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### **Confrontation After *Crawford v. Washington*: Defining “Testimonial”**

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## ARTICLES

### CONFRONTATION AFTER *CRAWFORD V. WASHINGTON*: DEFINING “TESTIMONIAL”

by  
Michael D. Cicchini\* & Vincent Rust\*\*

*When the state offers hearsay into evidence against a criminal defendant, the defendant’s constitutional right to confrontation is implicated. Under the test expressed in Ohio v. Roberts, that right to confrontation could be overcome by a judicial determination that the state’s proffered hearsay was reliable. Recognizing that the Roberts standard was vague and manipulable, the Court in Crawford v. Washington aimed to remove judicial discretion in lower court rulings by implementing a new framework for determining whether hearsay could be admitted against a defendant. It held that if the proffered statement is “testimonial” then it must be subject to cross-examination. Unfortunately, the Court declined to define testimonial, and in doing so has perpetuated the need for judicial discretion in determining the admissibility of hearsay. The Authors suggest that the Court should define testimonial to include all accusatory hearsay. Only a broad definition, they argue, will satisfy the text, purpose, and history of the Confrontation Clause as well as Crawford’s goal of constraining judicial discretion.*

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## I. INTRODUCTION

In criminal trials, prosecutors frequently offer accusatory statements into evidence without actually calling the declarant of the statement to testify in court. Often the declarant is unavailable because he cannot be located, invokes his right against self-incrimination, or simply refuses to testify. If the declarant’s statement was audio or video recorded, the state may simply offer to play the recording for the jury. If the statement was made to another person, e.g., a police officer, the state may offer to call that person and ask him to repeat the declarant’s statement for the jury.

When the declarant’s original, out-of-court statement constitutes hearsay, i.e., is offered for the truth of the matter asserted, the hearsay must first satisfy a hearsay exception in the evidence code.<sup>1</sup> Even if the hearsay is admissible under the evidence code, however, the defendant’s constitutional right to confront his accuser is also implicated.<sup>2</sup>

For example, suppose that a police officer intends to testify that the declarant told him “the defendant is the person who physically attacked me.” Because the declarant is not present to testify and the statement is being offered for the truth of the matter asserted, i.e., that the defendant was the attacker, the statement constitutes hearsay. While this statement might be admissible under the evidence code as an exception to the hearsay rule, the bigger question, and the focus of this Article, is whether such a statement should be admissible under the Confrontation Clause of the Constitution.

In answering this question, the U.S. Supreme Court in *Ohio v. Roberts* held that for such hearsay to be admissible against a defendant, the declarant must be unavailable to testify and the hearsay must carry an adequate “indicia of reliability.”<sup>3</sup> This rule often required a facts-and-circumstances analysis that

<sup>1</sup> See, e.g., WIS. STAT. § 908.03–.045 (2004).

<sup>2</sup> See, e.g., *Barber v. Page*, 390 U.S. 719 (1968).

<sup>3</sup> *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972)).

left the finding of reliability, and consequently the determination of admissibility, to the discretion of trial judges.<sup>4</sup>

The fundamental problem with *Roberts*, however, is that using judicial analysis rather than cross-examination undermines the core, underlying principles of the adversary system. Justice Scalia wrote that “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”<sup>5</sup>

Realizing that the *Roberts* framework “is so unpredictable that it fails to provide meaningful protection from even core confrontation violations,” the Court changed course in *Crawford v. Washington*.<sup>6</sup> In *Crawford*, the Court aimed to remove judicial discretion in lower court rulings by implementing a new framework for determining whether hearsay could be admitted against a defendant.

Under *Crawford*, the hearsay must first be categorized as testimonial or non-testimonial.<sup>7</sup> If the hearsay is testimonial, it is not admissible unless the declarant is unavailable and the defendant had a prior, meaningful opportunity to cross-examine the declarant.<sup>8</sup> If the defendant did not have such an opportunity, the hearsay must be excluded.<sup>9</sup> Under *Crawford*, therefore, the reliability of testimonial hearsay must be determined by cross-examination in court, as the Framers intended, and not by judicial determination as previously mandated under *Roberts*.<sup>10</sup>

The new *Crawford* framework, however, has actually done little to fulfill the intent of the Framers. *Crawford*’s ineffectiveness is largely due to the Court’s failure to define the term “testimonial.”<sup>11</sup> While the Court did offer many possible definitions of testimonial, and discussed the term at length, it refused to define it and gave little guidance in doing so.<sup>12</sup> The result is that judicial discretion in determining the admissibility of hearsay has not been replaced or even minimized, but instead has merely shifted from one

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<sup>4</sup> *Crawford v. Washington*, 541 U.S. 36, 67–68 (2004).

<sup>5</sup> *Id.* at 62.

<sup>6</sup> *Id.* at 63.

<sup>7</sup> *Id.* at 68.

<sup>8</sup> *Id.* The question of what constitutes prior, meaningful cross-examination is also the subject of much debate and is beyond the scope of this Article.

<sup>9</sup> *Id.* at 61.

<sup>10</sup> *Id.* (“Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross examination.”)

<sup>11</sup> *See id.* at 68 n.10 (acknowledging “that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty”).

<sup>12</sup> *See id.* *See also infra* notes 81–82. Future decisions of the Court may provide additional guidance. However, such guidance will likely be limited to the narrow factual scenarios similar to the cases giving rise to the decisions.

determinative issue—is the hearsay reliable?—to another determinative issue—is the hearsay testimonial?<sup>13</sup>

Part II of this Article will outline the *Roberts* framework and will discuss how its need for judicial discretion is its fundamental flaw. Part III will outline the *Crawford* framework and will illustrate how it has not eliminated the need for judicial discretion, but has merely transferred it from determining whether the hearsay is reliable to determining whether the hearsay is testimonial. Under both *Roberts* and *Crawford*, therefore, judges are still ultimately determining the admissibility of hearsay.

Part IV of this Article will argue that testimonial hearsay should be defined very broadly—as all accusatory hearsay—in order to minimize, if not remove, the need for judicial discretion in the admission of hearsay evidence. Part V will argue that hearsay, if any, falling outside of the definition of testimonial is still subject to constitutional scrutiny under *Roberts*. Part VI concludes the Article.

## II. CONFRONTATION BEFORE *CRAWFORD*: THE *OHIO V. ROBERTS* TEST

### A. Policy and Rule

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>14</sup> Confrontation of a witness serves many purposes, including "testing the recollection and sifting the conscience of the witness" and allowing the jury to decide "whether he is worthy of belief."<sup>15</sup> More succinctly stated, "the Clause's ultimate goal is to ensure reliability of evidence."<sup>16</sup>

Under the plain text of the Clause, as well as under *Roberts*, the defendant's confrontation rights were implicated whenever the state offered into evidence any hearsay, regardless of its type or classification.<sup>17</sup> Under *Roberts*, in order to introduce any type of hearsay against a defendant, the state first had to show that the declarant of the hearsay was unavailable for trial.<sup>18</sup> If the declarant was actually available for trial, he had to be called to testify and

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<sup>13</sup> Tom Lininger, *Prosecuting Batterers after Crawford*, 91 VA. L. REV. 747, 766–67 (2005) (conceding that "[o]ne might argue that the *Crawford* ruling did not eliminate the unpredictability and subjectivity of the *Roberts* test: *Crawford* just relocated the ambiguity from the reliability test to the definition of testimonial hearsay," but maintaining that while "*Crawford* is imperfect" it is "a commendable advancement of confrontation jurisprudence"). See also *infra* note 67.

<sup>14</sup> U.S. CONST. amend. VI.

<sup>15</sup> *Mattox v. U.S.*, 156 U.S. 237, 242–43 (1895).

<sup>16</sup> *Crawford*, 541 U.S. at 61.

<sup>17</sup> See *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). For a history of the decisions leading up to *Roberts*, see, e.g., Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 189–99 (2004).

<sup>18</sup> *Roberts*, 448 U.S. at 65.

be subject to cross-examination by the defendant.<sup>19</sup> Upon a showing that the declarant was not available, however, the hearsay could be admitted into evidence, but only if it carried an adequate “indicia of reliability.”<sup>20</sup>

The courts would find the hearsay to be reliable, and would admit it into evidence, if it fell within a “firmly rooted hearsay exception” or possessed “particularized guarantees of trustworthiness.”<sup>21</sup> This second test required the application of judicial discretion to determine reliability, and consequently admissibility, by analyzing the facts and circumstances surrounding the statement.<sup>22</sup> The theoretical result of this test was that the defendant was afforded either the opportunity for actual cross-examination or, if the witness was not available, the functional equivalent of actual cross-examination through the judicial determination of reliability.<sup>23</sup>

#### B. Roberts’ Underlying Problem: Judicial Discretion

The fundamental problem with *Roberts* is that allowing judges to determine the hearsay’s reliability, and consequently admissibility, undermines the core principles of our adversary system. The *Roberts* test “allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability.”<sup>24</sup> This test for reliability is a vague, highly subjective judicial analysis. “Vague standards are manipulable” and “judges, like other government officers, [cannot] always be trusted to safeguard the rights of the people.”<sup>25</sup> Furthermore, “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”<sup>26</sup> The *Roberts* test is fundamentally flawed in that a judicial determination of the reliability of evidence essentially transfers the jury’s function to the judge.

The application of *Roberts* manifested itself in the form of two symptoms, or as the Court stated, two “vices.”<sup>27</sup> First, it resulted in inconsistent and unpredictable rulings. “Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts.”<sup>28</sup>

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<sup>19</sup> The rule requiring a showing of unavailability was subsequently modified in several cases. *See, e.g.*, *U.S. v. Inadi*, 475 U.S. 387 (1986) (eliminating the required showing of unavailability for co-conspirator statements); *White v. Illinois*, 502 U.S. 346 (1992) (eliminating the required showing of unavailability for spontaneous declarations and statements made for medical treatment). However, witness availability or unavailability is not an issue addressed in this Article.

<sup>20</sup> *Roberts*, 448 U.S. at 66.

<sup>21</sup> *Id.*

<sup>22</sup> *See id.* at 67–73.

<sup>23</sup> *Id.* at 65.

<sup>24</sup> *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

<sup>25</sup> *Id.* at 67–68.

<sup>26</sup> *Id.* at 62.

<sup>27</sup> *Id.* at 63.

<sup>28</sup> *Id.*

For example, “[t]he Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime . . . while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect.”<sup>29</sup>

Second, in addition to its unpredictability, the “unpardonable vice” of *Roberts* is “its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”<sup>30</sup> These core testimonial statements are hearsay statements derived from *ex parte* examinations, e.g., interrogations, by government agents that are not subjected to cross-examination by the defendant.<sup>31</sup> The admission of these hearsay statements through a mere judicial determination of reliability, without cross-examination, is the “principal evil at which the Confrontation Clause was directed.”<sup>32</sup> Although this type of hearsay was routinely admitted under *Roberts*, “[t]he Framers would be astounded to learn that *ex parte* testimony could be admitted against a criminal defendant because it was elicited by ‘neutral’ government officers.”<sup>33</sup>

The factual and procedural history leading up to the Court’s decision in *Crawford* is an excellent illustration of both of the vices of *Roberts*: first, its inconsistency and unpredictability; and second, its capacity to admit even core testimonial hearsay without cross-examination. In *Crawford*, the defendant Michael Crawford was charged criminally for stabbing a man.<sup>34</sup> Mr. Crawford’s wife Sylvia, a witness and suspect in the incident, gave a statement to police while she was being interrogated.<sup>35</sup> Sylvia was unavailable to testify at Mr. Crawford’s trial, and the state attempted to offer her statement into evidence against him.<sup>36</sup> Mr. Crawford claimed the stabbing was justified in self-defense.<sup>37</sup>

The trial court applied the *Roberts* framework and, based on its facts-and-circumstances judicial analysis, found Sylvia’s hearsay statement reliable for several reasons: (1) “Sylvia was not shifting blame but rather corroborating her husband’s story that he acted in self-defense”; (2) “she had direct knowledge as an eyewitness”; and (3) “she was being questioned by a ‘neutral’ law enforcement officer.”<sup>38</sup>

The Washington Court of Appeals reversed.<sup>39</sup> After applying the same *Roberts* framework to the same statement and the same facts and

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<sup>29</sup> *Id.* (citations omitted).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 51–52.

<sup>32</sup> *Id.* at 50.

<sup>33</sup> *Id.* at 66.

<sup>34</sup> *Id.* at 40.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* Crawford’s wife, Sylvia, “did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse’s consent.” *Id.* Because Crawford refused to consent, Sylvia was “unavailable” to testify.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 41.

circumstances, the court determined that the hearsay was not reliable.<sup>40</sup> The court found that: (1) Sylvia’s statement contradicted her husband’s on an issue “crucial to [his] self-defense claim”; (2) “at one point she admitted that she had shut her eyes during the stabbing”; and (3) her statement was “made in response to specific questions” by law enforcement.<sup>41</sup>

The Washington Supreme Court then reversed the court of appeals.<sup>42</sup> The supreme court ignored the facts and circumstances considered by the two lower courts, and instead found the hearsay reliable because it interlocked with the defendant’s statement.<sup>43</sup> Finally, had the U.S. Supreme Court applied the *Roberts* framework instead of overruling it, the Court would have reversed the Washington Supreme Court. The Court stated that “[w]e readily concede that we could resolve this case by simply reweighing the ‘reliability factors’ under *Roberts* and finding that Sylvia Crawford’s statement falls short.”<sup>44</sup>

These various court holdings clearly showcase the underlying problem and the resulting vices of the *Roberts* framework. *Roberts*’ use of judicial discretion to determine reliability, and consequently admissibility, of hearsay evidence resulted in wildly inconsistent rulings and had the propensity to admit even core testimonial statements without cross-examination. *Crawford* was intended to correct *Roberts*’ underlying problem—the use of judicial discretion to determine the reliability and admissibility of hearsay—and in the process eliminate *Roberts*’ two vices.

### III. A NEW FRAMEWORK: *CRAWFORD V. WASHINGTON*

#### A. *Policy and Rule*

In *Crawford*, the Court stated that *Roberts*’ judicial determination of reliability, and consequently admissibility, illustrates a “fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion.”<sup>45</sup> Therefore, *Crawford* requires that the reliability of evidence be tested through cross-examination as the Framers intended, and not through the exercise of judicial discretion as required under *Roberts*.<sup>46</sup>

Under *Crawford*, if the state wishes to introduce hearsay at a criminal trial, the state must still show that the declarant of the hearsay is unavailable for trial.<sup>47</sup> If the declarant is actually available for trial, he must be called to testify

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 67.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 67–69.

<sup>47</sup> *Id.* at 57. As a preliminary step, of course, the state must show that the hearsay satisfies an exception to the evidence code’s hearsay rule.



and be subject to cross-examination by the defendant.<sup>48</sup> Assuming the declarant is not available, the court must then make a determination of whether the hearsay is testimonial or non-testimonial in nature.<sup>49</sup> If the hearsay is testimonial, it may be admitted only if the defendant had a “prior opportunity for cross examination.”<sup>50</sup> If there was no prior opportunity for cross-examination, the hearsay must be excluded.<sup>51</sup>

The Court very clearly links reliability to cross examination: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”<sup>52</sup> Therefore, the days of judicial discretion, at least insofar as the determination of reliability, are gone.

#### B. Crawford’s Failure to Define “Testimonial”

The entire *Crawford* framework hinges on the term “testimonial.” If the hearsay is testimonial, the Clause demands actual cross-examination or the evidence must be excluded. If the hearsay is non-testimonial, the Clause may not require actual cross-examination.<sup>53</sup> Despite the obvious importance of the term, the Court decided to “leave for another day any effort to spell out a comprehensive definition of ‘testimonial’.”<sup>54</sup> The Court did, however, give three examples of possible definitions:

[E]x-parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[.]<sup>55</sup>

[E]xtrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[.]<sup>56</sup>

[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]<sup>57</sup>

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<sup>48</sup> The rule requiring a showing of unavailability has been relaxed in several circumstances. *See id.* at 58 n.8.

<sup>49</sup> An important issue beyond the scope of this Article is whether state legislatures will attempt to circumvent *Crawford*. *See, e.g.,* Lininger, *supra* note 13, at 816–17 (urging legislatures to create criminal charges less dependent upon witness testimony).

<sup>50</sup> *Crawford*, 541 U.S. at 68.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 68–69.

<sup>53</sup> *Id.* at 68. *See also infra* Part V. The proper treatment of non-testimonial hearsay is still the subject of considerable debate.

<sup>54</sup> *Crawford*, 541 U.S. at 68.

<sup>55</sup> *Id.* at 51 (citations omitted).

<sup>56</sup> *Id.* at 51–52 (citations omitted).

<sup>57</sup> *Id.* at 52 (citations omitted).

Although the Court refused to adopt any of these definitions, it did hold that at a minimum, testimonial must include “prior testimony at a preliminary hearing, before a grand jury, or at a former trial” as well as statements obtained during “police interrogations.”<sup>58</sup> Therefore, if a witness had been interrogated by police and gave a statement, but the witness later became unavailable for trial and had not been cross-examined at any earlier hearing, the statement to police would be testimonial hearsay and could not be admitted at the defendant’s trial. Unfortunately, the Court used the term interrogation in a “colloquial, rather than any technical legal, sense” and also warned that “[j]ust as various definitions of ‘testimonial’ exist, one can imagine various definitions of ‘interrogation,’ and we need not select among them in this case.”<sup>59</sup>

While the Court discussed both of the key terms at length, and gave numerous examples of testimonial hearsay, it “did not pick a consistent dimension on which to describe results. Some of its examples related to at least one of its suggested general definitions of testimonial . . . but other examples used categories not directly used in any of the Court’s definitions.”<sup>60</sup> Further, “[o]ther examples related to *categories of hearsay law*—business records and co-conspirator statements—appeared even less theoretically connected to the suggested definitions.”<sup>61</sup>

Finally, the Court also discussed at length the historical practices it deemed relevant to deciphering the Framers’ intent as to the scope of the Clause’s protection.<sup>62</sup> The Court focused on prior civil law abuses where government agents would conduct *ex parte* examinations of witnesses, and then offer these formal, sworn witness statements in evidence against a defendant at trial, without any opportunity for confrontation.<sup>63</sup> It was this formal, government-developed hearsay that was “the principal evil at which the Confrontation Clause was directed.”<sup>64</sup> The Court’s history lesson hinted at a narrow definition of testimonial, seemingly limiting the term to only government initiated and developed hearsay. This would, of course, move the definition closer to the Court’s mandatory minimum definition, but would be directly at odds with the three broader definitions specifically enumerated by the Court.<sup>65</sup>

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<sup>58</sup> *Id.* at 68.

<sup>59</sup> *Id.* at 53 n.4.

<sup>60</sup> Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 526 (2005).

<sup>61</sup> *Id.* at 527 (emphasis added).

<sup>62</sup> *Crawford*, 541 U.S. at 43–55.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 50.

<sup>65</sup> The Court has granted certiorari in two cases post-*Crawford*, and may also decide future cases. However, given the structure the Court has set in *Crawford*, combined with the narrow factual issues identified in the pending, post-*Crawford* cases, there is little hope for a broad, clear and consistent definition of testimonial. *See infra* notes 81 and 82.

C. *The More Things Change the More They Stay the Same: Judicial Discretion Under Crawford*

The purpose of *Crawford* was to eliminate the use of judicial discretion in determining the reliability, and consequently the admissibility, of hearsay.<sup>66</sup> *Crawford*, however, has failed in this regard due to the Court's refusal to broadly and unequivocally define testimonial and its sub-terms. Under *Crawford*, therefore, the need for judicial discretion has not been eliminated, but merely transferred from one determinative issue—whether the hearsay is reliable—to another determinative issue—whether the hearsay is testimonial.<sup>67</sup> Trial judges, who “could not always be trusted to safeguard the rights of the people,”<sup>68</sup> are now deciding which hearsay is testimonial and must be excluded, and which hearsay is non-testimonial and therefore may be admitted. The end result, therefore, is the same as it was under *Roberts*: the admission of hearsay is still based on judicial discretion, untested by cross-examination.

*Crawford* also created an additional layer of judicial discretion. Before applying the *Crawford* framework, each court must first decide what definition of “testimonial” it wishes to apply. In so doing, courts have been wildly inconsistent. Some courts have adopted one of the three definitions outlined by the Court, some have adopted none, and some have adopted all three.<sup>69</sup>

Eventually, litigation may work its way through the state and federal court systems, and consistent state-by-state and circuit-by-circuit definitions of testimonial and interrogation may ultimately be developed. Alternatively, the Court could continue to build the definition of testimonial on a case-by-case basis. However, the current predicament of uncertainty and inconsistency is not a temporary state of affairs, as the Court naively hopes.<sup>70</sup> The reality is that nearly any definition of testimonial, and certainly all of the definitions proposed by the Court, will still require judicial discretion and a facts-and-circumstances analysis to determine if the proffered hearsay falls within that definition. This will perpetuate, not eliminate, the need for judicial discretion by the lower courts.

For example, consider the possible definitions of testimonial offered by the Court and enumerated in Part III. B., *supra*. Under the first and third

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<sup>66</sup> *Crawford*, 541 U.S. at 67–68. The Court stated that the Framers “were loath to leave too much discretion in judicial hands” and realized that “open-ended balancing tests” result in “[v]ague standards” that are manipulable. *Id.* Rather, “[t]he Constitution prescribes a procedure for determining the reliability of testimony in criminal trials”—confrontation. *Id.* at 67.

<sup>67</sup> Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 70 (“*Crawford* is only another balancing test, with the balancing now being carried out in deciding whether any statement should be labeled testimonial.”). See also Lininger, *supra* note 13.

<sup>68</sup> *Crawford*, 541 U.S. at 67.

<sup>69</sup> See, e.g., *State v. Manuel*, 697 N.W.2d 811, 822 (Wis. 2005) (“For now, at a minimum, we adopt all three of *Crawford*'s formulations.”).

<sup>70</sup> *Crawford*, 541 U.S. at 68 n.10 (criticizing the *Roberts* framework as “permanently unpredictable” and thereby implying that *Crawford*'s framework is only temporarily unpredictable).

definitions, how would a court decide whether the declarant reasonably expected that the statement “be used prosecutorially” or reasonably believed “that the statement would be available for use at a later trial”? Should the actual, subjective intent of the declarant matter? Under the second definition offered by the Court, how is a “confession” defined? To what extent must the statement inculcate the declarant? Is this term any easier to define than interrogation? Under any and all definitions, should the statements be parsed and analyzed in sections, or viewed only as a whole?

These and other questions can only be answered by analyzing the facts and circumstances surrounding the declarant and the statement. This judicial analysis would then determine the hearsay’s status as testimonial or non-testimonial. This judicially determined status would in turn dictate the hearsay’s admissibility. Once again, hearsay would be admitted into evidence as the result of judges applying vague standards, but this time under a different label: testimonial rather than reliable. Unfortunately, “[v]ague standards are manipulable,”<sup>71</sup> leaving the same fundamental, underlying problem of *Roberts* that *Crawford* was intended to cure.

Time has also shown that along with the continued need for judicial discretion, inconsistent and unpredictable rulings also remain. It is “apparent that the Supreme Court’s refusal to articulate a definition of ‘testimonial statements’ has resulted in irreconcilable evidentiary rulings.”<sup>72</sup> This is evident in cases adopting the third definition of testimonial: “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>73</sup>

When applying this definition, courts have struggled with the term “objective witness.” For example, *In re T.T.* held that the “objective witness” is an objective person in the shoes of the declarant at the time the statement was made.<sup>74</sup> Similarly, *People v. Cage* held that the proper focus of the objective witness is on the declarant, but the declarant’s subjective expectations when making the statement, including the actual expectation that the statement be used in prosecution, are irrelevant.<sup>75</sup> In direct contrast, *People v. Sisavath* held that the “objective witness” is an objective, independent observer, not an objective person in the shoes of the declarant.<sup>76</sup> In yet a different approach, *People v. Vigil* held that the proper focus of the objective witness is from the standpoint of the person listening to the statement.<sup>77</sup>

Additionally, and not surprisingly in light of the Court’s historical discussion, some courts “appear to be applying the definition of testimonial

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<sup>71</sup> *Id.* at 68.

<sup>72</sup> Melissa Moody, *A Blow to Domestic Violence Victims: Applying the “Testimonial Statements” Test in Crawford v. Washington*, 11 WM. & MARY J. WOMEN & L. 387, 398 (2005).

<sup>73</sup> *Crawford*, 541 U.S. at 52.

<sup>74</sup> 815 N.E.2d 789, 802 (Ill. App. Ct. 2004).

<sup>75</sup> 15 Cal. Rptr. 3d 846, 856–57 (Ct. App. 2004).

<sup>76</sup> 13 Cal. Rptr. 3d 753, 758 (Ct. App. 2004).

<sup>77</sup> 104 P.3d 258, 265 (Colo. Ct. App. 2004).

relatively expansively to modern practices. Other courts are reading the definition much more narrowly, focusing on historical examples and perhaps responding to the concern that the broader definition of testimonial would have too great an impact on the prosecution of cases.”<sup>78</sup>

These case examples and legal commentary show both the multiple levels of judicial discretion demanded by the *Crawford* framework and the resulting inconsistent and unpredictable rulings.<sup>79</sup> While this reality may be ignored by some, it should surprise no one. The Court not only refused to define testimonial, but its dicta also created “a mantle of uncertainty over future criminal trials in both federal and state courts”<sup>80</sup> which has become evident in lower courts’ post-*Crawford* rulings.

Since its decision in *Crawford*, the Court has accepted certiorari in two cases directly involving the definition of testimonial hearsay.<sup>81</sup> While these cases may seem to promise some guidance beyond the vagueness of *Crawford*, the decisions likely will not eliminate or even reduce the need for judicial discretion. Both cases before the Court are very fact specific, where alleged victims of domestic violence made statements to the authorities within minutes, and at the scene, of the alleged crimes.<sup>82</sup> Even if the Court were to announce a

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<sup>78</sup> Mosteller, *supra* note 60, at 529.

<sup>79</sup> A thorough listing of the lower court holdings interpreting *Crawford* is not the purpose of this Article. However, many articles have been written on this topic and often separate and analyze holdings by type of statement or by other relevant facts and circumstances. See, e.g., Robert Wm. Best, *To Be or Not to Be Testimonial? That Is the Question: 2004 Developments in the Sixth Amendment*, ARMY LAW., Apr. 2005, at 65 (analyzing hearsay by listener—non-governmental actors, social workers and other medical professionals, and 9-1-1 phone calls); Mosteller, *supra* note 60 (analyzing hearsay by type of case—“child sexual abuse” and “domestic violence”); Chris Hutton, *Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent In Crawford v. Washington*, 50 S.D. L. REV. 41 (2005) (analyzing hearsay by type of case—“domestic violence” and “child witness”); Miguel Méndez, *Crawford v. Washington: A Critique*, 57 STAN. L. REV. 569 (Nov. 2004) (analyzing hearsay by type of hearsay—“business records”, “coconspirators’ declarations”, and “declarations against interest”); Ralph Ruebner & Timothy Scahill, *Crawford v. Washington, the Confrontation Clause, and Hearsay: A New Paradigm for Illinois Evidence Law*, 36 LOY. U. CHI. L.J. 703 (2005) (analyzing hearsay by hearsay exceptions in Illinois).

<sup>80</sup> *Crawford v. Washington*, 541 U.S. 36, 69 (2004) (Rehnquist, C.J., concurring).

<sup>81</sup> See *State v. Davis*, 111 P.3d 844 (Wash. 2005), *cert. granted*, 126 S. Ct. 547 (U.S. Oct. 31, 2005) (No. 05-5224); Petition for Writ of Certiorari, *Davis*, 126 S. Ct. 547 (No. 05-5224), 2005 WL 2844969 (“Whether an alleged victim’s statements to a 911 operator naming her assailant . . . constitute ‘testimonial’ statements subject to the Confrontation Clause[?]”); *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005) *cert. granted*, 126 S. Ct. 552 (U.S. Oct. 31, 2005) (No. 05-5705); Petition for Writ of Certiorari, *Hammon*, 126 S. Ct. 552 (No. 05-5705), 2005 WL 2844970 (“Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement[?]”).

<sup>82</sup> See *id.* In fact, after this Article was written, but before it was published, the Supreme Court decided both *Davis* and *Hammon* and held that statements made in response to police interrogation will be classified as either testimonial or non-testimonial depending on the “primary purpose” of the interrogation. *Davis v. Washington*, 126 S. Ct. 2266, 2273–74 (2006). If the interrogation was intended primarily to enable police to respond to an “ongoing emergency,” then the resulting statements are non-testimonial. *Id.* at 2273. However, if the interrogation was intended primarily to “establish or prove past events,” then

clear, broad definition of testimonial, its holding would only apply to cases that are factually similar, i.e., statements made by alleged victims in response to police questioning in so-called fresh-accusation cases.

The problem with this would be two-fold. First, it would do nothing to address the majority of hearsay that affects defendants in criminal cases, such as videotaped statements of children, statements by independent witnesses and delayed reports by alleged victims, to name just a few examples. Second, it would still require judicial discretion to determine whether the new definition should apply under the facts of a given case. For example, did too much time pass to the point where the accusation is no longer a fresh accusation? Does it matter that the alleged victim went to the police station rather than reporting the event at the scene of the alleged crime? These questions leave the same problem *Crawford* was intended to remedy: the need for judicial discretion in determining the admissibility of hearsay.

#### IV. DEFINING "TESTIMONIAL" POST-CRAWFORD

The goal of *Crawford* was to eliminate judicial discretion from the determination of whether the proffered hearsay is reliable, and therefore admissible at trial. This judicial determination of reliability was not significant for its own sake, but rather because it, in turn, determined admissibility.<sup>83</sup>

In order to advance the goal of *Crawford* and the Clause, specifically that accusations be tested through cross-examination, the term testimonial should be defined as all accusatory hearsay, i.e., hearsay that tends to establish in any way an element of the crime or the identification of the defendant.<sup>84</sup> To adopt a narrower definition, including any of the three definitions cited by the Court, would necessarily require a tremendous amount of judicial discretion under a facts-and-circumstances analysis. Although such an analysis would be under

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the resulting statements are testimonial. *Id.* at 2274. By establishing this test, the Court has again perpetuated the need for judicial discretion, the very thing *Crawford* was intended to eliminate. As Justice Thomas stated in his dissenting opinion, this test "yields no predictable results" and any attempt to divine the primary purpose of an interrogation "calls for nothing more than a guess by courts." *Id.* at 2283, 2285 (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>83</sup> *Crawford*, 541 U.S. at 62 ("The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of accessing reliability [confrontation of the witness in front of a jury] with a wholly foreign one [the judicial application of a balancing test].").

<sup>84</sup> See Best, *supra* note 79, at 87 (arguing that, at least in cases of statements to social workers and medical personnel, "to the extent that a statement is accusatory, the declarant's statement should be considered testimonial."); see also Reed, *supra* note 17, at 224 ("In a criminal prosecution, 'testimony' would include any solemn in-court statement or out-of-court substitute that identifies the perpetrator of the offense, or directly proves an element of any offense charged in the indictment.").

the heading of testimonial, rather than reliability, the end result would be the same: judges would still be deciding which hearsay is admissible.<sup>85</sup>

The most obvious way to accomplish this is to have the Court explicitly define testimonial broadly, as all accusatory hearsay. However, given the dicta of *Crawford* and the incremental steps the Court appears to be taking, this likely will not happen in the near future, if at all.<sup>86</sup> Despite this, lower courts should ensure a defendant's right to confront his accuser by defining testimonial broadly within any confines the Court may impose. Additionally, and preferably, lower courts may and should offer greater protection for its citizens by defining testimonial as all accusatory hearsay under state constitutional provisions.<sup>87</sup> Offering greater protection under state law is not only appropriate, but in fact explicitly approved by the Court.<sup>88</sup>

The previous section has shown that *Crawford's* continued use of judicial discretion, regardless of how it is labeled, has perpetuated *Roberts'* first vice: inconsistent and unpredictable lower court rulings. More significantly, however, the continued use of judicial discretion would also perpetuate the unforgivable vice of *Roberts*: the admission of even core testimonial statements without the opportunity for cross-examination. Conversely, defining testimonial broadly as all accusatory hearsay would accomplish the "intended constraint on judicial discretion"<sup>89</sup> and would protect against "core

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<sup>85</sup> The distrust of the government discussed by the Court in *Crawford* is not unfounded. See, e.g., Moody, *supra* note 72, at 394 ("[W]hen courts stubbornly insist on admitting hearsay evidence that they believe should be admitted despite *Crawford's* exclusion of testimonial evidence, they must creatively circumvent the *Crawford* test with inventive evidentiary rulings"); David Jaros, *The Lessons of People v. Moscat: Confronting Judicial Bias in Domestic Violence Cases Interpreting Crawford v. Washington*, 42 AM. CRIM. L. REV. 995, 1005 (2005) (describing a firsthand account of the "urgency, on the court's part, to establish that *Crawford* does not impose an obstacle to [victimless prosecutions]" and discussing "judges' predisposition to believe the prosecution's version of domestic assaults.").

<sup>86</sup> See *supra* notes 81–82. By refusing to define testimonial in *Crawford*, and then nearly two years later deciding *Davis* and *Hammon* on very narrow grounds by adopting a judicial facts-and-circumstances approach, the Court has apparently taken a piece-meal approach to defining testimonial and likely will proceed slowly on a case-by-case basis. This approach, if pursued further, will permanently defeat *Crawford's* goal of replacing judicial discretion with cross-examination. By distinguishing between factual situations when forming various definitions, the Court is requiring lower courts to do the same in order to determine which definition applies under a given case.

<sup>87</sup> See, e.g., *State v. Knapp*, 700 N.W.2d 899, 913–14 (Wis. 2005) (holding that "this court will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." Further, "[i]t is plain that United States Supreme Court interpretations of the United States Constitution do not bind the individual state's power to mold higher standards under their respective state constitutions.") (quotations and citations omitted).

<sup>88</sup> See *id.* ("Indeed, the United States Supreme Court, through both majority and dissenting opinions, has explicitly extended invitations to the states to adopt different rules should they deem it appropriate.").

<sup>89</sup> *Crawford v. Washington*, 541 U.S. 36, 67 (2004).

confrontation violations.”<sup>90</sup> Such a definition would also be consistent with the text of the Clause and the Framers’ intent.

A. *Preventing the Admission of Core Testimonial Hearsay*

Those seeking to limit constitutional protection under *Crawford* invariably argue for some type of facts-and-circumstances analysis or balancing test to determine whether the proffered hearsay is testimonial.<sup>91</sup> It is true that these fact intensive tests are used in many areas of constitutional criminal law, including confession cases and Fourth Amendment search and seizure cases. Although such a test would have constitutional precedent in other areas, it would be ineffective, and in fact counter-productive, in Confrontation Clause cases. Most significantly, a facts-and-circumstances test would fail to cure *Roberts*’ most serious vice: the propensity to admit even core confrontational hearsay without the opportunity for cross-examination.<sup>92</sup>

In a confrontation case the declarant is necessarily unavailable or he would simply be called to testify. Because of this, the only evidence before a court is the testimony from the government agent, typically a police officer, who supposedly witnessed the statement. Relying on a facts-and-circumstances test to determine whether the statement is testimonial would create an incentive for police and prosecutors to alter their practices, and would also provide the incentive and opportunity for police perjury to ensure the admission of the statement.

1. *The Adaptability of Police and Prosecutor Practices*

Consider, for example, that instead of defining testimonial broadly as all accusatory hearsay, the term instead required a showing of some affirmative action by a government agent to obtain the hearsay statement in the course of his investigation.<sup>93</sup> Factors under such a test would likely include: whether the statement was recorded by the agent; whether the statement was taken in response to structured questioning by the agent; whether the witness was in

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<sup>90</sup> *Id.* at 63 (asserting that the *Roberts* “framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.”).

<sup>91</sup> See, e.g., Whitney Baugh, Note, *Why the Sky Didn’t Fall: Using Judicial Creativity to Circumvent Crawford v. Washington*, LOY. L.A. L. REV. 1835, 1868–69 (2005) (advocating a facts-and-circumstances test to determine whether a proffered statement is testimonial); Richard D. Friedman, *Grappling With the Meaning of “Testimonial”*, 71 BROOK. L. REV. 241, 252–55 (2005) (advocating a facts-and-circumstances test to determine “whether the declarant *understood* that there was a significant probability that the statement would be used in prosecution”); Brooks Holland, *Testimonial Statements under Crawford: What Makes Testimony...Testimonial?* 71 BROOK. L. REV. 281, 289 (2005) (advocating a facts-and-circumstances test to determine whether “the circumstances surrounding the out-of-court statement [made] its formal, adjudicative use *foreseeable* to the declarant”).

<sup>92</sup> Méndez, *supra* note 79, at 609–10 (“Judges should not be entrusted [to determine reliability of accusers and their statements] unless we are confident that we can formulate rules that avoid the pitfalls singled out by the Court—unpredictability, manipulation, and inconsistent results. That may prove to be an impossible task.”).

<sup>93</sup> See, e.g., *State v. Searcy*, 709 N.W.2d 497, 512 (Wis. Ct. App. 2005).



custody; and whether there are other facts and circumstances that indicate the agent's intent.

Now consider that government agents—including police, domestic violence victims' advocates and children's advocates—commonly question alleged victims and videotape these formal interviews.<sup>94</sup> Under our hypothetical definition of testimonial, such a videotaped statement made in response to structured questioning by a government agent would clearly fall within the definition of testimonial, and therefore would be inadmissible if the declarant were unavailable for trial.

In response, prosecutors could alter the form of the evidence that is developed in the investigation and prosecution of a case. Interviewers could be instructed to conduct interviews in an informal, unstructured environment. Interviewers could also be trained to use leading questions more subtly, or to better prepare the alleged victim before the camera is employed.<sup>95</sup> More likely, all videotaping would be stopped entirely and the state could rely on the notes of the interviewer. Alternatively, the notes could be destroyed after being selectively incorporated into the interviewer's report. The significant point is that any facts-and-circumstances test will, by its very nature, allow for easy circumvention of constitutional protection:

[Government agents] will, at a minimum, adapt their practices. Under any facts-and-circumstances test, confrontation will be defined and implemented in a dynamic environment where police and prosecutors, and over the longer run, judges and prosecutors, can change practices and potentially alter results under *Crawford*. Relatively common practices that created clearly testimonial statements are likely now to simply disappear, only to be replaced by others that are similar in substantive result, but less clearly produce testimonial statements.<sup>96</sup>

Although modifying investigative practices requires conscious planning and strategy, equally harmful from the standpoint of the defendant and the Clause are the risks of unconscious bias, honest mistake and misinterpretation by interviewers. The mere absence of malicious intent by the government would not render the hearsay harmless.

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<sup>94</sup> See, e.g., *State v. Snider*, 668 N.W.2d 784, 787 (Wis. Ct. App. 2003) (describing a child's report of sexual assault to a school counselor, who in turn "called the Monroe County Department of Human Services and reported the alleged assault to a social worker. The social worker in turn contacted a police detective. The social worker conducted an investigative interview with the victim while the detective videotaped the interview."). Under many circumstances, the videotaped statements of children are admissible in any criminal trial or hearing, even where the child is available to testify. See, e.g., WIS. STAT. § 908.08 (2004).

<sup>95</sup> Kirst, *supra* note 67, at 88–89 ("Child forensic interviewers have been advised to change some of their techniques to increase the chances their interviews will be labeled nontestimonial and admitted when the child does not testify.").

<sup>96</sup> Mosteller, *supra* note 60, at 529–30. See also Friedman, *supra* note 91, at 249 ("As a result, we have seen police advised to try to secure accusatory statements before beginning what would necessarily be deemed a formal interrogation.").

## 2. *Government Manipulation: Lessons from the Fourth Amendment*

Most statements obtained in the course of a criminal case are not recorded, and many of those that normally would have been recorded no longer would be, due to modified practices. This provides government agents with the opportunity to lie about the circumstances surrounding the statement. This problem is most evident in Fourth Amendment search and seizure cases. In 1961, the Supreme Court in *Mapp v. Ohio*<sup>97</sup> made the exclusionary rule effective against the states, and all evidence obtained in violation of a suspect's Fourth Amendment rights required suppression. A study was then conducted detailing arrests in drug possession cases both before and after 1961:

Before that [1961] ruling, police reports for narcotics arrests rarely claimed that a suspect "dropped" the contraband, making a search unnecessary. Only 14 percent of arrest reports made that claim, while 33 percent reported they simply reached into the suspect's pockets and found the drugs. After the Supreme Court decision allowed suppression of the contents of a suspect's pockets, 50 percent of police reports indicated the suspect dropped the drugs when police approached. In only 5 percent of the cases was it necessary to reach into the suspect's pockets. How remarkable that a decision of the U.S. Supreme Court in Washington, D.C., could cause an outbreak of dropsy on the sidewalks of New York! *The exclusionary rule was having a strong impact on police behavior. But rather than encouraging compliance with the Fourth Amendment, it was encouraging false testimony to make it appear the police were conforming to the Fourth Amendment.*<sup>98</sup>

Courts and commentators have noted that this type of dropsy testimony occurs often, typically in the same boilerplate fashion each time. According to Irving Younger, "[s]pend a few hours in the New York City Criminal Court . . . and you will hear case after case in which a policeman testifies that the defendant dropped narcotics on the ground, whereupon the policeman arrested him. Usually the very language of the testimony is identical from one case to another."<sup>99</sup>

Police perjury is widespread, widely tolerated, and has serious implications not only for defendants, but also for the criminal justice system more broadly.<sup>100</sup> "Police perjury may have terrible consequences. In individual cases, not only may the guilty be wrongly acquitted, but the innocent may be wrongly convicted. Over time, average citizens may lose faith in the police department and in the law itself."<sup>101</sup> These same risks in Fourth Amendment

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<sup>97</sup> 367 U.S. 643 (1961).

<sup>98</sup> GERALD F. UELMEN, *LESSONS FROM THE TRIAL: THE PEOPLE V. O.J. SIMPSON*, 39 (The Notable Trials Library 2003) (citations omitted) (emphasis added).

<sup>99</sup> Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 249 (1998) (citations omitted).

<sup>100</sup> *Id.* (citing multiple studies, reports, articles, cases, as well as other publications, documenting police perjury, its forms and implications).

<sup>101</sup> *Id.* at 237.

cases would also arise in Confrontation Clause cases if a facts-and-circumstances test were used to determine whether hearsay is testimonial.

Under a facts-and-circumstances test, the declarant is necessarily unavailable to testify or he would simply be called as a witness and no confrontation issue would arise.<sup>102</sup> Given that the declarant is absent, the only way to determine if the statement is testimonial is to rely on the government agent's version of the facts and circumstances surrounding the statement. The agent could simply testify that the statement was not made under structured questioning, or whatever the applicable test may be at the time, and there would likely be nothing to contradict the agent's version of events. Without a declarant or independent witnesses to testify, the agent's testimony would be unchallenged and incorporated into the court's factual findings.<sup>103</sup>

This illustrates that a facts-and-circumstances test would necessarily defeat the very policy behind the *Crawford* decision. First, as the Court acknowledged, government agents cannot be trusted to safeguard the rights of the people.<sup>104</sup> Therefore, *Crawford* prohibits an agent from interrogating a witness and then reading that statement into evidence against the defendant.<sup>105</sup> However, under a facts-and-circumstances test, the agent would be allowed to first testify that he did not interrogate the witness, but rather the witness freely offered the statement. Based on that testimony of the agent, the judge would find that the statement is non-testimonial. Based on that finding, the agent would then be allowed to read the statement into the record at trial against the defendant. This would be the precise type of civil law, *ex parte* practice that *Crawford* condemns.<sup>106</sup>

This circularity defeats the underlying goal of *Crawford*. A facts-and-circumstances test would merely change the means of getting to the same end: the admission of the hearsay obtained through inquisitorial government practices.<sup>107</sup> Much like the contraband magically dropping out of suspects' pockets after the 1961 Supreme Court decision, so too would government agents begin testifying that witnesses suddenly began making accusatory statements with no government interrogation or instigation whatsoever.

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<sup>102</sup> *Crawford v. Washington*, 541 U.S. 36, 59–60 n.9 (2004).

<sup>103</sup> It would be highly unlikely that a government agent would conduct his or her interviews and interrogations in plain view of other witnesses. In fact, police officers necessarily separate and isolate witnesses during interrogation, regardless of where the interrogation takes place.

<sup>104</sup> *Crawford*, 541 U.S. at 67.

<sup>105</sup> *Id.* at 50 (“[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”).

<sup>106</sup> *Id.* Moreover, even a rebuttable presumption that the statement is testimonial, as recommended by some commentators, is counter-productive and defeats the purpose of *Crawford*. With no evidence to contradict the agent's testimony as to the facts and circumstances surrounding the statement, the presumption would be easily rebutted nearly every time. The hearsay would then be classified as non-testimonial, and therefore admissible, without any opportunity for cross-examination.

<sup>107</sup> *Id.* at 42–50.

3. *Case in Point: State v. Searcy and the Erosion of Crawford*

This phenomenon is already in full-swing and any constitutional protection intended by *Crawford* is already being eroded. In *State v. Searcy*,<sup>108</sup> for example, Jeffrey Searcy was accused of burglary. The police received an anonymous tip that Searcy was living in a certain geographic area.<sup>109</sup> While conducting surveillance in that area, the police saw Searcy in public and arrested him.<sup>110</sup> Upon his arrest, a crowd of people gathered and the police had contact with Leisa Adams.<sup>111</sup> During the course of this contact, Adams informed the police that she was related to Searcy, and Searcy lived with her at her apartment.<sup>112</sup> Adams then allegedly consented to a search of her apartment, where the stolen property was found.<sup>113</sup> Adams denied ownership of the property.<sup>114</sup>

At trial, the state needed to link Searcy to the stolen property, but Adams was unavailable to testify.<sup>115</sup> In order to make the necessary link, therefore, the state introduced Adams’ hearsay statements to police stating that: (1) Searcy lived with her at the apartment; and (2) the physical evidence recovered at the apartment was not hers, therefore implying that it was Searcy’s.<sup>116</sup> Searcy argued that, in addition to being inadmissible hearsay, “Adams’ statements were ‘testimonial’ in nature because they resulted from a police effort to create evidence for trial.”<sup>117</sup> The state contended that the statements were admissible under an exception to the hearsay rule, and were not testimonial in nature, and therefore not prohibited by *Crawford*.<sup>118</sup>

With Adams unavailable, only the police officer could testify about the facts and circumstances surrounding Adams’ statement. The officer testified that one to two minutes after Searcy’s arrest, Adams voluntarily approached him.<sup>119</sup> Without any instigation, questioning, or provocation by the officer, “[s]he said—she—that [Searcy] had been staying with her from time to time.”<sup>120</sup> Then, “thirty to forty-five minutes later, the officers obtained Adams’ permission to search her apartment” which was in the area of the arrest.<sup>121</sup> The stolen property was then recovered at the apartment, and the officer further testified that “Ms. Adams denied ownership.”<sup>122</sup>

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<sup>108</sup> 709 N.W.2d 497 (Wis. Ct. App. 2005).

<sup>109</sup> *Id.* at 502.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 503.

<sup>115</sup> *Id.* at 513.

<sup>116</sup> *Id.* at 502–03.

<sup>117</sup> *Id.* at 509. This is actually closely related to the issue in *Davis and Hammon*. See *supra* notes 81–82.

<sup>118</sup> *Id.* at 511.

<sup>119</sup> *Id.* at 502.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 503.

The first task for the state was to find an exception to the hearsay rule. Without this, the statements would be excluded under the evidence code and the Confrontation Clause would not be implicated.<sup>123</sup> The state offered Adams' statement as an excited utterance.<sup>124</sup> The prosecutor asked the officer to "describe [Adams'] demeanor when she gave the statement to you," and the officer replied, "[u]m, rather excited."<sup>125</sup> With nothing to contradict the officer's conclusory testimony that Adams was "excited," the Court admitted the alleged statement under the excited utterance exception.<sup>126</sup>

The next step was the *Crawford* analysis. At the time of Searcy's arrest and the supposed voluntary statement by Adams, the police had not yet recovered the stolen property needed to link Searcy to the crime.<sup>127</sup> The officer testified that after the arrest, he remained at the scene of the arrest (not of the crime) and supposedly conducted no investigation or questioning of any kind.<sup>128</sup> Adams, Searcy's cousin, then inexplicably volunteered the necessary information to link Searcy to the stolen property.<sup>129</sup>

The court accepted this uncontested testimony, and found that "[t]here is no evidence in the record demonstrating that the statements were made in response to a tactically structured police interrogation, or in response to any questioning at all."<sup>130</sup> Instead, the court found that Adams simply approached the officer and volunteered Searcy's place of residence. The court further found that "[w]e are not persuaded by Searcy's contention that the officers obtained the information from Adams with an eye toward [Searcy's] prosecution."<sup>131</sup> Rather, Adams' statements "were offered unsolicited by a victim or witness at the scene of a traumatic event [Searcy's arrest], and were not generated by the

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<sup>123</sup> *Id.* at 509 ("If the statements are not admissible under the rules of evidence, they are excluded, and we need not proceed to the constitutional question.") (citing *State v. Tomlinson*, 648 N.W.2d 367 (Wis. 2002)).

<sup>124</sup> *Id.* at 511. See also WIS. STAT. § 908.03(2) (2004).

<sup>125</sup> *Searcy*, 709 N.W.2d at 502.

<sup>126</sup> *Id.* at 511. By further analyzing the facts and circumstances under which Adams' statement was made, the court determined that the statement was non-testimonial, and proceeded to apply the *Roberts* test to determine whether the statement was reliable. As asserted above, the application of a facts-and-circumstances or balancing test to determine whether a statement is testimonial will cause unpredictable results. Indeed, the *Searcy* court acknowledged that "in determining whether a particular out-of-court hearsay statement is testimonial or non-testimonial in the post-*Crawford* era, courts in other jurisdictions have reached conflicting decisions under the same or similar circumstances." *Id.* at 512 n.9.

<sup>127</sup> *Id.* at 503.

<sup>128</sup> *Id.* at 502.

<sup>129</sup> *Id.* at 502-03.

<sup>130</sup> *Id.* at 512 (emphasis added). *Searcy* is one of the unusual cases where there actually would have been witnesses to Adams' alleged statements, if she had actually volunteered them in front of the crowd as the police testified. However, with Adams unavailable, and the defendant being arrested and removed before the crowd could gather, the defendant was in an impossible position to identify and call the witnesses to the alleged voluntary statement. Yet the absence of corroborating testimony from additional witnesses was weighed by the court against the defendant, and not against the state.

<sup>131</sup> *Id.* at 512.

desire of the prosecution or police to seek evidence against a particular suspect.”<sup>132</sup>

This illustrates that when left with a facts-and-circumstances test, the police and prosecutors have the ability to easily circumvent any protection intended by *Crawford*.<sup>133</sup> Although the Clause is meant to protect against the principal evil of inquisitorial government practices, it is the government agents themselves—police and prosecutors—that are essentially allowed to determine whether their practices are inquisitorial. Unless the Court defines testimonial broadly, i.e., all accusatory hearsay, then *Crawford* will be malleable in nature and subject to the adaptable practices of police and prosecutors and to the discretion of judges.<sup>134</sup> *Crawford* will have failed in ensuring the reliability of evidence and advancing the fundamental goal of the Clause.

*B. Complying with the Text of the Clause and the Framers’ Intent*

Broadly defining testimonial as all accusatory hearsay is also consistent with the text of the Clause and with the Framers’ intent. The Clause states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>135</sup> The Court’s testimonial versus non-testimonial distinction derives from how it interprets the phrase “witnesses against him.”<sup>136</sup> The Court acknowledged that phrase could be interpreted a number of ways: narrowly, to include only “those who actually testify at trial”; broadly, to include “those whose statements are offered at trial”; or “something in between.”<sup>137</sup>

Upon examining the history and practices surrounding the Clause, the Court held that “witnesses against him” should be read broadly in this regard, and should include not only in-court statements of those who actually testify at trial, but also out-of-court statements that are offered at trial.<sup>138</sup> To hold otherwise would allow government agents to interrogate witnesses and offer

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<sup>132</sup> *Id.*

<sup>133</sup> See, e.g., Jaros, *supra* note 85, at 1005; see also Baugh, *supra* note 91, at 1853 (“[C]ourts have discovered ways to circumvent the [*Crawford*] decision.”).

<sup>134</sup> See *supra* notes 81–82. Under *Davis* and *Hammon*, if a hearsay statement is obtained from an interrogation of the declarant, that statement will be admissible if the “primary purpose” of the interrogation was to gain information to enable the police to respond to an emergency, rather than to obtain information for future prosecution. *Davis v. Washington*, 126 S. Ct. 2266, 2273–74 (2006). Of course, with the declarant necessarily absent, the only factual information on which the judge can base a ruling will come from the police. Just as in *Searcy*, police can simply offer conclusory, uncontradicted testimony which will be accepted by the court and will serve as the factual basis for the desired finding.

<sup>135</sup> *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (citing U.S. CONST. amend. VI).

<sup>136</sup> *Id.* at 51, 54. The Court first defines “witnesses against him” as those who offer “testimony.” The actual test, then, is whether the statement being offered is “testimonial” or non-testimonial.

<sup>137</sup> *Id.* at 43.

<sup>138</sup> *Id.* at 51.

that hearsay at trial, leaving “the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.”<sup>139</sup>

Similarly, to avoid leaving the Clause powerless, the phrase “witnesses against him” should be interpreted broadly not only with regard to whether the statement was made in or out of court, but also with regard to the classification of the speaker and the listener, as well as all other facts and circumstances surrounding the statement.<sup>140</sup>

First, as illustrated in the previous section, reading the phrase “witnesses against him” narrowly with regard to the classification of the speaker or listener, or the intentions or mental state of either, would allow for the easy circumvention of the Clause’s protection. This, in turn, would result in the admission of hearsay developed from inquisitorial government practices, the principle evil at which the Clause was directed. Second, the Clause’s protection should not be limited only to inquisitorial government practices, the principal evil, but rather should extend to all evils:

The defendant, who is protected by the Confrontation Clause, is harmed just the same whether the need for confrontation is the result of government manipulation of what was said or reported, or from the malevolence or error of the witness. Nothing in the text of the Confrontation Clause’s guarantee of the right of the defendant to confront the “witnesses against” him restricts the protection to only government action.<sup>141</sup>

Nowhere is the word “official” or “governmental” used as an adjective before the word “witness.” . . . [I]t should matter little the status or even purpose of the listener. What should matter is bringing witnesses in the courtroom for confrontation—as the text of the Confrontation Clause clearly states.<sup>142</sup>

The Clause was indeed designed to protect against governmental manipulation of hearsay. However, the Clause was also designed to allow the defendant to test all witnesses against him through cross examination, and to allow the jury to observe the witness, hear his testimony and assess his truthfulness.<sup>143</sup> Therefore, the mere absence, or alleged absence, of government manipulation does not ensure the truth of the hearsay statement. To allow the introduction of untested hearsay, regardless of the level of government involvement in its development, would violate the plain text of the Clause and the Framers’ intent.

Even if defining testimonial broadly as all accusatory hearsay were to violate the historical practices cited by the Court, it would not do so any more

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<sup>139</sup> *Id.*

<sup>140</sup> *See Best, supra* note 79.

<sup>141</sup> Mosteller, *supra* note 60, at 572–73.

<sup>142</sup> Best, *supra* note 79, at 71.

<sup>143</sup> *Mattox v. U.S.*, 156 U.S. 237, 242–43 (1895). *See also Crawford*, 541 U.S. at 61 (“[T]he Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

than *Crawford* already has. For example, *Crawford* held that, at a minimum, testimonial must include certain unsworn statements such as statements obtained from police interrogations.<sup>144</sup> However, the historical practices did not afford any protection at all against unsworn statements.<sup>145</sup> Furthermore, while “the Framers were mainly concerned about sworn [statements], it does not follow that they were similarly concerned about the Court’s broader category of testimonial statements.”<sup>146</sup> Nonetheless, *Crawford* expands the protection afforded by the historical practices to include unsworn statements. The Court’s inconsistency is best described as follows:

Originalism in criminal procedure suffers two serious defects. First, the justices too often get the history wrong. Getting the history right requires considerable immersion in the historical sources, but the justices do not have the time to delve into history that deeply. Second, in the event the justices were to get the history right, they would find that authentic framing-era doctrine is usually so distant from the modern context and from modern conceptions that it simply does not connect up with contemporary issues.<sup>147</sup>

The Court in *Crawford* defends its inclusion of unsworn statements in its minimum definition of testimonial by stating that “any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly, admissible unsworn statements) involves some degree of estimation.”<sup>148</sup> This is unquestionably true, but this fact actually supports the argument for extending the protection of the Clause beyond the narrow category of statements to government agents.

As the Court acknowledges in *Crawford*, just because historical protections did not extend to other types of hearsay does not mean that other types of hearsay do not warrant constitutional protection.<sup>149</sup> At the time of the historical practices cited in *Crawford*, “[m]ost hearsay was not a threat to confrontation because most problematic hearsay was not admissible” under the rules of evidence.<sup>150</sup> Therefore, due to the preexisting protection against hearsay, there would have been no reason to extend the constitutional protection at that time.<sup>151</sup>

Today, however, courts recognize a multitude of hearsay exceptions to the point where the rules of evidence offer little protection for the defendant.<sup>152</sup> Further, juries are much more willing to convict in part, or in whole, on hearsay

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<sup>144</sup> *Crawford*, 541 U.S. at 52.

<sup>145</sup> *Id.* at 69–71 (Rehnquist, C.J., concurring).

<sup>146</sup> *Id.* at 71.

<sup>147</sup> Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 207 (2005).

<sup>148</sup> *Crawford*, 541 U.S. at 52, 53 n.3.

<sup>149</sup> See also Mosteller, *supra* note 60, at 620.

<sup>150</sup> *Id.*

<sup>151</sup> Davies, *supra* note 147, at 119 (“Indeed, during the framing era it was still black-letter law that hearsay was ‘no evidence.’”).

<sup>152</sup> See, e.g., WIS. STAT. § 908.03-045 (2004) (recognizing nearly thirty exceptions to the general rule that hearsay is inadmissible).



evidence.<sup>153</sup> Given this “phenomenon that did not exist at the time” of the Clause’s adoption, it rings true that “the Framers were likely concerned about accusatory statements more generally, *or they would have been had the historical practices presented themselves.*”<sup>154</sup>

Finally, the goal when defining testimonial should be “interpreting the Constitution, not deciding history for its own sake.”<sup>155</sup> In doing so, the focus should be on the “language and logic of the Amendment,”<sup>156</sup> rather than historical practices that are inapplicable to today’s world. Defining testimonial as all accusatory hearsay complies with the language and logic of the Amendment. Additionally, given the “necessary degree of estimation” in applying the Constitution to modern realities, it also fully complies with the intent of the Framers. Finally, it “has the beauty of not only complying with the Confrontation Clause, but also being very easy to implement.”<sup>157</sup>

#### V. PROPER TREATMENT OF RESIDUAL OR NON-TESTIMONIAL HEARSAY

If testimonial is defined as something less than all accusatory hearsay, then the question remains: What protection does the Clause now afford the defendant against non-testimonial hearsay? Under *Roberts*, all hearsay regardless of type was evaluated for “indicia of reliability” or “particularized guarantees of trustworthiness” under the same standard.<sup>158</sup> Under *Crawford*, however, the right of cross-examination only applies to testimonial hearsay, whatever that may be.<sup>159</sup>

Given that the Court refused to define testimonial and interrogation, both terms that are critical to its holding, it is no surprise that the Court failed to address the treatment of non-testimonial hearsay. However, the Court once again went a step further than merely ignoring this issue. Instead, it muddied the waters by hinting through suggestive dicta that the Confrontation Clause may offer no protection at all with regard to non-testimonial hearsay.<sup>160</sup> Justice Scalia writes, as though he were trying to interpret a Supreme Court opinion

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<sup>153</sup> See, e.g., *State v. Manuel*, 697 N.W.2d 811 (Wis. 2005).

<sup>154</sup> Mosteller, *supra* note 60, at 621 (emphasis added).

<sup>155</sup> *Id.* at 556.

<sup>156</sup> *Id.*

<sup>157</sup> Best, *supra* note 79, at 75 (recommending a very broad definition of testimonial to ensure the proper protection of confrontation rights, especially in the context of statements made to social workers and medical professionals, and 9-1-1 calls). Few authors other than Best have commented on the workability or ease of implementation of a proposed definition. It is often overlooked that, no matter how intellectually appealing a particular test or definition, it must be workable in order to be effective. The economic costs of the various definitions of testimonial are, however, beyond the scope of this Article.

<sup>158</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>159</sup> *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004).

<sup>160</sup> See *id.* at 68 (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*.”).

rather than author one, that “*even if* the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object . . . .”<sup>161</sup>

Understandably, many commentators have seized upon this quote and speculated that the Clause no longer offers any protection against non-testimonial hearsay. For example:

Post-*Crawford*, the Confrontation Clause should play no role in determining the admissibility of a great deal of the hearsay statements that courts and attorneys address on a daily basis. . . . Thus, post-*Crawford*, the Clause applies to fewer statements, but, where it applies, it requires confrontation and will accept no substitute.<sup>162</sup>

Despite the appeal of this argument, however, the residual or non-testimonial hearsay, if any, *must* still be subject to constitutional scrutiny. *Crawford* only overruled *Roberts* with regard to testimonial hearsay, however that term is defined. As a matter of law, therefore, *Crawford* has not overruled *Roberts* with regard to non-testimonial hearsay. If the Court had meant to overrule *Roberts* in all respects, including with regard to non-testimonial hearsay, “it would not have done so in such an oblique manner.”<sup>163</sup> Lower courts recognize this and continue to apply constitutional protection to even non-testimonial hearsay.<sup>164</sup>

Additionally, non-testimonial hearsay *should* continue to be subject to constitutional scrutiny because the scope of the Confrontation Clause is much broader than just testimonial hearsay,<sup>165</sup> assuming that the term testimonial comes to be defined as something less than all accusatory hearsay. This conclusion is supported by the plain text and the decades of application prior to *Crawford*.<sup>166</sup> Furthermore, it is not defeated by the historical practices

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<sup>161</sup> *Id.* at 53 (emphasis added).

<sup>162</sup> W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After Crawford v. Washington: Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1, 3 (2005).

<sup>163</sup> *Crawford*, 541 U.S. at 59 (discussing the need for a clear pronunciation or inevitable inference, rather than a “possible inference,” in order to create an exception to a well established rule).

<sup>164</sup> See, e.g., *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004); *Horton v. Allen*, 370 F.3d 75, 83–84 (1st Cir. 2004); *State v. Manuel*, 697 N.W.2d 811, 825 n.10 (Wis. 2005) (identifying jurisdictions that have adopted *Roberts* to assess nontestimonial statements); *State v. Rivera*, 844 A.2d 191, 201–02 (Conn. 2004); *State v. Dedman*, 102 P.3d 628, 636 (N.M. 2004); *People v. Moscat*, 777 N.Y.S.2d 875 (Crim. Ct. 2004); *People v. Corella*, 18 Cal. Rptr. 3d 770, 775 (Ct. App. 2004); *State v. Doe*, 103 P.3d 967, 972 (Idaho Ct. App. 2004) (applying *Roberts* on both state and federal constitutional grounds); *State v. Blackstock*, 598 S.E.2d 412, 422 n.2 (N.C. Ct. App. 2004); *Miller v. State*, 98 P.3d 738, 743–44 (Okla. Crim. App. 2004).

<sup>165</sup> See *supra* Part IV.

<sup>166</sup> In one sense, arguing for a broad definition of testimonial is the same as arguing for continued constitutional protection of non-testimonial, or residual, hearsay. For example, if testimonial includes all hearsay, then all statements would be covered under the Clause. Likewise, if testimonial is defined narrowly, but non-testimonial hearsay is still afforded constitutional protection, then all statements would be covered under the Clause. The only difference, although a very significant difference, is that in the first example, all hearsay would be inadmissible unless there was a prior opportunity for meaningful cross

discussed by the Court. Because of the dangers of hearsay, constitutional protection is still important against all of its types and classifications, whether that be protection be in the form of cross-examination under *Crawford*, or in the form of residual protection under *Roberts*.<sup>167</sup>

## VI. CONCLUSION

When the state offers hearsay into evidence against a criminal defendant, the defendant's constitutional right to confrontation is implicated. Under *Ohio v. Roberts*, the defendant's right to confrontation was satisfied simply by a judicial determination that the state's proffered hearsay was reliable. Upon a finding of reliability, the hearsay would be admitted into evidence.

The Court in *Crawford* realized, however, that the *Roberts* test was vague and manipulable, and "judges, like other government officers, could not always be trusted to safeguard the rights of the people."<sup>168</sup> The Court further acknowledged that *Roberts* was a "fundamental failure on [its] part to interpret the Constitution in a way that secures its intended constraint on judicial discretion."<sup>169</sup>

Under *Crawford*, therefore, the Court held that with regard to testimonial hearsay, there can be no substitute for cross-examination. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."<sup>170</sup> Without the opportunity to cross-examine, the Court must exclude all testimonial hearsay offered by the state against the defendant.

Unfortunately, the Court declined to define testimonial. Instead, it gave three possible definitions, a mandatory minimum definition, and a historical discussion that hinted at severely limiting the definition to only formal, government initiated hearsay. The Court's failure to define testimonial has only perpetuated the need for judicial discretion in determining the admissibility of hearsay. Under *Crawford*, instead of determining whether hearsay is reliable, judges must now determine whether hearsay is testimonial. Regardless of the label, judicial discretion continues to determine admissibility, which is the problem that *Crawford* was intended to eliminate but has not.

Post-*Crawford* Supreme Court cases will likely do little to reign in judicial discretion. To date, those cases have addressed the definition of testimonial in very limited and narrow factual situations. As a result, the holdings will, by their very fact specific nature, invite further judicial discretion by lower courts. Additionally, they will be applicable only to substantially similar, narrow factual scenarios, leaving no additional guidance for the vast majority of hearsay in criminal cases.

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examination. Under the second example, two layers of protection would exist: *Crawford* for testimonial hearsay, and *Roberts* for residual hearsay.

<sup>167</sup> Mosteller, *supra* note 60, at 620–23.

<sup>168</sup> *Crawford*, 541 U.S. at 67.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 62.

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Given the goals of *Crawford* and the Clause, testimonial should be defined very broadly as all accusatory hearsay. Any other definition will necessarily require a facts-and-circumstances analysis and judicial discretion to determine whether the hearsay falls within the definition. This judicial discretion, in turn, would determine admissibility. Under such a system, *Crawford's* goal of constraining judicial discretion would be permanently defeated. Additionally, broadly defining testimonial as all accusatory hearsay is consistent with the text, purpose and history of the Clause, as well as the strict holding of *Crawford*. To the extent that future decisions of the Court may limit the definition of the term, lower courts may and should offer broader protection under state constitutions.

Finally, *Crawford* has overruled *Roberts* only with regard to testimonial hearsay. Therefore, should testimonial hearsay come to be defined more narrowly than all accusatory hearsay, any residual or non-testimonial hearsay must, and should, still be subject to constitutional scrutiny under *Roberts*.