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Crawford’s Aftershock: Aligning the Regulation of Non-Testimonial Hearsay with the History and Purposes of the Confrontation Clause

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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. News reports have called the decision “an earthquake rocking America’s criminal justice foundations.” Three years ago, in *Crawford v. Washington*, 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.” The case and its recent progeny redefined what this clause’s implications were for hearsay statements.

Before *Crawford*, under *Ohio v. Roberts*, the Confrontation Clause barred prosecutors from introducing declarants’ hearsay statements against a criminal defendant unless the statements met one of two prerequisites. Either the statement had to fall into a “firmly rooted” hearsay exception or it had to bear “particularized guarantees of trustworthiness.” Yet, in *Crawford*, the Court found the *Roberts* test problematic, at least in the context of what it called “testimonial statements.” 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 had [] a prior opportunity for cross-examination.”

Commentary on the Confrontation Clause exploded after the *Crawford* decision—mostly exploring what the precise definition of “testimonial” does or does not mean.
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should entail. This narrow question, too, has been the focus of Confrontation Clause cases that the Supreme Court has decided post-Crawford. Still, while the definition of testimonial is a rich issue, surprisingly little was written in the immediate aftermath of Crawford about a related issue: Should the Confrontation Clause now leave non-testimonial statements unregulated altogether?

For roughly a two-year period, courts continued to apply the old Roberts test to non-testimonial statements consistently, though not unflinchingly. Some noted that many of the problems that plagued the reliability-test in the context of testimonial statements continue to haunt with equal force when courts assess


12 See Davis, supra at note 5. This opinion stemmed from two lower court cases, one in Washington and one in Indiana. Davis v. State, 111 P.3d 844 (Wash. 2003); Hammon v. State, 809 N.E.2d 945 (Ind. 2005). In the Washington case, the question presented was when an emergency 911 call could be properly classified as testimonial. In the Indiana case, the question was when a police’s questioning of a domestic violence victim, shortly after arriving on a scene, qualified as a testimonial statement.

13 An exception is a piece by Miguel Mendez in which he identified this issue and discussed it briefly. Crawford v. Washington: A Critique, 57 Stan. L. Rev. 569, 609 (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 (Wis. 2005) (noting "only one reported case, a trial court decision, has construed Crawford as exempting nontestimonial hearsay from Confrontation Clause analysis altogether," and that decision relied on misquotation). See, e.g., Summers v. Dretke, 431 F.3d 861, 877 (5th Cir. 2005) (finding that "it is clear that [Roberts] continues to control" with respect to non-testimonial 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 the Roberts standard to a non-testimonial excited utterance); United States v. Gibson, 409 F.3d 325, 338 (6th Cir. 2005) ("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."); Horton v. Allen, 370 F.3d 75, 84 (1st Cir. 2004) ("Accordingly, we apply Roberts to determine whether the admission of [a witness’s non-testimonial] statements violated [the defendant’s] Confrontation Clause rights."); Mungo v. Duncan, 393 F.3d 327, 336 n. 7 (2d Cir. 2004) (suggesting that “under Roberts, nontestimonial hearsay deemed unreliable is barred by the Confrontation Clause").
whether non-testimonial statements ought to be admitted into evidence. And in some cases, courts’ intuition that the Roberts test would ultimately be revisited in the context of non-testimonial statements was palpable.

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,” the Court went further two years later in Davis v. Washington. There, the Court concluded that ‘testimonial’ statements do not only mark the Confrontation Clause’s “‘core,’ but its perimeter.” A few courts, even after Davis, continued to apply Roberts to non-testimonial hearsay statements. 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 statement[s].”

After Davis and Bockting, it is now permissible to enter non-testimonial statements into evidence against a criminal defendant without any Confrontation Clause restrictions whatsoever. And, as one commentator has observed, the Court reached this conclusion in those two cases without “entertain[ng] briefing or argument on whether such a conclusive trade-off is actually compelled by either history, policy, or traditional conventions of constitutional interpretation.”

This Article explores what the purposes, history and text of the Confrontation Clause have to say about the admission of non-testimonial hearsay statements. Part I examines historical sources such as the common law near the Founding, as well as the text of the clause, and concludes that non-testimonial hearsay was one of the ills that the Confrontation Clause was designed to protect. 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 non-testimonial statements receive meaningful scrutiny as well. The United States Constitution is no stranger to such a two-tiered approach to implementing its amendments.

Part II of the paper then more carefully explores what “confrontation” should mean, both historically and practically, in the context of non-testimonial

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15 See, e.g., Compan v. People, 121 P.3d 876 (Co. 2005) (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.” Crawford, 541 U.S. at 63.

16 United States v. Saget, 377 F.3d 223, 227 (2d Cir. 2004) (“the 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 Davis, supra note 5, at 2274.

18 State v. Legendre, 942 So.2d 45, 51 (La.App. 4 Cir. 2006) (acknowledging Davis, but concluding nonetheless that “As to ‘non-testimonial’ statements, the Roberts reliability analysis still applies.”); State v. Jensen, 727 N.W.2d 518, 525 (Wis. 2007). (“The Roberts test remains when nontestimonial statements are at issue.”)

19 Bockting, 127 S.Ct. at 1183.


21 Id. at 384-85.

22 See infra note 83 and the substantive accompanying text.
hearsay. After marshalling relevant caselaw, historical texts, jury instructions and practitioners’ guides, Part II additionally concludes that simply re-implementing 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, as the Crawford Court left “for another day any effort to spell out a comprehensive definition” of the word. Still, there are some situations 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. And there are cases reported at or around the Founding in which common law courts rejected such non-testimonial statements as inadmissible.

One critical case-on-point is King v. Brasier. Decided less than a decade before the ratification of the United States Constitution, this British appellate decision has proved endurant; 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. What neither opinion delivered in Crawford states, however, are the facts or holding of Brasier.

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.” 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. 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 “non-testimonial” made the statements less credible, not more so: The court expressed unanimous concern that the girl’s statements were not made under oath; therefore, these statements “ought not have been received.” Also of note is that the

23 See, e.g., United States v. Johnson, 440 F.3d 832, 843 (2006) (conversations between friends of 25 years non-testimonial); McKinney v. Bruce, 125 Fed.Appx. 947, 950 (10th Cir.2005) (victim’s statements to his uncle were non-testimonial); Horton, 370 F.3d at 84 (finding that statements made during a private conversation to a friend 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 been held non-testimonial.”); People v. Griffin, 93 P.3d 344, 372 n. 19 (Cal. 2004) (statement to a friend at school that defendant had fondled her was non-testimonial hearsay within the meaning of Crawford); Demons v. State, 277 Ga. 724 (2004) (conversations between close friends not testimonial).

24 1 Leach 199, 200 (K.B. 1779).

25 Crawford, 541 U.S. at 70 (Rehnquist, J. concurring in part, dissenting in part). Brasier was also cited in the most recent case interpreting the confrontation clause. Davis, 126 S.Ct. at 2277.
court referred to the girl’s statements as “testimony,” stating that “no testimony whatever can be legally received except upon oath.” (emphasis added). This adds credence to the idea that any time a statement is presented to a jury for the truth of the matter asserted that statement constructively becomes “testimony” and the author becomes a witness.27

One could attempt to dismiss Brasier as a hearsay case rather than a case properly viewed as a precursor to the Confrontation Clause.28 There are a few problems with this perspective. First, in the four times this case has been cited in American jurisprudence, three have cited it for its bearing on their Confrontation Clause interpretations, and one cited it as useful in determining whether a child was competent to take the stand.29 None have cited it merely for its hearsay implications. Thus, if one were to argue that this were a hearsay case rather than a Confrontation Clause case, the burden would be on them to demonstrate why almost every American appellate jurist to have reviewed the Brasier has been wrong about its implications.

The second problem with this characterization is that the Brasier opinion lacks any discussion of hearsay or its exceptions. For example, despite the fact that the girl reported her injuries “immediately on her coming home,” there is no discussion as to whether this statement constituted an excited utterance—a principle that dates back at least to 1602 in Thompson and Ux’ v. Trevanion.30

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 non-testimonial statements. In one of the earliest American cases to cite the Con-

28 Crawford, 541 U.S. at 59 n.9 (internal references omitted) (“The Clause 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 that are not offered for 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.

27 Brasier, supra.

28 Conversations with [redacted] brought another potential counterargument to Brasier to my attention. The second counterargument is that a court today might conclude that the statements the child-victim made to her mother in Brasier could be properly termed testimonial. However, in contemporary cases, with facts quite similar to those in Brasier, courts have concluded that such statements are not testimonial. See, e.g., Compan v. People, 121 P.3d 876, 880-81 (Colo. 2005) (abuse victim’s statements to friend ruled nontestimonial); Herrera-Vega v. State, 888 So.2d 66, 69 (Fla. Dist. Ct. App. 2004) (child’s spontaneous statements to mother and father that she was sodomized nontestimonial). See also People v. Sharp, 355 Ill.App.3d 786, 797 (2005) (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 J.E. to determine the veracity of her suspicions. Lydia’s questions and J.E.’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 678, 692 (Mich. App. 2004) (statement made by child to a non-government employee of Children’s Assessment Center and was not testimonial.).


30 90 Eng. Rep. 179 (K.B. 1694) (“he also allowed, that what the wife said immediate upon the hurt received, and before that she had time to devise or contrive anything for her who advantage, might be given in evidence).
frontation Clause, the United States Supreme Court Chief Justice, in dicta, strongly implied that the Confrontation Clause does. That case is United States v. Burr.\(^{31}\) The case involved, inter alia, the admissibility of a statement made by Herman Blanerhasset to another lay witness, statements that were apparently not made in preparation for or in anticipation of a legal investigation or proceeding. Still, the court found that this statement should not have been admitted. The Court cited Confrontation Clause concerns both indirectly and directly. Indirectly, the court expressed concern the admitted statements were being used “to criminate others than him who made it.”\(^{32}\) 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.” He then immediately added, “I know none, by 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.”\(^{33}\) 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.”\(^{34}\) This characterization of the above sixty-eight-word discussion of the Confrontation Clause misses the point. Even if Justice Marshall’s statement is dicta, that negates its precedential, but not historical force. For example, Justice Scalia cites old British cases from the Eighteenth Centuries presumably not because he thinks these international opinions are binding on the United States, but because he thinks they provides evidence of this historical mood—of the brand of concerns that were on the Framers’ minds when they crafted the Confrontation Clause. Considering the Burr’s temporality to the Founding, and considering Chief Justice Marshall’s personal connections to the Founders, 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, especially when this limitation is based on the increasingly common presumption that ex parte witness examinations such as sir Walter Raleigh’s in the 1600’s were the primary basis of the Confrontation Clause.\(^{35}\) Frank Hermann and Brownlow Speer, for example, have pointed out that there are historical precursors to the Confrontation Clause with ancient roots—that date well before the ex parte

\(^{31}\) 25 F. Cas. 187, 193 (1807).
\(^{32}\) Id. at 193.
\(^{33}\) Id.
\(^{34}\) Crawford, 541 at 59 n. 9.
\(^{36}\) Frank R. Hermann and Brownlow Speer, Facing the Accuser: Ancient and Medieval Precursors to the Confrontation Clause, 34 Va. J. Int’l L. 481, 482 (noting that “conventional wisdom” marks Raleigh’s trial as the starting point of the history of the Sixth Amendment’s Confrontation Clause.” The authors point out the tension between this claim, and the Supreme Court’s claims that the Confrontation Clause’s roots date back to antiquity.)
examinations of the 1600’s. In fact, the Crawford Court cited Hermann and Speer’s piece for its historic evidence. The court seemed unaware, however, of how the existence of precursors to the Confrontation Clause undermines the conventional wisdom: that ex parte witness examinations in the 1600’s were the starting point for the clause. The Supreme Court even noted just a few decades ago that the right to confront one’s accusers existed at least 2,000 years. In a passage cited in Confrontation Clause jurisprudence, found in the Biblical Book of Acts, Paul states, “It is not the manner of the Romans to deliver any man to die, before which that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him.”

Consider, too, the story of Susanna, which explicitly served as partial justification for more transparent pre-trial testimonial examinations during the Twelfth Century—the sort of liberal reforms that served as precursors to the Confrontation Clause. In the story of Susanna, 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 into the request and the men fulfill their threat by accusing her of adultery. (Notably, the first person who her accusers tell is not a court officer, but Susanna’s servants). At trial, her life is spared, but only because Daniel—who enters as her advocate—requested that he be allowed to sequester and examine the accusers. Upon doing so, he identified gross inconsistencies in their stories.

Although Susanna’s accusers presented testimony, it seems odd to conclude that accusations would have been less problematic if they had been non-testimonial—and had not been subjected to Daniel’s pithy, but powerful cross-

\[\text{37 Id.}\]
\[\text{38 \textit{Id.}}\]
\[\text{39 See Hermann, supra note 37. See also California v. Green, 399 U.S. 149, 156-157 n.10 (1970) (Harlan, J.) (citing Sir Raleigh’s trial and noting that “at least one author traces the Confrontation Clause to the common-law reaction against these abuses of the Raleigh trial.”); \textit{Crawford}, 541 U.S. at 44 (citing the Raleigh trial). These sources tell explain how Raleigh’s alleged accomplice implicated him in a crime, but Raleigh was not permitted to ask questions to demonstrate that this alleged accomplice “had lied to save himself. Crawford, supra.}\]
\[\text{41 Coy, supra.}\]
\[\text{42 Susanna 1:64. This story is has been omitted from the King James Version of the Bible as apocrypha. See generally Missing Books of the Bible, V.1 (1996).}\]
\[\text{43 James A. Hughes, \textit{WITNESSES IN CRIMINAL TRIALS OF CLERICS} 16-17 (Catholic University of America Canon Law Studies No. 106, 1937), as cited in Hermann and Spear, supra note 37, n.190. Liberal reforms included allowing the both parties in a proceeding to submit questions to the judge to ask the witnesses, and to have the witnesses’ answers to the questions publicly announced.}\]
\[\text{44 Id.}\]
\[\text{45 \textit{Susanna} 1:51: (“Then said Daniel unto them, Put these two aside one far from another, and I will examine them.”)}\]
\[\text{46 Id. The witnesses even diverged as to what type of tree they saw Susannah fornicating under.}\]
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, who 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.

There is at least one strong counterargument to my thought experiment. That is, one could contend my hypothetical merely shows the importance of hearsay rules, which may have different roots and purposes than the Confrontation Clause. The counterargument might note 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 government 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 in which the aim is to lead to more reliable trials—rather than merely trying to curb government evils. For example, the Due Process clause of Fifth Amendment has been generally interpreted to serve as a shield against other types of grossly unreliable or arbitrary evidence.

Second, ex parte secret examinations played absolutely no part in the story of Susanna—the very story that helped lead to the increased confrontation and transparency that graced 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 United States’ Confrontation Clause had a significantly narrower purpose than the confrontation-related reforms that predated it centuries earlier. 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 further 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 case.

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.” The Court reasoned that, within the context of the Con-
frontation Clause, “witness” translates roughly into one who “bears testimony.”\footnote{Crawford, 541 U.S. at 51, citing N. Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)}

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.\footnote{Id.} Therefore, the Court concluded, “[t]he constitutional text… reflects an especially acute concern with a specific type of out-of-court statement.”\footnote{Id.}

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.”\footnote{Id at 42-43, citing 3. J. Wigmore, Evidence § 1397, p. 104. See also OXFORD ENGLISH DICTIONARY (2d ed. 1989), available at (http://dictionary.oed.com/cgi/entry?query_type=word&queryword=witness&first=1&max_to_show=10&sort_type=alpha&result_place=1&search_id=sZv9-mdx-yRG-16204&hlid=50286399) (subscription required) (defining witness, in part, as “The action or condition of being an observer of an event.”)} Other commentators have launched that particular critique.\footnote{See Kilpatrick, at 382; Randolph N. Jonakait, “Witness” in the Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process, 79 Temp. L. Rev. 155, 158 (2006).}

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.\footnote{Jane Schacter, The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation, 51 Stan. L. Rev. 1 (1998), 10 (Tracing, inter alia, the increased use of dictionaries by the 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.”); Edwards v. Carter, 580 F.2d 1055, 1080 (D.C. Cir. 1978) (“[t]he rules applicable to the construction of a statute also apply to the construction of a Constitution.”); Badger v. Hoidale, 88 F.2d 208, 211 (8th Cir. 1937) (same).} Neither of these approaches gets much play in Crawford. 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.”\footnote{Crawford, 541 U.S., 42-43}

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 times American cases during the year of 1787—and each time it was used to refer to a trial or hearing, not to the more hazy, amorphous notion of testimonial that the Crawford court invokes.\footnote{See, e.g., Lindsay v. Lindsay’s Adm’ts, 1 Des. 150, 1 S.C.Eq. 150, (1787) (referring to “the weight of testimony” given at a particular trial); Watlington v. Howley, 1 Des. 167 (1787); Worsley v. Earl of Scarborough, 3 Atk. 392 (1787); Garth v. Ward, 2 Atk. 174 (1787); Kissam v. Burrall, 1 Kirby 326 (Conn. Super. 1787). (1787). C.f. Thorp v. Gracey, 2 Kirby 26}
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One comes to a similar conclusion when 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.”

That is the first definition given by the American Heritage Dictionary. And as the concurring opinion of Rehnquist and O’Connor notes, the majority in Crawford does not limit the reach of the Confrontation Clause to statements made under oath either. 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. 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, 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. 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. American Heritage, supra. C.f. Id. (the first three definitions of witness are: “to be present at or have personal knowledge of; to take note of observe; to provide or serve as evidence of.”)

(Conn.Super. 1787). (referring to the contents of a deposition, the court did not use the word testimony in the opinion).

Crawford, 541 U.S. at 63 (“Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at formal trial; and to police interrogations.”)

AMERICAN HERITAGE DICTIONARY (2000) (the third definition of testify is “to make a statement based on personal knowledge in support of an asserted fact.”)

Crawford, 541 U.S. at 69 (Rehnquist, J., concurring). 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. American Heritage, supra. C.f. Id. (the first three definitions of witness are: “to be present at or have personal knowledge of; to take note of observe; to provide or serve as evidence of.”)

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

Crawford, 541 U.S. at 43, citing 3 J. Wigmore, Evidence § 1397, p. 104. See also OXFORD ENGLISH DICTIONARY (2d. ed. 1989), available at (http://dictionary.oed.com/cgi/entry/50286399?query_type=word&queryword=witness&first=1&max_to_show=10&sort_type=alpha&result_place=1&search_id=sZ9V-mxyRG-16204&hilite=50286399) (subscription required) (defining witness, in part, as “The action or condition of being an observer of an event.”)

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

Id.
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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.”

Amar points out that in the amendment immediately preceding the Sixth 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.” (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.) 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 inconsistency. And the Fifth Amendment and Sixth Amendments were, after all, enacted at the same time.

However, the word “testimonial” has not tended to apply identically in the contexts of those two amendments. 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. Instead, 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. And this could theoretically lead to lacuna 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. Yet, the Ninth Circuit has ruled that in the context of the Sixth Amendment, the contents of a diary are not testimonial.

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67 U.S. CONST., amend. V.
68 Consider the highly related in pari materia canon of interpretation. Wachovia Bank v. Schmidt, 126 S.Ct. 941, 943-44 (2006) (“under the in pari materia canon, statutes addressing the same subject matter generally should be read as if they were one law...”) (internal citations omitted). “The rules applicable to the construction of a statute also apply to the construction of a Constitution.” Edwards v. Carter, 580 F.2d 1055, 1080 (C.A.D.C. 1978); Badger v. Hoidale, 88 F.2d 208, 211 (8th Cir. 1937).
69 See generally Davis, supra note 5.
70 Crawford, 541 U.S. at 68
71 Fisher v. United States, 425 U.S. 391, 393-401 (1976) (noting, in dicta, that “Special problems of privacy which might be presented by subpoena of a personal diary.”) See 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 Committee 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.”).
72 Parle v. Runnels, 387 F.3d 1030, 1037 (2004) (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)
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. 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.’

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 commentators—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 were passed at roughly the same time, and contained the same word—but yet, 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 amendment. Yet, in the Fourteenth Amendment context alone has the court restricted the Congress’s power to those actions that are congruent to and proportional with

73 U.S. Const. Amend V. (“nor shall be compelled in any criminal case to be a witness against himself”). See Counselman v. Hitchcock, 142 U.S. 547, 563-564 (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 or forfeitures.”) (emphasis added).

74 Precedent comports with this textual understanding. “[I]t is the prosecutor who should have the burden of producing witnesses against the defendant.” United States v. Oates, 560 F.2d 45, 82 n.39 (2d Cir. 1977) (internal citations omitted). See also State v. Coombs, 821 A.2d 1030, 1033 (N.H. 2003) (“the duty to confront a defendant with witnesses falls upon the State”) (quotation omitted); State v. Rohrich, 939 P.2d 697 (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.”); State v. Fisher, 563 P.2d 1012, 1018 (Kan. 1977) (“[F]or the declarant to be subject to full and effective cross-examination by the defendant, he must be called to testify by the state.”)

75 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 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.”); 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.”) 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.)

76 U.S. Const. Amend XIII; U.S. Const. Amend XIV.
the evil being addressed. 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.” Unlike some commentators, I acknowledge that prohibiting ex parte examinations may have been one the chief goals of the clause. I concede this in part because of the evolving consensus around the issue and in part because the explanation can be found in at least one 19th century case. This point also should likely be conceded because Crawford is simultaneously so young and so well-accepted. However, concluding that testimonial statements are the primary infirmity the Confrontation Clause intended to remedy is not antithetical to acknowledging that non-testimonial statements, too, are within the scope of the clause.

Testimonial statements and non-testimonial statements should receive two separate tiers of protection under the Confrontation Clause. This certainly would not be the first constitutional provision to be interpreted in such a way. Since the early 1940’s, courts have afforded a different brand of protection to commercial speech than to other forms of speech in the context of the First Amendment. And even more starkly, the Fourteenth Amendment’s Equal Protection clause provides 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. Following these models, in Part II of this paper, I explore the potential meaning of “confrontation” in the context of non-testimonial hearsay statements.

77 See City of Boerne v. Flores, 521 U.S. 507, 530
78 William v. State, 19 Ga. 402 (1856)
79 Graham Lilly, Notes on the Confrontation Clause and Ohio v. Roberts, 36 U. Fla. L. Rev. 207-208-09 (expressing skepticism toward this view)
80 Margaret Berget, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 Minn. L. Rev. 557, 578-587 (presenting an argument that trial’s like Sir Raleigh’s played a role). Crawford, 541 U.S. at 43 (same).
81 William, supra note 78.
82 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, i.e., 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 (2006), 474 (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 anytime soon.
83 Central Hudson Gas & Elec. Corp. v Public Serv. Comm’n of New York, 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, THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1960).
II. Non-testimonial statements: How much “Confrontation” is Enough?

Even if one does accept that defendants should receive some constitutional protection from the admission of non-testimonial 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 non-testimonial statements?  

A. The Unreliability of the Roberts Reliability Test

The Crawford court lambasted the Ohio v. Roberts reliability test. As a reminder, 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 also 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” or, alternatively, by demonstrating that the statement bore particular guarantees of trustworthiness.

In the two-years following Crawford, Roberts test has continued to apply non-testimonial hearsay almost without exception—but not without major problems. One of the enduring problems with the Roberts test is that, even after Crawford, courts continued to apply it in a starkly inconsistent matter. 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 opposite 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; (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 somewhat regular basis during the Roberts era.

1. Corroborating evidence

In the two years following Crawford and preceding Davis, when courts are determined whether non-testimonial hearsay had particularized guarantees of trustworthiness, they were inconsistent as to whether they consider evidence that tends 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. The Supreme Court of Connecticut came to a similar conclusion.
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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…”\textsuperscript{93} The Tenth Circuit Court of Appeals similarly held that “reliance on [corroborating facts] is inappropriate for determining whether a statement is trustworthy.”\textsuperscript{94}

Alternatively, another post-Crawford court that applied the Roberts to non-testimonial hearsay not only concluded that considering corroborating evidence is permissible. It went further, by actually concluding that it was 	extit{obliged} to consider corroborating evidence. In \textit{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.”\textsuperscript{95} The court then dutifully did just that. \textit{Hammond}, not to be confused with \textit{Hammon}, “is particularly salient because it considered, among other things, corroborating medical evidence”—a form of corroborating evidence that the Nevada Supreme Court explicitly rejected.\textsuperscript{96} And to the extent the \textit{Hammond} court was following intra-jurisdictional precedent, it was not an entirely rogue decision.\textsuperscript{97}

It is difficult to imagine two more contradictory applications of a legal rule than the above illustrations.\textsuperscript{100} Part of what is especially striking about this inconsistency is that it is outcome determinative. For example, when 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.\textsuperscript{101} Such outcome-determinative inconsistency is not generally favored in the context of the Bill of Rights\textsuperscript{102} generally or criminal procedure specifically.\textsuperscript{103}

2. Child Hearsay in Abuse Cases

One recurrent issue throughout the Roberts era was how to determine whether a child’s use of kid-like 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...

\textsuperscript{93} 890 A.2d 474, 554 (Conn. 2006); see also State v. Rivera, 844 A.2d 191 (2004) (same).

\textsuperscript{94} See, e.g., Brown v. Uphoff, 381 F.3d 1219, 1225 (10th Cir. 2004); Bocking, 848 P.2d at 1369 n.8 (interpreting \textit{Idaho v. Wright}, 497 U.S. 805, 822 (1990) as prohibiting such evidence).

\textsuperscript{95} 880 A.2d 1066, 1102 (2005).

\textsuperscript{96} \textit{Hammon} v. State, 809 N.E.2d 945 (Ind. 2005).

\textsuperscript{97} Id. at 1103

\textsuperscript{98} Flores, 120 P.3d at 1179 (“The district court below considered corroborative medical evidence in assessing reliability under \textit{Wright} and \textit{Roberts}. This was an error under \textit{Wright.”}


\textsuperscript{100} This inconsistent application rages despite the fact that the Supreme Court stated in \textit{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.”

\textsuperscript{101} Flores, 120 P.3d at 1181

\textsuperscript{102} See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 843 (1992) (“Liberty finds no refuge in a jurisprudence of doubt.”)

\textsuperscript{103} See, e.g., Crawford, 541 U.S. at 63 (stating that the Roberts “framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.”)
less credible. Whether a statement is kid-like or adult-like is concededly subjective. But the following cases make clear that this is another area in which courts are 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.” Consider, for example, State v. Aaron, in which the Supreme Court of Connecticut concluded, applying Roberts to non-testimonial 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. In fact, courts of appeals in at least three different circuits have held that such child-like language makes a statement more credible.

Still, other courts invoked a child-hearsay rule that directly contradicts the one found in, among other cases, Aaron. In People v. Hicks, in which the child-victim used the proper adult terms to describe sexual abuse, a California appellate court interpreted the child’s use of adult terms to be evidence of the statement’s reliability. A Ninth Circuit case 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.” And yet a third 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.” Indeed, Missouri concluded a decade ago that “a test based upon age-appropriate vocabulary words is unworkable.”

The above cases alone reveal at least three different approaches courts took when assessing the reliability of non-testimonial 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. Another approach credited age-inappropriate language, because it evinces that the child learned such

104 United States v. Nick, 604 F.2d 1199, 1204 (9th Cir. 1979)
105 See, e.g., United States v. Grooms, 978 F.2d 425, 427 (8th Cir. 1992); United States v. George, 960 F.2d 97, 100 (9th Cir. 1992); United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993).
106 See, e.g., United States v. Grooms, 978 F.2d 425, 427 (8th Cir. 1992); United States v. George, 960 F.2d 97, 100 (9th Cir. 1992); United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993).
108 Webb v. Lewis, 44 F.3d 1387, 1394 (9th Cir. 1994) (dissenting opinion). This dissenting opinion succinctly describes the dissent’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
110 State v. Worrel, 933 S.W.2d 431, 434 n.3 (1996), citing State v. Redman, 916 S.W.2d 787, 792 (Mo. 1996), en banc.
111 See, e.g., People v. Sharp, 355 Ill.App.3d 786, 797 (2005) (“J.E. was sexually assaulted on one occasion, and the fact that she did not know what the term ‘penetrated’ suggests (if anything) that she was not coached as to what she should say.”)
language while being sexually abused.\footnote{In fact, this approach was urged by the defense in Sharp. \textit{Id.} (‘Defendant seems to suggest that if J.E. were the victim of sexual assault, she should be better versed in sexual terminology.’)} Then, a third approach abandoned the use of terminology as a factor at all—because of administrability concerns. And defendants, depending on the jurisdiction that they were in, got 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 \textit{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 or replace the Roberts test for non-testimonial statements, it is important first to search for the full range of goals of cross-examination, and then assess both what Roberts does well and what it does not.

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”\footnote{Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (“it confers at least a right to meet face to face all those who appear and give evidence at trial.”) (internal citations omitted). But see 5 J. Wigmore, Evidence § 1397, 158 (J. Chadbourn rev. 1974) (“There was never at the common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination.”) (emphasis in original.)} at trial, and the right to thoroughly\footnote{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.”)} cross-examine\footnote{See \textit{generally} Davis v. Alaska, 415 U.S. 308 (1974). \textit{See also}, John Wigmore, \textit{S} Wigmore, Evidence \textit{s} 1395, p. 123 (3d ed. 1940) (“The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.”)} government witnesses. It has been recognized both by historians and by the Supreme Court 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.”\footnote{Z. Chafee, \textit{THE BLESSINGS OF LIBERTY} 35 (1956). This passage was quoted in \textit{Jay v. Boyd}, 351 U.S. 345, 375 (1956) (Douglas, J., dissenting) and \textit{Coy}, 487 U.S. at 1019.} Additionally, cases, historical sources, jury instructions and trial-technique texts reveal that among the purposes and effects of the Confrontation Clause are: (1) to challenge mistaken witnesses, including their per-
ception and memory; (2) to give fact-finders an opportunity to assess witnesses’ demeanor and language when their story is subjected to vigorous testing; (3) to allow attorneys to make arguments which focus the fact-finders’ attention to key points; (4) to cause a witnesses’ story to be subjected to immediate testing; and (5) to 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 “delving into the witness’ story to test the witness’ perceptions and memory.”

Jury instructions, for example, encourage jurors to consider memory as a factor in assessing the credibility. Indeed, some studies maintain that mistaken eye-witnesses account for “nearly sixty-five percent of the total mistaken convictions studied came from this one cause alone.” This, perhaps, is why trial advice dispensed by top lawyers focuses on the importance of curbing the likelihood of convictions by using cross-examination as an opportunity to reveal a witnesses’ faulty or wavering memory.

Similarly, cross-examination allows fact-finders the opportunity to assess a witness’s 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.” Sample model jury instructions, for example, demonstrate courts’ recognition that cross-examination in particular helps jurors assess witnesses’ credibility through their demeanor. Model Federal Jury Instructions recommend 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

118 Davis v. Alaska, supra note 116. See also Bartlett v. Kansas City Public Service Co., 160 S.W.2d 740, 745 (Mo. 1942) (stating that cross-examination is a safeguard against, in part, “mistaken evidence.”); Paul J. Passanante and Dawn Mefford, Cross-Examination, 62 Journal of Missouri Bar 28 (2006) (noting that among counsel’s goals at cross-examination is to “test the strength of [witnesses’] memory, knowledge and perceptions”); United States v. Owens, 484 U.S. 554, 559 (noting that a cross examination may test a witnesses’ “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.”) (internal citations omitted).

119 Ninth Circuit model Criminal Jury Instruction 1.8 (listing as a factor the jury should consider “the witness’ memory”).

120 F. Lee Bailey, CRIMINAL TRIAL TECHNIQUES (1994) § 62:3 (citing external studies)

121 Id. at 62:5. Here, F. Lee Bailey provides his potential 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
122 Id. at 62:3
way the witness testified on direct examination compare with how the witness testified on cross-examination?\[123\] Two other benefits of cross-examinations, cited less frequently, are that they: (1) permit a form of argument by attorneys which focus the fact-finder’s attention to key themes and (2) allow the witness’s story to be subjected to immediate testing. Cross-examination has historically done both. In John Langbein’s Origins of the Modern Adversarial Trial, for example, he discusses a major trial circa 1790 in which a defense attorney used his “cross-examination to formulate the argument” that he wanted the fact-finder to consider.\[124\] That defense attorney was not alone; around the same time, there was a general trend or “phenomenon” of defense counsel-using cross-examination “to evade the ban on addressing the jury.” Id. And much more recently, 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….”\[125\]

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.”\[126\] “[I]mmediate cross-examination is the most effective” and “delayed cross-examination is the least effective.”\[127\] Likewise, the value of cross-examination’s immediacy is expressed quite succinctly and effectively in the seventy-year-old Minnesota case State v. Saporen. 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 stokes fall while the iron is hot.”

But to recognize the potency of immediacy as a value of actual cross-examination, one need not look to cases like Saporen. Rather one need not look much further than common sense. Imagine if trials were conducted differently: Suppose the government were allowed to conduct direct examinations of each of its witnesses—and that the defense were allowed to ask these witnesses no questions at all until the second half of the case, the portion in which the defense places its case before the jury. By the time a defense attorney were allowed to cross-examine the first witness, the jurors may have settled impressions that are significantly

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\[123\] Federal Jury Instructions (Matthew Bender) 7-1 (emphasis added)

\[124\] John Langbein, ORIGINS OF THE MODERN ADVERSARIAL TRIAL p. 256 n. 14

\[125\] Davis v. Alaska, 415 U.S., at 317 n. 5 (requiring 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 J. Wigmore, Evidence s 940, 776) (Chadbourn rev. 1970)).


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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 opening statement. The defense usually has the right to waive opening statement, or postpone opening statement until the beginning of its case-and-chief. 128 Yet, trial strategy texts books warn against actually waiving or postponing an opening. 129 This is because in so doing, one risks allowing the jury to receive a settled, unchallenged impression based on the prosecution’s opening statement that may be harder to refute later. 130

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

2. Roberts’ incomplete focus

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 noted hyperbolically 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.” 131 Still, the Roberts test may place too much emphasis on this sincerity factor at the expense of others, such as challenging mistaken witnesses.

a. How sincerity is often treated as sufficient under Roberts

The Roberts test, as you will recall, admits all statements that fall into a firmly rooted hearsay exception. 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 at the English common law, the court gave this sole explanation for it: the statement was made “before that she had time to devise or contrive any thing for her own advantage.” 132 Similar language appears in early cases explaining the rationale of the dying declaration. The 1789 case of King v. Woodcock, 133 for example, provides “the general principle upon such evidence is admitted.” That principle is:

when 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

128 See, e.g., Boulder County Bar Association, BAR MEDIA MANUAL, Chapter 12, available at www.boulder-bar.org/bar_media/trial/12.4.html
129 Jeffrey T. Frederick, PERSUASION AT TRIAL: OPENING STATEMENTS, Defense Practice Notebook (1996), 1, 76-78. (One of his 13 recommendations for opening statement is: “Do not waive opening statements.”)
130 Id. (“By waiving an opening statement, the attorney risks that jurors’ adopting the opponent’s view of the case at the outset of the trial.”)
133 1 Leach 500 (1789).
by the law as creating an obligation that which is imposed by a positive oath administered in a Court of Justice.

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

These early justifications, with a few hiccups,134 have survived. The Advisory Committee Notes, written by the authors of the 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.”135 These advisory notes acknowledge that “stilling the capacity of reflection” may serve to impede accuracy in some ways. 136 The fact that such statements are marked by sincerity, though, is sufficient for this venerable “firmly rooted” hearsay exception. Likewise, the advisory notes make equally patent that sincerity the underlying justification for the medical-diagnosis exception to the hearsay rule.138 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.” More illuminating, though are the sources the committee then cites for this proposition. There are two. One is Woodcock—a case in which the justification, as noted above, is tied to sincerity rather than more general concerns about accuracy.139 The other source is Dean Wigmore’s evidence treatise, which also relies on the declarant’s sincerity when explaining this particular exception.140

b. The disconnect between “firmly rooted” exceptions and confrontation generally

Sincerity may be a sufficient ground upon which to fashion a statutory exception to the hearsay rule. That determination is beyond the scope of this Article. Yet, demonstrating that a speaker was probably sincere should not, standing alone, serve as a substitute for constitutionally mandated confrontation. As articulated,

121 Regina v. Megson, 173 Eng. Rep. 894 (K.B. 1854) (noting that the excited utterance there “show her credit and the accuracy of her recollection”) (emphasis added).
132 Federal Advisory Committee Notes, Rule 803, citing 6 Wigmore § 1747, p. 135
133 See, i.e., R.M. Hutchins and D. Sliginger, Some Observations on the Law of Evidence: Spontaneous Exclamations, 28 COLUM. L. REV. 432 (1928)
134 White v. Illinois, 502 U.S. 354, 355 n. 8 (1992) (noting that the exception is several centuries old.)
135 The Advisory Committee Notes explain that there is a “strong motivation to be truthful” when someone makes statements for the purposes of medical treatment. Cf. United States v. Yazzie, 59 F.3d 807, 813 (9th Cir. 1995) (finding this exception to be “firmly rooted”); Dana v. Department of Corrections, 958 F.2d 237, 239 (8th Cir. 1992) (same).
136 Woodcock, note 133.
137 See 5 Wigmore §§ 1430, 1438 &1443. For discussion, see John B. Myers, et. al., Hearsay Exceptions: Adjusting the Ration of Intuition to Psychological Science, 65 Law & Contemp. Probs. 3 n. 2 (Winter 2002), (noting that Wigmore’s rationale for this exception is that the dying person is “free from all ordinary motives to misstate:”) (emphasis added).
there are at least five different key values 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. Meaningful attempts to import the values of cross-examination into Confrontation Clause requirements must account for more than the sincerity of the declarant.

III. The Clause’s Perimeter: Looking Forward

Four reforms would improve how courts treat non-testimonial 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 test, 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 non-testimonial hearsay.

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

Courts should be required to admit impeachment materials against prosecutorial hearsay-declarants if those materials would have been admitted against a live witness. This is not a particularly radical proposal. Currently, Federal Rule of Evidence 806 already requires the admission of such evidence in federal court on the grounds that a declarant’s “credibility should in fairness be subject to impeachment and support as though he had in fact testified.”

141 Coy v. Iowa states that yet another such value is the appearance of fairness in the trial process. Coy, 487 U.S. at 1018-19 (“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.”)

142 See Samuel R. Goss, Loss of Innocence: Eyewitness Identification and Proof of Guilt, 16 J. Legal Stud. 395, 413 (1987). See generally, Samuel Gross, et. al., Exonerations in the United States: 1989 through 2003, 95 J. Crim. L. & Criminology, 523, 524 (2005) (explaining that this may be an even greater problem than previously thought. DNA has exonerated 121 individuals in rape cases, 88% of which were a result of false identification. He notes that such false identifications are more common in robberies than in rape cases—but DNA is not as frequently available.)

143 Courts should permit the admission of non-testimonial hearsay if it falls into a firmly rooted hearsay exception and the defense fails to show particularized guarantees of untrustworthiness.

144 For a discussion of a close cousin of this proposal, see Lynn McLain’s Post-Crawford: Time to Liberalize the Substantive Admissibility of a Testifying Witness’s Prior Consistent Statement, 74 UMKC L. Rev. 1 (2005).

145 Federal Rule of Evidence 806, Advisory Committee Notes.
courts have been receptive to arguments that such evidence should be admitted. 146 Georgia, for example, does not have a statutory equivalent of Federal Rule 806. 147 Yet, its state appellate courts have held that defendants are “entitled” to introduce prior inconsistent statements of hearsay declarants. 148

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. 149 The court concluded that “the letter [of impeachment] should have been admitted as proper evidence”—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” whether the trial court’s exclusion of the letter constituted “an impropriety of constitutional magnitude…”. 150

Considering Rule 806 at the federal level, and the manner in which courts are handling the issue the state level, readers may ask: why elevate this to a constitutional requirement at all? Here are three reasons. First, statutory evidence-admission is governed by an abuse of discretion standard, 152 whereas constitutional errors are generally reviewed de novo. 153 Second, for confrontation-clause viola-

146 The Advisory Committee Notes that accompany rule 806 note that some courts already allowed this procedure prior to the rule’s passage. See 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, Crown Cas. 147.). People v. Collup, 167 P.2d 714 (Cal. 1946) (holding that where a witness was unavailable, “The defendants are helpless in meeting the testimony by a method which may refute 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.”).

147 O.C.G.A. § 24-3-33 (codifying of the state’s hearsay rules).

148 Smith v. State, 510 S.E.2d 1 (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. App. 2000) (requiring the admission of impeachment materials against statements that fall into the medical diagnosis exception to the hearsay rule).

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

150 Id. at 360.

151 Id. at 361.


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tions, the government must prove that such errors are harmless beyond a reasonable
doubt, whereas for statutory evidentiary errors, a less stringent harmless-error test
applies. It is therefore not wholly irrelevant what source of authority a court in-
vokes on when addressing this impeachment issue. Third, constitutionalizing the
impeachment-rule would further align requirements of the Confrontation Clause
more closely with some of that clause’s underenforced norms. That is, impeach-
ment materials such as prior inconsistent statements do not necessarily just attack a
witness’s motives or sincerity. These materials also can demonstrate problems
with a witness’s memory or perception, a confrontation-related value that current
Confrontation Clause doctrine often neglects.

Further, the admission of such impeachment materials should occur im-
mediately after the non-testimonial hearsay statements are admitted. “Immediately” roughly means after the direct examination of the witness who reports the
out-of-court statements. To require the admission of impeachment materials before
that would unnecessarily disrupt trial continuity. Also, the moment immediately
after direct-examination, is when the defense would generally get to cross-examine
the declarant if he or she were a live witness.

The virtues of immediacy, and its relationship to the Confrontation Clause,
are discussed in Part (II)(B)(1)(d) of this paper. Building on that theme, requiring
courts to admit impeachment materials immediately is a rather low-cost burden on
courts that would further make Confrontation Clause values and Confrontation
Clause requirements one in the same.

C. 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 non-testimonial 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. Roberts, as you will remember.

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157 Chapman v. California, 386 U.S. 18, 23 (1967) (“Before 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.”); Wright, 805 U.S. at 827 (stating, in dictum, that “the Confrontation
Clause error in this case was not harmless beyond a reasonable doubt.”); United States v.
Jones, 766 F.2d 412, 414 (9th Cir. 1985) (“Violations of the confrontation clause require re-
versal unless they are harmless beyond a reasonable doubt.”).

158 United States v. Lane, 474 U.S. 438, 446 n. 9 (1986) (“harmless-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.”).

hallmark of abuse-of-disccretion review” and overturning a lower court that failed to afford
such deference).

160 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) [co-conspirator hearsay exception] does not ipso
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permitted the admission of prosecutorial non-testimonial hearsay statements if the statement either (a) falls into a firmly rooted hearsay exception or (b) bears particularized guarantees of trustworthiness. This paper exposed that the problem with (a) is that it places an emphasis on the sincerity of the statement made, at the exclusion of all other Confrontation Clause values. The problem with (b) was its inconsistent application.

Yet, adopting the proposed rule could particularly solve some of the problems associated with the “firmly rooted hearsay exception” prong of the old Roberts test. That is because that prong is not inherently flawed—just incomplete. As discussed, excited utterances and dying declarations, for example, are premised on the notion that such declarants are likely sincere. But there are other reasons that a speaker might be unreliable, 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. 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. Still, as it stands, contrary 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 that other commentators can further build upon.

In any event, the modified Roberts test would have the biggest impact when statements do not fall into a firmly rooted hearsay exception at all. They would never be admitted. However, this was the rule throughout the British common law and throughout the 19th Century here in America. Mattox v. United States, issued in 1895, cited one exception to the Confrontation Clause: the dying declaration exception to the hearsay rule. Likewise, prior to Crawford, at least one state ruled that it was never permissible to admit statements against the accused unless they fell into a firmly-rooted hearsay exception.

facto satisfy the right of confrontation. Rather we require a separate confrontation clause analysis designed to guarantee the reliability of the challenged coconspirator statements.”)

158 448 U.S. 56 (1980)
159 See supra notes 118-121.
160 See Whitney Baugh, Why the Sky Didn’t Fall: Using Judicial Creativity to Circumvent Crawford v. Washington, 38 Loy. L.A. L. Rev. 1835. Indeed, in the scores of cases I read applying the reliability test post-Crawford, I identified one case 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. See Flores v. Nevada, 120 P.3d 1170 (2005).
161 Mattox v. United States, 156 U.S. 237, 243 (1895)
162 State v. Dinkins, 339 S.C. 597, 603 (S.C. App. 2000) (“[W]e will not consider any other ‘particularized guarantees of trustworthiness’ when analyzing the admissibility of statements under the Confrontation Clause.”)
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If observers view this rule as too stringent, another alternative modification to Roberts that should be considered would be to admit statements falling into “widely-accepted” hearsay exceptions, rather than just “firmly-rooted” ones. 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-rooted residual hearsay exception often rest at the heart of the government’s case. Nonetheless, this modification would bring Confrontation Clause jurisprudence closer to the following, virtually dormant, high ideal articulated by the Supreme Court less than twenty years ago, which should be the guiding principle of the clause’s requirements: “that the declarant’s truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.”

D. 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, post-direct examination, the potential deficiencies of a particular hearsay statement. Cross-examination, as discussed in Part II(B)(1)(c), 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. Caselaw has not generally cited “argument” as a purpose of cross-examination. And in fact, while lawyers use cross-examination as an opportunity for argument, courts use Federal Rule 611(a) to limit questions that are particularly argumentative. Still, there may be scenarios when a judge may conclude, for example, 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

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163 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”).


165 Wright, 497 U.S. at 817, supra note 163.

166 There is case law that certainly comes close. See Davis v. Alaska, 415 U.S., at 317, supra note 115. (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 J. Wigmore, Evidence s 940, 776 (Chadbourn rev. 1970).).
hearsay statement. Under such limited scenarios, judges should be equipped with the discretionary power to allow such immediate clarification by attorneys.

E. Concluding Thoughts

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

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Drew, supra note 2.
Fed Up With The Feds: Can States Exert Control Over Federal Antiterrorism Investigations?

By Tom Lininger

A growing number of state and local governments have protested the federal government’s surveillance and intelligence-gathering in antiterrorism investigations. As of June 30, 2005, a total of seven state legislatures and 379 local governments have passed resolutions objecting to federal investigative practices. These resolutions have raised concerns about racial profiling, surveillance of First Amendment activity without particularized suspicion, interception of attorney-client communication, overzealous investigation of immigrants, and withholding of information from local officials and the public, among other objections. On April 28, 2005, Portland became the first city in the nation to withdraw its police from a Joint Terrorism Task Force (JTFFJTF) organized by the F.B.I. Elected officials in other cities with JTFFJTFs are considering whether to follow Portland’s lead.

Meanwhile, the federal government continues to bolster the power of federal law enforcement agencies. In a succession of legislation from the U.S.A. PATRIOT Act of 2001 to the Intelligence Reform and Terrorism Prevention Act of 2004, Congress has conferred much greater authority on federal agents and prosecutors. In 2005, as Congress considers whether to reauthorize the most controversial provisions of the Patriot Act, key congressional leaders are paying little heed to the protests of state and local governments, and President Bush has vowed to veto any legislation that erodes the power of federal prosecutors and law enforcement agents. The Bush Administration has repeatedly exercised federal authority to override states’ laws and policies, notwithstanding the president’s putative commitment to the doctrine of federalism. For its part, the U.S. Supreme Court recently issued an opinion in Gonzales v. Raich that emphatically underscored the supremacy of federal law enforcement despite contrary state legislation.

Are state and local governments powerless to slow the federal juggernaut in antiterrorism investigations? The strategies that state and local governments have pursued to date seem unlikely to achieve any significant results. The U.S. Constitution generally precludes state and local governments from exercising control over federal law enforcement officials, except that state and local officials can prevent the federal government from commandeering their personnel and resources. Portland’s approach — the withdrawal of local police from a JTFFJTF —
actually appears to be counterproductive, reducing the long-term prospects for local influence over federal antiterrorism investigations.\textsuperscript{17} State and local governments resorting to precatory strategies have met with little success. For example, when thirty-four [AA: should this be seventy-four, per the footnote?]\textsuperscript{34} local governments requested that federal agencies report investigations within the local boundaries, the federal government refused to cooperate.\textsuperscript{18} Some commentators have suggested that states consider the possibility of suing the federal government, but there has been little progress on this front.\textsuperscript{19}

One promising strategy has been overlooked, however: ethical regulation of federal prosecutors by state bar associations. In the 1999 "McDade Amendment,ct,\textsuperscript{20}" Congress created a chink in the armor of the Supremacy Clause. That legislation subjected federal prosecutors to the ethical rules of the bars in the states where the prosecutors practice. If state bar codes included provisions that prohibited certain prosecutorial practices, federal prosecutors would have no choice but to abide by these provisions. Constraints imposed on federal prosecutors would, in turn, influence the conduct of law enforcement agents whom the prosecutors direct in proactive investigations.

This article will argue that the amendment of state bar codes presents a viable means of exerting state control over federal antiterrorism investigations. My analysis will proceed in five steps. First, I will contend that federal prosecutors have become central—often indispensable—figures in antiterrorism investigations. Second, I will suggest an amendment to states' bar codes that would help to ensure that all prosecutors (including federal prosecutors) respect the civil liberties of suspects whom they investigate. Third, I will argue that the Supremacy Clause would not thwart the application of this new rule to federal prosecutors. Fourth, I will argue that the rule would indirectly influence the conduct of FBI agents, who depend heavily on prosecutors in proactive investigations. Fifth, I will address foreseeable criticisms of my proposal.

I. Prosecutors’ Increasing Prominence in Investigations

In 1999, Professor Rory Little observed that, ""prosecutors today are centrally involved in . . . proactive criminal investigations.""\textsuperscript{21} That role became even more significant after the tragedy on September 11, 2001. An attorney for the FBI observed that by 2003, federal prosecutors’ involvement in intelligence-gathering had ""reached unprecedented proportions.""\textsuperscript{22} Prosecutors no longer wait on the sidelines for law enforcement agents to complete investigations; prosecutors now guide, and even control, many important phases of these investigations.

Prosecutors’ most powerful investigative tool is the grand jury. While the grand jury’s function has historically been a passive one—assessing whether evidence collected by police officers supports a finding of probable cause—today the grand jury takes a more active role in investigating crime and fortifying the prosecution’s case.\textsuperscript{23} The grand jury can issue subpoenas for both documents and testimony. Of course, it is actually the prosecutor who undertakes these activities, invoking the authority of the grand jury. Much of the evidence gathered by grand juries would be unavailable to law enforcement agents acting on their own.\textsuperscript{24} Recognizing the tremendous investigative power of grand juries, Congress has recently enlarged Rule 6(e) of the Federal Rules of Criminal Procedure so that federal prosecutors handling grand jury investigations can disclose their findings to a wide audience, including state and local officials, C.I.A. agents, and even foreign governments.\textsuperscript{25}

\textsuperscript{2005, available on WESTLAW at 2005 WLNR 6567327.}
The approval of prosecutors is necessary for law enforcement agents to use certain electronic surveillance techniques. An agent may not apply for a Title III wiretap unless the agent has received authorization from a high-level attorney within the U.S. Department of Justice. Similarly, when an agent wishes to install a “trap and trace” device—which captures the numbers dialed in outgoing telephone calls—the agent must depend on a prosecutor to present this request to a magistrate or judge. So too is a prosecutor’s involvement crucial for an agent to set up a pen register, which identifies the phone numbers from which incoming calls originated.

Agents need the help of prosecutors to obtain search warrants and arrest warrants. While federal law technically permits agents to obtain such warrants from judges without the assistance of prosecutors, in practice agents rely heavily on prosecutors to screen the draft applications and affidavits, and to review whether agents have properly discussed the involvement of confidential informants, disclosed exculpatory evidence, listed all the locations and items for which the agents seek authority to search, etc. Agents recognize that judges are more likely to grant an application that a prosecutor has screened. Prosecutors’ involvement also increases the odds that a faulty search can be salvaged under the “good faith exception.”

Certain categories of undercover operations require the blessing of prosecutors. According to guidelines promulgated by the U.S. Attorney General, no FBI agent may undertake an undercover operation “involving any sensitive circumstance” unless the agent sends to FBI headquarters a “letter from the appropriate Federal prosecutor indicating that he or she has reviewed the proposed operation, including the sensitive circumstances reasonably expected to occur, agrees with the proposal and its legality, and will prosecute any meritorious case that has developed.” In reviewing the agent’s application to conduct the undercover operation, FBI headquarters must convene a committee that includes prosecutors designated by the Assistant Attorney General in charge of the Criminal Division. The committee may also include assistant U.S. attorneys from the district in which the FBI proposes to conduct the undercover operation. If one of the prosecutors reviewing the application expresses reservations “because of legal, ethical, prosecutive, or departmental policy considerations,” the operation cannot proceed unless the prosecutor’s concerns are overridden by high-level attorneys in the U.S. Department of Justice. Thus the FBI’s ability to conduct undercover investigations in sensitive circumstances depends, at many different junctures, on the approval of federal prosecutors.

Prosecutors also exert significant influence over agents’ use of investigative techniques pursuant to the Foreign Intelligence Surveillance Act (FISA). This 1978 legislation created an exception to the probable cause requirement for searches, wiretaps and subpoenas of records, so long as the applicant could demonstrate to the secret Foreign Intelligence Surveillance Court that the applicant’s primary purpose was to gather foreign intelligence. The original FISA did not contemplate that prosecutors would utilize this court for criminal investigations. In fact, a 1995 memorandum from the U.S. Attorney General emphasized that attorneys in the Criminal Division should not give the FBI advice “that would result in either the fact or the appearance of the
Criminal Division's directing or controlling the FBI" in any FISA investigation.⁴¹