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Jennifer A. Mnookin

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EXPERT EVIDENCE AND THE CONFRONTATION CLAUSE AFTER *CRAWFORD V. WASHINGTON*

*Jennifer L. Mnookin**

INTRODUCTION

In 2004, in the landmark case of *Crawford v. Washington*,¹ the Supreme Court dramatically transformed its approach to the Confrontation Clause of the Sixth Amendment, which guarantees to criminal defendants the right to confront witnesses against them.² Prior to *Crawford*, rather little hearsay evidence was held to violate the Confrontation Clause. The previous framework for evaluating the Confrontation Clause, put into place by the 1980 decision in *Ohio v. Roberts*,³ permitted the use of hearsay in criminal cases under the Confrontation Clause so long as the evidence either fell into a “firmly rooted” hearsay exception, or bore “particularized guarantees of trustworthiness.”⁴ As the jurisprudence developed, nearly all of the hearsay exceptions were pronounced by the courts to be “firmly rooted,” and in the relatively unusual circumstance that otherwise admissible

* Professor, UCLA School of Law. Thanks to Richard Friedman, David H. Kaye, Kenneth Graham, Lisa Griffin, and Robert Pitler for helpful conversations, as well as participants in the conference. Portions of Part II previously appeared in DAVID H. KAYE, DAVID E. BERNSTEIN AND JENNIFER L. MNOOKIN, *THE NEW WIGMORE: EXPERT EVIDENCE* (supplement, 2006). For helpful research assistance, I thank Hal Melom, Rachel Kleinberg, and Michael Madigan.

¹ 541 U.S. 36 (2004).

² U.S. CONST., amend VI.

³ 448 U.S. 56 (1980).

⁴ *Id.* at 66.

hearsay was not firmly rooted, judges had a great deal of discretion with which to determine whether the evidence bore the necessary “particularized guarantees of trustworthiness.”⁵ Prior to *Crawford*, evidence passed Confrontation Clause muster so long as it was adequately reliable, and reliability could either be “inferred without more” because the evidence fit into a longstanding hearsay exception (and hence was firmly rooted), or, if it did not, courts could analyze the question of reliability directly, and this reliability determination also answered the Confrontation Clause inquiry.⁶

Crawford dramatically refocused the lens for analyzing Confrontation Clause claims. Jettisoning the *Ohio v. Roberts* spotlight on reliability, the opinion substituted an altogether different inquiry: was the evidence in question “testimonial”—meaning, roughly, was it made in circumstances that suggested that it was akin to testimony or would be available for use at trial?⁷ If a prior statement *is* testimonial and the declarant is not testifying at trial, the hearsay may be introduced against a criminal defendant only if the declarant is unavailable *and* the defendant had a prior opportunity to cross-examine the declarant.⁸ If the prior statement is not testimonial, then the Confrontation Clause is not implicated, at least not under the Federal Constitution.⁹

While the court in *Crawford* did not precisely delimit the boundaries of “testimonial,” it explained in general terms:

Various formulations of this core class of “testimonial” statements exist: “*ex parte* in-court

⁵ *Id.*

⁶ *Id.*

⁷ *Crawford*, 541 U.S. at 37, 53-54.

⁸ 541 U.S. at 53-54.

⁹ See *Davis v. Washington*, 126 S. Ct. 2266, 2274 (2006) (“We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay The answer to the first question was suggested in *Crawford*, even if not explicitly held: ‘The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. . . .’ A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core,’ but its perimeter.”) (internal citations omitted).

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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;” “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . .” These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing.¹⁰

¹⁰ *Crawford*, 541 U.S. at 51-52 (internal citations omitted). Scholars and courts quickly began to try to define the outer boundaries of the testimonial. For early efforts, see, e.g., Richard D. Friedman, *Grappling with the Meaning of “Testimonial”*, 71 BROOK. L. REV. 241 (2005); Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439; Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511 (2005). This past term, *Davis v. Washington* offered additional thoughts on how to identify testimonial hearsay, at least in the context of statements made in response to interrogation by law enforcement personnel:

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.

Davis, 126 S. Ct. at 2273-74. While *Davis* explicitly stated that “testimonial” statements could extend beyond police interrogations, it did not provide any direct guidance for use in other settings. *Id.* at 2274 n.1. While *Davis* does not, therefore, speak directly to the question of expert evidence under

Whatever the precise definition, the core idea of “testimonial” relates to the expected purpose of the statement at the time of its utterance. Was the statement made in circumstances that suggest its likely future relevance as testimony in a criminal prosecution? Often, a statement’s path from utterance to legal evidence is serendipitous and unexpected—imagine, for example, that someone reports on her ate of mind to a friend, and that information later turns out, surprisingly to both the original speaker and hearer, to be relevant in a legal case; or suppose that a company, which keeps its accounts as a matter of course, later finds its business relevant to a lawsuit. In these circumstances, such statements are clearly not testimonial as the Court understands the term. By contrast, if the circumstances in which a given statement was made suggest that this information is likely to be useful as legal evidence—if, indeed, to quote *Davis v. Washington*, the Supreme Court’s 2006 decision further explicating *Crawford* in the context of police interrogations and statements made to 911, the statement’s “primary purpose” is to generate a statement that may have later legal relevance, then the statement is clearly testimonial.¹¹

Obviously, this look to “primary purpose” does not resolve the question of the boundary of the testimonial; some materials, such as affidavits, depositions, and formal confessions, clearly fall inside its perimeter, while others, such as many business records or most statements made for the purpose of medical diagnosis will not. Still other statements will fall neither squarely inside nor outside, and their placement will depend on how the definition of the testimonial is further honed over time, as well as assumptions and factual determinations about the particular statement and its purposes.

Whatever the precise definition of “testimonial,” *Crawford*

Crawford, its turn to a “primary purpose” test may influence how courts assess whether laboratory reports and matters upon which experts rely are testimonial.

¹¹ *Id.* at 2273-74. *Davis* limits its attention to statements made in the course of police interrogation, but it would not be surprising if this “primary purpose” test were to be extended beyond this application.

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has, without doubt, given additional backbone to the previously rather spineless operation of the Confrontation Clause. But like all significant constitutional reinterpretations, it has also raised as many questions as it has answered, and almost immediately after the opinion was issued, both courts and legal academics began wrestling with its implications. Defining the limits of “testimonial” was obviously an important question: figuring out which statements fall within the box labeled “testimonial” and which lie safely outside. Myriad other questions arose as well. Did the Confrontation Clause prohibit only evidence that fit into the category of “testimonial,” or was there some residual role for the earlier approaches with respect to non-testimonial hearsay? Should the expectation of likely future legal use be assessed objectively or subjectively, and should it be analyzed from the vantage point of the declarant, the listener, or both?¹² How would *Crawford* affect particular domains of criminal law, such as, for example, domestic violence prosecutions, in which the growing trend towards “evidence-based prosecutions” meant that typically the prosecution went forward even if the victim recanted or refused to testify? Was Scalia’s originalist account of the Confrontation Clause’s history plausible or persuasive? Courts pondered, academics ruminated, symposia (like this one) sprouted.

This article focuses on one domain within the post-*Crawford* universe that has received rather little academic scrutiny:¹³ the

¹² In *Davis*, the Court makes clear that the inquiry into whether a statement is testimonial should be made based on an objective assessment of the circumstances rather than the subjective intent of the declarant. 126 S. Ct. at 2273. *Davis* also states that the focus on testimonial statements reflects “not merely its ‘core’ but [the] perimeter” of the Confrontation Clause; non-testimonial hearsay therefore does not raise Confrontation problems under the Federal Constitution. *Id.* at 2274.

¹³ Pamela R. Metzger’s recent article is a notable exception, in the context of certificates of analysis. See Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475 (2006). See also Bradley Morin, Note, *Science, Crawford and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports*, 85 B.U.L. REV. 1243 (2005); John M. Spires, Note, *Testimonial or Nontestimonial The Admissibility of Forensic Evidence After Crawford v. Washington*, 94 KY. L. J. 187 (2005).

intersection of expert evidence with the Confrontation Clause. *Crawford* was celebrated by some as bringing clarity and intellectual coherence to an area that had become riddled by both inconsistency and intellectually unjustifiable legal fictions.¹⁴ However, a close look at the area of intersection between expert testimony and the Confrontation Clause suggests that such sanguine predictions may have been premature. As I shall show, the area of expert/*Crawford* intersection has become a serious practical concern: a great many lower court opinions have wrestled with the potential Confrontation Clause implications of expert evidence that includes statements that might be classified as testimonial. Most of these courts have endeavored to find ways around *Crawford*'s dictates; unfortunately, most of the arguments proffered by these courts are deeply intellectually unsatisfying.

Part I of this Article will briefly describe the ways in which expert evidence issues and the Confrontation Clause tend to intersect. Part II will describe and critique several arguments that lower courts have been making in an effort to avoid restricting these forms of evidence under *Crawford*. In this section, my purpose is not to assess the inherent intellectual legitimacy of *Crawford*'s approach. Rather, taking *Crawford* itself as a given, I wish to examine whether and to what extent the various approaches taken by lower courts to the problems related to expert evidence are intellectually justifiable. Unfortunately, as we shall see, these dominant approaches are, for the most part, not grounded in a legitimate reading of *Crawford*. Finally, Part III will offer some preliminary suggestions toward intellectually more viable approaches for evaluating expert evidence under the Confrontation Clause post-*Crawford*, attempting to balance *Crawford*'s goals and purposes against the genuine need for the continued availability of forensic evidence.

¹⁴ See, e.g., Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L. J. 183, 192 (2005) (noting that "The previous case law had been a mess," and that "*Crawford* at least provides a principle and a coherent inquiry for adjudicating Confrontation Clause disputes.").

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AND EXPERT EVIDENCE

When does the Confrontation Clause intersect with issues concerning the admissibility and use of expert evidence? There are two recurring scenarios in which expert evidence may raise *Crawford* issues. First, expert evidence is sometimes introduced without any live testimony at all, through the use of a certificate of analysis or some other statutorily-approved method for introducing expert evidence via affidavit. Second, testifying experts often wish to disclose information upon which they have relied in order to form their conclusions, and sometimes, especially in the forensic science setting, this disclosed evidence may itself constitute testimonial hearsay. This second category can be further subdivided into two subcategories: first, when experts reveal tests performed or information provided by other experts; and second, when experts rely upon information provided to them by non-experts in circumstances that make the underlying statements at least arguably testimonial. Each of these scenarios will be unpacked below in somewhat more detail.

A. *Expert Testimony Without A Witness*

In many—indeed, most—jurisdictions, statutes explicitly permit the introduction of some kinds of routinely generated expert evidence by forensic scientists without any testimony at all.¹⁵ For example, a prosecutor might be permitted to offer a certificate of analysis written by a forensic scientist describing the evidence that was tested, the analyses that were done, and the conclusions reached. These statutes hand to prosecutors the option of proving key forensic facts by document in lieu of live testimony. Some states permit certificates of analysis only in

¹⁵ For a useful description of the widespread use of certificates of analysis and the constitutional problems they generate, see Metzger, *supra* note 13. According to Metzger, all but six jurisdictions in the United States have some kind of statute permitting certificates of analysis in at least some circumstances. *Id.* at 478.

particular instances, such as to prove the results of a blood or breath alcohol tests, or to establish that the breath detection machine used was properly calibrated, or to disclose the chemical composition of possible narcotics, but other states permit the use of such certificates for any tests conducted by forensic scientists.¹⁶

Practically speaking, these statutes mean that the fact that a substance found on the defendant's person was tested and determined to be cocaine of a specified quantity might, at the prosecutor's prerogative, be proven by waving an official-looking paper that says so before the jury, rather than presenting live testimony subject to cross examination. In those states that permit very broad use of certificates of analysis, written evidence without live testimony might even be used to establish matters such as the conclusion that the casings found at the crime scene match the gun found in the defendant's nightstand, or the determination that the defendant's fingerprint or DNA matched the evidence located at the scene. When a certificate of analysis is used, the written statement may wholly substitute for putting a witness on the stand.

Nearly half of those states that permit certificates of analysis require the prosecutors to provide the defense with advance notice of an intent to use a certificate of analysis, and many (but by no means all of these states) do have opt-out provisions that allow the defendant to insist that the state offer live testimony in lieu of the certificate. However, some of these opt-out provisions are quite narrowly drawn, often requiring the defense to do something more than simply make the demand for the opportunity for confrontation. Take, for example, Alabama's statute, which requires defense counsel not only to certify a

¹⁶ While many states restrict the use of certificates of analysis to particular circumstances, typically the identification of a controlled substance or matters relating to DUI, such as breath alcohol test results and calibration records, several state statutes permit essentially all laboratory reports or forensic science findings to be admitted via certificate. For examples of the latter, *see, e.g.*, Ala. Code §12-21-300 (2006); Ark. Code Ann. §12-12-313 (2006); Iowa Code. §691.2 (2006); Tex. Code Crim. Proc. Ann. Art. 38.41 (Vernon 2006); Va. Code Ann. §19.2-187 (2006).

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good-faith intent to cross-examine the witness at trial, but also to alert the court to the “basis upon which the requesting party intends to challenge the findings.”¹⁷

The Confrontation Clause issues potentially raised by the use of certificates of analysis are obvious.¹⁸ If these certificates are testimonial, then the use of paper evidence instead of live testimony by witnesses violates the Confrontation Clause unless the declarant is unavailable and the defense had a prior opportunity for cross-examination. Apart from retrials after a successful appeal or a hung jury, it is unlikely that the defendant would have had such an opportunity. So in the vast bulk of cases, the only way that these statutes can pass constitutional muster post-*Crawford* is if either (1) the evidence is not considered to be testimonial; or (2) if, in the minority of states that require advance notice to the defendant and permit some kind of opt-out procedure, the defendant’s failure to invoke the available pre-trial mechanisms to challenge the prosecution’s use of a certificate is understood as a legitimate waiver of her Confrontation Clause rights.¹⁹

¹⁷ Ala. Code. §12-21-302.

¹⁸ For an important early article on the Confrontation Clause issues relating to the use of such certificates, see Paul C. Giannelli, *Expert Testimony and the Confrontation Clause*, 22 CAP. U. L. REV. 45, 84 (1993). For the most detailed post-*Crawford* analysis, see Metzger, *supra* note 13.

¹⁹ There are several courts that have held that such opt-out procedures make the use of certificates of analysis permissible under *Crawford*. See, e.g., *City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005). The opt-out provision at issue in *Walsh* required the defendant to establish to the court’s satisfaction that “(a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and (b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined.” This, to my mind, is deeply problematic: exercising the Confrontation right should not require as a prerequisite that the defendant persuade the Court that she has a sufficiently valuable reason for doing so. Though careful discussion of this point is beyond the scope of this Article, assuming (as I argue), that the content of a certificate of analysis is properly understood as testimonial and hence is within *Crawford*’s purview, surely the statutes that require either a good faith basis for cross-examination or even a good faith intent to cross-examine ought to be seen as constitutionally problematic. Some courts have made the still more disturbing argument that

Certainly, a straightforward analysis of these certificates would suggest that they are testimonial. After all, their central purpose is precisely to substitute for live testimony at trial. That is, in fact, their very *raison d'être*: the whole idea of the certificates is to be used in lieu of the testimony that would otherwise be necessary. Even if “testimonial” evidence were defined as narrowly as possible, it is difficult to see how certificates of analysis could fall outside the definition. They are indeed a kind of “*ex parte* in court testimony,” a form of “formalized testimonial materials,” in essence, a form of affidavit.²⁰ It is almost unimaginable that a principled way could be found to distinguish them as a category from other kinds of clearly testimonial statements.

Nonetheless, as Part II will illustrate, many courts are rejecting this straightforward analysis and attempting to find some way to preserve the use of these certificates notwithstanding *Crawford*. While these arguments will be detailed in the following Part, it is worth noting at the outset that if *Crawford* were interpreted to bar the use of certificates of analysis, it would be an inconvenience for prosecutors, certainly, but it would be unlikely to create insurmountable obstacles to the introduction of the underlying evidence.

because the defendant could subpoena the author of the laboratory report at no cost if she chose to, the state may use a certificate in lieu of calling a witness to the stand. *See, e.g., State v. Campbell*, 719 N.W.2d 374 (N.D. 2006). This form of burden-shifting offers an extremely weak form of protection of the Confrontation right, and is difficult to reconcile with *Crawford's* emphasis.

However, this does not mean that all forms of routine waivers ought to be prohibited. While it is true that even a statute that requires a defendant to object to the prosecution's planned use of a certificate is not cost-free for a defendant, a simple demand requirement, in which the defendant need not give a reason, persuade the court, or have a lawyer affirm any actual intent to cross-examine, might offer a reasonable way to balance efficiency concerns against the protection of the defendant's opportunity to cross-examine. Careful consideration of the legitimacy of waiver options is, however, beyond the scope of this Article. In Part II, I focus instead on the question of whether certificates of analysis are properly understood as testimonial.

²⁰ See the variety of definitions on offer in *Crawford*, 541 U.S. at 51-52.

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Certificates of analysis are, in essence, a shortcut to the process of proof, so prohibiting them would force the prosecutor to take the long way around. But it would not do more than that. Removing a shortcut would increase costs and this in turn might to some extent affect the balance of power between defendant and prosecutor, which might in turn have some affect on each party's willingness to negotiate or the precise terms of plea bargains. Eliminating or curtailing the use of certificates of analysis would obviously increase the costs of prosecution to some extent; that, of course, is generally true of any increase in constitutional protection afforded to defendants. But abolishing or restricting them would be unlikely to cause massive logistical or practical problems. Strong evidence on this point is provided by a simple fact: at present, several states (including the most populous state, California) do not permit the use of certificates of analysis at all, and yet the criminal trial process in these jurisdictions does somehow manage to function. In addition, even if certificates of analysis are properly understood to be testimonial, it might be possible to develop constitutionally permissible waiver procedures under which their use would be allowed unless the defendant opted out of permitting the state to use them.

B. Expert Basis Evidence

Rule 703 of the Federal Rules of Evidence permits experts to rely upon inadmissible evidence "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," and most states have similar provisions.²¹ This Rule means that the information that helps shape or form the expert opinion does not itself need to be admissible in evidence, so long as it is the kind of information that experts in the field would typically use for reaching conclusions or opinions like this one. The logic justifying the rule is essentially a form of deference to legitimate expertise: if the expert herself can assess whether a particular piece of

²¹ FED. R. EVID. 703.

information is worth being considered as part of the basis for her conclusion, why should the court second-guess this judgment by the expert, especially if it is a judgment that conforms with the customary norms of the expert's community?²²

A related but distinct question is whether an expert may disclose the information upon which she has relied to form her opinion to the jury, even if that information is itself otherwise inadmissible. The strongest argument in favor of disclosure is to create the possibility for educating the jury by making the expert's conclusion and reasoning more transparent. If the jury does not know the underlying facts or bases for an expert's conclusions, it is difficult to see how the jury could rationally assess the plausibility of the expert's judgment. Without such disclosure, the jury may have little choice but to defer (or not) to an expert's credentials, and to assess her demeanor rather than unpack her arguments. Without disclosure, the jury may lack the fundamental building blocks that could permit it to evaluate the substantive merits of the expert's conclusion.²³ If we want to encourage, or indeed even permit, rational evaluation of an expert's conclusions by the jury, permitting the disclosure of basis evidence would appear to be a very good idea.

However, this strong argument in favor of permitting disclosure is matched by an equally strong argument against it: if disclosure is permitted, it is likely to become a mechanism by which savvy lawyers funnel otherwise inadmissible hearsay evidence to the jury. Permitting disclosure of all matters upon which an expert has reasonably relied would risk opening the door to a great deal of hearsay evidence, and could turn the expert into a conduit for large quantities of otherwise inadmissible, and potentially prejudicial, information. At an extreme, parties might even introduce an expert precisely for the purpose of getting before the jury evidence that would otherwise

²² See generally Advisory Committee Note, FED. R. EVID. 703.

²³ See generally Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education*, 87 NW. L. REV. 1131 (1993).

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be prohibited.²⁴

In short, so long as experts may rely on inadmissible factual matters as the bases for their conclusion, there is an inevitable tension between jury education and adherence to the rest of the rules of evidence.²⁵ In practice, the dominant approach has been to permit disclosure of an expert's basis evidence subject to a balancing test.²⁶ Prior to the year 2000, many courts applied that Rule 403 balancing test so familiar to every student of evidence, and looked to whether the probative value of disclosure was "substantially outweighed by the danger of unfair prejudice,

²⁴ There has been significant scholarly discussion of this issue. *See, e.g.*, Ronald L. Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234 (1984); Ronald L. Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 MINN. L. REV. 859 (1992); Ronald L. Carlson, *Experts, Judges and Commentators, The Underlying Debate About an Expert's Underlying Data*, 4 MERCER L. REV. 481 (1996); Ronald L. Carlson, *Is Revised Expert Witness Rule 703 a Critical Modernization for the New Century*, 52 FLA. L. REV. 715 (2000); Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986); Joanne A. Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C. L. REV. 53 (1994); David L. Faigman, *Struggling to Stop the Flood of Unreliable Expert Testimony*, 76 MINN. L. REV. 877 (1992); Edward J. Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 MERCER L. REV. 447 (1996); L. Timothy Perrin, *Expert Witnesses Under Rule 703 and 803 (4) of the Federal Rules of Evidence: Separating the Wheat from the Chaff*, 72 IND. L. J. 939 (1997); Peter J. Rescorl, *Fed. R. Evid. 703, A Back Door Entrance for Hearsay and Other Inadmissible Evidence: A Time for Change*, 63 TEMP L. REV. 543 (1990); Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Reply to Professor Carlson*, 40 VAND. L. REV. 483 (1987); Paul R. Rice, *The Allure of the Illogic: A Coherent Solution for Rule 703 Requires More than Redefining "Facts or Data"*, 47 MERCER L. REV. 495 (1996); Charles J. Walsh & Beth S. Rose, *Increasing the Useful Information Provided by Experts in the Courtroom: A Comparison of Federal Rules of Evidence 703 and 803(18) in Illinois, Ohio, and New York*, 26 SETON HALL. L. REV. 183 (1995).

²⁵ For further discussion of this issue, *see* DAVID KAYE, DAVID BERNSTEIN, AND JENNIFER MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE* §3.7 (2004).

²⁶ *See generally id.*

confusion of the issues, or misleading the jury.”²⁷ In 2000, Federal Rule of Evidence 705 was amended to address concretely the issue of disclosure, and reversed the Rule 403 balancing test, making non-disclosure the default, unless the probative value of disclosure substantially outweighs the harm of non-disclosure.²⁸ A few states have followed the federal rule, but most have not amended their equivalent state rule, and at present disclosure practices vary significantly across jurisdictions.²⁹ Notwithstanding Rule 705 and the existence of rules of some kind on this point in many states, on-the-ground practices with respect to the extent of expert disclosures vary tremendously, even within jurisdictions, and are typically not very closely regulated by appellate courts.

As the cases concerning *Crawford* and expert evidence themselves reveal, however, there is no doubt that a great deal of expert basis evidence is regularly being disclosed to juries—and it is this disclosure that potentially raises the Confrontation Clause concern. When an expert details the statements made by an out-of-court declarant, the defendant does not have the chance to cross-examine the witness whose statements are relayed to the jury. To be sure, it is frequently the case that the hearsay basis for an expert’s testimony will not be testimonial under any reasonable definition of the term. When a doctor relies on other medical records made in the course of treatment, or an appraiser relies on comparable prior sales, or an expert in

²⁷ FED. R. EVID. 403. For cases articulating this standard, *see, e.g.*, *Guillory v. Dontar Indus.* 95 F. 3d 1320, 1331 (5th Cir. 1996); *Gong v. Hirsch*, 913 F. 2d 1269, 1273 (7th Cir. 1990).

²⁸ Federal Rule of Evidence 705 now reads, “Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the courts determine that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.” A few states have followed suit, but many have left their equivalent rules unchanged. *See Kaye et al*, *supra* note 23 at §3.8.2.

²⁹ To give an example, Pennsylvania and Rhode Island make disclosure of the basis of an expert opinion both admissible and mandatory, whereas Minnesota restricts disclosure to civil cases and even then only permits it when “the underlying data is particularly trustworthy.” *See Pa. R. Evid.*, 704; *R.E. R. Evid.* 703; and *Minn. R. Evid.* 703.

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gang structure relies on interviews conducted with former gang members over many years and not related to the particular case, no plausible understanding of “testimonial” would encompass these statements. They were not made in circumstances that would suggest that they were going to be used in a trial as a substitute for live testimony, nor were they spoken with the expectation that they would be used to prove some fact in court.

However, in other circumstances, a portion of an expert’s basis may well fit within the category of “testimonial.” While the variety of potential circumstances is great, two recurring categories of evidence that are implicated by *Crawford* are described briefly below: a testifying expert’s description of the findings of other forensic experts; and an expert’s disclosure of statements learned during the process of investigating the case.

Note that there may be a *Crawford* problem even when there is no problem with disclosure under Rules 703 and 705. In some cases, the matters upon which experts rely may be hearsay that is admissible under some other exception. Prior to *Crawford*, disclosure of this evidence would not have been problematic (unless the hearsay exception that applied was not firmly rooted, in which case a reliability analysis would have been necessary if the evidence was understood to have been introduced substantively for the truth of its contents). But *Crawford* changes this analysis: even if the basis evidence fits into some legitimate hearsay exception, while it does not fall into Rule 705’s limitations on disclosure (or any state equivalent), if the underlying evidence is testimonial, it may still be barred by *Crawford*. Moreover, even in those states that have heretofore permitted or even required disclosure of an expert’s basis on direct testimony, if the disclosure is testimonial, the Confrontation Clause must obviously trump.

1. Experts Reporting the Case-Specific Findings of Other Experts

On many occasions, the forensic expert who testifies in court is not the person who actually conducted the forensic tests in the case. One person might carry out a toxicological analysis, a

DNA test, or an autopsy, while an altogether different person stands before the jury to provide testimony, often another employee in the same laboratory. Sometimes the testifying witness is the original analysts' supervisor or successor, or it might just be the staff member who happened to be free to come to court that day, or perhaps the person already testifying in some other case that day and hence conveniently available to do double duty; or possibly it is whichever laboratory analyst is thought to be best at testifying before the jury. Typically, this testifying witness's conclusions derive primarily from looking over the laboratory results of the non-testifying expert. In such a circumstance, courts often permit the testifying witness to describe in detail the tests conducted by others, and frequently also permit the actual test reports themselves to be formally introduced into evidence and presented to the jury.

The potential *Crawford* issues are clear. If an expert testifies about tests she has personally conducted, there is obviously no Confrontation Clause problem: the expert is on the stand and available for cross-examination. But when an expert reports to the jury detail and substance of tests conducted by others, is she relaying constitutionally prohibited testimonial hearsay? In order to permit such testimony, a court would need to be able legitimately to claim that the evidence was either not hearsay or not testimonial. Otherwise, *Crawford* would bar such disclosures, unless either the expert who actually conducted the tests was also testifying, or the original expert was unavailable and the defendant had been afforded a prior opportunity to cross-examine.

As with certificates of analysis, a straight-faced reading of *Crawford* seems to make it difficult to avoid the conclusion that at least some of this expert basis evidence is testimonial. In the next Part, I will explore in some detail why it is not plausible to conclude that expert basis evidence of this sort is not hearsay.³⁰ And certainly these reports are produced in clear contemplation of future legal proceedings. Unlike certificates of analysis, which are truly intended to substitute for testimony, with

³⁰ See generally Part II.

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forensic science reports of these kinds it is frequently contemplated that someone's testimony will accompany the report.³¹ But if it is not the declarant herself who testifies, then the report is certainly operating as "*ex parte* in court testimony."

It is worth noting that, were *Crawford* construed to apply to these situations, most of the time it would be a logistical inconvenience for the prosecution but not an insurmountable problem. Much of the time, it would be feasible to introduce forensic science testimony through the particular forensic scientist who conducted the test. It might put pressure on laboratories to hire only those forensic scientists who had appealing courtroom demeanors, and it might frequently be inconvenient—imagine for example a number of small-scale drug trials happening the same day, for which it would be far easier to send one person to court rather than the four different people who had conducted the actual tests at issue.

Sometimes, however, compliance would be more than an inconvenience. When the original author of the report was genuinely unavailable, *Crawford's* dictates could pose a serious problem of proof. Any time a forensic scientist quit her job, moved to another state, or died, there would be a backlog of cases for which she had done the tests but that had not yet gone to trial—how would these tests now be introduced into evidence? Particularly in those areas where there is frequently a long lag time between forensic examination and prosecution—take murder cases, for example, in which many years might regularly separate the autopsy and arrest, much less the trial itself—*Crawford's* requirements could create severe difficulties if no work-around was available.

³¹ Note, however, that in some jurisdictions, forensic science reports are regularly introduced without accompanying testimony, accompanied by some certification, the details of which depend on the state. See Metzger, *supra* note 13 at 486-88 and accompanying notes.

2. *Expert Disclosures of Non-Expert Basis Evidence*

Crawford concerns can also arise in those cases in which experts testifying on behalf of the prosecution have interviewed subjects in the course of gathering information and preparing their testimony for the particular case. Imagine, for example, that a forensic psychologist interviews friends and relatives of the defendant about her behavior around the time of the crime in order to assist in her assessment of the defendant's sanity. Or, in a criminal case arising from a vehicular accident, an accident reconstruction expert might base his opinion partly on affidavits made by witnesses to the authorities, or might go out herself to conduct interviews with onlookers. A gang expert might examine statements made by suspects under interrogation, or might conduct interviews with former gang members to learn more about operational details of the gang to which the defendant is thought to belong.

Myriad additional examples could be generated; the point is that when an expert retained by the prosecution gathers statements from people who know that she is an expert retained by the prosecution, or uses statements gathered by the police, these statements may quite possibly fall within the boundaries of the testimonial. If so, then any expert disclosure of the substance of these statements might also run afoul of *Crawford*. Note, however, that whether basis evidence of this sort is testimonial is a closer question than the earlier two categories, because it is typically less formalized, and depending on the circumstances, it might, from the declarant's perspective, not be as obviously made in anticipation of litigation or understood to be a potential substitute for testimony. If, as the definition of testimonial is further honed, the "formalized" nature of the statements is thought to be central, then some utterances of these sorts might be outside the definition's boundaries. By contrast, if the key question is whether either a reasonable listener or declarant would have expected the information to be used prosecutorially, then these kinds of expert basis evidence would often be testimonial.

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How much of a practical impediment would it be to bar these kinds of disclosure by experts? In some circumstances, the underlying evidence upon which the expert relies might be independently admissible. Obviously if the same individuals upon whom the expert relies are also testifying and hence available for cross-examination, this cures any potential *Crawford* problem. In other instances, experts might be permitted to rely upon such evidence but not disclose it—an expert might explain to the jury that her conclusions about the gang structure were based in part on transcripts of an interrogation by the police with other gang members, without describing the details of what these interrogations revealed. This, to be sure, gives the jury less information with which to substantively evaluate the expert's conclusion; it pushes the jury further toward the deference pole of the deference/education axis. It also raises the intriguing question of whether the logic of *Crawford* places any limitations on the *reliance* upon testimonial evidence, or simply limits its in-court disclosure, but serious discussion of this question is beyond the scope of this Article.

II. AVOIDING REALITY: COURTS' EFFORTS TO CATEGORIZE
EXPERT BASIS EVIDENCE AND CERTIFICATES OF ANALYSIS AS
NON-TESTIMONIAL

Prior to *Crawford*, most cases downplayed any Confrontation Clause concerns wrought by expert reliance upon or disclosure of hearsay, or by the use of certificates of analysis.³² Some of the arguments typically proffered by courts included the following: (1) when the evidence is admitted for the limited purpose of helping the jury evaluate the expert's basis, it is not offered for the truth of its contents and hence, because it is not hearsay, the Confrontation Clause is not implicated; (2) frequently, the facts disclosed by the expert are such that the

³² A few courts did find such testimony to violate the Sixth Amendment. *See, e.g.*, *State v. Towne*, 453 A.2d 1133 (Vt. 1982) (finding that expert's testimony that another non-testifying doctor agreed with him, coupled with prosecutor's emphasis of this point, amounted to a violation of defendant's confrontation rights).

assistance to the defendant from confrontation would have been limited; (3) the availability of a testifying expert for cross-examination is an adequate substitute for cross-examining the hearsay declarant; and (4) because the basis for allowing the expert's reliance under Rule 703 is reliability, the disclosed information should also be deemed reliable enough to eliminate Confrontation Clause concerns.³³ Some courts even tried to argue that that reliance on factual matters by an expert under Rule 703 was a firmly rooted hearsay exception.³⁴ Given that Rule 703 is not explicitly framed as a hearsay exception at all, this argument was especially persuasive.³⁵

In the two years since *Crawford*, many state and federal courts have confronted cases involving expert reliance upon and disclosure of matters that are at least arguably testimonial, as well as numerous cases involving the continued use, post-*Crawford*, of certificates of analysis. A handful of courts have concluded, sometimes reluctantly, that *Crawford* bars the use or disclosure of such evidence. Most of the time, however, courts have held that the Confrontation Clause does not bar either disclosure by experts or the use of certificates of analysis.

³³ See, e.g., *Barrett v. Acevedo*, 169 F. 3d 1155 (8th Cir. 1999) (suggesting that disclosure of basis was for a purpose other than the truth of its contents and hence neither hearsay nor a violation of the Confrontation Clause); *Reardon v. Manson*, 806 F. 2d 39 (2d Cir. 1986) (finding sufficient indicia of reliability to justify use and disclosure of hearsay by expert and emphasizing defendant's opportunity to cross-examine expert).

³⁴ See, e.g., *United States v. Brown*, 299 F.3d 1252 (11th Cir. 2002) (finding expert's reliance on hearsay to be "firmly rooted" for confrontation clause purposes); *State v. Hutto*, 481 S.E.2d 432 (S.C. 1997) (same).

³⁵ As *State v. Rogovich*, 932 P.2d 794 (Ariz. 1997), correctly noted, "[b]ecause Rule 703 is not a hearsay exception . . . it is certainly not firmly rooted." *Id.* at 798. Rule 803, the federal rule against hearsay, makes hearsay inadmissible "except as provided by these rules or other rules prescribed by the Supreme Court pursuant to statutory authority." One could argue that Rule 703 and Rule 705, which, prior to their amendment in 2000, implicitly permitted disclosure at least some of the time, were "other rules" under Rule 803, and thus, they operated as a legitimate hearsay exception. This argument is strained but not wholly preposterous; however, even if these rules created an implicit hearsay exception, it would be difficult to claim with a straight face that it was a firmly-rooted one.

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Perhaps surprisingly, many courts have continued to make precisely the same arguments that they made prior to *Crawford*.

A close look at several of the arguments mustered by the courts who deem such evidence non-testimonial or otherwise find *Crawford* inapplicable shows them to be generally unpersuasive, sometimes even disingenuous. Even if *reliance* on testimonial evidence by experts continues to be permissible under *Crawford*, it is difficult to justify *disclosure* of this testimonial basis to the factfinder. In this section, I will describe and evaluate the stratagems by which state and federal courts are attempting to limit *Crawford*'s applicability to forms of expert evidence. I will give particular attention to the argument that an expert's factual basis disclosures are not hearsay at all, for this claim is an especially tempting, though in my view unjustifiable, way for courts to avoid creating a *Crawford* problem.

A. The Evidence is Introduced for a Non-Hearsay Purpose

Prior to *Crawford*, many courts permitted experts to describe the substance of the sources upon which they relied, arguing that not only were there no Confrontation Clause issues at stake in such disclosures, but that these disclosures were actually not even hearsay at all. This issue commonly arose when courts had to decide whether to permit experts to disclose matters upon which they relied, but that were not independently admissible under some hearsay exception. As I described in Part I, Rule 703 of the Federal Rules of Evidence explicitly permits experts to rely upon inadmissible evidence "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," and most state evidence rules contain similar provisions.³⁶ When an expert relies on inadmissible evidence that fits the confines of the rule, can she tell the jury about the basis for her conclusions? Can she disclose this otherwise inadmissible evidence to them?

Certainly, prior to *Crawford* and the revisions to Rule 705 that shifted the balancing testing federal court to favor non-

³⁶ FED. R. EVID. 703.

disclosure, courts were regularly in the habit of permitting experts to disclose the factual foundation for their conclusions. When such evidence was admitted, it led to a related question: what, precisely, was the evidentiary status of this disclosed foundation? Once disclosed, was it formally “in evidence” for all purposes, including to prove the truth of its contents? Or, was it available only for some more limited purpose, and if so, what might this purpose be? One approach taken by courts—and which some courts are continuing to employ, even after *Crawford*—was to suggest that the disclosure of the expert’s basis was actually permitted not for the truth of its contents, but only for a more limited purpose: to help the jury assess the expert’s opinions and conclusions.

Rules of limited admissibility are commonplace in evidence law. They inevitably invite questions about whether they actually work—whether it is plausible to believe factfinders capable of the mental gymnastics necessary to consider a piece of proffered information for one purpose while wiping it clear out of their minds when ruminating upon some other question for which common sense might deem the item of evidence relevant. There are many places where the Rules of Evidence ask juries to cut distinctions finer than ordinary—or for that matter, perhaps even extraordinary—minds are capable: for example, when evidence of a testifying defendant’s prior convictions are ostensibly admitted to shed light on her credibility, but not her general character or her propensity to commit crime.³⁷ In general, courts operate as if limited admissibility does work, even in those cases when reasonable minds might doubt that it actually can, though occasionally the fiction of limited admissibility seems too blatantly fictional to tolerate.³⁸ But when it came to figuring out how to treat basis evidence disclosed by an expert witness, courts had both a doctrinal and practical need to find a way to see the evidence as admitted only for a limited purpose, rather

³⁷ See, e.g., FED. R. EVID. 609.

³⁸ See, e.g., *Bruton v. United States*, 391 U.S. 123 (1968) (finding that an out-of-court confession by a co-defendant accomplice, implicating the defendant, is barred by the Confrontation Clause unless the accomplice testifies and is available for cross-examination at trial).

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than generally admitted for the truth of its contents.

Why so? First, the practical difficulty: the obvious danger with permitting disclosure by experts of their basis evidence is that attorneys may attempt to “funnel” otherwise inadmissible evidence in through experts; to get before the jury materials that otherwise would be excluded. While subjecting disclosure to some kind of balancing test might reduce this danger, another protection, albeit a small one, might be offered by refusing to treat these disclosures as substantive evidence of the truth of their contents. This would, for example, prevent an attorney from relying on a fact disclosed by an expert but otherwise not in evidence in her closing argument. Nor could such a disclosure be considered to establish the legal sufficiency of the evidence for any element of the crime charged. Although whether these limitations offered any substantial protection against expert funneling might be doubtful, at least at the margins they encouraged parties to introduce what evidence they could through other channels rather than simply having the expert disclose it as part of her factual basis.

Moreover, prior to *Crawford*, this “not for the truth of its contents” stratagem offered the added benefit of making the Confrontation Clause issue easy. Doctrinally, if expert disclosures of basis evidence were treated as substantive evidence offered to prove the truth of their contents, then they were, functionally, a form of hearsay that fit no articulated exception. As a matter of statutory interpretation, clearly this would have suggested a lack of artful drafting: if they were an admissible form of hearsay, why was there no corresponding hearsay exception?³⁹ A more serious problem, however, would be that given that there was no explicit hearsay exception, these disclosures could not be seen to fit a firmly rooted hearsay exception, and thus, in criminal cases when the disclosures were

³⁹ Some have argued that there should be an explicit hearsay exception. See, e.g., Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Reply to Professor Carlson*, *supra* note 24; Paul R. Rice, *The Allure of the Illogic: A Coherent Solution for Rule 703 Requires More than Redefining “Facts or Data”*, *supra* note 24 (suggesting possibility of a new hearsay exception for expert basis materials).

offered by experts testifying for the prosecution, the Confrontation Clause jurisprudence of the time—requiring “particularized guarantees of trustworthiness”—would have been implicated.⁴⁰ Making such a determination would have at a minimum added a layer of complexity to the decision whether to permit disclosure of the basis evidence, and in many cases, it might not have been plausible to argue that there were *particularized* guarantees of reliability, as opposed to more structural indicators merely suggesting that the category of evidence is typically reliable.

Recall that the very basis for permitting expert reliance on inadmissible evidence under Rule 703 is the assumption that qualified experts themselves can adequately determine whether facts within their purview are worthy of reliance, whether or not they conform to the precise dictates of the rules of evidence.⁴¹ Indeed, in many circumstances, it may be every bit as reasonable to think that an expert’s basis evidence is as reliable as evidence that fits, for example, the “excited utterance” exception or evidence admitted under Rule 803(3) and the *Hillmon* doctrine regarding someone’s future intent (both of which courts have deemed “firmly rooted”).⁴² Recall further that prior to *Crawford*, the protections of the Confrontation Clause were not, to say the least, terribly robust.

Moreover, the jurisprudence that followed *Ohio v. Roberts* was filled with jurisprudential moves that could only be understood as legal fictions. For example, the Court declared that all firmly rooted hearsay exceptions met the necessary reliability standard *ipse dixit*; that any firmly rooted hearsay exception was sufficiently reliable was, in essence, an

⁴⁰ Occasionally courts did try to suggest that basic evidence disclosed by experts fell into a firmly rooted hearsay exception—a rather incredible claim, considering the nonexistence of any formal hearsay exception on the matter.

⁴¹ FED. R. EVID. 703.

⁴² *See, e.g.*, *Hayes v. York*, 311 F.3d 321, 324 (4th Cir. 2002) (finding North Carolina’s state of mind exception to be firmly rooted for Confrontation Clause purposes, relying in part on the long history of the *Hillmon* doctrine).

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irrebutable presumption, taken as true as a matter of law.⁴³ The courts were willing to see nearly all the main hearsay exceptions (except for the residual exception⁴⁴ and the Rule 804 exception for statements against interest⁴⁵) as firmly rooted—and even when the specific contours of a hearsay exception were tinkered with via judicial opinion or by revision to the Rule, courts still found these recently modified versions of the exceptions to remain firmly rooted!⁴⁶ Considering this approach to the Confrontation Clause in aggregate, for courts to be forced into a detailed Confrontation Clause analysis in order to permit disclosure by an expert would have seemed at odds with the generally meager protections it appeared to offer criminal defendants against hearsay. It would have meant that the protection turned out to be especially robust in a place where the arguments for it were, if not weakest, then certainly no stronger than in many other settings.

If only there were some way to see disclosures by experts in terms that would not implicate the Confrontation Clause, this peculiar result could be avoided. The courts invented such a method: if the disclosure of basis evidence by experts was not hearsay at all, as a corollary, it was by definition outside of the Confrontation Clause's purview.

This commonly made argument went like this: when experts tell the jury about the matters upon which they relied, they are not disclosing this information in order for the jury to make a decision about its truth. Rather, these disclosures happen for an (allegedly) separate purpose: to help the jury evaluate the credibility of an expert. The jury will better be able to determine if the expert has adequate grounds for her conclusion, and whether she warrants being believed, by hearing about the

⁴³ As *Ohio v. Roberts* put it, it could be “inferred without more.” *Roberts*, 448 U.S., at 66.

⁴⁴ See generally *Idaho v. Wright*, 497 U.S. 805, 817 (1990).

⁴⁵ *Lilly v. Virginia*, 527 U.S. 116, 133-34 (1999).

⁴⁶ See, e.g., *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (rejecting the idea that the court's modification of how co-conspirator statements could be established to the judge had any effect on whether the exception was firmly rooted).

expert's sources—not only the *categories* of information upon which she relied, but the *substance*. Therefore, when this substance is disclosed, it is introduced for the ostensibly non-hearsay purpose of aiding the factfinder in her evaluation of the expert testimony. Because the information is not being introduced for the truth of its contents, it is not actually hearsay at all, and any potential Confrontation Clause problem disappears into thin air.

The problem with this argument is that notwithstanding its frequent invocation by courts, it makes almost no sense. To be sure, the jury might have better grounds for evaluating the expert's testimony if it hears about the data upon which the expert relied for her conclusion. But part of a rational evaluation of the expert will thus entail an evaluation of her sources—which will inevitably involve a judgment about the likelihood that the sources themselves are valid and worthy of reliance. In other words, to decide how much to credit the expert's sources, the jury should, logically, first assess the odds that they are reliable. And what is this but a judgment about the likely truth of their contents? Using the information for the permissible purpose of evaluating the expert thus necessarily requires a preliminary determination about the information's truth. The permitted purpose is therefore neither separate nor separable from an evaluation of the truth of the statement's contents.

To say that evidence offered for the purpose of helping the jury to assess the expert's basis is not being introduced for the truth of its contents rests on an inferential error. To make rational use of this evidence, a factfinder must first assess the likelihood that it is worth relying upon. Having done so, she may then build upon this first inference in order to assess the likely reliability of the expert's conclusions. The second inference is what is permitted by the allegedly non-hearsay purpose for the evidence. But this second judgment relies upon the first, and the first is inherently a judgment about the likely truth of the underlying basis. The fact that this underlying judgment about the truth is then subsequently used in making another judgment does not mean that the evidence is being used for a non-hearsay purpose.

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To see this point more clearly, consider an example from outside the expert context. Suppose a witness took the stand and testified, “John was extremely drunk the night of April 13th.” Imagine that the foundation for this opinion was not that the witness had seen John slurring his words or imbibing large quantities of alcohol, but rather, that a friend, whom the witness had seen that night had reported to him that earlier that evening, John had consumed seven drinks in the span of two hours. This friend’s statement, if relayed to the court by the witness, would obviously be hearsay. The fact that it informed the witness’ judgment about John’s drunkenness would not somehow make it non-hearsay, or suggest that it was being introduced for a purpose other than the truth of its contents, assuming that the purpose of the witness’ testimony was to assert the conclusion that John was drunk.⁴⁷ As a logical matter, the jury can only believe the witness’ conclusion about John’s drunkenness if it also credits what the witness’ friend told him. This is quite clearly a judgment about the truth of the matter asserted. By contrast, if the witness had behaved in a particular way toward John that evening because he believed him to be drunk, and that behavior by the witness was itself relevant to the case, then the statement could be introduced for the non-hearsay purpose of the effect on the listener—it would be introduced not to establish that John was drunk, but rather to inform our understanding of why the witness behaved as he did. The mere fact that the friend had said this to the witness would then be relevant for understanding the witness’s actions—whether or not the words spoken by the friend were accurate or true. But there is no parallel to this “effect on listener” argument that holds up in the context of expert basis evidence. The basis evidence is not being introduced to explain the expert’s actions, but rather to explain her conclusions. And assessing the conclusions is a judgment about reliability, a determination about truth.

When Confrontation Clause jurisprudence was rather

⁴⁷ Of course, if this was the witness’ sole basis for his opinion of drunkenness, the opposing party could also object for lack of personal knowledge. In the expert context, there is no requirement under the federal rules of personal knowledge of underlying facts.

toothless, this claim that expert basis evidence was being introduced for a purpose apart from the truth of its contents could have been seen as fictional but harmless, just another fiction of a piece with the rest of the striking fictions that operated within the doctrine.⁴⁸ Given how little hearsay was thought to be problematic under *Ohio v. Roberts*, an approach that resulted in treating expert disclosures on par with most other forms of hearsay, was, at least arguably, a practical compromise even if it strained logic and common sense.⁴⁹

Under *Crawford*, however, a reliability determination is neither a necessary nor even a permissible inquiry for determining whether evidence meets the Confrontation Clause. Therefore, whatever confidence a court might have about the likely reliability of an expert's basis evidence is, quite simply, beside the point. Moreover, the stakes in making the hearsay/non-hearsay determination have increased. Prior to *Crawford*, if a court deemed an expert's disclosure or basis evidence to be hearsay, that would have triggered analysis under both the hearsay rule and under the Confrontation Clause. Frequently, the disclosed evidence would have met the requirements of one of the exceptions to the hearsay rule—for example, forensic science reports could be deemed business records (so long as the court did not think that the fact that they were produced by litigation did not prevent them from falling within the exception's confines); statements made to the police by excited onlookers to an accident, and later used by an accident reconstructionist, might well be excited utterances; statements made by family members to a psychiatrist might fall into the exception for statements made for purposes of medical diagnoses or treatment. These are, of course, just examples—the point is that whenever the basis evidence fit into a firmly rooted hearsay exception, admitting the evidence as permitted hearsay posed no Confrontation Clause issue. Moreover, under the Rule

⁴⁸ Certainly some scholars did not see it as harmless. *See*, for example, the several articles by Ronald Carlson, *supra* note 24.

⁴⁹ To be sure, some judges resisted treating expert disclosures in this manner even before *Crawford*. *See, e.g.*, the strongly worded dissent in *United States v. Corey*, 207 F.3d 84, 105 (1st Cir. 2000).

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803 exceptions, whether or not the hearsay declarant would have been available to testify was irrelevant.⁵⁰

Often, then, permitting the evidence in under Rule 703 was simply a useful shortcut for evidence that could have been admitted in other ways. Indeed, the Advisory Committee Note to Rule 703 explicitly explains Rule 703 in these terms:

Thus a physician in his own practice bases his diagnoses on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records and X rays. Most of them are admissible in evidence, but only with the expenditures of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.⁵¹

Whenever evidence could have been introduced under a firmly-rooted hearsay exception, admitting it instead under Rule 703 to explain the expert's conclusions might have operated as a shortcut that reduced the need for authentication, but it was nothing more. (Much of the time, indeed, both courts and attorneys may well have seen an expert's disclosures as explicitly or implicitly coming in under a delineated hearsay exception, and reserved the argument that the evidence was not being introduced for the truth of its contents for those circumstances when either the evidence clearly required additional authentication to meet an exception, or when no exception applied.)

Even when the evidence did not fall into a firmly rooted hearsay exception, under the earlier approach to the

⁵⁰ The use of the exceptions delineated under FED. R. EVID. 803 does not require any showing of unavailability, unlike those delineated under FED. R. EVID. 804. As a matter of evidence law there is, therefore, no preference for non-hearsay as opposed to hearsay with respect to materials permitted under the 803 exceptions.

⁵¹ Advisory Committee's Note, FED. R. EVID. 703.

Confrontation Clause it could well still have been admissible. The question would then have been whether it could legitimately have been introduced under the residual exception, Rule 807, or the equivalent state provision. Rule 807 requires evidence to have “circumstantial guarantees of trustworthiness” equivalent to those in place for the delineated hearsay exceptions. It could certainly be argued that the reasonable reliance by a qualified expert—especially, post-*Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*,⁵² coupled with the court’s determination of adequate reliability to warrant admissibility of the conclusions—would meet Rule 807’s requirements. At least as a technical matter, Rule 807’s requirement of “circumstantial guarantees of trustworthiness” equivalent to those found in the delineated hearsay exceptions might not be precisely the same as the “particularized guarantees of trustworthiness” required under *Roberts*, but even if the contours of Confrontation Clause analysis were slightly different than those surrounding the use of the residual exception, the foundational questions motivating both inquiries were the same: necessity and reliability were the touchstones for both. Thus, meeting the one standard would usually, as a practical matter, mean meeting the other as well. Indeed, it was precisely the frequent conflation of the hearsay standard with the Confrontation Clause standard, coupled with an anxiety that a judicial determination of reliability was substituting for the constitutional guarantee of confrontation, that led commentators to argue—and the Court in *Crawford* to agree—that Confrontation Clause jurisprudence needed an overhaul.

⁵² 509 U.S. 579 (1993). *Daubert*, the first of the Supreme Court’s trilogy on expert evidence, made clear that courts have a gatekeeping responsibility under the Federal Rules, in order to assure that expert evidence proffered at trial is sufficiently valid and reliable. *Id.* at 589. *Daubert* rejected the notion that the older *Frye* test, which focused on whether the expert evidence was “generally accepted” in the relevant expert community was incorporated into the Federal Rules, and instead, building upon a general gloss of the words “scientific . . . knowledge,” suggested a number of criteria (including “general acceptance” by which the courts could evaluate expert evidence). *Id.* at 584-87.

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Thus, pre-*Crawford*, even if courts had abandoned the abracadabra of pronouncing some disclosures by experts to be admissible as non-hearsay, most basis evidence disclosed by experts would have been able to be introduced in some way, though the degree of necessary rigmarole and judicial scrutiny of the reliability of the statements would surely have increased. Permitting experts to disclose matters to the jury for the ostensibly non-hearsay purpose of helping them to evaluate the expert's reasoning probably did not lead with great frequency to the disclosure of matters that could not have been introduced through some other logic as well. And even when it did, in a judicial environment in which the theoretical foundation of the Confrontation Clause was reliability (coupled to some extent with necessity), admitting purportedly reliable basis evidence was, as a conceptual matter, relatively unproblematic, whatever the awkward doctrinal logic through which it came in.

Along comes *Crawford*. Because *Crawford* no longer uses reliability as a touchstone, the implicit justification for an approach that was never entirely coherent falls apart. Before *Crawford*, when courts indulged in the fiction that expert disclosures were introduced for a purpose distinct from the truth of the matter asserted, they were admitting evidence that often would have been admissible on some other grounds. Even if it would not have been able to fit another exception, assuming that the reliance by the expert was in fact reasonable, the evidence probably had as much of a structural guarantee of reliability as plenty of admissible hearsay.⁵³ Given that reliability was the

⁵³ Note that I am by no means suggesting that the materials relied upon by experts are generally reliable. I mean to express no view on this point. But I see no reason to believe that statements upon which qualified experts reasonably rely are any less likely to be reliable, as a general matter, than, say, excited utterances, or statements made for the purposes of medical diagnosis. To be sure, within a system of party-appointed adversarial experts, we may have good reason to be worried about whether expert reliance takes place in good faith, and there are no doubt many occasions on which highly compensated experts are prepared to rely on materials that are not, in fact, worthy of reliance. Still, the justification for Rule 703 is quite explicitly the likely reliability of the evidence, a justification structurally analogous to that supporting many of the Rule 803 hearsay exceptions. The empirical

animating concern of the doctrine, the “not for the truth of the contents” argument was a fiction, yes, but a fiction consistent with the underlying values animating how the Confrontation Clause was understood.

Quite clearly, *Crawford* changes this analysis. When the focus on reliability is replaced by an inquiry into whether a statement is “testimonial,” the already doubtful justifications for the “not for the truth of its contents” argument for admitting experts’ basis evidence fall away entirely. The axes for analysis have shifted from reliability and necessity to an altogether different concern. Moreover, under *Crawford*, that some of this hearsay disclosed by an expert might also fit into a delineated and firmly rooted hearsay exception becomes irrelevant: no longer does whether an exception is firmly rooted make any difference to the constitutionality of hearsay introduced against a criminal defendant. If a basis statement upon which an expert relies is testimonial, its use is unconstitutional whether or not it also fits within a hearsay exception, and whether or not it is reliable. Given this, to pretend that expert basis statements are introduced for a purpose other than the truth of their contents is not simply splitting hairs too finely or engaging in an extreme form of formalism. It is, rather, an effort to make an end run around a constitutional prohibition by sleight of hand.

Unfortunately, even after *Crawford*, courts in a number of jurisdictions are continuing to claim that expert’s basis evidence is introduced for a purpose other than the truth of its contents, in order to avoid confronting the potential *Crawford* problem with such testimony. The very first court to face the issue of expert basis evidence post-*Crawford* intimated that it could be introduced for the ostensibly non-hearsay purpose of explaining the expert’s testimony.⁵⁴ A number of other courts have gone on

foundations of this assumption are open to question in both settings, but this gets well beyond the scope of my argument here.

⁵⁴ *United States v. Stone*, 222 F.R.D. 334 (E.D. Tenn. 2004). To be fair, in this case, it is not clear whether the court meant to permit only reliance (and disclosure at the opposing party’s discretion on cross-examination), or was permitting disclosure on direct testimony as well (presumably subject to the balancing test of Rule 705). In *Stone*, a federal

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to claim explicitly that when an expert discloses the basis for her opinions, no *Crawford* issue is raised, because she is merely introducing it to help the jury evaluate the expert's testimony.⁵⁵

district court admitted the expert testimony of an IRS agent in a criminal tax fraud case even though this testimony was based partly on statements made by company employees to a criminal tax investigator. The district court found that it was not clear from the record whether the defendant had an opportunity at the time these statements were made to cross-examine the declarants, nor was there evidence as to whether the declarants were presently unavailable to testify. Nonetheless, the court found no Confrontation Clause problem:

Even if the particular Benton Manufacturing employees are not "unavailable" and even if the statements they gave to IRS criminal investigator Bohannon during the interviews Ms. Cantrel attended are "testimonial" as contemplated by the Court in *Crawford*, the statements may nevertheless be used by Ms. Cantrel in forming her expert opinions because they would not be used to establish the truth of the matters the employees asserted. Rather, if defense counsel were to elicit the statements from Ms. Cantrel on cross-examination, the purpose of the out-of-court statements would not be for hearsay purposes but rather would be for evaluating the merit of the opinions Ms. Cantrel offered on direct examination. Because *Crawford* explicitly maintained the Confrontation Clause's inapplicability to statements used at trial for purposes other than establishing the truth of the matter asserted, Ms. Cantrel could rely on the employees' statements in forming her opinions.

On the one hand, *Stone* refers to eliciting the information on cross-examination: if this is truly all the court means to permit, there is nothing problematic about this. Clearly the defense can if it chooses inquire into the basis for the prosecution's experts' conclusions on cross-examination. On the other hand, the logic of the court's reasoning—that disclosing the statements could be for the purpose of assessing the merits of the opinions, and this is a purpose separate from the truth of the statements' contents—would seem to apply equally to disclosure on direct examination, and hence, would intimate that such disclosure was not prohibited by *Crawford*. Moreover, the court seems to conflate expert use and expert disclosure. Though there may be an argument that *Crawford* should prevent not simply disclosure but expert reliance on testimonial evidence, this is surely a relatively separate question from, and a far closer question than, that of expert disclosure of testimonial evidence under the guise of claiming that it is not for the truth of its contents.

⁵⁵ See, e.g., *People v. Thomas*, 130 Cal. App. 4th 1202 (2005); *State v.*

In some of these cases, the “not for the truth of its contents” argument borders on the truly preposterous. Take for example, a series of cases in North Carolina about the admissibility of forensic science reports conducted by one expert, but introduced into evidence by someone other than the person who ran the tests and wrote the report. One such case was *State v. Jones*, in which a forensic chemist testified in court that a substance found in the defendant’s possession was cocaine. The basis for her conclusion was a laboratory analysis conducted by another agent who did not testify. The testifying witness detailed the testing methodology used by the nontestifying expert and explained that she reasonably relied on this test in concluding that the substance was cocaine. The laboratory report conducted by the other agent was also admitted by the trial court into evidence. Over the defendant’s objection that this violated the Confrontation Clause, the state appellate court in an unpublished opinion insisted that *Crawford* did not apply because the laboratory analysis was only “admitted to demonstrate the basis of the expert opinion . . . [and] not admitted for the purpose of proving the truth of the matter asserted.”⁵⁶

This is surely nonsense. The expert’s in-court testimony was, in essence, “this laboratory report written by someone else, which reports on the tests that were conducted, reliably informs me that the substance is cocaine, and therefore I can reliably inform you that it is cocaine.” In fact, the report and the accompanying notes were the testifying witness’ only basis for judging the substance to be cocaine. The expert’s judgment that the substance was cocaine could be accurate *if and only if* the report by the other nontestifying agent determining the substance to be cocaine was itself accurate. It cannot be seriously doubted that the report was coming in *both* to demonstrate the basis of the expert opinion *and* for the truth of its contents—if it were

Jones, 603 S.E.2d 168, 2004 WL 1964890 (N.C. Ct. App. 2004) (unpublished opinion). State v. Delaney, 613 S.E.2d 699 (N.C. Ct. App. 2005); State v. Lyles, 615 S.E.2d 890 (N.C. Ct. App. 2005); State v. Bunn, 619 S.E.2d 918 (N.C. Ct. App. 2005).

⁵⁶ State v. Jones, 603 S.E.2d 168, 2004 WL 1964890 (N.C. Ct. App. 2004) (unpublished opinion).

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not true, the expert in fact had no basis at all for her conclusion. The expert was not even aggregating multiple disparate sources of evidence, or making novel inferences from the basis evidence—instead, he was basically parroting the conclusions reached in the report itself. One can sympathize with a court's desire to permit the disclosure of basis evidence that is probably reliable, such as a routine analysis of drug composition. But to pretend that it is not being introduced for the truth of its contents simply strains all credibility.

New York's highest court has been the first court explicitly to reject the "not for the truth of its contents" argument with respect to expert basis evidence post-*Crawford*. In *People v. Goldstein*,⁵⁷ the Court stated:

The claim that the [statements made to Hegarty, the expert] were not hearsay is based on the theory that they were not offered to prove the truth of what the interviewees said. . . . Here, according to the People, the interviewees' statements were not evidence in themselves, but were admitted only to help the jury in evaluating Hegarty's opinion, and thus were not offered to establish their truth. We find the distinction the People make unconvincing. We do not see how the jury could use the statements of the interviewees to evaluate Hegarty's opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution's goal was to buttress Hegarty's opinion, the prosecution obviously wanted and expected the jury to take the statements as true. Hegarty herself said her purpose in obtaining the statements was "to get to the truth." The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context.⁵⁸

In a relatively unusual move, the *Goldstein* court considered this issue *sua sponte*. But its answer was spot on: courts should

⁵⁷ 6 N.Y.3d 119 (2005).

⁵⁸ *Id.* at 127-28.

not be able to avoid analysis of the *Crawford* issues present when prosecution experts disclose the substance of their sources on direct examination, through the fictional claim that such statements are offered for a purpose other than their truth.

I have addressed this argument in particular detail because it reflects such a dramatic temptation for courts facing the issue of expert basis evidence post-*Crawford*. While it would not, of course, provide a way around *Crawford* for certificates of analysis, it would essentially eliminate all expert basis issues from *Crawford*'s purview. If expert basis evidence is disclosed for a non-hearsay purpose, then any potential *Crawford* problem with its disclosure entirely disappears. And because this way of framing expert disclosure has been a longstanding legal fiction, it beckons seductively as a potential solution to these *Crawford* issues. But it is simply not possible for a jury to make use of an expert report that is disclosed as a source by another expert, or even of statements upon which the expert has relied, without first judging their likely accuracy. Unless a court can actually detail a chain of inferences that makes the disclosure useful for a *genuinely* non-hearsay purpose (i.e., a purpose that does *not* require a preliminary assessment of the likely accuracy of the source) then the seductive charms of this poorly reasoned argument should be resisted.

In some post-*Crawford* cases, courts have made a subtler and more plausible argument—that *Crawford* does not prohibit experts from referring in fairly general terms to the *kinds* of sources on which they relied.⁵⁹ When only the general nature of

⁵⁹ See, e.g., *In re Julio D.*, No. G033550, 2004 Cal. App. LEXIS 10962, 2004 WL 2786375 (Cal. Ct. App. Dec. 6, 2004) (unpublished opinion reasoning that when information was “presented in generalized form as the basis for the experts’ opinions, *Crawford* was not violated”); *People v. Ortiz*, No. D042552, 2005 Cal App. LEXIS 3255, 2005 WL 851716, at *8 (Cal. Ct. App. Apr. 12, 2005) (unpublished opinion finding that an expert’s mention of and reliance on field investigation reports and other hearsay matters did not violate *Crawford* “because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases an opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert’s opinion.” It is unclear from the opinion whether these field reports were simply

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the sources is described, the argument that the information is introduced strictly to help the factfinder assess the expert's testimony is stronger, especially when the expert has relied on an array of different kinds of sources, only some of which are even arguably testimonial. This argument, however, cannot justify a detailed recital of the substance of the testimonial evidence on which the expert has relied.⁶⁰

To be sure, some litigants might argue that if describing the general kinds of evidence is permissible for a non-hearsay purpose, then describing their contents ought also to be, for whatever use the former might have for helping the jury understand the expert is equivalently provided by the latter as well. In other words, if telling the jury that an expert's opinion was based on five particular sources without detailing their actual contents might help the jury assess whether these sources are *of a kind* likely to provide useful information for the expert's conclusions, the jury could use a substantive description of the five sources for this same purpose, without actually relying on a judgment about the truth of the contents. But this argument should fail. It is, in fact, structurally analogous to the argument

mentioned or whether their contents were described in detail; only the former could be justified as a non-hearsay use.).

⁶⁰ When the expert opinion consists of nothing beyond agreement with the conclusions of another expert's report, this distinction between the nature of the expert's sources and their content dissolves. If, in *State v. Jones*, No. COA03-976, 2004 WL 1964890 (N.C. Ct. App. Sept. 7, 2004) (unpublished opinion), for example, the court had permitted the expert to testify that the substance was cocaine and the basis of the expert's conclusion was a careful examination of another expert's toxicological report, that would, in essence, be disclosing the contents of this other report even if the report itself were not admitted. *See also* *State v. Delaney*, 613 S.E.2d 699 (N.C. Ct. App. 2005) (permitting one expert to testify that he reviewed the methodology used by another in testing drugs, and relied on the colleague's analysis to reach his judgment that the substances in question were marijuana and opium). In cases like these, distinguishing between category and content may be a distinction without a difference. However, in those many cases when an expert's judgment derives from multiple testimonial inputs, permitting the expert to delineate the categories without disclosing the contents may be a sensible method for respecting Confrontation Clause values while simultaneously permitting expert reliance on inadmissible materials when reasonable.

the government attempted to make in *Old Chief v. United States*⁶¹: that because the government had a need to prove that the defendant had committed a prior felony as an element of a “felon in possession” charge in the present case, it ought also to be able to prove the name of the felony in question notwithstanding the defendant’s offer to stipulate the existence of his previous conviction.

The Court in *Old Chief* appropriately rejected this argument, essentially acknowledging that while parties ought to have substantial leeway to prove their cases in the way they chose, at the same time, courts had to consider the existence of “evidentiary substitutes,” alternative ways to prove the same matter with equivalent probative value and less prejudicial impact.⁶² Just as in that case an offer to stipulate provided the equivalent probative value of naming the particular disclosed crime, while greatly lessening the danger of an unfairly prejudicial character inference, here too, describing the *categories* of evidence without detailing the *contents* reduces the chances that the jury will make substantive inferences about the truth of their contents, inferences which are impermissible under *Crawford* whenever the basis evidence is testimonial.

In *Old Chief*, the Court recognized that the name of the prior felony committed by the defendant *was* relevant under Rule 401, because the felony, if introduced by name, would help prove that he violated the felon-in-possession law.⁶³ But a stipulation

⁶¹ *Old Chief v. United States*, 519 U.S. 172 (1997).

⁶² *Id.* As the Court put it:

On objection, the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.

Id. at 182-83.

⁶³ *Id.*

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or admission that the defendant had indeed previously been convicted of a felony that would count under the felon-in-possession law, without providing the actual name of the prior felony, would have virtually the same probative value. This alternative form of proof had a side benefit: substantially reducing the danger that the jury would impermissibly think that because the defendant had committed an assault before, he was more likely to have committed this assault with which he was now charged—an impermissible character inference under our evidentiary rules.⁶⁴ For permissible inferences, this evidentiary substitute was just as good, and it avoided providing information to the jury that it would be quite likely to misuse.

A virtually identical argument applies with respect to expert basis evidence under *Crawford*. Even assuming that experts may legitimately disclose to the jury the kinds of information on which they have relied, this ought not to mean that they may disclose the substance of this basis when it is testimonial. To be sure, disclosing the *substance* of the expert's basis evidence does also reveal the *category*, and hence, is strictly speaking relevant for the purpose of helping the expert to evaluate the legitimacy of the kinds of evidence made use of by the expert, just as the name of the felony was appropriately recognized by Souter as relevant in *Old Chief*. But just as prohibiting disclosure of the name of the felony in *Old Chief* protected the jury from impermissible inferences, disclosing only the category of testimonial expert basis evidence protects the jury from the danger that they will impermissibly attempt to assess the truth of the testimonial basis evidence without a chance to cross examine the actual declarant.

1. Business Records as an Exception to Crawford

Many Courts have attempted to avoid *Crawford*'s strictures with respect to both forensic science reports and certificates of analysis by making recourse to a supposed business records

⁶⁴ *Id.* For the rules governing character evidence, see generally Federal Rules of Evidence 404-405.

exception to the Confrontation Clause's dictates.⁶⁵ To be sure, *Crawford* does state that some hearsay is not testimonial. It notes that "[m]ost of the hearsay exceptions [recognized in 1791] covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy."⁶⁶ Certainly, a bill, a receipt, a demand letter, or other commercial writings not prepared with an eye toward criminal litigation would not be "testimonial" within the meaning of *Crawford*. But it is extravagant to read

⁶⁵ See, e.g., *Perkins*, 897 So. 2d at 462–465 (finding that autopsy report fits into a business-record exception to *Crawford*); *Commonwealth v. Verde*, 827 N.E.2d 701, 703 (Mass. 2005) (calling drug certificate "akin to a business record"); *People v. Durio*, 794 N.Y.S.2d 863 (Sup. Ct. 2005) (exempting autopsy report from *Crawford* under business-record exception); *State v. Thackaberry*, 95 P.3d 1142, 1145 (Or. Ct. App. 2004) (reasoning that because a laboratory report "may be analogous to, or arguably even the same as, a business or official record," it might not be testimonial under *Crawford*, and hence it was not plain error for the trial court to admit a toxicology report in the absence of an objection); *Rollins v. State*, 866 A. 926 (Md. Ct. App. 2005) (autopsy report nontestimonial under business records exception so long as the findings reported are "routine, descriptive and not analytical," but not if they report "contested conclusions"); *United States v. Bahena-Cardenas*, 411 F.3d 1067 (9th Cir. 2005) (warrant of deportation nontestimonial because it was like other routine, objective public records, such as birth certificates) *People v. Meras*, No. F044043, 2005 WL 1562735 (Cal. Ct. App. July 5, 2005) (unpublished opinion noting that DNA laboratory results are business records and hence not testimonial under *Crawford*); *People v. Fajardo*, No. F045640, 2005 WL 1683615 (Cal. Ct. App. July 18, 2005) (unpublished opinion); *State v. Cutro*, 618 S.E. 2d 890 (S.C. 2005) (considering autopsy reports public records and hence nontestimonial); *State v. Windley*, 617 S.E. 2d 682 (N.C. Ct. App. 2005); *Green v. DeMarco*, 812 N.Y.S. 2d 772 (Sup. Ct. 2005) (declaring foundational breath test certificates business records that do not implicate the core concerns of the Confrontation Clause despite an "incidental" litigation purpose); *State v. Kronich*, 128 P. 3d 119 (Wash Ct. App. 2006) (finding a department of licensing record asserting that defendant's license was revoked nontestimonial as a business and/or public record); *State v. Forte*, 360 N.C. 427, 435 (N.C. 2006) (asserting that business records, including forensic science laboratory reports, are nontestimonial because they "are neutral, are created to serve a number of purposes important to the creating organization, and are not inherently subject to manipulation or abuse.")

⁶⁶ *Crawford*, 541 U.S. at 61.

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this dictum as creating a generalized business-records exception to the application of *Crawford*. The fact that most business and public records are not testimonial does not exempt those that are from *Crawford*'s dictates. There is simply no logical basis for a *per se* business records exception to the reach of the Confrontation Clause. (Note, though, that Chief Justice Rehnquist, in his concurrence, elevates the dictum of the majority opinion into a genuine exception, writing, "To its credit, the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records and official records."⁶⁷ But Rehnquist's say-so does not make it so, and Rehnquist's concurrence in the judgment is largely an argument against the majority's approach, as he objects both to the substitution of the testimonial for the earlier inquiry into reliability, and the decision to create an "immutable category of excluded evidence."⁶⁸)

Recall that the core idea of *Crawford* is that when the state procures evidence expected to be used as substantive evidence incriminating a criminal defendant, that evidence is testimonial. Forensic science laboratory reports are surely testimonial in this sense, and so are certificates of analysis. With the latter, in fact, their very *raison d'être* is to be a substitute for testimony; they are overtly designed as a shortcut, a way to prove something without having to introduce live testimony. Both certificates of analysis and forensic test reports in general are made with an explicit eye toward eventual prosecution. Their purpose is to provide information that will be useful both to identify the perpetrator of a criminal act (through, for example, DNA identification, fingerprinting, or ballistics evidence), or to identify the criminality of an act (by, for example, analyzing drugs, or blood alcohol levels, or the cause of death of a victim), but in addition and concomitant with their investigatory purposes, these tests are surely conducted in significant part precisely in order to provide legal evidence in court.

Forensic scientists and those requesting their services know

⁶⁷ *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring).

⁶⁸ *Id.* at 74.

full well that the information may be used as testimony, and this is true regardless of whether the test is performed by government employees or an independent laboratory. As one of the few courts that has correctly deemed these tests testimonial wrote, “[b]ecause the test was initiated by the prosecution and generated by the desire to discover evidence against defendant, the results were testimonial.”⁶⁹

If courts continue to permit certificates of analysis and forensic evidence reports without requiring the testimony of their creator through a supposed business records exception, they will be eroding whatever claims to increased coherence *Crawford* appeared to offer. It is true that most business records are not produced in settings in which their future use as evidence is a primary purpose, and accordingly, most business records are therefore not testimonial. But records created by law enforcement personnel or those hired to provide support to law enforcement processes—a group that would surely include both state forensic scientists and those at private laboratories hired to perform forensic tests for the prosecution—ought to fall into the category of the “testimonial,” even if they are also appropriately understood to be business records for the purpose of the relevant hearsay exception.

2. *Cross-Examination of the Expert as an Adequate Substitute for Cross-Examination of the Declarant*

Prior to *Crawford*, courts sometimes concluded that the opportunity to cross-examine the *expert*, rather than the *hearsay declarant*, satisfied Confrontation Clause concerns even when the basis evidence was disclosed by the expert on direct examination. After *Crawford*, this view is untenable; if the basis

⁶⁹ *People v. Rogers*, 780 N.Y.S. 2d 393, 397 (App. Div. 2004); *see also State v. Crager*, 844 N.E.2d 390 (Ohio Ct. App. 2005) (rejecting the argument that all business records are exempt from *Crawford*); *Belvin v. State*, 922 So. 2d 1046 (Fla. Dist. Ct. App. 2006) (rejecting the state’s argument that a breath test affidavit memorializing a nontestifying breath test technician’s procedures and observations in administering the test were nontestimonial hearsay).

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for the expert's testimony is "testimonial," then substituted cross-examination cannot be constitutionally adequate. Several courts have nonetheless continued to suggest that expert disclosure of basis information does not raise Confrontation Clause concerns because the expert, though not the declarant, is available for cross-examination.⁷⁰

The idea that cross-examining the expert is an adequate substitute for confronting the expert's sources directly is one of the rationales underlying Rule 703's willingness to permit experts to rely on inadmissible information. This justification exists alongside a necessity justification, based upon the recognition that experts invariably rely in part on hearsay, in the books they have read, the courses they have studied, the experiences from which they have learned. One might therefore worry that if cross-examining the expert were not understood to be a substitute for cross-examining the underlying basis evidence itself, it could lead to a kind of infinite regress, a need to call witness after witness in order to get to the root of whatever it was that the expert relied upon. This fear, however, is unwarranted: even applying *Crawford* strictly, there is no grave danger that in order to satisfy Confrontation Clause concerns, the prosecutor would need to call a stream of additional

⁷⁰ See, e.g., *State v. Jones*, 603 S.E.2d 168, 2004 WL 1964890 (N.C. Ct. App. Sept. 7, 2004) (unpublished opinion quoting with approval a pre-*Crawford* state case emphasizing that the opportunity to cross-examine the expert satisfies the Sixth Amendment); *State v. Leonard*, No. 2004-1609, 2005 WL 1039635 (La. Ct. App., Apr. 27, 2005) (defendant's Confrontation Clause right was satisfied because he had an opportunity to cross-examine the prosecution's expert, even though the testifying expert was not the one who had conducted the autopsy and written the autopsy report); *State v. Delaney*, 613 S.E. 2d 699 (N.C. Ct. App. 2005) (finding no *Crawford* problem in part because the testifying expert was available for cross-examination about his reliance on the tests and reports performed by others); *People v. Thomas*, 130 Cal. App. 4th 1202 (2005) (noting "the expert is subject to cross-examination about his or her opinions"); *State v. Durham*, 625 S.E.2d 831, 833 (N.C. Ct. App. 2006) (finding no violation of the confrontation right when the expert is available for cross-examination, notwithstanding the testifying expert's reliance upon and disclosures regarding an autopsy conducted by others.).

witnesses to justify every matter upon which an expert has relied. *Crawford*, after all, applies only to testimonial evidence. Most general expertise gained through study, reading, and experience will *not*, in fact be testimonial, and even a good deal of case-specific information will frequently not be testimonial either. Hence, all of these matters can be relied upon by the expert and—subject to the application of Rule 705 or the state equivalent—even disclosed without triggering problems under *Crawford*.

However, in those instances when an expert's basis evidence *is* testimonial, cross-examining the expert cannot be deemed a constitutionally adequate substitute under *Crawford* for being able to confront whoever actually issued the testimonial statements. It is not that cross-examination of the expert about the basis will necessarily lack utility. Questioning the expert about the reasons for her reliance on the statements and the reasonableness of this reliance might well give a factfinder useful information for evaluating the likely reliability of both the expert and the underlying basis. But *Crawford* is quite clear: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."⁷¹ Cross-examining the expert cannot therefore satisfy *Crawford's* requirements with respect to the testimonial basis evidence, any more than cross-examining a detective who took an affidavit can substitute for cross-examining the declarant. *Crawford's* language simply does not permit cross-examination of a surrogate when the evidence in question is testimonial.

To see why this is so, imagine the same issue outside of the expert context: it is abundantly clear that under *Crawford* the policeman who interrogates a witness cannot testify about the substance of the witness' statement in lieu of having the witness herself take the stand. If such substituted cross-examination were generally permitted, it would erode *Crawford's* very foundations, for it would provide a way around confrontation of the witness herself in nearly all cases involving formalized

⁷¹ *Crawford*, 541 U.S. at 62.

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testimonial materials. Moreover, at least in the non-expert context, the substitute witness might be someone personally present when the affidavit or statement was made, and therefore someone with personal knowledge about its circumstances and context. By contrast, when one expert testifies on a report made by someone else, most of the time they were not even present when the tests reported on were conducted and memorialized!

As I shall suggest in Part III, there may nonetheless be some reason to distinguish substituted cross-examination of an expert about a report from the substituted cross-examination of non-expert witnesses, though the opinions permitting substituted cross-examination do not yet, for the most part, develop this point with any care. Perhaps over time, the Supreme Court will be willing to find that in some limited circumstances, the cross-examination of an expert may substitute for the cross-examination of his sources, even when the source's statements do fit within the category of testimonial evidence. However, it is difficult to see how such an expansion could be wrought without a nod toward the same values that underpin Rule 703: reliability and necessity, both of which are rejected as justifications under *Crawford*. In any event, *Crawford* as written offers no plausible justification for this position; in Part III, I will begin to explore whether there are rational grounds for treating substituted cross-examination differently in the context of expert testimony.

3. *Crawford's Impracticality*

Some courts have tried to justify their decisions that forensic science reports, other expert basis testimony, or certificates of analysis are not testimonial, even though they were produced explicitly for future use in the courtroom, by asserting that no matter what *Crawford* might seem to dictate, any other conclusion is simply too impracticable.⁷² Hauling every forensic

⁷² See, e.g., *People v. Durio*, 794 N.Y.S.2d 863 (Sup. Ct. 2005) (detailing impracticality of treating autopsy reports as testimonial hearsay, especially because they are non-replicable and so much time may pass between test and testimony that the medical examiner is unlikely to have independent recollection apart from the report itself); *State v. Cunningham*,

expert who writes a report into court to testify simply cannot be constitutionally required, they suggest, especially because routine forensic tests are likely in most circumstances to be reliable

The quandary over these issues is understandable. It may be a significant drain on limited forensic science budgets to require that every forensic test be presented in court by whoever actually performed the test, unless that examiner is unavailable and the defendant had a prior opportunity for cross-examination. In some cases, strictly complying with *Crawford* might be not just inconvenient but impossible. Many years can pass between the preparation of an autopsy report in a homicide case and the apprehension and trial of the perpetrator.⁷³ By this point, the medical examiner who prepared the report might have moved out of state, changed professions, or even died. How can such a person testify or even provide an opportunity for cross-examination? Certainly, as the Kansas Supreme Court pointed out, excluding an autopsy report in a case in which the pathologist who conducted the test years earlier is now unavailable or deceased is indeed a “harsh” result, considering that autopsies are conducted “in an environment where the medical examiner would have little incentive to fabricate the results.”⁷⁴

903 So. 2d 1110 (La. 2005) (noting that twenty marijuana cases might be processed during each session of night court in Orleans Parish, and asserting that making defendants take a small procedural step (e.g., subpoenaing the testing expert) is reasonable because these matters “often are not in dispute”).

⁷³ See *Durio*, 794 N.Y.S.2d at 863.

⁷⁴ *State v. Lackey*, 120 P. 3d 332, 351 (Kan. 2005). As another court put it, “[a]t oral argument, in this Court, defense counsel was given a hypothetical about a situation in which the maker of an autopsy report dies before the date of trial. Defense counsel stated that, even in that situation, the maker of the autopsy report would still be required to meet *Crawford* standards, and in the maker’s absence, the State would be required to prove the victim’s death in another manner. This is unacceptable in practical application.” *Rollins v. State*, 897 A.2d 821 (Md. 2006). Note that it may not be quite so clear as the *Lackey* court would have it that medical examiners have little incentive to fabricate. While the vast majority of forensic professionals no doubt perform their jobs with care and integrity, the

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Following *Crawford* strictly can seem especially nonsensical when there is little chance that the actual declarant, the author of the forensic report, will still have any independent memory of conducting the test by the time of trial, either because many years have passed or because the volume of similar tests makes it unlikely that the expert will retain a specific memory of the one in question. In this case, any expert who testifies about the report will most likely be relying wholly on what has been memorialized within the report itself. When this recognition combines with the widespread and often (though by no means always) warranted belief that forensic science tests are likely to be conducted in a reliable manner, excluding the autopsy, blood analysis, or whatever test is at issue because the declarant is unavailable may seem like constitutional overkill.

The inefficiency of requiring live testimony from the actual person who conducted the test may point to a cogent critique of *Crawford*'s formalism. However, *Crawford* is quite explicit on this point:

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.⁷⁵

Moreover, within the judicial hierarchy, it is not for trial courts to reject the Supreme Court's test simply because of its impracticable, or even harsh, consequences.

Even taking *Crawford*'s dictates seriously, the fact that experts can rely on inadmissible evidence without disclosing it would often permit a surrogate expert to express a conclusion to

close connections between forensic scientists and the prosecution can create structural incentives for the forensic scientists to produce results that please the prosecution—and in some cases this has indeed even meant fabrication.

⁷⁵ *Crawford*, 541 U.S. at 61.

the jury based on the inadmissible report.⁷⁶ Although the jury would not be able to see or hear about the details of the report itself, *Crawford* does not prohibit some expert other than the declarant from considering the report in the course of her expert evaluation. Perhaps over time Courts will find a way to hone Confrontation Clause jurisprudence to permit disclosure in certain circumstances, especially when the report's author is genuinely unavailable, but for the moment, refusing to apply *Crawford* simply because of its impractical consequences should not be a legitimate option for the lower courts.⁷⁷

4. Disclosure of Objective or Factual Results

Several courts have attempted to distinguish matters of opinion and judgment from factual, unambiguous, and objective reports. In *State v. Lackey*,⁷⁸ for example, the Kansas Supreme Court distinguished between “factual, routine, descriptive and nonanalytical findings,” which it deemed non-testimonial, and “contested opinions, speculations and conclusions derived from these objective findings,” which the court viewed as

⁷⁶ For examples of this argument, see *Louisiana v. Garner*, 913 So. 2d 874 (La Ct. App. 2005) (emphasizing that testifying witness was rendering his own opinion and judgment, not merely repeating the autopsy report prepared by another); *State v. Barton*, 700 N.W. 2d 93, 97 (Wisc. Ct. App. 2005) (holding that confrontation right is satisfied “if a qualified expert testifies as to his or her independent opinion, even if the opinion is based in part on the work of another.”). In *Barton*, however, while the trial court did not admit the report itself, it did permit the witness to testify about the test performed by the non-testifying expert, the procedures used and the results achieved. This degree of detail cannot be justified under *Crawford*.

⁷⁷ See, e.g., *People v. Orpin*, 796 N.Y.S.2d 512, 517 (Just. Ct. 2005) (recognizing the practical concerns but pointing out that “the current Court’s formalistic approach to interpreting the guarantees of the Sixth Amendment provides little room for accommodation of the pragmatic issues its decisions might raise in the day-to-day administration of criminal justice.”). However, this opinion was attacked collaterally in *Green v. DeMarco*, 812 N.Y.S.2d 772 (Sup. Ct. 2005) (holding that although not all business records can be admitted as nontestimonial under *Crawford*, a statutorily mandated maintenance certificate for a breath testing machine can be).

⁷⁸ 120 P. 3d 332 (Kan. 2005).

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testimonial.⁷⁹ These courts are, in essence, narrowing the applicability of the business records exception to the hearsay rule as an escape valve under *Crawford*. Instead of finding that business records are *per se* exempt from the testimonial, they are taking a closer look at the nature of the record. These courts believe facts and objective findings by experts are admissible even without an opportunity for confrontation, whereas opinions and inferences should be redacted from a report and excluded unless *Crawford*'s dictates are met.

The core idea underlying these opinions is that the more a laboratory finding looks like a factual observation, "an objective finding which would have been observed and recorded by any trained individual in that field," the less useful cross-examination is likely to be.⁸⁰ The underlying logic asks: when there is not room for judgment, interpretation, or difference in opinion, what precisely would be gained by pressing the recorder on the stand about the matter recorded? In addition, there is obviously a strong reliability undercurrent underpinning these opinions, a belief that the more straightforward and unambiguous the matter recorded, the more confident we can be that the methods and processes used to make the record can help to assure its reliability.⁸¹

⁷⁹ *Id.* at 351; *see also* United States v. Bahena Cardenas, 411 F.3d 1067, 1075 (9th Cir. 2005) (warrant of deportation not testimonial because it was "routine, objective, cataloging of an unambiguous factual matter"); Rollins v. State, 866 A.2d 926, 948 (Md. Ct. Spec. App. 2005), *aff'd*, 897 A.2d 821 (finding no Confrontation Clause concern for statements of fact conditions objectively ascertained); North Carolina v. Huu the Cao, 626, S.E.2d. 301, 305 (N.C. Ct. App. 2006) (holding that laboratory reports are nontestimonial business records "only when the testing is mechanical. . . and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst."); State v. Melton, 625 S.E.2d 609, 612 (N.C. Ct. App. 2006) (forensic science reports are nontestimonial business records if they report "objective fact obtained through a mechanical means").

⁸⁰ People v. Mellott, No. 1173-05, 2005 WL 3322843 (N.Y. Just. Ct., 2005).

⁸¹ This is on occasion explicit. *See, e.g.,* Rollins, 897 A.2d 821; People v. Fajardo, No. F045640, 2005 WL 1683615 (Cal. Ct. App. Jul 18, 2005) (unreported opinion finding demeanor evidence would not be helpful to assess

However, there is less to these arguments than meets the eye. First, the reliability justification, while perhaps intuitively appealing, is explicitly taken off the table in *Crawford* itself. *Crawford*'s critique of *Ohio v. Roberts* is precisely that it permitted "a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability," and *Crawford* explicitly rejected such "surrogate means" for assessing reliability.⁸² Moreover, having a judge make a determination about whether the matter is fact or opinion, unambiguous or subject to interpretation, analytical or nonanalytical is, in essence, delegating to the judge the power to decide whether cross-examination and confrontation are warranted in a particular instance. This seems as unjustifiable under *Crawford*'s approach as a direct judicial determination of reliability. In addition, the premise is itself controversial: the idea that descriptive and non-analytical findings are not themselves open to differences in judgment or interpretation is itself a matter upon which people's reasonable judgments may differ. And certainly, given the disclosure of a number of scandals in which "factual" reports of forensic science laboratories or medical examiners turned out to have been faked or otherwise misreported,⁸³ it is not plausible to say that in no circumstance could confrontation and cross-examination be helpful with respect to seemingly unambiguous factual findings contained in laboratory reports.

Furthermore, the logic, if taken seriously, would extend well beyond the forensic science setting. The claim of a bystander, made to a policeman interrogating witnesses after a bank robbery has concluded, that he saw three men wearing grey

report's credibility).

⁸² *Crawford*, 541 U.S. at 61.

⁸³ See, e.g., Richard L. Fricker, *Pathologist's Plea Adds to Turmoil: Discovery of Possibly Hundreds of Faked Autopsies Helps Defense Challenges*, A.B.A.J., Mar. 1993, at 24; U.S. Dep't of Justice, Office of the Inspector General, *The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerability* (2004), available at <http://www.usdoj.gov/oig/special/0405/final.pdf>; Jim Yardley, *Doubts on Evidence Put Oklahoma City Police Scientist Under Scrutiny*, N.Y. TIMES, May 2, 2001.

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overcoats and masks enter the bank at 10:30 a.m. is every bit as factual and non-analytic as a forensic report. And yet just about any judge would recognize that such statements surely fall squarely into the category of the testimonial under *Crawford*. Attempting to graft an inquiry into whether the matter at issue is factual or interpretive onto *Crawford's* focus on the testimonial would either lead to enormous inconsistencies across categories, exclude large amounts of testimonial evidence from the purview of the Confrontation Clause, or both.

* * *

In this Section, I have described a variety of judicial efforts to continue to permit both certificates of analysis and the disclosure of expert reports and other basis evidence even when the declarant is not available on the stand. None of these arguments, however, is persuasive. Some of them—such as arguing that basis evidence is not hearsay because it is not being introduced for the truth of its contents, or suggesting that there is a per se business records exception, or that *Crawford* should treat factual claims different from opinions—are intellectually incoherent. The claim that *Crawford* is impractical may be accurate, but it is not actually an argument—it is better, perhaps, considered as a plea for reconsidering *Crawford's* scope, or as a call for the development of arguments that could mitigate its consequence. Perhaps an argument can be made to distinguish substituted cross-examination in the expert context, but it is simply untenable that *Crawford* could mean that substituted cross-examination is, as a general matter, a legitimate alternative for cross-examining the hearsay declarant: this would permit any testimonial statement into court so long as someone present when the earlier statement was made is on the stand to answer questions about it!

One of the key purposes of this Article is to invite the lower courts to rethink their willingness to rely on these arguments. There are already sufficiently large numbers of cases relying upon precisely these arguments that some courts are, unfortunately, beginning not even to argue these points with care, instead merely relying on the allegedly persuasive

authority of other courts' reasoning. If this trend continues, it will have a real cost: a too-thoughtless pragmatism will have trumped principled application of the underlying principle at stake in *Crawford*. In a great many cases, the forensic evidence against a defendant may in fact be the most powerful proof on offer by the prosecution. Moreover, forensic science evidence has, to some degree, been under attack for having significantly less rigorous scientific foundations than most would presume, and there have been more than a few recent scandals involving overclaimed results or downright fraud. These forms of expert testimony should not, for Confrontation Clause purposes, get a free pass, or be presumed because of their subject matter to be outside of *Crawford*'s dictates.

III. TOWARD A MORE NUANCED UNDERSTANDING OF TESTIMONIAL EVIDENCE AND ITS LIMITS IN THE CONTEXT OF EXPERT TESTIMONY

What, then, is the alternative? One alternative is simple and obvious: recognize certificates of analysis and the disclosure of some basis evidence by experts as testimonial. While many courts have attempted to find ways around *Crawford*'s seemingly expansive approach to the Confrontation Clause, a minority of courts have been willing to recognize that some expert basis testimony or reports and documents prepared by experts are indeed testimonial.⁸⁴ In a sense, these courts' analyses are

⁸⁴ See, e.g., *People v. Goldstein*, 843 N.E. 2d 727 (Ct. App. N.Y. 2005); *People v. Pena*, 128 Cal. App. 4th 1219 (2005) (finding a statement by a co-defendant that implied that an attack was gang related and implicating members of a particular gang was admitted, and relied upon by expert, in violation of *Crawford*); *People v. Rogers*, 780 N.Y.S.2d 393 (App. Div. 2004) (finding a blood alcohol test done on a rape victim to be testimonial and not admissible under the business records exception to the hearsay rule); *People v. Hernandez*, 794 N.Y.S.2d 788 (Sup. Ct. 2005) (finding a report by an unavailable latent fingerprint examiner to be testimonial and hence excluded under *Crawford*); *City of Las Vegas v. Walsh*, 124 P.3d 203 (Nev. 2005) (finding the affidavit of a healthcare professional to be testimonial); *Napier v. State*, 820 N.E.2d 144 (Ind. Ct. App. 2005) (finding the admission of defendant's breath test results without live testimony of officer who

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among the most straightforward. They often simply ask whether the statement was a pretrial statement that the declarant would reasonably expect to be used prosecutorially; if the answer is affirmative, they find that *Crawford* applies.⁸⁵ In addition, several of these opinions have usefully and appropriately challenged the assumption that seems to inform many of the other cases; that cross-examination of the declarant who conducted a routine laboratory test is unlikely to be helpful.⁸⁶

In recognizing that such evidence is indeed testimonial, and thus problematic under *Crawford*, these courts are initiating an important line of analysis. They should be lauded for facing the issues raised by *Crawford* head-on, for confronting

conducted test to violate *Crawford*); *Shiver v. State*, 900 So. 2d 615 (Fla. Dist. Ct. App. 2005) (finding an affidavit about a breath test to be testimonial); *Ohio v. Crager*, 2005 Ohio 6868 (2005) (DNA test is testimonial); *Belvin v. State*, 922 So. 2d 1046 (Fla. Dist. Ct. App. 2006) (portions of breath test affidavit pertaining to nontestifying breath test technician's procedures and observations in administering test were testimonial hearsay requiring prior opportunity for cross-examination under *Crawford*); *State v. Carpenter*, 882 A.2d 604 (Conn. 2005) (testimonial, but introduction was harmless error); *State v. Berezansky*, 899 A.2d 306 (N.J. Super Ct. 2006) (blood analysis testimonial).

⁸⁵ See, e.g., *State v. Crager*, 844 N.E.2d 390 (2005) (DNA test is testimonial because "a reasonable person could conclude that the report would later be available for use at trial"); *State v. Berezansky*, 899 A.2d 306 (N.J. Super. Ct. 2006) (finding introduction of laboratory analysis of blood without live testimony to be a Confrontation Clause violation because it was introduced "to prove an element of the crime and offered in lieu of producing the qualified individual who actually performed the test.").

⁸⁶ See, e.g., *State v. Berezansky*, 899 A.2d 306 (N.J. Super. Ct. 2006) (noting that neither the neutrality nor the reliability of a state laboratory analysis can be presumed); *People v. Orpin*, 796 N.Y.S.2d 512, 517 (Just. Ct. 2005) (noting "the truth seeking value of cross-examination in this context is not merely theoretical. Substantial problems with DWI testing in this state were uncovered in the 1990s, and there have also been recent problems even with reliability of the FBI laboratory's analyses. Subjecting the persons who conduct these calibration tests to the 'crucible of cross examination' will help ensure the reliability of their work and protect the integrity of the judicial system by avoiding convictions based on faulty breath test results."), *collaterally attacked*, *Green v. DeMarco*, 812 N.Y.S.2d 772 (Sup. Ct. 2005).

Confrontation Clause concerns without subterfuge. This approach is without a doubt the most consistent with the constitutional logic that underlies *Crawford* itself.

By contrast, as the previous Part showed, the great majority of courts analyzing expert disclosure issues under *Crawford* are, by hook or by crook, holding that these disclosures are *not* testimonial under *Crawford*. To get there, they are sometimes forced to make arguments that overreach any reasonable interpretation of *Crawford* (e.g., the business records exception); rely on distinctions that *Crawford*'s analysis suggests should not be meaningful (e.g., objective/subjective; substituted cross-examination); or invent distinctions without logical foundation (e.g., arguing that disclosure is not for the truth of its contents). Unfortunately, the arguments on offer to evade *Crawford* are not logically coherent, and sometimes even border on the disingenuous. Furthermore, these solutions are reminiscent of the very approach to the Confrontation Clause that *Crawford* was attempting to eliminate—an effort to use categorical labels without analysis as a substitute for the protection of the value of cross-examination. It would seem, therefore, that testimonial basis evidence and certificates of analysis ought to be prohibited under this new approach to Confrontation.

And yet...

Perhaps there *is* still more to say. While recognizing that some expert basis evidence and certificates of analysis do meet any coherent definition of the testimonial, at the same time, it is difficult not to sympathize with the frustration of the Kansas Supreme Court in *State v. Lackey* at the thought of excluding an autopsy report whose author had died before trial. Even if general hand-waving in the direction of “impracticality” seems strikingly inconsistent with *Crawford*'s bright-line rule approach, the impulse to find some way around *Crawford*'s dictates, for at least some subset of these cases, is not only strong, but understandable.

One way to put the point is this: even if we must reject a vague claim of impracticality as a justification for dispensing with what *Crawford* seems otherwise to require, is there any degree to which practicality and efficiency concerns do

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legitimately intersect with the Confrontation right? Are there ever times when Confrontation should be dispensed with even for evidence that *is* testimonial—either because it is practically impossible or because it is highly inconvenient and extremely unlikely to be useful, or both? This is one of Rehnquist’s chief concerns in his concurrence: that the court has lost sight of the link between cross-examination and likely accuracy; that “[b]y creating an immutable category of excluded evidence, the Court adds little to a trial’s truth-finding function.”⁸⁷

The difficulty is that for the judge to make this decision—to decide that this is a circumstance in which cross-examination is unlikely to yield benefits or to increase accuracy appears to be precisely what *Crawford* disallows: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”⁸⁸

So where are we left? If we return to the beginning, and look at the kind of information that is problematic under *Crawford*, just how impractical would it be to apply *Crawford* strictly? How often would it be merely an inconvenience? What are the circumstances in which it is likely to be not merely an annoyance but a serious problem of proof? In what settings, if any, is *Crawford* intellectually troubling if taken to its logical extreme?

As I indicated in Part I, in most circumstances, complying with *Crawford* would be an inconvenience, but no worse. It would mean that the actual authors of forensic science reports would have to testify about them in court in order to introduce them into evidence. It would further mean that the use of certificates of analysis would have to be substantially curtailed. These would be inconveniences, to be sure, though in the many cases in which the matters established by, say, a certificate of analysis were uncontested, defendants might well frequently be prepared to waive their confrontation clause rights and nothing in *Crawford* suggests the impermissibility of waiver. While not

⁸⁷ *Crawford*, 541 U.S. at 75.

⁸⁸ *Id.* at 69.

meaning to devalue the extent to which a strict application of *Crawford* might be irritating both to prosecutors and forensic scientists, to generally exempt these categories of evidence from the category of the testimonial would be intellectually unjustifiable under *Crawford*'s own logic.

To be sure, Rehnquist's question—how much gain in accuracy do we purchase through the application of this strict rule?—is a fair one. But the ability to cross-examine the actual creator of a forensic science report, for example, rather than merely cross-examining another expert who has done no more than eyeball the report, could well reveal additional weaknesses, discrepancies, or other reasons to have less confidence in the evidence than would otherwise have been apparent. There is no reason to believe that the matters upon which experts rely ought to be intrinsically exempt from *Crawford*'s dictates when they are disclosed.

However, there are certain subcategories of evidence that would be banned under this strict application that might make us think that *Crawford* itself needs some kind of modification, lest it become formalism without any clear benefit or purpose. Two of these deserve particular mention.

First, one line of cases has struggled with whether certain kinds of fairly routine, ministerial documentation ought to be subject to *Crawford*. For example, breath test machines are typically required by statute to be calibrated on a regular basis, and when they are calibrated, the technician who does so typically fills out a form certifying that the calibration has been completed. Thus the issue arises: in a DUI case, can the document certifying that the machine was properly calibrated be admitted without giving the defendant the opportunity to confront the human being who conducted the calibration? Does it really make sense that the Constitution requires the prosecutor to haul into court the technician who filled out this form, to confirm that she did what the certificate claims? When we require the person who is simply doing quality assurance tests on the machinery to come into court for each and every DUI trial, we may truly have gone too far.

Why so? What is the difference between calibrating an

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Intoxilyzer machine and conducting a DNA test? The most salient distinction is that the former is done without a focus on any particular case. As a number of courts have recognized, while the records created to establish calibration are made in expectation that they will be available for use in criminal trials, they are not created with an eye to any particular trial, any particular crime, or any particular defendant. This is in sharp contrast to certificates reporting the result of a particular breath test and the circumstances in which it was conducted. These, unlike the calibration records, make an accusation. The calibration evidence neither exculpates nor inculpates; it is, rather, a foundational requirement statutorily required in order to use the machine for evidentiary purposes.

In fact, almost all of the courts who have confronted breath test calibration evidence have found it not to be testimonial. Some of these courts have partly relied on some mixture of the arguments described in the previous section. Several of these arguments—such as the alleged business records exception to *Crawford*, or the claim that because these are “objective” findings rather than subjective—prove far too much. If those arguments apply here, where do they stop, and why?

But a number of the opinions concerning calibration evidence and other forms of routine, non-case specific documentation have begun to develop a significantly more promising way around *Crawford* in circumstances such as these, building on the notion that the application of the Confrontation Clause, even post-*Crawford* is limited to *accusations* against the defendant. If evidence is developed not for any particular case, not with an eye toward inculpating any particular defendant, but rather as part of the routine quality control processes of law enforcement, perhaps it is not appropriate to deem it “testimonial” in the first place. Certainly breath test calibration certifications are made with an eye toward the courtroom; it is not only foreseeable that they will be used as evidence, but it is one of their most important purposes. But as one court points out, “[u]nlike police or prosecutorial interrogators, the technicians have no demonstrable interest in whether the certifications produce evidence that is favorable or adverse to a particular

defendant.”⁸⁹ The certifications are “not done for the purpose of any particular prosecution.”⁹⁰ They contain “the power to exonerate as well as convict”—after all, the breath test can exculpate only if it is in proper working order.⁹¹ They accuse no one in particular of anything in particular, and in this sense they are “neutral in character.”⁹² Indeed, these certifications often pre-date the criminal act itself. If they lack an “accusatory purpose,” then perhaps their use without the opportunity to confront does not violate the Confrontation Clause.⁹³

This line of argument is an intriguing method for potentially limiting the Confrontation Clause’s reach. It is, of course, in part a response to concerns about practicality, but it is a response anchored within a framework for understanding the purposes of confrontation, rather than using practicality as an argument in its own right. *Crawford* itself does not suggest that whether a statement is accusatory bears on whether it is testimonial—indeed, the word “accusation” or “accusatorial” does not appear in either *Crawford* or *Davis*.⁹⁴ Nonetheless, this is a potential direction in which the doctrine could develop that could substantially be reconciled with *Crawford*’s present structure.⁹⁵ If the court made explicit that only evidence that was

⁸⁹ *State v. Norman*, 125 P.3d 15, 19 (Or. Ct. App. 2005); *see also Michels v. Commonwealth*, 624 S.E.2d 675 (Va. Ct. App. 2006).

⁹⁰ *People v. Krueger*, 804 N.Y.S.2d 908 (Just. Ct. 2005).

⁹¹ *State v. Forte*, 629 S.E.2d 137, 143 (N.C. 2006); *see also Commonwealth v. Walther*, 189 S.W.3d 570, 575 (Ky. 2006).

⁹² *Green v. DeMarco*, 812 N.Y.S.2d 772, 783 (Sup. Ct. 2005).

⁹³ *People v. Durio*, 794 N.Y.S.2d 863 (Sup. Ct. 2005); *see also, e.g., Bohsancurt v. Eisenberg*, 129 P.3d 471 (Ariz. Ct. App. 2006).

⁹⁴ There are, however, numerous references in the opinion to confronting one’s “accusers.” *See generally, Crawford*, 448 U.S. at 36.

⁹⁵ For an argument in favor of an “accusatorial” approach to the Confrontation Clause, *see* §6371.2 of 30A Wright & Graham, *Federal Practice and Procedure: Evidence* (Pocket Part, 2007), also available in draft as Kenneth Graham, *The Short(?) Happy(?) Life of Crawford v. Washington*, at http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1033&context=uc_lalaw; *see also* Robert P. Mosteller, “*Testimonial*” and the Formalistic Definition—The Case for an “Accusatorial” Fix, 20 CRIM. JUST., Summer 2005, at 14.

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created to bear witness against *the perpetrator of a particular criminal act* fit into the category of the testimonial, then these calibration records could legitimately fall outside of the Confrontation Clause's purview. Limiting the Confrontation Clause's operation to accusations, broadly defined, would not be inconsistent with the principles that underlie *Crawford*.

This approach would create a new set of questions surrounding the definition of an accusation.⁹⁶ Is a DNA test determining that two samples match an accusation? What about an autopsy report? Should accusations consist only of those statements that literally accuse a specific person of an act, or should they reach all testimonial evidence created for the purpose of either adducing evidence useful for prosecuting a particular trial or investigating a specific criminal act? Only the latter, I would suggest, is justifiable; otherwise, *Crawford's* scope would be tremendously and unjustifiably narrowed. (Imagine, for example, police interviews with victims of a burglary, in which the victims describe what was taken, the state of their home, et cetera, but make no literal accusation against a specific person. Surely such statements should still be testimonial; they are developed for the investigation of a particular case, even if the statement does not accuse a named human being of a criminal act. Similarly, forensic science evidence produced for a specific case should be testimonial even if, like an autopsy report, it may not accuse a particular person.) Under such an appropriately broad definition, most laboratory reports would still remain testimonial. But it would mean that routine equipment checks and quality assurance methods engaged in by forensic science laboratories could, depending on statutory requirements, be introduced by certificate rather than through live testimony notwithstanding the Confrontation Clause.

One could certainly argue against such a limitation to the testimonial. After all, only if the machine is properly calibrated can its test results be relied upon; indeed, considering how

⁹⁶ For a sharply worded critique emphasizing the manipulability of the idea of an accusation, see the dissenting opinion in *Luginbyhl v. Commonwealth*, 628 S.E. 2d. 74, 81-82 (Va. Ct. App. 2006).

automatic in operation breath test machines have become, the chance to cross-examine about calibration could arguably seem more important than the opportunity to cross-examine the person who conducted the actual breath test. Breath tests themselves have virtually become “black boxes”—an officer simply inputs a driver’s license, the suspect breathes into the machine, and a breath ticket pops out indicating the alcohol level found through the test process. For the officer conducting such a test, there is virtually no room for the exercise of discretion or judgment.⁹⁷ But this reported breath alcohol level will of course only be accurate if the machine is properly calibrated and in working order, so one could argue that issues of maintenance and calibration are at least as salient as the particular result spit out by the machine.

My purpose here, however, is not to argue whether calibration records ought to fall within or outside the boundaries of the testimonial. Rather, I simply wish to show that this is one place where there is an intellectually viable argument for excluding them from the definition of the testimonial—and to suggest that if we believe that they ought to be excluded from Confrontation Clause protections, it would be far better to develop a principled limitation to *Crawford* than to jimmy up a general business records exception that makes no intellectual sense.

The second, and frankly still more concerning, circumstance under *Crawford* occurs when the maker of a forensic science report is genuinely unavailable. While it may be troubling to have the prosecutor *elect* not to call the expert who conducted the test, how ought the analysis to change if the expert is no longer living, or no longer works for the laboratory in question? When the expert is genuinely unavailable through no fault of the prosecution, exclusion of the test under the Confrontation Clause because of the defendant’s inability to confront its maker might seem an excessively strict interpretation of what the Constitution

⁹⁷ This description applies, for example, to the BAC Datamaster breath testing machines which are used in Los Angeles County. Thanks are due to Barry Fisher and Catherine Navetta of the Los Angeles County Crime Laboratory for showing me how these machines operate.

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requires. This is especially so when the test has been conducted far enough in the past (such as, for example, an autopsy conducted years before the suspect was apprehended) that even were she available, the expert who conducted it is very unlikely to have any independent memory of what he or she put to paper so long ago. In this circumstance, cross-examination is unlikely to be particularly fruitful; the initial test was conducted in circumstances that give little reason for fabrication; and other experts can at least report on the plausibility of the finding and their appropriate interpretation.

Let us return to the example of an autopsy conducted in the distant past. Imagine, for example, an autopsy appropriately conducted by the medical examiner, and further imagine that key findings are not only reported on but carefully measured, documented, and photographed. Now imagine that a decade passes, or even longer, and a suspect is finally located. Meanwhile, the medical examiner has died. Frankly, even were she still living, how likely is it that she would have a usefully specific memory of conducting that autopsy, separate from what she had recorded? In addition, the careful documentation can be interpreted by other qualified experts, perhaps almost as well as she would have been able to interpret it herself. When (1) the expert is truly unavailable; (2) even if the expert were available, it is not likely that she would have an independent memory of what she recorded; *and* (3) the evidence was created in circumstances that suggest its likely (though of course not certain) trustworthiness, does *Crawford* truly mean that we must nonetheless exclude this test? Must the autopsy conducted a decade or two earlier by a now-deceased medical examiner actually be excluded?

This result would indeed seem troubling. The autopsy report is the best present evidence we have about the cause and circumstances of the victim's death. There is no way to conduct the test again at the present time. And the reason that so much time has passed—increasing the odds of both the unavailability of the medical examiner and the lack of memory even were she available—is precisely because the perpetrator has managed to evade the law.

And yet the autopsy report, unlike the calibration records, really does squarely fit into the category of the testimonial. This cannot and should not be doubted. It is created as part of an ongoing investigation in order to produce evidence. It is prepared with an eye toward future criminal prosecution. Though we may not know at the time it is conducted against whom it will serve as testimony, it is meant to serve as testimony against someone in particular, the perpetrator of the murder. If it is introduced without the testimony of the person who created it, the report is indeed being used as a surrogate for testimony.

To be sure, most courts confronting autopsy reports are electing not to deem them testimonial, again, largely by using a business records exception or deciding that objective findings are not subject to *Crawford*. The Court has thus far rejected several certiorari petitions on precisely the question of whether autopsy reports are testimonial; eventually, however, this is certainly an issue that will have to be confronted (no pun intended).

If the Court is unwilling to create a general business records exception to *Crawford* (as it should be, for this would mark a return to the ad hoc, fiction-filled approach that is precisely what the Court was trying to leave behind in the move away from *Ohio v. Roberts*), what are the plausible alternatives? One possibility is for some other expert to rely upon the report but not disclose it—to provide conclusions about the cause of death but not evidence-based reasons in support of these conclusions. While this might fulfill the letter of *Crawford*, it would be an unfortunate result: the jury would be deprived of any access to a form of evidence that is far more detailed and precise than the testifying expert's conclusions. Moreover, the expert's opinion would only be warranted if the report itself was warranted; so if the report is inadmissible as testimonial hearsay, it is not altogether clear we should permit reliance upon it as a sole source of information.

What else might we do? *Crawford* itself raises and then appears to reject the possibility of a special exception for coroner statements: the opinion notes, "There is some question whether the requirement of a prior opportunity for cross-

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examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes. . . Whatever the English rule, several early American authorities flatly rejected any special status for coroner statements.”⁹⁸

The autopsy example forces us to consider whether despite what *Crawford* says, there ought ever to be circumstances in which unavailability and necessity should continue to play a role in Confrontation Clause analysis. Perhaps there ought to be a kind of “best evidence” rationale for continuing to permit the autopsy report even when its creator is unavailable.⁹⁹ Under this rationale, when the person who conducted a forensic test is unavailable to testify, the first step ought to be to have someone conduct a retest if it is technologically feasible. But when retesting is not a viable alternative, ought there not to be some way to use the original test in court notwithstanding the absence of its creator?

⁹⁸ *Crawford* at 46. Indeed, one of the cases discussed in *Crawford*, *State v. Campbell*, 30 S.C.L. 124 (1844) deals explicitly with information received at a coroner’s inquest. The question was whether testimony taken by the coroner and put into writing can be introduced at trial without the declarant’s presence, and the opinion answers in the negative on Confrontation Clause grounds. To a certain extent, this case is not apropos: the issue is not whether the coroner need testify, but rather whether the declarant must. But it would be interesting to know whether physical findings by the coroner and reported upon were able to be introduced at common law without the coroner himself. In other words, one possible “out” for some of these scenarios might possibly be a turn to history. Perhaps coroner’s physical findings (rather than reports of what others said at an inquest) were permitted even when the coroner did not testify.

However, whatever the history showed, there would be something deeply odd about taking an originalist approach in this situation. The kinds of physical observations available to a nineteenth century coroner are so dramatically different from the kinds of scientific findings offered by forensic scientists today that it is far from clear that even if one generally approved of originalism as a method for answering such questions of constitutional scope, this would be a circumstance where viewing our past traditions as binding our present understanding was appropriate.

⁹⁹ For an argument suggesting the centrality of a best evidence principle undergirding evidence law, see generally Dale A. Nance, *The Best of Evidence Principle*, 73 IOWA L. REV. 227 (1988).

I will suggest two possible options. First, perhaps we could create the possibility for some kind of pre-trial cross-examination of the medical examiner. Perhaps after autopsies in which the cause of death is found to be murder, there could be a public opportunity for a cross-examination of the medical examiner who conducted the tests. To be sure, most of the time, if no one had yet been charged in the case, it is unlikely that anyone would come forward to conduct a cross-examination! But perhaps the creation of this pre-trial opportunity, coupled with unavailability of the medical examiner at trial, would suffice under *Crawford* to permit the use of the records.¹⁰⁰

Alternatively, and in my view better, especially given the problem of the lack of an actual defendant at the time of the hearing, we can imagine a narrowly drawn necessity exception to the Confrontation Clause in circumstances such as these. What if, upon a showing of necessity, the prosecutor were permitted to use a substitute expert to interpret autopsy report and present it to the jury? The use of the substitute expert could be subject to a jury instruction informing jurors that they were free to consider the lack of an opportunity to hear directly from the writer of the report in assessing the credibility of the contents of the report.¹⁰¹ To my mind, this is the more appealing approach, because it responds directly to the nature of the expert evidence and avoids the partly fictional nature of a preliminary opportunity to cross-examine. With a detailed autopsy, in which all findings were both carefully documented, recorded, measured, and photographed, a substitute expert really is a reasonable second-best solution—especially given that the

¹⁰⁰ For an argument suggesting the use of such a mechanism in domestic violence prosecutions, see Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 791-94 (2005). Of course, in domestic violence cases, there is not typically any question about the identity of the alleged perpetrator.

¹⁰¹ The jury would, of course, be free to consider this point even without a jury instruction saying so, and in any event it is not clear that jury instructions make a great deal of difference. But at the margins, pointing out the unavailability of the original declarant might usefully remind jurors to assess the evidence with a critical eye.

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original expert is not likely to have a significant actual memory of the tests anyway. This procedure would protect the Confrontation right by requiring the prosecutor to use the forensic expert or medical examiner who conducted the test whenever it is possible to do so, but would permit cross-examination of another expert when there was no feasible alternative. This approach would not permit prosecutors to game the system by choosing their most courtroom-friendly technicians instead of the ones who actually conducted a particular test. But it would, at the same time, allow some degree of practical flexibility in order to continue to put the best available evidence before the factfinder in criminal prosecutions.

This approach, to be sure, is not overtly justified by *Crawford* and *Davis*, which at present provide no space for considerations of necessity, unavailability, or reliability. Staunch advocates of *Crawford's* new regime might therefore resist such a move, as it takes a definite, if limited, step back toward the very ideas that *Crawford* has left behind. But recognizing some kind of necessity exception for evidence that, because of its expert nature and because of the way that it has been carefully memorialized by the original expert, truly can, to a substantial if imperfect extent, be adequately interpreted by a surrogate expert would be a reasonable way to continue to permit autopsies and forensic findings (that cannot be retested), even in the absence of the original tester. This approach would represent a narrowly drawn and intellectually honest approach to the problem. It would recognize correctly that autopsies and other forensic science reports are indeed testimonial. It would establish a preference for hearing in court from the declarant when possible. But it would also allow a second best solution when it was both necessary and justifiable. Surely a narrowly drawn, necessity-based, exception to *Crawford's* prohibition on testimonial evidence would be more jurisprudentially justifiable than general and vague pronouncements about practicality, or claims of a general (and unjustified) business records exception to the Confrontation Clause, or, still worse, the wholly nonsensical fiction that expert basis evidence is introduced for an ostensibly non-hearsay purpose.

CONCLUSION

More than two years have now passed since the Supreme Court dramatically recast its orientation to the Confrontation Clause in *Crawford*. What is most striking in the context of those expert evidence issues that intersect with the Confrontation Clause is just how resistant lower courts have been to taking *Crawford* at face value. A significant majority of those courts faced with questions about the admissibility of either certificates of analysis or basis evidence that is produced with an eye toward testimony by a person not present in court have resorted to strained and dubious arguments in order to avoid restricting these forms of proof.

The Court may well not at all have had the implications for forensic science evidence in mind when it decided *Crawford*. It is certainly possible that the justices did not intend to effect change in how these forms of evidence were handled at trial. But the logic underlying *Crawford* simply cannot justify a wholesale exemption of these forms of proof from the category of the testimonial. If it looks like a duck, quacks like a duck, and swims like a duck, one ought to have a very good justification for determining that the aquatic beast in question is not a duck after all. Unfortunately, most of the arguments that courts have put forward simply do not succeed in offering coherent or logical ways to justify treating forensic science reports, other kinds of expert basis evidence produced in circumstances suggesting their possible use as future testimony, or certificates of analysis, as non-testimonial.

The argument that basis evidence is being introduced for the non-hearsay purpose of helping the jury assess the expert fails to recognize that this allegedly non-hearsay purpose necessarily requires a preliminary assessment of the likely truth of the underlying matter. How can I use the basis evidence for assessing the expert without first assessing whether the basis evidence itself is worthy of credence? The fact that I may build on this first inference about the quality of the basis evidence in order to make a second inference about the quality of the

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expert's conclusions does not at all mean that my use of the basis evidence is for a purpose other than the truth of its contents. This approach either misunderstands the definitions of hearsay, misunderstands the nature of inferential thought, or both. Only if a court can actually detail a line of reasoning for which the basis evidence is useful that does *not* require a preliminary determination of its truth ought the courts to be able to resort to this argument; at least until now, no court has succeeded in doing so.

The argument that there is a *per se* business records exception to *Crawford* defies the decision's internal logic. Simply because most business records are not testimonial ought not to mean that those few that do that fit the category are nonetheless exempt simply because they also fit the contours of that hearsay exception.

While *Crawford* does lead to some practical difficulties, these may often not be so severe as is feared by courts and prosecutors understandably anxious about change. And even if *Crawford* is impractical, this does not justify the lower courts in ignoring its dictates. To be sure, in those limited instances when *Crawford* may create significant logistical and practical difficulties that threaten our process of proof, there may be an argument for limiting or rethinking *Crawford*'s boundaries, but this ought to be done both carefully and coherently, not simply based on general and sometimes overstated anxieties about practicality.

Arguing that testimony from a substitute expert witness avoids a *Crawford* problem is similarly problematic. Quite clearly *Crawford* prohibits testimonial substitutes in the non-expert context. A police interrogator's in-court testimony cannot possibly justify the admission of testimonial statements by the person interrogated, nor, more generally, can testimonial hearsay become admissible just because someone with knowledge relevant to the testimonial statement other than the declarant takes the stand. If cross-examination of a substitute expert is ever to be an option, it must depend on some meaningful ways in which expert evidence is distinct from other kinds of proof; otherwise, such a rule would virtually swallow

Crawford whole.

Similarly, the effort to exclude “objective” findings from *Crawford*’s purview is not satisfactory. Plenty of non-expert observations are descriptive and non-analytical; indeed, as a general matter, the rules of evidence exhibit a strong preference for factual descriptions by percipient witnesses rather than interpretations and opinions. If there is something distinct about forensic science reports that might warrant thinking about confrontation issues differently in this context, it cannot simply be that they are fact-based or facially objective. Moreover, delegating to judges the task of separating factual findings from interpretive ones goes deeply against the grain of *Crawford*’s reasoning. Precisely the arguments through which *Crawford* resists permitting judges to make determinations about reliability as the basis for determining whether confrontation is required would caution equally strongly against asking courts to distinguish factual claims from interpretive ones to decide whether the need for confrontation applies.

I claim, therefore, that none of these arguments succeeds as a justification for finding these kinds of expert evidence to be non-testimonial. There is, however, one argument that a number of lower courts have offered that is more successful. Sometimes the evidence at issue has been produced in a setting in which it can be fairly understood as non-accusatorial. When a technician fills out a report certifying that she has calibrated a particular piece of machinery, or a former gang member describes general contextual information about the structure of the gang to a police detective outside of the confines of a particular case, it is, I think, fair to view this information as non-testimonial, even though the words were spoken or written with the clear knowledge that they might be useful for testimony at some point in the future. The salient difference in these settings and analogous ones is that the statements at issue do not relate simply to a particular case or incident, but rather, have a significantly more abstracted and attenuated quality. While they could potentially be relevant to any number of future cases, these statements were not made with a view toward any one case in particular or any definable instance of wrongdoing. *Crawford*,

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to be sure, does not make this question of whether a statement is accusatorial explicitly relevant to its analysis of what is testimonial. But a limit on the Confrontation Clause that emphasized that only accusations, broadly understood, were subject to its confines, could be grafted onto *Crawford* without any great difficulty or loss of internal coherence. While this modification would eliminate a number of more ministerial kinds of expert documents from *Crawford's* purview, let me be clear: the vast majority of otherwise testimonial expert basis evidence and many certificates of analysis could not be excluded from the definition of the testimonial on this ground.

Apart from this possible limitation, I would argue that testimonial expert evidence should be recognized as testimonial. That sounds tautological, even obvious. And yet, far too many courts have refused to recognize the point. There is simply no reason why any of these forms of expert evidence should get a free pass, or be understood as obviously exempt from the Confrontation Clause's purview. Indeed, often forensic science evidence will be the strongest evidence offered against a defendant; if we take confrontation values seriously, this may in fact be an especially important site in which to assure that the defendant has the possibility for cross-examination.

That said, there may still be both reasons and possible methods for dispensing with the confrontation right in some circumstances. With certificates of analysis, an important question ought to be whether some waiver procedures ought to pass constitutional muster. Though I have not considered that issue in any detail, it is certainly true that there are many cases in which the key issue at trial does not at all relate to the reliability of the forensic evidence. To require live testimony in every case, even when both parties agree on the forensic science facts, may well be a significant waste of resources. Stipulations can, of course, be one way around this issue. But it may make sense to go further: waiver procedures that would let the prosecutor use a certificate of analysis unless the defendant requests otherwise could offer a practical way to both permit and limit the use of such certificates without any testimony. However, the burden imposed on the defendant by these waiver

provisions ought to be minimized.

A second possible way to get around the limitations imposed by *Crawford* would be to create additional pre-trial mechanisms for cross-examination. If this made sense anywhere, it would likely be in the context of autopsies, in which there may frequently be a significant passage of time between the autopsy of a victim and the indictment of a defendant in the case. After an autopsy found that the cause of death was murder, there could be notice of a public hearing in which the medical examiner would be available for cross-examination. Would anyone representing an uncharged suspect show up at these hearings? Probably not, but so be it. By merely creating the opportunity, the prosecution could argue that the medical examiner's report should be admissible at trial, should the medical examiner herself turn out to be available.

This potential procedural innovation is, however, more clever than useful. It could possibly pass constitutional muster under *Crawford*, but it is an inelegant solution. In practical terms, it would simply be make-work for medical examiners, while providing little actual possibility of confrontation for defendants who were charged at some point subsequent to the hearing, and who might not even have been suspects at the point when the hearing occurred. To be sure, there is no particular reason to feel sorry for the guilty defendant who did not avail herself of the opportunity to cross-examine at this pretrial hearing because, at the time of the hearing, she had still evaded justice or even suspicion, but this pre-trial mechanism would offer little assistance to the subsequently-charged innocent defendant either.

The better solution would be a narrowly drawn exception to *Crawford* in circumstances that meet three conditions. When (1) the expert who conducted the original test is legitimately unavailable; (2) the expert memorialized the results of the original test in a form that another expert in the field can reasonably understand and interpret; and (3) a retest by an available scientist is infeasible, then the courts should permit a qualified substitute expert to disclose and to interpret the original results for the jury, even though the report itself is testimonial.

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This solution appropriately balances the defendant's constitutional interest in confrontation with the public interest in accurate adjudication. It prevents the state from cherry-picking the forensic experts it uses for testimony, or from offering critical evidence without any testimony at all. It also recognizes that substitute experts are only a second-best solution; when possible, the defendant ought to be given the opportunity to cross-examine the experts who actually produced the report. But it also recognizes that substitute experts *are* a second-best solution. Especially when considerable time elapses between test and testimony, the actual expert who did conduct the test is likely to lack an independent memory of the tests administered. To be sure, this will sometimes hold true for non-experts as well: a witness to a crime who makes a statement shortly thereafter may, by the time of trial, have little memory of what occurred apart from what is captured by the statement itself. But in the expert context, a substitute witness with adequate training will typically be able to use her expertise usefully to interpret the results documented by the original expert—perhaps not quite as well as the original creator of the report, but well enough that we should permit it when necessary. Part of what makes someone expert in the relevant forensic field is precisely that they have had training in how to produce and interpret such reports. Note that I am neither assuming nor presuming the reliability of forensic science evidence—there have been far too many incidents of both innocent error and malfeasance in the forensic sciences for their reliability simply to be taken as a given. But the shared procedures and routines for documentation of results within a particular laboratory ought, at least in principle, to make a substitute expert a reasonable interpreter of a forensic science report when, and only when, the actual creator is unavailable.

This proposed solution does reflect a certain degree of backpedaling—a small move away from *Crawford*, and back toward the dual foci of necessity and reliability that *Crawford* ostensibly left behind. It also injects into *Crawford's* formalism a degree of functionalist analysis—but *Davis*, in quite a different context, has already begun to add functionalist inquiries (e.g.,

what was the *primary* purpose of the statement?) to the Confrontation Clause inquiry. As a practical matter, it is almost unthinkable that courts will be prepared to exclude the autopsy report from long ago, written by an expert now truly unavailable. The real question is not whether most courts will find some way to permit such evidence—for they almost certainly will—but whether the courts will make careful and intellectually justifiable distinctions in order to permit under the Confrontation Clause a limited amount of testimonial evidence in delineated circumstances. If they choose instead to rely, for example, on the fiction that expert basis evidence is not hearsay, or to invent a generalized business records exception to the Confrontation Clause, they will be making use of the same kinds of inelegant, ad hoc, and jerry-rigged doctrinal creations that prompted *Crawford* itself. That would be both avoidable and a shame.