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CRAWFORD V. WASHINGTON: ENCOURAGING AND ENSURING THE CONFRONTATION OF WITNESSES

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I. INTRODUCTION

In *Crawford v. Washington*,[1] the Supreme Court of the United States radically changed Confrontation Clause doctrine, creating a very firm rule of exclusion of "testimonial" statements, with apparently quite limited exceptions.[2] This Article deals with two broad issues: first, what we know and what we can predict about the new system and the statements it covers,[3] and second, proposals regarding how confrontation could or should develop in response to *Crawford*.

Many answers to how the new system will operate must await future Supreme Court decisions, but some results are clear and other implications can be sketched. One of the most important questions—whether the class of testimonial statements covered by *Crawford* is extremely narrow or relatively broad—will likely be addressed soon. Nevertheless, the message of the introductory

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1. 124 S. Ct. 1354 (2004).
2. *See id.*
3. A part of this analysis is how the old system of confrontation under *Ohio v. Roberts*, 448 U.S. 56 (1980), might interact with the new system, if the old system remains operable at all.

sentence bears repeating: *Crawford* has changed confrontation analysis enormously. Its concrete impact was immediate and substantial in both appellate and trial courts on the evidence rendered inadmissible.[4] It has given real teeth to the Confrontation Clause in several frequently encountered and important situations. For instance, statements made during grand jury proceedings and plea allocutions and statements made by co-participants in crime to authorities during police interrogation can no longer be admitted against a criminal defendant unless confrontation is provided.[5]

Crawford involved statements made by one unavailable crime participant against another during a police interrogation.[6] Despite the Supreme Court's attempt to limit admission of such statements in *Lilly v. Virginia*,[7] trial and appellate courts continued to admit them[8] in substantial numbers upon finding that they satisfied the *Ohio v. Roberts*[9] ad hoc trustworthiness/reliability analysis.[10] As a result of *Crawford*, these statements are inadmissible, absent confrontation or a couple of other quite limited exceptions, discussed below.[11]

The impact of the *Crawford* opinion is clear and substantial in some respects; however, it is unknown and unpredictable in others. One reason for the uncertainty lies literally in the lack of a

4. See *infra* note 70 for a list of some of the cases that have been reversed under *Crawford*.

5. *Crawford*, 124 S. Ct. at 1374. Statements made by defendants themselves during interrogation, i.e., admissions, are apparently unaffected by *Crawford*. Presumably self-admissions fall under the theory that a party cannot complain about not being able to confront himself. EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 265–66 (1962) (stating this position with regard to the hearsay rule of admission). In *Crawford*, the Court said nothing about continuing to allow admission of this category of statements, and the opinion gives no basis for such a momentous shift in doctrinal analysis.

6. *Crawford*, 124 S. Ct. at 1357–58.

7. 527 U.S. 116, 139–40 (1999).

8. Such statements are typically offered under the hearsay exceptions for statements against interest. *See* FED. R. EVID. 804(b)(3).

9. 448 U.S. 56, 66 (1980).

10. The Court cited the findings of Professor Roger Kirst stating that after *Lilly*, courts had admitted accomplice statements in more than one-third of the cases—twenty-five out of seventy. *Crawford*, 124 S. Ct. at 1372 (citing Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in* Lilly v. Virginia, 53 SYRACUSE L. REV. 87, 105 (2003)). The Court showed obvious displeasure with the lower courts' results under the *Roberts* test, which it termed an "unpardonable vice." *Crawford*, 124 S. Ct. at 1371. Admission in these situations revealed "its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id*.

11. *Id*. at 1374.

general definition for the opinion's most critical concept—testimonial statements. The opinion was authored by Justice Antonin Scalia and joined by six other justices; Chief Justice William Rehnquist filed a concurring opinion, in which Justice Sandra Day O'Connor joined.[12] Justice Scalia's opinion points toward a narrow construction, which he has previously supported,[13] but the opinion provides an opening for at least a somewhat broader view that is likely favored by some of the other justices who joined the opinion.

Another reason for uncertainty relates to *Crawford*'s place in a dynamic system that can and will respond to the opinion with short-term tactical countermeasures and with potentially long-term legal and institutional changes. Investigative and prosecutorial practices are certain to change. For example, the practices in some jurisdictions of having victims make statements to investigating officers on videotape shortly after the crime *were* once very useful to the prosecution, but now produce inadmissible testimonial statements.[14] Police and prosecutors are certain to develop alternative investigative methods in an attempt to avoid *Crawford*'s impact.[15]

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12. *Id*. at 1356.

13. *See* White v. Illinois, 502 U.S. 346, 364–65 (1992) (Thomas, J., concurring) (arguing for a new approach to confrontation limited to "formalized testimonial materials").

14. *See* People v. Espinoza, No. H026266, 2004 Cal. App. Unpub. LEXIS 6573, at *16–18 (Cal. Ct. App. July 13, 2004) (reversing sexual assault conviction because of admission of videotaped statement made to police by seven-year-old child who did not testify); People v. Kilday, 2004 Cal. App. Unpub. LEXIS 6290, at *2, *17–22 (Cal. Ct. App. June 30, 2004) (reversing convictions for domestic abuse because of admission of videotaped statements regarding four instances of abuse); People v. Pirwani, 14 Cal. Rptr. 3d 673, 675, 684–85 (Ct. App. 2004) (reversing theft conviction because of the admission of the victim's videotaped statement to police); People v. Sisavath, 13 Cal. Rptr. 3d 753, 757–58 (Ct. App. 2004) (reversing conviction because of admission of a videotaped interview of a four-year-old child by a "forensic interview specialist"); People *ex rel.* R.A.S., No. 03CA1209, 2004 Colo. App. LEXIS 1032, at *10–11 (Colo. Ct. App. June 17, 2004) (reversing finding of delinquency based on sexual abuse because of admission of videotape with investigating officer); People v. Vigil, 2004 Colo. App. LEXIS 1024, at *2, *5–6 (Colo. Ct. App. June 17, 2004) (reversing conviction for receipt of videotaped statement by child to police officer regarding sexual abuse); State v. Courtney, 682 N.W.2d 185, 194–197 (Minn. Ct. App. 2004) (reversing assault conviction because videotaped interview of child by child protection worker was testimonial and thus inadmissible unless the child was available for cross-examination); Lee v. State, 143 S.W.3d 565, 570 (Tex Ct. App. 2004) (finding a statement testimonial where it was made by a witness/co-participant to a police officer in a patrol car after the arrest of one suspect because, even though not audible, it was recorded on the car's audio-video system, which indicated it was intended to record testimony for prosecution).

15. *See infra* Part IV.C.3.

What *Crawford* might also do at a conceptual level, which could be tremendously important, is to refocus the constitutional inquiry away from hearsay law and the trustworthiness and reliability of out-of-court statements toward the positive procedural goal of the confrontation right—encouraging and ensuring that evidence is presented in the courtroom in the presence of the accused and subject to adversarial testing.[16] I suggest that the path of the law's development will be improved if the clause is read as a positive command to afford the accused the right "to be confronted with the witnesses against him,"[17] rather than principally as a negative restriction on the admission of certain out-of-court evidence, which has previously been its focus.

The opinion in *Crawford* provides the Court's (Justice Scalia's) view of the historical purpose of the Confrontation Clause. These historical materials and the perspective adopted are obviously selective, but they are now the essential materials and the privileged perspective.[18] The core of that history lesson is the abhor-

16. While he is not responsible for my errors, I want to thank Professor John Douglass for giving me the global inspiration for this major emphasis of my article. One of the major points of his two fine articles on the Confrontation Clause was to develop ways to actually let confrontation happen. *See* John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 196–97 (1999) (arguing that the Confrontation Clause should be read to confront and challenge admitted hearsay and to impeach the declarant rather than just excluding unreliable hearsay); John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1875 (2001) (developing an approach that allows both hearsay and confrontation rather than pitting the two against each other). These are valuable insights and an important orientation toward the right of confrontation.

17. U.S. CONST. amend. VI.

18. 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. *See* Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 748–49; *see also* Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 600–01 (1988); Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 870–71 (1988). I believe historical materials support a place for the concern about accusations. *See infra* note 548.

On the other hand, I recognize that the decisional moment has been reached and that, despite my arguments, the concept of testimonial statements, rather than accusatory hearsay or accusatory statements, has been the dominant paradigm. Moreover, if testimonial is defined using the amicus definition in *Crawford* and, appropriately interpreted, it will include most accusatory hearsay. *See infra* note 75 and accompanying text. Thus, I focus on testimonial statements. Nevertheless, I believe the concept of accusatory statements is quite useful in helping to identify those statements that should be identified as testimonial.

rence of the Framers to the inquisitorial method of both evidence development and trial, symbolized by the treason trial of Sir Walter Raleigh.[19] From the Framers' antipathy to that practice and the text of the Sixth Amendment right, particularly its use of the term "witnesses," the Court derived a core meaning for the Confrontation Clause, which focuses on whether the statement is testimonial.[20]

Although the central issue under *Crawford* was whether a statement was testimonial, the Court declined to adopt a comprehensive definition for the term.[21] At the very least, *Crawford* has given us a model for treatment of the core of the Confrontation Clause—the exclusion of statements made out of court that are inquisitorial in nature, absent confrontation.[22] A major part of the battle in determining the scope of testimonial statements is how closely that term is tethered to the particular historical practices that the Court identified as inspiring the confrontation right. In essence, the issue is whether the core of the Confrontation Clause, covering a relatively small group of statements, is instead the complete confrontation right.

Another issue not resolved by *Crawford* is what remains of the old system under *Roberts*. If the Confrontation Clause has no role in policing the admission of statements that are not determined to be testimonial, then this definition takes on even greater importance. Conversely, if the existing protections of *Roberts* remain as a residual policing system for at least some problematic hearsay that is non-testimonial,[23] then restricting the scope of the definition somewhat has less significance.

The case law has made relatively little use of the accusatory concept. *In re T.T.*, 815 N.E.2d 789, 804 (Ill. Ct. App. 2004), is a rare exception that uses the accusatory concept as decisive in distinguishing between testimonial and non-testimonial statements. However, its particular methodology, which uses the concept to distinguish between testimonial subject matter (the identity of perpetrator) from non-testimonial subject matter (the nature of the condition) within the same statement given by a child victim of sexual assault to a doctor, is probably compatible with the testimonial concept. *See infra* note 506.

19. *Crawford*, 124 S. Ct. at 1360.

20. *Id*. at 1374. The Court stated that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Id.*

21. *Id.* The Court acknowledged that its refusal to articulate a comprehensive definition would cause "interim uncertainty." *Id*. at 1374 n.10. Yet the Court noted that this uncertainty "can hardly be . . . worse" than the unpredicatable *Roberts* test. *Id*.

22. *Id*. at 1374.

23. Depending on how the definition of testimonial develops, I believe there may be

Crawford places a bold "stop sign" in the way of the admission of statements in this core area when confrontation is not provided. Given the damaging impact on prosecutions—a "stop sign" for the statement if it is testimonial—tremendous pressure will be placed on courts to narrow the definition. The same sort of pressure will be placed on expanding the scope of each of the other exceptions, and the breadth or narrowness of those exceptions will influence the courts in deciding how broadly or narrowly they can construe the term testimonial.

Crawford notes a set of exceptions that are limited in number, although some of them can be expanded in scope by interpretation or change in prosecutorial and judicial practices.

First, if the statement is not within the core area of concern—that is, it is not testimonial in nature—then the "stop sign" does not apply.[24] Second, the confrontation right is satisfied during the current trial when the person who made the prior statement appears, testifies, and is subject to cross-examination as required by the confrontation right.[25] Third, the confrontation right is satisfied when the declarant has been previously confronted regarding the statement, but he or she cannot be confronted currently because of unavailability.[26] Fourth, the defendant is found to have forfeited his or her right to require confrontation if, through his or her own actions, the declarant becomes unavailable, rendering confrontation of the declarant impossible.[27] Fifth, the historic recognition of dying declarations as an exception to the confrontation right at the time of the Framing perhaps may mean that the Confrontation Clause is inapplicable to such statements, even if testimonial.[28] Sixth, the Confrontation Clause does not bar the use of statements, even if testimonial, if they are used for purposes other than establishing the truth of the matter asserted.[29]

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sufficient need, as well as doctrinal, historical, and textual support, for some Confrontation Clause protection outside this area of core concern. In particular, the Confrontation Clause may have a proper role in screening admissibility of accusatory hearsay that falls outside a narrow definition of testimonial, and *Roberts*'s analysis could have a place here. *See* discussion *infra* Part VII.

24. *See Crawford*, 124 S. Ct. at 1374. Although this is not really an exception, it is probably the most important limitation.

25. *See id*. at 1369 n.9.

26. *Id*. at 1365–66.

27. *Id*. at 1370 (citing Reynolds v. United States, 98 U.S. 145, 158–59 (1879)).

28. *Id*. at 1367 n.6.

29. *Id*. at 1369 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)).

With respect to the future development of the doctrine, this last exception is of little consequence because it is limited to a relatively rarely encountered hearsay exception that was only tentatively recognized by the Court and noted to be *sui generis*.[30] The other exceptions can be broadly expanded by changing investigative and prosecutorial practices and by judicial interpretation.[31] One of my major normative arguments in this Article is that, consistent with the core concepts of the new doctrine, developments and expansion should be encouraged in ways that guarantee and enhance, rather than limit and deny, the right to confrontation and that these developments should concentrate on guaranteeing confrontation, rather than excluding evidence.

The current period of transition between systems is particularly fraught with the danger that confrontation will be unnecessarily limited because of a backward-looking concern for *Crawford*'s impact on the cases that have already been tried but are on direct review and where "retroactivity" rules clearly make the opinion applicable.[32] These cases put pressure on the lower appellate courts to narrow the definition of testimonial, to expand exceptions to preserve convictions, or both. This is true even though, had the more exacting requirements been known earlier, confrontation could often have been provided and the evidence introduced. Also, a host of prosecutorial actions could have been taken either to admit alternative evidence or to avoid creating or admitting evidence that violates the Confrontation Clause. This Article will have no impact on that type of pressure, and the decisions made under it may unnecessarily warp the doctrine and eliminate what might otherwise be pressure for changes in prosecutorial practices and legal procedures that would facilitate more confrontation. I hope, however, that we can avoid the major unnecessary damage to the worthy goals of encouraging and ensuring both confrontation and just verdicts.

30. *Id.* at 1367 n.6.

31. When I treat all of the ways to escape the application of *Crawford* as exceptions, including the determination that the statement is not testimonial, I mean that the definitional exception is expanded when testimonial is interpreted more narrowly.

32. *See* Griffith v. Kentucky, 479 U.S. 314 (1987). The Court in *Griffith* held that a "new rule" would be automatically applicable to all cases still on direct review at the time the decision was rendered. *See id.* at 328. *Crawford* is likely to be considered such a new rule.

The pressure on the definition of testimonial and the scope of *Crawford*'s exceptions will also be exacerbated by the fact that the definition's application is particularly uncertain and a broad application is especially problematic to the prosecution of two very sensitive types of cases—domestic violence and child sexual abuse. Frequently in domestic violence prosecutions, the complaining witness—usually a wife or girlfriend—is uncooperative or unavailable by the time of trial. In many jurisdictions, prosecutors have developed ways to prosecute these crimes when the alleged victim is absent. Hearsay statements made in 911 calls, and on the scene to emergency and medical personnel, as well as to investigating officers, have been used frequently as an effective alternative method of proof.[33] Whether those alternatives remain viable will likely depend on how broadly testimonial statements are defined and how liberally forfeiture through wrongdoing is interpreted. The obvious temptation will be to narrow the definition or expand the exceptions in these cases, which would likely then apply to similar statements.

Crawford's impact on the types of hearsay often admitted in child abuse prosecutions is particularly uncertain. It is unclear how the term testimonial will be applied to statements made to examining doctors admitted under the exception for statements for medical treatment or diagnosis and to statements to family members, school teachers, social workers, and police officers responding to various levels of suspicion of abuse admitted under several other hearsay exceptions, including, chiefly, excited utterances, "tender years," and the general catch-all provision. A looming unresolved issue here is whether statements must be elicited by questions from a government agent to be testimonial or whether questioning by private individuals or interrogators working for private groups can also qualify.

33. *See* People v. Moscat, 777 N.Y.S.2d 875, 878 (N.Y. Crim. Ct. 2004) (describing efforts by prosecutors to fashion "victimless" prosecutions in domestic violence cases by using statements received under the hearsay exceptions as excited utterances and statements for the purpose of medical diagnosis and treatment, which are received from emergency 911 calls, police officers who arrive at the scene of a reported domestic assault, and doctors treating injuries at hospitals); *see generally* Neal A. Hudders, Note, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?*, 49 DUKE L.J. 1041 (2000) (describing the way various hearsay exceptions are used to overcome some of the prosecution's difficulties with unavailable and uncooperative victims in domestic violence cases).

Three basic results are possible when a confrontation challenge is made. One is a finding that the confrontation right does not exist or has been forfeited. A second is the finding of the confrontation right and exclusion of an out-of-court statement, the admission of which would violate the right. The third is providing confrontation, which may also allow admission of the statement. The goal of enhancing the protection of the confrontation right is thus not at all the same as favoring maximum exclusion of the evidence under the command of the Confrontation Clause. Exclusion may be a necessary remedy to enforce compliance, but I contend that the goal should generally be more confrontation, not necessarily the admission of less evidence, even if such evidence qualifies as testimonial out-of-court statements.

I support an approach that resists excessively limiting the definition of testimonial. Likewise, my approach does not lead to an expansive reading of forfeiture.[34] Of course, my support will not matter to the justices who decide future cases. My approach might matter to some, however, if it demonstrates that the only alternatives are not either to limit dramatically the scope of testimonial statements or to harm greatly prosecutions. My approach principally encourages more confrontation by having available declarants who made testimonial and other problematic out-of-court statements appear, testify at trial, and be subject to cross-examination. It emphasizes that enforcing the confrontation right is compatible with effective prosecution.[35]

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34. *State v. Meeks*, 88 P.3d 789 (Kan. 2004), reflects a somewhat expansive, but tolerable, interpretation of forfeiture. The court found that the defendant had forfeited his confrontation right by murdering the victim during a fight, but did not require an intent to silence him as a witness. *Id*. at 793–94. *See also* People v. Jiles, 18 Cal. Rptr. 3d 790 (Ct. App. 2004) (treating the possible dying declaration exception to confrontation, which the Supreme Court suggested might be excepted from confrontation on historical grounds, *Crawford*, 124 S. Ct. at 1367 n.6, as if it were recognized by the Court as an example of "forfeiture by wrongdoing," *id.* at 1370, which the Court did not suggest, *id.* at 1367 n.6); People v. Moore, No. 01CA1760, 2004 Colo. App. LEXIS 1354, at *11 (Colo. Ct. App. July 29, 2004) (following *Meeks*). If this line of analysis is adopted by the Supreme Court, its suggested "dying declaration" exception to confrontation could become a somewhat broader exception, but still a rarely encountered exception to the right of confrontation, applicable whenever a potential witness is killed during a crime. For a discussion of a potentially more expansive treatment of forfeiture in domestic violence cases, see *infra* note 549.

35. My approach owes much to the work of Professor Richard Friedman, but it differs in some respects. *See* Richard D. Friedman, *Adjusting to* Crawford: *High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST. 4 (2004). Professor Friedman encourages a much greater role for forfeiture than I would, but questions the adequacy of confrontation provided as to prior statements in the current trial and disparages this

My example for expanding confrontation comes from prosecution practices regarding child witnesses in sexual abuse cases.[36] My perception is that prosecutors in many jurisdictions have learned that children can in fact be enabled to testify and be available for cross-examination, which broadly permits introduction of their out-of-court statements under the Confrontation Clause. As to other declarants, such as domestic violence victims who frequently become unavailable or uncooperative at trial, the right and admissibility may both be met by greater efforts to afford confrontation at early adversarial hearings, such as preliminary examinations and depositions. In the area of testimonial statements by co-defendants at grand jury proceedings and during police interrogations, the granting of immunity from the prosecution may allow confrontation and permit the prior statements to be admitted.[37]

An approach that emphasizes and anticipates future developments is important for many reasons, but is particularly apt for *Crawford* since the decision may have its greatest impact in the long-run. *Roberts* tied the Confrontation Clause to hearsay law, and, while only overruling *Roberts* as to testimonial statements, *Crawford* greatly weakened that link and threatened a complete break.[38] As long as confrontation and hearsay law were tied together, fundamental hearsay reform was unrealistic because of the accepted premise in American evidence law that the same law applied to both civil and criminal cases. The pressure to relax hearsay restrictions in civil cases will remain a motivating force

method of satisfying confrontation, which I embrace as a preferable, if imperfect, accommodation. *See id.* at 7–8, 11–12. He raises more questions about the testimonial capacity of children than I believe their typically encountered developmental limitations warrant. *Id.* at 10–11. My broad approach to the testimonial determination is much like his, although mine is more functionally oriented in that I find the concept of accusatory statements helpful, and I believe the intent of government agents also matters. *See id.* at 9 (discussing the meaning of testimonial).

36. *See* Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257 (1989) [hereinafter *Medical Hearsay Exception I*]; Mosteller, *supra* note 18; Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, 65 LAW & CONTEMP. PROBS. 47 (2002) [hereinafter *Medical Hearsay Exception II*].

37. I will not discuss this mechanism since it has been part of a well-developed debate that is only given somewhat greater urgency by *Crawford*.

38. *Crawford*, 124 S. Ct. at 1369–70. The Court stated that its analysis "casts doubt" on *Roberts*'s application of the Confrontation Clause across all hearsay, but to resolve the *Crawford* facts, it was not required to decide whether to reverse *Roberts* on that point. *Id.*

for reform, and if the link between hearsay and the Confrontation Clause is ultimately severed, broad scale reform can proceed. If this happens, jurisdictions may simply show greater variation as to exceptions.[39] Perhaps something on the order of the proposal made at the time of the development of the federal rules will be followed[40] and all hearsay determinations will be treated as ad hoc trial court determinations based on a mixture of reliability and necessity. Perhaps as to declarants who testify, the hearsay rule will be eliminated except for the trial court's discretion to avoid wasting time and receiving meaningless repetition through prior out-of-court statements. In any case, *Crawford* opens possibilities for relaxing hearsay's restrictions on the admissibility of out-of-court statements that make the definition of testimonial statements even more significant.

Will this future world be one in which the right to confront is substantially expanded or narrowed? It could be either. One possible view is that there is a narrow core of hearsay in criminal cases where confrontation will be fully enforced, but as to all the rest of hearsay, no control will be imposed, even as to what is often viewed as problematic hearsay.[41] At the same time, investigative and prosecutorial practices may be altered to avoid creating the types of hearsay excluded by the definition of testimonial but to generate the same evidence in other hearsay forms. Another vision is that even with a much-relaxed hearsay rule, a broad, affirmative requirement of confrontation should be maintained as

39. Alterations in individual hearsay exceptions are quite possible, such as eliminating the restriction that the declarant must be unavailable for statements against interest. Broad, sweeping reform might occur as well.

40. The 1969 proposal for hearsay exceptions under Rule 8-03 of the Proposed Rules of Evidence began with the following General Provision: "[a] statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy . . . ." 46 F.R.D. 345 (1969). Subsection (b) listed the exceptions, but did so "[b]y way of illustration only." *Id*. The pattern for Rule 8-04 is similar. *Id*. at 377.

41. Without the application of the Confrontation Clause, there would remain some overall constitutional protection through the Due Process Clause, but it would likely protect only against unreliable convictions, not individual pieces of unreliable evidence. A different type of analysis could be used if the evidence was generated by improper governmental practices, as occurs in eyewitness identification cases where the government arranges an impermissibly suggestive identification procedure. *See* Simmons v. United States, 390 U.S. 377, 384 (1968) (stating that "convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"). Due process examination of the ordinary production of evidence and eyewitness identification law, however, is not typical.

to important and problematic types of hearsay. In this future world, practices may be changed, not to avoid creating evidence that falls within the narrow ambit of the Confrontation Clause, but to allow confrontation.

In the end, I am not sure that the legal world I support, with a broader provision of confrontation, is the one that defendants, who the Confrontation Clause sought to protect, would prefer. Restricting the admission of evidence under hearsay rules and excluding evidence as violating the Confrontation Clause would likely be favored by most defendants over affording confrontation and admitting incriminating evidence. In many cases, my preferred approach may result in more confrontation, but also more admissible evidence and conviction rates that are little affected.

Perhaps in addition to not being favored by defendants, broad confrontation may not be the best for justice. Confronting witnesses and accusers in the presence of the jury, while they give their testimony and are cross-examined, may be a very imperfect way to find truth. Confrontation as a procedural mechanism for determining reliability is not empirically based, but is historically and culturally determined. It is, however, specified by the Constitution.[42] The Confrontation Clause may be misguided, but that is not my belief or the message of this Article. My focus is on a future in which substantially more confrontation may be provided—Sir Walter Raleigh may win this one.[43]

In Part II, I examine the *Crawford* case and discuss both its clear points of application and some of its uncertainties using the lower court case law decided under the opinion to provide illustrations. In Part III, I suggest resolutions of frequently encountered situations where I believe the result is relatively clear. In Part IV, I examine the specific area covered by the Court in *Crawford*—police interrogations—and expand its rule to other citizen-police encounters that I contend should be uniformly treated as testimonial. In general, I argue for what I believe is the most appropriate approach, but generally also indicate alternatives that might reasonably be chosen. In Part V, I discuss a doctrinal development that I believe the analysis underlying *Crawford* implies: prosecutors should be required to call wit-

42. U.S. CONST. amend. VI.

43. *See generally* Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972).

nesses who previously made testimonial statements and attempt to secure from them their accusation at trial before admitting the prior statement. I also work through the case law on the minimum testimonial presence needed both before and after *Crawford* to satisfy what the Court has termed "availability for cross-examination." In Part VI, I examine *Crawford*'s implications for child abuse and domestic violence prosecutions and suggest several approaches that, in these difficult cases, both facilitate effective prosecutions and provide confrontation. In Part VII, I discuss a role for a secondary system to police confrontation, probably continuing the *Roberts* framework, because of the existence of problematic accusatory hearsay that will probably fall outside the boundaries of testimonial statements.

II. THE BASIC TEACHINGS AND IMPLICATIONS OF *CRAWFORD V. WASHINGTON*

A. *The Facts of the Case*

Michael Crawford was tried for assault and attempted murder for stabbing a man whom he contended tried to rape his wife, Sylvia.[44] The police arrested Michael and Sylvia for the stabbing, and after giving them both *Miranda* warnings,[45] they interrogated both husband and wife twice.[46] The challenged statements came from the second tape-recorded interrogation of Sylvia, who gave a version of the fight between Michael and the alleged victim that appeared inconsistent with her husband's self-defense claim.[47]

Sylvia's tape-recorded statement was introduced at trial against Michael, in the words of the Supreme Court, "even

44. *Crawford*, 124 S. Ct. at 1356–57.

45. *See* Miranda v. Arizona, 384 U.S. 436, 467–69, 471, 473 (1966) (establishing warnings that must be read once a person is taken into police custody and before interrogation).

46. *Crawford*, 124 S. Ct. at 1357.

47. *See* State v. Crawford, 54 P.3d 656, 658 (Wash. 2002). The first statements by both Michael and Sylvia gave roughly the same account of the assault. *Id.* The second statements, however, which were obtained in independent interrogation sessions, differed from the first, and from each other, in the State's view regarding whether the alleged victim had something in his hand at the moment (Michael's version) or after (Sylvia's second version) he was stabbed by Michael. *Id.*

though he had no opportunity for cross-examination."[48] That last point is a little unusual. Sylvia was in fact unavailable at trial, but this was because of Washington's marital privilege, which Michael could and did invoke.[49] The Supreme Court of Washington rejected the state's argument that, by invoking the privilege, Michael waived his confrontation rights.[50] In the Supreme Court of the United States, the prosecution did not challenge that holding, and the Court declined to express an opinion on the issue.[51] Thus, the case was analyzed simply as one where the declarant was unavailable.

The Court of Appeals of Washington and the Supreme Court of Washington applied different tests, albeit both grounded in the framework described by *Ohio v. Roberts*, which looks for "adequate 'indicia of reliability.'"[52] The Court of Appeals of Washington reversed the conviction, finding that there were not sufficient "particularized guarantees of trustworthiness,"[53] while the Supreme Court of Washington reinstated the conviction, concluding that "it bore guarantees of trustworthiness."[54]

B. *General Theory Under the New View of the Confrontation Clause*

Examining history, Justice Scalia, writing for the majority in *Crawford*, concluded that 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."[55] This civil law procedure of private examination by judicial officers, with its roots on the European continent, stood in sharp contrast to the preferred English

48. *Crawford*, 124 S. Ct. at 1357.

49. *See Crawford*, 54 P.3d at 658. Washington's marital privilege provides that a spouse cannot be examined without the consent of the other spouse. WASH. REV. CODE ANN. § 5.60.060(1) (West Supp. 2004). Michael Crawford did not call his wife at trial and neither did the state. *Crawford*, 54 P.3d at 658.

50. *Crawford*, 54 P.3d at 660.

51. *Crawford*, 124 S. Ct. at 1359 n.1.

52. Ohio v. Roberts, 448 U.S. 56, 66 (1980) (quoting Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)).

53. *Crawford*, 124 S. Ct. at 1358.

54. *Id*.

55. *Id*. at 1363.

common law tradition of "live testimony in court subject to adversarial testing."[56]

The Court then turned to the text of the Confrontation Clause in the Sixth Amendment, which provides that in criminal prosecutions, "the accused shall enjoy the right . . . *to be confronted with the witnesses against him.*"[57] "'Witnesses' against the accused" indicated, in the Court's judgment, that the Confrontation Clause was to be applied to witnesses, defined as "those who 'bear testimony.'"[58] The Court derived from that terminology its focus on testimonial statements.

> "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.[59]

The Court left "for another day" an effort to define comprehensively testimonial statements.[60] It determined, however, that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."[61]

For testimonial statements, the Court figuratively erected a "stop sign" as to admissibility in the absence of confrontation. For statements in this category, it firmly rejected the "reliability" or "trustworthiness" mode of analysis adopted by *Ohio v. Roberts*.[62]

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of

56. *Id*. at 1359.

57. U.S. CONST. amend. VI (emphasis added).

58. *Crawford*, 124 S. Ct. at 1364.

59. *Id*. (quoting 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

60. *Crawford*, 124 S. Ct. at 1374

61. *Id*.

62. *Id.* at 1370–71; *see Roberts*, 448 U.S. at 66. ("[T]he evidence must be excluded, at least absent a showing of particularized guarantees of trust worthiness.").

> "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. 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.
>
> . . . .
>
> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.[63]

C. *What are Testimonial Statements?*

The dividing line between testimonial and non-testimonial statements after *Crawford* is unclear for a number of reasons. Chief among these is that the Court refused to adopt a general definition, instead giving us three possible definitions that differ as to their range of application. The Court's avoidance of detailed guidance went even further. While it provided some examples of statements that are and are not testimonial, these examples do not examine close cases. Rather, the Court seemed to give polar examples: "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[64]

The Court also did not pick a consistent dimension on which to describe results. Some of its examples related to at least one of its suggested general definitions of testimonial as an "off-hand, overheard remark,"[65] but other examples used categories not directly used in any of the Court's definitions, such as "police interrogation," which is broader than the most restrictive definition[66] and

63. *Crawford*, 124 S. Ct. at 1370–71.

64. *Id*. at 1364.

65. *Id*.

66. *See id*. The most restrictive definition was set forth by Justice Clarence Thomas, joined by Justice Scalia, in his concurring opinion in *White v. Illinois*, which spoke only of "confessions" and "formalized testimonial materials," and much that would be strictly defined as police interrogation will produce neither. *White v. Illinois*, 502 U.S. 346, 365 (1992).

far narrower than the scope of another.[67] Other examples related to categories of hearsay law—business records and co-conspirator statements—appeared even less theoretically connected to the suggested definitions.[68]

Although not providing a definition, the Court gave some interpretive guidance that is, on the one hand powerful and decisive, and on the other infuriatingly incomplete. It provided historical analogies, a few examples of statements that are and are not testimonial, rough rationales (perhaps) for its treatment of some statements, and three possible general definitions. Ultimately, it reached a narrow holding.[69] The opinion provides an assorted set of tantalizing hints, the majority of which appear to point in the direction of a narrow scope for the Confrontation Clause, but some that leave open the door for a broader view, although that broader construction would likely have to be authored by a different justice.

The clear meanings, implications, and uncertainties of *Crawford* can be illustrated by already decided lower court cases, which provides a relatively consistent resolution of some issues, suggestions for promising approaches in others, and unanswerable questions and fundamentally conflicting views in others. Several points emerge from examining the lower court case law in the immediate wake of *Crawford*. One is that cases are being reversed in substantial numbers.[70] It is impossible to know how

67. *Crawford*, 124 S. Ct. at 1364 (suggesting as a possible definition that testimonial statements include those "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").

68. *Id*. at 1366–67.

69. *Id*. at 1374.

70. *See, e.g.*, People v. Adams, 16 Cal. Rptr. 3d 237, 243–45 (Ct. App. 2004) (reversing convictions for assault because of admission of statements made to sheriff deputies by an unavailable victim); People v. Pirwani, 14 Cal. Rptr. 3d 673, 675 (Ct. App. 2004) (reversing conviction for theft from elderly person in defendant's care because of admission of videotaped statement of victim to police); People v. Espinoza, No. H026266, 2004 Cal. App. Unpub. LEXIS 6573, at *16–18 (Cal. Ct. App. July 13, 2004) (reversing sexual assault conviction because of admission of videotaped statement made to police by seven-year-old child who did not testify); People v. Kilday, No. A099095, 2004 Cal. App. Unpub. LEXIS 6290, at *20 (Cal. Ct. App. June 30, 2004) (reversing convictions for domestic abuse because of admission of videotaped statements regarding four instances of abuse, and a statement obtained as a result of an "unrecorded, informal questioning" of the victim who was frightened and visibly injured; such statements were adjudged testimonial even if they were not an "interrogation" because they were "part of a police investigation aimed at obtaining testimonial evidence."); People v. Sisavath, 13 Cal. Rptr. 3d 753, 757–58 (Ct. App. 2004) (re-

versing conviction because of admission of videotaped interview of a four-year-old child by a "'forensic interview specialist'"); People v. Zarazua, No. H025472, 2004 Cal. App. Unpub. LEXIS 3831, at *13–14 (Cal. Ct. App. Apr. 20, 2004) (reversing rape and domestic battery convictions because of use of videotaped statement of victim); People v. Fry, 92 P.3d 970, 974–81 (Colo. 2004) (reversing murder conviction because of admission of preliminary hearing testimony under the Colorado's catch-all exception, acceptable under *Roberts*, but was rejected under *Crawford* because of inadequacy of opportunity for cross-examination in the jurisdiction's preliminary hearings); People *ex rel.* R.A.S., No. 03CA1209, 2004 Colo. App. LEXIS 1032, at *10–11 (Colo. Ct. App. June 17, 2004) (reversing finding of delinquency based on sexual abuse because of admission of videotape with investigating officer); People v. Vigil, No. 02CA0833, 2004 Colo. App. LEXIS 1024, at *2 (Colo. Ct. App. June 17, 2004) (reversing conviction for receipt of videotaped statement by child to police officer regarding sexual abuse); Davis v. United States, 848 A.2d 596, 599–600 (D.C. 2004) (reversing perjury conviction where confession obtained during police interrogation of unavailable accomplice in murder, out of which perjury charges arose, was admitted); *In re* T.T., 815 N.E.2d 789, 800–05 (Ill. App. Ct. 2004); People v. Thompson, 812 N.E.2d 516, 521–22 (Ill. Ct. App. 2004) (reversing convictions for aggravated battery and unlawful restraint where statements made by victim in obtaining a protective order were used to impeach defendant's testimony; victim was available to prosecution but not called); Snowden v. State, 846 A.2d 36, 47 (Md. Ct. Spec. App. 2004) (reversing conviction for sexual abuse because of admission of statement of child to social worker); *In re* People v. Jones, No. 246617, 2004 Mich. App. LEXIS 1457, at *1–3 (Mich. Ct. App. June 10, 2004) (reversing armed robbery conviction where statements of two co-defendants obtained during police questioning, who were unavailable at trial, were admitted); State v. Courtney, 682 N.W.2d 185, 194–97 (Minn. Ct. App. 2004) (reversing conviction for assault because videotaped interview of child by child protection worker was testimonial, and its admission violated the Confrontation Clause); People v. Woods, 779 N.Y.S.2d 494, 496 (N.Y. App. Div. 2004) (reversing case for receipt of plea allocution of non-testifying co-participant implicating the defendant); People v. Rogers, 780 N.Y.S. 2d 393, 396–97 (N.Y. App. Div. 2004) (reversing rape conviction because of admission of blood test report without affording defendant right to cross-examine); State v. Allen, No. 82556, 2004 Ohio App. LEXIS 2764, at *16–17 (Ohio Ct. App. June 17, 2004) (reversing murder conviction because of admission of statement of accomplice, who did not testify, to the police while in custody that implicated the defendant); State v. Cutlip, No. 03CA0118-M, 2004 Ohio App. LEXIS 1848, at *8–9 (Ohio Ct. App. Apr. 28, 2004) (reversing conviction because of admission of statements of two alleged accomplices, who were unavailable, which were made during police interrogation); Johnson v. State, 145 S.W.3d 346, 350–51 (Tex. Ct. App. 2004); Hale v. State, 139 S.W.3d 418, 421–23 (Tex. Ct. App. 2004) (reversing conviction because of admission of written statement of unavailable accomplice made during police interrogation); Brooks v. State, 132 S.W.3d 702, 704–07 (Tex. Ct. App. 2004) (reversing conviction on admission of a written statement made by an unavailable non-testifying co-defendant during police interrogation); *see also* United States v. Massino, 319 F. Supp. 2d 295, 301 (E.D.N.Y. 2004) (excluding guilty pleas of co-defendants from being offered by government in rehabilitation); United States v. Saner, 313 F. Supp. 2d 896, 901–02 (S.D. Ind. 2004) (denying government's motion *in limine* to admit testimonial statements elicited by an antitrust division attorney during an interview in the co-defendant's home against other defendant unless co-defendant testifies); United States v. Gonzalez-Marichal, 317 F. Supp. 2d 1200, 1204 (S.D. Cal. 2004) (granting motion *in limine* to exclude testimonial interview with unavailable material witness while she was in custody); Las Vegas v. Walsh, 91 P.3d 591, 596 (Nev. 2004) (affirming trial court's determination that nurse's affidavit, prepared in connection with the drawing of blood for admission of evidence regarding intoxication, was required to testify because statement was testimonial); People v. Carrieri, 778 N.Y.S.2d 854, 854–55 (N.Y. Sup. Ct. 2004) (denying motion by government to admit co-defendant's plea allocution unless he testified).

many of these cases would have been reversed under *Ohio v. Roberts*, and some surely would have been, but the number would certainly have been much, much lower. One point to note, however, is that some of the cases are certain reversals because the prosecution followed a set of practices that were designed to meet a different standard and often exhibited clear errors under the vastly different *Crawford* approach. Such clear errors are thus an aberration that is a function of the suddenness and magnitude of the change in doctrine and not necessarily indicative of a continuing pattern and the rate of reversals in the future. A second point is that the lower courts are taking quite different approaches. Some appear to be applying the definition of testimonial relatively expansively to modern practices.[71] Other courts are reading the definition much more narrowly, focusing on historical examples and perhaps responding to the concern that the broader definition of testimonial would have too great an impact on the prosecution of cases.[72]

The decided cases point to the necessity of changing existing practices, such as the practice of police videotaping victim statements shortly after the crime, which is clearly testimonial and now inadmissible without confrontation. Presumably, however, even if the video equipment is turned off, interviews will continue in a modified form. This example shows that confrontation will be defined and implemented in a dynamic environment where police and prosecutors, and over the longer run, judges and prosecutors, can change practices and potentially alter results under *Crawford*. Relatively common practices that created clearly testimonial statements are likely now to simply disappear, only to be re-

71. *See, e.g.*, People v. Kilday, No. A099095, 2004 Cal. App. Unpub. LEXIS 6290, at *20 (Cal. Ct. App. June 30, 2004) (concluding that "unrecorded, informal questioning" of the victim, who was frightened and visibly injured, was testimonial even if not "interrogation" because "it was part of a police investigation aimed at obtaining testimonial evidence"); *see also infra* note 263.

72. *See, e.g.*, Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004); Fowler v. State, 809 N.E.2d 960 (Ind. Ct. App. 2004). In these cases, the Court of Appeals of Indiana found that statements to the police in the aftermath of domestic assaults were non-testimonial because they involved police "questioning" rather than "interrogation." *Hammon*, 809 N.E.2d at 952; *Fowler*, 809 N.E.2d at 963–64. The court stated that the practice of questioning victims shortly after an apparent criminal assault to ascertain the facts did not "remotely resembl[e] an inquiry before King James I's Privy Council." *Hammon*, 809 N.E.2d at 952; *Fowler*, 809 N.E.2d at 964. The impact of a contrary finding on these convictions, and on the prosecution of domestic violence, likely played a part in the courts' decision. *See* People v. Cage, 15 Cal. Rptr. 3d 846, 851–57 (Ct. App. 2004) (applying a similar analysis to *Hammon* and *Fowler*).

placed by others that are similar in substantive result, but less clearly produce testimonial statements. The fact that countermeasures will be taken highlights the importance of determining whether changes in the Court's noted hallmarks of testimonial statements will alter the constitutional status of the statements under a general formalistic definition, or whether the threat of allowing statements to escape scrutiny by merely changing a procedure will cause the Court to cover substantively equivalent practices as well. On the other hand, the dynamic environment can produce changes of a different sort that provide confrontation at prior or current proceedings. Such changes would diminish pressure on the definition because they would permit admission of the statements regardless of their testimonial status.

1. Suggested Possible Definitions

Without adopting any specific formulation, the Court quoted three possible definitions for testimonial statements. The petitioner suggested that testimonial be defined as "'*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.'"[73] A second definition for testimonial, from Justice Thomas's concurring opinion in *White v. Illinois*, was "'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'"[74] The *Amici Curiae* Brief for the National Association of Criminal Defense Lawyers suggested the definition to be "'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.'"[75]

These definitions differ substantially in scope, with the third definition being the most abstract and having the broadest and most general applicability, requiring only a reasonable, objective recognition that the statement would be available for trial use.

73. *Crawford*, 124 S. Ct. at 1364 (quoting Brief for Petitioner at 23).

74. *Id*. (quoting *White*, 502 U.S. at 365 (Thomas, J., concurring)).

75. *Id*. (quoting Brief of Amici Curiae National Association of Criminal Defense Lawyers et al. at 3).

Justice Thomas's definition is the narrowest and most concrete, at least on its face, being wedded to "formalized testimonial materials."[76] Petitioner's suggested definition bridges some of the gaps between the two, using formal testimony as its touchstone, but expands the category by including "its functional equivalent" where "reasonably expect[ed] to be used prosecutorially."[77]

2. Statements That *Are* Definitely Testimonial

The Court gave the following examples of statements that are testimonial: "prior testimony at a preliminary hearing, before a grand jury, or at a former trial;" "police interrogations;"[78] and "plea allocution[s] showing existence of a conspiracy."[79]

More generally, but an example rather than a definition, the Court stated that "[a]n accuser who makes a formal statement to government officers bears testimony."[80]

3. Statements That *Are Not* Testimonial

The Court gave a few examples of statements that are not testimonial, stating that "[a]n off-hand, overheard remark" may be "a good candidate for exclusion under the hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted."[81] This description has two elements: "off-hand" and "overheard." "Off-hand" is defined as "showing no premeditation or preparation,"[82] suggesting a lack of purpose or intent about the comment and casualness, as opposed to formality. "Overheard" buttresses the connotation that the speaker lacks intent at least as to the use of the statement for what might be termed official purposes.

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76. *Id*.

77. *Id*.

78. *Id*. at 1374.

79. *Id*. at 1372 (citing United States v. Aguilar, 295 F.3d 1018, 1021–23 (9th Cir. 2002)). Presumably, plea allocutions that incriminate another person generally would be covered. Statements that incriminate the speaker—admissions—may be testimonial in form but are not excluded by the Confrontation Clause. *See supra* note 5.

80. *Crawford*, 124 S. Ct. at 1364.

81. *Id*.

82. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1567 (1993). Synonyms provided for "off-hand" include "casual, informal." *Id*.

Similarly, the Court contrasted "a casual remark to an acquaintance,"[83] which does not bear testimony, to "a formal statement to government officers,"[84] which as noted above, does.[85] "Casual" is defined as "occurring . . . without calculated intent . . . without specific motivation, special interest, or constant purpose."[86] Here, in addition to the lack of intent, is added a lack of formality that is solidified by the contrast to the formal statement made to the government official. A new component is also added; the identity of the person who hears the statement is an acquaintance, presumably a private individual, as opposed to a government officer, with which it was contrasted.

Finally, the Court described "business records or statements in furtherance of a conspiracy" as "by their nature . . . not testimonial."[87] The Court's statement appeared to signal that hearsay received under these exceptions, and indeed most hearsay generally, was not testimonial,[88] although even as to these two exceptions, its treatment may not to be as categorical as it initially appears.[89]

While the Court gave no further explanation regarding business records,[90] it did provide possible interpretative clues in its description of co-conspirator statements; first referring to them as "statements in furtherance of a conspiracy."[91] Such a characterization of co-conspirator statements might be seen as emphasizing that the statement aids the criminal enterprise, which generally means that it excludes "idle chatter," statements simply recounting past events, and thus, most accusatorial statements.[92] Second,

83. *Crawford*, 124 S. Ct. at 1364.

84. *Id*.

85. *Id*.

86. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 349 (1993).

87. *Crawford*, 124 S. Ct. at 1367.

88. Relying on historical analysis, the Court 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." *Id*.

89. *See infra* Part III.D.

90. Chief Justice Rehnquist, in his concurring opinion, construes the majority's treatment of hearsay exceptions as a categorical exclusion of the exceptions. *See Crawford*, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring) (commending the majority's analysis of "testimony" because it "excludes at least some hearsay exceptions"). In what was presumably a purposeful effort to expand the categories, Chief Justice Rehnquist added "official records" to the list of categorically excluded statements. *Id*.

91. *Id*. at 1367, 1378.

92. *See infra* text accompanying notes 198–200.

the Court gave further insight into why it considered co-conspirator statements outside the testimonial category when it described the statement admitted in *Bourjaily v. United States*[93] as one "made unwittingly to an FBI informant."[94] Instead of talking in fact to "an acquaintance" or business associate who is a private individual, as suggested by the earlier example, in *Bourjaily* the declarant was instead speaking to an FBI informant, but believed that person to be a private individual.[95] This description suggests that the speaker's knowledge that he or she is talking to a government agent is critical. The interpretative clues are interesting and potentially helpful, but they show the cryptic character of *Crawford*, pointing in different directions and providing alternate rationales.

III. *CRAWFORD*'S APPLICATION TO CLEAR CATEGORIES, RELATIVELY CLEAR CATEGORIES, AND NON-CATEGORIES

A. *Clear Categories: Formal, Recorded Statements Made to Public and Quasi-Public Officials*

The boundaries of testimonial statements are uncertain outside of a few examples and categories. Examining areas of relative certainty is a useful point of departure. In *Crawford*, the Court stated that "[a]n accuser who makes a formal statement to government officers bears testimony."[96]

A number of the statements in this core category involve statements made to fit special hearsay exceptions specifically developed to satisfy the trustworthiness and reliability requirements of *Ohio v. Roberts*.[97] California statutory and case law, involving special classes of victims, provide some clear examples. Sections 1360, 1370, and 1380 of the California Evidence Code were designed to admit hearsay statements regarding child abuse or ne-

93. 483 U.S. 171 (1987).

94. *Crawford*, 124 S. Ct. at 1368 (referring to *Bourjaily*, 483 U.S. at 181–84).

95. *See Bourjaily*, 483 U.S. at 173. The declarant, Angelo Lonardo, was speaking to Clarence Greathouse, an informant working for the FBI, about the purchase of a kilogram of cocaine in a conversation that was being secretly tape recorded. *Id*.

96. *Crawford*, 124 S. Ct. at 1364.

97. 448 U.S. 56, 65–66 (1980).

glect,[98] domestic violence,[99] and elder and dependent adult abuse cases.[100] Also, cases from California and other jurisdictions that vary slightly from the core situations show how quickly ambiguity enters the picture when the circumstances or features of the statement are altered.

Three cases illustrate these prior practices that are now unconstitutional under *Crawford*. In *People v. Zarazua*,[101] the apparent victim of domestic violence, which included rape and aggravated assault,[102] was interviewed on videotape by a police officer in the early morning hours at the police department.[103] As the court stated, "[b]y the time [the officer] finished setting up the recording equipment and began the interview, it was about an hour and a half after the incident."[104] A week later, when the victim was interviewed, she denied that she was raped and did not want the defendant incarcerated; she also evaded service and did not appear at trial.[105] The videotape was played at trial and the defendant was convicted.[106] The California Court of Appeal reversed the conviction on the basis of *Crawford*.[107]

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98. CAL. EVID. CODE §§ 1360, 1370, 1380 (West Supp. 2004). Section 1360(a) provides that

> [i]n a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule . . .

assuming three specific conditions are met. *Id*. § 1360(a) (West Supp. 2004).

99. *Id*. § 1370(a)(1) (West Supp. 2004). Section 1370(a)(1) provides that hearsay is not excluded if "[t]he statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant." *Id*.

100. *Id*. § 1380(a)(6)(A). Section 1380(a)(6)(A) requires that at the time of the offense, the alleged victim was either sixty-five years of age or was a dependent adult, and that

> "[at] the time of any criminal proceeding . . . regarding the alleged violation or attempted violation, [the victim] is either deceased or suffers from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired."

Id.

101. No. H025472, 2004 Cal. App. Unpub. LEXIS 3831 (Cal. Ct. App. Apr. 20, 2004).

102. *Id*. at *1. The defendant was convicted of rape, assault by force likely to produce great bodily injury, and "domestic battery" with corporal injury. *Id*.

103. *Id*. at *2.

104. *Id*.

105. *Id*. at *4, *7.

106. *Id*. at *7.

107. *Id*. at *12–14; *see also* People v. Kilday, No. A099095, 2004 Cal. App. Unpub.

In *People v. Pirwani*,[108] the evidence involved a videotaped statement, made two days before a dependent elderly victim died, to a police detective and a fraud investigator regarding financial transactions with the defendant.[109] The defendant was convicted of stealing money from the victim, who was in her care.[110] The Attorney General conceded the unconstitutionality of the evidence provision that admitted this videotaped evidence.[111] The California Court of Appeal believed that "[e]ven assuming that the statement was not taken specifically with a view towards its use at a later trial, it would be reasonable to anticipate its use at trial if [the victim] became unavailable to testify."[112]

Finally, in *People v. Sisavath*,[113] the California Court of Appeal found that a videotaped interview of a four-year-old child by a "'forensic interview specialist'" at the county's Multidisciplinary Interview Center (MDIC) was testimonial and improperly admitted under *Crawford*.[114] The court noted that, by the time of the interview, formal criminal charges had been filed against the defendant, a preliminary hearing had been held, and both the deputy district attorney who prosecuted the case and an investigator from the district attorney's office were present.[115] It rejected the state's arguments that the statement was not testimonial because the interviewer was not a government employee and that the interview might have been intended for therapeutic purposes or removal proceedings rather than prosecution.[116] The court concluded that the statement was testimonial, employing the test that it was "'made under circumstances which would lead an ob-

LEXIS 6290, at *5, *6, *17 (Cal. Ct. App. June 30, 2004) (ruling that videotaped interview of victim taken in her hotel room after the defendant's arrest concerning domestic abuse committed on four separate occasions was testimonial despite the victim not being under arrest).

108. 14 Cal. Rptr. 3d 673 (Ct. App. 2004).

109. *Id*. at 675.

110. *Id*.

111. *Id*.

112. *Id*. at 685.

113. 13 Cal. Rptr. 3d 753 (Ct. App. 2004).

114. *Id.* at 757–58; *see also* People v. Espinoza, No. H026266, 2004 Cal. App. Unpub. LEXIS 6573, at *16–18 (Cal. Ct. App. July 13, 2004) (reversing sexual assault conviction due to the admission of videotaped statement made to police by seven-year-old child who did not testify).

115. *Sisavath*, 13 Cal. Rptr. 3d at 757.

116. *Id*. at 758.

jective witness reasonably to believe that the statement would be available for use at a later trial.'"[117]

These cases illustrate several significant points. First, they appear to fit the *Crawford* Court's description that "[a]n accuser who makes a formal statement to government officers bears testimony."[118] The statements were recorded on videotape and were all apparently made by the government with an eye to—although not necessarily only to—admission under hearsay provisions tailored to the facts of each case. Second, videotaping the statement appears obviously an important factor supporting a finding that the statement is testimonial in that it indicates an evidentiary purpose for the statement.[119] Third, two of the cases suggest the uncertainty of whose perspective matters—the government's or the witness's—and how the witness's perspective is evaluated when the actual witness is either a child or an elderly or dependent adult whose perceptive abilities and intellectual functioning are below that of ordinary adults. Fourth, even if the person asking the questions is not a government agent, it is enough if the government, particularly the police or prosecutors, are involved in some way with the making of the statement.[120]

117. *Id*. at 757 (quoting *Crawford*, 124 S. Ct. at 1364). The court used the test of an "objective witness" rather than an objective witness in the same category as the actual witness, here a four-year-old. *Id*. at 758 n.3.

118. *Crawford*, 124 S. Ct. at 1364.

119. Lee v. State, 143 S.W.3d 565, 570 (Tex. Ct. App. 2004) (finding a statement testimonial that was made by a witness/co-participant to a police officer in a patrol car after the arrest of one suspect, even though not audible, because it was recorded on the car's audio-video system, which indicated it was intended to record testimony for prosecution). Remarkably, neither *Zarazua*, *Pirwani*, nor *Sisavath* emphasizes the fact that the statements were videotaped; none of these three decisions or *Lee* seemed concerned with the degree to which the witnesses understood they were being videotaped; and, except in *Zarazua* where the court noted the video equipment was set up before the interview began, the extent to which the witnesses were aware of the taping is unclear. *See Zarazua*, 2004 Cal. App. Unpub. LEXIS 3831, at *2.

120. *See also* People v. Warner, 14 Cal. Rptr. 3d 419, 429 (Ct. App. 2004) (finding interview by a MDIC to be testimonial despite the state's argument that the statement was intended to serve a broader purpose because law enforcement had been involved in the training of the interview specialist and a police detective observed the interview); State v. Courtney, 682 N.W.2d 185, 196 (Minn. Ct. App. 2004) (finding the videotaped statement of child by child protection worker to be testimonial where a police officer observed the interview and interrupted it to have the child draw a picture of the gun used in the assault).

People v. Vigil,[121] *People ex rel. R.A.S.*,[122] and *Snowden v. State*[123] are three other cases, all of which involved children's testimony, where specific facts made the testimonial designation clear. *R.A.S.* involved a videotaped "'forensic interview'" by a police investigator regarding sexual abuse.[124] The interview was conducted "in a question and answer format appropriate to a child" three days after the alleged incident, which had previously been reported by the victim to his mother and grandmother.[125] The Colorado Court of Appeals found that the statement was testimonial.[126] In *Vigil*, decided on the same day by the Colorado Court of Appeals, the court found a videotaped police interview of the victim testimonial, rejecting the state's argument that the questioning did not constitute interrogation because it was conducted "in a relaxed atmosphere, with open-ended, nonleading questions."[127] The court also rejected the state's argument that the seven-year-old in the case would not reasonably expect his statement to be used prosecutorially because in response to questions by the police officer regarding what should happen to the defendant, the child stated that he "should go to jail."[128] The officer then told the child he would need to talk to "'a friend'" in the district attorney's office who would try to put the defendant "'in jail for a long time.'"[129]

Snowden, which also found statements to be testimonial, did not involve videotaped statements.[130] Instead, a licensed social worker employed by the county child protective services recounted statements made to her by three children who were

121. No. 02CA0833, 2004 Colo. App. LEXIS 1024 (Colo. Ct. App. June 17, 2004).

122. No. 03CA1209, 2004 Colo. App. LEXIS 1032 (Colo. Ct. App. June 17, 2004). The record on the child's availability is unclear. The court reported that the state initially asked the victim to take the stand so the court could determine competency, but after a bench conference that was held off the record, the child was not called and a police investigator testified instead. *Id*. at *2.

123. 846 A.2d 36 (Md. Ct. Spec. App. 2004).

124. *R.A.S.*, 2004 Colo. App. LEXIS 1032, at *2–3.

125. *Id*. at *10.

126. *Id*.

127. *Vigil*, 2004 Colo. App. LEXIS 1024, at *6.

128. *Id*. at *7.

129. *Id.* at *7–8. *Vigil* also involved two other types of statements: one by the child to his father shortly after the incident, which the court found to be non-testimonial, *see id.* at *16, and another by the victim to a doctor who examined the child after the incident, which the court ruled was testimonial. *Id.* at *17–18.

130. *See Snowden*, 846 A.2d at 39.

available, but were not called as witnesses,[131] as permitted under Maryland's "tender years" hearsay exception.[132] The court found that the statements were testimonial because the trial court had stated that "'[t]he children were interviewed for the expressed purpose of developing their testimony by [the social worker], under the relevant Maryland statute that provides for the testimony of certain persons in lieu of a child, in a child sexual abuse case.'"[133] The appellate court also noted that before the interview, the social worker had received a police report stating that the defendant "'had sexually abused these children.'"[134] The court's focus here was also on the intention of the government officer. If and how the purpose to develop testimony was communicated to the children and whether they reasonably understood that fact was not examined.[135]

One point that can be seen in these three cases is that the testimonial determination was relatively easy because the government was purposefully creating formalized statements for potential use at trial. In most of the cases, it was directly related to a hearsay exception that contemplated the admission of such statements if created under circumstances indicating trustworthiness and reliability as defined by *Ohio v. Roberts*.[136] After *Crawford*, however, and the virtually automatic rejection of statements made in this fashion, such clear practices almost certainly will disappear.

Investigations and conversations, however, will not disappear. Countermeasures and avoidance of *Crawford*'s restrictions are certain. Indeed, most of the factors that the courts relied on—whether it be the written form of the witness's statement[137] or its

131. *Id*. The children, who were ten and eight years old at the time of the incident, were treated as available by the court, *id*., or not shown by the state to be unavailable, *Id.* at 47 n.31. The court did not explain why they were not called as witnesses. *See id*. at 47.

132. MD. CODE ANN., CRIM. PRO. § 11-304 (Supp. 2003).

133. *Snowden*, 846 A.2d at 47.

134. *Id.* at 42 n.10.

135. The description of the social worker's conversation with the children does not include any statements by her regarding the anticipated use of the statements at trial. *Id.*

136. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

137. *See* Brawner v. State, 602 S.E.2d 612, 613–14 (Ga. 2004) (finding a written statement made by uninvolved eyewitness given to investigative detective several days after crime testimonial); Samarron v. State, No. 04-01-00124-CR, 2004 Tex. App. LEXIS 8015, at *14–15 (Tex. Ct. App. Sept. 1, 2004) (concluding that a statement given by eyewitness to detective at station and admitted at trial as excited utterance was testimonial).

recording on videotape,[138] the training and identity of the interviewer, the statements made by the interviewer to the witnesses about the potential use of the statement, conversations with investigating officers, or the examination of police reports before the interview—can be eliminated.

The facts of *Samarron v. State*[139] present an interesting example. Rather than talking immediately to an eyewitness to a murder, who was apparently excited, at the scene, the detective interviewed the cooperative witness at the police station and took a typed statement.[140] The statement, which was admitted by the trial court as an excited utterance,[141] was found to be testimonial under *Crawford*, resulting in reversal of the conviction under the Confrontation Clause since the witness did not testify.[142] The court explained: "Garcia [the witness] did not spontaneously tell Detective Martinez what had happened at the scene. Instead, after being questioned by Detective Martinez, he gave a formal, signed, written statement to the police."[143] After *Crawford* and the recognition of potential significance of preparing the written witness statement, the police may delay the immediate, more informal, and more excited conversation.

All countermeasures, of course, will not be taken. Particularly, countermeasures that interfere with the effective investigation and prosecution of crime will not be adopted,[144] but many of the

138. The situation in *Lee v. State*, 143 S.W.3d 565, 570 (Tex. Ct. App. 2004), presents a dilemma for authorities. In *Lee*, the court held a statement made by a witness/co-participant to a police officer in the patrol car after the arrest of one suspect was testimonial because, even though not audible, it was recorded on the audio-video system in the patrol car, which indicated an intention to record testimony for prosecution of the case being investigated. The potential to create an inadmissible testimonial statement under *Crawford* by having the conversation recorded is not likely to cause recording systems to be removed from squad cars, but that concern may cause some conversation first to be held outside the patrol car rather than inside.

139. 2004 Tex. App. LEXIS 8015.

140. *Id*. at *2–4.

141. *Id*. at *5.

142. *Id*. at *15.

143. *Id*.

144. Some of the practices, such as videotaping an interview with the child, are done for multiple purposes, and indeed, child advocates have long argued for limiting, where possible, the number of times a child who has been sexually abused or otherwise traumatized is questioned about the incident to reduce the additional trauma involved in the process of retelling. *See, e.g.*, Kee MacFarlane, *Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135, 136-37 (1985). Videotaping a "multi-purpose" interview, so that it can be watched and used by the different agencies rather than re-interviewing the child, is part of this effort. *Id.* at 139. Therefore,

indicators of testimonial statements can disappear. If such "cookbook" changes in form can render the statements non-testimonial, avoidance of the restriction of *Crawford* will prove relatively easy for many statements that are not made to police officers, and if there is no Confrontation Clause protection whatsoever for those statements, serious issues of justice as to problematic accusatory statements will go unaddressed.

B. *Clear Categories: Privately Made Statements—Confidential, Purposeful*

On the other hand, statements made to family, friends, and acquaintances without an intention for use at trial have consistently been held not to be testimonial, even if highly incriminating to another. *State v. Rivera*[145] presents one of many examples. In *Rivera*, a co-participant in the crime confided in his nephew during a car trip that he and the defendant Rivera committed a burglary together and that when the victim discovered them, the defendant choked her.[146] The statement was admitted at the defendant's trial as a statement against the declarant's interest.[147] The Supreme Court of Connecticut found the statement to be non-testimonial because it failed under the most expansive test articulated by the *Crawford* Court: an objective witness would not reasonably believe that the statement would be available for use at a later trial.[148] Instead, the witness "made the statement in confidence and on his own initiative to a close family member, almost eighteen months before the defendant was arrested and more than four years before his own arrest."[149]

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it would be unfortunate, if such videotaped interviews were discontinued. *Crawford* could cause them to be discontinued, but more likely, they will continue even if *Crawford* renders them inadmissible, but simply be unavailable for use by the prosecution unless the child testifies. *See*, *e.g.*, People v. Warner, 14 Cal. Rptr. 3d 419, 424, 431 (Ct. App. 2004) (admitting testimonial videotape of a child as satisfying the Confrontation Clause because the child testified and was available for cross-examination). The non-testimonial interview, if there is one, will likely be an additional earlier interview.

145. 844 A.2d 191 (Conn. 2004).

146. *Id.* at 197.

147. *Id*. at 198.

148. *Id*. at 202.

149. *Id.*

Similarly, in *People v. Cervantes,*[150] one of the perpetrators of a murder, who was injured while escaping from the crime, made statements implicating himself and others in the killing when the witness, a medical assistant, happened to visit his nearby home the day of the incident.[151] Five days later, the medical assistant, who knew the perpetrators were members of a gang and was afraid to testify, called the police and reported the conversation.[152] The trial court found the statements made by the perpetrator to be related to the medical treatment that the neighbor was providing outside the normal avenues and was without any apparent connection to law enforcement.[153] The California Court of Appeal rejected the argument that the statement was testimonial, even under the amicus definition: "[W]e subscribe to the view that [the co-participant] sought medical assistance from a friend of long standing who had come to visit his home. [His] statement appears to have been made without any reasonable expectation it would be used at a later trial."[154]

The facts of *Horton v. Allen*[155] present an even stronger argument for non-testimonial treatment. There, the statement, admitted under the state-of-mind hearsay exception, was made by a co-participant before the crime occurred, describing the motive for the subsequent murder.[156] The court concluded that the statement was non-testimonial because it was made in a private conversation and not "under circumstances in which an objective person would 'reasonably believe that the statement would be available for use at a later trial.'"[157]

150. 12 Cal. Rptr. 3d 774 (Ct. App. 2004).

151. *Id*. at 777.

152. *Id.*

153. *Id.* at 780.

154. *Id.* at 783.

155. 370 F.3d 75 (1st Cir. 2004); *see also* United States v. Manfre, 368 F.3d 832, 838 n.1 (8th Cir. 2004) (ruling that *Crawford* was inapplicable because the statements "were made to loved ones or acquaintances and are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks").

156. *See Horton*, 370 F.3d at 83.

157. *Id.* at 84 (quoting *Crawford*, 124 S. Ct. at 1364)). Other cases have found similar statements to private individuals, with no clear evidence of an intent to use the statements in criminal prosecutions or to communicate them to authorities, as non-testimonial. *See, e.g.*, United States v. Morgan, 385 F.3d 196, 208–09 (2d Cir. 2004) (approving admission of letter written by co-defendant to her boyfriend in private and with no expectation that it would be found or used by police as non-testimonial); People v. Griffin, 93 P.3d 344, 369, 372 n.19 (Cal. 2004) (concluding that a statement by a murder victim to another girl

The statements in each of these cases may have been accusatory, but they were made to private individuals not associated with the government with no expectation of being conveyed to the police, the prosecution, or other officials. They were clearly made for a purpose other than prosecution. Accusatory statements that are intended to be conveyed beyond the family, friends, or acquaintances to whom they are made, and even those that the speaker understands might be conveyed further are different and perhaps should be treated as testimonial. Determining where the dividing line should be drawn, however, would be a challenge.

People v. Compan[158] applies this same rationale but in what might be considered a transition case. In *Compan*, the victim of domestic violence called a friend, told her that her husband was "angry and yelling at her," and asked the friend "to drive over and pick her up."[159] About fifteen minutes later, the victim called back to say that she had been hurt and would be awaiting her friend in the back of her home.[160] About fifteen minutes later, the friend picked up the victim, and during the ride to the friend's home, the victim recounted that the defendant had punched and kicked her, threw her against a wall, and pulled her hair.[161] Shortly after arriving at the friend's home, the friend took the victim to the hospital where the victim spoke with the police and a doctor.[162] The victim did not testify at trial, and instead her friend testified, under the excited utterance exception, to the

at school made on the day that the crime occurred that the "defendant had been fondling her for some time and that [the victim] intended to confront him if he continued" was not testimonial); People v. Conwell, Nos. A097011, A101881, A101927, 2004 Cal. App. Unpub. LEXIS 2409, at *105, *123 (Cal. Ct. App. Mar. 16, 2004) (ruling that a statement made to a private individual at a basketball court, after the discovery of a body, that the speaker and Conwell had committed the crime were "unsolicited and unwelcome statements made to an acquaintance in a public park" and were not testimonial); Somervell v. State, No. 5D03-1751, 2004 Fla. App. LEXIS 11330, at *4–5 (Fla. Dist. Ct. App. July 30, 2004) (concluding that a statement that a mother overheard her autistic child make when pretending to talk to the defendant on the phone was not testimonial); People v. Shepherd, No. 247945, 2004 Mich. App. LEXIS 2501 (Mich. Ct. App. Sept. 28, 2004) (finding statements to relatives overheard by guards not testimonial); State v. Manuel, 685 N.W.2d 525, 527, 531–32 (Wis. Ct. App. 2004) (finding that a statement about a murder by the defendant, who was arrested two days later, on the night of the crime to his girlfriend that he did the shooting was not testimonial).

158. No. 02CA1469, 2004 Colo. App. LEXIS 865 (Colo. Ct. App. May 20, 2004).

159. *Id*. at *1.

160. *Id*.

161. *Id*. at *1–2.

162. *Id*. at *2.

statements she made on the telephone and during the car ride before she calmed down.[163]

The Court of Appeals of Colorado concluded that these statements were not testimonial because they were made to a friend "unassociated with government activity"[164] and because they "were not made for the purpose of establishing facts in a subsequent proceeding."[165] The conclusion raises, as do many 911 calls, the status of statements made to private individuals that put the criminal process in motion or were not necessarily intended to remain confidential, and thus, depending on the standard, could "reasonably" be anticipated to be used at trial or not.[166]

Finding an all-purpose "bright line," rather than a totality of the circumstances approach, may be a challenge. In *Compan*, a line suggested, which I will continue to examine later, is that the statement was made to a private individual rather than to a gov-

163. *Id*.

164. *Id*. at *9.

165. *Id*. at *10.

166. There are other cases involving statements in this ambiguous area that were made to private individuals, but were not necessarily intended to be communicated to authorities or used at trial. However, they are accusatory and have clear potential as evidence. *See, e.g.,* State v. Blackstock, 598 S.E.2d 412, 420 (N.C. Ct. App. 2004) (finding that extended statements made by individual fatally shot during a robbery to his wife and daughter while in the hospital were non-testimonial because they were made during a period when his physical condition was improving and therefore would not have been anticipated by the speaker to be used prosecutorially); State v. Orndorff, 95 P.3d 406, 408 (Wash. Ct. App. 2004) (concluding that an excited utterance made by one crime victim was not testimonial because it was "a spontaneous declaration made in response to the stressful event that [the witness] was experiencing," it was made to a private individual rather than in response to police questioning, and the declarant "had no reason to expect that her statement would be used prosecutorially").

In general, cases where statements are made to family members, and then later introduced in domestic violence cases under the state of mind exception to show various points about a pattern of treatment, are problematic. On the one hand, they typically were not immediately communicated to the authorities, but, on the other, they were not intended to remain confidential—they are about a crime, i.e., accusatory, a type of statement frequently admitted at trial, and not made for an unrelated purpose. Courts often find them non-testimonial. *See, e.g.*, Demons v. State, 595 S.E.2d 76, 79, 80 (Ga. 2004) (finding a statement by a murder victim to a co-worker that the defendant had beaten him and had said he was going to kill the victim ruled non-testimonial because it was made to a friend before the crime occurred and "without any reasonable expectation that they would be used at a later trial"); People v. Williams, No. 246011, 2004 Mich. App. LEXIS 1217, at *2–4 (Mich. Ct. App. May 13, 2004) (finding that statements to victim's mother, brother, sister, and friend regarding unhappiness, feelings regarding defendant's stalking and threats, fear for her life, and desire to end the relationship with the defendant all to be non-testimonial).

ernment agent.[167] If government involvement in receiving the statement is strictly required, however, *Crawford* would be too easily avoided in some routinely encountered situations by having government functions passed off to private groups. *Compan* attempts to avoid this problem by requiring that to be considered private, the individual must be "unassociated with government activity."[168]

I suggest one dividing line. When a statement is accusatory and intended to be conveyed beyond those who would be expected to keep it confidential—to government agents, private agencies that perform government functions, and strangers at arms length from the witness—it should be considered testimonial.

In general, where the burden of proof is placed in construing the intent of the speaker may be helpful in developing workable dividing lines.[169] I suggest that when a statement is made to a strictly private party, the burden can properly be placed on the defendant to show that it was for a testimonial purpose. The critical determinations are two-fold: whether the statement was accusatory, and whether it was intended to be conveyed to those investigating the crime. Ambiguity would mean exclusion from the testimonial category. In concrete terms, it would mean that the statements in *Compan* and similar fact patterns would not be considered testimonial.[170] In the next Part, I address a different situation—statements made to police officers—where I believe reversing the burden would clearly be in order.

C. *Relatively Clear Categories: Privately-Made Statements, Formal, and Litigation Focused*

The preceding section began with purely private statements made in confidence that were non-testimonial and moved to private statements where the speaker had a growing understanding that the statement would be communicated further, and its cate-

167. *See Compan*, 2004 Colo. App. LEXIS 865, at *10.

168. *Id*. at *9.

169. *People v. Cortes*, 781 N.Y.S.2d 401, 414 (N.Y. Sup. Ct. 2004), employs this promising general approach—allocating the burden of proof as to the character of the statement—although its specific application of the approach, which placed the burden for 911 calls on the government because it is "more in accord with the highly prized protection of the right of confrontation" may well not be adopted. *Id.* at *37–42.

170. *See Compan*, 2004 Colo. App. LEXIS 865, at *1–2.

gorization might be ambiguous. With a slight additional movement to more formal private statements and a specific intent for judicial use, the statement's categorization again becomes clear as testimonial. *Crawford* stated that the role of the government in creating the evidence was a central concern of the resistance to inquisitorial evidence.[171] Indeed, from the lower court application and from logic, it appears that open government involvement should be sufficient to establish the testimonial quality of the statement, even without an intent by the speaker that it was to be used testimonially.[172] On the other hand, formality and clear intent of the speaker to create a testimonial document is apparently also sufficient even without governmental involvement.[173]

Justice Scalia provides an excellent, albeit ambiguous, example of this latter situation from the prosecution of Sir Walter Raleigh, the clearest historical example of the abuse the Confrontation Clause was designed to remedy.[174] Sir Walter Raleigh stated that Lord Cobham, his alleged accomplice, "had implicated him in an examination before the Privy Council and *in a letter*,"[175] and that at his trial these were read to the jury.[176] Cobham wrote two letters to the Lords, one on July 29, 1603, after his examination before the Council on July 20.[177] The other, which is much more damning, was written just before trial, which occurred in November 1603.[178] It explained away Cobham's recantation of his accusation as occasioned by two letters Raleigh was able to get to Cobham while he was in prison, begging him to renounce his former statements.[179] 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.[180]

171. *See Crawford*, 124 S. Ct. at 1365.
172. *See id*. at 1364.
173. *See id*.
174. *Id*. at 1360.
175. *Id.* (emphasis added).
176. *Id*.
177. 1 DAVID JARDINE, CRIMINAL TRIALS 422–23 (1832).
178. *Id*. at 444–46.
179. *Id*.
180. *Id.* at 444. "[H]e could not sleep quietly till he had revealed the truth to the Lords, and therefore voluntarily wrote the whole matter to them, with his own hand, but yesterday." *Id*.

The *Crawford* Court appeared to consider these letters as testimonial and part of the abuses of the inquisitorial system at the core of Confrontation Clause concerns.[181] If so, it supports the very sensible proposition that intentionally created, formal materials may be testimonial, even if the government had no direct role in creating them.

Two caveats are appropriate, however. First, since Cobham was under the physical control of the government and his life and liberty depended upon his cooperation,[182] his statements may be viewed as created by governmental pressure, regardless of whether they were on their face voluntarily produced by him.[183] A second distinguishing feature might be found in the timing of the statement, an issue that will be treated further below.[184] These witness-generated letters were created after the Lords had interrogated Cobham.[185] Statements "volunteered" in that situation may not be considered as fully self-generated. More generally, the statement was made after the government had begun its efforts to prosecute Raleigh.[186] Statements made to authorities after authorities have signaled their investigation of a particular individual as the perpetrator—by an arrest, for example—should, except in rare exceptions, be considered testimonial.

Whether government agents, perhaps criminal investigators, must be involved in some way and what type of involvement is required—the solicitation or the recording of information—are important issues. I will discuss those issues in the next Part, which examines police interrogations.[187]

D. *Non-Categories: The Irrelevancy of Hearsay Exceptions as Strict Categories to the* Crawford *Definitional System*

Several issues arise concerning the Court's treatment of several hearsay exceptions in *Crawford* as non-testimonial. The first is whether the Court intends to categorically exclude all state-

181. *See Crawford*, 124 S. Ct. at 1360.
182. *See id*. (noting Raleigh's argument at trial that Cobham had lied to save himself).
183. *See id*.
184. See *infra* Part IV, particularly Parts IV.B.2–3.
185. JARDINE, *supra* note 177, at 445.
186. *Id*.
187. *See infra* Part IV.

ments that fit within the identified exceptions, or if this is simply a rough and ready division in that most statements coming under these exceptions will be excluded. The Court's heavy reliance on history in *Crawford* makes categorical exclusion unlikely. It argued that there was no correspondence between the confrontation right as it was understood at the time of its framing and the developing hearsay rule[188] and noted that the definition of an exception at the time of the Framing might have been very different than it is today.[189] Thus, there is no theoretical basis to assume that, simply because a statement falls within a modern-day hearsay exception, it was intended to be excluded from protection under the Confrontation Clause if that particular statement has testimonial characteristics.[190] Rather, the Court's treatment probably was meant to say that, because of the specific requirements of the particular hearsay exceptions, most statements within them would not meet the testimonial definition. However, given the need for, and attractiveness of, a rule-of-thumb for application by trial courts, certain hearsay exceptions are likely to become practically excluded categories, but they should not become theoretical determiners if the particular statement is otherwise testimonial.

An examination of business records and statements in furtherance of a conspiracy is helpful in suggesting an important indicator of when statements are non-testimonial and which particular statements, even though falling within a modern hearsay exception, should be treated as testimonial. That indicator is whether the statement is made for the purpose of accusing, or whether it is made for another purpose associated with other ordinary human activities.[191]

188. *Cf*. White v. Illinois, 502 U.S. 346, 362 (Thomas, J., concurring) ("There appears to be little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation.") Justice Thomas criticized the majority's failure to explain the correspondence between "firmly rooted" hearsay exceptions and the historical meaning of the Confrontation Clause. *Id.* at 365–66 (Thomas, J., concurring).

189. *See Crawford*, 124 S. Ct. at 1368 n.8 (recognizing that the exception for "spontaneous declarations," if it existed at all, was much narrower than today's definition).

190. *See id*. at 1367 & n.6 (finding "scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case," except for the *sui generis* treatment of dying declarations).

191. In a slightly different context, Professor Friedman excludes statements "made in the course of going about one's ordinary business." Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1043 (1998). When that is an apt way

Some business records may concern matters that are understood at the time they were made to be destined for litigation or may be clearly accusatory.[192] However, at their core, they involve employees, who are recording matters that are ordinary, routine, and related to performing their job functions.[193] *Olesen v. Henningsen*,[194] a typical case, involved a telephone operator stamping a ticket for a long distance telephone call showing the time the call was made.[195] As the court noted, the makers of the record were wholly disinterested witnesses as to the automobile accident case in which their records were offered.[196] It considered those records within the category "'[w]here the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed.'"[197]

As noted earlier, the *Crawford* Court characterized co-conspirator statements as made "in furtherance of a conspiracy,"[198] a requirement inconsistent with statements made for accusatory purposes or intended for use in judicial proceedings. Rather, the "in furtherance" requirement typically eliminates most narratives of past events and instead limits admissibility to those that aid accomplishment of the conspiracy.[199] Indeed, if lit-

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to describe a hearsay statement, regardless of specific exception, it should not be treated as testimonial.

192. Under hearsay analysis, the fact that a statement is made for litigation purposes is a factor that counts strongly against admission as a business record. *See generally* 2 MCCORMICK ON EVIDENCE § 288, at 269–72 (5th ed. 1999). Confrontation analysis under *Crawford* should be even more clearly categorical in treating all such statements as testimonial. Thus, some statements that would meet the business records exception, should be excluded under *Crawford*. *See* People v. Rogers, 780 N.Y.S.2d 393, 396–97 (N.Y. App. Div. 2004) (reversing a conviction under *Crawford* because a blood test report produced by a private lab was introduced without confrontation).

193. *See* 2 MCCORMICK, *supra* note 192, § 288, at 269–70.

194. 77 N.W.2d 40 (Iowa 1956).

195. *See id*. at 41.

196. *Id.* at 44.

197. *Id*. (quoting 5 WIGMORE ON EVIDENCE § 1422, at 204 (James Chadbourn ed., 1974)).

198. *Crawford*, 124 S. Ct. at 1367.

199. Occasionally, statements may both meet the "in furtherance" requirement and be highly accusatory, which can occur when a co-conspirator recounts past criminal activities to entice someone new to join the conspiracy. *See, e.g*., United States v. Saget, 377 F.3d 223, 225 (2d Cir. 2004). *Cf.* Commonwealth v. Robins, 812 A.2d 514, 518 (Pa. 2002) (involving a similar statement that failed to qualify as a co-conspirator statement because of the passage of considerable time since the conspiracy had been active). In these situations, whether the statement is considered testimonial would also turn on whether the speaker must have an awareness that he or she is speaking with a government agent or whether the role of the government in receiving accusatory hearsay renders the statement testi-

erally applied, the requirement would exclude statements that are admissions and instead limit admission to those statements that are actually not hearsay because they constitute verbal acts that advance and form part of the crime.[200]

The exceptions chosen and the bits of evidence provided indicate that whether a statement is testimonial often relates to it fitting a particular modern hearsay exception, but the purpose for which a statement is made is the critical determiner of whether it is testimonial. Business records and statements made in furtherance of a conspiracy are generally non-testimonial.[201] An accusatory statement made for the purpose of trial, however, even if admitted under one of these exceptions, should be treated as testimonial, perhaps automatically so, unless the Court rules that it must be made knowingly (or unknowingly) to a government officer or at least someone exercising government-related functions. A point that I have made earlier,[202] and to which I will return,[203] is that where the burden is allocated is important and can be a useful tool in developing clear lines when statements have multiple possible purposes.

IV. POLICE INTERROGATIONS

A. *The Significance of Labeling Police Interrogations as Testimonial and the Importance of Categorical Treatment of the Genre*

The type of statement specifically examined in *Crawford* was classified by the Court as produced by "police interrogation[],"

monial without the speaker's awareness of that role. *See infra* Part IV.C.4.

200. *See* 2 MCCORMICK, *supra* note 192, § 259, at 156–57.

201. As will be shown in a later treatment of the modern exception for "Statements for the Purposes of Medical Diagnosis or Treatment," FED. R. EVID. 803(4), a similar "other purpose" rationale should exclude statements made for medical treatment. It should not, however, exclude those made strictly for diagnosis when meant for presentation at trial, from the testimonial definition. *See infra* Part VI.A.3. The timing of the statement—for example, whether made after an arrest or after the police have conducted their interview—and the determination of whether the burden falls on the defendant or the government to establish the purpose of ambiguous statements will affect which of the statements made to physicians and other health care providers are considered testimonial.

202. *See supra* notes 169–70 and accompanying text.

203. *See infra* notes 305–11, 337.

which it held was testimonial.[204] Even as to police interrogations, the Court declined to be revealing, and in fact seemed to go out of its way to avoid clarity, using the term "interrogation" "in its colloquial rather than any technical, legal sense."[205] It acknowledged that several different definitions might be imagined, but chose none.[206] The Court stated that it was not required to select among definitions because Sylvia Crawford's questioning qualified "under any conceivable definition,"[207] and it declined to explicate.

In limiting its application only to police interrogations, the Court did not necessarily reject a broader inclusion of statements to police as testimonial, but it left open that possibility. If the Court meant to adopt the amicus definition that testimonial statements included all those "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'"[208] virtually every statement made to a person known to be a police officer would qualify. When one "describes criminal activity" to someone known to be a police officer,[209] the amicus definition is generally satisfied. Interrogation would not be required, and indeed, questioning might not even be needed. The Court did not reject that possibility, but what it decided was far narrower: statements made in response to police interrogation were testimonial.[210]

Providing clear, categorical answers to the police and to the lower courts are important practical concerns in Supreme Court jurisprudence, as Justice Thomas expressed it in his influential concurring opinion in *White v. Illinois*.[211] His opinion objected to the suggestion of the United States, as amicus curiae, that not only should formal testimonial materials "such as affidavits, depositions or confessions that are made in contemplation of legal

204. *Crawford*, 124 S. Ct. at 1364.
205. *Id*. at 1365 n.4.
206. *Id.*
207. *Id*.
208. *Id.* at 1364.
209. Friedman, *supra* note 191, at 1042.
210. *Crawford*, 124 S. Ct. at 1365 n.4.
211. 502 U.S. 346, 364 (1992) (Thomas, J., concurring) ("If not carefully formulated . . . this approach might be difficult to apply and might develop in a manner not entirely consistent with the crucial 'witnesses against him' phrase.").

proceedings" be treated as testimonial, but also "the functional equivalent."[212] Justice Thomas wrote:

> In this case, for example, the victim's statement to the investigating police officer might be considered the functional equivalent of in-court testimony because the statements arguably were made in contemplation of legal proceedings. Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties. Few types of statements could be categorically characterized as within or without the reach of a defendant's confrontation rights. Not even statements made to the police or government officials could be deemed automatically subject to the right of confrontation (imagine a victim who blurts out an accusation to a passing police officer, or the unsuspecting social-services worker who is told of possible child abuse). It is also not clear under the United States' approach whether the declarant or the listener (or both) must be contemplating legal proceedings.[213]

Whether they are as important as Justice Thomas contends, these concerns remain sound; trying to develop workable bright lines is a worthy goal. It is likely to be the Court's strong preference, although admittedly the Court follows and sometimes insists upon a "totality of the circumstances" test.[214]

B. *The Elements of Police Interrogations*

Other than eliminating the possible requirement that the statement be made under oath, which could not have been satisfied by the facts of *Crawford* or by the vast majority of police interrogations, the Court was not required to exclude any of the major factors that might reasonably be required under the "technical legal sense" of "interrogation" because Sylvia Crawford's "interrogation" met them.[215] The Court described her statement as a "recorded statement, knowingly given in response to struc-

212. *Id.*

213. *Id.*

214. The Court, for example, is committed to a totality of the circumstances approach for the finding of consent to search under the Fourth Amendment. *See* United States v. Drayton, 536 U.S. 194, 207 (2002) (insisting that consent be determined under a "totality of the circumstances" test, rather than giving special weight to a warning of the right to refuse to permit the search). The Fourth Amendment finding of probable cause is determined under this same standard. *See, e.g.,* Maryland v. Pringle, 124 S. Ct. 795, 800 (2003).

215. *Crawford*, 124 S. Ct. at 1365 n.4.

tured police questioning."[216] Moreover, although not relied on or even noted by the Supreme Court, Sylvia Crawford had been arrested for the offense, and thus was both a suspect and in custody at the time of the questioning.[217]

Despite the Court using the term in a "colloquial" rather than a "technical sense,"[218] the term "interrogation" invites analysis linked to constitutional criminal procedure concepts, which have been largely absent from Confrontation Clause analysis.[219] This analysis also invites an examination of one of the major historical practices—statements taken before examining magistrates under the Marian Statutes—that the Court believed the Framers sought to prohibit.[220]

Six potentially significant factors were present in Sylvia Crawford's interrogation. The Court described it as a "recorded statement, knowingly given in response to structured police questioning."[221] That description thus indicates that the statement was (1) made to a government agent (2) by a person who knew she was speaking to a government agent (3) in response to structured questioning that (4) was officially (mechanically) recorded.[222] Sylvia was also (5) a suspect and (6) in custody, having been arrested.[223]

One important point of demarcation in constitutional criminal procedure as to other guarantees of the Sixth Amendment is absent. No one in the case—suspect or witness—had been formally charged with a crime at the time of the police interrogation.[224] With respect to the right to counsel under the Sixth Amendment, the initiation of judicial proceedings is required "'whether by way

216. *Id*.

217. State v. Crawford, 54 P.3d 656, 663 n.6 (Wash. 2002).

218. *Id.*

219. Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 332–43 (1981) (arguing that evidence scholars' treatment, particularly Wigmore, of confrontation in conjunction with hearsay as opposed to academics specializing in the Constitution generally or in criminal procedure, had an important role in shaping the mode of analysis and the content of the doctrine).

220. *Crawford*, 124 S. Ct. at 1365.

221. *Id*. at 1365 n.4.

222. It appears that Sylvia Crawford was aware that the statement was being recorded. At two different points, the police recorded on tape the questioning of Sylvia. Brief for Petitioner at 2, Crawford v. Washington, 124 S. Ct. 1354 (2004) (No. 02-9410).

223. State v. Crawford, 54 P.3d 656, 663 n.6 (Wash. 2002).

224. *See id.* at 658.

of formal charge, preliminary hearing, indictment, information, or arraignment.'"[225]

Thus, as to the Confrontation Clause, formal accusation is clearly not required, for in *Crawford*, that stage in the proceedings had not been reached.[226] An important point also is that the concern of the Confrontation Clause is not about obtaining evidence from the accused. The confrontation right, which is a "trial right,"[227] is a right of the accused, and he or she has the status of the accused at the time of trial when the evidence is offered. At the time the statement is made, the focus is on the government's conduct as well as on the witness.[228] This point may not tell us much, but it does open the possibility that the perspective of the witness—who is not being protected by the right—does not always have the central status that the perspective of the defendant has under *Miranda*.[229]

C. *Seeking a Categorical Solution to Treatment of Police Interrogations as Testimonial Statements*

1. Formality as to Tangible Form of the Statement

The fact that police interrogations are a category of statements to be treated as testimonial[230] makes it difficult to place much significance on the formality of the statements in terms of their tangible form, whether it is one that is mechanically recorded, or

225. Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

226. *See Crawford*, 54 P.3d at 663 n.6.

227. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 52–53 (1987) (noting that the right has been described in these terms by a number of prior decisions of the Court and ruling that it guarantees the defendant the right to cross-examine witnesses fully at trial, but does not force the government to provide discovery materials to aid in contradicting those witnesses during cross-examination).

228. *See Crawford*, 124 S. Ct. at 1364–65 (concluding that the Confrontation Clause applies to interrogations by law enforcement officers as well as testimony from "witnesses").

229. *See* Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980) (noting that although injecting some factors to make the test more readily applied by the police, its primary focus was on the perceptions of the suspect, which "reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police").

230. *See supra* Part II.C.2.

embodied in a signed statement, or given orally and remembered and recounted by the officer. Statements made during police interrogations, even under structured questioning, are formally recorded or remain unrecorded for a myriad of reasons, most of which are unrelated to the concerns of the Confrontation Clause.

Statements might not be mechanically recorded because the officer does not want the often unseemly interrogation process captured on the record, because no working equipment is available, because the witness insists on talking without recording, or because the officer does not know the significance of the statement until after he or she hears it or learns other information about the case.[231] The last point—the officer not recognizing the significance of the statement at the time made—could relate to a testimonial concern in that statements that are of no relevance to the criminal investigation are not likely to be considered testimonial by either the witness or the officer. If the statement relates to a crime, however, that should satisfy the relevance requirement to make the statement at least minimally testimonial, even if not immediately recognized by the police.[232]

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 in the sense of "on the record." The officer may have a notebook in which to record what was said, the officer may rely on memory, or the officer may record the statement in a more technical, formal way. When made to a known police officer, however, the statement is subject to use in a criminal investigation and at trial, and is in a form sufficient to be received in evidence if other limitations on its admissibility, such as satisfying some hearsay excep-

231. Many of the same, largely irrelevant, concerns go into whether the conversation is memorialized in a signed witness statement, which is typically done for statements that are perceived to be important if time permits and the witness is willing.

232. Moreover, if the witness's perspective is critical, there is no necessary connection between the officer's perception of the significance of the statement, as indicated by recording, which might be clear to the witness or largely unexpected. The fundamental point is that if a citizen is talking to a police officer about a crime, the conversation will fall on the formal, rather than the casual, side of the line. This is true whether initiated by the police officer, which has important implications for the citizen's perception of importance, or initiated by the citizen, which has different but typically equally significant implications. *See, e.g.*, Arizona v. Mauro, 481 U.S. 520, 529 (1987).

tion, are met. Every reasonable person knows or should know that statements to the police are "on the record."

On the other hand, the formality of recording, which includes a written, signed statement or tape recording, affirmatively indicates that the statement was created for potential use at trial,[233] but it is very difficult to require formality in the tangible embodiment of the statement. To do so would exclude from the category, under present practices, a large number of statements that are in every other way police interrogations. Perhaps more importantly, imposing formal recordation as a requirement would allow crass manipulation by authorities, who could consciously pick some statements not to be recorded and thereby free them from exclusion as testimonial statements, while suffering minimal loss in investigative efficiency.

The potential for changing the testimonial character of a statement by altering its form means that whether a statement was recorded before the *Crawford* decision may have different evidentiary significance than the failure to record after the decision. Both before and after *Crawford*, the fact that a formal statement was taken by the police, whether openly recorded by mechanical means, signed by the witness, or provided with similar formality, shows the statement is testimonial regardless of the type of questioning used to produce it.[234] Before *Crawford*, the failure to record might be an imprecise proxy, for the perceived unimportance or irrelevance of the statement heard. After *Crawford*'s adoption of the testimonial approach, however, which apparently gives significance to the form of the statement,[235] failure

233. Widespread availability of recording equipment means that even the taping of a statement may have no affirmative impact on making the statement testimonial unless the fact of recording is known to the speaker or unless the witness is talking to a government agent and the receiver's perspective matters. *See* Lee v. State, 143 S.W.3d 565, 570 (Tex. Ct. App. 2004) (holding that a statement is testimonial when made by a witness/co-participant to a police officer in the patrol car after the arrest of one suspect because, even though inaudible, it was recorded on the car's audio-video system, which the court, apparently using the receiver's perspective, found to indicate an intention to record testimony for prosecution). Recording may be acknowledged by the police, may be automatic and known or unknown (recording device on front of car), or may be hidden and unknown to the speaker. *See* People v. Torres, No. F041547, 2004 Cal. App. Unpub. LEXIS 2670, at *29 n.4 (Cal. Ct. App. Mar. 24, 2004) (ruling that a conversation between arrested individuals recorded by a taping system, which was partially concealed and apparently unknown to them, was not testimonial).

234. *See Crawford*, 124 S. Ct. at 1364.

235. *Id.*

to record the statement may simply be a countermeasure to avoid the testimonial label and subsequent exclusion of the statement, even if it is recognized as important and expected to be offered in evidence.

Thus, the fact that a statement was officially recorded should indicate to the reasonable person that the statement may be used in court, which should render the statement testimonial. Anticipated use in court may exist, however, without formality as to the tangible embodiment of the statement. Statements made to a known police officer about a crime, except for comments coming figuratively "out of left field," should be sufficient to satisfy any requirement as to form.[236] More could be required, particularly if the scope of the confrontation right were tied to some specific historical practice, but in terms of workable and sensible theory, nothing more should be required.

2. Requirements Beyond Statements Knowingly Made to a Police Officer About a Crime

Perhaps all statements made knowingly to police officers should be considered testimonial. Indeed, I believe drawing the line at this point is critical so as not to complicate the definition or exclude statements that are substantively indistinguishable from clearly testimonial statements. On the other hand, I cannot ignore the strong signal in *Crawford* that testimonial is a relatively narrow concept confined to a core interest of the Confrontation Clause and that the term interrogation was also used.[237]

The *Crawford* opinion, however, attempts to define the phrase "witnesses against" in the Constitution through the term testimonial,[238] which appears to have no direct link to an interrogation concept. The task is interpreting the Constitution, not deciding history for its own sake. In this determination, a conflict exists between the language and logic of the Amendment, which broadens interpretation, and historical practices, which could lead to a narrower scope. I contend that, although advanced in

236. *See id.* at 1365 n.4.
237. *Id.* at 1374.
238. *See id.* at 1364.

Crawford as an important category, interrogation is not a constitutionally based requirement.

a. Structured Questioning and Implications of the Term Interrogation

The *Crawford* Court characterized the police's questioning of Sylvia Crawford as "structured."[239] The term might mean that some or all volunteered statements, perhaps even if clearly accusatory, are not testimonial; the term could also mean that statements not in response to structured questioning, whatever that term means, would not be testimonial or that those statements not in response to structured questioning when the witness is free from custody would be classed as non-testimonial.

Although Fifth Amendment analogies must be used carefully, since the right against compulsory self-incrimination and the Sixth Amendment's confrontation right are conceptually very different, "interrogation" has been explored extensively in the *Miranda* context,[240] and some examination of this doctrine is illustrative. One requirement of *Miranda* is that the questioning occur while the defendant is in custody, which is critical to creating a compelling atmosphere that is the equivalent of formal compulsion historically required by the Fifth Amendment.[241] That requirement seems obviously not sensible as a requirement for police interrogation under *Crawford*.

The facts of *Beckwith v. United States*[242] provide a good mental exercise. In that case, Beckwith, who was not under arrest, sat

239. *Id.* at 1365 n.4.

240. *See* Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980) (concluding its discussion of interrogation by stating that "*Miranda* safeguards come into play whenever a person in custody is subject to either express questioning or its functional equivalent"); Blake v. State, 849 A.2d 410, 418–19 (Md. 2004) (discussing interrogation in the context of *Miranda* and concluding that "[i]nterrogation means more than direct, explicit questioning and includes the functional equivalent of interrogation").

241. Miranda v. Arizona, 384 U.S. 436, 461 (1966). The Court stated in *Miranda*:

> [W]e are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak.

Id.

242. 425 U.S. 341 (1976).

down at the dining room table in his home with agents from the Intelligence Division of the Internal Revenue Service.[243] The agents informed Beckwith that one of their functions was to investigate the possibility of criminal tax fraud and that they were assigned to investigate his income tax liability for a period of six years.[244] While Beckwith was clearly the focus of a criminal investigation, the Court held his interrogation was not within the protection of *Miranda* because he was not in custody.[245] There can be little doubt that had the statements provided by the defendant in this situation incriminated another, they would be considered testimonial under *Crawford*.[246] Clearly, custody is not required.[247]

b. Historical Analogy to Inquisitorial Judicial Examinations

In *Crawford*, the Court contrasted the common law right of confrontation to the civil law practices of "examination in private by judicial officers."[248] As noted earlier, the central example of the despised inquisitorial practice—"one of the most notorious instances of civil-law examination"—was the treason trial of Sir Walter Raleigh.[249] The more general practice of pretrial examinations occurred under two statutes adopted during the reign of Queen Mary, known as the Marian statutes, which dealt with bail and committal.[250] As the Court described these statutes, they "required justices of the peace to examine suspects and witnesses in felony cases and to certify the results to the court."[251]

In finding "[s]tatements taken by police officers in the course of interrogations" as "testimonial under even a narrow standard," Justice Scalia observed that "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in Eng-

243. *Id.* at 343.
244. *Id*.
245. *Id.* at 345–47.
246. *Crawford*, 124 S. Ct. at 1364–65.
247. For a recent application of this principle, see *United States v. Saner*, 313 F. Supp. 2d 896, 901–02 (S.D. Ind. 2004). In *Saner*, the district court concluded that custody was not required. Statements elicited by an antitrust division attorney during an interview in the defendant's home were testimonial despite the fact that the witness was not in custody. *Id*.
248. *Crawford*, 124 S. Ct. at 1359.
249. *Id.* at 1360.
250. *Id.*
251. *Id.*

land."[252] This analogy could provide the elements of a bright line test. Indeed, given Justice Scalia's strong desire to moor constitutional principles to historical practices, it is likely to have importance. Unless an extremely narrow definition is chosen, however, the analogy does not provide a simple solution with easily discernable and logically consistent demarcation lines.

Justices of the peace under the Marian statutes[253] were required to examine the suspect and the witnesses to determine whether to grant bail to the suspect and to determine whether to commit the defendant to pretrial detention until the time of trial.[254] The justice of the peace was also to bind over or issue an order compelling the victim and accusing witnesses to appear at trial.[255] The examinations occurred in situations where a suspect had been apprehended and brought to the justice of the peace.[256] Thus, an arrest was presumed. The witnesses, however, were clearly not in custody, although they were present before the justice of the peace in a modestly formal setting, likely the justice of the peace's "parlor."[257] The witnesses examined were the "bringers," those who brought the suspect before the magistrate—often including the victim and other accusing witnesses.[258] The magistrates were required to record their examinations, but the committal statute required only that it be done within two days, which did not contemplate verbatim depositions.[259]

The court in *People v. Cage*[260] uses this historical analogy to identify the type of police interrogation that should be covered by *Crawford* and other police-citizen encounters that it contends should not be covered.[261] A number of other lower courts have employed something of this analysis to exclude informal "field in-

252. *Id.* at 1364.

253. *See generally* JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 5–54 (1974) [hereinafter PROSECUTING CRIME]; JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 40–47 (2003) [hereinafter ORIGINS].

254. LANGBEIN, PROSECUTING CRIME, *supra* note 253, at 7–8.

255. *Id.*

256. LANGBEIN, ORIGINS, *supra* note 253, at 40–41.

257. *Id*. at 41.

258. *Id*. at 40–41.

259. LANGBEIN, PROSECUTING CRIME, *supra* note 253, at 17–18.

260. 15 Cal. Rptr. 3d 846 (Ct. App. 2004).

261. *Id.* at 852–57.

terviews,"[262] although others have found statements obtained in similar circumstances testimonial.[263]

262. In *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004), and *Fowler v. State*, 809 N.E.2d 960 (Ind. Ct. App. 2004), the Indiana Court of Appeals found statements made to the police in the aftermath of domestic assaults to be non-testimonial because they involved police questioning rather than interrogation. *Hammon*, 809 N.E.2d at 952; *Fowler*, 809 N.E.2d at 963. The court stated that the practice of police questioning of victims shortly after an apparent criminal assault to ascertain the facts did not "remotely resembl[e] an inquiry before King James I's Privy Council." *Hammon*, 809 N.E.2d at 952; *Fowler*, 809 N.E.2d at 964. *See also* People v. Newland, 775 N.Y.S.2d 308, 309 (N.Y. App. Div. 2004) (treating "a brief, informal remark to an officer conducting a field investigation" as non-testimonial); Cassidy v. State, No. 03-03-00098-CR, 2004 Tex. App. LEXIS 4519, at *10 (Tex. Crim. App. May 20, 2004) (ruling that the statement of a victim of aggravated assault, when "interviewed" by a police officer at the hospital one hour after the assault in which he described his assailant and the facts of the assault, was not testimonial); *Cf.* State v. Barnes, 845 A.2d 575, 577 (Me. 2004) (concluding that statements made by defendant's mother to the police *at the station house* where she went after an earlier assault were not testimonial because they were initiated by the witness, made while she was excited, and not part of structured questioning because the statements were not about previously known criminal activity). *But see, e.g.,* Wall v. State, 143 S.W.3d 846, 850 (Tex. Ct. App. 2004) (disagreeing explicitly with the decision in *Cassidy v. State* and concluding that a police interview of a witness at the hospital was testimonial).

Like *Cage*, *State v. Forrest*, 596 S.E.2d 22 (N.C. Ct. App. 2004), is a very problematic case. The North Carolina Court of Appeals found a statement made by a kidnapping and assault victim non-testimonial because "*Crawford* protects defendants from an absent witness's statements introduced after formal police interrogations in which the police are gathering additional information to further the prosecution of a defendant." *Id*. at 27. In *Forrest*, the statement was received after the police, in response to an order to "take [him] down," had forcibly subdued Field and rescued the witness. *Id*. at 24. After the defendant was removed from the scene, a police officer whose task was to interview the victim, approached the victim, but asked no questions until after the victim "abruptly started talking." *Id*. at 27; *see also id*. at 28, 30 (Wynn, J., dissenting). Despite the fact a specific suspect had been arrested, the court concluded that, principally because the statement was initiated by the witness and in the immediate aftermath of a traumatic event, the statement was non-testimonial. *Id.* at 27.

Leavitt v. Arave, 371 F.3d 663 (9th Cir. 2004), is arguably a different type of case. In *Leavitt*, the Ninth Circuit did not consider statements that were made by a citizen, who called police to her home—the night before her murder—regarding a prowler who attempted to break in as testimonial. *Id.* at 683. The statement also included her thought that the prowler was the defendant because of his earlier efforts to talk his way into her home. *Id.* The court found the statement non-testimonial because it was initiated by the victim for the purpose of seeking help in ending a frightening home intrusion. *Id*. at 683 n.22.

263. *See* People v. Kilday, No. A099095, 2004 Cal. App. Unpub. LEXIS 6290, at *20 (Cal. Ct. App. June 30, 2004) (concluding that "unrecorded, informal questioning in the [hotel] lobby" of a victim who was frightened and visibly injured was testimonial even if not interrogation because it was "part of a police investigation aimed at obtaining testimonial evidence"); Moody v. State, 594 S.E.2d 350, 353–54 (Ga. 2004) (finding statements made to police during "field investigation" regarding what a murder victim told police shortly after defendant shot into the bedroom, in which she had been sleeping, was testimonial, although the error was harmless); Heard v. Commonwealth, No. 2002-CA-002494-MR, 2004 WL 1367163, at *1, *4–5 (Ky. Ct. App. June 18, 2004) (concluding that state-

In *Cage*, the court used the English justice of the peace analogy to exclude from the testimonial category statements made by a crime victim to a police detective at the hospital where the victim was waiting for medical treatment for a five- to six-inch cut on his face.[264] The detective testified that he asked John, the victim, "what had happened between [him] and the defendant?"[265] He recited the victim's statement, which is highly accusatory, as follows:

> [T]here was an argument, a fight between his mother and him over a belt. She became angry because she thought he was messing up the house. She began pushing him, and . . . he fell on . . . the glass top of [a] coffee table, and th[e] coffee table broke.
>
> About th[at] time . . . , his grandmother came downstairs and had grabbed ahold of him. While she was holding him, [defendant] grabbed a piece of glass and came over and cut him. [W]hen she started to go and cut him a second time, he broke free and ran from the residence.[266]

The state categorized the conversation as "'pre-investigative, informal[ ] fact gathering' rather than 'an attempt to gather evidence in anticipation of a criminal prosecution,'"[267] a description which the court in essence accepted. The court stated its reasoning as follows:

> We cannot believe that the framers would have seen a "striking resemblance" between Deputy Mullin's interview . . . at the hospital and a justice of the peace's pretrial examination. There was no particular formality to the proceedings. Deputy Mullin was still trying to determine whether a crime had been committed and, if so, by whom. No suspect was under arrest; no trial was contemplated. Deputy Mullin did not summon John [the victim] to a courtroom or a station house; he sought him out, at a neutral, public place. There was no "structured question[ing]," just an open-ended invitation for John to tell his story. The interview was not recorded. There is no evidence that Deputy Mullin even so much as recorded it later in a police report. Police questioning is not necessarily police interroga-

ment made to police, who arrived at victim's home within minutes of the report of an assault, identifying the defendant as having hit her in the head with a gun was "testimonial," but the admission of the statement was harmless); State v. Clark, 598 S.E.2d 213, 215–17 (N.C. Ct. App. 2004) (treating statements of identification during officer's initial investigation as testimonial).

264. *Cage*, 15 Cal. Rptr. 3d at 856–57.

265. *Id.* at 849 (alteration in original).

266. *Id.* (alteration in original).

267. *Id*. at 856.

> tion. When people refer to a police interrogation, however colloquially, they have in mind something far more formal and focused.[268]

On this basis, the Court found the statement non-testimonial.[269]

It reached a different conclusion, however, as to a later statement made by the victim "during a classic station-house interview. It featured structured police questioning and tape recording."[270] The court reached this conclusion despite the fact that the witness was not in custody, as it noted Sylvia Crawford had been in custody, and, apparently from the court's silence, the defendant had not been arrested yet either.[271] Thus, while *Cage* relies on the analogy to the Marian statute interrogations by a justice of the peace, it did not require an arrest at least where the questioning was structured, occurred at the police station, and was recorded.[272]

Requiring an arrest is unreasonable because, if for no other reason, it is too easily manipulated by the police. In many cases, arrests could be delayed momentarily while a few key witnesses were interrogated. Using the existence of probable cause or "focus" on the defendant instead of arrest would avoid the difficulty of manipulation. Imposing either as a requirement, however, is problematic for a number of reasons.

As to focus, the concept would be very difficult to define in any definite way and is almost hopelessly impractical.[273] The exis-

268. *Id*. at 856–57. Remarkably, in *State v. Barnes*, 845 A.2d 575 (Me. 2004), the Maine Supreme Judicial Court held that statements made by the victim—the defendant's mother—about an earlier assault were not testimonial even though the statements were made to police officers at the station house because the witness went there on her own and initiated the conversation while still excited and was not subjected to structured questioning because the police did not know about the criminal activity prior to her report. *Id.* at 577 n.3.

269. *Cage*, 15 Cal. Rptr. 3d at 848. Although the court did not attribute any significance to this point, finding the statement non-testimonial is even more questionable because the first citizen-police contact was initiated by the police and the police asked the first question for the purpose of determining whether a crime took place. *Id.* at 849. This situation is therefore not in the potentially distinguishable category of a citizen-initiated contact for a purpose, such as medical attention or safety, other than criminal prosecution. *See* People v. Moscat, 777 N.Y.S.2d 875, 880 (N.Y. Crim. Ct. 2004) (finding statements non-testimonial because they were not the equivalent of formal pretrial examination but rather typically made by a victim for the purpose of saving her life).

270. *Cage*, 15 Cal. Rptr. 3d at 854.

271. *Id.*

272. *Id.*

273. A more minimalist approach to focus could be workable, as will be discussed below. It would be the identification of a specific suspect, or the clear recognition that a

tence of probable cause perhaps is more promising, but still impractical as a requirement. If the government has not arrested the person, it would have the incentive to show that probable cause did not exist. Requiring the defense to prove in unclear cases, such as the frequent disputes of who was the victim and who was the attacker in injuries between family members, or to cumulate the information available to the police that established probable cause would be a daunting task in a relatively large class of cases.

Moreover, the historical analogy does not indicate that an arrest was theoretically required rather than merely part of existing practices. While the magistrates conducted their examinations where a "prisoner" existed, it was the manner of making this evidence that was so opposed. Having a "prisoner" present when testimony was taken from a witness would likely have been seen as preferable for providing face-to-face encounters.[274] Had statements from witnesses been taken by magistrates without an arrest, as Justice Scalia stated as to another type of arguably nonexistent historical practice, "there is no doubt what its application would have been."[275]

While the witness neither being a suspect nor in custody should be required,[276] custody of the witness surely counts heavily

crime was committed in situations where identify is unknown. This limitation could effectively allow the initial reports of crime, or parts of them, to be received as non-testimonial. *See infra* Part VI.B.2 (discussing 911 calls).

274. *See* Mosteller, *supra* note 18, at 740–41, 741 n.246 (describing as apparently not objectionable the receipt of evidence taken under oath by committing magistrates in the presence of the defendant but without cross-examination); *see also id.* at 744–45 (describing the differing importance placed on personal presence of the defendant during the receipt of the accusatory statements).

275. *Crawford*, 124 S. Ct. at 1365 n.3 (concluding that unsworn testimonial statements would not have been admissible for evidentiary reasons at the time of the Framing; however, had that evidentiary rule changed, the Framers would certainly have considered their admission a violation of the Confrontation Clause).

276. In *United States v. Saner*, 313 F. Supp. 2d 896 (S.D. Ind. 2004), the court concluded that a statement elicited by an antitrust division attorney during an interview in the suspect's home, which incriminated both the suspect and another person, would be testimonial if it was offered against the other person even though the suspect was not under arrest. *Id*. at 901–02. In *United States v. Gonzalez-Marichal*, 317 F. Supp. 2d 1200 (S.D. Cal. 2004), the district court held that an interview with a material witness while she was in custody was testimonial even though the witness was not a suspect in the crime for which the defendant was prosecuted. *Id*. at 1201–03. Similarly, in *Brawner v. State*, 602 S.E.2d 612 (Ga. 2004), the Supreme Court of Georgia rejected the state's argument that *Crawford* should be limited to cases where the witness is a suspect. *Id.* at 614 n.2.

in favor of a statement being testimonial.[277] Even ostensibly volunteered statements made by a witness to government officers while in custody should be seen as the product of government action because of the likely coercive force of custody on the witness and the desire of witnesses to curry favor with those who can affect their release.[278] Also, when the witness is in custody, it greatly affects the witness's perspective, making statements to any government agent very likely to be seen by that person as for evidentiary purpose.

Similarly, when the defendant has been arrested or an arrest warrant has been issued, it has the effect of demonstrating the government's interest in the criminal prosecution of a particular individual. Thus, while I argue that accusatory statements made to private individuals somewhat at arms length—not made to those who would be expected to keep information confidential as intimates, such as family and friends—should be considered testimonial, such statements are more clearly testimonial once an arrest has occurred or an arrest warrant has been issued. Arrest, which publicly demonstrates an official commitment to criminal prosecution of a particular person, eliminates any ambiguity about the testimonial status of an accusatory statement made for dissemination beyond those expected to keep confidences.

Moreover, once the defendant has been arrested, the authorities should not be able to develop statements through private organizations or officials and still have them considered nontestimonial. Thus, a witness's conversation with a doctor about criminal actions, which might not be considered testimonial before arrest, should be treated as testimonial after the defendant's arrest.[279]

277. *Gonzalez-Marichal*, 317 F. Supp. 2d at 1202.

278. For a discussion of the Court's recognition that the letters sent by Cobham to those prosecuting Raleigh were testimonial, see *supra* notes 174–86 and accompanying text.

279. However, the courts in *Cage*, 15 Cal. Rptr. 3d 846, and *Heard*, 2004 WL 1367163, ignored this factor entirely. *See infra* Part VI.A.3.

3. Field Investigation/Non-Custodial Interrogations

The Court in *Miranda* described two types of non-custodial questioning not covered by the Fifth Amendment privilege. One was "[g]eneral on-the-scene questioning."[280]

> When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. . . . In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.[281]

Interrogation outside *Miranda* and outside the station house, loosely termed field investigations,[282] can be conducted to develop statements to be used against suspects who have already been arrested. Since field investigations, like a "classic station-house interview,"[283] can include questioning for the explicit purpose of gathering evidence against arrested suspects, that category should not define when statements are non-testimonial. Field investigations do take place in a more public or less official setting than the interrogations that historically were particularly despised. I believe, however, that had English justices of the peace gone into the field to question witnesses and record their answers, "there is no doubt what [the Confrontation Clause's] application would have been."[284] It would have applied and excluded the evidence.

Miranda also stated that it did not apply to volunteered statements produced without questioning.[285] The Court stated:

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280. Miranda v. Arizona, 384 U.S. 436, 477–78 (1966).

281. *Id.*

282. *Compare* People v. Newland, 775 N.Y.S.2d 308, 309 (N.Y. App. Div. 2004) (assuming that a "brief, informal remark to an officer conducting a field investigation, not made in response to 'structured police questioning' . . . should not be considered testimonial since it 'bears little resemblance to the civil-law abuses the Confrontation Clause targeted'"), *with* Moody v. State, 594 S.E.2d 350, 354 n.6 (Ga. 2004) (assuming testimonial included the type of "field investigation of witnesses" that occurred in that case).

283. People v. Cage, 15 Cal. Rptr. 3d 846, 854 (Ct. App. 2004).

284. *Crawford*, 124 S. Ct. at 1365 n.3.

285. *Miranda*, 384 U.S. at 478.

> There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.[286]

It is much more reasonable to exclude the sub-class of volunteered statements made by individuals not in custody from the category of testimonial statements than to exclude the entire class of statements produced from police questioning in the field.

Finding a meaning for structured questioning, the description given to Sylvia Crawford's questioning by the Court,[287] might also provide a promising area for further development. That term indicates the statement was produced by government questioning and was not volunteered or unexpected. The potentially pointed nature of the questions might suggest potential prosecutorial use to reasonable people and thus is an alternative to an accusatory purpose by the speaker, or it effectively creates accusation. Structural questioning might also suggest that a specific suspect has been identified,[288] indicating that the case has moved beyond simple initial neutral fact gathering. In trying to achieve Justice Thomas's desire for clear application,[289] which factors individually or in combination matter and why? If clarity and simplicity are desired, I suggest that statements made to the police must be considered testimonial either quite early in the investigative process or quite late, perhaps only in circumstances closely analogous to the examinations under the Marian statutes.

A mental exercise should be useful to get a feel of whether clear and workable lines can be drawn using any of these factors. As to all of the situations described below, assume the witness is talking to a person he or she knows to be a police officer in the

286. *Id.*.

287. *Crawford*, 124 S. Ct. at 1365 n.4.

288. This might mean use of the focus standard as employed in *Escobedo v. Illinois*, 378 U.S. 478, 490–92 (1964), but abandoned quickly thereafter in *Miranda*. 384 U.S. at 444 n.4. *See also* Beckwith v. United States, 425 U.S. 341, 347 (1976) (ruling that interview with government agents from the IRS Intelligence Division did not violate *Miranda* even though the taxpayer was clearly the focus of a criminal investigation because he was interviewed in his home and was not in custody). The fact that the police did not initiate contact for the purpose of seeking evidence against a particular suspect has been noted as a reason why a statement should not be considered testimonial. *See* People v. Moscat, 777 N.Y.S.2d 875, 879 (N.Y. Crim. Ct. 2004).

289. White v. Illinois, 502 U.S. 346, 365 (Thomas, J., concurring).

field. Assume further that each of these citizen-police encounters end with a two paragraph statement like that obtained in *People v. Cage* from the victim by the police officer at the hospital that incriminates a specific individual in a crime.[290]

Using the key factors that could characterize the police receiving information from a citizen, some of the differing situations in which a statement might be obtained are as follows:

1. The witness makes an accusatory, but volunteered, statement to an officer with a notepad.

2. The witness makes an accusatory, but volunteered, statement that she knows is being mechanically recorded.

3. The witness makes an accusatory, but volunteered, statement after a suspect has been identified or arrested or both.

5., 6., & 7. In each of the above situations, assume that the witness begins by volunteering the accusatory information, but after a period of time, some questions from the officer in follow-up and to clarify points enter the conversation.

8. The witness is questioned with a single "softball" question—"Do you know anything about X?" or "What happened?"—in a situation where the existence of a crime is unclear.

9. The witness is questioned with a single "softball" question—"Do you know anything about X?" or "What happened?"—in a situation where the existence of a crime is clear but no suspect has been identified.

10. The witness is questioned with a single "softball" question—"Do you know anything about X?" or "What happened?"—in a situation where the existence of a crime is clear and a suspect has been identified.

11 & 12. The witness is asked several questions, and the existence of a crime is (or is not) clear.

13. & 14. The witness is asked several questions, and a suspect has (or has not) been identified.

15. & 16. The witness is asked several questions, and a suspect has (or has not) been arrested.

290. *See People v. Cage*, 15 Cal. Rptr. 3d 846, 849 (Ct. App. 2004).

17. & 18. The witness is questioned extensively, and the existence of a crime is (or is not) clear.

19. & 20. The witness is questioned extensively, and a suspect has (or has not) been identified.

21. & 22. The witness is questioned extensively, and a suspect has (or has not) been arrested.

23. The witness volunteers the statement while in an excited state.

As I hope examining the above set of situations makes clear, neither the concept of structured questioning nor any other obvious set of factors is serviceable in developing dividing lines that are both theoretically sound and practical.

In addition, requiring structured questioning would likely be historically inaccurate. Many of those examined by the justices of the peace were extremely willing witnesses who were among the "bringers."[291] While the magistrates had a clear prosecutorial bent,[292] leading, rather than clarifying, questions were likely unnecessary.[293]

In *Cage*, the second statement to the police was considered testimonial because it was at the station house, tape recorded, and made in response to structured questions.[294] If these are critical factors, at least the first two 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.

One response to my analysis might be that all of the statements made outside the station house should be considered non-

291. LANGBEIN, ORIGINS, *supra* note 253, at 40–01.

292. *Id.* at 43.

293. It is not at all clear to me that the questioning of many victims and "bringers" would have very much differed from what happened in *State v. Barnes*, 845 A.2d 575 (Me. 2004), where the defendant's mother fled to the station house to tell the police about the assault committed against her. The court, nevertheless, found that the statements were not testimonial because they were initiated by the witness, made while she was excited, and, not in its judgment, in response to structured questioning. *Id.* at 577.

294. *Cage*, 15 Cal. Rptr. 3d at 854.

testimonial because they are not in situations like that of the examinations before the justices of the peace under the Marian statutes.[295] Rather, they are like the statements made to the constable or sheriff who helped arrest the person, which were not the source of concern of the Framers.[296]

I accept that such statements outside proceedings before justices of the peace proceedings were not of concern, but again that was because those statements were not used as evidence. The hearsay rule of that time did not have the ready exceptions available today.[297] Accusatory, testimonial-type statements, other than some dying declarations and a very limited number of excited utterances, were not admissible.[298] Thus, they were not of concern as to the common law right of confrontation because they were not admissible. If the historical practice had been different, would the statements have likewise been seen as violating this common law right? I suggest yes, but I insist that the absence of specific historical analogy should not count as a strong argument for excluding such statements from the testimonial category because, given that the evidence of concern was not admitted, the confrontation concern never arose.

4. Role of Governmental Action in Creating Evidence and the Specific Dangers Involved in Testimonial Statements and Unconfronted Accusations

From the point of testimonial, why should the nature of the police questioning matter? Three broad purposes for Confrontation Clause protection are possible. One possibility is that the Confrontation Clause is concerned solely with the government's manipulation of the witness in creating the evidence—manipulating the words uttered.[299] If this concern is decisive, then volunteered statements, whether the person is excited or not, and those pro-

295. *See Crawford*, 124 S. Ct. at 1360.

296. *See supra* note 262 and accompanying text.

297. *Compare Crawford*, 124 S. Ct. at 1367 n.6, *with* FED. R. EVID. 803.

298. *See Crawford*, 124 S. Ct. at 1367 n.6.

299. This may be what the Court had principally in mind when it stated, "[t]he involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace." *Crawford,* 124 S. Ct. at 1365.

duced by very light questioning would not have much, or as much, potential for this type of manipulation.

A second purpose is clearly present in the view of some authors, Blackstone in particular.[300] That is the government's "dressing up" of the statement, which is governmental manipulation of the recording of the statement rather than manipulation of what was said.[301] Several responses may be made to this concern. One is that it should not be a Confrontation Clause concern, assuming the person who recorded the statement testifies in court. Indeed, the standard hearsay response is precisely of this sort—the problem with hearsay is not with the "ear witness" because that person can be cross-examined about what he or she heard.[302] That response, however, is clearly historically inaccurate. In the Raleigh case, some of the same judges who sat at Raleigh's trial had been interrogators of Cobham and had explained from the bench the circumstances under which Cobham's statements were taken.[303] Raleigh was not at all satisfied to have access to them,[304] and neither were the Framers.[305] Instead, confronting Cobham was the issue and his goal.[306]

Moreover, officials who will manipulate the content of the statement received will also lie about that manipulation. That dishonesty can be cross-examined, but it can better be exposed if the person whose words were manipulated can contradict the manipulation with the response: "No that is not what I said at all. Here is what I said and what I meant." Those who favored *viva voce* proceedings over the inquisitorial method—which Blackstone famously recounted—knew well of all these advantages.[307] I can find no indication that, in giving defendants the right to be

300. *See infra* note 367 and accompanying text.

301. *See id.*

302. *See, e.g.,* 2 MCCORMICK, *supra* note 192, § 245, at 93 (noting that as to the witness who reports the statement, all three of the ideal conditions—oath, personal presence at trial, and cross-examination—exist).

303. 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 6342, at 262 (1997); *cf.* Douglas v. Alabama, 380 U.S. 415, 419-20 (1965) ("Nor was the opportunity to cross-examine the law enforcement officers [who took the statement] adequate to redress this denial of the essential right secured by the Confrontation Clause.").

304. 30 WRIGHT & GRAHAM, *supra* note 303, § 6342, at 262 (stating that Raleigh demanded confrontation with Cobham, not just Cobham's unsworn statements).

305. *Crawford*, 124 S. Ct. at 1370–71.

306. 30 WRIGHT & GRAHAM, *supra* note 303, § 6342, at 262–63.

307. *See infra* note 367 and accompanying text .

confronted with the witnesses against them, the Framers meant to restrict that beneficial impact only to government manipulation of the words uttered rather than the alteration or selective recording of what was in fact said.

A more limited response may be that mechanical recording, if done fully and well, may eliminate this concern. When statements are accurately recorded in their entirety, then manipulation of what was said is not possible.[308] Interestingly, this particular concern is not eliminated—but exacerbated—by the failure to record the statement when it is made, which a focus on formality in recording gets backward.[309] 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.

A third purpose is to protect the defendant from malicious falsehoods or even errors by the witness independent of governmental manipulation. The historical practices that the *Crawford* Court dealt with were those of the Privy Council, which was centered in political trials where governmental manipulation was probably the greatest concern,[310] and the preliminary examinations before justices of the peace under the Marian statutes, which were concerned principally with ordinary crime and initiated largely by private action.[311] If the Framers' historical concern extended to practices under the Marian statutes, which the *Crawford* Court states it did, and to regulation of ordinary crime, as the Court held in granting relief to Michael Crawford,[312] then it seems difficult to dismiss concern about unchecked witness error independent of government manipulation. If the product of the Marian statutes was seen as contrary to the common law right of confrontation, it was likely in substantial part because the critics believed that ordinary evidence should be presented before the trier of fact and subjected to testing, even if the only

308. The fact that the entire 911 call is recorded does eliminate the argument that the statements are being "dressed up."

309. For example, the court in *People v. Cage* said that because the statement to the officer was not written down but recited from memory, the statement was non-testimonial. 15 Cal. Rptr. 3d 846, 857 (Ct. App. 2004).

310. *Crawford*, 124 S. Ct. at 1360.

311. *Id.* at 1359–60.

312. *Id.* at 1363–65.

concern was the error of the private accuser or others, who gave their evidence to the magistrate.[313]

The third concern with unconfronted private error suggests that even privately made statements should be covered by the Confrontation Clause. It may be that a governmental role in recording the statement in other contexts is such a central part of the historical practices of concern to the Framers that the line must be drawn for *Crawford*'s "stop sign" between statements made to government officers, or to those functionally associated with them, and truly private conversations, even if intended to be accusatorial. Alternatively, perhaps both the risk of government manipulation and of witness error or maliciousness must exist before the full force of the Confrontation Clause is triggered, meaning that some governmental involvement is required.[314] For the above reasons, burdens might be allocated differently, as I suggested earlier,[315] when statements are given to private individuals. As to private statements, the requirement might be that a statement must be clearly or exclusively intended to be used testimonially where as 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.

Whose perspective matters is also affected by the policies identified as important. I contend that when a government officer receives the statement, the perspectives of both the witness and the government officer should matter, and if from the reasonable perspective of either person the statement is clearly for a testimonial purpose, it should be covered by *Crawford*.[316] The defendant, who is protected by the Confrontation Clause, is harmed just the same whether the need for confrontation is the result of government manipulation of what was said or reported, or from the malevolence or error of the witness. Nothing in the text of the Confrontation Clause's guarantee of the right of the defendant to confront

313. *Id.* at 1365 n.3.

314. *Id.* at 1364.

315. *See supra* note 169 and accompanying text.

316. *See infra* notes 560–64 and accompanying text (discussing this issue in the context of 911 calls).

the "witnesses against" him restricts the protection to only government action.[317]

With regard to the narrow issue of whether purely private statements can ever be testimonial, the lower court case law has not developed any consensus. This is unsurprising since the vast majority of statements made to private individuals are made for a purpose other than creating evidence, and thus relatively few statements made to private individuals would qualify as to purpose, even without a government involvement requirement.[318] Such statements are typically made to convey information to accomplish other purposes, or for no real purpose other than to share the burden of an emotional event. Moreover, most statements made to private individuals tend to be made without any anticipation by the speaker that the statement will be conveyed beyond the immediate audience, let alone that it will be used at trial.[319] Thus, most private statements, even if accusatory, are not candidates for being considered testimonial.[320]

Even if government action is required, however, not as a misplaced "state action" component,[321] but as a historical defining factor—so that privately made statements are generally not testimonial, even if they are accusatory and intended to be conveyed to others, a few types of privately made statements should be covered. First, the testimonial concept should include formal statements that a private individual creates for testimonial purposes and either delivers to authorities or gives to another person to serve as a conduit to the prosecution.[322] This category of statements, however, is likely to be rarely encountered.

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317. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

318. *See Crawford*, 124 S. Ct. at 1364.

319. *Id.*

320. For a discussion of the case law involving privately made statements, see *supra* Part III.B.

321. Imposing a requirement of "state action" in the making of the statements is theoretically unsound. Moreover, it would require the Court to admit the unauthorized exercise of power over state court rulings. Under *Ohio v. Roberts*, 448 U.S. 56 (1980), privately made statements, such as those in *Idaho v. Wright*, 497 U.S. 805, 809–11 (1990), were subject to constitutional scrutiny without any issue of constitutional power being raised. *Roberts*, 448 U.S. at 68–74. Furthermore, if *Crawford* were suggesting a new barrier to its power to adjudicate confrontation challenges, which is fundamental and obvious if "state action" is required, it should not have suggested the possible continuing validity of *Roberts*, even with its greater flexibility. *See Crawford*, 124 S. Ct. at 1374.

322. *See* Friedman, *supra* note 191, at 1042 (describing and arguing for inclusion of a

Other situations that are somewhat more common should be covered under *Crawford*'s framework even if government involvement is required. These include statements given to a nongovernment agent when the individual or agency is exercising a governmental function of investigation.[323] For example, statements made to private organizations that investigate suspected child abuse or support domestic violence victims should be covered. Statements received by private individuals should also be attributed to the government when the government has substantial involvement by requesting the information or through enforcement of reporting requirements, interrogation systems, or physical presence.[324] Similarly, in *People v. Vigil*,[325] the Colorado Court of Appeals concluded that the statement of a child about the sexual abuse to a doctor who examined him after the incident was testimonial.[326] The court described the facts and its reasoning as follows:

> The doctor was a member of a child protection team that provides consultations at . . . area hospitals in cases of suspected child abuse. He had previously provided extensive expert testimony in child abuse cases. He was asked to perform a "forensic sexual abuse examination" on the child and spoke with the police officer who accompanied the child before performing the examination.[327]

In *State v. Geno*,[328] the Michigan Court of Appeals reached a different conclusion as to an interview conducted by the executive director of the local Children's Assessment Center, a private or-

version of what I term the "conduit" theory).

323. *See* Las Vegas v. Walsh, 91 P.3d 591, 595–96 (Nev. 2004) (finding that an affidavit prepared by a registered nurse, in connection with the drawing of blood for use in evidence regarding intoxication, was testimonial, despite her apparent private status); People v. Rogers, 780 N.Y.S.2d 393, 396–97 (N.Y. App. Div. 2004) (ruling that a test done by a private lab was non-testimonial as a business record, because, among other reasons, private labs are regularly relied on by state police because they do not perform such tests themselves). *See also supra* note 120 and accompanying text.

324. *See Rogers*, 780 N.Y.S. 2d at 396–97; *cf.* United States v. Walther, 652 F.2d 788, 791–93 (9th Cir. 1981) (discussing the general dimensions of governmental action required to render a private action subject to Fourth Amendment sanctions and finding the requirement satisfied by a search conducted by a private airline employee because of the expectation created by other searches that had been encouraged and rewarded by a government agency). For another example of the treatment of statements to a nongovernment entity, see *supra* notes 113–17 and accompanying text.

325. No. 02CA0833, 2004 Colo. App. LEXIS 1024 (Colo. Ct. App. June 17, 2004).

326. *Id.* at *18.

327. *Id*. at *17–18.

328. 683 N.W.2d 687 (Mich. Ct. App. 2004).

ganization.[329] In *People v. Cage*,[330] the California Court of Appeal concluded that a statement made by a child to an emergency room physician, who was not a government employee, was not testimonial.[331] In both *Geno* and *Cage*, the courts relied heavily on the fact that the person receiving the statement was a private individual.[332] Differences also existed, however, as to the clarity of the evidentiary purpose, in that in both of these cases the statements were elicited by single questions rather than following structured forensic interview protocols.[333] Moreover, unlike in *People v. Sisavath* and *People v. Vigil*, which found the statements testimonial, here the interviewer had no direct contact with the police before the interview and no prosecutorial personnel were present during the interview.[334] While factual distinctions might justify different treatment of *Geno* and *Cage*,[335] in general, agencies that perform governmental functions and are in the business of helping to investigate crimes should not be treated differently than police investigators—the Confrontation Clause has no requirement of government involvement[336]—when the questioning they do is designed to develop testimony or evidence for a criminal trial.

5. Excited Utterances

As to all hearsay statements, those made for purposes other than testimony, or more generally prosecutorial court use, or those that are non-accusatory, can properly be excluded from a testimonial concept. An important general consideration is that statements may be made for mixed purposes, and resolving how such statements are to be construed is a key issue. One approach

329. *Id*. at 691–92.

330. 15 Cal. Rptr. 3d 846 (Ct. App. 2004).

331. *Id.* at 854–55.

332. *See id.* at 854; *Geno*, 683 N.W.2d at 692.

333. *Cage*, 15 Cal. Rptr. 3d at 849 ("Dr. Russell asked John what had happened."); *Geno*, 683 N.W.2d at 689 ("The interviewer . . . asked the child if she 'had an owie?'").

334. *Cage*, 15 Cal. Rptr. 3d at 849; *Geno*, 683 N.W.2d at 689.

335. For example, in a case like *Cage*, had the statement to the physician been made by a patient seeking treatment before the police became involved by interviewing the victim and obtaining from him a clearly accusatory statement that seemed almost certain to have a prosecutorial purpose, I would find the statement to the doctor as potentially being for the purpose of seeking medical attention and conclude that it was non-testimonial.

336. *See* U.S. CONST. amend. VI.

could be to treat statements as non-testimonial as long as the testimonial or accusatory purpose is not the primary or exclusive purpose. Conversely, the statement could be considered testimonial unless made primarily or exclusively for another purpose. Finally, the presumption could change depending on whether the statement was made to a private party or—knowingly perhaps—to a government agent.[337]

The excitement of the witness when making a statement has two possible functions. First, it may be a historical exception to the rights of the Confrontation Clause, like dying declarations.[338] Second, it may be associated with a finding that the statement was made for a purpose other than providing evidence to the authorities about a crime.[339]

In *Crawford*, the Court noted that the result in *White v. Illinois*[340] was "arguably in tension with the rule requiring a prior opportunity for cross-examination."[341] Thus, it questioned, but did not directly reject, the argument that excited utterances should be received as a historically recognized exception to the confrontation right.[342] Unlike its willingness to entertain the possibility that testimonial statements that constituted dying declarations might be received because historically they were admitted under the common law, the Court observed that if spontaneous or excited statements would have been admitted at the time the Sixth Amendment was adopted, that exception was very narrow.[343] It was limited to statements that were almost part of the event itself and made so soon after the event that the declarant had no

337. See text accompanying *supra* notes 169, 316–22.

338. *See Crawford*, 124 S. Ct. at 1367 n.6.

339. *Id.* at 1364.

340. 502 U.S. 346 (1992).

341. *Crawford*, 124 S. Ct. at 1368 n.8. The California Court of Appeal in *People v. Lockett*, No. A099945, 2004 Cal. App. Unpub. LEXIS 6326 (Cal. Ct. App. July 6, 2004), treated this language by the Supreme Court as a "historical aside" that had no effect on the admission of excited utterances. *Id.* at *36. Cases such as *Harmon v. State*, 809 N.E.2d 945, 952–53 (Ind. Ct. App. 2004), and *Rogers v. State*, 814 N.E.2d 695, 701 (Ind. Ct. App. 2004), accomplish the same result without explicitly reading out of the opinion the Supreme Court's uncertainty about treating excited utterances as an exception to confrontation. Instead, these cases take the view that because of the nature of excited utterances and the formality required for testimonial statements, "[i]t is difficult to perceive how such a statement could ever be testimonial. *Hammon*, 809 N.E.2d at 952.

342. *Crawford*, 124 S. Ct. at 1368 n.8.

343. *Id.*

time to develop a self-serving statement.[344] The modern version of the exception[345] is much more expansive, and only a few of the statements currently received under it would likely meet that more limited historical antecedent.[346]

Another use of an element associated with excitement is likely more theoretically productive and of broader, but still somewhat limited, application. Contacts with the authorities made for the purpose of securing help, as opposed to statements for the purpose of accusing or creating evidence, could be excluded from the testimonial category. Whatever else the characteristics of the preliminary examinations under the Marian statutes and examinations in the Privy Council, the statements were made for judicial or evidentiary purposes and not to accomplish another task, such as getting medical aid[347] or securing safety from attack.[348]

I have previously argued that as to statements knowingly made to a police officer about a crime, a bright line should be drawn early in the process that treats as testimonial any statement about a crime, and that the major workable alternative, which is theoretically inferior, is to begin application very late using an analogy to pretrial examinations under the Marian statutes.[349] The same should be true even as to excited utterances knowingly made to police officers about a crime. There are no clear demarcation lines between different types of statements made in this context, other than a statement made to receive immediate protection or secure medical attention. When not made to police officers, however, statements that are excited utterances constituting the entirety of some 911 calls and parts of others could legitimately be excluded from the testimonial category, both because many are made for these other purposes and because they are not clearly made to police officials who are either investigating a crime or whose unmistakable and primary function is to do so.[350]

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344. *Id*.

345. FED. R. EVID. 803(2).

346. *See, e.g.,* People v. Conyers, 777 N.Y.S.2d 274, 276–77 (N.Y. Sup. Ct. 2004) (admitting 911 calls for help made during the course of the assault).

347. *See, e.g.,* People v. Cage, 15 Cal. Rptr. 3d. 846, 849 (Ct. App. 2004).

348. *See, e.g., Conyers*, 777 N.Y.S.2d at 276–77.

349. *See supra* Part IV.B.

350. *See infra* Part VI.

V. IMPLICATIONS OF THE *CRAWFORD* APPROACH FOR OTHER RELATED CONSTITUTIONAL DOCTRINES

In addition to suggesting dividing lines as to what are and are not testimonial statements, my purpose in this Article is to suggest ways to encourage and ensure confrontation. One of the ways confrontation can be provided as to testimonial statements is by providing it at the current trial. The testimonial approach is new; with it should come an examination of related components of the confrontation right at the current trial.

A. *Requirement that the Witness Testify in Addition to Being Available for Cross-examination*

The Supreme Court of the United States has never decided whether prior statements of a witness can be admitted under the Confrontation Clause as a result of confrontation at the current trial, or whether the witness simply being available to be called and cross-examined by the defendant is sufficient. While apparently remarkable that it has not addressed the issue, the Court has never had to face it because witnesses have always given testimony under hearsay exceptions for prior statements and testimony that were conditioned on receiving such testimony.[351]

In *Crawford*, the Court stated that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."[352] The Court's language is ambiguous on the issue of whether direct testimony is required. It stated only that the "declarant appears for cross-examination."[353] While it did not state that the declarant must first testify for the prosecution and then be subject to cross examination, the Court also did not say that the declarant merely had to be available for cross-examination, or subject to subpoena by the defense under the Compulsory Process

351. In *California v. Green*, 399 U.S. 149 (1970), the statement at issue was admitted as a prior inconsistent statement, which required inconsistency with current testimony under California law, and the defendant testified. *Green*, 399 U.S. at 150–52. In *United States v. Owens*, 484 U.S. 554 (1988), the statement involved a prior identification, which requires the witness to testify, and the witness testified for the government on direct examination. *Id*. at 556; *see also* FED. R. EVID. 801(d)(1)(C).

352. *Crawford*, 124 S. Ct. at 1369 n.9 (citing *Green*, 399 U.S. at 162).

353. *Id.*

Clause, which would have squarely put the responsibility for ensuring both testimony and cross-examination on the defense.[354] Moreover, the Court described the common law tradition, which provided the Framers with the concept of confrontation, as one of "live testimony in court subject to adversarial testing."[355]

As authority for its statement, the Court cited *California v. Green*,[356] where the Court stated, "[f]or where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem."[357] In *Green*, the witness, Melvin Porter, did in fact testify as required by the state's hearsay exception for prior inconsistent statements, although he proved "'markedly evasive and uncooperative on the stand.'"[358] Thus, the language, while supportive of the obligation of testimony, may have been merely descriptive.

The Court again examined the satisfaction of the Confrontation Clause as to prior statements of a witness appearing at trial and subject to cross-examination in *United States v. Owens*.[359] In *Owens*, the witness testified on direct examination for the government, as he was required to do by the federal hearsay provision for statements of prior identification under Rule 801(d)(1)(C).[360]

Is it a requirement of the Confrontation Clause, or perhaps some combination of provisions in the Sixth Amendment, that the witness in such situations be called by the prosecution and testify

354. *See* U.S. CONST. amend. VI. Moreover, when the issue is solely the treatment of the witness's prior statements about the defendant's conduct, rather than testimony about the conduct itself, cross-examination is all that is required. *See infra* notes 386–88 and accompanying text.

355. *Crawford*, 124 S. Ct. at 1359.

356. 399 U.S. 149 (1970).

357. *Id.* at 162. Some inferential weight is given to the possibility that this description is too broad, as the Court also stated, "[v]iewed historically, then, there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *Id.* at 158. The latter part of that statement—"full and effective cross-examination"— was limited by *United States v. Owens*, 484 U.S. 554 (1988).

358. *Green*, 399 U.S. at 150–52.

359. 484 U.S. 554 (1988).

360. *Id.* at 556. The rule requires that the "declarant *testifies at the trial or hearing* and is subject to cross-examination concerning the statement." FED. R. EVID. 801(d)(1) (emphasis added).

in some fashion on direct examination? The answer must be yes.[361]

In cases where statements have been admitted as testimony given at an earlier trial, the Court has recognized a *constitutional preference* under the Confrontation Clause for present testimony.[362] It requires that the witness testify in front of the present jury to the facts, unless he or she is unavailable.[363] Particularly given the focus of *Crawford* on the anti-inquisitorial roots of the Confrontation Clause, a similar constitutional preference should be recognized here as well. The Constitution is best read to require direct testimony rather than just availability for cross-examination.

Trial by dossier was the evil at which the Confrontation Clause was directed; trial by live testimony of witnesses was the preferred form.[364] As noted earlier, the Court found the confrontation concept rooted in English common law tradition, which "is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers."[365] For this proposition, the Court cited Blackstone's *Commentaries on the Law of England*.[366] The relevant, well-known, and celebrated passage states as follows:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing

361. I have previously made this argument. *See* Mosteller, *supra* note 18, at 753 & n.294; *see also* Graham, *supra* note 43, at 135.

> It would be rash to suppose that *Green* means that a state could permit the prosecution to prove its case by affidavits so long as the witnesses are brought to court for questioning by the defendant. Without excusing circumstances, this is too similar to the continental trial by dossier which the drafters of the Sixth Amendment meant to prohibit.

Id.

362. Ohio v. Roberts, 448 U.S. 56, 65 (1980).

363. *See id*.; *see also* United States v. Inadi, 475 U.S. 387, 394 (1986) (describing this as a constitutional preference for the better evidence under the Confrontation Clause).

364. *See Crawford*, 124 S. Ct. at 1363.

365. *Id.* at 1359.

366. *Id.*

> up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance: for, besides the respect and awe with which his presence will naturally inspire the witness, he is able by use and experience to keep the evidence from wandering from the point in issue. In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them: and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it. These are a few of the advantages attending this, the English, way of giving testimony, *ore tenus*. Which was also indeed familiar among the *ancient* Romans, as may be collected from Quintilian; who lays down very good instructions for examining and cross-examining witness *viva voce*. And this, or somewhat like it, was continued as low as the time of Hadrian: but the civil law, as it is now modelled, rejects all public examination of witnesses.[367]

A requirement of direct testimony by the witness—the point I am arguing for—has been described or implicated in several opinions. In *Mattox v. United States*,[368] one of its earliest Confrontation Clause cases, the Court recounted the purposes of the Confrontation Clause, giving emphasis to cross-examination, but also recognizing the elements of personal presence and the examination of the witness.[369]

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted . . . against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the con-

367. 3 WILLIAM BLACKSTONE, COMMENTARIES 373–74 (photo. reprint 1978) (1783) (footnotes omitted). This quotation contains much, in addition to cross-examination, such as the witness's personal presence before the jury and the examination of witnesses there, that Blackstone considered part of the common law tradition. *See id.*

368. 156 U.S. 237 (1895).

369. *Id.* at 242–43.

> science of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand . . . whether he is worthy of belief.[370]

Justice Scalia's opinion in *Coy v. Iowa*[371] provides strong indirect support for the right to have direct examination given in the presence of the defendant.[372] In *Coy*, the Court concluded that the Confrontation Clause included, absent adequate justification for dispensing with it, the right of the defendant to have his accusers meet him face to face to deliver their accusation.[373] These accusations are to be delivered, presumably, on direct examination.

Justice Scalia cited numerous examples that dealt with personal presence, but also included the presentation of direct testimony and accusation:

> Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: "'Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . .'"[374]
>
> . . . Similarly, in *Dowdell v. United States*, 221 U.S. 325, 330 . . . (1911), we described a provision of the Philippine Bill of Rights as substantially the same as the Sixth Amendment, and proceeded to interpret it as intended "to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination."[375]
>
> . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. . . .[376] Look me in the eye and say that.[377]
>
> . . . A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts."[378]

370. *Id.*

371. 487 U.S. 1012 (1988).

372. *Id.* at 1016.

373. *Id.*

374. *Id*. (alteration in original) (quoting WILLIAM SHAKESPEARE, THE TRAGEDY OF KING RICHARD II, act 1, sc. 1).

375. *Id*. at 1017.

376. *Id*. at 1018 (quoting President Eisenhower's description of the "code" of Abilene, Kansas, from Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 381 (1959)).

377. *Id*.

378. *Id*. at 1019 (quoting ZECHARIAH CHAFEE, JR., THE BLESSINGS OF LIBERTY 35

Certainly, some of these same benefits can be obtained by cross-examination of the witness, but it is absolutely clear that the preferred method of taking testimony in the English common law tradition was by direct testimony rather than presentation of evidence by dossier followed by cross-examination. Where there is no justification for the prosecution being relieved of the obligation of asking the witness to testify about the defendant's misdeeds before introducing testimonial statements about them, direct testimony should be required. Much of *Ohio v. Roberts* has been undercut, and indeed, its view of a general unavailability requirement has been abandoned.[379] Its description, however, of the core of the confrontation right—"the Framers' preference for face-to-face accusation"—is apt.[380]

There is, or should be, a constitutional preference for live testimonial statements at trial, if they can be obtained from the witness, rather than, and certainly before, proof of past events by prior testimonial statements. Indeed, we can only know if testimonial statements can be obtained in front of the jury in the present trial or if the weaker substitute is needed if the prosecution attempts to secure such statements through direct testimony. That preference should be imposed as a matter of constitutional requirement on the prosecution, not the defense.[381]

Perhaps the witness will not repeat the accusation, but if so, the goal of many of the quoted statements would have been satisfied, not thwarted. The witness is expected to have a more difficult time repeating the accusation to the defendant's face than he or she did in making it earlier. The benefit of that different version is anticipated by the descriptions of the English common law practices that were well known to the Framers and a part of our cultural values.

This set of arguments may seem to ring inconsistent with the Supreme Court's decisions in *United States v. Inadi*[382] and *White v. Illinois*,[383] because they are largely irreconcilable. Differences

(1956)).

379. *Crawford*, 124 S. Ct. at 1370–72.

380. *Roberts*, 448 U.S. at 65.

381. *See* State v. Cox, 876 So. 2d 932, 938–39 (La. Ct. App. 2004) (rejecting state's argument that defendant waived his confrontation right because he accepted the trial court's invitation to subpoena and call the witness who had given a statement to police).

382. 475 U.S. 387 (1986).

383. 502 U.S. 346 (1992).

are to be expected because those cases deal largely with non-testimonial hearsay, and use an analysis that admits the statements when found reliable and trustworthy and admits unconfronted statements without a requirement of even available witness's testimony because the statements have "independent evidentiary significance."[384] That approach is very different than *Crawford*'s for policing statements at the core of the Confrontation Clause with a robust requirement of confrontation, which I contend also includes a preference for direct accusation.

As to one form of testimonial statements—prior testimony—*Inadi* did recognize a constitutional preference: "When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence."[385] That logic should mean that the in-court accusation should be preferred over the out-of-court accusation as well. Indeed, the theory of testimonial statements strongly supports an across-the-board requirement of in-court accusations because testimonial statements, like prior testimony, are, or approach, explicit substitutes for in-court testimony.[386]

Assuming the Court imposes a requirement of in-court testimony on the witness when testimonial statements are admitted so as to satisfy the Confrontation Clause in the present trial, the question becomes what are the essential elements of direct examination required of the prosecution? The constitutional requirement, although somewhat related to the concept of adequate memory or testimony to satisfy cross-examination, is distinct. The requirement is simply that the prosecution ask the witness to make the accusation in court. If the witness does so, the requirement is clearly satisfied. If the witness is unwilling, then the better in-court testimony is not available, and prior statements can be received consistent with the Confrontation Clause.

384. *Inadi*, 475 U.S. at 394.

385. *Id*.

386. Many of the clearest testimonial statements lack independent evidentiary significance, as defined in *Inadi*, but, some could qualify. Prior testimony clearly lacks independent evidentiary significance, and the same is obviously true for grand jury testimony, which, without cross-examination, is a weaker form of prior testimony. Statements against interest require unavailability, indicating a perception of the weakness of at least some of the statements within that exception. A good argument can be advanced, however, that because they are against an interest at the time they are made, and are unlikely to be repeated at trial, such statements do have independent evidentiary significance.

The prosecution may also want to ask the witness about prior statements he or she has made, because it may be effective trial strategy, may jog the witness's memory, or may be necessary to set up admissibility under evidentiary rules. As a matter of confrontation theory, however, it should not be required. What is required is the effort to get the accusation on direct examination and not to elicit all prior statements.[387] The distinction is that the question needs only go to what the defendant did, and not what the witness has previously said about the defendant's conduct.[388]

The state courts of Washington have developed a good framework in the area of child testimony. They have concluded that a child did not "testify" regarding abuse, as required by its statute, when the child was asked by the prosecutor only about innocuous subjects, such as the school she attended, the birthday presents she received, and her pet's name, but not about abuse.[389] The requirement is satisfied if the prosecution asks about the abuse, even if the witness denies it,[390] but is not satisfied if the prosecutor provides the child with an invitation and a "means to avoid

387. *In re L.J.P.*, 587 S.E.2d 15 (Ga. 2003), is consistent with this treatment of the requirement. In *L.J.P.*, the child testified and was asked to make an in-court identification of the defendant, but was unable to do so. *Id.* at 16. Even though the victim was not asked about the pre-trial identification by the prosecution and left the stand before another witness testified about it, the testimony satisfied the Confrontation Clause because the witness could have been cross-examined about the prior identification. *Id.* at 17; *see also* Clark v. State, 808 N.E.2d 1183, 1189–90 (Ind. 2004) (ruling that where the witness was asked on direct examination by the prosecutor about the incident and stated that he remembered nothing, the ability of the defendant to recall the witness for cross-examination after the prior statement was introduced was sufficient); *cf.* People v. Warner, 14 Cal. Rptr. 3d 419, 424, 429–30 (Ct. App. 2004) (finding testimony to be sufficient when a child testified on direct examination about an incident of improper touching, but was not questioned about the prior statement, which was admitted after she stated she did not remember it).

388. A distinction must be drawn regarding the testimony and cross-examination of a prior out-of-court statement, however, if the Confrontation Clause is being satisfied by earlier cross-examination and present unavailability, rather than testimony and cross-examination at the present trial. Where earlier cross-examination is relied on and questions cannot be asked currently, the defendant must have had an opportunity to cross-examine the prior statement. Realistically, that is only available if the prior statement was introduced at the earlier proceeding by the prosecution, and the defendant was given an opportunity to recall the witness, if necessary, and cross-examine.

389. State v. Rohrich, 939 P.2d 697, 699 (Wash. 1997). *But see* State v. Nelson, 725 P.2d 1353, 1356–57 (Utah 1986) (concluding that there is no requirement that the witness be asked about or testify regarding the alleged offense).

390. *See* State v. Clark, 985 P.2d 377 (Wash. 1999). The *Clark* court went too far, in my judgment, as to the constitutional minimum in requiring that the child be asked about the prior statement, which it did. *See id*. at 382.

answering by telling her that she could respond, 'I don't want to talk about it.'"[391]

B. *Constitutionally Adequate "Availability" for Cross-Examination*

Crawford stated that the prior statement can be received "when the declarant appears for cross-examination at trial" and that admission of a prior statement was not barred "so long as the declarant is present at trial to defend or explain it."[392] Thus, as to prior statements that were not subject to confrontation at the time made, the Confrontation Clause requires that the declarant be available for cross-examination at the current hearing.

The rough dimensions of what "availability for cross-examination" means are relatively clear and the requirements are quite limited. In *United States v. Owens*,[393] the Court stated:

> Ordinarily a witness is regarded as "subject to cross-examination" when he is placed on the stand, under oath, and responds willingly to questions. Just as with the constitutional prohibition [of the Confrontation Clause], limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists. But that effect is not produced by the witness' assertion of memory loss . . . .[394]

Owens dealt with actual memory loss as a result of the alleged criminal assault by the defendant at issue in the trial.[395] The witness, who testified as fully as he could, was unable to recall the underlying incident although he had memory of the earlier identification of the defendant during an interview with an FBI agent.[396] The Court concluded that neither his memory loss regarding the underlying incident nor his prior statement rendered him unavailable for cross-examination.[397] As to the adequacy of cross-examination, where the witness cannot remember the prior

391. *In re* Personal Restraint of Grasso, 84 P.3d 859, 867 (Wash. 2004) (quoting the trial transcript).

392. *Crawford*, 124 S. Ct. at 1369 n.9.

393. 484 U.S. 554 (1988).

394. *Id.* at 561–62.

395. *Id.* at 556.

396. *Id*.

397. *Id*. at 560–61.

statement, the Court relied upon its decision in *Delaware v. Fensterer*,[398] from which it quoted:

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.[399]

Before examining the constitutional minimum that satisfies "availability for cross-examination," I will note the limited situations where the opportunity is clearly inadequate. As *Owens* observed, successful assertion of a privilege, whether based on the Constitution, such as the Fifth Amendment,[400] or an evidentiary privilege, such as the marital privilege asserted in *Crawford*,[401] renders the witness unavailable for cross-examination.[402] Significant judicial restrictions on cross-examination have the same effect,[403] but those restrictions must be truly significant to render cross-examination constitutionally inadequate.[404]

Finally, the witness's refusal to answer questions makes him or her unavailable. *Douglas v. Alabama*[405] presents the best known example of a refusal. In *Douglas*, Loyd, an apparent accomplice, was tried first and convicted of assault with intent to

398. 474 U.S. 15 (1985). *Fensterer* dealt with the testimony of an expert, who testified as to the opinion he had formed, but could not remember the basis on which he formed it. *Id*. at 17.

399. *Id.* at 21–22; *see Owens*, 484 U.S. at 558.

400. *See, e.g.*, People v. Redd, 553 N.E.2d 316 (Ill. 1990).

401. *Crawford*, 124 S. Ct. at 1357 (stating that Crawford had "no opportunity for cross-examination because of the state marital privilege").

402. *Owens*, 484 U.S. at 562.

403. *Id.* at 561–62; *see* United States v. Wilmore, 381 F.3d 868, 871–73 (9th Cir. 2004) (finding witness unavailable, confrontation denied, and *Crawford* violated with regard to prior testimonial statement where trial court prohibited defense counsel from asking anything about prior grand jury testimony after witness asserted her privilege against self-incrimination as to statements to the grand jury).

404. *See, e.g.,* State v. Crocker, 852 A.2d 762, 784–87 (Conn. Ct. App. 2004) (concluding that cross-examination at preliminary hearing by a lawyer with conflict of interest was substantively adequate and constitutionally sufficient); State v. Stiernagle, No. A03-1422, 2004 Minn. App. LEXIS 776, at *12–14 (Minn. Ct. App. July 6, 2004) (ruling that trial court's limitation of cross-examination did not render it inadequate).

405. 380 U.S. 415 (1965).

commit murder.[406] When called as a witness, he gave his name and address but invoked the Fifth Amendment privilege in response to all questions concerning the crime, and despite the trial court's ruling that the privilege was invalid, he persisted in refusing to testify.[407] He was ruled unavailable for cross-examination under the Confrontation Clause.[408]

United States v. Torrez-Ortega[409] presents a recent example of such a refusal. In *Torrez-Ortega*, a co-participant in a drug distribution conspiracy, who had been granted immunity by the prosecution, asserted his Fifth Amendment privilege, which the court accepted as invalid.[410] On direct examination, he was declared a hostile witness, and the prosecutor read his testimony before the grand jury to him, to which he responded with a refusal to answer on the basis of the Fifth Amendment claim.[411] On cross-examination, the witness apparently answered a few questions,[412] which the court characterized as "too elliptical and confusing to demonstrate that the defendants were ever presented with an opportunity for effective cross-examination."[413] The court ruled that the case was clearly "settled" by *Douglas*.[414]

Cases in the refusal-to-testify category, which is both doctrinally solid and clearly recognized, are relatively rare.[415] The paucity of examples is probably because the inadequacy of cross-examination must result from a direct refusal, which "earns" the witness contempt of court and incarceration, rather than an indirect form of refusal, such as lack of memory.[416] This softer version of refusal has the same benefit in that it avoids incriminating the defendant and risking retaliation, but also generally finessing a

406. *Id.* at 416.

407. *Id*.

408. *Id.* at 419.

409. 184 F.3d 1128 (10th Cir. 1999); *see also* United States v. Murphy, 696 F.2d 282 (4th Cir. 1982); United States v. Fiore, 443 F.2d 112 (2d Cir. 1971).

410. *Torrez-Ortega*, 184 F.3d at 1131 ("Such a witness, we conclude, is not sufficiently available for cross-examination to satisfy the requirements of the Confrontation Clause. . . .").

411. *Id*. at 1131–32.

412. *Id*. at 1132.

413. *Id*. at 1133.

414. *Id*.

415. *See* Barksdale v. State, 453 S.E.2d 2, 3–5 (Ga. 1995) (involving a witness who refused to testify in the face of threat of imprisonment).

416. *See* Delaware v. Fensterer, 474 U.S. 15, 16–17 (1985).

contempt finding and perjury charges.[417] It also renders the witness constitutionally available for cross-examination. An interesting semantic point is that *United States v. Owens* stated that the witness must "respond[ ] willingly to questions,"[418] while at the same time recognizing as constitutionally acceptable "'testimony that is marred by forgetfulness, confusion, or *evasion*.'"[419]

Nelson v. O'Neil[420] deals with a related situation where the witness was apparently "evasive."[421] In *Nelson*, a co-participant in a robbery took the stand, denied making a prior statement that implicated O'Neil, and testified that its substance was incorrect.[422] The Court concluded there was no violation of the Confrontation Clause,[423] ruling that a witness does not have to affirm either the prior event or the prior statement to create the ordinary situation where adversarial cross-examination occurs.[424]

Memory lapses and mental impairments of the witness do not render the opportunity to cross-examine inadequate where those lapses and impairments are real.[425] Similarly, what are apparently bogus claims of memory loss, even if total, also do not eliminate confrontation.[426] Thus, what is little different from a "refusal

417. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES § 8.64, at 1280 (2d ed. 1999).

418. United States v. Owens, 484 U.S. 554, 561 (1988).

419. *Id*. at 558 (quoting *Fensterer*, 474 U.S. at 21–22) (emphasis added).

420. 402 U.S. 622 (1971).

421. *See id.* at 624.

422. *Id.*

423. *Id*. at 629–30. The defendant actually conducted no cross-examination, but was free to do so. *Id*. at 624.

424. *Id*. at 628–29.

425. United States *ex rel*. Hamilton v. Ellingsworth, 692 F. Supp 356, 358–59 (D. Del. 1988) (finding opportunity for effective cross-examination despite the fact the witness was suffering from amnesia as a result of a car accident and was unable to remember the incident or the statement made); Wassilie v. State, 57 P.3d 719, 721–23 (Alaska Ct. App. 2002) (admitting statements by ninety-year-old witness who stated at trial he had no memory of the event or prior statement); Hall v. State, 788 A.2d 118, 125 (Del. 2001) (finding a witness was available for cross-examination despite suffering memory lapses as an elderly, mentally impaired witness); State v. Jenkins, 23 P.3d 201, 206 (Mont. 2001) (finding confrontation adequate where witness suffered from Alzheimer's related memory loss, but had been ruled competent to testify by the trial court).

426. United States v. Milton, 8 F.3d 39, 47 (D.C. Cir. 1993) (finding adequate confrontation where witness claimed lack of memory about events and prior statement apparently because of alleged drug addiction and near mental breakdown, but recalled some information that tended to discredit prior grand jury testimony); People v. Perez, 98 Cal. Rptr. 2d 522, 526 (Ct. App. 2000) (ruling a witness was available when they answered every prosecution question about the event and prior statements with failure of memory, but re-

to answer," if delivered in the guise of "I don't remember" or "it never happened," leaves the witness "available for cross-examination."[427] In connection with my examination of *Crawford*'s implications for statements in child abuse prosecutions in the next part, I examine for child witnesses the minimum that satisfies availability for cross-examination.

VI. PROSECUTIONS OF CASES OF SPECIAL CONCERN: CHILD SEXUAL ABUSE AND DOMESTIC VIOLENCE

In earlier parts, I have dealt with general principles of the *Crawford* decision and illustrated the analysis with recently decided cases from a number of areas. In this part, I will examine the difficult issues of application in child sexual abuse and domestic violence prosecutions. In general, I have argued for a relatively broad definition of testimonial statements.[428] I hope to demonstrate in these cases that such a definition can do much less damage to law enforcement interests than might be feared if the prosecution focuses on securing confrontation and removes *Crawford*'s "stop sign" by putting witnesses who have made testimonial statements on the stand. The end result can be one that is not bad for prosecutors and provides confrontation to defendants. I believe that many declarants may be more available than

sponded to a few defense questions relevant to bias); State v. Robinson, 746 A.2d 210, 213–14 (Conn. Ct. App. 2000) (ruling a witness examination was sufficient where witness testified that he recognized the signature on the prior statement but did not remember the statement because he was high on marijuana at the time it was made); Makell v. State, 656 A.2d 348, 350, 354–56 (Md. Ct. Spec. App. 1995) (finding confrontation adequate despite witness's claim of remembering nothing—a "warm body with no testimonial function" in the words of the defense—as a result of a continuous multi-year drug stupor). *But see* David Greenwald, Comment, *The Forgetful Witness*, 60 U. CHI. L. REV. 167, 180–81 (1993) (questioning the treatment of feigned forgetfulness as satisfying admission).

427. *See* People v. Wheatley, 543 N.E.2d 259, 265 (Ill. Ct. App. 1989) (rejecting the argument that the witness did not "respond[ ] willingly to questions" as required by *Owens* where he instead testified that he did not remember). *United States v. Fiore*, 443 F.2d 112 (2d Cir. 1971), suggests that if direct refusals to testify are present, and perhaps predominant, then the witness may be unavailable despite some "I don't recall" answers. *Id.* at 114. The witness in *Fiore* also refused to take the oath. *Id*. The refusal of the witness to answer some questions may, however, be constitutionally acceptable. *See* State v. Maier, 977 P.2d 298, 303, 306–07 (Mont. 1999) (ruling that failure to answer certain questions concerning the defendant's culpability was a tolerable evasion given the witness's confirmation that he had made prior statement implicating the defendant).

428. *See supra* Parts III & IV.

they presently appear, given the current lack of incentives to secure their live testimony.[429]

A. *Providing Confrontation in Child Sexual Abuse Cases*

I describe here one model for satisfying *Crawford* that comes from the area of child sexual abuse prosecutions. Through good fortune, I recently spent a period of time at the University of Oregon School of Law and taught a seminar there on evidence issues in child sexual abuse prosecutions. As a result, I saw something of the practice under Oregon's special exception for hearsay in such cases.[430] That exception is like many other states' exceptions in providing for admission of hearsay based upon an ad hoc determination of reliability and trustworthiness where the child is unavailable.[431] It differs from most, if not all, the others in that any and all hearsay describing "an act of sexual conduct with or on the child" is admissible if the child "testifies at the proceeding and is subject to cross-examination."[432] Thus, under the exception, the hearsay rule disappears as a restriction, and *all* prior statements are admissible if the Confrontation Clause is satisfied by confrontation at the current trial under *California v. Green*[433] and *United States v. Owens*.[434]

Under this rule, very powerful out-of-court statements are admissible, including the initial "disclosure interview" recorded by videotape and made by a professionally trained interviewer at the local child advocacy center.[435] These are clearly testimonial

429. In *United States v. Inadi*, the Supreme Court ruled that unavailability was not required before the prosecution could introduce co-conspirator statements, and in *Illinois v. White*, it reached the same conclusion as to excited utterances and statements for medical treatment, conclusions that presumably apply to all hearsay exceptions considered to have "independent evidentiary significance." United States v. Inadi, 475 U.S. 387, 394 (1986); *see also* White v. Illinois, 502 U.S. 346, 355–57 (1992). The pressure on the prosecutor to find and call witnesses who made admissible prior statements was thereby removed, putting the burden on the defendant to call these incriminating witnesses according to the Compulsory Process Clause. *White*, 502 U.S. at 355; *Inadi*, 475 U.S. at 397–98.

430. For a discussion of Oregon's hearsay exceptions, see Rachel L. Melissa, Comment, *Oregon's Response to the Impact of Domestic Violence on Children*, 82 OR. L. REV. 1125, 1146–47 (2003).

431. OR. R. EVID. 803(18a)(b).

432. OR. R. EVID. 803(18a)(b), 803(24).

433. 399 U.S. 149 (1970).

434. 484 U.S. 554 (1988).

435. *See* OR. R. EVID. 803(18a)(b).

statements under *Crawford*, which calls for exclusion absent the child testifying.[436] Such statements are usually devastating to the defendant, but also incredibly revealing of potential suggestiveness. In addition, statements made to family members, school counselors, friends and acquaintances, teachers, and police officers are admitted under this exception.[437] Many might have been admissible under other theories, but all come under this expansive exception in child sexual abuse cases if the child testifies and is subject to cross-examination.[438]

The hearsay exception has given prosecutors incentives to encourage children to appear and testify and to help them to do so by, for example, making them comfortable in the courtroom and leading them through what happens during testimony.[439] This incentive dovetails with the general perception among child abuse prosecutors that having the child testify in person is helpful to successful prosecutions.[440] In *Maryland v. Craig,*[441] the Supreme Court ruled that the Confrontation Clause allows children to testify without physically being in the presence of the defendant.[442] My perception is that the practice is used relatively rarely, probably because prosecutors feel that having the child testify in the courtroom is more effective, and they have concentrated their efforts on enabling children to testify in the defendant's presence rather than from a remote location.

I suggest that the idea of incentives be generalized and analyzed in ways to encourage confrontation. I take a specific example from Justice Brennan's dissenting opinion in *Ohio v. Roberts*.[443] There he argued that the state had failed to show a "good-faith effort" to secure the witness's presence at trial, and he sug-

436. *See supra* Part III.A (discussing *People v. Sisavath*, *People* ex rel. *R.A.S.*, *People v. Vigil*, and *People v. Warner*).

437. *See* State v. Lamb, 983 P.2d 1058, 1059 (Or. Ct. App. 1999) (admitting statements to "school counselors, a friend, and another adult woman" under exception).

438. OR. R. EVID. 803(18a)(b).

439. *See* Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 LAW & HUM. BEHAV. 165, 166 (1998) (reporting that prosecutors prefer to present children in person because of the greater perceived impact on juries through greater emotional empathy than with televised testimony).

440. *Id.*

441. 497 U.S. 836 (1990).

442. *Id.* at 860.

443. 448 U.S. 56, 77 (1980) (Brennan, J., dissenting).

gested that "[i]t is difficult to believe that the State would have been so derelict . . . had it not had her favorable preliminary hearing testimony upon which to rely in the event of her 'unavailability.'"[444]

Having children testify and be available for cross-examination may provide something of a model for practices that can develop in other areas that ensure confrontation as *Crawford* is refined and implemented. It also illustrates what I suggest as a question about the impact of the Confrontation Clause on justice. Much unreliable hearsay may be admitted under this rule. Indeed, the Oregon rule places absolutely no reliability or trustworthiness restriction on hearsay when the child testifies and is subject to cross-examination.[445] Cross-examining children can be extremely difficult. I have seen few lawyers who have the sensitivity and skill to do it well, and it is unclear whether jurors have the ability to evaluate accurately what they see and hear from such witnesses.[446] Whether adversary testing leads to reliable and trustworthy evidence with children is uncertain, but I have even less confidence that there is any better alternative.

Receiving such testimony from particularly young or mentally immature children is especially problematic. As discussed below, the constitutional minimum for mental awareness and intellectual development required for competency to testify has not been specified, but it is very low, and perhaps theoretically inadequate for justice.[447] Confrontation is being provided in these child sexual abuse cases, however, and they can be a model for the future.

One alternative, where I believe courts could easily go wrong, is to define away the need for confrontation with much hearsay given by children through a narrow definition of testimonial statements. Should it matter that the child is very young, and perhaps not appreciative of the use that will be made of the evidence, if a government employee is creating evidence to be admitted under a hearsay exception, perhaps using videotape? I believe that it should not.[448] Should it matter that the videotaped state-

444. *Id.* at 79–80 (Brennan, J., dissenting).

445. *See, e.g.,* Bugh v. Mitchell, 329 F.3d 496, 508 (6th Cir. 2003) (discussing the availability of a child even when the child has a poor memory).

446. *See* Goodman et al., *supra* note 439, at 169–70.

447. *See* People v. Sisavath, 13 Cal. Rptr. 3d 753, 758 (Ct. App. 2004).

448. *See infra* Part VI.A.2.

ment is created by a private organization; that the interview is not videotaped; or that the statement is taken during a medical examination? Does it matter whether the statement is made to a police officer, a social worker, a school teacher, or a psychologist? What should be the impact of police intervention in the case before the statement is taken or police conversations with a child victim or the interviewer before interviews conducted by private officials?

Obviously, lines must necessarily be drawn to define testimonial statements. None of those lines are significant under the Confrontation Clause if the child testifies and is subject to cross-examination, because all prior statements may be admitted.[449] Where those lines are drawn, however, will help determine whether the child will be encouraged to appear, prepared for testimony, and called by the prosecution. Thus, the definition of testimonial is interdependent with the satisfaction of confrontation.

The system I suggest has the benefit that it puts the incentive for encouraging testimony on the prosecutor—the party who has the practical ability to accomplish the task in child abuse cases. Giving the defense that responsibility would be unseemly and ineffective. The defendant cannot, and in many cases should not, realistically have full access to the child. If he or she did, the defendant would not typically have the trust of the child or the child's immediate care givers. The prosecutor is the right party to have this responsibility. If the prosecutor also has the incentive to make the child available, and enable the child to testify, such testimony will more likely occur.

1. Application of the *Green/Owens* Theory to Children

Courts have generally ruled that a witness being a child does not affect the principle that a witness who "responds [somewhat] willingly to questions," but who may be directly or indirectly evasive and have real or feigned limitations, is constitutionally available for cross-examination and satisfies confrontation.[450] For ex-

449. *Crawford*, 124 S. Ct. at 1369 n.9 (2004).

450. *See, e.g., Bugh*, 329 F.3d at 505 (applying OH. R. EVID. 801(D)(1)(C)). "[A] statement is not hearsay if . . . [t]he declarant testifies at trial, and the statement is . . . one of identification of a person soon after perceiving him, if the circumstances demonstrate the reliability of the prior identification." *Id.*

ample, in *Bugh v. Mitchell*, the United States Court of Appeals for the Sixth Circuit treated as available for cross-examination a child who was four at the time she first reported sexual abuse to her mother, and either four or five at the time of trial.[451] The child testified about one act of abuse verbally and then responded only by nodding affirmatively or negatively or by shrugging, which the court interpreted as a failure of memory.[452] The court explicitly rejected any general distinction between the treatment of adults and children.[453] Central to the decision and the analysis, I believe, was a determination of the state trial court, which the federal appellate court did not challenge, that the child was competent to testify at trial,[454] which will be examined below.

Numerous other cases have applied the *Green/Owens* analysis to prior statements by children who take the stand at trial.[455] One court found sufficiently available a child witness to a murder, who was three at the time of the incident, seven at the time of trial, and whose current memory of the incident was "essentially non-existent."[456] Another court found that a child, who was four at the time of the alleged abuse, and seven at the time of trial, and who responded with a simple "yeah" to the question on direct examination of whether the defendant did anything to her, but could not remember what was done,[457] was adequately available.[458] Similarly, a child who was three at the time of the abuse and ten at the time of trial was found adequately available[459] when, after responding to questions regarding age, the name of her parents and the need to tell the truth for the apparent purpose of showing her competency, she explained that she could not remember anything that happened before the third grade.[460] Un-

451. *Id*. at 499.

452. *Id*. at 507.

453. *Id*. at 509.

454. *Id*. at 502.

455. *See, e.g.*, People v. Warner, 14 Cal. Rptr. 3d 419, 430–31 (Ct. App. 2004) (finding four-year-old child, who recalled some of the molestation, but not the prior statements that were admitted, and was subject to cross-examination, adequately available).

456. State v. Jenkins, 483 N.W.2d 262, 271 (Wis. Ct. App. 1992). The court noted that the defendant did not attempt to probe the memory on cross-examination. *Id*. at 271 n.11.

457. United States v. McHorse, 179 F.3d 889, 895 (10th Cir. 1999).

458. *Id.* at 900. The court also relied upon something of a "forfeiture argument" arising from the defendant's choice not to cross-examine the child, which the court assumed might have jogged the child's memory. *Id*.

459. Vaska v. State, 74 P.3d 225, 226, 228–29 (Alaska Ct. App. 2003).

460. *Id.* at 226. In this case as well, the defendant asked no questions on cross-

questionably, the child's denial in direct examination that abuse or other offense took place does not render the child unavailable for cross-examination.[461]

Although it is possible that mere physical presence on the stand is all that the Confrontation Clause requires, the Supreme Court has never taken such a view, which is inconsistent with the importance the Court has placed, in addition to physical presence, on the opportunity for cross-examination.[462] In *United States v. Spotted War Bonnet*,[463] the United States Court of Appeals for the Eighth Circuit stated a general, albeit vague, cautionary note that recognizes the limiting case:

> To be sure, simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns. If, for example, a child is so young that she cannot be cross-examined at all . . . the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Clause.[464]

Confrontation theory, the Due Process Clause, or the competency concept must provide some constitutional floor, albeit certainly at a very low level, as to minimal testimonial adequacy. To date, courts have gone no further than *Spotted War Bonnet* in recognizing that a limit must exist, but not yet attempting a concrete definition.

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examination. *Id*. In *United States v. Martindale*, 36 M.J. 870 (N-M. Ct. Crim. App. 1993), the child was ruled adequately available for cross-examination when he either could not remember the acts of sexual abuse and the contents of prior statements about them or "chose not to." *Id.* at 874–76.

461. *See, e.g.*, State v. Clark, 954 P.2d 956, 960 (Wash. Ct. App. 1998) (finding testimony by an allegedly abused child sufficient even when the child denied that abuse occurred).

462. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 845–46 (1990) (emphasizing the importance of "rigorous testing in the context of an adversary proceeding" of which physical presence plays a part, but only a part).

463. 933 F.2d 1471 (8th Cir. 1991).

464. *Id*. at 1474. In an earlier article, I argued that availability for cross-examination should be interpreted to require more than the minimum willing, but vacuous, warm body of *Owens*. *See* Mosteller, *supra* note 18, at 762. That argument is very hard to maintain given the Court's definition of testimonial statements in *Crawford*, which appears to fit the statements in *Owens*, that were obtained by police questioning regarding the identification of the perpetrator. *Owens*, 484 U.S. at 556. Thus, *Owens* decided the minimum required for admissibility in a core confrontation fact pattern. *See id*. at 559. There is no remaining issue.

2. Competency and Incompetency as a Constitutional Matter

I also believe that the child must have the requisite mental ability to satisfy a constitutionally based level of competency. The Supreme Court has yet to deal with an issue of the adequacy of confrontation involving a witness ruled incompetent or with a constitutional concept of minimal competency. *Idaho v. Wright*[465] raised that issue but did not resolve it.[466]

In *Wright*, the witness was a child who was two and one-half years of age at the time of the out-of-court statements and three at the time of trial.[467] The trial court determined that the child was "'not capable of communicating to the jury.'"[468] The Supreme Court was extremely cautious in its interpretation of this finding, assuming, without deciding, that if a finding of unavailability were required for admission under the Confrontation Clause, the trial court's finding established that the child was unavailable.[469]

Getting closer to the issue of competency, but again not deciding it, the Court rejected the argument that the statements were "*per se* unreliable, or at least presumptively unreliable," because the child had been found incompetent to testify at trial.[470] The Court disagreed that the child had been found incompetent rather than unavailable.[471] The Court noted that the trial court had certainly not found the child "'incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly'" as required for incompetency under Idaho law,[472] but it had only found the child incapable of communicating to the jury.[473] The Court believed that implicitly the trial court

465. 497 U.S. 805 (1990).

466. *Id*. at 815–16.

467. *Id*. at 808–09.

468. *Id*. at 809.

469. *Id*. at 816.

470. *Id*. at 824.

471. *Id*. *United States v. Owens*, 484 U.S. 554 (1988), provides some indirect support for reconciling this apparent inconsistency. In *Owens,* the Court found acceptable the apparent inconsistency that a witness may be unavailable, because of lack of memory for a hearsay exception, but available for cross-examination under the Court's construction of that right under both the evidence rules and the Constitution. *Id.* at 563–64. The two characterizations, it argued, were made for different purposes and need not coincide. *Id*.

472. *Wright*, 497 U.S. at 824 (quoting IDAHO CODE § 9-202 (Supp. 1989); IDAHO R. EVID. 601(a)).

473. *Id*.

found that the child "was capable of receiving just impressions of the facts and of relating them truly" at the time the out-of-court statements were made.[474] It refrained from constitutionalizing a specific rule of competency as a per se determiner of exclusion for lack of trustworthiness because it felt to do so would inhibit the states in developing the law of evidence.[475]

That reticence to mark out a particular rule of competency as an absolute indicator of untrustworthiness is a very different matter than recognizing that some basic testimonial competency is required for a witness to be available for cross-examination to satisfy the Confrontation Clause. The basic formulation of Idaho law—the ability "to receiv[e] just impressions . . . and . . . relat[e] them truly"[476] can be, if applied generously, the basis for a constitutional standard. Georgia's standard that a child is incompetent if "she does not have the use of reason"[477] is also a reasonable starting point.

Certainly, the ability to take an oath in a technical sense is not required. While the taking of an oath was historically important,[478] the formal taking of an oath, or the ability to understand its particular intricacies, would not seem critical in the modern world. Federal Rule of Evidence 603 has recognized the importance of flexibility in dealing with children as witnesses,[479] and there is no suggestion that, as to ordinary testimony, the right of confrontation is violated by such flexibility.[480] Thus, the technical requirements of the oath should not bar children from giving testimony, although the refusal of an ordinary witness to take an oath or otherwise to agree to its substantive concerns of agreeing

474. *Id*. at 825.

475. *Id*.

476. IDAHO R. EVID. 601.

477. London v. State, 549 S.E.2d 394, 396 (Ga. 2001) (citing GA. CODE ANN. §§ 24-9-5, -9-7 (1995)). The Georgia statute excepts from this requirement children who are the victims of or witnesses to criminal offenses. GA. CODE ANN. § 24-9-5(b) (1995).

478. *See* Mosteller, *supra* note 18, at 740 (describing the importance placed on the oath by English evidence scholars in the eighteenth century).

479. *See* FED. R. EVID. 603. The advisory committee's note recognizes the rule's intended flexibility, inter alia, with mentally deficient adults and children. *Id*.

480. A number of courts have established flexible rules for competency in child abuse cases that either directly or effectively eliminate a firm oath requirement. *See* Mosteller, *supra* note 18, at 703 nn.48–50 (citing state rules and court decisions that either eliminate the technical requirement of an oath for children, flatly declare children in sexual abuse cases competent, or give courts flexibility in finding an understanding in the child of the need to tell the truth rather than an understanding of the oath).

to tell the truth and understanding that serious consequences flow from a violation should remain important substantive requirements.[481]

In line with my suggestion that children should be encouraged to testify, legislatures will probably need to revise their evidence rules and courts will need to interpret competency requirements with more flexibility to allow for testimony and cross-examination. Likewise, oath requirements will need to be revised in some states. If a child's out-of-court accusatory statement is sufficiently valuable to be received in evidence, it makes little sense to prevent the child from being available to testify in court and to be cross-examined on the basis of competency rules or the oath requirement.[482] Concerns about trauma from testimony are of another sort and can, of course, be recognized. Incompetence on this basis, however, rather than the inability to testify without impairment of the ability to testify effectively, is relatively rare and accommodation, rather than denial, of confrontation should be the goal.[483] The goal throughout should be to satisfy the Confrontation Clause—which can be accomplished better by showing generosity in determining whether a child can testify and be subject to cross-examination—rather than by making confrontation impossible but still receiving the child's accusatory hearsay.[484]

481. *See* United States v. Fiore, 443 F.2d 112, 115 (2d Cir. 1971) (relying, in part, on the fact that the witness refused to take an oath when it found the witness unavailable for cross-examination).

482. Admittedly, as to excited utterances, which theoretically interfere with the ability of witnesses to prevaricate, a theory exists as to why such out-of-court statements should be received from witnesses who might not be able to take an oath. *See* 2 MCCORMICK, *supra* note 192, § 272, at 210. Also, when the courtroom experience is so traumatic as to render the child incapable of testifying, the out-of-court statement may be the only available evidence. In most cases, however, there is little theoretical justification to receive the hearsay if the child is unable to testify.

483. For a discussion of the distinction between incompetence and the impact of trauma as justification for receiving testimony outside the presence of the defendant, see Mosteller, *supra* note 18, at 780–95.

484. For example, states may use closed-circuit television or other mechanisms that allow the child to testify outside the presence of the defendant, but still render them subject to contemporaneous cross-examination, if those procedures make it possible for the child to be confronted. *See* State v. Smith, 59 P.3d 74, 79–82 (Wash. 2002) (requiring trial courts to consider using closed-circuit television to obtain a child's testimony before it finds the child unavailable if that mechanism might allow the child to testify).

3. Statements for the Purpose of Medical Treatment and Diagnosis

As noted earlier, the *Crawford* Court explicitly appeared to exclude business records and co-conspirator statements from the category of testimonial statements[485] and suggested that even testimonial dying declarations might be exempted from the Confrontation Clause for historical reasons,[486] while questioning similar treatment for excited utterances.[487] Although the Court did not explicitly mention statements for medical treatment, its omission implicitly suggested non-testimonial status. In dealing with results in its prior cases, which the Court stated reached results that were consistent with its new approach,[488] the Court mentioned the excited utterance made by a child to a police officer in *White v. Illinois*[489] as perhaps being a case where admission of a testimonial statement had been permitted.[490] It did not question the admission of another statement in that case received under the hearsay exception for statements made for the purpose of medical treatment.[491] The Court's favorable view of statements for the purpose of medical treatment was, however, only implicit.

The modern formulation of the hearsay exception for the purpose of medical diagnosis or treatment admits statements made only "for . . . diagnosis" that are made for a clear litigative purpose.[492] When the exception has been construed as satisfying the Confrontation Clause, however, it has been treated as containing only statements that were made for a purpose different than testimony—the treatment of injury or disease.[493] In its influential amicus brief in *White*, the United States argued that the Confrontation Clause should not cover the statements involved because they were not made "'for the purpose of establishing or making proof of some fact.'"[494] Rather, they were statements of "a young

485. *Crawford*, 124 S. Ct. at 1367.
486. *Id*. at 1367 n.6.
487. *Id*. at 1368 n.8.
488. *Id*. at 1367–69. The Court acknowledged that although the results of prior cases had been generally consistent, the rationales had not been. *Id*. at 1369.
489. 502 U.S. 346 (1992).
490. *Crawford,* 124 S. Ct. at 1368 n.8.
491. *See id*.
492. FED. R. EVID. 803(4).
493. *See Crawford*, 124 S. Ct. at 1364.
494. Brief of Amicus Curiae United States of America at 18, White v. Illinois, 502 U.S.

patient who describes the nature of an assault to medical personnel in order to enable them to ascertain her condition and design an appropriate course of medical treatment."[495] While the majority in *White* did not follow the amicus's argument and recast Confrontation Clause theory, it did adopt its description of the statements, which the Court considered to have been "made in the course of receiving medical care."[496]

In *Idaho v. Wright*, by contrast, the Court took a different view of statements made to a pediatrician, which it construed as not made under conditions "comparable to those required" for this exception, characterizing the statements instead as "accusatory hearsay."[497] Furthermore, in its amicus brief in *White*, the United States construed what occurred in *Wright* as consistent with a testimonial approach because the nature and circumstances of the "questioning suggests that it was designed to develop evidence for a criminal case."[498]

Crawford should mean that the expansion of this hearsay exception beyond its traditional rationale for treatment purposes to include those statements made solely for the purpose of enabling the doctor to testify—termed "diagnosis—violates the Confrontation Clause because they are testimonial." The starkness of the difficulty under *Crawford* for that expansion is clear. The Advisory Committee Note states that "[c]onventional doctrine has excluded from the hearsay exception . . . statements to a physician consulted only for the purpose of enabling him to testify. . . . The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation."[499]

Prior to *Crawford*, I made the argument that this relatively radical alteration of the traditional exception moved the expanded part of the exception into an area of special scrutiny un-

346 (1992) (No. 90-6113) [hereinafter Amicus Brief for the United States in *White*]. The United States took this phrase from Justice Scalia's definition in *Maryland v. Craig*, 497 U.S. 836, 864 (1990).

495. Amicus Brief for the United States in *White*, *supra* note 494, at 18.

496. *White*, 502 U.S. at 355. *See generally* Mosteller, *Medical Hearsay Exception II*, *supra* note 36, at 75–76.

497. Idaho v. Wright, 497 U.S. 805, 827 (1990).

498. Amicus Brief for the United States in *White*, *supra* note 494, at 18.

499. FED. R. EVID. 803(4) advisory committee's note. *See generally* Mosteller, *Medical Hearsay Exception II*, *supra* note 36, at 56–61 (tracing the history of the enactment of this expansion, which focused on civil cases and apparently did not anticipate an impact in prosecution of child sexual abuse cases).

der *Ohio v. Roberts*,[500] in that it was not "firmly rooted" and therefore not automatically assumed to have the requisite reliability and trustworthiness.[501] A few courts adopted a view consistent with that argument, requiring a connection to treatment,[502] and others have imposed related restrictions.[503]

In those earlier articles, I also suggested some dividing lines. Depending on how narrowly or broadly the Court ultimately interprets testimonial statements, some of these lines may be well placed, although exclusion should more firmly be the result when they are crossed. In general, I was trying to draw a rough and easily applicable line between statements made in a treatment context and statements made in a context that was clearly for investigative or prosecutorial purposes, and such a division is roughly consistent with *Crawford*'s approach. I suggested generally that statements made to doctors and psychologists who were actively treating the child, particularly those who first treated the child after the report of injury or abuse, should generally be admissible under a treatment purpose rationale, although if a statement was made to the medical member of an abuse investigative team, it should be subjected to greater scrutiny.[504] Statements made after treatment had been completed, particularly for a second opinion or a diagnosis-only purpose, should be carefully screened under the Confrontation Clause.[505] Unless, as discussed below, the Confrontation Clause can only be violated if the statement is received by a government agent, statements in that second category should now be excluded under *Crawford*.

If testimonial statements are broadly defined, as suggested elsewhere, statements received by doctors who are part of investigative teams after the case has been identified as suspect should be considered testimonial under *Crawford* as well. Moreover, statements received by doctors after the police have interviewed the child, or the defendant has been arrested, should be

500. 448 U.S. 56 (1980).

501. Mosteller, *Medical Hearsay Exception I*, *supra* note 36, at 291–92; Mosteller, *Medical Hearsay Exception II*, *supra* note 36, at 52; Mosteller, *supra* note 18, at 796–99.

502. *See e.g.*, Low v. State, 705 A.2d 67, 72–73 (Md. Ct. Spec. App. 1998) (requiring a showing of treatment interest and a caregiving relationship with examiner); State v. Hinnant, 523 S.E.2d 663, 670–71 (N.C. 2000) (prohibiting admission after immediate medical needs have been satisfied).

503. *See* Mosteller, *Medical Hearsay Exception II*, *supra* note 36, at 50 n.6.

504. Mosteller, *Medical Hearsay Exception II*, *supra* note 36, at 95.

505. *Id.* at 90–95.

covered absent truly unusual circumstances that show an entirely pristine treatment motivation.

The post-*Crawford* case law has begun to examine statements for medical treatment or diagnosis but has yet to impose a consistent categorical treatment.[506] One major issue yet to be resolved by the Supreme Court, which may dramatically affect the analysis, is whether government involvement in receiving the statement is a prerequisite to finding it testimonial. To be covered by *Crawford*, must the person receiving it be a law enforcement officer or a government employee; must the person have some connection—perhaps a private employee associated with the investigation in the particular case or generally performing related functions, such as a doctor who regularly performs child sexual abuse examinations; or may the person be a strictly private individual, if the statement is intended to be testimonial?

The cases decided thus far regarding statements to doctors are mixed. In *State v. Vaught*,[507] upon discovery by her father's wife during bathing that the four-year-old child had swelling and redness in the genital area, the child was taken to the hospital emergency room for examination.[508] After explaining that he was going to do an examination, the emergency room physician asked the child what had happened and she described what had been done and named her uncle as the perpetrator.[509] Although the child had apparently named that individual to her father's wife earlier, the case gives no indication that the police had been notified or been in contact with the child before the examination.[510]

The Supreme Court of Nebraska concluded that the statement was not testimonial. It stated:

506. The Illinois Court of Appeals adopted a quite idiosyncratic perspective regarding confrontation in *In re T.T.*, 815 N.E.2d 789 (Ill. Ct. App. 2004). Subsequent to statements by a child sexual abuse victim to the police and a social worker, which the court found to be testimonial, it ruled that statements made to a doctor, who was a member of a child abuse protection team, were neither entirely testimonial nor non-testimonial. Rather, because they were accusatory, the portion of the statement identifying the perpetrator was testimonial while the portion regarding the nature of the condition was not. *Id.* at 803. While some conversations should be divided between testimonial and non-testimonial segments, it is unclear that this opinion captures a manageable division since that portion about what was done to the child was likely clearly about criminal activity and therefore not different in kind from the portion identifying the perpetrator.

507. 682 N.W.2d 284 (Neb. 2004).

508. *Id*. at 286.

509. *Id*.

510. *See id*.

> [T]he victim was taken to the hospital by her family to be examined and the only evidence regarding the purpose of the medical examination, including the information regarding the cause of the symptoms, was to obtain medical treatment. There was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination.[511]

The conclusion of the court on the facts presented is a reasonable result.

Likewise, two other cases found statements to doctors to be non-testimonial, but the correctness of that result is far less clear, principally because of the police involvement before the medical examination. *Heard v. Commonwealth*[512] involves domestic violence. In response to a call by a relative of the victim, the police and paramedics arrived at the relative's home.[513] While there, the victim, whose head wounds were bleeding, informed a police officer that the defendant "had kicked the door down and that he hit her in the head with a gun" and had taken their infant child.[514] The court found these statements testimonial.[515] Also, while the police were present, the defendant called and the police talked to him, but he refused to reveal where he had taken the child or "what had prompted him to assault" the victim.[516] The victim was then taken to the hospital emergency room, where she was treated.[517] She told the doctor that her cuts resulted from being struck with a pistol.[518] The Kentucky Court of Appeals held that the statements to the police were testimonial but the subsequent statements to the doctor where not.[519]

In *People v. Cage*,[520] the victim of a somewhat atypical domestic assault—mother assaulting son—was interviewed at the hospital emergency room by a police officer before seeing the doctor.[521] In response to a question as to what happened between him and the

511. *Id*. at 291.
512. No. 2002-CA-002494-MR, 2004 WL 1367163 (Ky. Ct. App. June 18, 2004).
513. *Id*. at *1.
514. *Id*.
515. *Id*. at *5.
516. *Id*. at *1.
517. *Id*.
518. *Id*.
519. *Id*. at *5.
520. 15 Cal. Rptr. 3d 846 (Ct. App. 2004).
521. *Id*. at 849.

defendant, he told the officer that his mother had purposefully cut him with a piece of glass while his grandmother held him down.[522] Somewhat later and apparently without the officer present, the doctor asked him "[f]or purposes of treatment" what had happened, and again he said "'he had been held down by his grandmother and cut by his mother.'"[523]

The California Court of Appeal concluded that both the statement to the officer and to the doctor were non-testimonial.[524] It looked for close analogies to the function of the English justices of the peace under the Marian statutes and found the doctor's function very different.[525] It argued that as to the latter, the absence of government involvement in the making of the statement was important under *Crawford*.[526] Finally, it rejected the argument that the declarant would have seen no difference between the police officer's questions and that of the doctor and that a reasonable person would have expected the doctor's statements to be used prosecutorially at the defendant's trial.[527]

Cage is at least internally consistent in holding that both the earlier statements to the police and the later statements to the doctor are treated the same.[528] It may be proven correct if the Supreme Court determines that statements must be received by government agents to be testimonial. In both *Heard* and *Cage*, however, the wounds were so severe that once the police became involved in an investigation and accusatory statements made to them, criminal prosecution was very likely, as should have been appreciated by reasonable people.[529] In this situation, statements to physicians that involve obviously suspect wounds, which the physicians are likely obligated to report, should be considered testimonial.

People v. Vigil[530] involved statements typical of many medical examinations in child sexual abuse prosecutions, which were gen-

522. *Id*.
523. *Id*.
524. *Id*. at 855, 857.
525. *Id*. at 851–52.
526. *Id*. at 854.
527. *Id*. at 855.
528. *Id*. at 855, 857.
529. For further discussion of *Heard v. Commonwealth*, see *supra* notes 512–19 and accompanying text.
530. No. 02CA0833, 2004 Colo. App. LEXIS 1024 (Colo. Ct. App. June 17, 2004).

erally admissible under *Ohio v. Roberts* but may be excluded under *Crawford* because of the association with prosecutorial functions.[531] In *Vigil*, the father of the victim walked in on the defendant while he was sexually assaulting his son.[532] The perpetrator, one of the father's co-workers, fled.[533] His son told him of the assault in graphic detail.[534] The father thereafter notified the police.[535]

The Colorado Court of Appeals concluded that the statement of the child to his father was not testimonial.[536] It concluded, however, that the statement made by the child to a doctor who examined him after the incident was testimonial, describing the facts and its reasoning as follows:

> The doctor was a member of a child protection team that provides consultations at . . . area hospitals in cases of suspected child abuse. He had previously provided extensive expert testimony in child abuse cases. He was asked to perform a "forensic sexual abuse examination" on the child and spoke with the police officer who accompanied the child before performing the examination. . . .
>
> We conclude that, under the particular circumstances present here, the child's statements to the doctor were testimonial under *Crawford*. The statements were made under circumstances that would lead an objective witness reasonably to believe that they would be used prosecutorially. Although the doctor himself was not a government officer or employee, he was not a person "unassociated with government activity." . . . The doctor elicited the statements after consultation with the police, and he necessarily understood that the information he obtained would be used in a subsequent prosecution for child abuse.[537]

Vigil reaches a very solid result that should become the law under *Crawford*. The issue should be where the testimonial line will be drawn between the facts of *Vaught* and *Vigil*. I contend that the courts in *Cage* and *Heard* reached very questionable results when they found the accusatory statements to doctors not to be testimonial after police interviews had already been conducted with the witnesses. The outcome in *Heard* appears particularly

531. *Id*. at *17–18.
532. *Id*. at *1–2.
533. *Id*. at *1.
534. *Id*. at *2.
535. *Id*.
536. *Id*. at *17.
537. *Id*. at *17–18.

problematic in that the court found an earlier statement to the police to be testimonial,[538] after which other accusatory statements that are not made confidentially should generally be testimonial. The task of applying *Crawford* in this area is a part of the larger task facing courts to carefully and consistently flesh out (or revise) the meaning of *Crawford*.

B. *Providing Confrontation and Enabling Effective Prosecution in Domestic Violence Cases*

My approach to satisfying *Crawford*'s construction of the Confrontation Clause encourages more witnesses to testify and has its costs and difficulties, even with the testimony of children. This approach is less likely to be an effective mechanism for providing confrontation and admitting evidence in domestic violence cases.[539] The frequent pattern in these cases is for victims to refuse to appear for trial, and, if they testify, to do so unwillingly. This reluctance is presumed in many cases to be the result of pressure from the defendant.

As jurisdictions implemented policy judgments that abusers should be arrested and prosecuted in domestic violence cases regardless of the wishes of the immediate victim, prosecutors developed methods for "victimless" prosecutions.[540] These prosecutions were based on the introduction of hearsay through excited utterances,[541] statements for medical treatment,[542] past recollection recorded,[543] special exceptions,[544] and the catch-all provision.[545] *Ohio v. Roberts* allowed the Confrontation Clause to be satisfied automatically for hearsay exceptions, such as excited ut-

538. *Heard*, 2004 WL 137163, at *5.

539. Another example is with co-defendants who have been interrogated by the police. After *Crawford*, those statements are excluded unless the co-defendant testifies. The Fifth Amendment creates a potential bar that can be raised by the prosecution. *Crawford* may do more to persuade prosecutors to grant the use of immunity than any legal argument by the defense.

540. People v. Moscat, 777 N.Y.S.2d 875, 878 (N.Y. Crim. Ct. 2004).

541. *Id*.

542. *Id*.

543. *See* Hudders, *supra* note 33, at 1058 (describing expanded interpretation of past recorded recollection exception in domestic violence cases).

544. CAL. EVID. CODE § 1370(a)(1) (Supp. 2004) (providing that hearsay is not excluded if "[t]he statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant").

545. *See Moscat*, 777 N.Y.S.2d at 878.

terances, that were "firmly rooted" and required no showing of unavailability.[546] *Crawford* has disrupted domestic violence prosecutions to a degree not seen in any other area. It erected a "stop sign" in front of most of this evidence, which combined with its reluctance to treat excited utterances as a historic exception to confrontation,[547] has caused massive disruption and great uncertainty.[548]

In domestic violence prosecutions, I see a number of possible responses to *Crawford*. I principally examine one providing early opportunities for confrontation through preliminary hearings. In the next subsection, I examine briefly a second response—the general argument that 911 calls should be excluded from the testimonial category. Another response should be noted—forfeiture through wrongdoing. It could eliminate the Confrontation Clause objection if responsibility for the victim's unavailability can be attributed to the defendant,[549] but I worry that expansion of this

546. 448 U.S. 56, 66 (1979).

547. *Crawford*, 124 S. Ct. at 1368 n.8.

548. Preventing "victimless" prosecutions might indeed have been at the core of the Framers' intention for the Confrontation Clause, and thus, the impact on this manifestation of modern domestic violence prosecutions may be historically "correct." Although the current testimonial approach makes no direct or indirect use of accusatory hearsay or of "accusers," the concern with forcing public accusation, and the defendant facing his or her accuser, was at the center of much of the history of the Confrontation Clause. *See* WRIGHT & GRAHAM, *supra* note 303, § 6348, at 788 (arguing that the responsibility of accusers, who had often testified in secret and were "more likely to give vent to spite or acquiesce in [government] manipulation" as a result, was more of historical concern than the lack of cross-examination or trial by dossier). If we are to imagine the Framers' reaction to practices that did not exist at the time, we could imagine few practices that would have been more abhorrent to their values than the concept of a prosecution through the out-of-court accusations of a victim who was not compelled, even if available, to take the stand and make those charges in person to the defendant.

549. In *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004), the court noted the possible use of *Crawford*'s "forfeiture by wrongdoing" in domestic violence cases, but expressed concern that application would be "difficult," requiring a separate investigation and resolution of whether psychological pressure would be sufficient and, if so, how much would be required. *Id*. at 950 n.3.

Prospects for expansion of the forfeiture by wrongdoing, which I do not particularly support, has perhaps more potential than *Hammon*'s treatment suggests through the use of presumptions. *Crawford* cites *Reynolds v. United States*, 98 U.S. 145 (1878), which itself deferred to the trial court's admission of evidence in a situation where the proof of wrongdoing and the defendant's responsibility for the witness's absence was not clear, but the Court believed the evidence was sufficient to create a presumption that cast the burden of explanation on the defendant. Crawford, 124 S. Ct. at 1371 (citing *Reynolds*, 98 U.S. at 158–59). The Court set out the evidence and its procedural reasoning as follows:

> The testimony shows that the absent witness was the alleged second wife of the accused; that she had testified on a former trial for the same offence under another indictment; that she had no home, except with the accused;

exception might be generalized so as to make suspicion of the defendant's involvement in the witness's unavailability or uncooperativeness sufficient to deny confrontation.

Before examining expanding the opportunities to create prior cross-examined testimony, I want to at least note that there may be some possibilities for securing more confrontation at the current trial. In domestic violence cases, the witness typically has no legal objection, such as the Fifth Amendment or the marital privilege, from being called to testify.[550] Prosecutorial efforts to compel testimony, however, may be unseemly and viewed as further vic-

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> that at some time before the trial a subpoena had been issued for her, but by mistake she was named as Mary Jane Schobold; that an officer who knew the witness personally went to the house of the accused to serve the subpoena, and on his arrival inquired for her, either by the name of Mary Jane Schofield or Mrs. Reynolds; that he was told by the accused she was not at home; that he then said, "Will you tell me where she is?" that the reply was "No; that will be for you to find out;" that the officer then remarked she was making him considerable trouble, and that she would get into trouble herself; and the accused replied, "Oh, no; she won't, till the subpoena is served upon her," and then, after some further conversation, that "She does not appear in this case."
>
> It being discovered after the trial commenced that a wrong name had been inserted in the subpoena, a new subpoena was issued with the right name, at nine o'clock in the evening. With this the officer went again to the house, and there found a person known as the first wife of the accused. He was told by her that the witness was not there, and had not been for three weeks. He went again the next morning, and not finding her, or being able to ascertain where she was by inquiring in the neighborhood, made return of that fact to the court. At ten o'clock that morning the case was again called; and the foregoing facts being made to appear, the court ruled that evidence of what the witness had sworn to at the former trial was admissible.
>
> In this we see no error. The accused was himself personally present in court when the showing was made, and had full opportunity to account for the absence of the witness, if he would, or to deny under oath that he had kept her away. Clearly, enough had been proven to cast the burden upon him of showing that he had not been instrumental in concealing or keeping the witness away. Having the means of making the necessary explanation, and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own.

Reynolds, 98 U.S. at 159–60.

550. The law in Washington that allowed the defendant in *Crawford* to assert the spousal immunity privilege is atypical. *See* Pamela A. Haun, Note, *The Marital Privilege in the Twenty-First Century*, 32 U. MEM. L. REV. 137 (2001). Haun found that a majority of the states with a spousal testimony privilege permit only the witness spouse to assert the privilege. *Id*. at 158. Six states, including Washington, give control of the privilege to the defendant alone, and three allow either spouse to exercise it. *Id*. at 159. Furthermore, all states that recognize the privilege create an exception for cases like domestic violence when one spouse commits a crime against the other. *Id*. at 163.

timizing the victim, although there may be benefits in calling even uncooperative witnesses to testify, as much as they are willing, and then having them remain available for recall by the defense for cross-examination when their prior statements are introduced. Under *California v. Green* and *United States v. Owens*, a complete refusal to testify renders the witness unavailable for confrontation purposes, but inadequate responses and evasions generally do not.[551] Holding victims in contempt for failure to testify goes too far, but the prosecutor calling the witness, and strong judicial encouragement of her testimony, may be productive. Although hardly certain, an unwilling victim may in this context be a reasonably effective witness given the assumption of many factfinders that the reticence results for pressure by the defendant.

1. Providing an Early Opportunity for Confrontation

In domestic violence cases, instead of the prosecution attempting to secure more victim testimony, another approach is likely to be more effective. This approach creates opportunities for testimony by the victim at the outset of the prosecution, when she may be a more willing witness, with a right of cross-examination by the defendant. An examination of the lower court case law after *Crawford* reveals promising possible elements of this new approach.

In *People v. Price*,[552] the California Court of Appeal upheld the admission of an out-of-court statement made by the defendant's wife to a police officer shortly after the police arrived at the victim's home, in response to a 911 call, because at the preliminary hearing the defendant was given the opportunity to, and did, cross-examine his unavailable spouse regarding the statement made to the police.[553] In *People v. Zarazua*,[554] the court rejected

551. A concurring opinion in *Fowler v. State*, 809 N.E.2d 960 (Ind. Ct. App. 2004), argued that the uncooperative domestic violence victim, who had refused to testify that the defendant battered her, *id*. at 961, had been sufficiently available, and could have been recalled by the defendant for cross-examination after her statement to the police about the battering was introduced. *Id*. at 965-66 (Crone, J., concurring). At some point, the refusal to submit to cross-examination will be held to deny confrontation, but during cross-examination, the incentive of the defendant may shift to encouraging rather than discouraging co-operation.

552. 15 Cal. Rptr. 3d 229 (Ct. App. 2004).

553. *Id*. at 238–40; *cf.* Blanton v. State, 880 So. 2d 798, 800–01 (Fla. Dist. Ct. App.

the state's argument that the defendant waived his confrontation right, by waiving a preliminary hearing, because of lack of notice to the defendant of the need to cross-examine and the absence of a showing that the victim would have testified.[555] Instead, if the government provides a hearing and the defendant fails to take advantage of cross-examination opportunities, the result will be different and the statement admissible if the witness is unavailable at trial.

People v. Fry[556] shows another aspect of the picture. The Supreme Court of Colorado has held that its preliminary hearings fail to provide adequate opportunities for cross-examination to meet the Confrontation Clause requirement.[557] If states wish to satisfy confrontation through early hearings, those hearings must allow for adequate cross-examination. Moreover, if prior statements are to be received, an opportunity to cross-examine must be provided both as to the event and to the prior statements.[558] In many jurisdictions, the scope of preliminary and other hearings accordingly will need to be expanded and other procedural changes made by legislative or judicial action.[559]

2004) (finding receipt of hearsay statement of unavailable child witness did not violate *Crawford* where the defendant took witness's deposition).

554. No. H025472, 2004 Cal. App. Unpub. LEXIS 3831 (Cal. Ct. App. Apr. 20, 2004).

555. *Id*. at *13.

556. 92 P.3d 970 (Colo. 2004).

557. *Id*. at 976–80.

558. *See Price*, 15 Cal. Rptr. 3d at 238–40; *see also* People v. Ochoa, 18 Cal. Rptr. 3d 365, 373 (Ct. App. 2004) (noting state's concession that testimonial statements which were not discussed or identified at the preliminary hearing could not be received under *Crawford* when witness refused to testify at trial but concluding that some expansion in details of those statements was allowable where the defendant was alerted to the existence of the statements, finding opportunity and (perhaps questionably) motive to cross-examine or that extensions were harmless). The adequacy of motive to cross-examine a prior incriminating statement of the witness, as opposed to her incriminating testimony at the preliminary hearing, is quite problematic unless the prior statement is introduced since a party lacks the motive to damage its own position by introducing new damaging statements during cross-examination. Even if a defendant has the opportunity, unless incriminating evidence is admitted by the prosecution, he or she clearly has no motive to produce that damaging information that would otherwise not be admitted to attempt to undercut its damaging force, with the potential disadvantage that the evidence would be admissible under the Confrontation Clause at a subsequent trial if the witness is unavailable. Thus, if this avenue is to be used, rules must allow admission of prior statements, and, as a general matter, the prosecution must actually introduce them to give the defense not only the opportunity, but also the motive, to cross-examine.

559. For example, in *State v. Whitehead*, 950 P.2d 818 (N.M. Ct. App. 1997), the court held that the prosecution was barred under its constitution and rules of procedure to demand a preliminary hearing if the defendant chose to waive that hearing. *Id.* at 819–22. If

One of the merits of developing prior cross-examined testimony is that once the testimony is "in the can," the incentive for confrontation falls on the party with the greatest likelihood of being able to encourage testimony—here the defendant. If cross-examined testimony has been secured, which makes the prior statements of the witness admissible if she is unavailable at trial, the defendant has much less incentive to keep the victim off the stand and may even encourage her testimony in the hope that she will disavow the prior incriminating statements, which the finder of fact can credit or readily disbelieve.

2. 911 Calls

Emergency 911 calls can be offered in any type of prosecution, but they are frequently offered in domestic violence cases under the hearsay exception for excited utterances, which, if accepted, automatically satisfy the Confrontation Clause through *Roberts* and *White*. They are frequently critical in domestic violence prosecutions. One of the first post-*Crawford* opinions reached the conclusion that such calls were generally non-testimonial. In *People v. Moscat*,[560] the trial court reasoned that unlike testimonial police interrogation, which "is undertaken by the government in contemplation of pursing criminal charges against a particular person," a 911 call is initiated by a citizen calling for the aid of the government.[561]

In *People v. Cortes*,[562] another lower New York court took a very different general position regarding 911 calls, finding them generally testimonial.[563] The focus of this court's analysis was on the protocols for organized questioning established for most 911 systems, and it concluded that "[w]hen a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investi-

early confrontation is to be afforded effectively, the prosecutor should be able to conduct a preliminary hearing regardless of the defendant's strategic interests, and state law procedures should be amended accordingly.

560. 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

561. *Id*. at 879. *Contra* Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1242–43 (2002) (discussing extensively 911 calls as a class of statements that the authors contend should generally, if not universally, be considered testimonial).

562. 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004).

563. *Id*. at 415.

gation, prosecution, and potential use at a judicial proceeding" regardless of the individual caller's beliefs.[564]

Some 911 calls would likely be non-testimonial under either mode of analysis as illustrated by *People v. Conyers*,[565] where the court concluded that the calls, which were made "while the assault [was] still in progress," were for the purpose of stopping the assault and without consideration of the legal consequences.[566]

I will spend no more time discussing directly the testimonial status of 911 calls, which is a major subject unto itself. Their treatment should largely follow, however, from the resolution of issues developed earlier. These include the allocation of the burden between the government and the state, when statements may be considered made for either testimonial or for another purpose; the treatment of excited utterances; the existence of, and if so, the precise nature of a requirement that the statements be made to a government agent; and whether the statement's testimonial status is determined by the perspective of the witness, or when received by a government agent, the receiver's perspective, by both, or in another manner.

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. Certainly there is no necessity to treat all parts of the conversation in the same manner, as opposed to breaking it into smaller statements manifesting different purposes.[567] In several well-known situations, such divisions occur.[568] The change during a

564. *Id*. The test used for determining whether hearsay generally was testimonial was whether the statement "was made primarily for another purpose" other than investigation or prosecution of crime. *Id*. at 414.

565. 777 N.Y.S.2d 274 (N.Y. Sup. Ct. 2004).

566. *Id*. at 276–77. In *State v. Wright*, 686 N.W.2d 295, 302–03 (Minn. Ct. App. 2004), the court noted that the majority of courts have found 911 calls to be non-testimonial, but in reaching its conclusion consistent with that position, the court did not reject the approach of *Cortes*, but rather found that nothing in that case indicated that the operator had used a formal protocol to elicit the witness's statement.

567. The approach in *Cortes* can in some ways be reconciled with *Moscat* through the division of the conversation into parts. The initial part may well be for a purpose that is not testimonial, but, as the operator guides the conversation with his or her structured questioning, the purpose may be transformed.

568. *See, e.g.*, Williamson v. United States, 512 U.S. 594 (1994). In *Williamson*, the Court construed the term "statement," as used in statements against interest under Federal Rule of Evidence 804(b)(3), to be quite narrow—"'a single declaration or remark'"—rather than "an extended declaration." *Id*. at 599. Another example is the long established

conversation from speaking for another purpose to making a statement aimed at criminal prosecution may come on directions by, and through questions from, the person receiving the statement rather than the speaker. Indeed, the purpose can change from the receiver's perspective without the speaker ever knowing. The difference in perspectives may not matter in privately made statements, but in those made to known government agents, an important question to be answered is whose perspective matters in deciding whether a statement is testimonial. I have argued earlier that if the government agent is intentionally creating testimony, the statement should be treated as testimonial regardless of whether the speaker recognizes that purpose.[569] Such analysis could transform the later parts of some 911 calls into testimonial statements.

VII. THE REMAINS OF THE OLD SYSTEM

A. Idaho v. Wright—*The Uncertain Precedent*

Idaho v. Wright[570] may or may not be a difficult case to resolve under *Crawford*'s analysis. We do not know because the majority inexplicably never mentioned *Wright*, although the concurring opinion did.[571] In its footnote recognizing the problematic nature of *White v. Illinois*, the Court noted that it was the "[o]ne case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial."[572] Since *Wright* approved exclusion of, rather than admission of, testimony, the Court's statement did not strictly include *Wright* within its carefully formulated category, but I still suspect

"non-hearsay" use of the prompt reporting of rape to demonstrate that the complaint was made promptly, but not including its details or allowing them to be used by the jury to prove the truth of the allegations. *See* 2 MCCORMICK, *supra* note 192, § 272.1, at 421 (noting that "only the fact that a complaint was made [not the details] could be admitted"). In a similar fashion, statements of arresting officers regarding the fact that they received a police communication sending them to a particular location is admitted to explain their presence there, but the details of the call are not admissible. *Id*. § 249, at 378.

569. *See supra* Part III.B.

570. 497 U.S. 805 (1990).

571. *See Crawford*, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring) (citing *Wright* as the authority under which he would easily reverse without overturning the Court's well-established confrontation doctrine).

572. *Id*. at 1368 n.8.

that the majority's failure to discuss *Wright* was not inadvertent.[573] Explaining how *Wright* fit would likely have required a more detailed treatment of the definition of testimonial than the Court was willing to provide.

The statements at issue in *Wright* were made by a child who was two and one-half years old to Dr. John Jambura, "a pediatrician with extensive experience in child abuse cases."[574] They were made after the child's older sister, who was five and one-half years old, had undergone a medical examination that revealed evidence of sexual abuse.[575] One of the doctors conducting the older child's examination was Dr. Jambura.[576] The younger child was then taken into custody for protection and investigation, and the following day, Dr. Jambura examined her and secured the statements excluded by the Court in *Wright*.[577]

The Court agreed with the Supreme Court of Idaho that "[g]iven the presumption of inadmissibility accorded accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception . . . 'particularized guarantees of trustworthiness'" had not been shown.[578] In addition to the lower court's focus on the "presumptive unreliability of the . . . statements,"[579]

573. *Wright*'s fit had been examined by the seminal authorities to the majority's approach. The amicus brief for the United States in *White* compared results under the proposed approach with the Court's prior cases, but unlike *Crawford*, the brief noted that *Wright* presented a possible deviation between the Court's proposed approach and decided cases. In its brief however, the United States argued that the result was not "necessarily inconsistent" because "the questioning in [*Wright*] occurred after the declarant had been taken into custody by police, and the state court's characterization of the questioning suggests that it was designed to develop evidence for a criminal case. . . . The questioning therefore may be regarded as functionally equivalent to other forms of official interrogation that result in statements by a 'witness.'" Amicus Brief for the United States in *White*, *supra* note 494, at 28 n.18.

Professor Akhil Amar, whom the Supreme Court cited as one of its principal theoretical sources for its new approach, *see Crawford*, 124 S. Ct. at 1370, likewise squared his version of a new approach with decided cases. In his book, Professor Amar stated that "[h]appily, our reading of the confrontation clause squares with the results of almost all modern Supreme Court cases." AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 131 (1997). He used the explanation given by the United States in its amicus brief in *White* to square this one potential outlier. *Id*. at 245 n.193.

574. *Wright*, 497 U.S. at 808–09.

575. *Id*. at 809.

576. *Id*.

577. *See id*.

578. *Id*. at 827.

579. *Id*. at 826. "Presumptive unreliability" for the lower court came simply from the fact that the statement was "inculpatory" and fell within no traditional hearsay exception.

the Court noted the suggestive manner of Dr. Jambura's questioning.[580]

Wright illustrates the complexity of the testimonial determination even as to what might be highly problematic hearsay. The questioning was done by a private individual, a medical doctor.[581] Indeed, there appears to be no reason why these statements could not have been admitted under the exception for statements for the purpose of medical diagnosis or treatment but for the failure of the prosecutor and the Idaho courts to reach a result in this early case that was adopted later in most other jurisdictions.[582] The statements were, in the words of the Court, accusatory,[583] which does not appear to be a significant term under *Crawford*. I believe that such statements should not be admitted under the Confrontation Clause without at least careful scrutiny, and while the United States as amicus in *White* would accept at least that premise, Justice Thomas in *White* questioned generally the clarity of this functional approach.[584]

Wright apparently remains good law. Indeed, after *Crawford*, it is the only case where evidence was excluded that cannot necessarily be accounted for by *Crawford*. It constitutes an exclusionary result from the "old system" that is not consistent with the testimonial approach if that approach is restrictively applied.

B. *The Confrontation Clause Application to Non-testimonial Statements*

In *Ohio v. Roberts*,[585] Justice Blackmun articulated a general standard of trustworthiness and reliability for all hearsay in which the declarant was unavailable that created the now-familiar term "firmly rooted hearsay exception," which was an automatic route to satisfying the Confrontation Clause in many

See State v. Wright, 775 P.2d 1224, 1227 (Idaho 1989).

580. *Wright*, 497 U.S. at 826.

581. *Id*. at 809.

582. *See* Mosteller, Medical Hearsay Exception II, *supra* note 36, at 69–74 (examining carefully the Idaho case law, including the briefs and arguments of the parties, and concluding that there was no clear reason why the statements could not have been offered and received as statements for the purpose of medical diagnosis or treatment).

583. *Wright*, 497 U.S. at 827.

584. *See White*, 502 U.S. at 364 (Thomas, J., concurring).

585. 448 U.S. 56 (1980).

situations.[586] As part of a summary, the opinion stated: "[the] 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."[587]

What remains of the old system? The Court did not give an answer. One part of it is clearly gone. When statements are testimonial under *Crawford*, the reliability and trustworthiness analysis is irrelevant. Only cross-examination or one of the other limited exceptions described above avoids *Crawford*'s "stop sign" under the Confrontation Clause. The *Roberts* system is thus obliterated as to testimonial statements.

What of non-testimonial statements? Two alternatives are suggested. Perhaps *Roberts*'s reliability and trustworthiness analysis remains the operative test as to all non-testimonial statements. The other competitor is that the Confrontation Clause has nothing whatsoever to say about non-testimonial hearsay, and admissibility depends solely on satisfying hearsay and other evidentiary restraints that rules of evidence impose.[588]

In *Crawford*, Justice Scalia entertained the possibility of resolving this uncertainty and revising the Confrontation Clause to apply "only to testimonial statements, leaving the remainder to regulation by hearsay law."[589] He noted that this proposal had been in fact considered and rejected in *White*.[590] Intriguingly, he recognized that "our analysis in this case casts doubt on that holding," but did not resolve that question because it was not necessary to "definitively resolve whether [*Roberts*] survives our decision today" in that the hearsay in *Crawford* would be inadmissible regardless of whether *Roberts* survives.[591]

586. *See id.* at 66.

587. *Id.*

588. *See Crawford*, 124 S. Ct. at 1374 (stating that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether").

589. *Id*. at 1370.

590. *Id*.

591. *Id*.

Resolving *Roberts*'s future will not have an impact on the outcome of many cases since the Confrontation Clause was generally easily satisfied under the *Roberts* test as to most admissible hearsay, and indeed, admissibility under *Roberts*'s reliability and trustworthiness analysis was most often decided automatically when the statement met a broadly accepted and long established—"firmly rooted"—hearsay exception. How this pathway to admissibility is defined will matter, however, in situations of non-testimonial hearsay that is highly unreliable and fits no "firmly rooted" exception.

Difficult examples can easily be imagined regarding highly problematic accusatory statements and the frequently difficult statements by children in child sexual abuse cases. Some of these statements will be considered testimonial, as a Maryland appellate court determined as to an interview by a social worker employed by the county Child Protective Services conducted after the social worker had received a police report that children had been sexually abused[592] and was done for the purpose of developing the children's statements for admission under a hearsay exception.[593]

Where the dividing line will be located has not yet been determined for statements made by children to family members, doctors, school teachers, social workers, and police officers when the purpose of the statement is not entirely clear. Many of those statements may be ruled non-testimonial as illustrated by the decision of a Michigan appellate court that concluded that statements of a child made to an interviewer at Child Protective Services, after the agency was contacted for an evaluation by a parent concerned about possible abuse, were not considered testimonial because the interviewer was not a governmental employee.[594]

The statement might also be argued to be non-testimonial for other reasons, such as a lack of awareness of the purpose of the questioning by the child[595] or because the statements were not

592. Snowden v. State, 846 A.2d 36, 42 n.10 (Md. Ct. Spec. App. 2004).

593. *Id*. at 47.

594. People v. Geno, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004).

595. *See* Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 250–51 (2002) (arguing on one hand that statements by young children might properly not be considered testimonial because the child may not

made in response to structured questioning, which would be most persuasive in the early stages of an inquiry when suspicion is vague and unformed.

In states that have a broad catch-all exception or a similarly general exception that applies to children, one can imagine statements of the child to relatives, family friends, and probably school teachers which might be found lacking in reliability under *Roberts*, particularly given that under *Wright* reliability and trustworthiness may not be proved by corroboration of the truth of the statement through external evidence.[596] Thus, whether the Confrontation Clause still applies to statements like those in *Wright* has practical significance in child sexual abuse cases, and it has even greater significance if jurisdictions relax their hearsay rules as that body of law and confrontation diverge.

Presently, lower courts should still apply the "old system" to non-testimonial hearsay because *Crawford* did not overrule *Roberts* in this area.[597] Whether the applicability of the Confrontation Clause will remain the law in the future, however, is uncertain. We can be relatively confident of the votes of Justices Thomas and Scalia in *White* that they would free such statements from any control under the Confrontation Clause. The inclinations of the rest of the Court have not been revealed. I believe, however, that any "betting line" would treat *Roberts* as a clear underdog.

appreciate that he or she is providing information about wrongful conduct that may be used in a criminal prosecution, and on the other, that elicitation by a state officer might be sufficient). More likely, the reasonable witness awareness that the statement would be available for use at a later trial is not to be judged based on an objective child similar to the witness, but as to an ordinary reasonable observer. People v. Sisavath, 13 Cal. Rptr. 3d 753, 758 n.3 (Ct. App. 2004). For example, when a government agent is openly developing evidentiary materials that fall within the core of the inquisitorial model, lack of appreciation of that fact by a witness with mental limitations should not render the statement non-testimonial.

596. *Wright*, 497 U.S. at 819–20. *See* Miller v. State, 98 P.3d 738, 744–48 (Okla. Ct. Crim. App. 2004).

597. *See, e.g.*, United States v. Saget, 377 F.3d 223, 227 (2d Cir. 2004) (applying *Roberts* to non-testimonial statements at the same time it noted *Crawford*'s strong criticism of the trustworthiness methodology).

C. *The Case for a Secondary System of Confrontation Clause Protection—The Brief for* Roberts *Continuing to "Live"*

I sense there are few academics who would favor retaining the *Roberts* analysis as a supplement to *Crawford* because of the apparent theoretical incompatibility of the two systems and because of *Roberts*'s proven inadequacy as an effective way to enforce the Confrontation Clause. I contend the conflict need not be viewed this starkly and believe there will be a need for *Roberts* to supplement the definition of testimonial statements that I assume will not cover all statements of proper concern under the Confrontation Clause.

When one examines with a broad perspective the overall history of hearsay and the Confrontation Clause, I suggest that the story is one of a confrontation right arising at a time when hearsay law was largely unformed and few hearsay exceptions were recognized. Most hearsay was not a threat to confrontation because most problematic hearsay was not admissible. The confrontation right arose to block admission of a particular type of hearsay—inquisitorial hearsay—and it had little to say directly about other hearsay because such hearsay was not admissible.[598]

As hearsay law developed, practices arose and evidence from out-of-court declarants was offered, which the Framers had never seen and about which they had no opinion. The question now is how that new form of evidence should be treated. In the words of the Sixth Amendment, are these hearsay declarants "witnesses against"[599] the defendant, or should they be treated as outside its scope? If determining how the Framers would have answered the question is a relevant question, I believe we simply cannot know the answer.

Crawford does seem to correctly perceive the area where we can be most certain of the Framers' intent—testimonial statements of an inquisitorial sort offered in judicial proceedings.[600] Thus, treating these types of statements as particularly deserv-

598. *See* Mosteller, *supra* note 18, at 746–55 (taking a similar approach to the ambiguity of knowing the meaning of or how the Framers would have applied the Confrontation Clause given that the hearsay rule of that period was both different and somewhat unformed).

599. U.S. CONST. amend. VI.

600. *See* Mosteller, *supra* note 18, at 751–53.

ing of scrutiny and exclusion makes perfect theoretical sense. Also, targeting some narrower group of statements for special scrutiny makes practical sense. A broad rule that mandates exclusion will be difficult to maintain in that courts will feel tremendous pressure to make accommodations.[601] A narrower rule has a better chance of maintaining integrity, particularly if the remedy is to exclude important evidence.

But having defined a core and recognized a practical need for restricting that core does not prove that the Framers were only concerned with the category of testimonial statements as *Crawford* "defines" it or that the Confrontation Clause has no other legitimate formulation. I contend that the Framers were likely concerned about accusatory statements more generally, or they would have been had the historical practices presented themselves.[602]

If testimonial is not broadly defined, however, I contend continued scrutiny under the Confrontation Clause is justified for an additional group of statements. *Wright* presents such a case. I believe the Confrontation Clause has something to say about the admission of this type of accusatory hearsay.

Another case, *Commonwealth v. Robins*,[603] which is not well known, presents a similarly problematic fact pattern and one that *Crawford* may be construed not to cover. In *Robins*, a police informant, Downey, was incarcerated and seeking to negotiate his release.[604] He learned in jailhouse conversations with Auman, who was confined in the same cellblock, that Auman and others had committed a burglary.[605] Although he did not name Robins as one of those accomplices, the details he described were incrimi-

601. The erosion of the protections of the Confrontation Clause under the broad rule of *Roberts* is rightfully attributed in part to this practical difficulty.

602. Perhaps virtually everything that I would consider to be accusatory will be treated as testimonial under a generous interpretation of the amicus definition, but such full coverage is far from clear.

603. 812 A.2d 514 (Pa. 2002). I want to thank Professor Roger Kirst for bringing this case to my attention as an archetypal problematic case. I do not implicate him, however, in my arguments to preserve some part of *Roberts*. *United States v. Saget*, 377 F.3d 223, 225–31 (2d Cir. 2004) involves facts somewhat similar to *Robins*, finds *Crawford* inapplicable, *see id.* at 225–26, and determines that *Roberts* is satisfied. *Id*. at 231. The court affirms the use of the statements. *Id.* at 231–32.

604. *Robins*, 812 A.2d at 516–17.

605. *Id*. at 516.

nating to Robins.[606] To secure his release, Downey agreed to participate in a sting operation to secure further details of the burglary.[607] Along with an undercover police officer who posed as a potential purchaser of valuable stamps stolen in the burglary, he met with Auman.[608] In their conversation, which was secretly recorded, Auman described the burglary apparently to explain how he had possession of expensive stamps and gave more details of the burglary, a discussion which Downey and the agent prodded Auman to continue.[609] Auman still did not name Robins but added details that further incriminated him.[610] Auman entered into a plea agreement, and, despite his unavailability, both of his statements were admitted against Robins.[611]

The statements were offered initially as co-conspirator statements, but admission under that exception was rejected because the conspiracy was determined to have ended in the year since the burglary.[612] They were then offered and admitted as statements against Auman's interest.[613]

Robins is a great case to test the limits of a testimonial statement approach. One statement was made while in custody, one statement at liberty, one statement was recorded, but unknown to the defendant, the other was not recorded at all. The statements were not made to known government agents. They were also not made in furtherance of a conspiracy. Indeed, they were elicited by a person with motives to develop more incriminating details, and Auman even noted with concern that he was incriminating himself.[614]

Depending on how testimonial is defined, this statement may be within that category. The *Crawford* Court has suggested, however, I believe incorrectly, that statements which were made to a person not believed to be a government agent may not be considered testimonial.[615] Furthermore, if the witness's perspective is

606. *Id*. at 517.
607. *Id*.
608. *Id*.
609. *Id*.
610. *Id*. at 516–17.
611. *Id*. at 517–18.
612. *Id*. at 518.
613. *Id*. at 517.
614. *Id*.
615. *Crawford*, 124 S. Ct. at 1364.

exclusively considered and the intent of the government agent ignored, the statement will likewise be considered non-testimonial. I contend that, like *Wright*, *Robins* presents facts that are a proper matter of concern under the Confrontation Clause. If *Crawford* does not handle this class of problematic, accusatory hearsay, *Roberts* or some variant should.

VIII. CONCLUSION

Crawford leaves many important issues undecided regarding the scope of its application. These issues can be resolved effectively by making *Crawford* cover virtually all statements to government officers, except those that are unrelated to crime or clearly made for another purpose. While the line that I am suggesting does not limit statements to those closely analogous to the preliminary examinations under the Marian statutes, it is a division consistent with the practices at the time of the Framing in that outside dying declarations, few, if any, of the additional statements covered would have been admissible in criminal prosecutions under the evidence law of that era. Statements to private organizations performing government functions and formally prepared statements made to private individuals that are intended to be used testimonially should also be covered. The dividing lines become progressively more debatable from this point forward, except that I believe accusatory statements made after the police have publicly begun their investigative conversations should generally be treated as testimonial.

More broadly and controversially, I suggest that statements made to private parties should be considered testimonial if accusatory and made to individuals who stand at arms length from the witness or are expected to communicate the statements to others. Creating testimonial statements is not something about which ordinary individuals make reasonable judgments. Rather, they make statements for another purpose—part of living their lives—or they make statements that are accusatory; they either make them confidentially to friends, family, and intimates, or they put them into the hands of those they do not control to be used as the third party determines. When speaking to a private individual, just as when they are being questioned by the police,

the speakers are not giving testimony or being witnesses.[616] More formalism may be required, but neither history nor the words of the Constitution compel it.

Assuming statements made to private individuals may be considered testimonial, they are different and may be treated somewhat differently. First, for private statements, it may be appropriate to impose on the defendant the burden of showing that the statement was intended to be accusatory, or testimonial, rather than being made for another purpose. Because of specially recognized dangers of manipulation, when statements are made to government agents the burden should shift, and the government should be required to demonstrate that they were made for another purpose for the statement to be treated as non-testimonial.

Second, when statements are made to private individuals, the only perspective that matters is that of the witness, who must have an accusatory or testimonial intent. On the other hand, when the statement is made to a government agent or to a private organization exercising government functions, the perspective of the receiver/hearer should also matter. A statement should be treated as testimonial if the government agent as receiver, who does often think of generating testimony, is producing a statement to be used testimonially even if the witness is uncertain as to intent. Surely those who rely on history will acknowledge that the Framers feared the role of the government in ma-

616. Testimony is obviously given in court or in a deposition. A statement in a police station may be highly incriminating, but that is against the speaker, which is not the issue under the Confrontation Clause. Moreover, it is not testimony, even if formally recorded. Thus, arguing that police interrogations are particularly close to testimony when used against another participant does not seem accurate. These statements are generally made to shift blame and win leniency, not in anticipation of evidentiary use. Indeed, historically statements made while in custody by one participant incriminating, not the speaker, but another were generally not admissible until the exception for statements against interest was expanded to include those against penal interest. *See* 2 MCCORMICK, *supra* note 192, §§ 318–19. Thus, if the test is whether a reasonable person believed his or her statement made in custody was admissible as evidence, the answer for knowledgeable witnesses would have been "no" in federal prosecutions until about 1975 and "no" or "probably not" in jurisdictions that faithfully followed *Lilly v. Virginia*, 527 U.S. 116 (1999), at the time *Crawford* was decided. The statements, however, were always accusatory, made to individuals (in this case government agents) operating at arms length from the witness, and subject to whatever use the persons receiving the statements might make of them. Making the witness's anticipation of the later use of the statement a central concern adds unnecessary imprecision to the determination, and it was not done under the Marian statutes, where the witnesses were giving testimony, but they were oblivious to its later use, which was the concern of the Framers.

nipulating the statements received and would not have excused them if the government deluded the witnesses or took advantage of their inadequate knowledge or limited mental capacity.

Statements that are accusatory and made to clandestine government agents are likely to be excluded from the testimonial category, but I contend that result is at least problematic and sometimes wrong. Most co-conspirator statements should not be treated as testimonial because they are in furtherance of the conspiracy and not accusatory. Those rare statements that are accusatory and made to a government agent should be prime candidates for testimonial treatment. The witness is not speaking for another purpose and it is a government agent who is receiving the statement and who can engage in the most dangerous types of manipulation. Deluding the speaker about the identity of the agent has a useful law enforcement purpose, but that delusion has no positive impact in terms of eliminating the concerns of the Confrontation Clause when the statements are accusatory and thus provides no substantive basis for non-testimonial treatment.

A significant issue is how the definition of testimonial that is adopted will interact with the dynamic response of law enforcement, prosecutors, courts, and legislatures. The boundaries should be established so that countermeasures adopted by the police that change the form of the statements, but not their substance, should not be permitted to eliminate the protection of the Clause.

Many of the above conclusions are controversial. I hope those who disagree can de-couple those arguments from the perspective that follows, which I believe is largely uncontroversial and helpful both to the prosecution and to furthering the interests of the Confrontation Clause. It focuses on the future development of the law.

Crawford, which will be implemented in a dynamic environment, should be developed with the goals of encouraging and ensuring confrontation. As suggested with child sexual abuse and domestic violence prosecutions, this can be done in a way that minimizes the loss of evidence and maximizes the actual confrontation in the courtroom. Mechanisms will have the best chance of success if they give incentives to encourage confrontation to the party with the best opportunity to accomplish the task of securing appearance and testimony.

After *Crawford*, the world of confrontation law has been radically altered. Given that the old system was incapable of policing problematic hearsay effectively, the new system that reliably excludes the most problematic statements is almost certainly an improvement. How well it will cover accusatory and other problematic hearsay, however, is yet to be decided and will take careful work. How effective it will be in providing confrontation as opposed to the exclusion of a limited class of evidence is even more in doubt, and better accomplishing that task should be the priority of reformers.

The shape of hearsay in the future is intriguing. Whatever else it has done, *Crawford* has certainly breathed new interest into the law of evidence and particularly confrontation and hearsay theory. The devil is in the details, and that is our immediate, important task. Solid work on the Confrontation Clause will help lay a firm foundation for broader evidence revision and potential broad scale procedural reform that both allows for the effective working of the criminal justice system and is true to the central concerns of the Constitution—evidence that is tested in the caldron of confrontation.