

## SOFTENING THE FORMALITY AND FORMALISM OF THE “TESTIMONIAL” STATEMENT CONCEPT

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### I. INTRODUCTION

In *Crawford v. Washington*, the United States Supreme Court ruled that “testimonial” statements are the core, perhaps exclusive, concern of the Confrontation Clause.<sup>1</sup> The Court began a process of defining the testimonial-statement concept but did not develop a comprehensive definition. In *Crawford*, the Court found testimonial a statement that was tape recorded and obtained from a criminal suspect who was in police custody, had been given *Miranda*<sup>2</sup> warnings, and was being interrogated by known governmental agents using what the Court termed “structured” questioning. One of the definitions the Court explicitly presented as a possible model was highly formal and formalistic, and the fact pattern in *Crawford*, as briefly described above, would have fit within such a restrictive and wooden formulation of the concept.

I use the terms “formal” and “formalistic.” By “formal,” I mean a requirement about the physical form of the statement (written, recorded, etc.), which is at the heart of the definition proposed by Justice Thomas in *White v. Illinois*,<sup>3</sup> or the formality of the proceedings where that statement was secured.<sup>4</sup> “By formalistic, I mean [a relatively] wooden adherence to a set formula rather than a functional approach based on the protective purposes of the Confrontation Clause.”<sup>5</sup> These two

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<sup>1</sup> 541 U.S. 36, 50–52 (2004).

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>3</sup> 502 U.S. 346, 365 (1992) (Thomas, J., concurring). In *White*, Justice Scalia joined Justice Thomas’s opinion, but in *Davis v. Washington*, 126 S. Ct. 2266 (2006), Justice Scalia showed that he did not strictly adhere to that definition, although Justice Thomas continued to do so as his dissent in that case showed.

<sup>4</sup> Among the problems with using this type of definition is that the coverage of the Confrontation Clause is subject to easy manipulation by the police to avoid such formality. See discussion *infra* pp. 343–44, 349–50.

<sup>5</sup> Robert P. Mosteller, *Crawford’s Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411, 411 n.2 (2005) [hereinafter Mosteller, *Crawford’s Impact*] (stating, initially, a form of dual criticism of the potential inadequacy of “testimonial”); see also Robert P. Mosteller, “*Testimonial*” and the *Formalistic Definition—The Case for an “Accusatorial” Fix*, CRIM. JUST., Summer 2005, at 14 [hereinafter Mosteller, “*Accusatorial*” *Fix*] (arguing against formalism and instead for a

concepts are related but distinct: in my view, neither excessive formality nor formalism are demanded by *Crawford*, nor are they consistent with its basic intuition about the role of the Clause.

In *Davis v. Washington*, the Court applied the *Crawford* testimonial-statement approach to two additional types of statements, one of which it found to be within the definition and the other outside it.<sup>6</sup> The Court again declined to provide a comprehensive definition of the concept, and it left a large number of questions unanswered about its dimensions. However, it did reject some of the most formal and formalistic elements of what was possible after *Crawford*.

*Davis* gave us a somewhat softened definition for the testimonial-statement concept. Specifically, its holding and the additional explanatory language of Justice Scalia's opinion for the eight-justice majority, which was often in direct or implicit response to Justice Thomas's dissent advocating adherence to formality, has softened the formality of the definition.<sup>7</sup> *Davis's* expanded coverage and the modest flexibility it allows in applying the professed definition has also had the effect of softening its formalism. Both developments are quite positive, but unfortunately the opinions leave it entirely unclear whether the Court will continue in this direction.

These changes in the formality and formalism of the testimonial-statement concept and their implications are the subject of this article. My analysis also leads to some further general observations. I question whether the term "testimonial" accurately describes the definition the Court is developing and whether that definition is as faithful to textual and originalist sources as Justice Scalia insists.

## II. THE OUTLINES OF THE COURT'S DEVELOPMENT OF THE TESTIMONIAL-STATEMENT DEFINITION

Justice Scalia began with history, which he found reflected a special concern: "[T]he 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."<sup>8</sup> He specifically cited two examples: first, the use of statements taken from accusers by the examining magistrates under the Marian Statutes in the sixteenth century;<sup>9</sup> and second, the accusations of Lord Cobham against

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more functional definition that takes as its most important feature the core concern of whether certain witnesses were making criminal accusations against the defendant).

<sup>6</sup> 126 S. Ct. at 2276–80.

<sup>7</sup> The Court, however, explicitly stated that the formality of a statement is a requirement of a testimonial statement: "We do not dispute that formality is indeed essential to testimonial utterance." *Id.* at 2279 n.5.

<sup>8</sup> *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

<sup>9</sup> *Id.* at 44, 50.

Sir Walter Raleigh in his treason trial, who had directly implicated him in both an examination before the Privy Council and in a letter to it.<sup>10</sup>

With respect to the dictionary and its insight into the meaning of the constitutional language used, Justice Scalia wrote:

The text of the Confrontation Clause reflects this focus. It applies to “witnesses” against the accused—in other words, those who “bear testimony.” “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.<sup>11</sup>

Without adopting any specific formulation, the Court quoted three possible definitions for “testimonial” statements:

1. Petitioner’s Definition: “*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.”<sup>12</sup>
2. Justice Thomas’s Definition: “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”<sup>13</sup>
3. Amici’s Definition: “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.”<sup>14</sup>

Justice Scalia left for another day a comprehensive definition of such statements.<sup>15</sup> In doing so, he acknowledged the merits of Chief Justice Rehnquist’s contention that the majority’s “refusal to articulate a comprehensive definition in this case will cause interim uncertainty.”<sup>16</sup> Justice Scalia provided only a somewhat generalized version of the necessary implications of the fact pattern covered in *Crawford*, where he seemed to add to the Justice Thomas definition, the most restrictive of the three suggested definitions.

Justice Scalia described the scope of the testimonial concept as follows: “[I]t applies at a minimum to prior testimony at a preliminary

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<sup>10</sup> *Id.* at 44.

<sup>11</sup> *Id.* at 51 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 91 (New York, S. Converse 1828)).

<sup>12</sup> *Id.* (quoting Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02–9410)).

<sup>13</sup> *Id.* at 51–52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

<sup>14</sup> *Id.* at 52 (quoting Brief of Amici Curiae the National Ass’n of Criminal Defense Lawyers et al. in Support of Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02–9410)).

<sup>15</sup> *Id.* at 68.

<sup>16</sup> *Id.* at 68 n.10.

hearing, before a grand jury, or at a former trial; and to police interrogations.”<sup>17</sup> This is a list of examples, which are generally physical products and statements in formal, tangible form. Indeed, in the context of the facts of the *Crawford* case, even police interrogation meant a formal, physical product. It exhibits no clear connection to the function of the Clause, nor does the product give indications of what intent or expectation is required by the person who makes or receives the statement.

In *Davis*, another opinion written by Justice Scalia, the Court examined two more fact patterns under the testimonial-statement approach.<sup>18</sup> It found nontestimonial one set of statements that started in an apparent emergency situation. However, it found another set of statements testimonial, even though the statements were made in the field not long after an apparent assault, because the purpose of the police questioners was to establish facts about past events.

*Davis*, like *Crawford*, declined to provide a comprehensive definition. Although possibly understandable, it should be clear to the Court that the lack of a general definition is causing major problems in criminal cases throughout the United States. Chief Justice Rehnquist criticized this same uncertainty in *Crawford*.<sup>19</sup> What is truly remarkable, however, is that *Davis* did not build positively on any of the three suggested potential definitions set out above in *Crawford*.

Positively, *Davis* only amplified slightly the coverage of testimonial statements:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>20</sup>

This minor clarification, albeit important, appears to go backward rather than forward in terms of developing a comprehensive definition. It is couched generally in the language of *Webster's Dictionary* rather than clarifying the language of any of the three proposed definitions from the *Crawford* opinion. It also does not move toward a general approach that is tailored to categorize the major types of circumstances commonly encountered in criminal prosecutions.

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<sup>17</sup> *Id.* at 68.

<sup>18</sup> 126 S. Ct. 2266, 2276–80 (2006).

<sup>19</sup> 541 U.S. at 70, 75–76 (Rehnquist, C.J., concurring).

<sup>20</sup> 126 S. Ct. at 2273–74.

## III. SOFTENING FORMALITY

*Davis*'s most important clarification of a possible general interpretation of "testimonial" as suggested in *Crawford* is negative.<sup>21</sup> It rejects the definition centered on the formality and formalism of the Justice Thomas definition, which was taken from his concurring opinion in *White v. Illinois* (with Justice Scalia concurring) and was the Court's first signal of what was to come in *Crawford*. Moreover, it specifically rejects some of the more extreme amplifications of such a definition.

Justice Thomas would have defined testimonial statements as "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."<sup>22</sup> Justice Scalia unmistakably departed from this signature feature of that proposed definition. Instead, he de-emphasized the importance of the formality of the statement, which is at the core of Justice Thomas's definition and which begins Webster's formulation—"[a] solemn declaration or affirmation."<sup>23</sup>

Concretely, in *Davis*, the testimonial statements were oral statements made in the field to a police officer. Justice Thomas, in dissent, argued that recognizing such a statement as testimonial deviated both from Webster's definition, which the majority itself had endorsed,<sup>24</sup> and from the historical example exemplified by the formality of proceedings before the examining magistrates under the Marian Statutes.

This requirement of solemnity supports my view that the statements regulated by the Confrontation Clause must include "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Affidavits, depositions, and prior testimony are, by their very nature, taken through a formalized process. Likewise, confessions, when extracted by police in a formal manner, carry sufficient indicia of solemnity to constitute formalized statements and, accordingly, bear a "striking resemblance," to examinations of the accused and accusers under the Marian Statutes.

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<sup>21</sup> See Robert P. Mosteller, *Davis v. Washington and Hammon v. Indiana: Beating Expectations*, 105 MICH. L. REV. FIRST IMPRESSIONS 6, 7–9 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/mosteller.pdf>.

<sup>22</sup> *Crawford*, 541 U.S. at 51–52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

<sup>23</sup> *Id.* at 51 (quoting 2 WEBSTER, *supra* note 11, at 91).

<sup>24</sup> "But the plain terms of the 'testimony' definition we endorsed necessarily require some degree of solemnity before a statement can be deemed 'testimonial.'" *Davis*, 126 S. Ct. at 2282 (Thomas, J., concurring in the judgment in part and dissenting in part). As noted earlier, the majority did not abandon a requirement of formality. Justice Scalia explicitly stated: "We do not dispute that formality is indeed essential to testimonial utterance." *Id.* at 2279 n.5 (majority opinion). However, in Justice Thomas's judgment, the "softening" of the requirement had gone too far.

. . . Interactions between the police and an accused (or witnesses) resemble Marian proceedings—and [“the early American cases invoking the right to confrontation or the Confrontation Clause itself”]—only when the interactions are somehow rendered “formal.” In *Crawford*, for example, the interrogation was custodial, taken after warnings given pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) . . . *Miranda* warnings, by their terms, inform a prospective defendant that “anything he says can be used against him in a court of law.” This imports a solemnity to the process that is not present in a mere conversation between a witness or suspect and a police officer.<sup>25</sup>

#### A. Rejecting Strict Formality of Statement Form

*Crawford* left open the possibility that the form of the statement—whether it was written or recorded—might be given dispositive weight. One unfortunate consequence of this type of definition is that it would invite manipulation by investigative officers in their decision to record a statement or to rely on memory or informal notes.<sup>26</sup> However, in *Davis*, while explicitly acknowledging a formality requirement—“[w]e do not dispute that formality is indeed essential to testimonial utterance”<sup>27</sup>—the Supreme Court clearly eliminated some of the extreme readings of formality and generally softened the requirement.

In apparent response to Justice Thomas’s arguments in dissent, the Court acknowledged that most of the early American cases dealing with the Confrontation Clause or its state or common-law counterparts involved formal statements. However, that was not true, it noted, of “the English cases [which] were the progenitors of the Confrontation Clause.”<sup>28</sup> The Court generalized its point: “[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a

<sup>25</sup> *Id.* at 2282–83 (Thomas, J., concurring in the judgment in part and dissenting in part) (citations omitted) (quoting *Dickerson v. United States*, 530 U.S. 428, 435 (2000)).

<sup>26</sup> See Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 555 (2005). Some lower courts effectively embraced this distinction and invited future determination of testimonial quality by the decision whether to record. See, e.g., *People v. Cage*, 15 Cal. Rptr. 3d 846, 856–57 (Ct. App. 2004) (noting that the interview was not recorded and that no evidence existed to show that the police detective “even so much as recorded it later in a police report”), *review granted*, 99 P.3d 2 (Cal. 2004). The majority in *Davis* readily recognized the possibility of police evasion of coverage through “informal” recording of the statement, 126 S. Ct. at 2276, and even Justice Thomas in his dissent would “reach[ ] the use of technically informal statements when used to evade the formalized process.” *Id.* at 2283 (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>27</sup> *Davis*, 126 S. Ct. at 2279 n.5 (majority opinion).

<sup>28</sup> *Id.* at 2276.

deposition.”<sup>29</sup> It then extended the point through a broad positive formulation: “The product of [police interrogation to prove or establish past crime], whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.”<sup>30</sup>

The clarification is not theoretically momentous, but it has significant practical import. Without this explanation, the testimonial label might be found to turn on whether the police asked the witness to provide a written and signed statement or received exactly the same information but memorialized it less formally.<sup>31</sup>

*B. Rejecting Strict Formality of Proceedings and Limitation to Procedural Situations Resembling Historical Inquisitorial Practices*

In his dissenting opinion in *Davis*, Justice Thomas limited his earlier proposed definition of “testimonial” along the lines that a number of lower courts had followed, by limiting the testimonial concept to statements produced in rigorous interrogation proceedings that resembled those under the Marian Statutes. A number of lower courts excluded most statements received by officers in the field because they did not resemble the procedures employed by the examining magistrates under the Marian Statutes. Together, the formality of the form of the statement (written or recorded) and the formality of proceedings would have frequently permitted investigators to obtain accusatory hearsay statements and still avoid Confrontation Clause protection.

*Hammon v. Indiana* rejected the effort to limit testimonial statements to those produced in procedures resembling the historical situations that concerned the Framers. In doing so, Justice Scalia indicated that he believed original principles should be translated into changed circumstances even if he is not fully accepting of a Constitution that is evolving by stating the following:<sup>32</sup> “Restricting the Confrontation

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Mosteller, *supra* note 26, at 539–40 (describing how the decision of the police not to interview a witness in the field but instead to take the witness to the police station to receive a written statement could determine whether the statement was ruled testimonial under some formulations of the *Crawford* test, and arguing that if formality of that sort were decisive, it would likely lead to manipulation and countermeasures by the police to avoid the testimonial determination).

<sup>32</sup> See JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 9–10 (2005) (drawing a distinction between an originalist view that original principles may be modified to fit changed circumstances and the non-originalist view of an evolving or living Constitution).

Clause to the precise forms against which it was originally directed is a recipe for its extinction.”<sup>33</sup>

### C. *Rejecting a Rigorous Interrogation Requirement*

The *Crawford* opinion was open to the interpretation that formality required rigorous station-house interrogation because rigorous interrogation occurred in that case. It spoke both of police interrogation and structured questioning. Indeed, Justice Thomas argued that the provision of *Miranda* warnings in the *Crawford* case in the context of custodial interrogation adequately resembled the Marian procedures and thereby provided “sufficient . . . solemnity to constitute formalized statements.”<sup>34</sup>

*Hammon*, the companion case to *Davis*, presented a quite different situation. In *Hammon*, the questioning was in the field rather than in the police station, and the person questioned was an apparent victim and clearly not a criminal suspect. One could hardly imagine a situation where questioning a victim would be nearly as forceful and rigorous as that involved in *Crawford*, where Sylvia Crawford was a suspected co-participant in the aggravated assault. The Court found that none of these differences mattered to its determination that the statements were testimonial. However, Justice Scalia did not remove all sense that special formality was or might be required, leaving the possibility of some future limitations of this type to general inclusion of non-emergency investigative interviews within testimonial statements.

Justice Scalia recognized that the circumstances of the *Crawford* interrogation were more formal than *Hammon*, which he viewed functionally: “[T]hese features certainly strengthened the statements’ testimonial aspect—made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events . . . .”<sup>35</sup> He found that none of those formalities—(1) the giving of *Miranda* warnings, (2) the fact they were tape recorded, and (3) the fact they were made at the station house—was required. Comparing the situation in *Hammon* to *Crawford*, he provided the following description:

Both declarants were actively separated from the defendant . . . . Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for

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<sup>33</sup> *Davis*, 126 S. Ct. at 2279 n.5.

<sup>34</sup> *Id.* at 2282 (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>35</sup> *Id.* at 2278 (majority opinion).



live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.<sup>36</sup>

Justice Scalia continued to use the term “interrogation” to describe what occurred in *Hammon*. But, on the other hand, he appears to have eliminated interrogation as a requirement for formality. Furthermore, neither pointed questioning nor even questioning itself is required. He stated: “This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.”<sup>37</sup>

What is left of these various elements of formality, formalism, and interrogation? Justice Scalia’s opinion certainly did not remove all limitations. For example, he noted the witnesses’ separation from the suspect as an apparently significant common feature of the two testimonial situations found by the Court. Such separation (“let me talk with you alone”) is quite different from a casual group conversation that one could imagine a police officer having with a group of people on a street corner. However, beyond imputing that basic message of some seriousness of purpose as opposed to informality of information gathering, it is hard to articulate in general terms the critical threshold in formality he is describing. He did not explain the purpose it served or how that feature might be evaluated across circumstances. More generally, his opinion continued to speak of “interrogation,” even when that term appeared no more accurate, and perhaps less so, than the less evocative term “questioning.”<sup>38</sup> More significantly, Justice Scalia’s opinion kept in place the possibility that testimonial statements might be only those made to persons known to be government investigative agents, or indeed much more restrictively, only statements made to known police officers.

Perhaps in response to Justice Thomas’s emphasis on *Miranda* warnings, he articulated a new and potentially very significant limitation. Largely out of the blue, he stated, “It imports sufficient formality . . . that lies to [police] officers are criminal offenses.”<sup>39</sup> Even if

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 2274 n.1. As evidence for its conclusion, the Court noted that part of the evidence against Sir Walter Raleigh was a letter written by Lord Cobham “that was plainly *not* the result of sustained questioning.” *Id.* (citing *The Trial of Sir Walter Raleigh* (1603), in 2 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 1, 1–60 (T.B. Howell ed., London, R. Bagshaw 1809) [hereinafter *The Raleigh Trial*]).

<sup>38</sup> Indeed, in discussing the movement from nontestimonial to testimonial status of statements made in *Davis*, Justice Scalia referred to McCrotty’s exchange with the 911 operator as a “conversation,” which it clearly seemed to be. *Id.* at 2271–72. Nevertheless, he retained generally the interrogation characterization.

<sup>39</sup> *Id.* at 2279 n.5.

statements to known government officials and indeed to government investigators are the only statements covered, restricting the Confrontation Clause to those agents to whom making false statements is a criminal offense is not a minor matter.<sup>40</sup>

#### IV. REMAINING POTENTIAL LIMITATIONS

##### A. *The Highly Questionable Potential Requirement that a Statement Must be a Criminal Offense "If It Were" a False Statement*

Why the Court in *Davis* focused on the possibility of prosecution for making a false statement as adding sufficient formality is curious, if not inexplicable. In response to Chief Justice Rehnquist's dissenting argument in *Crawford*, Justice Scalia contended that "[e]ven if . . . there were no direct evidence [on] how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been."<sup>41</sup> The answer to his rhetorical question is clear: the Confrontation Clause would have applied. We know because Justice Scalia says it is "implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK."<sup>42</sup> If that explanation is accurate as to sworn statements, why would Justice Scalia now contend that the obviously ridiculous distinction is appropriate when we substitute for sworn statements, statements subject to prosecution if false? Indeed, limiting testimonial statements to those statements that happen to be covered by a statute criminalizing purposefully false statements would be less sensible than limiting them to statements under oath.<sup>43</sup>

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<sup>40</sup> Statements of children to school social workers, school teachers, and doctors who were explicitly eliciting statements for the purpose of establishing or proving a crime (e.g., child sexual abuse) could be excluded from the testimonial definition by the requirement that giving false statements constitutes a criminal offense, even if not already eliminated by a requirement that the statement be received by either a government agent or a government investigative agent.

<sup>41</sup> *Crawford v. Washington*, 541 U.S. 36, 52 n.3 (2004).

<sup>42</sup> *Id.*

<sup>43</sup> The rationale behind Justice Scalia's posing of the rhetorical question that answers itself is unclear. One possibility is that a statement that performs the same function as testimony at trial—for example, a highly incriminating accusation by an out-of-court declarant—could not possibly be treated differently based on whether it was or was not made under oath. If this is the rationale, Justice Scalia is employing some limited version of a functional analysis, which is suggested by the decision to cover statements to police officers made during an interview in the field in *Hammon*. The second possibility is based on reliability: surely if there is a need to confront and cross-examine a declarant who made a statement under oath, which should have enhanced reliability because it was made under oath, the need would be even greater as to less reliable statements not made under oath. Either rationale makes some sense, but both are fundamentally inconsistent with the formal and formalistic testimonial-statement definition that Justice Scalia supports.

Perhaps Justice Scalia saw the possibility of prosecution for false statements as a substitute for the oath before the examining magistrates under the Marian Statutes, but if so, it is hardly equivalent and would be a bizarre requirement. First, unlike the possibility of a (typically minor) criminal penalty for such a false statement, the ancient oath carried with it not only the possibility of punishment by the authorities, but the far more serious promise of divine punishment combined with the additional obligation to answer on pain of contempt.<sup>44</sup> Also, the publicly administered oath draws the speaker's attention to the obligation, and even today it is recognized to communicate the solemnity of the situation and the seriousness of the enterprise.<sup>45</sup>

Justice Scalia describes his test and examples as follows: "The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood."<sup>46</sup> By contrast to the formally and publicly administered oath or affirmation, neither 18 U.S.C. § 1001, the federal provision,<sup>47</sup> nor section 946.41 of the

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Indeed, in terms of formality, sworn statements are more like testimony than unsworn statements. So, under a definition based on formality, the distinction that Justice Scalia rhetorically suggests is obviously ridiculous would hardly be so. Under that language, perhaps treating sworn statements different from unsworn ones might make some sense. But Justice Scalia rejects that distinction. Given this position, the distinction between statements subject to prosecution for false statement and those not subject to criminal punishment should not stand because the arguments against the distinction are stronger and those supporting the distinction are weaker than when the oath is involved.

<sup>44</sup> Sanction for false statement is only one element of the "cruel trilemma" that testimony under formal oath carried with it. *See* *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) ("The privilege . . . [is founded on] our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt . . .").

<sup>45</sup> *See* FED. R. EVID. 603. In modern practice this rule is supposed to be implemented with flexibility to deal with the needs of "religious adults, atheists, conscientious objectors, mental defectives, and children." *Id.* advisory committee's note. The rule states that the oath or affirmation is to be "administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to [testify truthfully]." *Id.* This function of the publicly administered oath is an obvious element of its importance throughout history. Punishment for false statement, not announced, would appear qualitatively quite different in terms of its effect on solemnity.

<sup>46</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2276 (2006); *see, e.g., United States v. Stewart*, 433 F.3d 273, 288 (2d Cir. 2006) (holding that false statements made to federal investigators violate 18 U.S.C. § 1001); *State v. Reed*, 695 N.W.2d 315, 323 (Wis. 2005) (holding that it is a state criminal offense to "knowingly giv[e] false information to [an] officer with [the] intent to mislead the officer in the performance of his or her duty").

<sup>47</sup> The statute reads as follows:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

Wisconsin Statutes (which was the statute at issue in *State v. Reed*),<sup>48</sup> require that a violator be warned of the potential criminal consequences of his or her statement if falsely made. Perhaps Justice Scalia is assuming that the same purpose is accomplished without the oath or affirmation because everyone knows of the offense, perhaps because it is so serious. Justice Scalia states the consequences are severe, but the Wisconsin statute ordinarily punishes the crime only as a misdemeanor,<sup>49</sup> which appears typical of state treatment of the offense.<sup>50</sup>

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(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

18 U.S.C.A. § 1001 (West 2000 & Supp. 2006).

<sup>48</sup> The Wisconsin statute criminalizes generally “[w]homever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority.” WIS. STAT. § 946.41(1) (2005). It defines “obstructs” as including “without limitation knowingly giving false information to the officer or knowingly placing physical evidence with intent to mislead the officer in the performance of his or her duty.” *Id.* § 946.41(2)(a).

*Reed*, which the United States Supreme Court cites, interprets this statute, which has something of the form of an obstruction of justice statute, as requiring only a materially false statement: “In order to be convicted of this crime, Reed would have to have knowingly given an officer false information and done so with the intent to mislead the officer. As long as the officer was doing an act in an official capacity, and was acting with lawful authority, the statute has been satisfied.” *Reed*, 695 N.W.2d at 321.

<sup>49</sup> WIS. STAT. § 946.41(1). The statute treats the offense as a Class A misdemeanor unless two additional requirements are satisfied: (1) the trier of fact considers the evidence at trial and (2) an innocent person is convicted. In that situation, it is a low grade felony (Class H felony). *Id.* § 946.41(2m).

<sup>50</sup> New York grades its offense a Class A misdemeanor. N.Y. PENAL LAW § 240.50 (McKinney Supp. 2007). North Carolina grades its offense as a Class 2 misdemeanor. N.C. GEN. STAT. § 14-225 (2005). Ohio grades the offense a misdemeanor of the “second degree,”

That everyone knows of the offense is also unlikely given the widely variable coverage of the two examples Justice Scalia cites. The federal statute covers, with exceptions, any material false statement made “within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.”<sup>51</sup> It has extremely broad scope and is generously interpreted.<sup>52</sup> By contrast, the Wisconsin statute, which appears more typical of state statutes, punishes only false statements to an officer, which is defined as someone allowed to make arrests.<sup>53</sup> Of course, additional statutes may cover false statements made to different types of government officers and in other contexts, but variability would predictably be enormous across the nation. I believe that in the typical case where false unsworn statements made to law enforcement officers are prosecuted in the states, almost never is anyone put on notice that a false statement could be punished. The lack of notice is evidenced by the number of citizen-police interactions that entail some measure of self-protective falsehoods being stated to police officers. Furthermore, offenders are not on notice because the offense is tremendously underenforced and most often not even prosecuted. Finally, even if an offender is prosecuted, publicity is likely minimal and little notoriety is generated because it is only a minor offense.

More significantly, these statutes have no relationship to the concerns of the Confrontation Clause, and a system that uses them as a dividing line for coverage would be absolutely ahistoric<sup>54</sup> and without logical defense.<sup>55</sup> Let us take two examples from the *Raleigh* case—the

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unless the obstruction “creates a risk of physical harm,” in which case it is a felony of the “fifth degree.” OHIO REV. CODE ANN. § 2921.31(B) (LexisNexis 2006).

<sup>51</sup> 18 U.S.C.A. § 1001(a).

<sup>52</sup> 1 SARAH N. WELLING, SARA SUN BEALE & PAMELA H. BUCY, FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO § 12.7 (1998).

<sup>53</sup> WIS. STAT. § 946.41(2)(b) (defining “officer” as “a peace officer or other public officer or public employee having the authority by virtue of the officer’s or employee’s office or employment to take another into custody”).

<sup>54</sup> 18 U.S.C.A. § 1001 is not a statute with roots in English common law, colonial history, nor the early years of the new nation. It even has nothing to do with an alternative to the oath. Rather, it has its origin in 1863 as part of the False Claims Act. In its earliest form, the statute covered only frauds against the government by military personnel that cause pecuniary or property loss. In 1872, criminal and civil provisions were separated. In 1918 and 1934, the statute was expanded by Congress to cover frauds not involving military personnel to all those that frustrate government programs even though not causing pecuniary or property loss. 1 WELLING ET AL., *supra* note 52, § 12.7. Under Justice Scalia’s suggested distinction, it would appear that statements made to federal law-enforcement officers for the first century after adoption of the Confrontation Clause were not covered by the Clause because Congress had not enacted criminal punishment for false statements made to these officers. That result does not seem sensible to say the least.

<sup>55</sup> It is not reasonable that reports would violate the Confrontation Clause if made in a state, such as Wisconsin, where a false statement is an offense, *see supra* notes 49, but

statements of Lord Cobham and those from a witness named Dyer who told of statements made by a Portugese gentleman that Raleigh and Cobham conspired to have the king killed.<sup>56</sup> Practically, neither would be prosecuted as false statements, a fact that the speaker would likely appreciate. Moreover, the former might not even be a theoretical violation of some state statutes that are based on obstruction of justice concepts,<sup>57</sup> and the second would not be criminal under either the federal or state statutes.

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the identical statement would not be covered by the United States Constitution if made in another state where the statute imposes different requirements, such as New York or North Carolina. *See infra* note 57.

<sup>56</sup> Jardine gives the testimony of Dyer at Raleigh's trial as follows:

Being at Lisbon, there came to me a Portugal gentleman who asked me how the King of England did, and whether he was crowned? I answered him that I hoped our noble King was well and crowned by this, but the time was not come when I came from the coast for Spain. "Nay," said he, "your King shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned."

1 DAVID JARDINE, CRIMINAL TRIALS 436 (London, Knight 1832).

<sup>57</sup> The North Carolina statute reads as follows:

Any person who shall willfully make or cause to be made to a law enforcement agency or officer any false, misleading or unfounded report, for the purpose of interfering with the operation of a law enforcement agency, or to hinder or obstruct any law enforcement officer in the performance of his duty, shall be guilty of a Class 2 misdemeanor.

N.C. GEN. STAT. § 14-225 (2005).

The North Carolina statute did not remove the explicit obstruction element or expand the statute's scope to cover any false statement to a police officer. In *State v. Hughes*, the North Carolina Supreme Court, in the process of refusing to find a confidential informant's tip sufficient to justify a traffic stop under the Fourth Amendment, stated:

The State argues that this was a case of declaration against penal interest because . . . [*inter alia*], since giving a false report to the police is a misdemeanor, the informant risked criminal charges if his information was not truthful. We are not persuaded by this argument, and we conclude that, under the circumstances, the burden of reliability was not met.

. . . [M]aking a false statement to the police, standing alone, is not against an individual's penal interest because doing so is not a crime. To be charged with the crime of making a false report to law enforcement agencies or officers, the evidence must show that the person willfully made a false or misleading statement to a law enforcement agency or officer *for the purpose of interfering with the law enforcement agency or hindering or obstructing the officer in the performance of his duties*.

539 S.E.2d 625, 629 (N.C. 2000) (citing N.C. GEN. STAT. § 14-225 (1994)).

The states' treatment of this crime is far from uniform. A New York statute makes it a crime to gratuitously make a false report of an event or offense that did not occur. N.Y. PENAL LAW § 240.50(3) (McKinney Supp. 2007). "Gratuitously" within the meaning of the statute occurs "only where that information is volunteered and is unsolicited." *See People ex rel. Morris v. Skinner*, 323 N.Y.S.2d 905, 908 (Sup. Ct. 1971). A false report made during a police investigation in response to questions cannot be punished under the statute. *Id.* at 909.

We are told in *Crawford* that the Framers were most concerned about evidence produced by the government through secret interrogations,<sup>58</sup> which coerced, presumably, false statements incriminating the accused. Justice Scalia's false statement statutes would facially appear to cover those situations, but the crime people are typically punished for is giving false exculpatory statements, not false statements incriminating another.<sup>59</sup> Critically, although the Confrontation Clause is concerned with the latter statements, it is those statements that the statute de facto does not reach.

Indeed, in situations where the confrontation right is needed, the authorities believe the declarant's statements are true, not false. The statements may be false, but that is obviously of no negative consequence to the declarant if the authorities believe them to be true. Alternatively, and in fact inconsistent with the theory under which the Confrontation Clause is important, if the individual were to be prosecuted for making a false statement, or if the threat of that punishment had deterred the falsity, the Confrontation Clause would not have been needed.<sup>60</sup>

Imagine the position of Lord Cobham, but place him, rather than in the Privy Council under formal interrogation which led to a written accusation, "on the street" in conversation with a police officer. The historic exchange might go something like this:

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<sup>58</sup> The Court stated in *Crawford* that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar." 541 U.S. 36, 56 n.7 (2004).

<sup>59</sup> See, e.g., *State v. Lazzaro*, 667 N.E.2d 384 (Ohio 1996) (prosecuting individual at nursing home for false statement that there were no witnesses to an assault). *Reed*, cited by the Supreme Court, is typical in that the prosecution was for a false denial, but largely atypical in that the person who was in fact the driver, both denied his involvement and named another individual as driver, who was never charged. *State v. Reed*, 695 N.W.2d 315, 317 (Wis. 2005).

<sup>60</sup> There was a time in the development of the common law when the oath was considered extremely important, indeed, in some instances an alternative protection to confrontation. See Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 740–41 (noting the importance of the oath in English common law development and its acceptance in some situations as an alternative to confrontation). Defining a confrontation right that is triggered by a factor that was seen as its substitute or in a later era as a guarantee of trustworthiness is at least somewhat incoherent and perhaps backward. The same can be said with more force, because it lacks any historical pretensions of the false statement offense, which is a basis for the reviled concept of reliability. See *Hughes*, 539 S.E.2d at 629 (describing the prosecution's argument that the false statement statute made the informer's statements more reliable for the purposes of the Fourth Amendment because those statements, if false, would be criminal).

*Officer*: “Cobham, you know we have the goods on you and your pal Raleigh. You might as well tell us what you know, and by the way, Raleigh has said some awful things about you.”

*Cobham*: “Raleigh has been saying those things? Oh, OK. You’re right. Raleigh was in the middle of the plot. Actually, it was all his idea.”

No false statement prosecution would occur as a result of this conversation. First, presumably because he is parroting their theory, the prosecution believes that Cobham’s presumed lies are true. As a result, he is in no danger of prosecution for his statement whether treated under either federal or state versions of the false statement statute. Unlike the federal statute, the state laws are general applications of an obstruction of justice that requires impeding the officer. As a result, it is unclear that Cobham could be prosecuted for giving a false statement if the authorities came to question that Raleigh was involved under at least some version of the state paradigm. After all, he gave his statement with the intent to aid the officer in achieving the government’s proclaimed goal, which is exactly what Cobham was doing under the theory Raleigh espoused and the Framers apparently embraced.

Now let us take another less well-known set of statements in the Raleigh case: the claim through a witness named Dyer that he heard a Portugese gentleman say that Raleigh and Cobham would have the king killed.<sup>61</sup> Lots of possibilities can be imagined, but some commentators have noted that this statement was probably made without any personal knowledge by the speaker of its truth.<sup>62</sup> Let us assume, as may have been the case, that the Portugese gentleman believed it true but had no foundation for the statement. The false statement statutes, both federal and state, require that the declarant make the statement knowing it to be false. Thus, a statement that is in fact false is not criminal if the speaker believes in its truth.

The situation of individuals who believe their false statements are true is often posited in cases involving children who are questioned by leading and suggestive methods. Suggestive questioning, overbearing manner, and preconceived result by the questioner are the dangers that lie behind the determinations of both the Idaho Supreme Court and the United States Supreme Court to exclude the statement in *Idaho v.*

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<sup>61</sup> For a further discussion of this problematic hearsay in the Raleigh trial and its possible implications for historical support for a broader Confrontation Clause protection than *Crawford* and *Davis*, see Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford’s Birth Did not Require that Roberts Had to Die*, 15 J. L. & POL’Y (forthcoming 2007).

<sup>62</sup> Roger Park, *A Subject Matter Approach to Hearsay*, 86 MICH. L. REV. 51, 90 (1987).



*Wright*.<sup>63</sup> These concerns reflect major, real issues for admission of hearsay statements made by children.

Absolutely nothing historically based and almost nothing sensible can be predicated on a distinction that makes coverage of the Confrontation Clause to statements dependent on whether a modern false statement statute criminalizes a false answer. Justice Scalia points to no historical practices he is modeling. More importantly, there is no indication that the Framers meant to restrict the Confrontation Clause only to statements that were known by the speaker to be false when made. Surely, those who were concerned about confrontation, as well as those who theorize about hearsay, understand that a critical reason to have a person who made a statement out of court take the stand for cross-examination is to determine, in addition to whether the person is purposefully lying, what the basis is for that statement.

It should be inconceivable that a highly accusatory statement made about a past crime to a person expected to provide it to the prosecution for use at trial would receive Confrontation Clause protection because that statement, *if it were false*, might be prosecuted under the false statement laws. However, the same statement would escape Confrontation Clause coverage if made to a government official who lacked, for example, arrest power. The distinction would often (perhaps generally) be unknown to the speaker. Moreover, allowing these statements violates our worst historical examples—i.e., those made by Lord Cobham where the speaker would know that he or she will not be prosecuted because that person is doing the government's bidding or, like the Portugese gentleman,<sup>64</sup> where he or she believes the statement to be true, therefore, making the false statement statute inapplicable.

*B. The Broad Potential Limitation that Only Statements Made to Known Government Officials or Their Recognized Agents Will be Covered*

The Court did nothing to remove the far broader possible limitation that only statements made to known government investigative agents can be considered testimonial. It assumed, without deciding, that if 911 operators are not police officers, they may be agents of law enforcement when they conduct interrogations of 911 callers. After making this

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<sup>63</sup> 497 U.S. 805 (1990).

<sup>64</sup> Similarly, the child in *Wright* was either telling the truth, convinced of the accused's guilt, or coerced into going along with the version of events provided to her by a forceful adult. In any of these situations, the child is not guilty of the crime. Moreover, the doctor in the case would not be covered by the statute.

assumption, the Court noted that as in *Crawford*, it need not decide whether these features were requirements.<sup>65</sup>

Professor Richard Friedman has adeptly pointed out<sup>66</sup> that the Court in *Davis* cited a case that involved a statement made from a child to her mother as an apparent example of an application of the common law principle of confrontation.<sup>67</sup> The case, *King v. Brasier*,<sup>68</sup> suggests that a statement to a known government officer is not required, since this statement was made by the child to her mother. This is indeed an interesting citation and a piece of important supporting evidence for what I believe is the appropriate result, but it cannot possibly constitute a resolution of the far broader question of whether government agents must be involved.<sup>69</sup> Both *Crawford* and *Davis* specifically reserved for later decision the narrower question of whether statements made to anyone other than police officers could be testimonial,<sup>70</sup> and both that narrower issue and the broader one could not be resolved by a single case citation, albeit a truly intriguing one.

#### V. WEBSTER'S DICTIONARY AS NEW CONSTITUTIONAL TEXT

If one were looking for a text for *Davis*, one would immediately assume that text was the Sixth Amendment to the U.S. Constitution. That is indeed where Justice Scalia nominally begins, with the accused's right "to be confronted with the witnesses against him." However, the true text he is interpreting in *Davis* is the definition of testimony in Noah Webster's 1828 edition of *An American Dictionary of the English*

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<sup>65</sup> The Court stated: "For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police," which as in *Crawford* "makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Davis v. Washington*, 126 S. Ct. 2266, 2274 n.2 (2006).

<sup>66</sup> Richard D. Friedman, "We Really (For the Most Part) Mean It!," 105 MICH. L. REV. FIRST IMPRESSIONS 1, 5 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/friedman.pdf>.

<sup>67</sup> *Davis*, 126 S. Ct. at 2277. *King v. Brasier* is cited in an argument distinguishing its report shortly after the incident from the situation in the *Davis* facts, which the Court described as an ongoing emergency. The reference is brief and for the purpose of showing that the English cases do not support *Davis*'s position. *Id.* However, as the facts are set out, the Court recognized its applicability by stating that circumstances exist where the case "would be helpful to *Davis*." *Id.*

<sup>68</sup> 168 Eng. Rep. 202 (K.B. 1779).

<sup>69</sup> As I describe in another article, the lower courts have consistently held that statements made to family members in situations like *Brasier* are nontestimonial. See Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. (forthcoming 2007). I have come to the conclusion that predicting with confidence future developments cannot be done, but there will be bases on which this pattern in the lower courts can be continued and *Brasier* ignored. The primary purpose rationale of *Davis* would seem to provide a completely sufficient basis to continue that result. *Id.*

<sup>70</sup> See *supra* notes 15–19 and accompanying text.

*Language*.<sup>71</sup> “Testimony” is defined there as “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>72</sup> Those are the words to which he looks in determining whether the statements of the two different victims should be treated as covered by the protections of the Confrontation Clause.

However, as described above, Justice Scalia departs from the text when he feels it appropriate. He chooses not to emphasize the “solemn declaration or affirmation” aspect of the definition, upon which Justice Thomas focuses. But in Justice Scalia’s defense, he is unwilling to jettison the concept entirely. Instead, he focused on “made for the purpose of establishing or proving some fact.” That focus becomes the core of the definition of testimonial statements in *Davis*.

*Davis* articulated the following definition for testimonial: if made under police questioning, a statement is testimonial when “the circumstances objectively indicate that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>73</sup> However, the resulting definition in *Davis* does not match any of the three comprehensive definitions suggested in *Crawford*.

#### A. Unexplained Variation from the “Text”

Justice Scalia’s test makes another somewhat more subtle but potentially very important shift from the “text,” which he does not even attempt to explain. In Webster’s Dictionary, the key inquiry is the purpose of the declaration or affirmation (“made for the purpose of”). In Justice Scalia’s test, the court must analyze the purpose of police questioning (“the primary purpose of interrogation is”).

Thus, he shifts the critical intent focus from speaker to questioner. Then without explanation of how to reconcile the different perspectives or even whether he is speaking to exactly the same point, he makes a statement in a footnote on the same page that appears quite inconsistent with the idea of shifted perspective. He states, “And of course even when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.”<sup>74</sup> That statement seems to say that the Constitution’s

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<sup>71</sup> I leave to one side and do not consider in my treatment of the issue the excellent research and arguments made by Professor Randy Jonakait that even Justice Scalia’s choice is selective among the many definitions offered by Webster for the word “testimonial.” See Randolph N. Jonakait, “Witnesses” in the Confrontation Clause: *Crawford v. Washington*, *Noah Webster*, and *Compulsory Process*, 79 TEMP. L. REV. 155 (2006).

<sup>72</sup> 2 WEBSTER, *supra* note 11, at 91.

<sup>73</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2273–74 (2006).

<sup>74</sup> *Id.* at 2274 n.1.

concern is the product of the interrogation and presumably, if intent matters, with the intent behind that product (the speaker's intent) rather than the intent behind the questioning. However, if that is so, why the testimonial statement definition should distinguish between emergency and non-emergency situations based on "the primary purpose of the interrogation" rather than the purpose, intent, or expectation of the person making the statement is left totally unexplained.<sup>75</sup>

*Crawford* provided both a historical and a policy-oriented justification for the appropriateness of focusing on the questioners when they are government agents. There the Court stated that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar."<sup>76</sup> That policy concern and that historical experience might warrant particular scrutiny toward the intent of government interrogators.

If a single perspective must be chosen, that of the investigative questioner might be the most appropriate because, in many situations, it may be the most easily determined. Furthermore, potential manipulation by a government agent who is investigating a crime is likely the greater danger to the criminal accused's confrontation rights. Fortunately, whose intent matters is usually insignificant because in the vast majority of cases the intent of both parties is the same. When the objectively discernable purpose of the police is to establish or prove a past fact potentially relevant to criminal prosecution, that purpose will usually be readily observable to the speaker as well as the police.

Much is left to be determined about this shift to the primary purpose of the government officer as questioner. It may reflect not a full determination of when the statement is testimonial, or even a necessary condition, but instead a sufficient condition. A statement may be testimonial if the government officer's primary purpose is to establish past facts potentially relevant to criminal prosecution in a non-emergency situation regardless of the speaker's purpose, intent, or expectation.

Although *Davis* dealt with only two potential purposes—enabling the police to deal with an ongoing emergency and establishing past facts relevant to criminal prosecution—presumably other questioners may have other purposes. Seemingly, however, only one purpose—establishing past facts relevant to criminal prosecution or something very close to that purpose—leads to the determination that the statement is testimonial. All other purposes apparently lead to a

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<sup>75</sup> *Id.* at 2274.

<sup>76</sup> *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004).

nontestimonial determination. Moreover, as to any other purpose, even the establishment of past facts would presumably not render the statement testimonial.<sup>77</sup>

*B. The Appropriate Focus in Some Situations is the Intent of the Declarant*

A single perspective is not required or even suggested by the right at issue. Although being interested in both the intent of the questioner and the speaker is unusual, it is quite appropriate for the Confrontation Clause. In Confrontation Clause cases, as opposed to *Miranda* cases, for example, the party being protected is not the person (witness-declarant) who is being questioned. It is instead the defendant against whom the statement is being introduced. And the critical constitutional violation occurs at the time of admission by the government against the accused at trial, regardless of whether one focuses on the intent of speaker or questioner at the time that statement was made. In *Davis*, Justice Scalia notes that “it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends [the Confrontation Clause].”<sup>78</sup>

The harm in not being able to cross-examine the witness is the same regardless of whether the police intended to manipulate an answer from the witness, or the witness intended to manipulate the police and the proceeding, or the witness was simply mistaken. And there is reason to assume the Framers also considered the malicious or mistaken witness perspective. *Crawford* implicitly tells us that the Framers were interested in more than just the abuses of government manipulation (which was the subject of the Raleigh case and the Privy Council’s interrogation), such as where the crime was against the government and government manipulation and coercion of witnesses would be a prime concern. *Crawford* also tells us that the Confrontation Clause was responsive to the Marian Statutes, which applied to ordinary crimes committed by private citizens where the government’s interest (as opposed to a possible private interest) in manipulating the facts would not have been nearly as clear as in a treason prosecution such as Raleigh’s.<sup>79</sup> Webster’s focus on the intent of the testifier—the person making the out-of-court statement—as opposed to the questioner, adds “textual” support to this historical argument.

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<sup>77</sup> For a more detailed treatment of the primary purpose test, its implications, and its potentially critical impact in cases involving statements by children, see Mosteller, *Crawford’s Impact*, *supra* note 5, at 414–15. See generally Mosteller, *supra* note 69.

<sup>78</sup> *Davis*, 126 S. Ct. at 2279 n.6.

<sup>79</sup> Mosteller, *supra* note 26, at 571–72.

I suggest that focusing on the declarant's perspective is most critical in situations where police officers are not involved. In that situation, if the statement can be covered by the testimonial concept, which I believe should be possible, and the witness has an intent to establish or prove a fact about a past crime, the statement should be considered testimonial. Such an analysis is needed at least to avert purposeful avoidance of the Confrontation Clause by a knowledgeable witness. Also, pursuant to Webster's "text," considering the declarant's perspective is undeniably proper. Presumably, for the speaker's purpose or intent to render the statement testimonial, that purpose or intent would need to be quite clear. Finding this clear purpose or intent would be a rare situation because speakers do not often relay relevant information for the purpose of a criminal prosecution to a private individual instead of to a government official.

#### VI. CASE STUDY IN THE "MISAPPLICATION" OF *CRAWFORD* AND THE IMPACT OF *DAVIS*

I present again<sup>80</sup> the fact pattern from a case that should have been treated as "testimonial" and as falling within *Crawford*, but was not when considered by the lower courts. The North Carolina courts gave the Clause a reading that demonstrates the trappings of a specific formalism. While not entirely clear under *Davis*, I believe this fact pattern illustrates well how the Court's second look at the testimonial concept at least softened the edges of the formality and formalism that *Crawford* and Justice Thomas's definition invited.

The fact pattern is from *State v. Forrest*,<sup>81</sup> which the U.S. Supreme Court vacated and remanded after *Davis*,<sup>82</sup> but which was never fully resolved because Forrest was killed shortly after remand.<sup>83</sup>

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<sup>80</sup> In an essay written before *Davis*, I used this fact pattern to illustrate the misuse that may be made of the ambiguity of *Crawford* combined with its formality and formalism. See Mosteller, "Accusatorial" Fix, *supra* note 5, at 18–19.

<sup>81</sup> 596 S.E.2d 22 (N.C. Ct. App. 2004). After oral argument, the North Carolina Supreme Court affirmed per curiam the decision of the North Carolina Court of Appeals. *State v. Forrest*, 611 S.E.2d 833 (N.C. 2005).

<sup>82</sup> *Forrest v. North Carolina*, 126 S. Ct. 2977 (2006) (granting certiorari, vacating the judgment, and remanding for further consideration in light of *Davis*).

<sup>83</sup> *State v. Forrest*, 636 S.E.2d 565 (N.C. 2006) (vacating original opinion and then dismissing as moot). Forrest was a violent person. In his dissent in *Deck v. Missouri*, a case that concerned the propriety of shackling a criminal defendant, Justice Thomas cited Forrest's conviction for attempted murder in the courtroom of his trial counsel during sentencing. 544 U.S. 622, 653 (2005) (Thomas, J., dissenting) (citing *State v. Forrest*, 609 S.E.2d 241, 248–49 (N.C. Ct. App. 2005)). This sentencing occurred upon his conviction in the case described in the text.

On July 12, 2006, not long after the Supreme Court's remand, Forrest was moving toward trial in an unrelated death penalty case. While in court, he snatched a revolver from a correction guard's holster and fired it several times, wounding a guard. He was then

The case involved charges that Forrest kidnapped and assaulted with a deadly weapon his aunt, Cynthia Moore. Moore had been served with a subpoena but did not appear at Forrest's trial and did not testify.<sup>84</sup> Forrest was convicted based on Ms. Moore's hearsay statements given to a police detective shortly after the incident, which were admitted as excited utterances.<sup>85</sup>

The events described in Forrest's trial began when, for some undisclosed reason, a police S.W.A.T. team surrounded and observed the house where Forrest was located for about an hour. During that period, Forrest escorted his aunt outside the house on two occasions where escalating violence was suggested. Inside the house, the two used crack cocaine after which Forrest became "paranoid."<sup>86</sup>

After darkness fell, Forrest left the house a third time with his aunt and they started down a nearby sidewalk. The officer in charge of the SWAT team ordered his men to "take down" Forrest. Police officers surrounded Forrest and, to demonstrate how heavily armed they were, illuminated him in the darkness with the lights attached to their "long guns." Two officers put submachine guns to Forrest's forehead. They separated him from Ms. Moore, who was injured with small lacerations on her neck and over an inch-long laceration on her arm. Forrest was taken away in police custody.

Waiting nearby was a police detective, Detective Melanie Blalock. According to her testimony, she was there for the purpose of interviewing Ms. Moore—testimony that was perhaps less circumspect regarding the sole purpose of interviewing the witness than it might have been had *Crawford* and *Davis* already been decided. However, at the time she testified, her intent was largely, if not entirely, irrelevant to the statement's admissibility, which faced only the question of whether it qualified as an excited utterance, and thus satisfied the Confrontation Clause as well.<sup>87</sup>

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fatally shot by a sheriff's deputy who was also in the courtroom. Mandy Locke, *Inmate Killed in Court*, NEWS & OBSERVER (Raleigh, N.C.), July 13, 2006, at A1, available at 2006 WLNR 12062660.

I am particularly familiar with the facts of *Forrest*, having filed an amicus brief on Forrest's behalf in the North Carolina Supreme Court both on direct appeal and after remand following the *Davis* decision, and participated in oral argument on both occasions.

<sup>84</sup> *Forrest*, 596 S.E.2d at 23, 30.

<sup>85</sup> *Id.* at 28–29.

<sup>86</sup> Knowledge of most of the events inside the house were provided through the hearsay statements of the victim/aunt who never testified, but instead were given to a police detective with whom she spoke after Forrest's capture.

<sup>87</sup> See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (treating "firmly rooted" hearsay exceptions, which includes excited utterances, as automatically satisfying the reliability requirement of the Confrontation Clause); see also *White v. Illinois*, 502 U.S. 346, 355–56 (1992) (ruling that unavailability need not be shown for excited utterances). At the time

When Detective Blalock moved from her nearby location to the crime scene, Forrest had been taken away. Moore, the victim, was standing in the street with another officer. That officer brought Moore to Blalock. She was crying and her arm was bleeding. Blalock informed Moore that she was calling emergency medical services. At some point, the medics arrived and treated the wounds, but Moore declined to be treated further at a hospital.

Detective Blalock stated that Moore “was nervous, she was shaking, she was crying and she was anxious to tell me that she had been held in the house . . . . [S]he appeared anxious to tell me what happened. And by that I didn’t have to ask her what happened to you.”<sup>88</sup> Blalock testified that she did not ask any questions initially, and that Moore “just immediately abruptly started talking and telling me.”<sup>89</sup>

Moore’s statement, according to Detective Blalock, lasted about one minute, during which Moore related that Forrest had come to her house (at least an hour before the statement) and smoked crack cocaine. He then became paranoid and refused to let her leave, taking her from room to room at knife point. She attempted to run but the door was locked; and Forrest cut her.<sup>90</sup> Blalock wrote notes regarding Moore’s statements, which she described in her testimony as highly accurate.<sup>91</sup>

The North Carolina Court of Appeals, with one judge dissenting, found the statement nontestimonial under *Crawford*. The Court reasoned as follows:

Moore’s statements concerning her kidnapping and violent assault were made immediately after her rescue by police with no time for reflection or thought on Moore’s part. These statements were initiated by the victim . . . . Detective Blalock testified that she did not have to ask Moore questions because she “immediately abruptly started talking.” . . . Although Detective Blalock was at the scene specifically to respond to Moore and later asked some questions, Detective Blalock did not question Moore until after she “abruptly started talking.” These facts do not warrant the conversation being deemed a “police interrogation” under *Crawford*. . . . She was not providing a formal statement, deposition, or affidavit, was not aware that she was bearing witness, and was not aware that her utterances might impact

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the statement was made to Detective Blalock, *Roberts* and *White* taken together established that statements within the excited utterance hearsay exception automatically satisfied the Confrontation Clause.

<sup>88</sup> Transcript of Proceedings at 94–95, *State v. Forrest*, No. 02 CRS 87696-98 (N.C. Wake County Super. Ct. Jan. 21, 2003).

<sup>89</sup> *Id.* at 95.

<sup>90</sup> *Id.* at 95–97. In a somewhat later conversation with Detective Blalock, Moore stated that she had also used crack.

<sup>91</sup> Detective Blalock indicated that she took notes regarding what Moore told her, and at one point during her testimony, Blalock stated, “[L]et me refer to my notes as to exactly what she said,” which suggests precision in capturing Moore’s words. *Id.* at 95–96.



further legal proceedings . . . *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. *Crawford* does not prohibit spontaneous statements from an unavailable witness like those at bar.<sup>92</sup>

The U.S. Supreme Court, in *Crawford*, seemed to invite such possible results. It described the statements as the result of police interrogation, and used the term "structured . . . questioning."<sup>93</sup> As the lower court found and relied upon, the statement in *Forrest* was not the result of structured questioning.

The principal statement of the test in *Davis* moves the law toward a relatively clear resolution of a case like *Forrest*. That test, which holds statements "testimonial when the circumstance objectively indicates that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution,"<sup>94</sup> renders a significant class of investigative conversations testimonial. Moreover, *Davis's* additional explanatory language eliminates a number of possible ambiguities.

#### A. Interrogation Not Required

As the *Davis* Court explained:

Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations—which in some circumstances tend to generate testimonial responses. *This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.* (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.<sup>95</sup>

#### B. Formality of Statement Form Not Required

The Court in *Davis* also eliminated any argument of a rigid formality with respect to the physical form of the statement. It held:

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<sup>92</sup> State v. Forrest, 596 S.E.2d 22, 27 (N.C. Ct. App. 2004).

<sup>93</sup> Crawford v. Washington, 541 U.S. 36, 53 n.4 (2004).

<sup>94</sup> Davis v. Washington, 126 S. Ct. 2266, 2273–74 (2006).

<sup>95</sup> *Id.* at 2274 n.1 (first emphasis added) (citing *The Raleigh Trial*, *supra* note 37, at 2–60).

“The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.”<sup>96</sup>

*C. Emergency Situation is Limited to Physical Safety  
and Can Change Quickly*

In *Davis*, the Court held the initial interrogation in the 911 call was not testimonial because it was “not designed primarily to ‘establis[h] or prov[e]’ some past fact, but to describe current circumstances requiring police assistance.”<sup>97</sup> It, however, noted that even an emergency situation, which does not give rise to testimonial statements, can rather quickly evolve into one where statements made are testimonial: “In this case, for example, . . . the emergency appears to have ended (when *Davis* drove away from the premises).”<sup>98</sup> Similarly, in *Hammon*, the Court concluded that the statement taken by a police officer in the field in response to an open-ended question was testimonial. Although apparently the officers arrived not long after the violence had ended, “there was no immediate threat to [the declarant’s] person,” and the officer “was not seeking to determine (as in *Davis*) ‘what is happening,’ but rather ‘what happened.’”<sup>99</sup>

The *Forrest* majority relied upon the reasoning set forth in *People v. Moscat*<sup>100</sup> in concluding that the witness’s statement to Detective Blalock was nontestimonial. In *Moscat*, the New York court determined that a 911 telephone call requesting emergency assistance was nontestimonial. The situation presented by a 911 call, however, is fundamentally different from the facts of the instant case. As noted by the *Moscat* court, a 911 call “is generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril.”<sup>101</sup>

Given this more clearly established framework, it is now virtually certain that under the *Forrest* facts, Moore’s statements to Blalock were testimonial.<sup>102</sup> At the time the statement was taken, the defendant had

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<sup>96</sup> *Id.* at 2276.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2277.

<sup>99</sup> *Id.* at 2278.

<sup>100</sup> 777 N.Y.S.2d 875 (Crim. Ct. 2004).

<sup>101</sup> *Id.* at 879.

<sup>102</sup> The description given by Judge Wynn in dissent is rather faithful to *Davis*’s later analysis. Wynn wrote:

In the instant case, the witness gave a statement to law enforcement officers describing Defendant’s actions during the incident . . . . The police officer who interviewed the witness, Detective Blalock, testified it was her

been arrested and removed from the scene. Also, the scene was secure. Moore, the victim, had reached a point of safety, which distinguishes this case from the logic of 911 calls generally, and her statements were not about rescue, or safety, or even medical care. The line that the Court drew in *Davis* when it indicated that the purpose of questioning changed when Davis left the scene is a useful one, and it offers further help in clarifying situations of this type.

Detective Blalock's purpose at the scene of the incident was to obtain the victim's statement for use in prosecution of Forrest. That was shown unmistakably by her direct testimony, and also by circumstantial evidence. Blalock was not the first police officer encountered by the witness at the scene. The witness did not make any statements to the other police officers. Instead, she was held effectively to speak to an officer there for that purpose. Moreover, Moore's statement was about past events.

While the North Carolina courts relied on the fact that no questions were asked, the *Davis* Court, in a part of the opinion not responsive to the facts or issues in the cases at hand (but apparently intended to resolve cases like *Forrest*), stated that questions were not required at all. Thus, volunteered statements like those in *Forrest* are covered.

Finally, the facts in *Forrest* suggested an effort at exact production of the witness's words, albeit written in the officer's notes rather than in a formal statement. Thus, the physical form of the statement probably would not have created a difficulty in treating the statement as testimonial. However, before *Davis*, some debate might have existed. Again, the "gratuitous" explanatory statement given in *Davis* eliminates the issue. Whether the statement is a signed witness statement or the statement is "embedded" in the memory or notes of the officer who received the statement is of no consequence if the statement was made in a non-emergency situation and the purpose of the questioning was to prove or establish a potential past crime.

This examination of the facts of *Forrest* reveals, I believe, how much the *Davis* Court clarified in the "field investigation" context of investigatory witness/victim interviews, and how it has softened some of the most problematic edges of formality in such situations. This is not to deny that *Davis* left much to be resolved. Despite wide areas of uncertainty regarding the dividing line between nontestimonial and

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"responsibility . . . first to stand by at Mary Phillips school while we waited to determine if the [area] had been secured, meaning that . . . the victim had been removed to safety" and then to "go to the location and get that person and interview that person." After police officers removed Defendant from the scene and the area was secure, Detective Blalock arrived and took the witness' statement, which was later used at trial.

State v. Forrest, 596 S.E.2d 22, 30 (N.C. Ct. App. 2004) (Wynn, J., dissenting).

testimonial statements in 911 calls and other emergency situations, *Davis* resolved, often rather clearly, an important class of cases—non-emergency police investigatory interviews—and it put them within the protection of *Crawford*'s invigorated Confrontation Clause.<sup>103</sup>

VII. SOFTENING FORMALISM—THE IMPRECISION OF THE TESTIMONIAL-STATEMENT LABEL FOR THE ACTUAL COVERAGE OF THE NEW CONFRONTATION CLAUSE

In describing the common features of the statements in *Crawford* and *Davis*, Justice Scalia made the following statement:

Both statements deliberately recounted, in response to police questioning, how potentially criminal events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.<sup>104</sup>

I question whether the above statement actually describes testimonial statements. Rather, it is a description of statements that would more accurately be covered by different terminology. This is a description of a statement made out of court recounting past events, which was then used in court and had the same effect as testimony. These two individuals were not giving testimony when they talked to the officers. The officers were trying to establish or prove past events. This is a description of non-emergency, official-investigative statements regarding past criminal events.<sup>105</sup> It is not testimony, and calling it testimony does not make it so.

After *Crawford* and *Davis*, the Confrontation Clause covers both testimonial statements as described by Justice Thomas's definition, plus the official investigative statements regarding past events covered by the holdings of those cases and the descriptive language of *Davis*.

Justice Scalia has shown a willingness to reduce substantially the formality requirement of his Webster's dictionary text as he has shifted

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<sup>103</sup> See also *State v. Lewis*, 619 S.E.2d 830, 841–44 (N.C. 2005) (ruling that statement of victim to police officer describing the robbery and her attacker made in non-emergency situation was nontestimonial, the court drawing a distinction between the initial gathering of information and the determination of whether a crime was actually committed, which it considered generally nontestimonial, and "structured questioning," which follows this initial stage and was seen as testimonial). *Lewis* was remanded by the U.S. Supreme Court as well. *Lewis v. North Carolina*, 126 S. Ct. 2983 (2006) (granting certiorari, vacating the judgment, and remanding for further consideration in light of *Davis*).

<sup>104</sup> *Davis*, 126 S. Ct. at 2278.

<sup>105</sup> When one abstracts the *Davis* holding and its explanatory statements into a descriptive definition, one must wonder what the historical basis is for the developing doctrine that has these specific dimensions. The case is hard to make that the result is compelled by the historical and linguistic sources cited.

from a focus on the intent of the testifying witness to that of the investigative questioner. How this is any longer a definition or description of testimonial statements is far from clear to me. It is certainly not Noah Webster's definition. However, whatever the definition should be labeled, it has become less formalistic than when Justice Thomas first formulated it in *White*, and it has shown some flexibility and some apparent attention to the function of such statements in two quite different historical environments.<sup>106</sup> These are positive developments, which I hope will continue.

### VIII. CONCLUSION

Future cases will tell us more about whether this process of softening formality and formalism will continue. In particular, when the statements move from those made to criminal investigative officers to others interested in establishing or proving past criminal events, we will again confront issues of formality and formalism. *Davis* was clearly a positive event in the development of the scope of new Confrontation Clause jurisprudence. It pushed back wooden boundaries to provide coverage suggested by historical sources in a changed environment.

As future cases test these boundaries further, part of what they will reveal is how flexible or rigid they are. Of immediate interest is the possible requirement suggested in *Crawford* that the statement must be made to a known government official, and the suggestion in *Davis* that the statement be made under circumstances where false statements may be criminally punished. We will also see whether categories are added to the current testimonial statements, which include affidavits, prior testimony, etc., as well as non-emergency, official-investigative statements regarding past criminal events (statements in the field of the type made in the *Hammon* case).

If the softening and expansion of the testimonial-statement definition stops at this point, a Confrontation Clause of substantial value will have been created. However, it will be incomplete and inadequate in

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<sup>106</sup> The testimonial concept suggests a formalistic definition, but inherently it need not be so defined. Although Professor Richard Friedman uses the testimonial-statement terminology and argues forcefully for its merits, his conception is far more functional as reflected by the amicus definition in *Crawford*. Indeed, his statement during his introductory remarks at this symposium was expansively functional. He argued that the purpose of the testimonial-statement approach is to preserve the type of trial procedures that give primacy to live testimony given before the jury that is subject to confrontation. That definition does not lead to the embodiment of the testimonial-statement concept in the formality of the statement form or in a formulaic analysis. See Richard D. Friedman, *Crawford and Davis: A Personal Reflection*, 19 REGENT U. L. REV. 303, 304–05 (2006-2007). When I criticize the testimonial concept I should not be understood to be criticizing this quite different view, but rather the view that I observe in the formulation given the concept by the Court. Obviously, it is the Court's formulation that decides cases.

coverage. We must await the answer given in future opinions because almost nothing in *Crawford* and *Davis*, either when viewed separately or together, compels or even indicates that the positive direction of *Davis* will continue.