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CRAWFORD & BEYOND: HOW FAR HAVE WE TRAVELED FROM ROBERTS AFTER ALL?

*Brooks Holland**

I. INTRODUCTION

We have ridden the *Crawford* confrontation train for almost eight years.¹ In *Crawford*, the U.S. Supreme Court overruled *Ohio v. Roberts*,² and “discarded the reliability framework that had governed the admissibility of hearsay statements under the Confrontation Clause for more than twenty years.”³ In place of *Roberts*’ reliability framework, under which judges decided which hearsay evidence to admit without cross-examination, *Crawford* gave us a rule excluding “testimonial” hearsay at trial.⁴

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¹ See *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).

² See *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980).

³ Brooks Holland, *Testimonial Statements Under Crawford: What Makes Testimony . . . Testimonial?*, 71 BROOK. L. REV. 281, 281 (2005) [hereinafter *Testimonial Statements*]; see *Crawford*, 541 U.S. at 61 (rejecting the argument that confrontation analysis can turn on “amorphous notions of ‘reliability’”).

⁴ See Hon. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 37 (2008) (noting that in *Crawford*, “the Court shifted from ‘reliability’ to an as yet undefined ‘testimonial’ test”); see also

I boarded this *Crawford* train an enthusiastic passenger,⁵ believing that *Crawford* promised real change in confrontation law to constrain trends such as “evidence-based” prosecutions—where prosecutors proved cases largely through hearsay evidence without producing the declarant.⁶ We just needed to ride the *Crawford* train for a few more stops to learn precisely what evidence would qualify as “testimonial.”⁷ In *Michigan v. Bryant*,⁸ however, the Supreme Court returned to a multi-factor judicial test for deciding whether cross-examination of a non-testifying declarant is needed, a test that resurrected the relevance of “reliability.”⁹ *Bryant* thus put the brakes on the *Crawford* train, and maybe even started its return to the *Roberts* station.¹⁰

Following the *Bryant* decision, Brooklyn Law School hosted

Crawford, 541 U.S. at 53–54 (introducing and explaining the concept of “testimonial” evidence under the Confrontation Clause, and holding that the confrontation right renders testimonial evidence inadmissible at trial absent an opportunity to cross-examine).

⁵ See generally *Testimonial Statements*, *supra* note 3, at 281–95 (embracing *Crawford*’s basic “testimonial” framework for confrontation analysis).

⁶ See *McClure v. Rehg*, No. 4:07CV1686 FRB, 2007 WL 3352389, at *1 n.1 (E.D. Mo. 2007) (defining evidence-based prosecutions); Richard Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. PA. L. REV. 1171, 1176–77 (2002) (exploring the growing trend of prosecutors introducing witness statements to 911 and the police without calling the witness at trial, particularly in domestic violence cases); Brooks Holland, *Using Excited Utterances to Prosecute Domestic Violence in New York: The Door Opens Wide, or Just a Crack?*, 8 CARDOZO WOMEN’S L.J. 171, 175–79 (2002) (reviewing trend of prosecutors using hearsay to prosecute cases without producing the victim to testify).

⁷ See *Crawford*, 541 U.S. at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”); see also Joelle Anne Moreno, *Finding Nino: Justice Scalia’s Confrontation Clause Legacy from Its (Glorious) Beginnings to (Bitter) End*, 44 AKRON L. REV. 1211, 1212–13 (2011) (“[B]oth in and after *Crawford*, the Court has repeatedly refused to provide clear or consistent criteria distinguishing testimonial statements from the infinite range of out-of-court statements made by victims and witnesses during criminal investigations.”).

⁸ *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

⁹ See *infra* notes 34–49 and accompanying text.

¹⁰ See *infra* notes 50–57 and accompanying text.

its most recent “*Crawford* and Beyond” symposium.¹¹ The learned presentations at this symposium prompted me to reflect on the point of *Crawford*, and where *Crawford* perhaps should have taken us. In the end, this reflection has made me more sympathetic to Chief Justice William Rehnquist’s caution in *Crawford*:

[T]housands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what . . . is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.¹²

Crawford did spawn years of doctrinal uncertainty, an uncertainty that persists to date.¹³ These were good years for law professors,¹⁴ but difficult ones for lawyers and judges. If this protracted uncertainty was necessary to bring criminal practice into harmony with an important constitutional principle, lawyers and judges needed to tough it out. But, if this uncertainty merely

¹¹ Brooklyn Law School has hosted three fantastic symposia exploring *Crawford* and subsequent Confrontation Clause developments. See Symposium, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1 (2005); Symposium, *Crawford and Beyond: Revisited in Dialogue*, 15 J.L. & POL’Y 333 (2007).

¹² *Crawford*, 541 U.S. at 75–76 (Rehnquist, C.J., concurring).

¹³ See Jeffery Fisher, *What Happened—and What is Happening—to the Confrontation Clause*, 15 J.L. & POL’Y 587, 589 (2007) (“We have entered a brave new world of confrontation jurisprudence in which virtually no judges have experience applying even its basic governing principles.”); Moreno, *supra* note 7, at 1212, 1213 (noting that *Crawford* “generated a flurry of activity in the federal and state courts,” and “[w]ithout clear guidance, the lower courts have generated confused and inconsistent confrontation decisions”). As of January 18, 2012, Westlaw Keycite lists 10,416 court decisions citing to *Crawford*—an average of more than 2,000 judicial citations a year since *Crawford* was decided in March of 2004. By contrast, Westlaw Keycite lists 2,759 judicial citations to *Roberts* from 1980 to March 2004, before *Crawford* was decided.

¹⁴ As of January 18, 2012, Westlaw Keycite lists 1,346 law review citations to *Crawford*. Westlaw Keycite lists 678 law review citations to *Roberts* between 1980 and March 2004.

resulted from the Supreme Court's experimentation with different confrontation theories, only to return the law close to where it began, the real world of law may have benefitted from a bit more respect for stare decisis.

This Essay will examine where this *Crawford* project took us, where it should have taken us instead, and whether the trip was worthwhile. Part II of this paper traces how the *Crawford-Davis-Bryant* trajectory of decisions regarding "testimonial" evidence effectively returns us to *Roberts*—or perhaps to an even more narrow conception of confrontation rights than under *Roberts*. Part III outlines how confrontation rights could have been understood consistent with our modern adversary system of criminal adjudication, and where I believed the *Crawford* train was destined when it departed eight years ago. Part IV concludes that if the Supreme Court was not prepared to deliver confrontation law to an important and new constitutional principle through *Crawford's* wholesale revision of existing doctrine, the Court should have heeded Chief Justice Rehnquist's call for restraint.

II. TESTIMONIAL EVIDENCE: A TURN BACK TO *ROBERTS*

The Sixth Amendment provides that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."¹⁵ The Supreme Court has interpreted the Confrontation Clause to include a right to face-to-face confrontation with accusers as sworn witnesses before the trier of fact, and a right to cross-examine those witnesses.¹⁶ *Roberts*, however, held that this right could be satisfied when the prosecution introduced hearsay evidence from a non-testifying declarant, so long as the evidence proved sufficiently reliable. The prosecution could demonstrate this reliability by showing that the evidence either fell within a "firmly-rooted" hearsay exception or contained judicially-determined guarantees of trustworthiness.¹⁷

¹⁵ U.S. CONST. amend. VI.

¹⁶ See *Maryland v. Craig*, 497 U.S. 836, 845–46 (1990) (reviewing confrontation jurisprudence dating to the nineteenth century).

¹⁷ See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

Crawford rejected *Roberts*' "amorphous, if not entirely subjective"¹⁸ reliability framework for confrontation. In the *Crawford* Court's view, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because the defendant is obviously guilty."¹⁹ Thus, the Court concluded, the prosecution may not introduce testimonial evidence against a defendant without producing the declarant for cross-examination, "unless the declarant [is] unavailable and the defendant[] had a prior opportunity [for cross-examination]."²⁰

The question became what evidence the Court would count as testimonial, and therefore subject to *Crawford*'s rule of exclusion. Relying on historical reference points, *Crawford* included testimony given at a preliminary hearing, before a grand jury, and during a former trial, as well as statements given during a precinct police interrogation.²¹ The Court "[left] for another day," however, the task of "spell[ing] out a comprehensive definition of 'testimonial.'"²²

The Court next undertook this task in *Davis v. Washington*.²³ *Davis* involved two separate domestic violence cases. Prior to *Crawford*, prosecutors frequently employed excited utterances and other hearsay evidence to prove domestic violence cases without producing the victim-declarant.²⁴ In *Davis*, the victim called 911 and said that Davis had assaulted her and fled the location.²⁵ In a companion case, *Hammon v. Indiana*, the police responded to the victim's home following a domestic disturbance

¹⁸ *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

¹⁹ *Id.* at 62.

²⁰ *See id.* at 68 ("Where testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination."); *see also* Fisher, *supra* note 13, at 587–88 (explaining that *Crawford* "prohibits the prosecution from introducing out-of-court 'testimonial' statements unless the declarants are unavailable and defendants had a prior opportunity to cross examine them").

²¹ *See Crawford*, 541 U.S. at 68.

²² *Id.*

²³ *Davis v. Washington*, 547 U.S. 813 (2006).

²⁴ *See id.* at 817, 819; *see also* Friedman & McCormack, *supra* note 6, at 1180–81 (commenting in 2002 on the admissibility of 911 calls in domestic violence cases, two years before the *Crawford* decision).

²⁵ *See Davis*, 547 U.S. at 817–19.

report.²⁶ The police separated the victim and Hammon, and the victim told the police that Hammon had assaulted her.²⁷ The victims did not testify at trial, and the defendants argued that the victims' out-of-court statements were "testimonial" under *Crawford*, thus precluding their admission absent cross-examination.²⁸

In resolving the confrontation challenges to these two instances of hearsay evidence, the Court split the outcome: the declarant's statement to 911 in *Davis* was ruled non-testimonial,²⁹ but the victim's statement to the responding officers in *Hammon* was deemed testimonial.³⁰ Thus, under *Crawford*, no confrontation was required at all in *Davis*—the State was free to prove Davis' guilt through the 911 record without cross-examination of the declarant or any other confrontation requirement. In *Hammon*, however, cross-examination was mandated, or else the declarant's statement had to be excluded from trial.

This critical constitutional line was demarcated by a new confrontation test that the Court articulated to refine *Crawford*'s incomplete definition of testimonial evidence:

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 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.³¹

This test and its application in *Davis* left several questions unresolved about the definition of "testimonial" evidence.³² But

²⁶ See *id.* at 819–21.

²⁷ See *id.*

²⁸ See *id.* at 818–19, 821.

²⁹ See *id.* at 828–29.

³⁰ See *id.* at 830–31.

³¹ *Id.* at 822.

³² These questions included what distinguishes an "ongoing emergency"

Davis did appear to answer one question: analysis of whether hearsay evidence is “testimonial” under the Confrontation Clause is completely removed from the lawyers, witnesses, and arguments in the courtroom where that hearsay evidence is being offered.³³ Instead, the Court divined whether the declarants’ statements proved testimonial in *Davis* and *Hammon* by looking solely to the “primary purpose” of the exchange between the declarant and the police *at the time and place of those statements*, many months before the trial.

Bryant reaffirmed this pre-trial focal point of the *Crawford* confrontation framework. In *Bryant*, the police encountered the declarant lying in the street after being shot.³⁴ The police asked the declarant “what had happened, who had shot him, and where the shooting had occurred.”³⁵ The declarant answered that “Rick” shot him.³⁶ The declarant also gave a time, location, and brief description of the shooting.³⁷ The declarant died later that

from an investigation of past events, and whose perspective bears on the “primary purpose” of the investigation: the declarant’s, the police officer’s, or both. *See generally, e.g.*, Fisher, *supra* note 13, at 617–18 (questioning predictability of *Davis*’ objective test for assessing the primary purpose of an interrogation); Richard Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & POL’Y 553, 561–63 (2007) (arguing that *Davis* should be understood to analyze evidence from the perspective of the declarant, not the police or a combination of parties to a conversation); Deborah Tuerkheimer, *A Relational Approach to the Right of Confrontation and Its Loss*, 15 J.L. & POL’Y 725, 728–35 (2007) (questioning how *Davis*’ “binary” emergency-past events framework will apply accurately in domestic violence cases).

³³ The Court in *Crawford* did limit its confrontation rule to hearsay evidence offered at trial for the truth of the matter asserted. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004). But the Court made clear that hearsay evidence and testimonial evidence should be defined separately. *See id.* at 51.

³⁴ *See Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011). For a thorough examination of the factual record in *Bryant*, see Kenneth W. Graham, Jr., *Michigan v. Bryant: The Counter-Revolution Begins* 2–6 (UCLA Sch. of Law, Research Paper No. 11-07, 2011), available at <http://ssrn.com/abstract=1798877>.

³⁵ *See Bryant*, 131 S. Ct. at 1150 (internal quotation marks omitted).

³⁶ *Id.*

³⁷ *Id.*

morning.³⁸ At Bryant's subsequent murder trial, the court admitted the declarant's statements to the police into evidence as excited utterances.³⁹

On appeal, Bryant argued that admission of the declarant's statements identifying the shooter violated *Crawford* because he could not cross-examine the declarant at trial.⁴⁰ The Supreme Court disagreed, finding the declarant's statements non-testimonial. In the process, the Court used this case as an opportunity to "provide additional clarification of what *Davis* meant by 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'"⁴¹

As in *Davis*, the Court in *Bryant* looked solely to the time and place of the exchange between the declarant and the police to determine whether the declarant's statements were testimonial. The Court sought in this exchange objective proof of either a crime investigation, which would require confrontation later at trial, or an emergency, in which case the purpose of the questioning "is not to create a record for trial and thus is not within the scope of the Clause."⁴² The Court employed a multi-factor judicial test to identify the objective primary purpose of the exchange.⁴³ This test considers the statements, actions, and perspectives of both the police and the declarant when the pre-trial statement was procured.⁴⁴ Moreover, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant."⁴⁵ In particular, the Court analogized the newly-minted

³⁸ *See id.*

³⁹ *See id.* at 1150–51 & n.1.

⁴⁰ *See id.* at 1150–51.

⁴¹ *Id.* at 1156.

⁴² *Id.* at 1155.

⁴³ Commentators have extracted anywhere from eight to a dozen potential factors to be considered under the *Bryant* test. *See* Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 *FORDHAM L. REV.* 1301, 1309–10 (2011) (identifying, for example, the formality of the interrogation producing the declarant's statement, whether a weapon was used during the alleged crime, the medical condition of the declarant, as well as other factors); Graham, *supra* note 34, at 28; Moreno, *supra* note 7, at 1245.

⁴⁴ *See Bryant*, 131 S. Ct. at 1160–61.

⁴⁵ *Id.* at 1155.

emergency-investigation distinction in confrontation law to the “logic . . . justifying the excited utterance exception in hearsay law,”⁴⁶ because “[a]n ongoing emergency has a similar effect of focusing an individual’s attention on responding to the emergency,”⁴⁷ rather than on fabricating evidence.⁴⁸ Thus, “the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.”⁴⁹

One commentator recently complained that after *Bryant*, the Confrontation Clause is “dead again.”⁵⁰ *Bryant* certainly returns confrontation law to a malleable judicial test that invites judges to decide whether out-of-court statements inspire sufficient confidence to dispense with cross-examination at trial.⁵¹ Nor does the Court’s recent confrontation jurisprudence hint at impending limits to the pro-admission trajectory that *Bryant* sets. The six-Justice *Bryant* majority included the four vocal dissenters from two recent confrontation decisions that did apply *Crawford*’s rule

⁴⁶ *Id.* at 1157.

⁴⁷ *Id.*

⁴⁸ *See id.* (citing *Idaho v. Wright*, 497 U.S. 805, 820 (1990)).

⁴⁹ *Id.* at 1157.

⁵⁰ Cicchini, *supra* note 43, at 1302–04 (“[T]he Confrontation Clause, for all practical purposes, died in 1980 with the Court’s decision in *Ohio v. Roberts*,” and following *Davis* and *Bryant*, “[t]he Confrontation Clause is dead again.”).

⁵¹ *Cf.* Graham, *supra* note 34, at 1, 29–30 (arguing that *Bryant* “effectively overruled *Crawford* and pushed confrontation doctrine back in the direction of *Roberts*,” and the “majority’s analysis of the exception for excited utterances demonstrates the lengths they will go to aid prosecutors”); Marc Chase McAllister, *Evading Confrontation: From One Amorphous Standard to Another*, 35 SEATTLE U. L. REV. 473, 492–93 (2011) (observing that *Bryant*’s totality-of-circumstances test “is strikingly reminiscent of the discredited *Roberts* framework” and “makes case results unpredictable and provides easy means for courts to dispense with actual confrontation” (citations omitted)); Moreno, *supra* note 7, at 1218 (“*Bryant* will lead to the admission of more prosecutor-sponsored statements that defendants cannot exclude from witnesses whom defendants cannot confront,” and “will almost inevitably exacerbate the problem of erratic and inconsistent decisions.”); Jason Widdison, Comment, *Michigan v. Bryant, The Ghost of Roberts and the Return of Reliability*, 47 GONZ. L. REV. 219, 230 (2011) (contending that *Bryant* undermined *Crawford* “by reintroducing reliability to the Court’s Sixth Amendment analysis”).

of exclusion: *Melendez-Diaz v. Massachusetts*,⁵² and *Bullcoming v. New Mexico*.⁵³ Those dissents evince that, to these Justices, confrontation is a flexible right that ensures “a fair trial with reliable evidence.”⁵⁴ Thus, in these Justices’ view, *Melendez-Diaz* and *Bullcoming* improperly “treated the reliability of evidence as a reason to exclude it.”⁵⁵ Four Justices consequently appear committed to the core principle of *Roberts*: judges may dispense with a defendant’s right to confrontation on a finding that a non-testifying declarant likely did not fabricate a pre-trial statement. Justice Clarence Thomas, by comparison, consistently has supported a very narrow definition of testimonial evidence, including only formal, solemnized pre-trial statements.⁵⁶ In total, therefore, five current Justices could vote for broad admission of hearsay evidence without cross-examination at trial. Regardless of how aggressively *Bryant*’s author, Justice Sonia Sotomayor, will push her primary purpose test,⁵⁷ evidence-based prosecutions easily may become prevalent again.

If anyone doubts the elasticity built into *Bryant*, one need

⁵² See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2543 (2009) (Kennedy, J., dissenting).

⁵³ *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2723 (2011) (Kennedy, J., dissenting). The dissenters in *Melendez-Diaz* and *Bullcoming* included Chief Justice John Roberts and Justices Anthony Kennedy, Stephen Breyer, and Samuel Alito.

⁵⁴ *Bullcoming*, 131 S. Ct. at 2725 (Kennedy, J., dissenting) (emphasis added).

⁵⁵ *Id.*

⁵⁶ See *Michigan v. Bryant*, 131 S. Ct. 1143, 1167 (2011) (Thomas, J., concurring) (criticizing the “primary purpose” test as “‘an exercise in fiction’ that is ‘disconnected from history’ and ‘yields no predictable results’” (quoting *Davis v. Washington*, 547 U.S. 813, 835, 838–39 (2006) (Thomas, J., concurring in part and dissenting in part))).

⁵⁷ Justice Sotomayor joined the Court subsequent to the *Davis* decision. She concurred separately in *Bullcoming*, listing several nuanced “factual scenarios” not presented by the expert report admitted in *Bullcoming*. See *Bullcoming*, 131 S. Ct. at 2721–23 (Sotomayor, J., concurring). Whether she will switch sides from *Bullcoming* according to one of these factual scenarios may be revealed this term in *Williams v. Illinois*. *Williams v. Illinois*, 939 N.E.2d 268 (Ill. 2010), *cert. granted*, 131 S. Ct. 3090 (June 28, 2011) (No. 10-8337). Justice Elena Kagan recused herself in *Bryant*, and she joined the *Bullcoming* opinion only in part. Justice Kagan thus may not have voted yet in a manner that fully reveals her views on confrontation.

only consider the decision in *United States v. Solorio*.⁵⁸ Solorio was charged with selling drugs to a confidential informant during an undercover “buy bust” operation.⁵⁹ During the informant’s purchase of drugs, two undercover DEA agents observed the interactions between the informant and Solorio, and radioed their observations to the arrest team.⁶⁰ The arrest team agents did not observe these events. At trial, the Government did not call the two officers who personally observed the informant and Solorio interact.⁶¹ Instead, “for reasons not explained in the record,”⁶² the Government called arrest team agents to testify to the radioed surveillance observations of the non-testifying agents.⁶³ The trial court admitted these hearsay statements as a present sense impression.⁶⁴

On appeal to the United States Court of Appeals for the Ninth Circuit, Solorio argued that these statements were testimonial and therefore inadmissible under *Crawford*, absent cross-examination. Invoking *Bryant*, the Ninth Circuit disagreed. The court accepted the Government’s argument that the non-testifying agents “communicated their observations to the other agents to ensure the success and safety of the operation, by assuring that all agents involved knew what was happening and enabling them to gauge their actions accordingly.”⁶⁵ Thus, the court observed, “objectively assessed, the ‘primary purpose’ of the agents’ statements was assuring that the arrest effort both succeeded and did not escalate into a dangerous situation, not ‘to create a record for trial.’”⁶⁶ The court accordingly held that “the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination,” because “the

⁵⁸ *United States v. Solorio*, No. 10-10304, 2012 WL 161843 (9th Cir. Jan. 19, 2012).

⁵⁹ *Id.* at *1-2.

⁶⁰ *Id.* at *1-2, 4-5.

⁶¹ *Id.* at *4-5.

⁶² *Id.* at *7.

⁶³ *Id.* at *4-5.

⁶⁴ *Id.* at *4. The trial court did not rule on a confrontation objection to this evidence. *See id.* at *4 n.6.

⁶⁵ *Id.* at *7.

⁶⁶ *Id.* at *8 (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011)).

prospect of fabrication' in statements" given for this purpose is presumably "'significantly diminished.'"⁶⁷

The *Solorio* decision's underlying rationale was not limited by unique case-specific facts, and instead relied on facts common to most undercover operations. Undercover operations of every kind present risks of danger or failure. Through this decision, therefore, *Bryant* appears to have gifted prosecutors with a fairly broad template for trying undercover operations without subjecting key witnesses to cross-examination. Defendants instead will confront only the recipients of hearsay statements about alleged criminal activity, so long as those statements, in the trial judge's opinion, objectively were made "to ensure the success and safety of the operation."⁶⁸

Crawford thus has followed a round-trip trajectory since its departure in 2004. From an early promise of robust protection of confrontation rights at trial, *Crawford* has circled back to an easily-narrowed conception of confrontation, authorizing judges to decide when cross-examination—or any other confrontation priority—must be preserved. Indeed, *Crawford* may conceive of confrontation even more narrowly than *Roberts* did, because outside of testimonial evidence, *Crawford* attaches no confrontation interests to hearsay evidence.⁶⁹ *Roberts*, by contrast, extended confrontation interests to hearsay evidence broadly.⁷⁰ As a result, if *Roberts* did "kill" confrontation thirty years ago, confrontation post-*Bryant* may be "dead again"—or even more dead.⁷¹

⁶⁷ *Id.* (quoting *Bryant*, 131 S. Ct. at 1157).

⁶⁸ *Id.* at *7.

⁶⁹ See *Crawford v. Washington*, 541 U.S. 36, 68 (2004); David Alan Sklansky, *Hearsay's Last Hurrah*, in *THE SUPREME COURT REVIEW*, 2009, at 1, 5 (Dennis J. Hutchinson et al. eds., 2010) ("[T]he Court has made clear that the introduction of nontestimonial statements raises no constitutional concerns, no matter how the statements are treated under the hearsay rule."); Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause* 1, 3, 5 (S. Methodist Univ. Sch. of Law, Research Paper No. 84, 2012), available at <http://ssrn.com/abstract=1956748> (noting that the constriction of testimonial evidence following *Davis* and *Bryant* excludes a wide range of hearsay evidence from confrontation protection).

⁷⁰ See Bellin, *supra* note 69, at 9 ("*Roberts* treated testimonial and nontestimonial statements identically.").

⁷¹ Cicchini, *supra* note 43, at 1302–04.

III. WHERE *CRAWFORD* COULD HAVE TAKEN CONFRONTATION: A TRIAL RIGHT IN AN ADVERSARY PROCESS

One commentator has pinned this trajectory of confrontation law on an “ill-advised attempt by Justice Scalia to fashion the confrontation clause in a manner only he, if anyone, is willing to accept as fundamentally sound and consistent in history, logic, and practice.”⁷² Yet Justice Scalia persuaded a majority of the Court to join his confrontation project, even if that train now has derailed.⁷³ On reflection, however, that train was destined to derail, because *Crawford*’s framework inevitably encouraged judges to narrow confrontation rights to avoid *Crawford*’s harsh exclusionary rule.⁷⁴ If the Confrontation Clause ultimately must permit discretionary judicial decision making, better that discretion apply to how to enforce that right, not to the definition of the right itself. By treating confrontation more accurately as a trial right in an adversary process, the Court could have realized this balance from *Crawford*.

Crawford observed that the Confrontation Clause “applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’”⁷⁵ The Court explained further that “[t]estimony,’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’”⁷⁶ If, however, “testimonial” evidence is the lynchpin for whether a declarant is a “witness” to be confronted, the Court has not adequately explained why it looks solely to the time and place of a pre-trial statement to determine whether it proves “testimonial,” and does not consider the trial purpose for which the prosecuting lawyer offers that evidence as the more accurate measure of the statement’s purpose.

I assume that the Court’s focus on out-of-court facts in

⁷² 6 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 802:2.2 (7th ed. 2011).

⁷³ Justice Scalia made quite clear in his *Bryant* dissent that the Court has mutated, if not destroyed, his original confrontation project. *See Bryant*, 131 S. Ct. at 1168 (Scalia, J., dissenting) (“[T]oday’s opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles.”).

⁷⁴ *See infra* notes 100–01 and accompanying text.

⁷⁵ *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

⁷⁶ *Id.*

defining testimonial evidence results from *Crawford's* heavy historical emphasis on the founding era, when criminal trials did not involve institutionalized prosecution and defense bars marshaling and challenging evidence in an adversary system.⁷⁷ Focus on the primary purpose of evidence when it was gathered during an investigation might be more meaningful in a “civil-law mode of criminal procedure.”⁷⁸ But in the 21st century criminal justice system, a trial lawyer’s purpose in admitting evidence defines the precise nature of that evidence.⁷⁹ Therefore, it makes marginal sense to judge whether a hearsay declarant has borne witness against a defendant at *trial* by inspecting solely the procurement of the declarant’s statement by the police, months or years prior to the trial.⁸⁰

The Court in *Davis* acknowledged that criminal procedure institutions and practices have changed since the founding era, and that these changes should inform how courts evaluate

⁷⁷ See *id.* at 42–50.

⁷⁸ *Id.* at 50; cf. Thomas Davies, *Not the “Framers’ Design”*: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause, 15 J.L. & POL’Y 349, 355, 365–68 (2007) (criticizing the *Crawford* opinion’s reliance on originalist methodology because it “fail[s] to grasp—or admit—the degree to which legal doctrine and legal institutions have changed since the framing”).

⁷⁹ See, e.g., FED. R. EVID. 404 (barring introduction of evidence of a character trait or prior act in order to prove propensity, but permitting introduction of that same evidence if offered to prove, for example, motive or modus operandi); FED. R. EVID. 407 (barring introduction of subsequent remedial measures to prove, inter alia, negligence, but permitting it for other purposes, such as impeachment); FED. R. EVID. 801 (barring the admission of out-of-court statements if offered for the truth of the matter asserted, but permitting their introduction for other purposes, such as their effect on the listener).

⁸⁰ Cf. *Testimonial Statements*, *supra* note 3, at 284 (questioning the “view [of confrontation that] focuses on the circumstances surrounding an out-of-court statement instead of the *trial* at which it is offered, which for confrontation purposes may be asking the wrong question”). Professor Josephine Ross has advocated a comparable position. See Josephine Ross, *After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 196–209 (2006).

whether evidence is testimonial.⁸¹ Yet the Court erred when it asserted that, as a result of those changes, we “no longer have examining Marian magistrates,”⁸² but “we do have, as our 18th-century forebears did not, examining police officers.”⁸³ In our modern criminal justice system, we have *investigating* police officers prior to trial; at trial, where confrontation applies, we have “examining” *prosecuting lawyers*.

Confrontation law should reflect this reality, where the intent of prosecuting lawyers, not of declarants and the police, defines the nature of trial evidence. An old evidence law cliché illustrates this distinction. A lawyer presents a plate of spaghetti to a witness.⁸⁴ The spaghetti is not offered to prove something about that plate of spaghetti. Rather, the spaghetti is offered to refresh the witness’ memory of some fact, or to test whether the witness can recognize spaghetti. The law thus does not evaluate when, where, why, and by whom that spaghetti was prepared in deciding whether the spaghetti may be offered, because the lawyer is not attempting to prove a fact about that particular plate of spaghetti—it is simply an object to trigger memory, or to test perception. If, however, the lawyer at trial offers that same plate of spaghetti as *the* plate of spaghetti at issue in the case, the law will condition the spaghetti’s admissibility on a showing of authenticity and chain of custody. The point is, how lawyers marshal and use evidence at trial determines what the evidence is in that trial—whether that same plate of spaghetti is just a physical object to awaken memory, *a* plate of spaghetti to test perception, or *the* plate of spaghetti subject to litigation at trial. The “objective primary purpose” with which the spaghetti originally was prepared cannot alone define the purpose for which the trial lawyer has offered the spaghetti as *trial* evidence.

⁸¹ See *Davis v. Washington*, 547 U.S. 813, 830 n.5 (2006) (“Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Cf.*, e.g., Jennifer Brown, *Cross-Examining the Difficult Witness: Tips for Women Defenders Navigating Gender Dynamics in the Courtroom*, CHAMPION, Apr. 2011, at 20, available at <http://www.nacdl.org/Champion.aspx?id=16224>.

Similarly, when a court considers whether a hearsay statement supplies testimonial evidence, the objective primary purpose of that statement when it was made reveals little about whether the declarant has borne witness at the later trial when it is introduced. Imagine a witness who testified before a grand jury, all with the clear objective purpose of establishing facts for a future trial. This sounds like a good case for testimonial evidence under *Crawford*.⁸⁵ But the prosecutor at trial offers that grand jury testimony only to show that this witness testified before a grand jury, not to prove any facts asserted by that testimony. The grand jury testimony should not constitute “testimonial” evidence as used in this trial, regardless of its primary purpose when created, because the lawyer offering it did not attempt to prove any fact from those statements.⁸⁶

By contrast, consider a person who comments casually about a fact to a friend at a party. Under *Crawford* itself, let alone *Davis* and *Bryant*, this statement seems a weak candidate for testimonial evidence⁸⁷—and properly so if we are asking solely whether the person “testified” at the time and place of the casual comment to the friend. But if the prosecutor offers this statement at trial to prove the fact expressed in this statement, the prosecutor has employed the statements as testimonial evidence at trial. Regardless of the primary purpose of the statement when made, *at trial* the prosecutor has offered it to prove this fact as true and accurate according to the declarant.⁸⁸

The Court has acknowledged this important investigation-trial dichotomy in confrontation analysis, recognizing that

⁸⁵ See *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding that “testimonial” covers prior testimony before a grand jury).

⁸⁶ See *id.* at 51 (testimony involves “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact” (internal quotation marks omitted)).

⁸⁷ See *id.* (“An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. . . . 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.”).

⁸⁸ See *id.*

confrontation is a trial right and not a right against police abuses during investigation.⁸⁹ An exigency can alter whether a search proves reasonable, because Fourth Amendment rights arise at the time of the search.⁹⁰ Whether a pre-trial statement addresses an emergency or anything else, however, does not determine how a prosecuting lawyer has employed that evidence at a later trial, consistent with the *trial* right of confrontation. Yet the Court still fixates on the interaction between the police and the declarant in deciding whether that evidence is testimonial at the later trial. And for some reason, the existence of an emergency when a statement is made predetermines that the prosecution cannot employ it as testimonial evidence at trial. The Constitution locks evidence into testimonial or non-testimonial form months or years before the trial even begins.

Crawford thus inexplicably authorizes declarants and the police, not the trial lawyers, to dictate whether evidence at trial operates as testimony. A single word from an important passage in *Bryant* reveals this failure in confrontation analysis, but a simple revision can resolve it. In *Bryant*, the Court held that confrontation rights extend to statements “*procured* with a primary purpose of creating an out-of-court substitute for trial testimony.”⁹¹ I would embrace this statement if it instead extended confrontation rights to statements “[*introduced at trial*] with a primary purpose of creating an out-of-court substitute for trial testimony.” Whatever history may say about 16th- and 17th-century criminal procedure abuses, in my experience this modified statement from *Bryant* more accurately reflects how lawyers and judges define evidence in criminal trials today. The Constitution should not defy the reality of how contemporary criminal cases are tried.⁹²

⁸⁹ See *Davis v. Washington*, 547 U.S. 813, 832 n.6 (2006) (“The Confrontation Clause in no way governs police conduct, because it is the *trial* use of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision.”).

⁹⁰ See generally *Minnesota v. Olson*, 495 U.S. 91, 100 (1990).

⁹¹ *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) (emphasis added).

⁹² Cf. *Graham*, *supra* note 34, at 30–31 (criticizing *Bryant* for ignoring the investigation-trial dichotomy in confrontation analysis); Ross, *supra* note 80, at 196–201 (proposing that “[t]estimonial’ should mean statements that

When I advanced this vision of testimonial evidence at the recent *Crawford and Beyond* symposium, a participant inquired whether I meant to define all hearsay evidence as testimonial and thus subject to *Crawford*'s rule of exclusion.⁹³ To me, this question implicates two considerations.

First, my understanding of testimonial evidence may track closely to the definition of hearsay. But I do not perceive this relationship as a flaw. Like confrontation doctrine, the hearsay rule also concerns itself with the opportunity to cross-examine.⁹⁴ And the intent of the examining lawyer at trial largely guides the court in judging whether evidence constitutes hearsay, not the "objective purpose" of the declarant and interrogator in creating the evidence.⁹⁵ Perhaps the Confrontation Clause could best be understood as the inverse of the confrontation view, embraced in *Roberts* and rejected in *Crawford*, that "[the Confrontation Clause's] application to out-of-court statements introduced at

function as testimony during the trial," not statements that function as testimony at the time and place of evidence production). Indeed, as the Supreme Court has acknowledged, the Confrontation Clause is not concerned with whether a defendant had any opportunity to cross-examine the declarant when the out-of-court statement was made, only when the evidence is offered at trial. *See California v. Green*, 399 U.S. 149, 159 (1970) ("[T]he inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial."). Whether that evidence necessitates confrontation thus should be defined by its use at trial, where the right to cross-examine exists.

⁹³ *See Crawford*, 541 U.S. at 51 ("[N]ot all hearsay implicates the Sixth Amendment's core concerns.").

⁹⁴ *See generally* *United States v. Owens*, 789 F.2d 750, 756 (9th Cir. 1986), *overruled on other grounds*, 484 U.S. 554 (1988) ("The reliability concerns of the rule against hearsay have been satisfied when 'the witness . . . is subject to cross-examination.'" (quoting *United States v. Fiore*, 443 F.2d 112, 115 (2d Cir. 1971))).

⁹⁵ *See United States v. Linwood*, 142 F.3d 418, 425 (7th Cir. 1997) ("[W]hether a statement is hearsay . . . will most often hinge on the purpose for which it is offered."). For an examination of prosecution arguments for offering trial evidence "not for the truth of the matter asserted," see Jeffrey L. Fisher, *The Truth About the "Not for the Truth" Exception to Crawford*, CHAMPION, Feb. 2008, at 18.

trial depends upon ‘the law of Evidence for the time being.’”⁹⁶ Instead, the Confrontation Clause simply could constrain the State from legislating or adjudicating policy exceptions to trial cross-examination of a hearsay declarant in criminal cases. Some commentators have argued that *Crawford* should have subjected more hearsay to confrontation limitations.⁹⁷ This approach even may have a stronger historical basis than *Crawford*’s focus on “testimonial” evidence.⁹⁸

More than tracking hearsay law, however, my suggested approach may bring testimonial evidence under the Sixth Amendment closer to the meaning and role of testimonial evidence under the Fifth Amendment Self-Incrimination Clause:⁹⁹ an assertion that the prosecuting lawyer has introduced to prove a fact against the accused at the trial itself.¹⁰⁰ But regardless of

⁹⁶ *Crawford*, 541 U.S. at 50–51.

⁹⁷ See, e.g., John R. Grimm, Note, *A Wavering Bright Line: How Crawford v. Washington Denies Defendants a Consistent Confrontation Right*, 48 AM. CRIM. L. REV. 185, 211–15 (2011); cf. Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 615–23 (2005) (advocating confrontation framework for “accusatory hearsay”).

⁹⁸ See Davies, *supra* note 78, at 352, 434 (explaining that, contrary to *Crawford*’s historical position, “the framing-era sources indicate that the confrontation right itself prohibited the use of hearsay statements as evidence of the defendant’s guilt,” and “[a]dmitting unsworn, ‘nontestimonial’ hearsay was not part of ‘the Framers’ design’”).

⁹⁹ See U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself.”).

¹⁰⁰ See *Doe v. United States*, 487 U.S. 201, 210 (1988) (“[T]o be testimonial, an accused communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.”); *Chavez v. Martinez*, 538 U.S. 760, 766–67 (2003) (“Martinez was never made to be a ‘witness’ against himself in violation of the Fifth Amendment’s Self-Incrimination Clause because his statements were never *admitted as testimony* against him in a criminal case.” (emphasis added)); cf. *Pennsylvania v. Muniz*, 496 U.S. 582, 590–91 (1990) (finding defendant’s response to police questions non-testimonial, because the prosecutor introduced this evidence to show defendant’s physically slurred speech, not to prove defendant’s knowledge, thoughts, or beliefs); Michael J. Zydney Mannheim, *Toward a Unified Theory of Testimonial Evidence under the Fifth and Sixth Amendments*, 80 TEMP. L. REV. 1135, 1135 (2007) (examining definitional differences of “testimonial” between the Fifth Amendment’s Self-Incrimination Clause and

whether confrontation law defines testimonial evidence separately from hearsay evidence, as *Crawford* and *Davis* indicated it should,¹⁰¹ confrontation rights should turn on the prosecuting lawyer's purpose for that evidence at trial, not the objective purpose for which that evidence was procured during the investigation.¹⁰²

Second, concern about a broad definition of testimonial evidence that tracks hearsay law, I suspect, reacts to *Crawford*'s rule of exclusion, which can transform confrontation rights into a perceived "windfall" for defendants.¹⁰³ Professor Robert Mosteller presciently predicted the response to this perception following *Crawford*:

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 [of testimonial evidence].¹⁰⁴

the Sixth Amendment's Confrontation Clause, and advancing a unified theory of testimonial evidence).

Of course, under the Fifth Amendment, courts do analyze the circumstances surrounding how the police procured a suspect's statement in determining its admissibility. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (defining interrogation to include "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect"). But this analysis does not address whether the suspect's statement is testimonial. Rather, unlike the Confrontation Clause, the Fifth Amendment also concerns itself with whether the police obtained a statement through coercive pretrial interrogation, necessitating analysis of these pretrial circumstances in addition to whether the statement constitutes testimonial evidence in its use at trial.

¹⁰¹ *See Davis v. Washington*, 547 U.S. 813, 821 (2006); *Crawford*, 541 U.S. at 51.

¹⁰² *Cf. Cicchini*, *supra* note 43, at 1320–21 ("The inquiry should not be on the facts and circumstances of how a hearsay statement was allegedly made Nor should it be on how a hearsay statement was allegedly collected [T]he proper inquiry to determine whether a statement is testimonial involves the statement's use at trial."); Ross, *supra* note 80, at 196–201.

¹⁰³ *See Davis*, 547 U.S. at 833.

¹⁰⁴ Mosteller, *supra* note 97, at 516.

As I indicated at the *Crawford and Beyond* symposium, I am not sold on *Crawford*'s absolute rule of exclusion not only for the practical reason suggested by Professor Mosteller, but also in my understanding of trial confrontation generally.

In my experience trying criminal cases, the confrontation right is not best understood as a "stop sign" against a narrow class of evidence. Rather, confrontation is part of an adversary process designed to ensure a fair trial.¹⁰⁵ In this process, the prosecution carries the burden of proof beyond a reasonable doubt, but both sides are represented by competent counsel before a judicial officer and unbiased jury. From this process-focused view should flow a broadly-defined trial right connected to a realistic set of confrontation priorities, not an exclusionary rule that eliminates only a very narrow range of evidence.

Crawford hitched confrontation's wagon to an exclusionary rule without clearly defining the right itself. A narrowed confrontation right inevitably followed. Many defendants now are left with no exclusionary rule or any other confrontation interest to assert when hearsay is admitted from a non-testifying declarant, because only a limited class of testimonial evidence implicates confrontation rights.¹⁰⁶ Instead of placing a constitutional "stop sign" before testimonial evidence, *Crawford* should have been understood to introduce a series of important confrontation priorities—priorities that frame confrontation less as a rule of evidence admissibility and more as a critical ingredient to a fair adversarial trial.

The first priority is that the prosecution should produce for

¹⁰⁵ Cf. *Testimonial Statements*, *supra* note 3, at 285 (defining "testimony" in light of its role in a process of criminal adjudication).

¹⁰⁶ See *Crawford*, 541 U.S. at 68; Sklansky, *supra* note 69, at 1, 5 ("[T]he Court has made clear that the introduction of nontestimonial statements raises no constitutional concerns, no matter how the statements are treated under the hearsay rule."); cf. Tom Lininger, *Reconceptualizing Confrontation after Davis*, 85 TEX. L. REV. 271, 288–325 (2006) (reconceptualizing confrontation as a policy issue, and proposing legislative reforms to protect confrontation interests excluded from *Crawford* and *Davis*); Bellin, *supra* note 69, at 1, 3, 5 (noting that the constriction of testimonial evidence following *Davis* and *Bryant* excludes a wide range of hearsay evidence from confrontation protection, and advocating that confrontation rights extend to limit the use of non-testimonial hearsay).

cross-examination any available witness whose pre-trial statement is being offered “for the purpose of establishing or proving some fact” against the defendant.¹⁰⁷ Availability is key. The prosecution should not be able to choose, by stratagem or lack of diligence, whether a defendant cross-examines the sources of testimonial evidence.¹⁰⁸ This prosecutorial practice, in my experience, supplied the most widespread confrontation problems under *Roberts*, and now perhaps under *Crawford* and *Bryant*.¹⁰⁹ A confrontation rule that constrains this practice would do a lot more to ensure fair criminal trials today than would a historically pure vision of 17th-century abuses.

If a prosecution can show true unavailability of a declarant, however, the prosecution has not elected to deprive the defendant of cross-examination.¹¹⁰ Unavailability begins to implicate legitimate concerns for both necessity and equity in an adversary process. *Crawford* thus identifies the next confrontation priority: where cross-examination at trial is not possible, the prosecution should give the defendant a pre-trial opportunity to examine the declarant.¹¹¹ Rarely will this pre-trial

¹⁰⁷ *Crawford*, 541 U.S. at 51.

¹⁰⁸ See, e.g., *United States v. Solorio*, No. 10-10304, 2012 WL 161843, at *7-8 (9th Cir. Jan. 19, 2012).

¹⁰⁹ See, e.g., *Testimonial Statements*, *supra* note 3. I do not mean to suggest that prosecutors never have good reasons for proceeding in this manner. In many domestic violence cases, for example, prosecutors face challenges in producing the victim for trial, challenges that may reflect the defendant’s misconduct. See generally Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 367-74 (1996) (exploring difficulties in prosecution); Thomas L. Kirsch, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?*, 7 WM. & MARY J. WOMEN & L. 383, 392-98 (2001) (reviewing challenges). I am arguing only that the prosecution should not be able to *choose* whether a defendant confronts a prosecution witness at trial, a choice I have witnessed prosecutors make in numerous cases.

¹¹⁰ For an example of unavailability, see *Hardy v. Cross*, 132 S. Ct. 490, 495 (2011).

¹¹¹ See *Crawford*, 541 U.S. at 68. For insightful questions and comments about prior opportunities to cross-examine under *Crawford*, see Richard Friedman, *Opportunity for Cross-Examination at Preliminary Proceedings*, CONFRONTATION BLOG (Aug. 29, 2007), <http://confrontationright.blogspot>.

cross-examination, such as cross-examination at a preliminary hearing,¹¹² substitute fully for defense counsel's trial examination.¹¹³ Yet even *Crawford* accepts this practical compromise, rather than the exclusion of evidence, to maintain a fair adversary process.¹¹⁴

Working beyond cross-examination as the sole measure of confrontation, *Crawford* recognizes another confrontation priority: if the prosecution could not afford a defendant any opportunity for cross-examination, even prior to trial, the defendant cannot complain about the loss of cross-examination in cases where the defendant wrongfully caused the declarant's unavailability.¹¹⁵ The Court has drawn this "forfeiture" exception to confrontation from history, but the Court also has noted that it is grounded in necessity and equity.¹¹⁶ Surely, a defendant cannot purposefully absent a witness from trial and complain about an unfair adversary process.¹¹⁷

At this point, if the defendant could not cross-examine the declarant and did not make the declarant unavailable, *Crawford* would prioritize the exclusion of testimonial evidence. This evidentiary "stop sign," however, understandably may have prompted members of the Court to curb the confrontation right itself by defining testimonial evidence narrowly.¹¹⁸ *Crawford* offered no substantial reasons for the law to stop here in

com/2007/08/opportunity-for-cross-examination-at.html; Richard Friedman, *Prior Opportunity for Cross-Examination*, CONFRONTATION BLOG (Feb. 11, 2005), <http://confrontationright.blogspot.com/2005/02/prior-opportunity-for-cross.html>.

¹¹² See *California v. Green*, 399 U.S. 149, 152 (1970).

¹¹³ Cf. *Blanton v. State*, 978 So. 2d 149, 154–56 (Fla. 2008) (holding that a "discovery deposition" does not constitute a prior opportunity for cross-examination under *Crawford*).

¹¹⁴ See *Crawford*, 541 U.S. at 68.

¹¹⁵ See *Crawford*, 541 U.S. at 62; *Reynolds v. United States*, 98 U.S. 145, 158–59 (1878).

¹¹⁶ *Giles v. California*, 554 U.S. 353, 359–61 (2008).

¹¹⁷ Cf. *id.* at 380 (Souter, J., concurring in part) (indicating that confrontation forfeiture should be triggered by an intent "to thwart the judicial process," or to "isolate the victim from outside help, including the aid of law enforcement and the judicial process").

¹¹⁸ See Mosteller, *supra* note 97, at 516.

considering practical confrontation priorities consistent with an adversary process.¹¹⁹ For example, if the defendant did not absent the unavailable declarant, one fairly might ask whether the prosecution had *any* opportunity to supply even pre-trial examination of the declarant. If the prosecution sat on its hands pending trial, or chose to deny the defense pre-trial access to the declarant through discovery limitations, the prosecution will have lost its claim to necessity and equity for introducing the now-unavailable declarant's statement at trial. But on the other hand, the prosecution's demonstrated inability to offer even pre-trial examination of an unavailable declarant should be a relevant consideration to a fair adversary process. Dying declarations certainly could qualify for this consideration,¹²⁰ as could victims or witnesses who evade the prosecution's diligent efforts to locate them.

In this circumstance, before excluding the testimonial evidence altogether, a court could prioritize exploring whether a fair adversary process still could be preserved without cross-examination of the unavailable declarant. For example, the court could order the prosecution to produce witnesses with detailed personal knowledge of the unavailable declarant and how the

¹¹⁹ *Cf. Crawford*, 541 U.S. at 72–75 (Rehnquist, C.J., concurring) (reviewing historical record and concluding, “I am not convinced that the Confrontation Clause categorically requires exclusion of testimonial statements”); *cf. Maryland v. Craig*, 497 U.S. 836, 849–50 (1990) (holding that face-to-face confrontation is a preferred but not indispensable part of trial confrontation, and thus modified confrontation procedures can be employed when necessary, equitable, and fair); *Coy v. Iowa*, 487 U.S. 1012, 1022–25 (1988) (O'Connor, J., concurring) (accepting face-to-face confrontation as a confrontation priority, but recognizing that necessity and equity can justify alternative procedures that do not deny the defendant the opportunity to test the evidence in an adversary process).

¹²⁰ I always have found “necessity and equity” as the most persuasive argument for admitting a dying declaration over a confrontation objection—the prosecution simply has no ability to produce this witness for *anyone* to examine, including the prosecution itself, at any time. The argument that a dying declaration uniquely should be admissible over a confrontation objection solely because of its greater antiquity than other hearsay exceptions, *cf. Giles*, 554 U.S. at 358 (identifying historical bases for testimonial dying declarations), too categorically and arbitrarily preferences the old over the new in the development of the law.

statement was made;¹²¹ condition admission on robust pre-trial discovery or deposition to enhance defense preparedness for this evidence; relax the evidentiary foundations for relevant impeachment of the non-testifying declarant or rebuttal of the declarant's statement;¹²² instruct the jury and permit defense argument on the risks of this kind of evidence;¹²³ or hold a pre-trial hearing to evaluate whether the evidence presents any unique risks of unreliability that cannot be confronted fairly without the declarant on the witness stand for cross-examination.¹²⁴

This approach recognizes that, in carrying the burden of proof, prosecuting lawyers determine whether trial evidence is testimonial by how they employ it against the defendant at trial. The defendant, however, also is represented by diligent trial counsel in an adversary process. In necessary and equitable circumstances, competent defense counsel properly may be expected to confront prosecution testimony with more than just the tool of cross-examination if the law treats confrontation as a part of a fair adversary process and not just a rule of evidence admissibility.

By embracing some flexibility in how confrontation rights are enforced, I do not mean to minimize the centrality of cross-examination to this right. *Crawford* properly ranks cross-examination at trial as the highest confrontation priority.

¹²¹ See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2723 (2011) (Kennedy, J., dissenting) (emphasizing that while the prosecution did not produce the declarant of the testimonial report, "a knowledgeable representative of the laboratory was present to testify and to explain the lab's processes and the details of the report").

¹²² See Fred O. Smith, Jr., *Crawford's Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 STAN. L. REV. 1497, 1524–26 (2008).

¹²³ See *id.* at 1528. Courts already instruct juries in this manner with other types of potentially problematic or unreliable evidence, such as cooperating witness testimony, interested witness testimony, missing testimony from an uncalled and knowledgeable witness, and identification evidence. Rather than exclude this evidence altogether, the law trusts that a well-informed jury in an adversary system can weigh the evidence appropriately. See *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012).

¹²⁴ Cf. Smith, Jr., *supra* note 122, at 1528.

Moreover, my approach severely would restrict the prosecution's ability to proceed without producing an *available* declarant, and it further would acknowledge that defendants retain confrontation interests even when the prosecution has a strong case for proceeding without an unavailable declarant. But the point of the confrontation right is an opportunity to test the prosecution's evidence as an adversary. Confrontation should not be an all-or-nothing evidence admissibility rule that, while reflecting some views of history, ignores how criminal cases can be tried—and how judges are likely to decide confrontation cases when given an all-or-nothing choice. By imposing an all-or-nothing choice, *Crawford's* commitment to a binary confrontation framework seems to assure less confrontation, not more: *Crawford* incentivizes a narrow view of the testimonial evidence subject to exclusion, and permits a broad universe of non-testimonial evidence that legislatures and courts are free to admit at trial without any concern for confrontation priorities.

I recognize that my suggested vision for confrontation rights may invite some of the vices of *Roberts*. But *Crawford* is doing no better, and perhaps even worse, at reducing judicial discretion and decision making uncertainty. Whatever the vices of my proposed approach to confrontation, it at least offers the competing virtue of honestly acknowledging real-world equity in solving confrontation problems in an adversary system. Judges already are acknowledging these concerns, just under the guise of *Crawford's* testimonial evidence framework. Judges by necessity are narrowing the definition of the right, rather than exploring practical ways to prioritize that right's enforcement. I would rather see this judicial discretion exercised in how confrontation is enforced, not in whether that right exists.

IV. CONCLUSION

If my assessment of the trajectory of confrontation law is accurate, one has to ask what the contribution of *Crawford* has been to constitutional criminal procedure. No doubt, *Roberts* had become a fairly empty confrontation framework that needed some meaningful constitutional discipline imposed on it. Yet the Supreme Court needs to be cautious about disrupting prevalent

rules of criminal trial procedure without some clear sense of where that constitutional project is going, and a judicial commitment to get there. That commitment apparently did not exist for *Crawford*.

Chief Justice Rehnquist thus raised an important question in *Crawford*: In the world of criminal practice, does a shot at perfection justify an extended and uncertain journey, perhaps to no better a place, or even to someplace worse? I do not know an overarching answer to this question. But in retrospect, Chief Justice Rehnquist made a pretty good case for a more modest effort to refine confrontation doctrine in *Crawford*—perhaps such as bundling a more robust unavailability requirement into *Roberts*.¹²⁵ An effort of this sort may not have promised confrontation perfection, even from the beginning. But it would have improved *Roberts*, avoided years of uncertainty in how criminal cases are to be tried, and in the end, may have proved about as good as where *Crawford* appears to have delivered us.

¹²⁵ See generally Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1016–17 (1988) (reviewing the weakening of the unavailability requirement under *Roberts*).