 86 (1970).

107 Crawford v. Washington, 541 U.S. 36, 56 (2004); *see also supra,* notes 82–84 and accompanying text.

108 In Chief Justice Rehnquist's concurrence in *Crawford,* he stated, "it seems to me any classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today." *Id.* at 71 (Rehnquist, C.J., concurring).

trinsically neutral fact, the identity of the substance itself."[109]

Similar formulations of this argument are present in post-*Crawford* decisions as well. In *People v. Johnson*, the court held that a lab report of a drug sample was nontestimonial, holding, "[a] laboratory report does not 'bear testimony,' or function as the equivalent of in-court testimony. If the preparer had appeared to testify at Johnson's hearing, he or she would merely have authenticated the document."[110] In *State v. Thackaberry*, the court stated in dicta that "[a] laboratory report of a toxicology test performed on a urine sample neither qualifies as, nor seems analogous to, testimony at a preliminary hearing, before a grand jury, or at a former trial."[111]

The conclusions in these cases present an unnecessarily narrow reading of the term *testimonial*. While lab reports are not testimony as it is generally imagined (i.e., in court, on the witness stand, etc.), they are nonetheless statements of a fact relevant to the case as the speaker perceives it. Were the preparer of a lab report to state his or her findings in court, then the spoken contents of the report would qualify as testimony. Therefore, it makes little sense to say that the same statement cannot be testimony merely because it is offered in the form of a report. In any event, *Crawford* made no indication that whether a statement is testimonial depends upon its format; instead, it merely defined testimony as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,"[112] a criterion most lab reports would have no trouble meeting.

The major fault with the reasoning in these cases is that it ignores the fact that the results of reports are not neutral facts and are not simply authenticated at trial. Lab reports represent the end result of a process of scientific testing on a given substance or other sample, but, "[t]ypically, the report contains only the expert's conclusions."[113] Requiring cross-examination permits the defense to expose the scientific bases for the expert's opinion and also forces the expert to defend his or her techniques, his or her application of them, and also his or her qualifications as a preparer of the statement.[114] Cross-examination of a lab technician allows the weaknesses in the expert's report to come to light in the same manner that cross-exami-

109 United States v. Evans, 45 C.M.R. 353, 356 (C.M.A. 1972).

110 People v. Johnson, 18 Cal. Rptr. 3d 230, 233 (Cal. Dist. Ct. App. 2004), *rev. denied* (Nov. 10, 2004); *see also* Commonwealth v. Verde, 827 N.E.2d 701, 706 (Mass. 2005) (holding that chemical analyses of drug samples had "very little kinship to the type of hearsay the confrontation clause intended to exclude, absent an opportunity for cross-examination") (citation omitted).

111 State v. Thackaberry, 95 P.3d 1142, 1145 (Or. Ct. App. 2004), *rev. denied*, 107 P.3d 27 (Or. 2005); *see also* People v. Miller, No. 249412, 2004 WL 2534367, at *3 (Mich. Ct. App. Nov. 9, 2004) ("An autopsy report documenting the doctor's medical observations clearly does not meet [the definition of testimonial]").

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

113 Giannelli, *Admissibility*, *supra* note 5, at 692.

114 *See id.* at 692–95.

nation of an eyewitness allows the weaknesses in his or her testimony to be revealed, suggesting that the two should be treated similarly.

B. Nontestimonial Forensic Evidence

While lab reports prepared in advance of litigation should probably be seen as testimonial, autopsy reports, hospital records, and other forensic evidence collected and maintained in a routine matter may require different treatment. *Crawford* itself supports this assumption.[115] Appropriately, this different treatment is predicated on the belief that such records are generally not prepared for their potential use in a criminal prosecution. In a pre-*Crawford* decision, the Indiana Supreme Court allowed an autopsy report to be admitted into evidence because, "[a]s a general rule, the examiners who prepare the autopsy report do so for non-advocacy reasons. They are charged by law with the job of producing public documents relating to deaths."[116] Likewise, "[t]he majority rule among state courts is that drug or alcohol tests performed in the usual course of business of a hospital are admissible in criminal cases under the business records exception."[117]

It is not surprising, then, that the courts which have dealt with hospital or autopsy reports following *Crawford* have held that such forensic evidence is nontestimonial. The Supreme Court of New Mexico held that a blood alcohol report was nontestimonial when its preparation was "routine, nonadversarial, and made to ensure an accurate measurement."[118] In *Perkins v. State*[119] and *Smith v. State*,[120] the Alabama Court of Criminal Appeals, on the same day and with little discussion in either case, held that autopsy reports were nontestimonial as business records. However, in *Smith*, the court nonetheless held that the lower court erred in admitting the report, "[u]nder the particular facts of [the] case," because admission of the affidavit allowed the prosecution to prove an essential element of its case (the cause of death) by affidavit.[121]

Although the results from the above cases are faithful to the letter of *Crawford*, their methodology is perhaps overly cursory. In most circumstances, routinely prepared documents will be nontestimonial, as they generally qualify as business records. But, as noted earlier,[122] a case-by-case analysis of laboratory reports is the preferred method of analysis in light of

115 *Crawford*, 541 U.S. at 56.

116 Ealy v. State, 685 N.E.2d 1047, 1055 (Ind. 1997).

117 Baber v. State, 775 So. 2d 258, 261 (Fla. 2000).

118 State v. Dedman, 102 P.3d 628, 636 (N.M. 2004).

119 Perkins v. State, 897 So. 2d 457, 464 (Ala. Crim. App. 2004).

120 Smith v. State, 898 So. 2d 907, 916 (Ala. Crim. App. 2004).

121 *Id.* at 916–17.

122 *See supra* note 87 and accompanying text.

the complexity of the rule of law explicated in *Crawford*. The conclusion that a report is nontestimonial simply because it falls within a given hearsay exception or is a certain type of document is to slight *Crawford*'s overriding resistance to the blending of the law of evidence with the Confrontation Clause and ignore *Crawford*'s statement that the Confrontation Clause possibly applies to any statement made with the reasonable belief it has prosecutorial value.

It is always possible that a business record could be testimonial if it was made in anticipation of litigation or with testimonial intent, and courts must be vigilant to ensure that defendants' confrontation rights are not denied in such situations. Indeed, certain routinely kept records seem by their very nature to be created for their potential litigation value.[123] Thus, a workable approach to this dilemma would be one that creates a presumption that a business record or similar report is nontestimonial but also provides that the presumption could be rebutted by evidence that the report was made for its potential use at trial.

C. Application of the Testimonial Approach to Forensic Evidence: Summary

Crawford and the cases following it illustrate that determining whether a lab report is made for use at a criminal prosecution is crucial in establishing whether it is testimonial. With that fundamental issue as a starting point, a reliable test for the admissibility of forensic evidence under the Confrontation Clause is ascertainable: when forensic evidence is prepared at the state's request for litigation purposes, it should be seen as testimonial, and the defendant must be afforded an opportunity for cross-examination if it is to be admitted. Despite cases that hold to the contrary, the fact that lab reports are somewhat dissimilar to stereotypical testimony should not alter this analysis. Conversely, when lab reports are kept as a matter of routine business, they should generally be seen as nontestimonial, unless there is also evidence that the report was made with testimonial intent or was otherwise made with an eye toward prosecution. This approach to determining whether forensic evidence is testimonial is clearly consistent with the application of *Crawford* as delineated above,[124] and the case law following *Crawford* has generally adhered to it as well.

123 For a more detailed discussion of this issue, see *infra* notes 135–38 and accompanying text.

124 *See supra* notes 88–92 and accompanying text.

V. THE APPLICATION OF THE CRAWFORD TESTIMONIAL APPROACH TO FORENSIC EVIDENCE: PRACTICAL IMPLICATIONS

It is important to note three important elements of Confrontation Clause jurisprudence that *Crawford* explicitly does not change.[125] First, a hearsay statement will not implicate the Confrontation Clause unless it is offered to prove the truth of the matter asserted.[126] Second, when the speaker appears for cross-examination at trial, the Clause does not restrict the use of his or her prior testimonial statements.[127] Third, if the defendant's wrongdoing prevented him or her from having an adequate opportunity for confrontation, then he may be deemed to have forfeited his right to cross-examination.[128]

At the same time, *Crawford* will surely change the way lab reports are used in criminal prosecutions in some noteworthy respects. The most fundamental change brought about by *Crawford* in this area should be obvious: a lab report may not be admitted just because it is reliable.[129] In addition, because *Crawford* clearly held that a prior opportunity for cross-examination satisfies the Confrontation Clause, the desirability of early depositions to prosecutors may increase.[130] Finally, as noted by Professor Giannelli, state "notice-and-demand" statutes also become more relevant. The typical notice-and-demand statute provides that a defendant be given notice of the prosecution's intent to use forensic evidence at trial; if the defendant does not request the presence of its preparer, his right to confrontation is deemed waived.[131] Although notice and demand statutes can provide a relatively simple method for avoiding confrontation issues, they also raise problems of their own related to the waiver of Constitutional rights.[132]

125 For a more detailed explanation of matters that remain unaltered by *Crawford*, see Friedman, *Adjusting*, *supra* note 69, at 7–8.

126 Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004) (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)).

127 *Id.* at 59 (citing California v. Green, 399 U.S. 149, 162 (1970)).

128 *Id.* at 62.

129 Friedman, *Adjusting*, *supra* note 69, at 8.

130 Friedman, *Adjusting*, *supra* note 69, at 11. The use of early depositions by prosecutors is hindered by the Federal Rules of Criminal Procedure, which state that witness depositions may only be taken and preserved for use at trial when the deposition is necessitated by "exceptional circumstances" and is "in the interest of justice." FED. R. CRIM. P. 15(a)(1). Friedman argues that Rule 15 is too strict and "should be loosened up considerably." Friedman, *Adjusting*, *supra* note 69, at 11.

131 *See, e.g.*, N.J. STAT. ANN. § 2C:35-19(c) (West 1995) (tests for the identity of substances alleged to be controlled substances); OHIO REV. CODE ANN. § 2925.51 (Matthew Bender 2003) (tests for the identity of substances alleged to be controlled substances); TENN. CODE ANN. § 55-10-410(d) (2004) (tests for drug and alcohol contents of blood); *see also* Giannelli, *Lab Reports*, *supra* note 93, at 31–32.

132 Giannelli, *Lab Reports*, *supra* note 93, at 31–32.

These changes aside, the excitement and apprehension generated by *Crawford* may have been somewhat overstated. Although *Crawford* does change the analytical approach a court must take to forensic evidence, the application of the rules discussed in the opinion should not differ significantly from those governing the admissibility of forensic evidence under hearsay law. An examination of relevant case law shows exactly why this should be the result.[133] Under the *Crawford* analysis for the Confrontation Clause, as under hearsay law, reports should not be admissible when they are prepared by or for government officials for trial purposes and the defendant is given no opportunity for cross-examination. The difference post-*Crawford* is that such reports are inadmissible because they are testimonial and the defendant was not permitted to cross-examine; under hearsay law, they are inadmissible because they lack trustworthiness. Conversely, when a report is kept according to ordinary business practices and is not prepared with the belief it will be used at trial, it generally should satisfy the Confrontation Clause because it is most likely nontestimonial. Under hearsay law, such a report is admissible because it is deemed trustworthy. Although *Crawford* altered the Court's doctrinal understanding of the Confrontation Clause dramatically, the practical effect of the decision in most cases is likely to be less pronounced than expected in the area of forensic evidence.[134]

Of course, forensic evidence is not always easily classified in these terms. In less well-defined cases, the admissibility of laboratory reports depends upon the precision with which the Supreme Court defines the term *testimonial* in future cases. This issue is raised by the Court's use of the formulation "statements . . . made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"[135] as a possible definition for testimonial. Seemingly, this test would place the inquiry in this matter on the point of view of the preparer of the report instead of the government investigators for whom it was made. If such a reading of *Crawford* is accepted, the protection of the Clause regarding laboratory reports has potentially been expanded a great deal, perhaps further than the Supreme Court originally intended.

For example, assume that in a state where an autopsy report is a regularly kept record, a coroner performs a routine autopsy on a shooting victim.

133 *See supra* notes 98–121 and accompanying text.

134 The Court's opinion in *Crawford* indicates it was tacitly aware of this anticlimactic situation. In replying to Chief Justice Rehnquist's argument that exceptions to the general exclusion of hearsay evidence were commonplace, Justice Scalia wrote, "there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case." Crawford v. Washington, 541 U.S. 36, 56 (2004).

135 *Id.* at 52.

Under *Perkins v. State*[136] and *Smith v. State*[137] the report should be seen as nontestimonial. But if the coroner comes to the conclusion that the victim was murdered, and he inwardly suspects that his report will be valuable in convicting the perpetrator, is the report testimonial? Under the reading of *Crawford* in the preceding paragraph, the answer should be yes. In fact, a conclusion that autopsy reports are more often than not prepared with the reasonable belief they will be used in litigation is not unreasonable, especially when the cause of death is violent.[138] Such an approach would, however, represent a divergence from pre-*Crawford* practice,[139] a step the Supreme Court may not be willing to take. Issues like this one demonstrate the difficulties presented when a court is forced to inquire into the reasonable beliefs of witnesses and their reasonable expectations.[140] Lower courts need to know whether they should take this step.

VI. CONCLUSION

Though it appeared that *Crawford* would cause a sea change in the use of forensic evidence in criminal trials, the foregoing suggests that these concerns are largely unfounded. The approach to the admissibility of forensic evidence under the Confrontation Clause has been changed, but, generally, the end result of the new doctrine is unlikely to be more or less exclusionary than before. Though case research shows that some courts have applied the definition of testimonial hearsay more restrictively than such a conclusion might suggest,[141] those cases represent theoretical disagreements as to the nature of forensic evidence, not differences in the application of the underlying constitutional doctrine.

The difficulties of *Crawford*'s approach to the Confrontation Clause lie more in its finer details. In many ways, the confusion over the future application of *Crawford* in this arena reflects the same ideological conflict

136 Perkins v. State, 897 So. 2d 457 (Ala. Crim. App. 2004).

137 Smith v. State, 898 So. 2d 907 (Ala. Crim. App. 2004).

138 Interestingly, in Justice Scalia's description of early American evidentiary practices, he cited *State v. Campbell*, a South Carolina decision in which a coroner's deposition was excluded because the defendant had had no opportunity to cross-examine him. *Crawford*, 541 U.S. at 49 (citing 30 S.C.L. (1 Rich.) 124 (S.C. 1844)). The *Campbell* court held that "such depositions are ex parte, and, therefore, utterly incompetent.... [One of the guarantees of the State Constitution is that] prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." *Campbell*, 30 S.C.L. at 125.

139 *See supra* notes 115–16 and accompanying text.

140 It is easy to imagine other cases in which the *Crawford* testimonial approach will be difficult to apply to forensic evidence. For example, how should a court treat a lab report prepared by a private investigator or nongovernment laboratory?

141 *See supra* notes 108–14 and accompanying text.

that divides Professors Akhil Reed Amar and Richard D. Friedman.[142] The Confrontation Clause was promulgated to prevent trial by ex parte affidavit. Whether one focuses on the mindset of the speaker or the recipient, a statement made by a laboratory technician at the behest of the government is testimonial. Similarly, statements made routinely and without state participation in their preparation are nontestimonial. The difficulty lies in the gray area between these two extremes. That is where Amar and Friedman disagree, it is where *Crawford* is notoriously difficult to apply, and it is where future interpretation from the Supreme Court is desperately needed.

142 *See supra* notes 68–71 and accompanying text.