



NOTE

CRAWFORD'S AFTERSHOCK:

ALIGNING THE REGULATION OF
NONTTESTIMONIAL HEARSAY WITH THE HISTORY
AND PURPOSES OF THE CONFRONTATION CLAUSE

Fred O. Smith, Jr.

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INTRODUCTION

Courts have called the decision a “bombshell,” a “renaissance,” and the dawning of a “new day” in the Sixth Amendment’s Confrontation Clause jurisprudence.¹ News reports have called the decision “an earthquake rocking America’s criminal justice foundations.”² Four years ago, in *Crawford v. Washington*,³ the United States Supreme Court revisited the scope and purposes of the constitutional guarantee that a criminal defendant shall “be confronted with the witnesses against him.”⁴ The case and its progeny⁵ redefined this clause’s implications for hearsay statements.⁶

Before *Crawford*, under *Ohio v. Roberts*,⁷ the Confrontation Clause barred prosecutors from introducing hearsay statements against a criminal defendant unless the statements met one of two prerequisites. The statement had to either fall into a “firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness.”⁸ Yet, in *Crawford*, the Court found the *Roberts* test problematic, at least in the context of what it called “testimonial statements.”⁹ Without providing a precise definition of this term, the Court concluded that “testimonial” hearsay statements are admissible only if the witness is “unavailable to testify, and the defendant [has] had a prior opportunity for cross-examination.”¹⁰

1. *People v. Cage*, 15 Cal. Rptr. 3d 846, 854 (Ct. App. 2004) (calling *Crawford v. Washington* a “bombshell”); *State v. Hale*, 691 N.W.2d 637, 646 (Wis. 2005) (“With the *Crawford* decision, a new day has dawned for Confrontation Clause jurisprudence. [The defendant] is the beneficiary of this renaissance”); see also *State v. Alvarez-Lopez*, 98 P.3d 699, 707 (N.M. 2004) (stating that the courts now view the Confrontation Clause through “a newly shaped lens”).

2. See Kevin Drew, *At 33, He’s a Two-Time Supreme Court Winner: Seattle Attorney Establishes New Legal Ground with Cases*, CNN, July 23, 2004, <http://www.cnn.com/2004/LAW/07/21/seattle.attorney> (profiling Jeffrey L. Fisher, who argued *Crawford* believing he was requesting “a dramatic change in the law, asking for a whole new system”).

3. 541 U.S. 36 (2004).

4. U.S. CONST. amend. VI.

5. *Whorton v. Bockting*, 127 S. Ct. 1173 (2007) (holding that *Crawford* was not retroactive); *Davis v. Washington*, 126 S. Ct. 2266 (2006) (determining the circumstances in which a 911 call is “testimonial” and therefore subject to the Confrontation Clause).

6. Richard D. Friedman has noted that in the 1960s, when the Court applied the Confrontation Clause to state prosecutions, it became more important for the Court to develop a doctrine as to how to treat such hearsay statements. This is because at that time, in federal prosecutions, a statement that was inadmissible “via the Confrontation Clause could also be excluded by bringing it within the rule against hearsay.” Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1014 (1998).

7. 448 U.S. 56 (1980), overruled in part by *Crawford*, 541 U.S. at 68.

8. *Id.* at 66.

9. *Crawford*, 541 U.S. at 53-54.

10. *Id.* at 54.

Commentary on the Confrontation Clause exploded after the *Crawford* decision—mostly exploring the precise definition of “testimonial.”¹¹ This narrow question has also been the focus of Confrontation Clause cases that the Supreme Court has decided post-*Crawford*.¹² Still, while the definition of “testimonial” is a rich issue, surprisingly little was written in the immediate aftermath of *Crawford* about a related question: should the Confrontation Clause now leave nontestimonial statements unregulated altogether?¹³

For roughly a two-year period, courts continued to apply the old *Roberts* test to nontestimonial statements consistently,¹⁴ though not unflinchingly.

11. For background and a survey of *Crawford*'s implementation, see generally Jerome C. Latimer, *Confrontation After Crawford: The Decision's Impact on How Hearsay Is Analyzed Under the Confrontation Clause*, 36 SETON HALL L. REV. 327 (2006). Particularly interesting commentary can be found in Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005); Robert M. Pitler, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1 (2005); Susanne C. Walther, *Pipe-Dreams of Truth and Fairness: Is Crawford v. Washington a Breakthrough for Sixth Amendment Confrontation Rights?*, 9 BUFF. CRIM. L. REV. 453 (2006). Much of the commentary has focused on the definition of “testimonial.” See, e.g., Mark Dwyer, *Crawford's “Testimonial Hearsay” Category: A Plain Limit on the Protections of the Confrontation Clause*, 71 BROOK. L. REV. 275 (2005) (providing a practitioner's perspective); Bradley Morin, *Science, Crawford and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports*, 85 B.U. L. REV. 1243 (2005); John M. Spires, Note, *Testimonial or Nontestimonial? The Admissibility of Forensic Evidence After Crawford v. Washington*, 94 KY. L.J. 187 (2005-2006). The most succinct of such articles exploring this definition is Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241 (2005).

12. See *Davis v. Washington*, 126 S. Ct. 2266 (2006). This opinion stemmed from two lower court cases, one in Washington, *State v. Davis*, 111 P.3d 844 (Wash. 2005), *aff'd*, 126 S. Ct. 2266, and one in Indiana, *Hammon v. State*, 809 N.E.2d 945 (Ind. Ct. App. 2004), *rev'd sub nom. Davis*, 126 S. Ct. 2266. In the Washington case, the question presented was when an emergency 911 call could be properly classified as testimonial. *Davis*, 111 P.3d at 846. In the Indiana case, the question was when police's questioning of a domestic violence victim, shortly after arriving on a scene, qualified as a testimonial statement. *Hammon*, 809 N.E.2d at 947. The Supreme Court recently granted certiorari in a case that may add further clarity to the definition of the word “testimonial.” *Commonwealth v. Melendez-Diaz*, 870 N.E.2d 676 (Mass. App. Ct. 2007), *review denied* 874 N.E.2d 407 (Mass. 2007), *cert. granted* 2008 WL 695627 (U.S. Mar. 17, 2008). At issue is whether crime-laboratory reports are testimonial.

13. An exception is a piece by Miguel A. Méndez in which he identifies this issue and discusses it briefly. Miguel A. Méndez, *Crawford v. Washington: A Critique*, 57 STAN. L. REV. 569, 608 (2004) (“Of critical importance is the question whether the Confrontation Clause embraces nontestimonial statements.”).

14. See *State v. Manuel*, 697 N.W.2d 811, 826 n.15 (Wis. 2005) (“[O]nly one reported case, a trial court decision, has construed *Crawford* as exempting nontestimonial hearsay from Confrontation Clause analysis altogether. However, that conclusion seemed to rest on a misquotation of *Crawford*.”); see also *Summers v. Dretke*, 431 F.3d 861, 877 (5th Cir. 2005) (finding that “it is clear that [*Roberts*] continues to control” with respect to nontestimonial statements by accomplices); *United States v. Hinton*, 423 F.3d 355, 358 n.1 (3d Cir. 2005) (holding that “non-testimonial hearsay is still governed by *Roberts*”); *United States v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005) (applying *Roberts* to a nontestimonial excited utterance);

Some noted that many of the problems that plagued the reliability test in the context of testimonial statements continued to haunt with equal force when courts assessed whether nontestimonial statements ought to be admitted into evidence.¹⁵ And in some cases, courts' intuitions that the *Roberts* test would ultimately be revisited in the context of nontestimonial statements were palpable.¹⁶

These lower courts' intuitions proved correct. While the Supreme Court stated in *Crawford* that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object,"¹⁷ the Court went further two years later in *Davis v. Washington*. There, the Court concluded that "testimonial" statements not only mark the Confrontation Clause's "'core,' but its perimeter."¹⁸ A few courts, even after *Davis*, continued to apply *Roberts* to nontestimonial hearsay statements.¹⁹ But in 2007, the Supreme Court issued an even more direct and unambiguous declaration on the subject in *Whorton v. Bockting*, concluding that "the Confrontation Clause has no application" to "out-of-court nontestimonial statements."²⁰

After *Davis* and *Bockting*, it is now permissible to enter nontestimonial statements into evidence against a criminal defendant without any Confrontation Clause restrictions whatsoever.²¹ In light of that recent shift, this Note explores what the purposes, history, and text of the Confrontation Clause have to say about the admission of nontestimonial hearsay statements.

United States v. Gibson, 409 F.3d 325, 338 (6th Cir. 2005) ("But *Crawford* dealt only with testimonial statements and did not disturb the rule that nontestimonial statements are constitutionally admissible if they bear independent guarantees of trustworthiness."); Mungo v. Duncan, 393 F.3d 327, 336 n.7 (2d Cir. 2004) (stating that "under *Roberts*, nontestimonial hearsay deemed unreliable is barred by the Confrontation Clause"); Horton v. Allen, 370 F.3d 75, 84 (1st Cir. 2004) ("Accordingly, we apply *Roberts* to determine whether the admission of [a witness' nontestimonial] statements violated [the defendant's] Confrontation Clause rights.").

15. See, e.g., *Compan v. People*, 121 P.3d 876 (Colo. 2005) (Coats, J., concurring) (noting that *Crawford* leveled several criticisms at the *Roberts* approach that would apply with equal force to its application to nontestimonial statements). Consider the *Crawford* Court's claim that "[r]eliability is an amorphous, if not entirely subjective, concept." 541 U.S. at 63.

16. See, e.g., *United States v. Saget*, 377 F.3d 223, 227 (2d Cir. 2004) ("[T]he continued viability of *Roberts* with respect to nontestimonial statements is somewhat in doubt . . ."); *State v. Dedman*, 102 P.3d 628, 637 (N.M. 2004) ("[T]he [Supreme] Court may later conclude that the Sixth Amendment is not concerned with non-testimonial hearsay.").

17. *Crawford*, 541 U.S. at 53.

18. *Davis*, 126 S. Ct. at 2274.

19. *State v. Legendre*, 942 So.2d 45, 51 (La. Ct. App. 2006) (acknowledging *Davis*, but concluding nonetheless that "[a]s to 'non-testimonial' statements, the *Roberts* reliability analysis still applies"); *State v. Jensen*, 727 N.W.2d 518, 524 (Wis. 2007) ("The *Roberts* test remains when nontestimonial statements are at issue.").

20. 127 S. Ct. 1173, 1183 (2007).

21. See generally Laird C. Kirkpatrick, *Nontestimonial Hearsay After Crawford, Davis and Bockting*, 19 REGENT U. L. REV. 367 (2007).

Part I examines historical sources, such as the common law, near the Founding, as well as the text of the Confrontation Clause and concludes that nontestimonial hearsay was one of the ills that the clause was designed to protect against. Part I additionally proposes a two-tiered approach to interpreting the Confrontation Clause, in which testimonial statements receive the most vigorous form of constitutional scrutiny, but nontestimonial statements receive meaningful scrutiny as well. The United States Constitution is no stranger to such a two-tiered approach to implementing its amendments.²²

Part II more carefully explores what “confrontation” should mean, both historically and practically, in the context of nontestimonial hearsay. After marshaling relevant case law, historical texts, jury instructions and practitioners’ guides, Part II concludes that simply reimplementing *Roberts* would not adequately or faithfully result in the type of meaningful confrontation demanded by the clause. Part III then proposes four interpretive reforms that would bring American courts closer to harmonizing the Confrontation Clause’s regulation with the provision’s full range of historical and practical values.

I. THE CASE FOR LIMITING THE CONFRONTATION CLAUSE TO TESTIMONIAL STATEMENTS, AND WHY IT IS WRONG

A. Taking a Historical and Purposive Look at the Confrontation Clause

The term “testimonial” is not yet a term of precision; the *Crawford* Court left “for another day any effort to spell out a comprehensive definition” of the word.²³ Still, there are some types of statements that courts routinely agree are not testimonial, including conversations between relatives and friends in which neither party has reason to suspect the statements will be repeated in a legal or investigative setting.²⁴ Yet, there are cases reported at or around the Founding in which common law courts rejected such nontestimonial statements as inadmissible.

22. See *infra* note 99 and accompanying text.

23. 541 U.S. at 68.

24. See, e.g., *United States v. Johnson*, 440 F.3d 832, 843 (6th Cir. 2006) (holding that conversations between friends of twenty-five years were nontestimonial); *McKinney v. Bruce*, 125 F. App’x 947, 950 (10th Cir. 2005) (holding that the victim’s statements to his uncle were nontestimonial); *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004) (finding that statements made during a private conversation to a friend were not testimonial); *People v. Griffin*, 93 P.3d 344, 372 n.19 (Cal. 2004) (holding that a statement to a friend at school that defendant had fondled her was nontestimonial hearsay within the meaning of *Crawford*); *Demons v. State*, 595 S.E.2d 76, 80 (Ga. 2004) (holding conversations between close friends were not testimonial); *State v. Blue*, 717 N.W.2d 558, 563 (N.D. 2006) (“[A]n out-of-court statement by a victim to a friend, family member, coworker, or non-government employee, without police involvement, have [sic] been held nontestimonial.”).

One critical case on point is *King v. Brasier*.²⁵ Decided less than a decade before the ratification of the U.S. Constitution, this British appellate decision has proved enduring; it was even cited by a *Crawford* concurring opinion as an example of the type of case that was likely on the Framers' minds at the time they crafted the Confrontation Clause.²⁶

In *King v. Brasier*, a child victim of assault and attempted rape "immediately" informed her mother of "all the circumstances of the injury which had been done to her."²⁷ The court noted that no circumstances could confirm the victim's story, except that the defendant had lodged at the same place the victim described.²⁸ While the girl did not testify at trial, her statements came in through her mother's testimony. The court concluded that this method of admission was improper—and indeed the fact that the statements were of a nature that the *Crawford* regime terms "nontestimonial" made the statements less credible, not more so.²⁹ The court expressed unanimous concern that the victim's statements were not made under oath; therefore, these statements "ought not have been received."³⁰ Also of note is that the court referred to the victim's statements as "testimony," stating that "*no testimony whatever* can be legally received except upon oath."³¹ This adds credence to the idea that any statement presented to a jury for the truth of the matter asserted³² constructively becomes "testimony," and the declarant becomes a witness.

One could attempt to dismiss *Brasier* as a hearsay case rather than a case properly viewed as a precursor to the Confrontation Clause. But in the four times this case has been cited in American jurisprudence, three courts have cited it for its bearing on their Confrontation Clause interpretations while one cited it as useful in determining whether a child was competent to take the stand.³³ None have cited it merely for its hearsay implications. Thus, one

25. (1779) 1 Leach 199, 200, 168 Eng. Rep. 202 (K.B.).

26. *Crawford*, 541 U.S. at 69-70 (Rehnquist, C.J., concurring in part, dissenting in part). *Brasier* was also cited in the most recent case interpreting the Confrontation Clause. See *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006).

27. 168 Eng. Rep. at 202.

28. *Id.*

29. *Id.*

30. *Id.* at 203.

31. *Id.* at 202 (emphasis added).

32. *Crawford*, 541 U.S. at 59 ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."). When a party introduces out-of-court statements for purposes other than proving the truth of the matter asserted, the federal rules permit limiting instructions prohibiting the jury from considering such statements for their truth. FED. R. EVID. 105.

33. For those citing *Brasier* in the Confrontation Clause context, see *Crawford*, 541 U.S. at 69-70 (Rehnquist, C.J., concurring in part, dissenting in part); *State v. Mizenko*, 127 P.3d 458, 481 (Mont. 2006); *State v. Gambutti*, 115 A.2d 136, 138 (N.J. Super. Ct. App. Div. 1955). But see *Gaines v. Commonwealth*, 728 S.W.2d 525, 527 (Ky. 1987) (citing *Brasier* in determining a child's competence to testify).

arguing that this is a hearsay rather than a Confrontation Clause case bears the burden to demonstrate why almost every American appellate jurist to have reviewed *Brasier* has been wrong about its implications.

Alternatively, some scholars, including Jeffrey L. Fisher, argue that *Brasier* stands as evidence that courts should adopt a broader conception of what constitutes testimonial evidence.³⁴ Fisher proposes that when a person provides a play-by-play description of a completed event to a person in a position of authority, a court should characterize this statement as testimonial. Accusations from children, reporting abuse to parents, typify this principle. "While parents are not governmental actors, they are people of authority in their children's eyes—the people to complain to when something is wrong and needs to be fixed."³⁵

Fisher's proposal, and his reading of *Brasier*, are thought-provoking. And because he argued *Crawford*, his proposal deserves particular attention. The *Crawford* Court certainly left open the possibility that in future cases, it might be receptive to broader definitions of "testimonial,"³⁶ noting that it need not decide that question since the police interrogation at issue was testimonial under even a narrow understanding. Fisher's proposal above supplies one example of such a broader definition.³⁷

Still, the notion that statements to friends and relatives can qualify as testimonial has generally been rejected by courts,³⁸ with few exceptions.³⁹ And

34. Jeffrey L. Fisher, *What Happened—and What Is Happening—to the Confrontation Clause?*, 15 J.L. & POL'Y 587 (2007); Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J.L. & POL'Y 553, 556 (2007). Friedman argued *Hammon v. Indiana*, the companion case to *Davis v. Washington*, 126 S. Ct. 2266 (2006). See Richard D. Friedman, *Crawford and Davis: A Personal Reflection*, 19 REGENT U. L. REV. 303, 303 (2007).

35. Fisher, *supra* note 34, at 624.

36. 541 U.S. at 52 (2004) ("Regardless of the precise articulation, some statements qualify under any definition—for example, *ex parte* testimony at a preliminary hearing. Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.").

37. To be sure, Fisher's proposal does raise its own set of questions. At what point does a remark become a narrative? Is the term "authority" objective or subjective? That is, does it matter whether a person has actual authority over the declarant, or is it sufficient that the speaker reasonably (or even unreasonably) believes the person has such authority? But these seem like judicially manageable questions.

38. See, e.g., *Compan v. People*, 121 P.3d 876, 880-81 (Colo. 2005) (ruling that an abuse victim's statements to a friend were nontestimonial); *Herrera-Vega v. State*, 888 So. 2d 66, 69 (Fla. Dist. Ct. App. 2004) (holding that a child's spontaneous statements to her mother and father that she was sodomized were nontestimonial); see also *People v. Sharp*, 825 N.E.2d 706, 717 (Ill. App. Ct. 2005) (Turner, J., concurring) ("Here, Lydia questioned the child as a concerned and loving parent. Lydia desired to determine if her child had been sexually abused, and she questioned [the child] to determine the veracity of her suspicions. Lydia's questions and [the child's] responses were not prompted by police officers or any other governmental authority, and I conclude the responses elicited were thus nontestimonial in nature."); cf. *People v. Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (holding that a statement made by child to a non-government employee of the Children's Assessment Center was not testimonial).

understandably so, for this interpretation of “testimonial” deviates from some of the most basic principles animating *Crawford*. The majority opinion expressed particular concern about the risks attached to statements made to those performing a prosecutorial or investigative function, especially government officials. The Court posited that “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”⁴⁰ Further, “[t]he involvement of government officers in the production of testimonial evidence”⁴¹ presents special risk. Thus, in light of the fact that courts have generally rejected the view that statements to acquaintances are testimonial, and in light of the fact that classifying such statements as testimonial deviates from some of the foundational principles of *Crawford*, this reading of *Brasier* is at least as plausible as Fisher’s.

Like Fisher, Professor Richard Friedman has also cited *Brasier* as evidence that the definition of “testimonial” should be broader than some might assume.⁴² However, Friedman argues that the word “testimonial” should refer to statements “made in anticipation of prosecutorial use.”⁴³ Friedman’s alternative use of *Brasier* is less convincing than Fisher’s. This is because the *Brasier* opinion provides little, if any, reason to believe that the young girl in that case expected her words to be put to prosecutorial use.

One does not need to look to England, however, to find examples of Founding-era cases revealing that the Confrontation Clause was intended to cover nontestimonial statements. In *United States v. Burr*, one of the earliest American cases to cite the Confrontation Clause, the Chief Justice of the United States Supreme Court strongly implied in dicta that the Confrontation Clause does cover nontestimonial statements.⁴⁴ The case involved, inter alia, the admissibility of statements made by Herman Blannerhassett to another lay witness, statements that were apparently not made in preparation for or in anticipation of a legal investigation or proceeding.⁴⁵ The Court found that these statements should not have been admitted.⁴⁶ The Court cited Confrontation Clause concerns both indirectly and directly. Indirectly, the Court expressed a concern that the admitted statements were being used “to criminate others than

39. See, e.g., *State v. Mechling*, 633 S.E.2d 311 (W. Va. 2006) (reversing a lower court’s finding that a domestic violence victim’s statements to a neighbor were nontestimonial and remanding to ensure that forfeiture doctrine did not compel the admission of the statements in any event).

40. *Crawford*, 541 U.S. at 51.

41. *Id.* at 53.

42. Friedman, *supra* note 34.

43. *Id.* at 556.

44. 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

45. *Id.* at 193.

46. *Id.* at 194.

him who made it.”⁴⁷ More directly, Chief Justice Marshall explained that he did not know “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.”⁴⁸ He then immediately added, “I know of no principle in the preservation of which all are more concerned. I know none, by undermining which life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.”⁴⁹ Chief Justice Marshall made such remarks in a case that did not involve what *Crawford* calls “testimonial” statements.

In *Crawford*, Justice Scalia dismissed Chief Justice Marshall’s strong statements about the Confrontation Clause as an unbinding “passing reference.”⁵⁰ This characterization of Marshall’s discussion of the Confrontation Clause misses the point. Even if Justice Marshall’s statements are dicta, that negates their precedential, but not historical, force. Justice Scalia himself cites British cases from the eighteenth century, presumably not because he thinks these international opinions are binding on the United States, but because he thinks they provide evidence of the historical mood—of the brand of concerns that were on the Framers’ minds when they crafted the Confrontation Clause. Considering *Burr*’s proximity to the Founding and Chief Justice Marshall’s personal connections to the Founders,⁵¹ the *Burr* Court’s turn-of-the-century declaration should presumably be at least as historically persuasive as a turn-of-the-century British case.

When one reaches back further, well before the Founding, it becomes even harder to historically justify limiting the Confrontation Clause to mere testimonial statements. This is especially true when this limitation is based on the increasingly common presumption that the primary basis of the Confrontation Clause was to preclude prosecutors’ reliance on ex parte witness examinations, such as those that led to the conviction of Sir Walter Raleigh in the 1600s.⁵² Frank R. Herrmann and Brownlow M. Speer, for example, have pointed out that there are historical precursors to the Confrontation Clause with roots that date well before the ex parte examinations of the 1600s.⁵³ In fact, the

47. *Id.* at 193.

48. *Id.*

49. *Id.*

50. *Crawford*, 541 U.S. 36, 59 n.9 (2004).

51. See, e.g., JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 11 (1996) (discussing Marshall’s personal friendships with James Madison, James Monroe, and Patrick Henry).

52. Frank R. Herrmann, S.J., & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT’L L. 481, 482 (1994) (noting that “[c]onventional wisdom marks Raleigh’s [trial] as the starting point of the history of the Sixth Amendment’s Confrontation Clause” and pointing out the tension between this claim and the Supreme Court’s claims that the Confrontation Clause’s roots date back to antiquity).

53. *Id.*

Crawford Court cited Herrmann and Speer's piece for its historic evidence.⁵⁴ The Supreme Court even noted just a few decades ago that the right to confront one's accusers has existed for at least 2000 years.⁵⁵

Consider the story of Susanna,⁵⁶ which explicitly served as partial justification for more transparent pre-trial testimonial examinations during the twelfth century⁵⁷—the sort of liberal reforms that served as precursors to the Confrontation Clause.⁵⁸ In the story, two respected male members of a community threaten to accuse Susanna of adultery if she does not submit to sexual relations with them. Susanna, conflicted and pained, refuses to give in to the request and the men fulfill their threat by accusing her of adultery. (Notably, the first person to whom her accusers tell their stories is not a court officer, but Susanna's servant.) At trial her life is spared, but only because Daniel—who enters as her advocate—requests that he be allowed to sequester

54. 541 U.S. at 43.

55. The Court's prior acknowledgment of the ancient roots of the Clause appear in *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988), where the Court cited the Biblical Book of Acts's admonition that "[i]t is not the manner of the Romans to deliver any man up to die, before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." For a discussion of the selective originalism in *Crawford*, see 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 (2005). More recently, in Thomas Y. Davies, *Not the "Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y 349 (2007), Davies argues that "the framing-era authorities do *not* indicate that the Framers would have distinguished between the general ban against hearsay and the confrontation right; rather, the sources indicate that the ban against hearsay evidence was understood to be a salient feature of the confrontation right." *Id.* at 383. Still, this analysis assumes that the history of the Confrontation Clause and the history of hearsay law are severable. More directly relevant for the purposes of this Note, Davies argues that Framing-era documents, including *Brasier*, support the view that the Supreme Court's recent distinction between testimonial and nontestimonial hearsay is not supported by history. He notes that in justice of the peace manuals, there was a complete ban against out-of-court statements against criminal defendants from available witnesses: "[N]o evidence is to be given against a prisoner but in his presence." *Id.* at 394-95 & n.110 (quoting 2 WILLIAM HAWKINS, *PLEAS OF THE CROWN* (1721)). Furthermore, there was a general prohibition against using unsworn statements against criminal defendants. *Id.* at 396. Davies's reading, though, in some ways echoes the positions put forth by the concurring opinion in *Crawford*, arguments that the majority rejected. 541 U.S. at 52 n.3 ("[S]ources—especially Raleigh's trial—refute the Chief Justice's assertion, that the right of confrontation was not particularly concerned with unsworn testimonial statements." (citation omitted)).

56. *Susanna* 1:164. This story has been omitted from the Bible as apocrypha.

57. JAMES A. HUGHES, *WITNESSES IN CRIMINAL TRIALS OF CLERICS* 16-17 (1937), as cited in Herrmann & Spear, *supra* note 52, at 517. Liberal reforms included allowing both parties in a proceeding to submit questions to the judge to ask the witnesses, and to have the witnesses' answers to the questions publicly announced.

58. *Id.*

and examine the accusers.⁵⁹ Upon doing so, he identifies gross inconsistencies in their stories.⁶⁰

Although Susanna's accusers testified at trial, it seems odd to conclude that accusations would have been less problematic if they had been nontestimonial—and had not been subjected to Daniel's cross-examination. Imagine the following scenario. Suppose Susanna's accusers refused to testify, died, fled the jurisdiction, or became otherwise unavailable at trial. Now imagine if the servant, whom the accusers told about the alleged incident, had been allowed to take the stand and recount the details of their accusations in their stead. The dangers of false conviction would have haunted such a proceeding as well.⁶¹

As a counterargument to my thought experiment, one could contend that my hypothetical merely shows the importance of hearsay rules, which may have different roots and purposes than the Confrontation Clause.⁶² The counterargument might note that the Confrontation Clause is a protection against governmental tyranny, like all of the other clauses in the Bill of Rights—and statutory law should alternatively regulate hearsay.

I offer two responses. First, the notion that the Bill of Rights is generally about protection from governmental tyranny does not logically lead to the conclusion that the Confrontation Clause was solely intended to curb *ex parte* witness examinations. There are, for example, clauses in the Bill of Rights aimed at more reliable trials. For example, the Due Process Clause of the Fifth Amendment has been generally interpreted as a shield against grossly unreliable or arbitrary evidence.⁶³

Second, *ex parte* secret examinations played no part in the story of Susanna—the very story that helped lead to the increased confrontation and transparency in some twelfth-century European courts. Thus, to accept the argument that the Confrontation Clause is only about *ex parte* witnesses, one would have to accept that the Confrontation Clause had a significantly narrower purpose than the confrontation-related reforms that predated it by

59. *Susanna* 1:51 (“Daniel said to them, ‘Separate these men and keep them at a distance from each other, and I will examine them.’”).

60. *Id.* at 1:52-59 (revealing that the witnesses diverged as to what type of tree under which they saw Susanna fornicating).

61. This, of course, invites the same critique that could be launched at my use of *King v. Braser*; that is, the example illustrates why a broader definition of “testimonial” that courts currently accept might be warranted. See Fisher, *supra* note 34. This example is different, though, because these statements would be nontestimonial even under the standard Fisher proposes. Fisher’s proposal would render statements testimonial if the statements were narratives of completed events reported to a person (or persons) of “authority.” However, a servant, *ipso facto*, is not a person of authority.

62. *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (“[N]ot all hearsay implicates the Sixth Amendment’s core concerns.”).

63. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (noting that on that particular due process question, “reliability is the linchpin in determining the admissibility”).

centuries. That is, one would have to accept that Medieval officials had more robust, progressive, and ambitious goals when constructing its confrontation-related reforms than the Framers did when constructing the Sixth Amendment's Confrontation Clause. And more dramatically, one would have to assume that the Founders were not influenced by the historical European predecessors to the Confrontation Clause. It is simply not clear that this is the case.⁶⁴

B. The Tale of the Inconclusive Text

The Confrontation Clause's text was important to the *Crawford* Court when it concluded that testimonial hearsay should pass a particularly high bar before being admitted against criminal defendants. Part of its analysis centered on the definition of "witness."⁶⁵ The Court reasoned that, within the context of the Confrontation Clause, "witness" translates roughly into one who "bears testimony."⁶⁶ "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."⁶⁷ Therefore, the Court concluded, "[t]he constitutional text . . . reflects an especially acute concern with a specific type of out-of-court statement."⁶⁸

The most direct rebuttal to this textual argument is that on its own terms, the word "witness" can mean more than one who "bears testimony." For example, as the *Crawford* Court acknowledged, the word can also plausibly mean one "whose statements are offered at trial."⁶⁹ Other commentators have launched that particular critique.⁷⁰

Legal text-based analysis is quite often governed by the ordinary usage of words and is sometimes aided by what precedent has to say about the definition of a given word.⁷¹ Neither of these approaches gets much play in *Crawford*.

64. Friedman, *supra* note 6, at 1022 ("The origins of the clause are famously obscure.").

65. 541 U.S. at 51; *see also* AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE*, 127-28 (1997) (putting forth a textual argument that is quite similar to the one the *Crawford* Court ultimately adopted, stating that the solution "begins with taking the text seriously").

66. *Crawford*, 541 U.S. at 51 (citing N. WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1828)).

67. *Id.*

68. *Id.*

69. *Id.* at 43 (citing 3 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1397, at 104); *see also* OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining "witness," in part, as "[t]he action or condition of being an observer of an event").

70. *See* Randolph N. Jonakait, "Witnesses" in the Confrontation Clause: *Crawford v. Washington*, *Noah Webster*, and *Compulsory Process*, 79 TEMP. L. REV. 155, 158 (2006); Kirkpatrick, *supra* note 21, at 382.

71. Jane Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 10 (1998) (tracing, *inter alia*, the increased use of dictionaries by the

That is, other than citing a single dictionary from 1828 which points in one direction, and a treatise by Dean Wigmore which points in the opposite direction, the Court does not wrestle with the plain meaning of the word “witness.”⁷²

What is more, to adopt the “bears testimony” definition of “witness,” the Court ironically had to massage the word “testimony”—and by the end, the word “testimony” barely resembled the way that it is commonly used in the English language. In the context of American trials at the time of the Founding, the word “testimony” almost always meant words delivered while on the stand before a court, grand jury, or jury. For example, the word was used in roughly twenty American cases during 1787—and each time it was used to refer to a trial or hearing,⁷³ not to the more hazy, amorphous notion of “testimonial” that the *Crawford* Court invokes.⁷⁴

One comes to a similar conclusion when one compares the *Crawford* Court’s definition of “testimony” to what is perhaps the most common definition of “testify” today: “To make a declaration of truth or fact under oath; submit testimony.”⁷⁵ That is the first definition given by the *American Heritage Dictionary*. And as the concurring opinion of Justices Rehnquist and O’Connor notes, the majority in *Crawford* does not limit the reach of the Confrontation Clause to statements made under oath either.⁷⁶

This is not to suggest that the definition of “witness” the court invoked was too broad. For historical and purposive reasons already discussed, that would be a mistake.⁷⁷ Rather, the above glimpse at the various meanings of the word “testimony” suggests that when the Court concluded that the best definition of “witness” was “bear testimony,” that did not alone move the ball very far

Court: “The dictionary was cited in 1% of the statutory cases in the 1981 Term, in 14% of the cases in the 1988 Term, and in fully 33% of the cases in the 1992 Term”).

72. *Crawford*, 541 U.S. at 42-43, 51.

73. See, e.g., *Kissam v. Burrall*, 1 Kirby 326 (Conn. Super. Ct. 1787); *Lindsay v. Lindsay*, 1 S.C. Eq. (1 Des. Eq.) 150, 1 (1787) (referring to “the weight of testimony” given at a particular trial); *Watlington v. Howley*, 1 S.C. Eq. (1 Des. Eq.) 167 (1787); cf. *Thorp v. Gracey*, 2 Kirby 26 (Conn. Super. Ct. 1787) (referring to the contents of a deposition, the court does *not* use the word “testimony”).

74. *Crawford*, 541 U.S. at 68 (“Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”).

75. AMERICAN HERITAGE DICTIONARY (2000), <http://www.bartleby.com/61/70/T0127000.html> (defining “testify” as “[t]o make a statement based on personal knowledge in support of an asserted fact”).

76. *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring).

77. Indeed, there are other, broader definitions of “testify”—and the *Crawford* Court’s definition of “testify” does not really comport with those definitions of “witness” either. See, e.g., AMERICAN HERITAGE DICTIONARY, *supra* note 75, <http://www.bartleby.com/61/45/W0194500.html> (defining “witness” as “1a. To be present at or have personal knowledge of. b. To take note of; observe. . . . 3. To provide or serve as evidence of”). See generally Fisher, *supra* note 34.

because the Court went on to bless a definition of “testimony” that is incongruent with the general meaning of that word at the Founding.

The broader definition of “witness” that the Court did not embrace—“one ‘whose statements are offered at trial’”—should have received more attention.⁷⁸ In fact, the United States Supreme Court, over a century ago, implied that this interpretation comported with the text of the Constitution. In *Mattox v. United States*, the Court stated that “there could be nothing more directly contrary to the letter of the [Confrontation Clause] than the admission of dying declarations.”⁷⁹ The Court continued, “[Dying declarations] are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination, nor is the witness brought face to face with the jury”⁸⁰ The Court went on to add that courts tolerated the admission of dying declarations out of necessity.⁸¹ Still, these preceding quotations from the *Mattox* Court show that, for those justices, applying the word “witness” to a hearsay declarant was not only an ordinary use of the word, but an apparently unassailable interpretation if the text were all that mattered.

Despite the evidence supporting a broad definition of the word “witness,” there is another powerful text-based counterargument in favor of limiting the word to so-called “testimonial” statements. Perhaps the strongest argument for such a limitation appears in the works of Akhil Reed Amar. He maintains that limiting the clause to “testimonial” statements would create structural consistency within the Constitution as to how we interpret the word “witness.”⁸² Amar points out that in the Fifth Amendment, we have had occasion to interpret the phrase that a defendant shall not “be compelled in any criminal case to be a witness against himself.”⁸³ (After all, in *statutory* interpretation, we do not generally favor interpreting the same word differently in different parts of the text without a very good reason.)⁸⁴ And in the Sixth Amendment, we have limited the word “witness” to the testimonial context. Amar’s argument is appealing. Consistency, on its face, is better than

78. *Crawford*, 541 U.S. at 43 (citing 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 104); *see also* MERRIAM-WEBSTER’S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/witness> (defining witness, in part, as “an attestation of a fact or event” and “one who has personal knowledge of something”).

79. *Mattox v. United States*, 156 U.S. 237, 243 (1895) (emphasis added).

80. *Id.*

81. *Id.* at 244.

82. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 94 (1997).

83. *Id.* at 93 (citing U.S. CONST. amend. V.).

84. Consider the highly related *in pari materia* canon of interpretation. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 305 (2006) (“[U]nder the *in pari materia* canon, statutes addressing the same subject matter generally should be read as if they were one law” (internal citations omitted)); *Edwards v. Carter*, 580 F.2d 1055, 1080 (D.C. Cir. 1978) (“The rules applicable to the construction of a statute also apply to the construction of a Constitution.” (citing *Badger v. Hoidale*, 88 F.2d 208, 211 (8th Cir. 1937))).

inconsistency. And the Fifth Amendment and Sixth Amendments were, after all, enacted at the same time.

However, the word “testimonial” has generally not been applied identically in the contexts of those two amendments. The *Crawford* Court stated that it would provide a definition of “testimonial” on “another day,” leaving lower courts temporarily free to interpret the word within certain parameters;⁸⁵ in the cases that have subsequently provided greater clarity to the meaning of the word “testimonial,” the Court makes no reference whatsoever to the Fifth Amendment’s self-incrimination clause.⁸⁶ Theoretically, there could be lacunae between what is considered testimonial under the Fifth Amendment and what is considered testimonial under the Sixth Amendment. For example, the Supreme Court has observed the possibility that the Fifth Amendment bars the forced disclosure of private papers when they are not business related—a principle the lower courts have sometimes interpreted to include diaries.⁸⁷ Yet, the Ninth Circuit has ruled that in the context of the Sixth Amendment, the contents of a diary are not testimonial.⁸⁸

Indeed, it is not clear that the Fifth Amendment and Sixth Amendment *should* reach the same class of statements. The Fifth Amendment denotes what the government should not “compel[],” which creates an implicit ban *against* certain government evils.⁸⁹ Conversely, the Sixth Amendment’s Confrontation Clause places the emphasis on what the government *should* do: provide criminal defendants with the right to “be confronted with the witnesses against him.”⁹⁰

85. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

86. See generally *Davis v. Washington*, 547 U.S. 813 (2006).

87. *Fisher v. United States*, 425 U.S. 391, 393-401 (1976) (noting, in dicta, that “[s]pecial problems of privacy which might be presented by subpoena of a personal diary . . . are not involved here”); see also *In re Grand Jury Proceedings*, 632 F.2d 1033, 1043 (3d Cir. 1980) (stating that Fifth Amendment rights would be violated if defendant were required to hand over his “pocket diaries”). But see Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17, 23 (D.D.C. 1994) (“Senator Packwood enjoys no Fifth Amendment privilege to avoid surrendering his personal diaries to the Ethics Committee, the act itself presenting no risk of incrimination beyond that he has already reduced to written or recorded form.”).

88. *Parle v. Runnels*, 387 F.3d 1030, 1037 (9th Cir. 2004) (holding that victim’s diary entries were not testimonial because they were not created “under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial” (internal citations omitted)).

89. U.S. CONST. amend. V. (“[N]or shall be compelled in any criminal case to be a witness against himself.”); see also *Counselman v. Hitchcock*, 142 U.S. 547, 563-64 (1892) (“It is an ancient principle of the law of evidence that a witness *shall not be compelled*, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties, o[r] forfeitures.” (emphasis added)).

90. Precedent comports with this textual understanding. *United States v. Oates*, 560 F.2d 45, 82 n.39 (2d Cir. 1977) (“[I]t is the prosecutor who should have the burden of producing witnesses against the defendant.” (internal citations omitted)); see also *State v. Fisher*, 563 P.2d 1012, 1018 (Kan. 1977) (“[F]or the declarant to be subject to full and

Nor should it be ignored that the Supreme Court's attempt to import the values and meaning of the Fourth Amendment into the Fifth Amendment has been roundly criticized by courts and commentators⁹¹—which should give jurists pause before importing the meaning of the Fifth Amendment into the Sixth Amendment.

Finally, there are other constitutional contexts in which two amendments that were passed at roughly the same time and contain the same word received different treatment by courts without much fanfare. The word “enforce,” for example, has a different meaning, with different restrictions, within the contexts of the Thirteenth Amendment and the Fourteenth Amendment. Both amendments say that Congress may enforce, by appropriate legislation, the provisions in the amendments.⁹² Yet, in the Fourteenth Amendment context alone has the Court restricted the Congress's power to those actions that are congruent and proportional to the evil being addressed.⁹³ Amar's intratextual consistency argument, while strong, is not dispositive.

C. Fulfilling the Primary and Secondary Goals of the Confrontation Clause

There is evidence that a “practice intended to be prohibited by [the Confrontation Clause] was the secret examinations, so much abused during the reign of the Stuarts.”⁹⁴ Unlike some commentators,⁹⁵ I acknowledge that

effective cross-examination by the defendant, he must be called to testify by the state.”); *State v. Coombs*, 821 A.2d 1030, 1033 (N.H. 2003) (“The duty to confront a defendant with witnesses falls upon the State.” (quoting *State v. Larochelle*, 297 A.2d 223, 223 (N.H. 1972) (Grimes, J., dissenting))); *State v. Rohrich*, 939 P.2d 697, 700-01 (Wash. 1997) (finding that the Confrontation Clause “requires the State to elicit damaging testimony from the witness so the defendant may cross examine if he so chooses”).

91. In *Boyd v. United States*, 116 U.S. 616, 633 (1886), the Court observed, “We have already noticed the intimate relation between the two amendments. They throw great light on each other.” This statement has arguably been discredited. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 790 (1994) (“*Boyd*’s mistake was to misread both the Reasonableness Clause and the Incrimination Clause by trying to fuse them together.”); Michael Pardo, *Disentangling the Fourth Amendment and the Self-Incrimination Clause*, 90 IOWA L. REV. 1857, 1859 (2005) (“Subsequent doctrine has, in Justice O’Connor’s words from over twenty years ago, ‘sounded the death knell for *Boyd*.’ As the Court has repelled from *Boyd*, scholars have also, for the most part, rejected the opinion’s analysis for both its reliance on ‘our old friend, *Lochner*-era property fetishism,’ and, more importantly, its fusion of Fourth and Fifth Amendment analysis.”). But see Aaron Clemens, *The Pending Reinvigoration of Boyd: Personal Papers Are Protected by the Privilege Against Self-Incrimination*, 25 N. ILL. U. L. REV. 75 (2004) (identifying recent Supreme Court precedent, such as *United States v. Hubbell*, 530 U.S. 27 (2000), suggesting that the interpretational relationship between the two amendments has endured or at least resurfaced).

92. U.S. CONST. amends. XIII, XIV.

93. See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

94. *Williams v. State*, 19 Ga. 402 (1856).

95. Graham C. Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 208-09 (1984) (expressing skepticism toward this view).

prohibiting ex parte examinations may have been one of the chief goals of the clause. I concede this in part because of the evolving consensus⁹⁶ around the issue and in part because the explanation can be found in at least one nineteenth century case.⁹⁷ This point also should likely be conceded because *Crawford* is simultaneously so young and so well accepted.⁹⁸

However, if testimonial statements are the *primary* infirmity the Confrontation Clause intended to remedy and nontestimonial statements are a secondary, less acute infirmity, a question then emerges. Must this mean that nontestimonial statements get no protection whatsoever? The answer is no. Such a result is not required.

In other constitutional contexts, courts do not slam shut the constitutional door on litigants just because the government ill suffered was one of the concerns, but not the central concern, of a provision. Consider, for example, the Fourteenth Amendment's Equal Protection Clause: courts apply different tiers of scrutiny to certain government acts or classifications depending on the extent to which the classification accords with the intent and overarching purpose of the Clause.⁹⁹ Likewise, in the context of the First Amendment, content-based restrictions on speech receive greater scrutiny than time-place-manner restrictions.¹⁰⁰ And since the early 1940s, courts have afforded a different brand of protection to commercial speech than to other forms of speech in the context of the First Amendment.¹⁰¹

96. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 578-87 (1992) (presenting an argument that trials like Sir Raleigh's played a role); *see also* *Crawford v. Washington*, 541 U.S. 36, 43 (2004).

97. *See Williams*, 19 Ga. 402.

98. As the articles in *supra* note 11 reveal, with few exceptions, commentators have written about how to implement *Crawford*—not why it is wrong. *See, e.g.*, Jerome C. Latimer, *Confrontation After Crawford: The Decision's Impact on How Hearsay Is Analyzed Under the Confrontation Clause*, 36 SETON HALL L. REV. 327, 419 (2006) ("The Supreme Court in *Crawford* was correct to take the difficult, but necessary, step of rejecting the jurisprudence derived from the *Roberts* reliability approach and thereby restoring confrontation to its true purpose."); Susanne C. Walther, *Pipe-Dreams of Truth and Fairness: Is Crawford v. Washington a Breakthrough for Sixth Amendment Confrontation Rights?*, 9 BUFF. CRIM. L. REV. 453, 474 (2006) (noting that *Crawford* is a generally favorable development with "ample inspiration"). The 7-2 opinion—with the two partial dissenters no longer on the Court—does not appear to be going anywhere any time soon.

99. *See generally* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

100. *United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

101. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (allowing the prohibition of false *commercial* speech, as distinguished from other forms of speech). For an argument that the chief purpose of the First Amendment is political, *see* ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE*

Similarly, in the Confrontation Clause context, testimonial statements and nontestimonial statements can, and should, receive two separate tiers of protection. Following this model, in Part II of this Note, I explore the potential meaning of “confrontation” in the context of nontestimonial hearsay statements.

II. NONTESTIMONIAL STATEMENTS: HOW MUCH “CONFRONTATION” IS ENOUGH?

Even if one does accept that defendants should receive some constitutional protection from the admission of nontestimonial statements, one threshold question needs to be answered before recommendations can be made about what that constitutional protection should look like. What, if anything, is wrong with the system courts used for roughly two years after *Crawford*, in which the *Roberts* test applied to nontestimonial statements?¹⁰²

A. The Unreliability of the *Roberts* Reliability Test

The *Crawford* Court lambasted the *Ohio v. Roberts* reliability test.¹⁰³ As a reminder,¹⁰⁴ *Ohio v. Roberts* was the leading Confrontation Clause case prior to *Crawford v. Washington*. Under the *Roberts* test, before admitting hearsay statements from witnesses who did not appear at trial, the state had to demonstrate that the statements were sufficiently reliable to be admitted. This test could be met in one of two ways: either by showing that the statement fell into a “firmly rooted hearsay exception”¹⁰⁵ or, alternatively, by demonstrating that the statement bore particular guarantees of trustworthiness.¹⁰⁶ In the two years following *Crawford*, the *Roberts* test continued to apply to nontestimonial hearsay almost without exception¹⁰⁷—but not without major problems.

PEOPLE 27 (1948).

102. See Méndez, *supra* note 13, at 609 (“[T]he challenge will be to formulate a test that can withstand the criticisms the Court leveled at *Roberts*.”). Professor Robert Mosteller has pointed out that the birth of *Crawford* did not necessitate the death of *Roberts*. Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford’s Birth Did Not Require That Roberts Had to Die*, 15 J.L. & POL’Y 685 (2007). Additionally, Professor Tom Lininger has proposed that legislatures revive *Roberts*’ requirement that a hearsay declarant be unavailable before prosecutors are permitted to use that declarant’s statement against the accused. Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 307 (2006).

103. *Crawford v. Washington*, 541 U.S. 36, 60 (2004) (“This malleable standard often fails to protect against paradigmatic confrontation violations.”).

104. See *supra* Introduction.

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

106. *Id.*

107. For a non-exhaustive list of such cases, see *supra* note 14.

One of the enduring problems with the *Roberts* test is that, even after *Crawford*, courts continued to apply it in a starkly inconsistent manner. By inconsistent, I do not merely mean that similar facts sometimes led to different results. Rather, courts adopted ways of applying *Roberts* that stood fundamentally opposed to each other. Two examples of this are: (1) whether it is proper for courts to look to corroborating evidence to determine if a statement is reliable; and (2) whether, in the context of child abuse cases, the child victim's use of age-appropriate language or, alternatively, adult language serves as an indicator of reliability. These are dichotomous propositions that courts applied on a regular basis during the *Roberts* era.

1. *Corroborating evidence*

In the two years following *Crawford* and preceding *Davis*, when courts determined whether nontestimonial hearsay had particularized guarantees of trustworthiness, courts were inconsistent as to whether they considered evidence that tended to corroborate the declarant's claims. For example, in *Flores v. Nevada*, the Nevada Supreme Court stated that the consideration of corroborative evidence is generally forbidden.¹⁰⁸ The Supreme Court of Connecticut came to a similar conclusion on the issue, explaining that "independent corroborative evidence may not be used to support a statement's particularized guarantees of trustworthiness, because reliance on such evidence gives rise to an undue risk that presumptively unreliable hearsay evidence will be admitted not on the basis of its inherent reliability but, rather, by bootstrapping on the trustworthiness of other evidence."¹⁰⁹ The Tenth Circuit similarly held that "reliance on [corroborating facts] is inappropriate for determining whether a statement is trustworthy."¹¹⁰

Alternatively, another post-*Crawford* court that applied the *Roberts* test to nontestimonial hearsay not only concluded that considering corroborating evidence is permissible, but went further, by actually concluding that it was *obliged* to consider corroborating evidence. In *Hammond v. United States*, the District of Columbia Court of Appeals stated that precedent "require[d]" it to consider "whether corroborating circumstances clearly indicate the trustworthiness of the statement."¹¹¹ The court then dutifully did just that. *Hammond*, not to be confused with *Hammon*,¹¹² is particularly salient because it considered, among other things, corroborating medical evidence¹¹³—a form of corroborating evidence that the Nevada Supreme Court explicitly

108. 120 P.3d 1170, 1179 (Nev. 2005).

109. *State v. Pierre*, 890 A.2d 474, 503 (Conn. 2006); *see also State v. Rivera*, 844 A.2d 191 (Conn. 2004).

110. *See, e.g., Brown v. Uphoff*, 381 F.3d 1219, 1225 (10th Cir. 2004).

111. 880 A.2d 1066, 1099-100 (D.C. 2005).

112. *Hammon v. State*, 809 N.E.2d 945 (Ind. 2005).

113. *Hammond*, 880 A.2d at 1103.

rejected.¹¹⁴ And to the extent the *Hammond* court was following intra-jurisdictional precedent, it was not an entirely rogue decision.¹¹⁵

It is difficult to imagine two more contradictory applications of a legal rule than the above illustrations.¹¹⁶ Part of what is especially striking about this inconsistency is that it is outcome determinative. For example, when the Nevada Supreme Court concluded that corroborating evidence is an impermissible consideration, it went on to conclude that the admission of the statement by the trial court was reversible error.¹¹⁷ Such outcome-determinative inconsistency is not favored in the context of the Bill of Rights¹¹⁸ generally or criminal procedure specifically.¹¹⁹

2. *Child hearsay in abuse cases*

One recurrent issue throughout the *Roberts* era was how to determine whether a child's use of childlike vernacular in a sex-abuse case makes a statement more credible or, alternatively, if a child's use of adult-like language makes a statement less credible. Whether a statement is childlike or adult-like is concededly subjective. But the following cases make clear that this is another area in which courts explicitly came to directly conflicting conclusions about what rules to apply.

Some courts concluded that when a youngster uses "childish terminology," this gives his or her statement a particular "ring of veracity."¹²⁰ Consider, for example, *State v. Aaron*, in which the Supreme Court of Connecticut concluded, applying *Roberts* to nontestimonial hearsay, that "the use of 'age-appropriate' language" in describing sexual abuse consistently has been considered supportive of, rather than detrimental to, a statement's reliability."¹²¹ In fact, courts of appeals in at least three different circuits have held that such childlike language makes a statement more credible.¹²²

114. *Flores v. Nevada*, 120 P.3d 1170, 1179 (Nev. 2005) ("The district court below considered corroborative medical evidence in assessing reliability under *Wright* and *Roberts*. This was an error under *Wright*.").

115. *See, e.g., Laumer v. United States*, 409 A.2d 190, 199-200 (D.C. 1979).

116. This inconsistent application rages despite the fact that the Supreme Court stated in *Idaho v. Wright* that hearsay evidence "must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." 497 U.S. 805, 822 (1990).

117. *Flores*, 120 P.3d at 1181.

118. *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) ("Liberty finds no refuge in a jurisprudence of doubt.").

119. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 63 (2004) (stating that the *Roberts* "framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations").

120. *United States v. Nick*, 604 F.2d 1199, 1204 (9th Cir. 1979).

121. 865 A.2d 1135, 1148 (Conn. 2005).

122. *See, e.g., United States v. Farley*, 992 F.2d 1122, 1126 (10th Cir. 1993); *United States v. Grooms*, 978 F.2d 425, 427 (8th Cir. 1992); *United States v. George*, 960 F.2d 97,

Still, other courts invoked a child-hearsay rule that directly contradicts the one found in, among other cases, *Aaron*. In *Webb v. Lewis*, the Ninth Circuit used a similar approach, citing “the fact that [the child’s] language was *not* unexpected of a child of similar age as a basis for its conclusion that [her] statements lacked guarantees of trustworthiness.”¹²³ And yet another approach has been adopted by Missouri appellate courts, which have explained that “the child’s knowledge of the subject matter and whether it is unexpected of a child of similar age, rather than the specific words that must be examined in reliability analysis.”¹²⁴ Indeed, Missouri concluded a decade ago that “a test based upon age-appropriate vocabulary words is unworkable.”¹²⁵

The above cases alone reveal at least three different approaches courts took when assessing the reliability of nontestimonial child-hearsay in sexual abuse cases. Under the most common approach, courts considered age-appropriate language a sign of reliability because it suggests that the child has not been improperly “coached” about what to say in order to obtain a conviction.¹²⁶ Another approach credited age-inappropriate language, because it evinces that the child learned such language while being sexually abused.¹²⁷ Then, a third approach abandoned the use of terminology as a factor at all because of administrative concerns.¹²⁸ And defendants, depending on the jurisdiction, received different doses of “Confrontation Clause” medicine—all called “*Roberts*,” but all with different active ingredients.

B. And Besides, Roberts Misses Much of the Point of Confrontation

The purposes, goals, and salutary effects of cross-examination overlap only slightly with those of *Ohio v. Roberts*. A close look at the *Roberts* test demonstrates that, above all else, it most effectively tests statements for sincerity. But cross-examination (and face-to-face access to accusers) is about far more than simply testing whether or not a witness is sincere. Before identifying what forms of Confrontation Clause protection should supplement

100 (9th Cir. 1992).

123. *Webb v. Lewis*, 44 F.3d 1387, 1394 (9th Cir. 1994) (Nelson, J., dissenting). This dissenting opinion succinctly describes the majority’s approach. The majority states: “Taken by itself, the videotape does not carry guarantees of trustworthiness. Heather’s language is not ‘unexpected of a child of similar age.’” *Id.* at 1392 (majority opinion).

124. *N.J.K. v. Juvenile Officer*, 139 S.W.3d 250, 258 (Mo. Ct. App. 2004).

125. *State v. Worrel*, 933 S.W.2d 431, 434 n.3 (Mo. Ct. App. 1996) (citing *State v. Redman*, 916 S.W.2d 787, 792 (Mo. 1996) (en banc)).

126. See, e.g., *People v. Sharp*, 825 N.E.2d 706, 714 (Ill. App. Ct. 2005) (“[The child] was sexually assaulted on one occasion, and the fact that she did not know the term ‘penetrated’ suggests (if anything) that she was not coached as to what she should say.”).

127. In fact, this approach was urged by the defense in *Sharp*. *Id.* (“Defendant seems to suggest that if [the child] were the victim of sexual assault, she should be better versed in sexual terminology.”).

128. *Worrel*, 933 S.W.2d at 433 n.3.

or replace the *Roberts* test for nontestimonial statements, it is important first to search for the full range of goals of cross-examination, and then to assess both what *Roberts* does and does not do well.

1. *Confrontation: what's the point?*

In the context of live witness testimony, courts have found that the Confrontation Clause embodies two requirements: the right to see witnesses "face-to-face"¹²⁹ at trial and the right to thoroughly¹³⁰ cross-examine¹³¹ government witnesses. Historians and the Supreme Court have recognized that part of the value of face-to-face meetings with one's accuser is that a witness "may feel quite differently when he has to repeat his story looking at the man who he will harm greatly by distorting or mistaking facts. He can now understand what sort of human being the man is."¹³² Additionally, as I articulate below, cases, historical sources, jury instructions and trial-technique texts reveal that the purposes and effects of the Confrontation Clause include: to (1) challenge mistaken witnesses, including their perception and memory; (2) give fact-finders an opportunity to assess witnesses' demeanor and language when their story is subjected to vigorous testing; (3) allow attorneys to make arguments which focus the fact-finders' attention on key points; (4) subject witnesses' stories to *immediate* testing; and (5) create the opportunity for witnesses' potential biases or fabrications to be exposed.

Cross-examination is not merely about testing the sincerity of a witness, but also about "delv[ing] into the witness' story to test the witness' perceptions and memory."¹³³ Jury instructions, for example, encourage jurors to consider

129. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) ("[The Confrontation Clause] confers at least a right to meet face to face all those who appear and give evidence at trial." (internal citations and quotation marks omitted)). *But see* 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 158 (James H. Chadbourne ed., rev. 1974) ("There was never at the common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination.").

130. *Alford v. United States*, 282 U.S. 687, 694 (1931) ("[N]o obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked.").

131. *See also* WIGMORE, *supra* note 129, § 1395, at 150 ("The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."). *See generally* *Davis v. Alaska*, 415 U.S. 308 (1974).

132. ZEPHARIAH CHAFEE, JR., THE BLESSINGS OF LIBERTY 35 (1956). The Supreme Court quoted this passage in *Jay v. Boyd*, 351 U.S. 345, 375 (1956) (Douglas, J., dissenting), and *Coy*, 487 U.S. at 1019.

133. *Davis*, 415 U.S. at 316; *see also* *United States v. Owens*, 484 U.S. 554, 559 (1988) (noting that a cross-examination may test a witness's "lack of care or attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination) the very fact that he has a bad memory" (citations omitted)); *Bartlett v. Kan. City Pub. Serv. Co.*, 160 S.W.2d 740, 745 (Mo. 1942) (stating that cross-examination is a safeguard against, in part, "mistaken evidence"); Paul J. Passanante & Dawn M. Mefford, *Cross-Examination*, 62 J.

memory as a factor in assessing witnesses' credibility.¹³⁴ Indeed, some studies maintain that mistaken eye-witnesses account for "nearly sixty-five percent of the total mistaken convictions studied."¹³⁵ This, perhaps, is why trial advice dispensed by top lawyers focuses on the importance of using cross-examination as an opportunity to reveal a witness' faulty or wavering memory in order to curb the likelihood of conviction.¹³⁶

Similarly, cross-examination allows fact-finders the opportunity to assess a witness' demeanor on the stand when his or her story is subjected to rigorous testing. "Sometimes the conditions under which the observation is claimed to have been made are such that assertions such as 'I am sure . . . ' are doubtful on their face."¹³⁷ Sample jury instructions, for example, demonstrate courts' recognition that cross-examination in particular helps jurors to assess witnesses' credibility through their demeanor. One model recommends that judges ask jurors, "Was the witness candid, frank and forthright? Or, did the witness seem as if he or she was hiding something, being evasive or suspect in some way? How did the way the witness testified on direct examination compare with how the witness testified on cross-examination?"¹³⁸

Two other benefits of cross-examinations, cited less frequently, are that they permit a form of argument by attorneys which focuses the fact-finder's attention on key themes, and that they allow the witness' story to be subjected to immediate testing. Cross-examination has historically done both. In John H. Langbein's *Origins of Adversary Criminal Trial*, he discusses how in the late

MO. B. 28 (2006) (noting that one of counsel's goals at cross-examination is to "test the strength of [witnesses'] memory, knowledge and perceptions").

134. MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT §1.8 (2003), available at <http://www.ca9.uscourts.gov/web/sdocuments.nsf/DCF4F914455891D4882564B40001F6DC/E48DE3CB42964D4E882564B4000378F5?OpenDocument> (listing "the witness' memory" as a factor the jury should consider).

135. F. LEE BAILEY & KENNETH J. FISHMAN, CRIMINAL TRIAL TECHNIQUES § 62:3 (2d ed. 1994) (citing external studies).

136. *Id.* § 62:5. Here, F. Lee Bailey provides a model exchange between lawyer and witness:

Q: What color was the shirt?
 A: Light shirt and dark pants?
 Q: Was the shirt light blue?
 A: It could have been. . . .
 Q: How many men were in the lineup?
 A: Five.
 Q: Could it have been six?
 A: Possibly.
 Q: How did you identify my client at the lineup?
 A: I said, "I think it's number six."
 Q: You said, "think"?
 A: Yes.

Id.

137. *Id.* § 62:3.

138. 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL § 7.01 (2007) (emphasis added).

eighteenth century, there was a general trend or “phenomenon” of defense counsel using cross-examination “to evade the ban on addressing the jury.”¹³⁹ Other legal historians have made similar observations, noting that cross-examination in late colonial America and the early United States was used to present “challenging and skeptical questions. Contradictions with other witnesses were highlighted. Attempts were made to enhance the defense witnesses’ credibility.”¹⁴⁰ “[D]efense lawyers made . . . points by sophisticated use of cross-examination, brilliant arguments to the jury, and dexterous presentation of their case.”¹⁴¹ As any observer of a contemporary criminal trial knows, this aspect of cross-examination has persisted. Indeed, in 1974, the United States Supreme Court noted that part of the problem with limiting a defense counsel’s cross-examination was that “the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment.”¹⁴²

The United States Supreme Court, D.C. Circuit and Sixth Circuit have further reasoned that the “right to immediate cross-examination . . . has always been regarded as the greatest safeguard of American trial procedure.”¹⁴³ The value of cross-examination’s immediacy is expressed quite succinctly and effectively in the seventy-year-old Minnesota case *State v. Saporen*.¹⁴⁴ There, the court explained that the “chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot.”¹⁴⁵

Court histories aside, the value of cross-examination’s immediacy is at heart a matter of common sense. One need do little more than imagine a scenario where the government is allowed to conduct direct examinations of each of its witnesses, but the defense is not allowed to ask any questions of government witnesses until the second half of the case when the defense places

139. JOHN H. LANGBEIN, *ORIGINS OF ADVERSARY CRIMINAL TRIAL* 256 n.14 (2003).

140. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 *RUTGERS L.J.* 77, 138 (1995).

141. *Id.* at 157-58.

142. *Davis v. Alaska*, 415 U.S. 308, 317 n.5 (1974) (requiring the lower court to allow a cross-examination regarding potential bias because “[a] partiality of mind at some former time may be used as the basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying” (quoting 3A JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 940, at 776 (Chadbourn rev. 1970))).

143. *United States v. Inadi*, 475 U.S. 387, 410 (1986); *Phillips v. Neil*, 452 F.2d 337, 348 (6th Cir. 1971); *N.Y. Life Ins. Co. v. Taylor*, 147 F.2d 297, 305 (D.C. Cir. 1945); *see also Cipriotti v. Bd. of Dirs. of Northridge Hosp. Found. Med. Ctr.*, 147 Cal. App. 3d 144, 156 (1983) (assuming without deciding that defendants have a “right of immediate cross-examination”). *But see Beavers v. State*, 492 P.2d 88, 93 (Alaska 1971) (questioning the value of immediacy).

144. *State v. Saporen*, 285 N.W. 898 (Minn. 1939).

145. *Id.* at 901.

its case before the jury. In that scenario, by the time the defense attorney is allowed to cross-examine the first witness, the jurors may have settled impressions that are significantly harder to rebut than if the defense attorney had been permitted to cross-examine witnesses immediately.

One analogous trial phase that helps illustrate the intuitive force of immediate rebuttal is the opening statement. The defense usually has the right to waive its opening statement or postpone its opening statement until the beginning of its case-in-chief.¹⁴⁶ Yet trial strategy textbooks warn against actually waiving or postponing an opening statement¹⁴⁷ because the defense risks allowing the jury to receive a settled, unchallenged impression based on the prosecution's opening statement that may be harder to refute later.¹⁴⁸

There is power in immediate testing. When fashioning a substitute for cross-examination in the context of nontestimonial statements, this valuable element of cross-examination should be remembered.

2. Roberts's *incomplete focus*—*treating sincerity as sufficient*

Despite the multiple purposes and effects of cross-examination, the *Roberts* test, at least in practice, places a virtually singular focus on the sincerity of the speaker to the exclusion of the other factors that shed light on the reliability of a speaker. As one commentator hyperbolically noted well over a century ago, cross-examination may be “the most perfect and effectual system for the unraveling of falsehood ever devised by the ingenuity of mortals.”¹⁴⁹ Still, the *Roberts* test may place *too much* emphasis on this sincerity factor at the expense of others factors, such as challenging mistaken witnesses. The *Roberts* test, as you will recall, admits all statements that fall into a firmly rooted hearsay exception.¹⁵⁰ The chief historical justification for these hearsay exceptions is that they minimize the possibility that declarants are intentionally lying. In the first recorded example of the excited utterance exception appearing in English common law, the court gave this sole explanation for it: the statement was made “before . . . she had time to devise or contrive any thing for her own advantage.”¹⁵¹ Similar language appears in early cases

146. See, e.g., BOULDER COUNTY BAR ASS'N, BAR MEDIA MANUAL § 12.4 (2007), available at www.boulder-bar.org/bar_media/trial/12.4.html.

147. Jeffrey T. Frederick, *Persuasion at Trial: Opening Statements*, in 2 DEFENSE PRACTICE NOTEBOOK 76, 78 (Def. Research Inst. ed., 1996), available at <http://www.nlrj.com/jrds/articles/opening.html> (recommending: “Do not waive opening statements.”).

148. *Id.* (“By waiving an opening statement, the attorney risks the jurors’ adopting the opponent’s view of the case at the outset of trial.”).

149. *Of the Disqualification of Parties as Witnesses*, 5 AM. L. REG. 257, 263-64 (1857), cited in Joel N. Bodansky, *The Abolition of the Party-Witness Disqualification: An Historical Survey*, 70 KY. L.J. 91, 96 (1981).

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

151. *Thompson v. Trevanion*, (1694) 90 Eng. Rep. 179 (K.B.).

explaining the rationale of the dying declaration exception. The 1789 case of *King v. Woodcock*, for example, provides “the general principle on which this species of evidence is admitted”:

[W]hen the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.¹⁵²

Notably, this general principle says nothing about whether dying declarations enhance the declarants’ memory or recollection. The court relied solely on declarants’ motives and sincerity.

These early justifications, with a few hiccups,¹⁵³ have survived. The Advisory Committee Notes on the Federal Rules of Evidence explain that the “theory of [the excited utterance exception] is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances *free of conscious fabrication*.”¹⁵⁴ These advisory notes acknowledge that “still[ing] the capacity of reflection” may serve to impede accuracy in some ways.¹⁵⁵ The fact that such statements are marked by sincerity, though, is sufficient for this venerable “firmly rooted”¹⁵⁶ hearsay exception. Likewise, the advisory notes make equally clear that sincerity is the underlying justification for the medical diagnosis exception to the hearsay rule.¹⁵⁷

The Advisory Committee Notes’ justification for the dying declaration exception to the hearsay rule is less clear. These notes state that under such circumstances “it can scarcely be doubted that powerful psychological pressures are present.”¹⁵⁸ More illuminating, though, are the two sources that the committee then cites for this proposition. One is *King v. Woodcock*—a case in which the justification, as noted above, is tied to sincerity rather than more general concerns about accuracy.¹⁵⁹ The other source is Wigmore’s evidence

152. *King v. Woodcock*, (1789) 168 Eng. Rep. 352 (K.B.).

153. *Regina v. Megson*, (1854) 173 Eng. Rep. 894 (K.B.) (providing an alternative justification for what we now call the excited utterance exception; that is, such statements “shew [the witness’] credit and *the accuracy of her recollection*” (emphasis added)).

154. FED. R. EVID. 803 advisory committee’s note (citing 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1747, at 135 (3d ed. 1940)) (emphasis added).

155. *Id.*; see also Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432 (1928).

156. *White v. Illinois*, 502 U.S. 346, 355 n.8 (1992) (noting that the exception is several centuries old).

157. FED. R. EVID. 803 advisory committee’s note (explaining that there is a “strong motivation to be truthful” when someone makes statements for the purposes of medical treatment); cf. *United States v. Yazzie*, 38 F. Appx. 407, 412 (9th Cir. 2002) (finding this exception to be “firmly rooted”); *Dana v. Dep’t of Corr.*, 958 F.2d 237, 239 (8th Cir. 1992) (same).

158. FED. R. EVID. 804 advisory committee’s note.

159. (1789) 168 Eng. Rep. 352 (K.B.).

treatise, which also relies on the declarant's sincerity when explaining this particular exception.¹⁶⁰

Sincerity may be a sufficient ground on which to fashion a statutory exception to the hearsay rule. That determination is beyond the scope of this Note. Yet demonstrating that a speaker was probably sincere should not, standing alone, serve as a substitute for constitutionally mandated confrontation. As articulated, there are at least five different key values¹⁶¹ that buoy confrontation—including its power in demonstrating faulty memory or accidentally false eyewitness identifications. This is not merely academic, since so many false convictions are a result of such identifications.¹⁶² Meaningful attempts to import the values of cross-examination into Confrontation Clause requirements must account for more than the declarant's sincerity.

III. THE CLAUSE'S PERIMETER: LOOKING FORWARD

Four reforms would improve how courts treat nontestimonial statements under the Confrontation Clause. First, courts should be required to admit impeachment materials (such as prior inconsistent statements and prior convictions) against hearsay declarants if those materials would have been admitted against a live witness. Second, criminal defendants should be permitted to introduce these impeachment materials immediately after the declarant's hearsay statements are placed into evidence. Third, courts should adopt a modified *Roberts* test¹⁶³ and supply clearer standards for courts to use when applying the "particularized guarantees" prong of the test. Fourth, on a discretionary basis, trial-court judges should be permitted to allow criminal defense attorneys to argue immediately to the fact-finder any deficiencies in government-admitted nontestimonial hearsay.

160. See WIGMORE, *supra* note 129, §§ 1430, 1438, 1443. For discussion, see John B. Myers et. al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 LAW & CONTEMP. PROBS. 3 n.2 (2002) (noting that Wigmore's rationale for this exception is that the dying person is "free from all ordinary motives to misstate" (emphasis added)).

161. *Coy v. Iowa* states that yet another such value is the appearance of fairness in the trial process. 487 U.S. 1012, 1018-19 (1988) ("Given these human feelings of what is necessary for fairness, the right of confrontation contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails." (internal citation and quotation marks omitted)).

162. See Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 413 (1987). Professor Gross explains in Samuel Gross et. al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 530 (2005), that this may be an even greater problem than previously thought. DNA has exonerated 121 individuals in rape cases, eighty-eight percent of whom were convicted as a result of false identification. *Id.* He notes that such false identifications are more common in robberies than in rape cases—but DNA is not as frequently available. *Id.* at 530-31.

163. Courts should permit the admission of nontestimonial hearsay if it falls into a firmly rooted hearsay exception *and* the defense fails to show particularized guarantees of untrustworthiness.

A. Proposals One and Two: Immediate Admission of Impeachment Materials

It would not be particularly radical to require courts to admit impeachment materials against prosecutorial hearsay declarants if those materials would have been admitted against a live witness.¹⁶⁴ Currently, Federal Rule of Evidence 806 already requires the admission of such evidence in federal court on the ground that a declarant's "credibility should in fairness be subject to impeachment and support as though he had in fact testified."¹⁶⁵ And state appellate courts have been receptive to arguments that such evidence should be admitted.¹⁶⁶ For example, while Georgia does not have a statutory equivalent of Federal Rule 806,¹⁶⁷ its state appellate courts have held that defendants are entitled to introduce hearsay declarants' prior inconsistent statements.¹⁶⁸

In 2006, the Connecticut Supreme Court was asked to consider whether the Confrontation Clause requires the admission of impeachment materials against the statements of hearsay declarants.¹⁶⁹ The court concluded that "the letter [of impeachment] should have been admitted into evidence as appropriate impeachment evidence"¹⁷⁰—without citing what statutory authority, if any, it used to reach this conclusion. After finding that the letter should have been admitted to impeach the declarant, the court then explained it "need not determine, however, whether the trial court's exclusion of the letter constituted an impropriety of constitutional magnitude."¹⁷¹

164. For discussion of a close cousin of this proposal, see Lynn McLain, *Post-Crawford: Time to Liberalize the Substantive Admissibility of a Testifying Witness's Prior Consistent Statements*, 74 UMKC L. REV. 1 (2005).

165. FED. R. EVID. 806 advisory committee's note.

166. The Advisory Committee Notes that accompany Rule 806 note that some courts already allowed this procedure prior to the rule's passage. *Id.*; see, e.g., *Carver v. United States*, 164 U.S. 694, 698 (1897) ("As these declarations are necessarily ex parte, we think the defendant is entitled to the benefit of any advantage he may have lost by the want of an opportunity for cross-examination." (citing *Rex v. Ashton*, 2 Lewin 147 (1837))); *People v. Collup*, 167 P.2d 714 (Cal. 1946) (holding that where a witness was unavailable, "[t]he defendants are helpless in meeting the testimony by a method which may refute it entirely or cast serious doubts upon its veracity, namely, subsequent contradictory statements or admissions by the witness that the testimony was false. Justice and fairness compel one of two results, that the testimony at the former trial be excluded or that the impeaching evidence be admitted"). Courts were not unanimous in this view, however. See *People v. Hines*, 284 N.Y. 93, 115 (1940) ("The law is well settled that a deceased witness whose prior testimony is admitted may not be impeached by showing alleged contradictory or inconsistent statements or alleged declarations that the prior testimony was false.").

167. GA. CODE ANN. § 24-3-33 (2007) (codifying the state's hearsay rules).

168. *Smith v. State*, 510 S.E.2d 1, 7-8 (Ga. 1998) (allowing impeachment of statements admitted under the dying declaration and excited utterance exceptions to the hearsay rule); *Allen v. State*, 543 S.E.2d 45 (Ga. Ct. App. 2000) (requiring the admission of impeachment materials against statements that fall into the medical diagnosis exception to the hearsay rule).

169. *State v. Estrella*, 893 A.2d 348 (Conn. 2006).

170. *Id.* at 360.

171. *Id.* at 360-61.

Considering Rule 806 at the federal level and the manner in which courts are handling the issue at the state level, readers may ask: why elevate this to a constitutional requirement at all? First, statutory evidence admission is governed by an abuse of discretion standard,¹⁷² whereas constitutional errors are generally reviewed de novo.¹⁷³ Second, for confrontation-clause violations, the government must prove that such errors are harmless beyond a reasonable doubt,¹⁷⁴ whereas a less stringent harmless error test applies for statutory evidentiary errors.¹⁷⁵ It is therefore not wholly irrelevant what source of authority a court invokes when addressing this impeachment issue.¹⁷⁶ Third, constitutionalizing the impeachment rule would further align requirements of the Confrontation Clause with some of that clause's underenforced norms. That is, impeachment materials such as prior inconsistent statements do not necessarily just attack a witness' motives or sincerity; these materials can also demonstrate problems with a witness' memory or perception, a confrontation-related value that current Confrontation Clause doctrine often neglects.

Further, the admission of such impeachment materials should occur immediately after the nontestimonial hearsay statements are admitted, i.e., immediately after the direct examination of the witness who reports the out-of-court statements. To require the admission of impeachment materials before

172. See, e.g., *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) ("We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings."); *Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997); *State v. Thang*, 41 P.3d 1159, 1165 (Wash. 2002).

173. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001) (concluding that the "constitutional issue merits de novo review"); *United States v. Brown*, 364 F.3d 1266, 1268 (11th Cir. 2004) ("We review questions of constitutional law *de novo*"). Incidentally, this distinction sometimes leads to confusion when courts address evidentiary questions of constitutional magnitude. See Cassandra H. Welch, Note, *Flexible Standards, Deferential Review: Daubert's Legacy of Confusion*, 29 HARV. J.L. & PUB. POL'Y 1085, 1101 (2006) (discussing the different standards courts have applied when admitting expert testimony in light of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)).

174. *Idaho v. Wright*, 497 U.S. 805, 827 (1990) (stating, in dictum, that "the Confrontation Clause error in this case was not harmless beyond a reasonable doubt"); *Chapman v. California*, 386 U.S. 18, 23 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."); *United States v. Jones*, 766 F.2d 412, 414 (9th Cir. 1985) ("Violations of the confrontation clause require reversal unless they are harmless beyond a reasonable doubt."), *abrogated on other grounds by* *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).

175. *United States v. Lane*, 474 U.S. 438, 446 n.9 (1986) ("[H]armless-error analysis adopted in *Chapman* concerning constitutional errors is considerably more onerous than the standard for nonconstitutional errors . . ."); *Moore v. United States*, 429 U.S. 20, 23 (1976) (remanding to determine whether wrongful admission of hearsay evidence was harmless error); *United States v. D.L.*, 453 F.3d 1115, 1134 (9th Cir. 2006) ("For nonconstitutional error, we apply a less stringent standard.").

176. *Cf. Gen. Elec. Co.*, 522 U.S. at 143 (noting that deference is "the hallmark of abuse-of-discretion review" and overturning a lower court that failed to afford such deference).

direct examination would unnecessarily disrupt trial continuity. Moreover, the moment immediately following direct examination is when the defense would generally cross-examine the declarant if he or she were a live witness.

The value of having these impeachment materials admitted immediately following a fresh presentation of hearsay testimony justifies the constitutional implications that this proposal invites. These constitutional implications include the fact that violations of this proposed rule could result in federal collateral and habeas review. But as noted in Part II.B.1 of this Note, and as the United States Supreme Court and multiple circuit courts have reasoned, the “right to immediate cross-examination . . . has always been regarded as the greatest safeguard of American trial procedure.”¹⁷⁷ “[I]mmediate cross examination is the most effective” and “delayed cross examination is the least effective.”¹⁷⁸ It follows that the same is true of admission of impeachment materials. It is more effective for a jury to learn immediately, rather than much later, that an out-of-court declarant has committed a felony involving dishonesty, or has previously made a statement that directly contradicts the hearsay statement placed before the jury. Indeed, requiring courts to admit impeachment materials immediately is a rather low-cost burden; it is a rule that is easy to understand and easy to follow.

B. *Proposal Three: Bringing Out the Best of Roberts*

Many of the problems identified in Part II that plague the *Roberts* test can be mitigated significantly if it were modified as follows: prosecutors should be permitted to introduce nontestimonial statements against criminal defendants if the statements fall into a firmly-rooted hearsay exception *unless* the defense can show that the statement is particularly untrustworthy.¹⁷⁹ *Roberts* permitted the admission of prosecutorial nontestimonial hearsay statements if the statement either: (a) falls into a firmly rooted hearsay exception; *or* (b) bears particularized guarantees of trustworthiness.¹⁸⁰ This Note exposed the problem with the “firmly rooted hearsay exception” prong to be its emphasis on the sincerity of the statement made, to the exclusion of all other Confrontation Clause values. The problem with the “particularized guarantees” prong is its inconsistent application.

177. *United States v. Inadi*, 475 U.S. 387, 410 (1986); *see cases cited supra* note 143 and accompanying text.

178. *Modesitt v. State*, 578 N.E.2d 649, 651 (Ind. 1991); *cf. State v. Furlough*, 797 S.W.2d 631, 646 (Tenn. Ct. App. 1990) (“Only sworn testimony in court subject to immediate cross-examination escapes the hearsay stigma.”).

179. *Cf. State v. Stever*, 732 P.2d 853, 859 (Mont. 1987) (“We therefore hold that satisfaction of the requirements of Rule 801(d)(2)(E) [the co-conspirator hearsay exception] does not ipso facto satisfy the right of confrontation. Rather we require a separate confrontation clause analysis designed to guarantee the reliability of the challenged coconspirator statements.”).

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

Adopting the proposed rule could solve some of the particular problems associated with the “firmly rooted hearsay exception” prong of the old *Roberts* test. This prong is not inherently flawed—just incomplete. As discussed, excited utterances and dying declarations, for example, are premised on the notion that their declarants are likely sincere. But a speaker might be unreliable for reasons unrelated to his or her sincerity, such as flawed memory or compromised perception. Under the proposed approach, courts would have the ability to consider these additional variables.

In particular, this proposal urges courts to consider whether the defendant has demonstrated: (1) a substantial risk that the hearsay statement was made under circumstances that raise serious doubts about the declarant’s ability to recall or perceive recounted events; or (2) a substantial risk of bias on the part of the declarant that cannot be neutralized through the immediate admission of impeachment materials. These two considerations are among the chief pillars of confrontation.¹⁸¹ To be sure, if courts’ treatment of the “particularized guarantees” prong of *Roberts* is any indication, this aspect of my proposal would only rarely make a difference in cases.¹⁸² That is, it would likely make a difference only in truly exceptional cases. As it stands, contrary to the history and purpose of the Confrontation Clause, this provision currently affords defendants no protection from these statements whatsoever. Accordingly, this proposal represents an improvement from that baseline, an improvement upon which other commentators can further build.

In any event, the modified *Roberts* test would have the biggest impact on statements that do not fall into a firmly rooted hearsay exception at all: such statements would never be admitted. If observers view this rule as too stringent, another alternative modification to *Roberts* would be to admit statements falling into “widely-accepted” hearsay exceptions, rather than just “firmly-rooted” hearsay exceptions. This would soften the rule’s impact on criminal prosecutions, especially in certain child or domestic abuse cases, in which statements that fall into the not-so-firmly-rooted¹⁸³ residual hearsay exception often rest at the heart of the government’s case.¹⁸⁴

181. See *supra* notes 142–44.

182. See Whitney Baugh, Note, *Why the Sky Didn’t Fall: Using Judicial Creativity to Circumvent Crawford v. Washington*, 38 LOY. L.A. L. REV. 1835 (2005). Indeed, in the scores of cases I read applying the reliability test post-*Crawford*, I identified only one case, *Flores v. State*, 120 P.3d 1170 (Nev. 2005), in which an appellate court reversed a lower court on the “particularized guarantees” prong—and that was because the lower court improperly considered corroborating factors.

183. *Idaho v. Wright*, 497 U.S. 805, 817 (1990) (“We note at the outset that Idaho’s residual hearsay exception . . . is not a firmly rooted hearsay exception for Confrontation Clause purposes.”).

184. For discussion of *Crawford*’s impact on these areas, see Geetanjali Malhotra, *Resolving the Ambiguity Behind the Bright-Line Rule: The Effect of Crawford v. Washington on the Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions*, 2006 U. ILL. L. REV. 205; Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s*

C. Confrontation as Argument

There is one final discretionary proposal. When a trial court believes it would lend clarity to proceedings, defense attorneys should be permitted to outline for a jury, after direct examination, the potential deficiencies of a particular hearsay statement. Cross-examination, as discussed in Part II.B.1, has historically and practically served as an opportunity for attorneys to argue key points, rather than merely elicit answers.

It is not evident that this tool should be etched into constitutional doctrine and rendered mandatory. Case law has not generally cited “argument” as a purpose of cross-examination.¹⁸⁵ And in fact, while lawyers use cross-examination as an opportunity for argument, courts use Federal Rule of Evidence 611(a)¹⁸⁶ to limit questions that are particularly argumentative. Still, there may be scenarios in which a judge may conclude that it is useful for an attorney to point out why a document he or she has entered as impeachment material arguably contradicts the declarant’s hearsay statement. Under such limited scenarios, judges should be equipped with the discretionary power to allow such immediate clarification by attorneys.

CONCLUDING THOUGHTS

If *Crawford* was “an earthquake rocking America’s criminal justice foundations,”¹⁸⁷ this Note is an attempt to assess and address one of its aftershocks. Nontestimonial statements are covered by the Confrontation Clause’s text, history and purposes. And although courts ought not be as rigid in rejecting nontestimonial hearsay as they should be with testimonial hearsay, these statements demand meaningful regulation. The Confrontation Clause’s values and the Confrontation Clause’s requirements should become a united force.

Impact on Domestic Violence and Child Abuse Cases, 71 BROOK. L. REV. 311 (2005); Jeanine Percival, Note, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. CAL. L. REV. 213 (2005); Matthew M. Staab, Student Work, *Child’s Play: Avoiding the Pitfalls of Crawford v. Washington in Child Abuse Prosecution*, 108 W. VA. L. REV. 501 (2005).

185. There is case law that certainly comes close. See *Davis v. Alaska*, 415 U.S. 308, 317 (1974) (noting that the “defense counsel sought to show the existence of possible bias and prejudice” during cross-examination and explaining that “[a] partiality of mind at some former time may be used as the basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying” (quoting 3A WIGMORE, *supra* note 142, § 940, at 776)).

186. FED. R. EVID. 611(a) (“The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.”).

187. Drew, *supra* note 2.