

# **CRAWFORD V. WASHINGTON: A TEN-YEAR RETROSPECTIVE**

## INTRODUCTION FROM THE EDITORS

No one disputes the significance of *Crawford v. Washington*, 541 U.S. 36 (2004), which fundamentally transformed Confrontation Clause jurisprudence. But ten years after the Supreme Court's landmark decision, scholars, practitioners, and judges still debate its logic and its consequences. This Symposium continues that debate, featuring essays written by Professors Richard D. Friedman and Jeffrey L. Fisher, who advocated in *Crawford* itself for the Supreme Court to adopt the "testimonial" approach to the Confrontation Clause; Professor George Fisher, one of the nation's premier scholars of criminal law and evidence; and Professor Deborah Tuerkheimer, who has written extensively on the *Crawford* regime's effect on domestic violence prosecutions.

The Symposium consists of five essays. Professors George Fisher and Tuerkheimer both wrote longer essays, while Professors Friedman and Jeff Fisher each wrote a shorter piece and collaborated on a joint response to George Fisher's essay.

We hope this Symposium fosters further debate about the merits of the *Crawford* regime and inspires the practitioners, scholars, and judges who will shape the contours of the Confrontation Clause over the next ten years.

# MICHIGAN LAW REVIEW

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Vol. 113, First Impressions

November 2014

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# COME BACK TO THE BOAT, JUSTICE BREYER!

*Richard D. Friedman\**

## INTRODUCTION

I want to get Justice Breyer back on the right side of Confrontation Clause issues.

In 1999, in *Lilly v. Virginia*,<sup>1</sup> he wrote a farsighted concurrence, making him one of the first members of the Supreme Court to recognize the inadequacy of the then-prevailing doctrine of the Confrontation Clause. That doctrine, first announced in *Ohio v. Roberts*,<sup>2</sup> was dependent on hearsay law and made judicial assessments of reliability determinative. In *Crawford v. Washington*,<sup>3</sup> the Court was presented with an alternative approach, making the key inquiry whether the statement in question was testimonial in nature. During the oral argument, Justice Breyer seemed to endorse the test I had articulated, in an amicus brief, for what makes a statement testimonial—“[W]ould a reasonable person in the position of declarant anticipate that the statement would likely be used for evidentiary purposes?”<sup>4</sup> Ultimately, he was one of seven members of the Court to support *Crawford*’s dramatic adoption of a testimonial approach. And two years later, in *Hammon v. Indiana* (decided with *Davis v. Washington*<sup>5</sup>), Justice Breyer was one of eight justices to treat as testimonial a woman’s statement accusing her husband of assaulting her, given that it was made to a police officer in the family living room a considerable time after the alleged event, while another officer held the accused at bay. (I like to think that I argued the case for the accused because I believed this was obviously right, not the other way around.)

But consider what Justice Breyer has done more recently. In 2011, he helped form a majority in *Michigan v. Bryant*,<sup>6</sup> taking a view far more restrictive than that reflected in *Hammon* of what is testimonial in the context of a fresh accusation. And three times over the last five years—in

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1. 527 U.S. 116 (1999).
2. 448 U.S. 56 (1980).
3. 541 U.S. 36 (2004).
4. Transcript of Oral Argument at 9–10, *Crawford*, 541 U.S. 36 (No. 02-9410).
5. 547 U.S. 813 (2006).
6. 131 S. Ct. 1143 (2011).

*Melendez-Diaz v. Massachusetts*,<sup>7</sup> *Bullcoming v. New Mexico*,<sup>8</sup> and *Williams v. Illinois*<sup>9</sup>—he has joined Chief Justice Roberts and Justices Kennedy and Alito in opinions resisting the proposition that forensic laboratory reports are ordinarily testimonial. Each of these opinions gives off a strong sense of buyer’s remorse, arising at least in large part from fear of undue burdens on the criminal justice system; the opinions seem to be looking around for any theory, however strained, that would substantially limit *Crawford*. Each has fallen just one vote short of gaining a majority of the Court, but in *Williams*—thanks to Justice Thomas, who (as in *Hammon*) takes an idiosyncratically formalistic view of what statements are formal enough to be deemed testimonial—the four justices became a plurality. *Williams* has, as predicted by Justice Kagan in a sparkling dissent, sown considerable confusion in the lower courts.

What happened? At least in part, I think the answer is simple: *Giles v. California*.<sup>10</sup> At the argument in *Giles*, Justice Breyer noted that he had joined in *Crawford*, but he then added that he was “rapidly leaving” “the boat.”<sup>11</sup> And so it has been: since *Giles*, in every divided case, Justice Breyer has been on the side that would limit the confrontation right.

#### I. GILES AND THE LAW OF UNINTENDED CONSEQUENCES

*Giles* was the Court’s first chance to address in depth the doctrine under which an accused might forfeit his or her confrontation right by engaging in misconduct that prevents a witness from testifying subject to cross-examination. I have long believed that a robust forfeiture doctrine is essential to the development of a sound confrontation doctrine. And so when the Court took the case I was delighted, complacent in the belief that the justices would surely hold that by his misconduct *Giles* had forfeited the confrontation right. Boy, was I wrong!

*Giles* was charged with murdering his former girlfriend, Brenda Avie. The prosecution wished to introduce a statement she had made to the police after a violent incident a few weeks earlier. He objected on the ground that he had not had a chance to examine her. But the undisputed reason for that was that he had killed her.

I thought that all that was necessary to conclude that *Giles* had forfeited his confrontation right was a determination by the trial judge that *Giles* had killed Avie without justification. True, that was the very question before the

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7. 557 U.S. 305 (2009).

8. 131 S. Ct. 2705 (2011).

9. 132 S. Ct. 2221 (2012).

10. 554 U.S. 353 (2008).

11. Transcript of Oral Argument at 13, *Giles*, 554 U.S. 353 (No. 07-6053).

jury, but this should not matter. The jury's job in determining whether the accused was guilty of the crime charged was entirely separate from the judge's job in determining whether the accused forfeited his confrontation right. Each of those functions may require deciding the same factual issue—but so what? This, indeed, is just what happens as an everyday matter in a prosecution for conspiracy when the judge has to determine whether a statement qualifies for the conspirator's exemption from the rule against hearsay.<sup>12</sup> And it seems clear where the equities lie: it is an abomination to allow the accused to keep the jury from hearing a witness's statement on the grounds that he did not have an opportunity to cross-examine her if the reason he did not is that he murdered her.

But that's not the way a majority of the Court saw it. The Court said that Giles could not be deemed to have forfeited his confrontation right unless his misconduct—killing Avie—not only prevented her from testifying but also was designed to do so.

I have thought ever since the Court decided *Giles* that the outcome was a disaster for the Confrontation Clause. This is sadly ironic, because this blow came at the hands of Justice Scalia, who wrote *Crawford* and who is intensely proud of it; indeed, he has said it is his favorite among his opinions for the Court.<sup>13</sup> I hope it does not turn out that, like the doomed man Oscar Wilde described in *The Ballad of Reading Gaol*, he “killed the thing he loved.” Some, Wilde said, “do it with a bitter look,” others “with a flattering word,” the coward “with a kiss,” and the brave man “with a sword.” Wilde did not note that some do it in a more prosaic way, by failing to establish proper limitations on doctrine and thus causing that doctrine to be limited in other, inappropriate ways.

Indeed, one of the most predictable consequences of *Giles* was that, in compensation for undue narrowing of forfeiture doctrine, the term “testimonial” would be given a constricted reading. And that is just what happened in *Bryant*.

## II. *BRYANT*: PAYING FOR *GILES*

*Bryant* concerned a statement made to uniformed police officers, with no apparent danger in sight, identifying the perpetrator of a shooting committed half an hour before and six blocks away. Given just those facts, it seems obvious that the statement was testimonial: clearly it was made in the anticipation—and indeed, one might say for the sole or at least dominant purpose—of bringing the shooter to justice. If Anthony Covington, the accuser, were readily available at trial, would it not be obvious that the

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12. FED. R. EVID. 801(d)(2)(E).

13. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 316 (2007).

prosecution should be required to produce him as a live witness rather than relying on the officers' accounts of what he said?

But *Bryant* held that Covington's accusations were not testimonial, which means that, so far as the Confrontation Clause is concerned, there would be no need to bring him to the trial or a deposition, no matter how readily available he was. How could this possibly be? The answer lies in two other facts: First, Covington was not only a witness to the shooting; he was also the victim. Second, he was already in dire physical condition when he made his accusations, and he died several hours later; taking his deposition would not have been humanely feasible, even if Bryant, the accused, could have been found in that time.

If Covington is to be believed, therefore, the reason he could not testify live at a trial or deposition concerning the shooting is that Bryant shot him, causing his death within an interval too short to allow even for a deposition. That is the real impetus for admissibility of his accusations.

*Bryant*, in other words, should have been decided as an ordinary forfeiture case. If the trial court concluded that Bryant committed serious wrongdoing that foreseeably caused Covington to be unavailable to testify subject to cross-examination, then Bryant should be deemed to have forfeited his confrontation right with respect to Covington. Such a ruling would have allowed for an equitable result—ensuring that murder of the witness by the accused would not prevent the jury from learning of the accusation—without need to deny what should have been obvious: that the accusation was testimonial.

But *Giles* simply forecloses this result. Even if Bryant murdered Covington, the murder was not *designed* to render Covington unavailable as a witness; rather, the altercation appears to have been rooted in a mundane dispute over a drug transaction. And so, as a direct consequence of *Giles*, the Supreme Court has adopted a mushy understanding of what it means for a statement to be testimonial, an understanding that will likely continue to impair Confrontation Clause jurisprudence in contexts far broader than the immediate one involved in *Bryant* itself.

Because it is often difficult to prove the accused's intent to render a witness unavailable, *Giles* has also made prosecution of some homicide cases more difficult than it should be. Sometimes, though, where the prosecution has failed to satisfy the *Giles* standard, the harmless-error doctrine has come to its rescue. Also, *Giles*'s effect has been somewhat mitigated by language in the majority opinion, and in Justice Souter's concurrence, indicating that in the domestic violence context the necessary intent can be inferred from a pattern of abuse. I hope that over time the effect of this qualifying language becomes more significant than that of the holding itself.

### III. WILLIAMS AND EXTRAORDINARY COINCIDENCES

I suspect that the overreaching of *Giles*—which may have given the impression of unbridled doctrinal zealotry—may also be responsible in part for Justice Breyer’s joining Justice Kennedy’s aggressive dissents in *Melendez-Diaz* and *Bullcoming* and Justice Alito’s equally aggressive opinion in *Williams*. The reports in *Melendez-Diaz* identified a substance as cocaine, and the one in *Bullcoming* revealed an inflated blood-alcohol level. That these reports were testimonial should have been rather obvious: they were statements made in clear contemplation of prosecutorial use. The dissents seem motivated by fear of the expense caused by requiring in-court or deposition testimony by a lab analyst (and, as *Bullcoming* requires, the analyst who made the report, not a surrogate)—a concern that Justice Scalia rightly brushed aside in *Melendez-Diaz*, on the twin bases that it is constitutionally irrelevant and factually unfounded.

*Williams* was more complex. That was a “cold-hit” DNA case. A private lab, Cellmark, analyzed a swab taken from a rape victim and generated a male DNA profile. The state police later matched this profile, by searching a large database, to that of Williams, who had not previously been a suspect in the case. An expert from the state police testified at Williams’s trial to the match, but Cellmark’s report was not introduced and nobody from Cellmark appeared.

Five justices concluded, though on different grounds, that the Cellmark report was not testimonial. Justice Thomas alone thought it was not sufficiently formal to be characterized as testimonial. I believe that his emphasis on formality is misguided, because a statement’s lack of proper formality does not mean it should be regarded as nontestimonial in nature; rather, it means that the statement should not be regarded as *acceptable* testimony at trial. Here I thought Justice Thomas made almost a parody of a formality test. The report was signed by two supervisors, it referred to “evidence” and a case number, and it was clearly written in anticipation of prosecutorial use. But it was not certified, and to Justice Thomas that made the difference.

The other four justices emphasized that the Cellmark report was not directed at a “targeted individual.” That assertion is debatable—the report was directed at the person who had a given DNA profile, which is a much more precise targeting than a name or a facial description. But in any event, so what? If only the makers of targeted statements had to confront the accused, criminal trials would look very different. For example, at least before identification of a suspect, a police officer, or anyone else, could make a statement describing the crime scene and never come to court. Similarly, a witness who observed an apparent crime but was unable to provide identifying information would never have to confront the accused.

No more persuasive is the four justices' assertion that the Cellmark report was not used for its truth because it underlay an expert's opinion that there was a match: the report supported that opinion only on the assumption that the report was *accurate*. I do believe, though, that a factor emphasized by Justice Alito's opinion gets closer to the mark: it would have been an extraordinary coincidence for Cellmark to come up with this particular profile if it were not accurate. That consideration might have supported admissibility of the Cellmark report, without anybody testifying from Cellmark, but only if the prosecution had not relied—as it did in fact—on Cellmark's proficiency in doing DNA testing. In other words, the essence of the reasoning would have been this: "We sent Cellmark the vaginal swab, and they sent back numbers that happened to match the profile of an actual male, Sandy Williams, who happens to live near the crime scene and against whom there happens to be other evidence linking him to the crime. Whatever you might think of Cellmark's proficiency, that would be far too unlikely a coincidence unless it so happens that Cellmark came up with those numbers by accurately recognizing the profile of Williams's DNA in the swab."

Ultimately, though, I suspect that the four justices were motivated largely by another concern, highlighted in a separate concurrence by Justice Breyer: multiple people usually participate in performing a DNA test, so if the report is testimonial, does that mean they will all have to testify? The answer is no, as shown by the experience of Michigan, which did not need the Supreme Court to tell it that, absent stipulation, the authors of forensic lab reports must testify at trial. I supervised a study of Michigan criminal sexual-conduct trials and found that, when DNA results were introduced, the presentation took an average of 1.24 live witnesses.<sup>14</sup> Several factors explain why this number is so low. Often stipulations ease the prosecution's burden. Michigan's police lab integrates vertically to a considerable extent, minimizing the number of people involved in performing a DNA test and still operating with suitable efficiency. (And note: lab practice should conform to the Constitution, not the other way around.) Perhaps most significantly, it is just not so that everyone who participates in a lab test must testify at trial. The only ones who must are those who make testimonial statements that the prosecution wants to use as proof. And, within limits, it is up to the prosecution to decide whose statements it needs.

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14. Richard D. Friedman, *Is There a Multi-Witness Problem with Respect to Forensic Lab Tests?*, THE CONFRONTATION BLOG (Dec. 7, 2010, 10:11 AM), <http://confrontationright.blogspot.com/2010/12/is-there-multi-witness-problem-with.html> [http://perma.cc/VWVP4-9L2R].



## A WAY FORWARD

So the state of confrontation doctrine a decade after *Crawford* is disappointing. I believe the Supreme Court can do better over the next decade or two.

A crucial first step would be, one way or another, to render *Giles* a dead letter. That would allow for more equitable results when an accused murders a witness. It would also free the Court to implement an optimal standard for determining whether a statement is testimonial: whether a reasonable person in the position of the speaker would anticipate prosecutorial use for the statement. And conscientious application of that standard would encourage the Court to adhere to the rule of *Melendez-Diaz* in the full range of forensic laboratory settings (including autopsies); a few years of experience might persuade the full Court that the rule is not impractical and so end attempts to find ways around it.

Removing the obstacle created by *Giles* would also give the Court an incentive to develop a doctrine requiring the state, on a type of last-clear-chance theory, to take reasonable steps to mitigate potential forfeiture. If the state claims that an accused intimidated a witness, it might be required to take reasonable measures to protect her or to create conditions under which she will feel comfortable testifying. Or suppose, as in *Bryant*, the accused fatally strikes the victim, but, before dying, the victim makes a testimonial statement. If the victim dies soon afterward, then presumably the accused should be held to have forfeited his confrontation right (without any need for a separate dying-declaration doctrine). But if the victim remains alive for a considerable period, it may be appropriate to require the prosecution, as a condition of using testimonial statements by the victim, to offer the accused the opportunity to be confronted with the victim at a deposition; this was the practice at about the time the Confrontation Clause was adopted.<sup>15</sup>

Freeing forfeiture doctrine of the unfortunate stricture created by *Giles*, but shaping it by a sensible mitigation requirement, might therefore lead to the development of a body of Confrontation Clause law that is reasonably clear and simple, practical, and in keeping with the traditional understanding of the confrontation right. I have the pleasant hope that the Court will move in this direction, that Justice Breyer will be lured back onto the *Crawford* boat, and that those two developments will each reinforce the other.

I have left aside one conundrum that the Court has not yet addressed but will very soon—how to handle statements by very young children. I believe that some very young children should be considered beyond the bounds of the clause because such children are not capable of being witnesses at all; nevertheless, they are still sources of potentially valuable

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15. See, e.g., *R v. Forbes*, Holt 599, 171 E.R. 354 (1814).

evidence, and the accused should have an opportunity to examine them out of court through a qualified expert, presumably a psychologist. But that is the subject of another essay,<sup>16</sup> as it will be the subject of another case.<sup>17</sup>

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16. Richard D. Friedman & Stephen J. Ceci, *The Child Quasi-Witness*, 82 U. CHI. L. REV. (forthcoming 2015).

17. *Ohio v. Clark*, 999 N.E.2d 592 (Ohio 2013), *cert. granted*, 135 S. Ct. 43 (2014) (mem.).

# **CRAWFORD V. WASHINGTON: THE NEXT TEN YEARS**

*Jeffrey L. Fisher\**

## INTRODUCTION

Imagine a world . . . in which the Supreme Court got it right the first time. That is, imagine that when the Supreme Court first incorporated the Confrontation Clause against the states, the Court did so by way of the testimonial approach.

It's not that hard to envision. In *Douglas v. Alabama*—issued in 1965, on the same day the Court ruled that the Confrontation Clause applies to the states—the Court held that a nontestifying witness's custodial confession could not be introduced against the defendant because, while “not technically testimony,” the confession was “the equivalent in the jury's mind of testimony” from the nontestifying witness.<sup>1</sup> From that platform, all the Court would have needed to say in *Dutton v. Evans*<sup>2</sup> and *Ohio v. Roberts*<sup>3</sup> was that a statement made seemingly in confidence to a cellmate is not “testimonial” in nature, while statements at a preliminary hearing obviously are (although such statements still are admissible when the defendant had an adequate prior opportunity for cross-examination).

Of course, things did not turn out that way. Concerned about the unusual nature of Georgia's version of the coconspirator hearsay exception at issue in *Dutton*, the Court tied itself up in knots. Then it announced in *Roberts* that the Confrontation Clause essentially tracked hearsay law.

For the next twenty-four years, states enjoyed a license to operate, for the most part, free and clear of the Confrontation Clause. No longer did prosecutors have to present their witnesses' testimony in court, in the presence of the defendant, and subject to cross-examination. In other words, the clause ceased to be a procedural requirement (enforced by an “exclusionary rule”<sup>4</sup> as necessary to preserve the integrity of the right). It became simply a backup to local evidence law.

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1. 380 U.S. 415, 419 (1965).
2. 400 U.S. 74 (1970).
3. 448 U.S. 56 (1980).
4. *Davis v. Washington*, 547 U.S. 813, 826 (2006).

Still, I introduce this thought exercise in order to address an important issue: many judges (and justices) in the post-*Crawford* era find it very difficult to believe that so many seemingly entrenched state-law and prosecutorial practices can be illegitimate. Judges raised under the *Roberts* approach, in other words, find it a great struggle to change their mode of confrontation analysis from an evidentiary approach to one that is meant to protect a purely procedural right.

If the Supreme Court had gotten it right the first time, we would not have this problem. Law-enforcement agencies would not have developed prosecutorial practices—such as so-called “victimless,” or “evidence-based,” prosecutions—that depend on introducing statements obtained during ex parte interviews in lieu of live testimony. Law-enforcement agencies would not have created forensic evidence protocols designed to rely on affidavits instead of live testimony. States likely would have allocated financial resources toward programs aimed at producing lay and expert witnesses in court, instead of assuming it was unnecessary to undertake these burdens. And, dare I say it, law faculties would not have housed the right to confrontation in evidence classes and casebooks. Instead, professors likely would have opted to teach it in criminal procedure alongside the Fifth Amendment right against self-incrimination, the other constitutional right governing “witnesses” in criminal cases.

With these real-world developments and missed opportunities in mind, I will try in the pages that follow to achieve two things. First, I will explain why, despite some continuing resistance in the judiciary and the academy, I firmly believe that *Crawford* is fundamentally sound. Second, I will map out a handful of things the Supreme Court could do over the next decade to stabilize the *Crawford* doctrine and to make it more easily digested and applied. My hope and belief is that by the time we celebrate *Crawford*'s twentieth anniversary, most lawyers and judges will thankfully engage the doctrine without carrying baggage from the *Roberts* era. By that time, remaining controversies should involve the edges of the doctrine, not the fundamentals.

## I

The testimonial approach starts from the premise that the Confrontation Clause is not a rule of evidence but rather one of criminal procedure. As the Court explained in *Crawford*:

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

cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.<sup>5</sup>

With this insight, the Court, quite properly, decoupled the Confrontation Clause from hearsay law. The Confrontation Clause does not turn on “amorphous notions of ‘reliability,’” so its exclusionary rule cannot depend on “the vagaries of the rules of evidence.”<sup>6</sup> In other words, the constitutional considerations requiring testimony to be subject to cross-examination in criminal cases “do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.”<sup>7</sup>

All that remains from these basic principles is to determine which statements fall within this exclusionary rule—that is, which statements are “testimonial.” The Court seems to have settled on the following test: “To rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events potentially relevant to a later criminal prosecution.’”<sup>8</sup> By last count, eight justices endorse this general test.<sup>9</sup> While some justices contend that a different test ought to apply to forensic analysts,

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5. 541 U.S. 36, 61–62 (2004). *See also* *Melendez-Diaz v. Massachusetts*, 567 U.S. 305, 319 n.6 (2009) (emphasizing that the Confrontation Clause would bar the introduction of forensic lab reports as a substitute for live testimony even “if all analysts always possessed the scientific acumen of Mme. Curie and the veracity of Mother Theresa”).

6. 541 U.S. at 61; *see also* *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004) (“If there is one theme that emerges from *Crawford*, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements.”).

7. *Crawford*, 541 U.S. at 56 n.7. In *Melendez-Diaz*, the Court elaborated on this principle while responding to the Commonwealth’s argument that forensic laboratory reports were admissible as business or official records: “Business and public records are generally admissible [in criminal cases] absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether or not they qualify as business or official records, the analysts’ statements here—prepared specifically for use at petitioner’s trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.” 567 U.S. at 324.

8. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 n.6 (2011) (plurality opinion) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)); *accord* *Michigan v. Bryant*, 131 S. Ct. 1143, 1154 (2011).

9. *See* *Davis v. Washington*, 547 U.S. 813, 822 (2006); *see also* *Bryant*, 131 S. Ct. at 1154 (new justices sign on to the opinion applying the *Davis* primary-purpose formulation).

there is no serious dispute that this “primary-purpose” test governs all statements made by eyewitnesses and other nonexperts.

I don’t think this formulation is perfect, but it will suffice. The critical thing it does is focus a court’s attention during litigation on the Confrontation Clause’s core concern: whether the speaker was doing the functional equivalent of offering testimony. Or, put another way, it focuses attention on whether the jury would perceive the statement as a substitute for live testimony. If so, the statement is testimonial, regardless of its perceived reliability.

To be sure, the Court noted in *Bryant* that, in determining whether a statement was procured “with a primary purpose of creating an out-of-court substitute for trial testimony[,] . . . standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”<sup>10</sup> But Justice Sotomayor, the author of *Bryant*, quickly clarified this passage. She rightly explained that, when a statement satisfies a hearsay exception, it is likely to be nontestimonial because many hearsay exceptions “rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution.”<sup>11</sup> That is, some of the same things that hearsay law takes to indicate reliability can also indicate that a statement is nontestimonial. But there is no *causal* connection between the two—merely an overlap. The fact that a statement is reliable does not make it nontestimonial, for “[t]he rules of evidence, not the Confrontation Clause, are designed primarily to police reliability.”<sup>12</sup>

One other overarching principle is important to bear in mind. Unlike exclusionary rules that flow from other provisions of the Bill of Rights, the restriction the Confrontation Clause imposes on introducing testimonial statements is not designed to identify or deter police misconduct. There is nothing unconstitutional or even improper about a police officer’s asking specific questions to determine what happened or executing a witness affidavit. To the contrary, we *want* the police to question witnesses and to conduct probing inquiries. As the Court has put it:

Police investigations . . . are . . . in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory “nontestimonial” evidence is gathered, this is essentially beyond police control. . . . The Confrontation Clause in no way

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10. *Bryant*, 131 S. Ct. at 1155; see also *Bullcoming*, 131 S. Ct. at 2720 (Sotomayor, J., concurring in part).

11. 131 S. Ct. at 1157 n.9.

12. *Bullcoming*, 131 S. Ct. at 2720 n.1 (Sotomayor, J., concurring in part).

governs police conduct, because it is the *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision.<sup>13</sup>

Accordingly, courts that ask—in the face of an argument that a statement is testimonial—how the police should have acted differently are asking the wrong question. Neither the police nor any other agent of law enforcement has a legitimate interest in trying to obtain statements from witnesses that are immune from adversarial testing. Instead, investigators are simply supposed to try to find out what happened. Then the prosecution is supposed to prove its case by putting live witnesses on the stand. When the prosecution is unwilling or unable (through no fault of the defendant) to do so, the Confrontation Clause’s exclusionary rule comes into play.

## II

Let me now outline a few things the Court should do over the next decade to clarify and solidify *Crawford*’s exclusionary rule.

First, the Court should decide one or two cases involving statements made to investigators other than police officers or their immediate agents (such as 911 operators). The Court has held that statements to police or their agents in the aftermath of potentially criminal events are testimonial—at least once any ongoing emergency arising from the events has been quelled.<sup>14</sup> But the Court has not yet addressed whether statements made under similar circumstances to other kinds of investigators or victim-support organizations are testimonial.

Most states, for example, employ personnel such as child protection services workers and other social workers to investigate suspected instances of child abuse. Most states or local law-enforcement agencies also direct (or at least encourage) “sexual-assault nurse examiners” or other personnel with medical training to conduct interviews of suspected crime victims, when possible, for forensic and investigatory purposes.<sup>15</sup> Finally, many localities have private victims’ services organizations that interview and help identify victims of abuse.

Lower courts, by and large, have held that statements made in these kinds of interviews are testimonial. But there are outliers in each of the three

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13. *Davis*, 547 U.S. at 832 n.6; *see also id.* at 830 (noting that “the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime—which is, of course, precisely what the officers *should* have done”).

14. *Bryant*, 131 S. Ct. at 1147; *Davis*, 547 U.S. at 814.

15. As the Nevada Supreme Court put it, in reference to sexual-assault nurse examiners (“SANEs”), such “nurses . . . are trained to conduct sexual assault examinations. A particular duty of a SANE nurse is to gather evidence for possible criminal prosecution in cases of alleged sexual assault. SANE nurses do not provide medical treatment. They only examine the individual to get vital signs and a history from the victim.” *Medina v. Nevada*, 143 P.3d 471, 473 (Nev. 2006). *See generally* *United States v. Gardinier*, 65 M.J. 60 (C.A.A.F. 2007).

subcategories, particularly in situations in which the police are not present or otherwise directly involved.<sup>16</sup>

The Supreme Court would do well to make clear that these kinds of statements are testimonial. All are given under investigatory circumstances. All are passed on directly to law enforcement insofar as they are useful to potential criminal prosecutions. And all, in a jury's eyes, are a nearly perfect substitute for in-court testimony. The statements recount under structured questioning "how potentially criminal past events began and progressed."<sup>17</sup>

Issuing a decision holding that such statements are testimonial would erase any doubt about the Court's general commitment to *Crawford*. It would also curtail the last remaining practice that law enforcement agencies developed to take advantage of the *Roberts* regime – a practice that threatens to allow a system in which victims and other witnesses can give their testimony without having to appear in court.

The other area of current confusion, of course, involves forensic reports. Even though the Court has held that reports identifying a substance as an illegal drug or determining blood-alcohol content are testimonial, lower courts are divided over whether the same is true with respect to autopsy reports concluding that a homicide occurred.<sup>18</sup> This should not be a difficult

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16. Courts have held that statements to state social workers or child protection services workers during risk-assessment interviews are testimonial, regardless of whether the law-enforcement personnel are involved in the interview or the interview is conducted at the behest of law enforcement. *See, e.g., State v. Hopkins*, 154 P.3d 250 (Wash. Ct. App. 2007). *But see State v. Arnold*, 933 N.E.2d 775 (Ohio 2010). If police are even indirectly involved with an interrogation conducted by a state social worker or child protection services worker, courts will likely find the statement testimonial. *See, e.g., In re S.P.*, 215 P.3d 847 (Or. 2009). But a significant minority of courts treats such statements as nontestimonial when the police are not yet directly involved. *See, e.g., Seely v. State*, 282 S.W.3d 778, 789–90 (Ark. 2008).

When private personnel interview child victims in coordination with law enforcement, courts have held that the resulting statements are testimonial. *See, e.g., State v. Blue*, 717 N.W.2d 558, 564 (N.D. 2006). When the police are not directly involved, however, courts are divided over whether statements to such private personnel are testimonial. *Compare D.G. v. State*, 76 So. 3d 852 (Ala. Crim. App. 2011), *with Bishop v. State*, 982 So. 2d 371 (Miss. 2008).

Every court but one has held that statements to sexual-assault nurse examiners and similar interviewers are testimonial even if the police are not yet involved. *See, e.g., Medina v. State*, 143 P.3d 471 (Nev. 2006). *But see State v. Scacchetti*, 711 N.W.2d 508 (Minn. 2006).

17. *Davis*, 547 U.S. at 830.

18. *Compare United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012) (testimonial), *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), *Malaska v. State*, 88 A.3d 805 (Md. Ct. Spec. App. 2014), *Commonwealth v. Carr*, 986 N.E.2d 380 (Mass. 2013), *State v. Navarette*, 294 P.3d 435 (N.M. 2013), *Miller v. State*, 313 P.3d 934 (Okla. Crim. App. 2013), *Lee v. State*, 418 S.W.3d 892 (Tex. Ct. App. 2013), *State v. Lui*, 315 P.3d 493 (Wash. 2014), *and State v. Kennedy*, 735 S.E.2d 905 (W. Va. 2012), *with State v. Medina*, 306 P.3d 48 (Ariz. 2013) (nontestimonial), *People v. Dungo*, 286 P.3d 442 (Cal. 2012) (objective statements in report



issue, and the Court should say so by explaining that autopsy reports are testimonial. Just like drug and alcohol reports, autopsies indicating that homicide has caused death are designed to aid investigations into past criminal events. Autopsy reports may not target or accuse a particular individual of committing the crime, but neither do numerous other sorts of plainly testimonial statements.

That leaves the final thing the Court should address in the near term—the rules governing the introduction of testimonial forensic reports through expert witnesses. In *Williams v. Illinois*, five justices concluded that, when one expert testifies on the basis of another expert’s report, that report (or any statement from it that the testifying expert transmits orally) is introduced for the truth of the matter asserted—and thus is subject to the ordinary rules governing the admissibility of testimonial statements.<sup>19</sup> This reasoning is manifestly correct. If the underlying report is true, it bolsters the expert’s opinion; if it is not, the expert’s opinion is less likely to be accurate. The Court should expressly endorse this principle in a majority opinion so as to remove any doubt that it constitutes the law.

Furthermore, the Court should make plain that the Confrontation Clause prohibits a testifying expert witness from transmitting the substance of a nontestifying witness’s testimonial statements, even if the expert also offers a so-called independent opinion concerning the situation. Again, most courts have already recognized as much. But not all have.<sup>20</sup> Just as with the “not-for-truth” argument that the state pressed in *Williams*, this independent-opinion argument would allow a bald circumvention of *Crawford*. It should therefore be walled off.

#### CONCLUSION

It is worth remembering that the project of developing rules of confrontation to apply against the states is roughly forty years behind similar efforts for other major criminal procedure rights. And nearly fifty years after the Supreme Court first coined various criminal procedure doctrines to implement other such rights—tests like the “reasonable expectation of privacy” and “reasonable person would feel free to leave” formulations, which are used to determine when “searches” and “seizures” take place—

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not testimonial), *People v. Leach*, 980 N.E.2d 570 (Ill. 2012), and *State v. Maxwell*, 9 N.E.3d 930 (Ohio 2014).

19. 132 S. Ct. 2221, 2257 (2012) (Thomas, J., concurring); *id.* at 2268 (Kagan, J., dissenting).

20. Compare *United States v. Soto*, 720 F.3d 51 (1st Cir. 2013), *Ignasiak*, 667 F.3d 1217, *State v. McLeod*, 66 A.3d 1221 (N.H. 2013), and *Kennedy*, 735 S.E.2d 905, with *State v. Brewington*, 743 S.E.2d 626 (N.C. 2013) (ignoring in-court witness’s disclosure of testimonial statements because the witness offered “independent opinion”), and *Lui*, 315 P.3d 493 (testifying expert may transmit any noninculpatory statement from nontestifying analyst).

courts still struggle at the margins to apply those tests. This is because doctrines designed to translate ancient (or at least colonial-era) protections to modern circumstances cannot eliminate all hard cases. Rather, the most we can hope for is that such doctrines will allow courts to get the easy cases right and force courts to ask the right questions when considering the hard cases.

*Crawford* is well on its way to accomplishing that objective. (No one, for example, argues anymore about whether nontestifying witnesses' custodial confessions or grand-jury testimonies are admissible.) But we're not quite there yet. Hopefully in another ten years we will be.

# THE CRAWFORD DEBACLE

*George Fisher*\*

First a toast—to my colleague Jeff Fisher and his *Crawford*<sup>1</sup> compatriot, Richard Friedman, on the tenth anniversary of their triumph: What they achieved in *Crawford* is every lawyer’s dream. By dint of sheer vision and lawyerly craft, they toppled what many saw as a flawed confrontation-law regime and put in its place one that promised greater justice. For that, much applause is due.

Still there’s no denying their doctrine’s a muddle, if not as conceived, then as realized. Consider the count: Four justices *almost* agree on *Crawford*’s contours but patch over the issues that divide them. A fifth justice defends the doctrine but scrimps on its scope. And the other four seek every chance to slip this listing ship and swim to dry land. After ten years and eight major rulings and mounting confusion on the Court, it’s time to reset and reassess: How might we have avoided this mess?

## I. SOME COMMON GROUND

To plot our differences, it’s useful first to survey common ground. No one disputes, first of all, the critical importance of a criminal defendant’s “right . . . to be confronted with the witnesses against him.” All agree the Confrontation Clause grants defendants the right to cross-examine those who testify against them in court. And almost everyone assumes that the clause extends further—that it bars the prosecution from introducing at least some hearsay unless the declarant appears in court for cross-examination or, if the declarant is unavailable at trial, the defendant had the chance to cross-examine the declarant before.

Yet almost no one reads the right as barring *all* hearsay offered against criminal defendants lacking the chance to cross-examine the declarant. Several sorts of hearsay survive almost every Confrontation Clause analysis. Chief among these are classic business records—not the records of crime labs working in league with prosecutors but those of commercial or

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

nonprofit entities kept routinely and without criminal prosecution in view. Public records kept in similar circumstances likewise evade objection. With somewhat less confidence I'll add dying declarations, made without hope of survival and with death close at hand and telling how death came about. And fourth I'll include statements made in the throes of danger, desperately, when the declarant's safety hangs on the listener's aid. Other hearsay statements survive scrutiny under one or another conception of the Confrontation Clause, but I think these four categories are common ground and therefore a starting point for analysis.

There are in contrast two sorts of hearsay that all believe pose dangers. Take first the hearsay at issue in *Crawford*—an accomplice's custodial statement offered to inculcate the accused. The Supreme Court has subjected such statements, "motivated by a desire to curry favor with the authorities," to "special suspicion."<sup>2</sup> Even more troubling are statements of child sexual-abuse victims, which the Supreme Court has agreed to address this term.<sup>3</sup> The frequency and gravity of sex crimes against children, together with children's fragile memories and psyches, make their hearsay accusations a critical test of any confrontation-law regime. A wise regime would address these two forms of hearsay cautiously, generally excluding blame-shifting statements of accomplices and distinguishing those children's statements that can stand on their own from those that, absent the child's testimony, must stay out, scuttling the case.

It's common ground, then, that some rule or standard must distinguish those hearsay statements meeting no Confrontation Clause objection from those the clause bars absent the defendant's chance to cross-examine the declarant. The nature of that rule or standard—its provenance, constitutional justification, and contours at the margins—is the nub of Confrontation Clause controversy. It's what divides the current justices into three contingents and separates the *Crawford* regime from the preceding regime of *Ohio v. Roberts*<sup>4</sup> and from other imaginable confrontation-law schemes.

Yet even here, in choosing among these schemes, we can find several points in common. First we must start with text. Perhaps the clause's words admit too much ambiguity to guide us, but no analysis will prove credible that doesn't start there. We must be guided as well by principle. Textualism is one principle; historical fidelity is another; deference to just results and the means to achieve them is yet another. The choice among them is fraught, but

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2. *Williamson v. United States*, 512 U.S. 594, 601 (1994) (internal quotation marks omitted).

3. *See Ohio v. Clark*, 135 S. Ct. 43 (2014) (mem.) (granting certiorari).

4. 448 U.S. 56 (1980).

without *some* guiding principle no scheme can claim respect. And whatever the principle, it must yield predictable results in recurring situations and, ideally, in emerging ones too.

By all these criteria I believe *Crawford* and the law regime it launched have fallen short. Let me say why—and then suggest a fix.

## II. CRAWFORD'S FLAWED ORIGINALISM

Writing for the Court in *Crawford*, Justice Scalia sought to divine the scope of the Confrontation Clause's command. Rightly he began with text. Here he confessed—again correctly—the text's hopeless ambiguity: “One could plausibly read ‘witnesses against’ a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between.” Pages later, however, Justice Scalia teased from the text the meaning he had confessed was lacking: “The text of the Confrontation Clause . . . applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’” Here Justice Scalia cited the 1828 edition of Noah Webster's *American Dictionary of the English Language*, which in turn defined *testimony* as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Hence a witness against the defendant, Justice Scalia concluded, can be “[a]n accuser who makes a formal statement to government officers” but not “a person who makes a casual remark to an acquaintance.” The former's out-of-court statement would be *testimonial* hearsay; the latter's would not.

Nowhere in this seemingly simple bit of lexicology did Justice Scalia confess that Webster had supplied not one but *five* definitions of *witness* and that Justice Scalia had selected the fifth—“One who gives testimony; as, the witnesses in court . . .” Webster's first and fourth entries clearly did not apply to *witness* as used in the Confrontation Clause. His second definition—“That which furnishes evidence or proof”—possibly applied to documents or physical artifacts, not persons. But what's wrong with Webster's third definition? It defined a *witness* as “[a] person who knows or sees any thing; one personally present; as, he was witness; he was an eye-witness.” As Professor Jonakait<sup>5</sup> and others have noted, this definition of *witness* suggests nearly all hearsay—not merely Justice Scalia's narrow class of “testimonial” hearsay—falls under the clause's command. Because almost all hearsay declarants knew or saw something, the Sixth Amendment could bar virtually all hearsay offered against criminal defendants unless they can cross-examine the declarant.

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5. See Randolph N. Jonakait, “Witnesses” in the Confrontation Clause: *Crawford v. Washington*, *Noah Webster*, and *Compulsory Process*, 79 TEMP. L. REV. 155, 159–61 & nn.26–27 (2006).

Justice Scalia acknowledged this uncertainty—but not in *Crawford*. Dissenting in *Maryland v. Craig* fourteen years before, he argued that Webster’s broader definition of *witness* could not be what the Framers had in mind. That definition is “excluded in the Sixth Amendment by the words following the noun: ‘witnesses *against him*.’ The phrase obviously refers to those who give testimony against the defendant at trial.”<sup>6</sup> But as Professor Shaviro asks, “Why cannot the term ‘witnesses against him’ refer to all persons having knowledge about the case and whose statements reporting such knowledge the prosecution uses as evidence against the defendant?”<sup>7</sup> At bottom, then, the Confrontation Clause’s text cannot sustain Justice Scalia’s distinction between *testimonial* hearsay, generally excluded unless the defendant can cross-examine the declarant, and *nontestimonial* hearsay, regulated only by evidence rules.

Nor does the clause’s history support this distinction. Consider the 1603 prosecution of Sir Walter Raleigh, which figures so prominently in the *Crawford* Court’s analysis. It’s true that Sir Walter fumed against admitting Lord Cobham’s confession accusing Raleigh of joining with Cobham in treason. “[L]et Cobham be here,” Raleigh cried. “[L]et him speak it. Call my accuser before my face . . . .”<sup>8</sup> It’s also true that by any of the many definitions of *testimonial* hearsay appearing in the *Crawford* canon, Cobham’s accusation would qualify.

But what of the *other* notoriously rank hearsay used to condemn Sir Walter? For all the attention the *Crawford* Court lavished on Raleigh’s complaints about his absent accuser Cobham, it paid none at all to Raleigh’s *second* absent accuser—the unnamed “gentleman” whom the witness Dyer, a boat pilot, encountered while visiting a merchant’s house in Lisbon. On hearing Dyer was English, the Portuguese gentleman asked if the King was crowned. “I answered, No,” Dyer testified, “but that I hoped he should be so shortly. Nay, saith [the gentleman], he shall never be crowned; for Don Raleigh and Don Cobham will cut his throat ere that day come.”<sup>9</sup> Here followed perhaps the trial’s most memorable moment—Raleigh’s outraged cry, “This is the saying of some wild Jesuit or beggarly Priest; but what proof is it against me?” A *saying* in the day’s legal argot was an unsworn

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6. 497 U.S. 836, 864–65 (1990) (Scalia, J., dissenting).

7. Daniel Shaviro, *The Confrontation Clause Today in Light of Its Common Law Background*, 26 VAL. U. L. REV. 337, 365 (1991).

8. The Trial of Sir Walter Raleigh, (1603) 2 How. St. Tr. 1, 15–16 (Eng. 1816).

9. *Raleigh*, 2 How. St. Tr. at 25.

statement<sup>10</sup>—here unsworn *hearsay*. Ignoring Raleigh’s charge, the attorney general rejoined coldly, “It . . . shows that your treason had wings.”<sup>11</sup>

Memorable as this scene was, it would have unsettled Justice Scalia’s carefully wrought historical argument. The *Crawford* Court focused on Raleigh’s trial to make a point—that the historical concern underlying the Confrontation Clause was admission of accusations made in formalized ex parte affidavits, the Court’s paradigm of testimonial hearsay. Dyer’s account of the Portuguese gentleman’s words decidedly did not fit this mold. The distant gentleman had made no “solemn declaration or affirmation . . . for the purpose of establishing or proving some fact.” Rather he made his accusation to a boat pilot in a private, unrecorded conversation far from the nearest English court. It was “a casual remark to an acquaintance,” the clearest kind of nontestimonial evidence. Yet Raleigh railed in outrage against its admission—and I know of no observer in Raleigh’s time or since who has suggested his outrage was misplaced.

Indeed I know of no observer in Raleigh’s day or the next three centuries who distinguished between *testimonial* and *nontestimonial* hearsay. Professor Davies sought such a distinction in the framing era and found none. In the day’s jargon, he writes, all unsworn statements—hence almost all hearsay—were simply “no evidence.” He notes Justice Scalia “did not identify any framing-era source that distinguished between testimonial and nontestimonial hearsay. So far as I can tell, none did.” And framing-era authorities surely did not view admission of nontestimonial hearsay against criminal defendants with complacency. On the contrary, Davies argues, the Framers never contemplated the matter “because they never anticipated that informal hearsay statements could come to be viewed as valid evidence in criminal trials.”<sup>12</sup>

Here Chief Justice Marshall lends Davies support. Presiding at Aaron Burr’s 1807 trial, the Chief Justice excluded a claimed coconspirator’s statement, hearsay *Crawford* deemed nontestimonial. In what appears to be the first confrontation interpretation by a Supreme Court justice, he wrote, “I know not why . . . a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him.”<sup>13</sup> A “mere verbal

10. See, e.g., *The Trial of Stephen Colledge*, (1681) 8 How. St. Tr. 550, 641 (Eng. 1816) (quoting notorious George Jeffreys, who dismissed Titus Oates’s unsworn trial statement by declaring, “Here is Dugdale’s oath against Dr. Oates’s saying.”).

11. *Trial of Sir Walter Raleigh*, (1603) 1 D. Jardine, Crim. Trs. 400, 436 (Eng. 1832). Professor Park highlights Dyer’s testimony and Raleigh’s outrage in *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 90 & n.161 (1987).

12. Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 107, 119, 191 (2005).

13. *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807).

declaration[]” sounds like what *Crawford* would call nontestimonial hearsay. Unlike the *Crawford* Court, Chief Justice Marshall seemingly believed admitting such hearsay offended the Confrontation Clause.

It may well be, as Justice Scalia wrote in *Crawford*, that “the principal evil at which the Confrontation Clause was directed was the . . . use of *ex parte* examinations as evidence against the accused.” But to sustain his distinction between testimonial and nontestimonial statements, Justice Scalia must show that nontestimonial hearsay was received without complaint. This he has not done. Raleigh’s outrage at the boatman Dyer’s testimony and Chief Justice Marshall’s rejection of a nontestimonial statement—together with the utter lack of citations to framing-era cases admitting “casual remark[s] to an acquaintance” against an accused<sup>14</sup>—suggest the Court’s testimonial/nontestimonial distinction found no footing in the framing era. Even Robert Kry, Justice Scalia’s law clerk when *Crawford* was decided and one of few prominent defenders of his originalist arguments, lends no support here. In a long article rebutting Davies, Kry offers no defense of the Court’s claim that the Framers and lawyers of their era accepted admission of nontestimonial hearsay.<sup>15</sup>

Nor did lawyers of the founding era always object to admission of *testimonial* hearsay. As Justice Scalia confessed in *Crawford*, there was authority for admitting dying declarations even when clearly testimonial. “If this exception must be accepted on historical grounds,” he said, “it is *sui generis*.” But when analysis rests heavily on history, mounting historical anomalies—Raleigh’s outrage at Dyer’s nontestimonial hearsay, Chief Justice Marshall’s rejection of a nontestimonial coconspirator’s statement, and admission of the entire category of testimonial dying declarations—erode confidence. That’s true especially when the dying-declarations exception was among the first and best-known hearsay exceptions—and when the theory behind that exception made nothing of the statements’ (non)testimonial nature but stressed instead their *reliability*.

### III. CRAWFORD’S AMBIGUITY

*Crawford*’s testimonial/nontestimonial distinction, lacking both textual and historical support, suffers from a third flaw: no one quite knows what that distinction *is*. The *Crawford* Court didn’t say, “grandly declar[ing],” as Chief Justice Rehnquist scolded, “We leave for another day any effort to spell

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14. See Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1891 (2012) (noting “the *Davis* Court’s failure to identify even one” framing-era case admitting nontestimonial hearsay).

15. See Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493 (2007).



out a comprehensive definition of ‘testimonial.’” A decade on, the Court still hasn’t embraced a single, comprehensive definition of testimonial hearsay.

The Court came nearest this goal in footnote 6 of its 2011 ruling in *Bullcoming v. New Mexico*, authored by Justice Ginsburg: “To rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.’”<sup>16</sup> Although admirably lean, this definition suffers from two shortcomings. First it’s not law. While most of Justice Ginsburg’s opinion commanded five votes, one member of her majority, Justice Thomas, withheld support from footnote 6.

Moreover, the *Bullcoming* definition fails to say whose “primary purpose” counts. Should trial courts look to the *declarant’s* purpose in speaking or, if the declarant was answering questions, the *interrogator’s* purpose in asking? By writing cleverly about the *statement’s* primary purpose, Justice Ginsburg ducked the issue. Her dodge was deliberate. Only four months earlier, two members of her fragile coalition had tussled over whose perspective counts when assessing a hearsay statement’s primary purpose. Justice Sotomayor, writing for the Court in *Michigan v. Bryant*, said “the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.”<sup>17</sup> Although Justice Sotomayor devoted several paragraphs to defending this view, Justice Scalia’s response in dissent was curt: “[B]ecause the Court picks a perspective so will I: The declarant’s intent is what counts. . . . For an out-of-court statement to qualify as testimonial, the declarant must intend the statement to be a solemn declaration . . . .”

Justice Ginsburg needed both of these sparring justices to hold her majority in *Bullcoming*. Her diplomacy in defining testimonial hearsay in terms of the *statement’s* primary purpose perhaps mended the rift between her colleagues and delivered five votes for reversing *Bullcoming’s* conviction. But her definition’s reference to the statement’s purpose leaves unresolved whose intent controls. That uncertainty in turn makes confrontation analysis wholly unpredictable in a great mass of cases likely to come before trial courts. Consider a jailhouse informant’s conversations with a cellmate implicating both the cellmate and the accused. The informant’s purpose was to produce evidence for trial; the cellmate’s purpose was not. Whose controls? Or consider a group of officers who, as in *Bryant*, come upon a gunshot victim. The officers suspect the shooter lurks dangerously nearby and ask questions to find and disarm him; the victim knows the shooter has fled and poses no threat and seeks to ensure his arrest and prosecution.

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16. 131 S. Ct. 2705, 2714 n.6 (2011) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

17. 131 S. Ct. 1143, 1160 (2011).

Whose purpose controls? Consider too a three-year-old victim of sex abuse who speaks in a playhouse-themed interview room with a social worker employed by the D.A. The interviewer poses questions with a prosecutorial purpose; the child answers with no such purpose. Whose purpose controls?<sup>18</sup>

In all these scenarios I've assumed both actors' purposes are knowable. But as *Bryant* made plain, real life is rarely so tidy. Where Justice Sotomayor saw officers desperate to find a potential mass shooter whose motives, intentions, and whereabouts were unknown, Justice Scalia saw wannabe detectives seeking to solve a crime. And where Justice Sotomayor saw a mortally wounded man so weak he "may have [had] no purpose at all in answering questions posed," Justice Scalia saw a savvy druggie who knew the shooter was distant and posed no danger and who realized the officers' questions sought to gather evidence for trial. Nor does it help to speak, as the Court often does, of an actor's primary purpose, "objectively considered." What was the primary purpose, objectively considered, of the gaggle of cops who questioned the dying Anthony Covington in *Bryant*? What was Mr. Covington's primary purpose, objectively considered, in speaking? These questions offer no clarity. If I may borrow a criticism Justice Scalia leveled at the old *Roberts* regime, "the [primary-purpose] test is *inherently*, and therefore *permanently*, unpredictable."

Nor is it even clear the primary-purpose test controls the analysis. Although a version of that test commanded a Court majority in *Davis v. Washington* in 2006, those days seem gone. In *Bullcoming* four members of the Court—the Chief Justice and Justices Kennedy, Breyer, and Alito—joined no part of Justice Ginsburg's opinion and embraced no primary-purpose test. Justice Thomas's fifth vote gave Justice Ginsburg a majority, but rather than endorse her definition of a testimonial statement, Justice Thomas instead hewed to the same cramped notion of testimonial hearsay he first advanced when concurring in *White v. Illinois* in 1992: statements "contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."<sup>19</sup> Having once joined in this view, Justice Scalia dismissed in *Davis* the notion that "the scope of the Clause is limited to that very formal category" of testimonial hearsay. But while Justice Thomas may be a curious outlier, he now defines the limit of Confrontation Clause protection in the post-*Crawford* world.

Recent cases have shown how very narrowly he defines that limit. The Court's last foray into this realm, *Williams v. Illinois* of 2012,<sup>20</sup> concerned a

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18. Park poses similar hypotheticals in *Is Confrontation the Bottom Line?*, 19 REGENT U. L. REV. 459, 462–63 (2007).

19. 502 U.S. 346, 365 (1992) (Thomas, J., concurring).

20. 132 S. Ct. 2221 (2012).

commercial laboratory's report of a DNA analysis commissioned by the Illinois State Police during a rape investigation. The report detailed a male DNA profile that laboratory technicians derived from semen-stained swabs collected from the victim. In many ways the lab report resembled the cocaine analysis at issue in *Melendez-Diaz v. Massachusetts*<sup>21</sup> and the blood-alcohol analysis at issue in *Bullcoming*—both of which Justice Thomas had deemed testimonial. Yet he spied differences in the formality of these documents and deemed those differences significant. The *Melendez-Diaz* analysis was sworn before a notary, he said, whereas the *Williams* report was unsworn. And while the *Bullcoming* report also was unsworn, Justice Thomas noted it contained a "Certificate of Analyst" affirming the technician followed proper protocol. The *Williams* report bore no such certificate and therefore, he concluded, was nontestimonial. Although Justice Kagan poked fun at such hairsplitting—there's "(maybe) a nickel's worth of difference"—Mr. Williams's fate turned on these distinctions.

Justice Thomas wields such outside influence because he holds the critical fifth vote for any *Crawford*-style reading of the Confrontation Clause. To his left sit Justices Scalia, Ginsburg, Sotomayor, and Kagan, all of whom remain true to *Crawford* and some version of the primary-purpose test. The four remaining justices have distanced themselves from *Crawford*'s framework, inching instead toward the old *Roberts* regime and its focus on the challenged hearsay's reliability. The result is a Court so badly splintered that when it came time for Justice Alito to summarize *Williams* from the bench on the day the Court ruled, he all but confessed his inability: "Anyone interested in understanding the Court's holding will have to read our opinions."<sup>22</sup>

#### IV. CRAWFORD'S POOR SENSE

Yet the greatest failing of the *Crawford* framework and its testimonial/nontestimonial distinction is not the primary-purpose test's ambiguity and inability to generate predictable results. Rather the *Crawford* framework's greatest failing is its stubborn refusal to make sense. Here the Court's failure to deliver a comprehensive definition of *testimonial statement* is not so much the problem as a symptom of the problem. The *problem* is the failure to explain why we should want to distinguish between testimonial and nontestimonial hearsay. Two answers seem plausible; neither explains the *Crawford* doctrine in a satisfying way.

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21. 557 U.S. 305 (2009).

22. Oral Opinion of Justice Alito, *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (No. 10-8505). I thank David Kaye for this reference.

The first answer emerges from hints scattered throughout the *Crawford* line of cases. Of the three “formulations of [the] core class of ‘testimonial’ statements” laid out in *Crawford*, two looked to the expectation of declarants (or of objective witnesses) that their statements would be used prosecutorially (or more generally at trial). Elsewhere in *Crawford* Justice Scalia suggested that some testimonial statements involve “government officers in the production of testimony with an eye toward trial”—a formula he said “presents unique potential for prosecutorial abuse.” And in *Bryant* Justice Scalia wrote that for a statement to be testimonial, the declarant must speak with the understanding that the statement “may be used to invoke the coercive machinery of the State against the accused.” All these hints suggest a common component of testimonial statements: the declarant’s or interrogator’s intent to create trial evidence while evading cross-examination.

Surely the law should frustrate such procedural ploys. Just as forfeiture doctrine saps the incentive for wrongdoers to eliminate witnesses, the Confrontation Clause should thwart those who contrive to plant trial evidence that eludes confrontation. If the *Crawford* doctrine targets testimonial hearsay for this reason, however, it’s both overinclusive and wildly underinclusive. It’s overinclusive because lots of hearsay deemed testimonial by post-*Crawford* courts is *not* created with an expectation of denying defendants the chance to cross-examine declarants. In typical crime investigations police officers canvass for witnesses. They ask for names and phone numbers precisely because they know prosecutors need those witnesses at trial. Most witnesses likewise know a trial may lie ahead and expect to testify if called. Sylvia Crawford herself was apparently willing to testify had her husband not invoked a marital privilege silencing her. Condemning all this hearsay as testimonial makes no sense if the aim is to discourage officers and witnesses from contriving to plant evidence while ducking cross-examination.

And if that’s the *Crawford* doctrine’s aim, the doctrine is radically *underinclusive*. For the *most* prolific actors in creating trial evidence that eludes cross-examination are not police officers or crime witnesses, but prosecutors. Every prosecutor who offers hearsay instead of calling an available declarant to testify intentionally strips the defendant of the chance to cross-examine the declarant. And if that hearsay is deemed nontestimonial because neither declarant nor interrogator aimed to create trial evidence, the Confrontation Clause leaves the defendant powerless to combat the prosecutor’s contrivance. Indeed if Justice Scalia is right that “[t]he declarant’s intent is what counts,” the Confrontation Clause is truly perverse: it protects defendants against crime witnesses (typically private persons) when they create trial evidence evading confrontation but fails to

protect defendants against prosecutors (consummate state actors) when they engage in the same contrivance.

Of course there's another—and far better—explanation for *Crawford's* distinction between testimonial and nontestimonial hearsay and its general condemnation of the former: when crime witnesses speak (and officers question) “with an eye toward trial,” they have an incentive to lie (and elicit lies). This explanation, rooted in testimonial hearsay's unreliability, makes good sense. Yet in *Crawford* Justice Scalia slammed the *Roberts* Court for looking to a statement's reliability when assessing whether the Confrontation Clause allows admission absent cross-examination: “Reliability is an amorphous, if not entirely subjective, concept.” Instead of scrapping reliability as a constitutional touchstone, however, the Court replaced one sort of reliability analysis with another. It replaced *Roberts* and its *plenary* consideration of factors suggesting reliability or unreliability with a formula staking the entire analysis on *one* possible source of unreliability—the declarant's or interrogator's intent to create trial evidence. It's hard to find sense here.

Little wonder, then, that four justices have divorced themselves from the *Crawford* framework, leaving us with the voting pattern that marked the Court's last two confrontation ventures, *Bullcoming* and *Williams*: Four justices *almost* agree on a primary-purpose test dictated by *Crawford* and its kin, but avoid deciding whose purpose controls the analysis, about which they disagree. Justice Thomas holds to his anemic conception of the clause's protection, which reaches only highly formalized hearsay. And the remaining four justices, having largely disavowed *Crawford*, hint at reviving an analysis rooted in contested hearsay's reliability. If I may borrow again from Justice Scalia's condemnation of *Roberts*, the Court's current disarray “reveals a fundamental failure on [the justices'] part to interpret the Constitution in a way that secures its intended constraint on judicial discretion.” It's time to suggest a fix.

#### V. A WAY OUT

Consider three propositions: At its core, if not in its particulars, *Roberts* was right. While *Roberts* was flawed, moreover, it was fixable—and was in the process of repair when the Court abandoned it. And third, a reformed *Roberts* regime would deliver the same results the Court reached in *Crawford* and every major post-*Crawford* case and would secure a sounder basis for analyzing two troubling questions not yet reached—the admissibility of dying declarations and of statements of child-abuse victims.

At the core of *Roberts* was the proposition, rarely disputed, that the Confrontation Clause aims to ensure the reliability of evidence. That's “the Clause's ultimate goal,” Justice Scalia said in *Crawford*. It follows that if a hearsay statement is highly likely to be reliable *and* cross-examination

cannot readily take place, good sense and justice suggest the statement may be admitted in absence of confrontation. That dying declarations, deemed reliable, proved admissible at the founding lends this approach historic precedent.

Starting from this sound core, however, *Roberts* made several fundamental errors: In most cases it abdicated to hearsay rules—and specifically “firmly rooted” hearsay rules—the judgment that contested hearsay is reliable enough to admit without cross-examination. Although our hearsay rules reflect largely sound notions of reliability, they took form in both civil and criminal courts without the deliberation that a denial of confrontation warrants. Moreover, in those cases not governed by a firmly rooted hearsay rule, *Roberts* endowed trial judges with nearly unguided discretion to admit hearsay absent cross-examination if it bore “particularized guarantees of trustworthiness”—a standard too flabby to ensure reasonably consistent results. And although *Roberts* wisely sought to pressure prosecutors to produce available declarants, its demand in most cases that “the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use” was too rigid. Inevitably this “rule of necessity” folded. After just six years the Court declared *Roberts* “cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.”<sup>23</sup>

Despite these defects the *Roberts* doctrine was under repair when *Crawford* aborted the regime. In the Court’s last major *Roberts*-era confrontation case, *Lilly v. Virginia*,<sup>24</sup> a plurality of four led by Justice Stevens issued perhaps the wisest ruling in this realm. Like *Crawford* the case concerned the custodial statement of an accomplice implicating the accused and admitted under state law as a statement against interest. Anticipating *Crawford*, Justice Stevens wrote that such statements, “when offered in the absence of the declarant, function similarly to those used in the ancient *ex parte* affidavit system.” But he said nothing of the statements’ “testimonial” nature. Instead he declared such hearsay “inherently unreliable” and a threat to “the truthfinding function of the Confrontation Clause.” A codefendant’s “strong motivation to implicate the defendant and to exonerate himself” renders his statements to authorities about the defendant’s actions “presumptively suspect” and therefore inadmissible without cross-examination. Here Sir Walter Raleigh would agree. As he said of his absent

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23. United States v. Inadi, 475 U.S. 387, 394 (1986).

24. 527 U.S. 116 (1999).

accuser, “Cobham is absolutely in the King’s mercy; to excuse me cannot avail him; by accusing me he may hope for favour.”<sup>25</sup>

It’s true that under *Lilly* the presumptive unreliability of accomplice statements could face rebuttal. But Justice Stevens cautioned that effective rebuttal is “highly unlikely” when accomplices’ blame-shifting confessions “are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice—that is, when the government is involved in the statements’ production, and when the statements . . . have not been subjected to adversarial testing.” Hence *Lilly* delivered much the same result as *Crawford*, but without the paradoxical, ahistorical division of hearsay into testimonial and nontestimonial statements.

Yet in *Crawford* Justice Scalia dismissed *Lilly* as a feeble hedge against wrongful admission of accomplice statements that shift blame onto the accused: “One recent study found that, after *Lilly*, appellate courts admitted accomplice statements to the authorities in 25 out of 70 cases . . .” This attack on *Lilly*’s potency founders on several fronts. For one thing, the sampling of 70 appellate cases did not include all those cases, perhaps hundreds of them, in which trial judges, heeding the *Lilly* plurality’s counsel, excluded accomplice statements to authorities and therefore never gave rise to appeals on this score. Nor did Justice Scalia mention that of the 45 cases—or 64%—in which error was found, 26 resulted in reversals, suggesting the error was deemed not harmless.<sup>26</sup> As fewer than 15% of all federal criminal appeals result in full or partial reversals,<sup>27</sup> the 37% reversal rate in this sampling of 70 cases was strikingly high, suggesting the force of the *Lilly* plurality’s opinion. That 17 of those 26 reversals took place in murder cases<sup>28</sup> sharpens the point. And recall that Justice Stevens wrote in *Lilly* for only four justices. Four others pointedly distanced themselves from his suggestion that admission of accomplice statements to authorities implicating the accused was “highly unlikely.” The ninth justice, Scalia himself, spurned Justice Stevens’s *Roberts*-based analysis and thereby denied the plurality’s opinion the force of law he later knocked it for lacking.

If instead of panning *Lilly* the justices embrace it as a model, we can begin to imagine a recrafted confrontation-law regime. Because the Confrontation Clause aims to ensure the *presence* of witnesses for cross-examination and the *reliability* of their statements, this recrafted regime would look to declarants’ availability and their statements’ reliability when

25. Trial of Sir Walter Raleigh, (1603) 1 D. Jardine, Crim. Trs. 400, 435 (Eng. 1832).

26. See Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia*, 53 SYRACUSE L. REV. 87, 109 (2003).

27. See Michael Heise, *Federal Criminal Appeals: A Brief Historical Perspective*, 93 MARQ. L. REV. 825, 829 tbl.1 (2009).

28. See Kirst, *supra* note 266, at 109.

identifying the rather rare instances when hearsay may be admitted without cross-examination. Under this regime appellate courts and ultimately the Supreme Court would follow Justice Stevens's lead in *Lilly* in assessing the reliability of identifiable *classes* of hearsay statements, an approach that would constrain trial judges' discretion and make rulings more regular and predictable. When reaching these class judgments, courts may find guidance in current hearsay rules but would not be bound by them.

Several classes of statements the Supreme Court could declare presumptively unreliable and inadmissible absent cross-examination. Among these are grand jury testimony conducted by the prosecution "with an eye toward trial"; accomplices' blame-shifting or blame-spreading statements made to police or prosecutors or to the court during plea allocutions; statements intended to evade cross-examination at trial, as with letters sent anonymously to authorities or arranged for delivery to law enforcement after the declarant's death; casual gossip uttered to an acquaintance; and statements made by lab technicians employed or commissioned by police or prosecutors and able to discern the test result (positive for cocaine, for example) desired by them. Here notice-and-demand statutes of the sort the Court approved in *Melendez-Diaz* and *Bullcoming* could moderate the inconvenience to prosecutors and lab technicians of deeming these lab reports inadmissible without confrontation.

Other classes of statements the Court could declare presumptively reliable and admissible even without cross-examination. These include business records of private entities made routinely and without prosecutorial needs or specific litigation in view; public records made in the same circumstances; dying declarations made classically "in the hush of [death's] impending presence";<sup>29</sup> statements uttered in the throes of danger while seeking aid; and reports of accredited labs produced by expert technicians ignorant of the results prosecutors desire (for example, the DNA profile of a crime-scene biological sample submitted without a suspect sample and without naming a known suspect).

Other statements may prove hard to treat as a class and may require a closely factual, case-by-case analysis. In this group might fall statements against interest made privately; excited utterances and present-sense statements not made at death's door or with danger lurking; medical statements; and statements of child victims. When assessing statements in this group, trial courts typically should exclude those made by available declarants not produced for trial, including those children able to testify without substantial trauma. Despite the *Roberts*-era ruling in *Idaho v. Wright*, there appears no sound reason to disregard corroborative evidence

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29. *Shepard v. United States*, 290 U.S. 96, 100 (1933).



when judging reliability. On another score, though, *Wright* supplies sound guidance: a useful standard of reliability would demand that “hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.”<sup>30</sup> The Supreme Court and courts of appeals would need to police this standard vigilantly to ensure that trial judges apply it with rigor and substantial uniformity.

If I may borrow one last time from Justice Scalia’s opinion in *Crawford*, this recrafted regime provides “an empirically accurate explanation of the results [the Court’s] cases have reached.” That many of the class judgments I suggest above match results reached in *Crawford*-era cases is no surprise. As I noted earlier, the best rationale for the *Crawford* regime’s suspicion of testimonial statements is that declarants who speak in anticipation of trial have reason to lie, rendering their statements unreliable. Indeed the one *Crawford*-era case that would be stranded by a reliability standard’s return is *Whorton v. Bockting*. The Court’s perverse boast that its confrontation case law “has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability” would not survive.<sup>31</sup>

Happily, under this recrafted regime the Court’s case law at last would align with the lessons of Sir Walter’s trial. A reliability standard would justify Raleigh’s outraged protests at admission not only of Cobham’s statement to authorities but also of the Portuguese gentleman’s accusation made in passing to the boatman Dyer. Against the words of that “wild Jesuit or beggarly Priest,” Sir Walter no longer would stand naked before the court.

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30. 497 U.S. 805, 823 (1990).

31. 549 U.S. 406, 420 (2007).

# CONFRONTATION AND THE RE-PRIVATIZATION OF DOMESTIC VIOLENCE

*Deborah Tuerkheimer*\*

## INTRODUCTION

When the Supreme Court transformed the right of confrontation in *Crawford v. Washington*,<sup>1</sup> the prosecution of domestic violence predictably suffered as a result. But commentators at the time did not anticipate how the Court's subsequent Confrontation Clause cases would utterly misconceive the nature of domestic violence, producing a flawed understanding of what constitutes a "testimonial" statement. Although the Court's definition was especially problematic in the domestic violence context, its overly rigid approach finally became intolerable in *Michigan v. Bryant*,<sup>2</sup> a 2011 case that did not involve domestic violence. In *Bryant*, the Court resurrected a public-private divide that relegated domestic violence to quasicriminal status, at best. By distinguishing between "domestic"<sup>3</sup> and "nondomestic"<sup>4</sup> disputes and minimizing the harms and dangers associated with the former, the Court revived long-standing hierarchies that were ostensibly repudiated decades ago. In assessing the significance of the *Crawford* revolution after ten years, I focus here on this largely unremarked jurisprudential move, which raises the distinct possibility that a privatized notion of domestic violence infected the Court's reasoning even before *Bryant*.

Since the Supreme Court revamped the Confrontation Clause, we have witnessed a rather jurisprudentially unsettled decade. A sound articulation of the meaning of "testimonial," which *Crawford* introduced but failed adequately to define,<sup>5</sup> continues to elude the Court, and lower courts have struggled to implement the testimonial concept.

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\* Professor of Law, Northwestern University School of Law. I am grateful to Sarah Buel, Bennett Capers, and Robert Mosteller for insightful comments on an earlier draft, and to Richard Friedman for his unwavering support of my work notwithstanding meaningful differences in our perspectives. This Essay is dedicated to the memory of Cheryl Hanna.

1. 541 U.S. 36 (2004).
2. 131 S. Ct. 1143 (2011).
3. *Id.* at 1156.
4. *Id.*
5. *Crawford*, 541 U.S. at 68.

Amid the *Crawford* confusion, properly treating statements made by crime victims to police officers has proved especially vexing. Two years after *Crawford*, in consolidated cases involving domestic violence, the Court offered a description of “testimonial.”<sup>6</sup> In one of those cases, the victim’s on-scene statements to responding police officers were deemed properly excluded as testimonial, “part of an investigation into possibly criminal past conduct.”<sup>7</sup>

Five years later, in 2011, the Court decided *Bryant*, where a gunshot victim spoke to police while lying in a gas-station parking lot.<sup>8</sup> By a vote of 6–2, the Court applied a new multifactor test to allow into evidence the dying man’s statements, which were made in response to questions about “what had happened, who had shot him, and where the shooting had occurred.”<sup>9</sup> This conversation with police officers “ended within 5 to 10 minutes.”<sup>10</sup>

Critics assailed *Bryant* as a dramatic departure from the earlier cases, tangible proof that the Court was revising its perspective on *Crawford*.<sup>11</sup> I have a different view of the case, and of the Confrontation Clause jurisprudence more generally. In my estimation, the problem was not *Bryant*. Or, to be more accurate, *Bryant* did not present the problem that others have identified. Instead, *Bryant* reflected the Court’s effort to remedy an earlier, unacknowledged failing: the testimonial definition was conceptually incoherent from the start.

Part I of this Essay contends that *Bryant* raised a set of compelling concerns—not for the integrity of Confrontation Clause jurisprudence, as others urge, but for the portrayal of domestic violence as a lesser crime. The *Bryant* Court retreated from its problematic definition of testimonial—which is *most* problematic in the domestic violence context—only by cordoning off domestic violence as an exceptional case that warranted the rejected formula. By using domestic violence to reify nondomestic violence as real crime, the Court resurrected the public–private divide that law-reform efforts had targeted with considerable success over time.

The notion that domestic violence is a crime against the state took hold in the 1970s, prompting a sea change in the way prosecutors handled cases that were formerly dismissed as private disputes.<sup>12</sup> For the first time, the

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6. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

7. *Id.* at 829.

8. *Bryant*, 131 S. Ct. at 1150.

9. *Id.* at 1163.

10. *Id.* at 1150.

11. See, e.g., Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 FORDHAM L. REV. 1301 (2011).

12. See *infra* notes 46–47 and accompanying text.

state was perceived as having a stake in holding batterers accountable, which meant that a case would sometimes proceed even without the victim's cooperation. The transformed Confrontation Clause made "evidence-based prosecution," as it became known, more difficult;<sup>13</sup> *Bryant* further complicated this picture.

After discussing the implications of *Bryant*'s public-private dichotomy, Part II of this Essay considers the post-*Crawford* state of domestic violence prosecution. A brief conclusion follows, reflecting on the Court's move toward re-privatizing domestic violence in the Confrontation Clause cases.

### I. BRYANT'S RESURRECTION OF THE PUBLIC-PRIVATE DIVIDE

When *Bryant* was decided in 2011, the Court emphatically softened the testimonial definition articulated in *Davis v. Washington*. It seems that the Court had grown uncomfortable with the full implications of the transformed Confrontation Clause—although Justice Sotomayor, writing for the majority in *Bryant*, never conceded this point. What emerged from *Bryant* was a new multifactor test that purported to adhere to precedent<sup>14</sup> while actually departing from it in important ways.

The new test was attacked for resembling the malleable reliability standard that *Crawford* overruled<sup>15</sup> and for being generally indeterminate.<sup>16</sup> But *Bryant* did not corrupt a conceptually sound jurisprudence; rather, it was born of incoherence.<sup>17</sup> The Court's definition of testimonial rests on the fallacy that exigency can be captured without reference to context—a misconception that would later contribute to the unraveling of the Court's rigid approach to the testimonial question.<sup>18</sup> The multifactor approach can

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13. See *infra* notes 49–50 and accompanying text.

14. *Bryant*, 131 S. Ct. at 1153–54.

15. *Id.* at 1174 (Scalia, J., dissenting) (“[T]oday’s decision is not only a gross distortion of the facts. It is a gross distortion of the law—a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned.”).

16. *Id.* at 1175 (Scalia, J., dissenting) (“The Court recedes from *Crawford* in a second significant way. It requires judges to conduct ‘open ended balancing tests’ and ‘amorphous, if not entirely subjective,’ inquiries into the totality of the circumstances bearing upon reliability.... This is no better than the nine-factor balancing test we rejected in *Crawford*....”).

17. See Deborah Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 20–32 (2006).

18. Context is most relevant in the domestic violence setting, where the ongoing nature of abuse often means that police investigation and police protection are functionally the same. Apart from ignoring the continuing danger faced by the primary victim, decontextualized exigency determinations obscure the connection between domestic violence and imminent danger to children and police. *Bryant* acknowledged the centrality of potential secondary

best be understood, then, as a natural outgrowth of irresolvable tensions underlying *Davis*.

Lacking a principled framework, the Court can hardly be faulted for reverting to greater flexibility. This latest jurisprudential move is troubling, however, for reasons that have gone largely unexplored. In stunning ways, *Bryant* reconstructed a boundary between the public and private spheres that, for most of our history, worked to the profound detriment of battered women. Nearly fifty years of feminist law-reform efforts effectively challenged the entrenched belief that domestic violence, because it is private, lies outside the reach of state intervention. But in *Bryant*, the familiar public-private divide resurfaced.

Throughout the opinion, the Court underscored the public nature of the crime at issue in *Bryant*, where the victim, Anthony Covington, was shot by a drug-dealing acquaintance.<sup>19</sup> In contrast, “purely private dispute[s]” were said to warrant their own special treatment.<sup>20</sup> In the Court’s estimation, domestic violence cases are different from nondomestic, and they are different in ways that justify a constricted definition of exigency.

This contention rests on a number of misconceptions. At the outset, the Court posited that “[d]omestic violence cases like *Davis* and *Hammon* often have a narrower zone of potential victims than cases involving threats to public safety.”<sup>21</sup> This claim is confusing, since it is unclear *which* cases “involv[e] threats to public safety;”<sup>22</sup> surely not all nondomestic violence cases fall into this category. More important, the claim is also misleading, because it suggests that domestic violence cases do not tend to involve the potential for harm to secondary victims. As the Court candidly observed, “[b]ecause *Davis* and *Hammon* were domestic violence cases, we focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat *to them*.”<sup>23</sup> But rather than remedy the earlier failing, the Court aggravated it by resorting to false dualisms.

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victims (“the first responders and public,” 131 S. Ct. at 1148) but only by implicitly denying that these victims exist in domestic violence cases and by ignoring the greatest risk of further harm by an at-large perpetrator—that is, the risk that confronts victims of domestic violence themselves. In an unfortunate irony, the cost of recognizing context has been adherence to the fiction of its absence in domestic violence cases, where context is uniquely essential to the meaning of exigency.

19. Unlike *Davis* and *Hammon*, which “arose in the domestic violence context,” *Bryant* presented “a new context: a non-domestic dispute,” as the Court conceived of it. *Id.* at 1156.

20. *Id.* at 1163–64.

21. *Id.* at 1158.

22. *Id.*

23. *Id.*

Consider how the Court's preoccupation with the public space delineated a private realm that, if not altogether lawless, was imagined as a place subject to a less-than-urgent, somewhat diluted, brand of law enforcement. By way of contrast, Covington met the police in a "public location,"<sup>24</sup> an "exposed, public area,"<sup>25</sup> thereby creating a danger to the "public safety"<sup>26</sup> that, in no uncertain terms, trumped the unnamed domestic analogue. "Private safety" disappeared entirely as a concern.

Similarly, *Bryant's* conception of public safety excluded children and other family members of the primary victim (again, responding police officers are at risk in all cases, although the Court contemplated only the danger from nondomestic calls). Likewise, just as the notion of public safety emphatically ignored family members, the Court's "zone-of-potential-victims"<sup>27</sup> analysis entirely overlooked the primary victim, who may herself remain a "potential victim,"<sup>28</sup> particularly in the domestic violence context.

The Court also devalued the kinds of injury that tend to occur in private space. For example, it noted that "Hershel Hammon was armed only with his fists when he attacked his wife."<sup>29</sup> Unlike the situation in *Bryant*, which involved a gun, in *Hammon* "removing [the victim] to a separate room was sufficient to end the emergency."<sup>30</sup> This was one way of characterizing the incident in *Hammon*; the facts in the trial record, however, supported quite another. Here is what we know: police responded promptly to a reported

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24. *Id.* at 1156.

25. *Id.* at 1160.

26. *Id.* at 1158.

27. *Id.*

28. Tellingly, the Court was able to see this danger where the primary victim was *not* intimately involved with the perpetrator. The Court repeatedly worried that Covington was still in danger even after police had arrived at the scene: "Nothing Covington said to the police indicated that the cause of the shooting was a purely private dispute or that the threat from the shooter had ended. . . . What Covington did tell the officers was that he fled Bryant's back porch, indicating that he perceived an ongoing threat." *Id.* at 1163–64. There was "no indication that the shooter, having shot at him twice, would be satisfied that Covington was only wounded. In fact, Covington did not indicate any possible motive for the shooting, and thereby gave no reason to think that the shooter would not shoot again if he arrived on the scene." *Id.* at 1166. According to Justice Scalia, the Court's concern about further violence derived from an "active imagination" that "invent[ed] a world . . . where drug dealers hunt their shooting victim down and fire into a crowd of police officers to finish him off." *Id.* at 1172 (Scalia, J., dissenting). Apart from whether this "dystopian view of Detroit," *id.* (Scalia, J., dissenting), was warranted, the majority's preoccupation with Covington's safety is striking when juxtaposed with the Court's utter disregard for the far greater possibility of ongoing violence in domestic cases.

29. *Id.* at 1159.

30. *Id.*

domestic disturbance and found a “timid” and “frightened” woman;<sup>31</sup> they also found a man who admitted to arguing with his wife but claimed—despite a living room in a state of “disarray” with “broken objects littering the floor”<sup>32</sup> and “broken glass . . . in front of a glass heating unit that appeared to be broken with flames coming out the front of the unit”<sup>33</sup>—that it never became physical.<sup>34</sup> After police separated the two of them, the woman told police that her husband had thrown her into the shattered glass and punched her in the chest, and she said that she was in pain.<sup>35</sup> Despite the efforts of police to keep the man away, he made “several attempts” to enter the room where the woman was speaking to an officer about the episode, and he became “angry” when the officer “insisted that [he] stay separated” from his wife “so that [the officers could] investigate what had happened.”<sup>36</sup>

Perhaps, even on this telling, the Court would resist characterizing Hershel Hammon as “the perpetrator of a violent crime.”<sup>37</sup> What is apparent, however, is that violence, as the Court conceived of it, must exceed a threshold before it even qualifies as an emergency. As Justice Scalia sputtered in dissent, “I do not look forward to resolving conflicts in the future over whether knives and poison are more like guns or fists for Confrontation Clause purposes.”<sup>38</sup> This inquiry is exceedingly problematic, not just because cases will fall in the middle but because there is no good reason that the designation should matter to the ultimate question—that is, whether the statement was made during an ongoing emergency.

This is not to deny that Covington’s gunshot wound to the abdomen was more serious than the physical injury suffered by Amy Hammon—Covington died from his wound. But even so, Amy Hammon may have been crying for help and in desperate need of police protection in a way that Covington was not. *Bryant* missed this distinction, perceiving violence as necessarily entailing serious physical injury that occurs in a moment of time. Accordingly, the Court reduced to irrelevancies the characteristic features of domestic violence: ongoing patterns of coercion that escalate and thereby cause the victim to live in fear.

As deployed by *Bryant*, “the private” accomplishes much of the work of designating a statement as testimonial. Had Hershel Hammon fled by the

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31. *Hammon v. State*, 809 N.E.2d 945, 947 (Ind. Ct. App. 2004), *aff’d*, 829 N.E.2d 444 (Ind. 2005), *rev’d*, 126 S. Ct. 2266 (2006).

32. *Hammon*, 829 N.E.2d at 444.

33. *Id.* at 498.

34. *Id.*

35. *Id.*

36. *Davis v. Washington*, 547 U.S. 813, 820 (2006).

37. *Michigan v. Bryant*, 131 S. Ct. 1143, 1159 (2011).

38. *Id.* at 1176 (Scalia, J., dissenting).

time the police arrived, it is unlikely that *his* “on-the-loose” status would signal to the Court the existence of an ongoing emergency. Under *Bryant’s* logic, a man who had “only” used his fists against his wife<sup>39</sup> would not be perceived as a danger to the public. This reading is further supported by the Court’s reminder that “‘a conversation which begins as an interrogation to determine the need for emergency assistance’ can ‘evolve into testimonial statements.’”<sup>40</sup> And the Court provided additional guidance that is even more on point: “This evolution may occur if, for example, a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute.”<sup>41</sup>

In *Bryant*, private disputes became a construct with independent significance. These disputes, as the Court conceived of them, create their own, limited emergencies; they occur in private space, which shields the public from collateral damage; and they tend to inflict less injury than other crime. Private disputes are defined by their points of departure from violence inflicted by strangers, which is privileged as the paradigm of crime, properly subject to state regulation.

These boundaries are not new, which means that *Bryant* must be placed in sociohistorical context to appreciate fully its import.

The legal treatment of domestic violence originated in a right of chastisement that remained in effect until the late nineteenth century.<sup>42</sup> Even after the formal chastisement right had been repudiated and wife beating had been criminalized, however, domestic violence remained widely accepted.<sup>43</sup> In place of transparently hierarchal norms, the rhetoric of marital privacy developed to justify nonintervention in intimate relationships.<sup>44</sup> Until recently, noninterventionist policies, and the privacy-based rationales used

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39. *Id.* at 1159.

40. *Id.* (quoting *Davis*, 547 U.S. at 828).

41. *Bryant*, 131 S. Ct. at 1159. I am suggesting that the private nature of a dispute—or, more helpfully, its source in a relationship of ongoing abuse—means quite the opposite of what the Court posited: in fact, past crime may reflect an ongoing emergency. To be clear, recognizing this point does not require accepting that the constitutionally relevant period of exigency extends indefinitely.

42. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2122–23 (1996).

43. *Id.* at 2130.

44. *Id.* at 2150–74.



to support them, “saturated the criminal justice system at all levels—police, prosecutor and bench.”<sup>45</sup>

This began to change in the 1970s, as challenges to police inaction resulted in improved training, significant procedural reforms, and substantially more domestic violence arrests.<sup>46</sup> These developments, in turn, prompted a focus on prosecution. Professor Sack describes this evolution as follows:

As the number of domestic violence arrests started to increase, prosecutors began to examine new ways to handle these cases. They began to develop “no-drop” policies in which their decision to go forward on a domestic violence case was not determined by whether the victim wanted the case to proceed. Not only would this improve prosecution rates in domestic violence cases, but it would have a positive effect on arrests, as police are more likely to make an arrest if they believe the case will be prosecuted. In addition, as with mandatory arrest, by not making prosecution dependent on a victim’s decision to press charges, no-drop policies would reduce batterers’ attempts to intimidate or retaliate against victims to keep them from proceeding. . . . And, a no-drop policy would make it clear that the justice system takes domestic violence seriously and treats it as a crime. Domestic violence is a public safety issue that is not confined to the victim and offender, but impacts the community as a whole.<sup>47</sup>

Introducing domestic violence as a public concern thus required implementing a host of tangible measures designed to ensure that such violence would be effectively prosecuted.

For present purposes, it is important to emphasize that the in-the-trenches treatment of domestic violence as a crime developed alongside deliberate efforts to dismantle a public-private divide that placed the latter off limits.<sup>48</sup> This conceptual move, which must be counted among the great contributions of feminist legal theory, facilitated a legal progression toward equal protection for women in violent relationships.

From this perspective, *Bryant* is worse than poorly reasoned; in relying on a retrograde framework that—it seemed—had been largely dismantled, the case marks a regression. Perhaps this regression is outweighed, as a practical matter, by the greater flexibility now generally afforded the

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45. Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 970 (2004) (internal citations omitted).

46. See Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 62 (1992).

47. Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1672–73 (2004).

48. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1869 (1996).

testimonial determination (although nondomestic cases are the ones that will most readily benefit from *Bryant's* more contextual approach). More to the point, the Supreme Court was not compelled to resuscitate, then sacrifice, “the private” to achieve its desired end. Its willingness to do so speaks to the endurance of long-standing hierarchies.

## II. DOMESTIC VIOLENCE PROSECUTION AFTER *CRAWFORD*

The re-privatization of domestic violence has a less abstract meaning on the ground, where, soon after *Crawford* was decided, prosecutors began dismissing cases.<sup>49</sup> Since then, courts have excluded as testimonial statements that would otherwise have been routinely admitted under the old reliability regime.<sup>50</sup> And, at the earlier charging stage, prosecutors have undoubtedly taken into account the odds of losing on admissibility, although this measure of *Crawford's* impact is quite difficult to gauge.

Whether *Bryant* will have a meaningful impact on domestic violence cases, and what that impact will be, is yet to be determined. Although the Court has now purported to make the existence of a relationship central to the testimonial analysis, a number of post-*Davis* cases classify on-scene statements by victims of domestic violence as nontestimonial, made in the course of an emergency.<sup>51</sup> For a lower court so inclined to adopt this perspective, the *Bryant* Court's multifactor approach—if not its artificial distinctions—may actually prove helpful.<sup>52</sup>

A classification as testimonial need not doom a victim-absent prosecution, of course. Prosecutors interested in pursuing a case without a victim may be able to invoke the equitable doctrine of forfeiture. When the batterer's efforts to control his victim resemble traditional witness-tampering methods—such as placing threatening calls from jail—there is no conceptual barrier to proving a defendant's intent to procure the witness's absence, a requirement the Court enunciated in *Giles v. California*.<sup>53</sup> But to the extent that abusers employ tactics that depart from paradigmatic witness tampering, which often occurs, prosecutors may find it difficult to establish

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49. See Tom Lininger, *Prosecuting BATTERERS After Crawford*, 91 VA. L. REV. 747 app. at 820 (2005) (76% of prosecutors responding to a survey of 60 prosecutors' offices reported a higher dismissal rate after *Crawford*).

50. See Robert K. Kry, *Confrontation at a Crossroads: Crawford's Seven-Year Itch*, 6 CHARLESTON L. REV. 49, 52 (2011).

51. See, e.g., *People v. Lewis*, No. A115107, 2007 WL 4206637, at \*3–4 (Cal. Ct. App. Nov. 29, 2007); *People v. Bradley*, 862 N.E.2d 79, 81 (N.Y. 2006); *State v. Shea*, 965 A.2d 504, 510 (Vt. 2008).

52. This is not to defend *Bryant*, which not only re-privatizes domestic violence but may also fail to protect the right of confrontation in cases where it should.

53. 554 U.S. 353 (2008).

the requisite intent. This difficulty limits the applicability of the Court's forfeiture framework to domestic violence, although the doctrine remains useful.<sup>54</sup>

Overall, my sense is that the reworked Confrontation Clause has not doomed evidence-based prosecution but rather has curtailed it. In cases where prosecutors can no longer introduce a victim's statements to police officers, the alternatives may now include forcing her to testify or dismissing the charges altogether. Efforts to hold abusers accountable have thus become noticeably more dependent on the participation of domestic violence victims.

As a result, one positive development has emerged: prosecutors are increasingly attuned to the myriad challenges that battered women face in assisting the state with investigation and trial.<sup>55</sup> This reorientation has in turn produced a greater emphasis on providing the kind of support that can enable domestic violence victims to do the hard work of cooperating with the state.<sup>56</sup> Ideally, prosecutors are adopting holistic measures aimed at addressing the full range of obstacles confronting the victim, whose participation in the criminal case often necessitates constructing a life away from the batterer. Best practices now include providing assistance that "support[s] the victim's legal and non-legal needs, including housing, education, childcare and employment accommodations."<sup>57</sup> In essence, policies of this kind—which are by no means universal but are indeed widespread—deliberately target underlying causes of the familiar alliance between accuser and accused.<sup>58</sup> By addressing the victim's reasons for noncooperation, the state positions itself to proceed *with* the accuser, reconfiguring a triangular structure that has long plagued domestic violence prosecution.<sup>59</sup>

Prosecuting domestic violence in a manner that empowers the victim is optimal, and recognizing victim support as integral to this model's success

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54. See generally Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295 (2010).

55. See WIDER OPPORTUNITIES FOR WOMEN, PROSECUTOR'S GUIDE TO SAFETY AND ECONOMIC SECURITY FOR VICTIMS OF VIOLENCE AGAINST WOMEN 13 (2013), available at <http://www.wowonline.org/wp-content/uploads/2013/10/WOW-ESS-Prosecutors-Sector-Guide.pdf> [<http://perma.cc/9WVP-5279>].

56. *Id.* at 9.

57. *Id.* at 13.

58. See Tuerkheimer, *supra* note 17, at 57 (identifying domestic violence as representing a deviation from the paradigmatic Confrontation Clause violation, which involves a particular configuration of relationships among accuser, state, and accused).

59. Absent this reconfiguration, domestic violence cases tend to present a significant departure from the Confrontation Clause paradigm—accuser and state aligned against the accused—insofar as victims of abuse who resist cooperating with prosecutors ally themselves *with* the defendant *against* the state. *Id.*

should be celebrated. But these adjustments do not eliminate the state's imperative to proceed sometimes despite the victim's noncooperation. Cases where the victim's expressed interests diverge from those of the prosecution are inevitable. These are the cases that squarely present the question of whether, as a normative proposition, charges should invariably be dropped simply because the victim does not wish to testify. In my view, the answer is no—that is, the decision must depend on the particular facts at issue. Although proceeding with a case may not always be the best prosecutorial response, the state has a powerful interest in redressing the crime (albeit, an interest that may on occasion be outweighed by other concerns). The public harm of domestic violence is real, notwithstanding a Confrontation Clause jurisprudence that disregards it.

#### CONCLUSION

*Davis* was fundamentally incompatible with the realities of domestic violence. Unmoored from context, the new approach to the testimonial inquiry posited an artificial ending to an ongoing emergency. Resolving an exigency often depends on an arrest and therefore on the victim's recounting of past criminal conduct. By overlooking this fact, the Court dictated the exclusion of out-of-court statements that were functionally quite different from the paradigmatic Confrontation Clause violation. Yet this discrepancy went unacknowledged, and the Court failed to offer an alternative vision for the normative underpinnings of the confrontation right.

When the Court addressed the limits of the *Davis* approach, it implicitly acknowledged that context matters in assessing the contours of exigency. *Bryant's* multifactor test conceded that an expansive list of factors was relevant to the analysis, but it did not elaborate on the norms underlying confrontation. Most surprisingly, the Court suggested that greater flexibility was warranted only with respect to nondomestic cases, leaving intact the discarded framework as applied to those cases least consistent with it.

The Court's re-privatization of domestic violence in this manner raises the prospect that, in unspoken ways, the domestic aspects of *Hammon* and *Davis* (and, for that matter, *Giles*) were integral to their faulty analyses. The hierarchy of violence that surfaced in *Bryant*—and that indeed animated the Court's reasoning throughout—may well have enabled the Court to tolerate, or even embrace, a model of confrontation that it would repudiate only when more public violence was at issue.

All told, a decade of Confrontation Clause jurisprudence suggests that advances in criminalizing domestic violence may be more tenuous than is generally believed.

# THE FRAME OF REFERENCE AND OTHER PROBLEMS

*Richard D. Friedman* \*

*Jeffrey L. Fisher* \*\*

Given the pair of Fishers, we'll use first names. And because we have more to say about George's essay, we'll concentrate our attention there.<sup>1</sup>

## I. HISTORY

George argues that, centuries ago, jurists did not distinguish between testimonial and nontestimonial hearsay, and so the distinction cannot be a historically well-grounded basis for modern confrontation doctrine. The argument proceeds from an inaccurate frame of reference.

When the confrontation right developed, principally in the sixteenth and seventeenth centuries, and English defendants—Raleigh among them—demanded that adverse witnesses be brought face to face with them, they were making a procedural assertion as to how witnesses must give their testimony. (Giving testimony is what witnesses in litigation do.) Rarely did they phrase this claim in terms of hearsay, for the simple reason that there was no rule against hearsay in the modern sense. Similarly, numerous statutes protected the right of treason defendants to have witnesses brought face to face, and these statutes never mentioned hearsay.

True, Geoffrey Gilbert's treatise from the early eighteenth century said that "a mere hearsay is no Evidence," but that was a limp statement: neither he nor any other writer at the time elaborated on it.<sup>2</sup> (Contrast the dense discussion of the law governing witnesses.) They did not offer a definition of hearsay, without which an exclusionary rule is indeterminate, nor did they catalogue exceptions, without which such a rule would be impractically

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1. We certainly agree with Deborah that it is important to recognize the public implications of domestic violence. We do not regard the holding in *Hammon v. Indiana* as violating this principle. There, the suspect was known and in the presence of the police; it was clear that there was no imminent danger to anybody.

2. GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 99 (Garland Publ'g 1979) (1754).

broad. The fact is that lots of hearsay was admitted in the early- and mid-eighteenth century, in criminal as well as civil cases.<sup>3</sup>

George certainly agrees that not all hearsay should be excluded. But the point appears to have escaped John Marshall; Marshall's broad-brush 1807 condemnation of all hearsay (and exclusion of a conspirator's statement) proves far too much and offers no support for George. Marshall's statement does suggest that by then—thirty years after the early state constitutions articulated the confrontation right, some using the “face-to-face” formula—lawyerly recognition of, and broad opposition to, hearsay had taken hold.<sup>4</sup> Over succeeding decades, the wide scope of the hearsay rule tended to make it, rather than the confrontation right, the doctrinal focus, even as the rule was whittled and shaped by exceptions that made its scope more practical but obscured its rationale.

As for George's argument based on the statement by the Portuguese gentleman in Raleigh's case, Rich responded to this precise argument earlier in the year, so given word limitations we will offer only a citation here.<sup>5</sup>

And as for dying declarations: When the doctrine emerged, it was not conceived as an exception to the rule against hearsay, which was still in embryonic form. Rather, the stated rationale was that imminent death was as powerful a sanction as the oath—in other words, that a surrogate for the ordinary required conditions of *testimony* was present. (Rich has argued repeatedly that forfeiture provides a better rationale.<sup>6</sup>) Even as the hearsay rule began to gel, a leading case described dying declarations as an alternative (along with formal statements to a justice of the peace taken under statutory directive) to the ordinary way of giving evidence—live testimony subject to oath and confrontation in open court.<sup>7</sup>

## II. STANDARDS

Like George, we have been disappointed by the Supreme Court's failure thus far to articulate a fully developed conception of what is “testimonial.”

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3. E.g., JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 234–35 (2003); T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499 (1999); John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1189–90 (1996).

4. See Gallanis, *supra* note 3, at 503 (“[T]he 1780s were a period of considerable activity and . . . by 1800 much of the modern approach to hearsay was already in place.”).

5. Richard D. Friedman, *The Mold That Shapes Hearsay Law*, 66 FLA. L. REV. 433, 459–62 (2014).

6. E.g., Richard D. Friedman, *Giles v. California: A Personal Reflection*, 13 LEWIS & CLARK L. REV. 733 (2009).

7. *King v. Woodcock*, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789).

But the problem is fixable—it is not the fault of the underlying approach—because such a conception is available.

We agree that it is confusing to speak of an actor’s primary purpose “objectively considered.” Purpose is a subjective matter. But this aspect of the problem would disappear if the Court spoke, as we believe it should, in terms of *reasonable anticipation*—rather than purpose—of prosecutorial use.

Whose anticipation? Again, we agree that the Court has muddied the waters. Justice Scalia is right: it is the anticipation of the declarant, the purported witness, that should be decisive.<sup>8</sup> We believe that this is not inconsistent with the Court’s pronouncements that the perspective of the questioner, if there is one, should be taken into account: what the declarant understands the purpose of the questioner to be may serve as a key factor in determining likely use of the statement. (And there is nothing perverse, by the way, about the fact that a prosecutor might create evidence without being subject to the Confrontation Clause; evidence creation alone is not sufficient to invoke the clause, which is indisputably about *witnessing*.)

### III. RELIABILITY

George contends that the best rationale for *Crawford* is that “declarants who speak in anticipation of trial have reason to lie, rendering their statements unreliable,” but his argument misses the mark. *Crawford*, while recognizing that the Confrontation Clause creates “a procedural rather than a substantive guarantee,” spoke of its “ultimate goal” as being “to ensure reliability of evidence.” That’s not quite right. Eyewitness testimony is notoriously *unreliable*, and confrontation cannot *ensure* reliability; when two witnesses give conflicting evidence, both cannot be reliable. The most we can hope for is that confrontation will help the trier of fact make *accurate* findings out of an assemblage of evidence, much of which may be very unreliable. But whether or not that is true, the real purpose of the clause is to ensure that witnesses perform their function under historically prescribed conditions (that is, face to face, under oath, subject to cross-examination, and, if reasonably possible, in open court). When a witness testifies at trial, a judge does not say, “That was so reliable that no cross is necessary.” There’s no reason for a different result when a witness has testified out of court, with the expectation that the testimony will be used for criminal investigation and prosecution.

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8. We will not discuss here whether the ordinarily applicable approach should be adjusted, or replaced altogether, when the speaker is a child or a person with developmental deficiencies.

IV. *ROBERTS REDUX?*

In the end, George's proposed solution is essentially an attempt to create an ideal hearsay code and give it constitutional force. While creating such a hearsay code is a worthwhile project, we respectfully suggest that it has nothing to do with the confrontation right. At any rate, there is no reason to believe a second attempt at turning the confrontation right into a catalogue of supposedly reliable classes of evidence, backed up by case-specific assessment, would be any more successful than the first. Can we really say that custodial confessions are inherently unreliable? Even a confession acknowledging responsibility for a murder, as in *Lee v. Illinois*?<sup>9</sup> Someone nostalgic for a return to the era in which the Court transformed the confrontation right into an attempted sifter of good and bad evidence might take pause from the fact that, decades into the *Roberts* regime, lower courts mangled cases like *Lee*, *Lilly v. Virginia*,<sup>10</sup> and *Crawford*. In each of these instances, the lower courts held admissible against the accused a statement made out of court to the authorities by another person—even though for more than three centuries it had been obvious that one could not act as a valid *witness* against another by making a custodial confession.<sup>11</sup>

It is true, though unfortunate, that four justices think that the scientific underpinnings of forensic lab reports, at least in part, make such reports nontestimonial. But no member of the present Court has stated that he or she wishes to return to the *Roberts* regime. Small wonder; it yielded a doctrine without historical or textual basis, one that gave inadequate guidance to the lower courts and failed to provide clear protection in core cases.

The testimonial approach expresses a sound conception of the confrontation right. It has not yet developed as fully as it should. But the missteps that George identifies and some resulting opacity in the doctrine need not constrain the future.

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9. 476 U.S. 530 (1986).

10. 527 U.S. 116 (1999).

11. Tong's Case, Kel. J. 17, 18, 84 Eng. Rep. 1061, 1062 (K.B. 1662).