

THROWING STONES FROM WITHIN A GLASS HOUSE: WHY
THE PROCEDURAL APPROACH TO CONFRONTATION FAILS
TO REMEDY THE ILLS OF THE INDICIA OF RELIABILITY
TEST, AND AN ARGUMENT FOR A BALANCED RULE

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I. INTRODUCTION

In June of 2004, the Supreme Court, in an opinion authored by Justice Scalia, decided *Crawford v. Washington*¹ and effected what purported to be a drastic change in Confrontation Clause jurisprudence.² Writing from a strict originalist point of view,³ the Court took issue with what it deemed to be the “malleable standard”⁴ of *Ohio v. Roberts*,⁵ the controlling precedent for nearly twenty-five years. Specifically, the majority criticized *Roberts*’s substantive approach, which construed the Confrontation Clause as guaranteeing the reliability of hearsay statements admitted against an accused,⁶ for “fail[ing] to protect against paradigmatic confrontation violations” that the Clause was originally purposed to prevent, namely, *ex parte* testimonial statements.⁷ The Court set forth a new approach that construed the Clause as a “procedural rather than a substantive guarantee” that demands “that reliability be assessed in a particular manner: by testing in the crucible of

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¹ 541 U.S. 36 (2004).

² *Id.* at 60. The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . .” U.S. CONST. amend. VI.

³ See Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 475–76 (2006). “Originalism” is “[t]he theory that the U.S. Constitution should be interpreted according to the intent of those who drafted and adopted it.” BLACK’S LAW DICTIONARY 1133 (8th ed. 2004).

⁴ *Crawford*, 541 U.S. at 60.

⁵ 448 U.S. 56 (1980).

⁶ *Id.* at 65, 66.

⁷ *Crawford*, 541 U.S. at 60.

cross-examination.”⁸ However, in rendering the *Crawford* opinion, the Court declined to articulate a working definition of “testimonial.”⁹ The majority acknowledged that this would create turmoil in the country’s courts, but asserted that any “interim uncertainty” would not yield results any worse than those reached under the *Roberts* line.¹⁰ Perhaps it also believed that whatever minor collateral damage was done would be worth suffering in order to accomplish the shift to a standard more easily and predictably applied,¹¹ and more in line with original intent.¹²

Two years later, the Supreme Court got an opportunity to clarify the meaning of “testimonial” in *Davis v. Washington*, and its companion case, *Hammon v. Indiana*.¹³ The result was the infusion of a “reasonable man” standard into the formulations of the definition of “testimonial” suggested in *Crawford*,¹⁴ and a step away from *Crawford*’s primary objective: to protect the confrontation right by creating a bright-line rule that removed the element of judicial discretion in deciding what evidence is to be excluded pursuant to the Confrontation Clause.¹⁵

Part II of this Comment will focus on a discussion of pre-*Crawford* Confrontation Clause jurisprudence, particularly with respect to the *Roberts* holding. Part III will discuss *Crawford* and *Davis* and their criticism of *Roberts*, and will point out how they suffer from many of the same flaws that they identify in *Roberts*, without retaining the most important virtues of that holding. Part IV will undertake a comparative analysis of *Crawford* and *Roberts* with respect to the flaws *Crawford* identifies in *Roberts*, and illustrate how *Crawford*’s procedural approach threatens the public interest in effective enforcement of the criminal law¹⁶ without contributing to the discovery of truth.

⁸ *Id.* at 61.

⁹ *Id.* at 51–52.

¹⁰ *Id.* at 68 n.10.

¹¹ See Strang, *supra* note 3, at 476.

¹² See generally *Crawford*, 541 U.S. at 42–50 (examining the original meaning of the Confrontation Clause).

¹³ 547 U.S. 813, 822 (2006).

¹⁴ *Id.*; *Crawford*, 541 U.S. at 51–52.

¹⁵ *Crawford*, 541 U.S. at 63, 67; Michael D. Cicchini & Vincent Rust, *Confrontation After Crawford v. Washington: Defining “Testimonial,”* 10 LEWIS & CLARK L. REV. 531, 533 (2006).

¹⁶ For purposes of this Paper, “effective enforcement of the criminal law” is used to refer to, inter alia, the public’s interest in prosecuting crime efficiently so as keep costs of doing so reasonable, the public’s interest in discerning the truth at trial so as to maintain public confidence in the criminal justice system, and the public’s interest in obtaining justice, generally.

In conclusion, this Comment will argue for a rule that “steer[s] [the] middle course among proposed alternatives,” as *Roberts* attempted to do.¹⁷ That is, the rule should address the majority’s criticism of *Roberts* as too permissive a standard to protect defendants’ confrontation rights, and at the same time avoid the rigidity of a bright-line rule that disserves the public by formalistic adherence to procedure without regard to whether it makes any contribution to the discovery of truth.

II. PRE-*CRAWFORD* CONFRONTATION CLAUSE JURISPRUDENCE—THE SUBSTANTIVE APPROACH

At the time the *Roberts* opinion was handed down, the Court had already spent nearly a century developing Confrontation Clause jurisprudence which recognized that, as with many other individual rights enjoyed before the Constitution was adopted, an accused’s right to confrontation is not absolute.¹⁸ *Roberts* joined a long line of cases that recognized that formalistic adherence to the letter of the Confrontation Clause would result in miscarriage of justice.¹⁹ Since at least 1895, the Court has been cognizant that the right of confrontation may “be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant.”²⁰ Thus, for at least eleven decades before the *Crawford* opinion, the Court labored to develop a standard that afforded defendants’ their Constitutionally guaranteed confrontation right, while still taking account of “considerations of public policy and the necessities of the case”²¹ such that justice may ultimately be attained.²² There is a point, implicit in this approach and expressly noted by the Court, at which the necessities attendant to seeing justice done, or the public interest in effective law enforcement vindicated, “may warrant dispensing with confrontation at trial.”²³ This is especially so where confrontation is

¹⁷ *Ohio v. Roberts*, 448 U.S. 56, 68 n.9 (1980).

¹⁸ *Mattox v. United States*, 156 U.S. 237, 243 (1895). *See also*, *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Mancusi v. Stubbs*, 408 U.S. 204, 212–13 (1972); *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Barber v. Page*, 390 U.S. 719, 722 (1968); *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

¹⁹ *Roberts*, 448 U.S. at 66; *Mattox*, 156 U.S. at 244.

²⁰ *Mattox*, 156 U.S. at 243.

²¹ *Roberts*, 448 U.S. at 64 (quoting *Mattox*, 156 U.S. at 243).

²² *Mattox*, 156 U.S. at 244.

²³ *Roberts*, 448 U.S. at 64; *see also Chambers*, 410 U.S. at 295 (discussing how the right to confrontation, in certain instances, must be balanced with other interests).

unlikely to contribute in a meaningful way to discerning the truth about events in question at trial, and may thus be said to be merely an “incidental [procedural] benefit” to the accused at the expense of substantive justice.²⁴

Pre-*Crawford* jurisprudence afforded the flexibility necessary to strike such a balance by its conception of the confrontation right, not as an end itself, but as a means to the end of promoting fairness to the accused in a criminal trial.²⁵ The Clause was construed to serve this end by ensuring that evidence received against an accused was reliable, and that an accused would not suffer the consequences of criminal conviction on the basis of testimony developed under circumstances tending to breed falsity and contrivance on behalf of the declarant.²⁶ It was well recognized that, while cross-examination may be “the ‘greatest legal engine . . . for the discovery of truth,’”²⁷ it is not the only one, and, given the “purpose to augment accuracy in the factfinding process”²⁸ attributed to the Confrontation Clause by pre-*Crawford* Courts, hearsay could be admitted despite the absence of cross-examination so long as it bore “adequate ‘indicia of reliability’”²⁹ (i.e., so long as “there [was] no material departure from the reason of the general rule.”).³⁰

The rule embodying the substantive approach was ultimately

²⁴ See *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Mattox*, 156 U.S. at 243. “Justice” is defined as “the maintenance or administration of what is just especially by . . . the assignment of merited rewards or punishments[;] conformity to truth, fact, or reason.” Merriam-Webster Online Dictionary, <http://mw1.merriam-webster.com/dictionary/justice> (last visited Sept. 1, 2008). This Paper uses the term “substantive justice” to refer to such things as discerning the truth at trial, ensuring that the guilty are convicted and the innocent set free to the best of our courts’ capacities, and appropriately addressing and balancing all interests in a given action. Substantive justice may be contrasted with “procedural justice,” which is used here to refer to the presumption that justice is done, and all interests properly vindicated, when a prescribed procedure is followed in a given case. For purposes of this Paper, substantive justice and procedural justice may be said to be the end goals of the substantive and procedural approaches to interpreting the Confrontation Clause, respectively, which are discussed *infra*.

²⁵ See *Pointer v. Texas*, 380 U.S. 400, 405 (1965). See also *Crawford v. Washington*, 541 U.S. 36, 73–75 (2004) (Rehnquist, C.J., concurring).

²⁶ See *Roberts*, 448 U.S. at 65; *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934); *Mattox*, 156 U.S. at 242–43. Those circumstances were, of course, ex parte interrogations of witnesses by the government, and the anonymous admission of statements generated therein against the accused. See, e.g., *Mattox*, 156 U.S. at 242.

²⁷ *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, EVIDENCE § 1367 (3d ed. 1940)).

²⁸ *Roberts*, 448 U.S. at 65.

²⁹ *Id.* at 66 (quoting *Dutton*, 400 U.S. at 89).

³⁰ *Id.* at 65 (quoting *Snyder*, 291 U.S. at 107).

articulated in *Roberts*, which held that where a declarant is unavailable for trial, his hearsay statement may nonetheless be admitted, despite the absence of any opportunity for the defendant to cross-examine, when the statement “bears adequate ‘indicia of reliability.’”³¹ Reliability, the Court said, could “be inferred without more [where a statement] falls within a firmly rooted hearsay exception.”³² If a statement did not fit such an exception, it could still be admitted upon a showing that the facts and circumstances surrounding the statement imbued the statement with “particularized guarantees of trustworthiness.”³³ This focus on the Confrontation Clause as guaranteeing an adequate test of truth to criminal defendants brought the purpose of the Clause in line with the purpose of hearsay rules, a congruence the existence of which the *Roberts* court described as a “truism.”³⁴ By guaranteeing reliability of evidence to an accused, but leaving available means for determining reliability alternative to cross-examination, the Court struck a compromise between defendants’ interest in confrontation and society’s interest in effectively prosecuting crime.³⁵ The substantive approach is thus grounded in practical considerations, and its flexibility accommodates “the workaday world of . . . criminal trials.”³⁶ The *Roberts* rule endured for 24 years, from 1980 through 2004, when it was abruptly overruled in *Crawford*.

III. THE DEVELOPMENT OF JURISPRUDENCE EMBRACING THE PROCEDURAL APPROACH: *CRAWFORD*, *DAVIS*, AND THE CRITICISM OF *ROBERTS*

A. *The Crawford Rationale and Rule*

Despite the well established and enduring Confrontation Clause jurisprudence culminated in *Roberts*,³⁷ cases involving the confrontation right began to resonate with Originalists’ grumblings that the course of the Clause’s development had strayed from the Framers’ intent, and, over the years since *Roberts*, opinions

³¹ *Id.* at 66.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 64.

³⁶ *Id.* at 66.

³⁷ See *supra* Part I.

advocating a new approach began to emerge.³⁸ Chief among their concerns was that the jurisprudence developed under the *Roberts* line was divergent from the meaning of the Clause's text and history.³⁹ The phrase "witnesses against"⁴⁰ was the Originalists' focus and the cornerstone of their rationale supporting the procedural approach.⁴¹ Though various possible interpretations of this phrase were recognized,⁴² history, the Court said, instructed that it meant "those who give testimony against the defendant."⁴³ "'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"⁴⁴ Additionally, the premise, fundamental to the substantive approach, "that 'hearsay rules and the [c]onfrontation [right] are generally designed to protect similar values,'⁴⁵ and 'stem from the same roots'"⁴⁶ was rejected as historically unsupported.⁴⁷ By this route, the Originalists concluded that the Framers meant the Confrontation Clause to require cross-examination of all testimonial statements, regardless of reliability.⁴⁸

Finally, in 2004, the Originalists were able to command a majority of the Court, and the *Crawford* decision was rendered.⁴⁹ The putative intentions of the Framers were embodied in a "procedural . . . guarantee"⁵⁰ that "impose[s] an absolute bar to [hearsay] statements [offered against an accused] that are testimonial, absent a prior opportunity to cross-examine."⁵¹ However, in formulating this rule, the Court opted not to give a definitive meaning to the term "testimonial."⁵² Rather, it offered

³⁸ See, e.g., *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting); *White v. Illinois*, 502 U.S. 346, 358 (1992) (Thomas, J., concurring in part and concurring in the judgment).

³⁹ See, e.g., *White*, 502 U.S. at 358.

⁴⁰ U.S. CONST. amend. VI.

⁴¹ See *Crawford v. Washington*, 541 U.S. 36, 51 (2004); *White*, 502 U.S. at 360 (quoting *Craig*, 497 U.S. at 864–65 (Scalia, J., dissenting)).

⁴² See, e.g., *White*, 502 U.S. at 359–60; *Craig*, 497 U.S. at 864–65.

⁴³ *Crawford*, 541 U.S. at 51; *Craig*, 497 U.S. at 864–65.

⁴⁴ *Crawford*, 541 U.S. at 51 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

⁴⁵ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (quoting *California v. Green*, 399 U.S. 149, 155 (1970)).

⁴⁶ *Id.* (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970)).

⁴⁷ See *White*, 502 U.S. at 362.

⁴⁸ *Id.* at 363.

⁴⁹ *Crawford*, 541 U.S. at 36.

⁵⁰ *Id.* at 61.

⁵¹ *Id.*

⁵² *Id.* at 68.

three possible interpretations.⁵³ Testimony, the Court said, could be “*ex 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.”⁵⁴ Or it could be “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”⁵⁵ Lastly, the Court said testimony could be “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.”⁵⁶ The Court subscribed to none of these possible definitions, acknowledging that doing so would cause both “interim uncertainty” and apparently trusting lower court judges to know testimonial matter when they see it.⁵⁷

B. *Davis and the Tempering of Crawford’s Bright-Line Rule*

In *Crawford*, the Court stated that “[w]hatever else the term [‘testimonial’] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”⁵⁸ Whatever may lie outside this core testimonial matter, but remain covered by the term, is, at best, vague.⁵⁹ Two years later, in *Davis v. Washington*,⁶⁰ the Court was called upon to clarify the meaning of “testimonial.” Despite the harsh indictment of *Roberts* as a standard too susceptible to the exercise of judicial discretion,⁶¹ the Court faltered in its quest to establish a bright-line rule for application of the Confrontation Clause by perpetuating the very malleability it condemned in *Crawford*.⁶²

Davis and its companion case, *Hammon v. Indiana*, were both

⁵³ *Id.* at 51–52; Cicchini & Rust, *supra* note 15, at 538.

⁵⁴ *Crawford*, 541 U.S. at 51 (quoting Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (2003) (No. 02-9410)).

⁵⁵ *Id.* at 51–52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)).

⁵⁶ *Id.* at 52 (quoting Brief of the National Association of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner at 3, *Crawford*, 541 U.S. 36 (2003) (No. 02-9410)).

⁵⁷ *Id.* at 68 n.10.

⁵⁸ *Id.* at 68.

⁵⁹ *See id.* at 51–52.

⁶⁰ 547 U.S. 813 (2006) (decided with *Hammon v. Indiana*).

⁶¹ *Crawford*, 541 U.S. at 66.

⁶² *Davis*, 547 U.S. at 822.

domestic violence cases in which the prosecution sought to introduce the victims' statements taken by the police.⁶³ Neither victim testified.⁶⁴ In *Davis*, the victim called 911, apparently while she was still under attack, and responded to several questions the operator asked that served to identify the defendant, Davis.⁶⁵ Then, at a later point in the 911 call, Davis's victim noted that Davis had just fled the scene.⁶⁶ In *Hammon*, police arrived at the scene, separated the victim from her husband and alleged attacker, Hammon, and began to question her about the altercation they had.⁶⁷ During their conversation with Mrs. Hammon, police thwarted Mr. Hammon's repeated "attempts to participate in [his wife's] conversation with the police."⁶⁸

In deciding the case, the Court noted important factual distinctions between the two victims' interrogations, which were reflected in the Court's holding.⁶⁹ The Court held that a statement is "nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," and that a statement is "testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."⁷⁰ Thus, since Davis's victim was currently under attack when she made the comments identifying her attacker, those statements were deemed to be non-testimonial.⁷¹ However, the statements she made after Davis fled the scene were testimonial.⁷² The Court found Mrs. Hammon's statements to be testimonial since there was no ongoing emergency during any of her questioning and the questions pertained to "possibly criminal past conduct" rather than to events occurring in the present.⁷³

IV. *CRAWFORD/DAVIS* AND *ROBERTS*: A COMPARATIVE ANALYSIS OF

⁶³ See *id.* at 818–21.

⁶⁴ *Id.* at 818–20.

⁶⁵ *Id.* at 817–18.

⁶⁶ *Id.* at 818.

⁶⁷ *Id.* at 819–20.

⁶⁸ *Id.*

⁶⁹ *Id.* at 827–29.

⁷⁰ *Id.* at 822.

⁷¹ *Id.* at 827–29.

⁷² *Id.* at 828–29.

⁷³ *Id.* at 829.

THEIR VIRTUES AND FLAWS

A. Rationale

A foundational criticism levied against *Roberts* by the *Crawford* Court is that the substantive approach runs contrary to the history of the Confrontation Clause.⁷⁴ This conclusion is reached after a seemingly exhaustive recitation of the development of the confrontation right leading up to the enactment of the Sixth Amendment.⁷⁵ Indeed, the validity of the entire *Crawford* holding is dependent on the validity of the history on which it is based.⁷⁶ Yet, Justice Thomas has stated that “[t]here is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean,”⁷⁷ and, as then Chief Justice Rehnquist pointed out, it is as likely as not that the majority misinterpreted the meaning of historical facts cited in the *Crawford* opinion.⁷⁸ Notably, in grounding the procedural approach in originalist doctrine, the majority was careful not to justify the approach with direct claims that the Founders understood the Clause to mean what *Crawford* says it means.⁷⁹ Rather, they use the historical backdrop against which the Clause was adopted to infer that the Founders must have intended the Clause to have the meaning the majority attributes to it.⁸⁰ Even assuming that the majority’s conclusions about the meaning of the Confrontation Clause’s history are beyond contest, the distinction between testimonial and non-testimonial, and the

⁷⁴ *Crawford v. Washington*, 541 U.S. 36, 60 (2004).

⁷⁵ *Id.* at 42–50.

⁷⁶ *Id.* at 61.

⁷⁷ *White v. Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J., concurring in part and concurring in the judgment).

⁷⁸ *Crawford*, 541 U.S. at 69–72 (Rehnquist, C.J., concurring). Chief Justice Rehnquist, in a concurring opinion that reads more like a dissent, categorized the majority’s “distinction between testimonial and nontestimonial statements [as] no better rooted in history than [the *Roberts* holding],” pointing out that hearsay rules and confrontation rights were still unclear at the time of the framing, that a categorical exclusion of testimonial hearsay is not consistent with the Clause’s history, and that exceptions to the confrontation right have always been recognized, even at the time of the framing. *Id.* at 69 & n.1, 72, 73–74. *See also* Cicchini & Rust, *supra* note 15, at 553 (arguing that the first of two serious defects of originalism is that “the justices too often get the history wrong”) (quoting 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)).

⁷⁹ *See White*, 502 U.S. at 359 (Thomas, J., concurring in part and concurring in the judgment) (“There is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean.”). *See also Crawford*, 541 U.S. at 42–50.

⁸⁰ *Crawford*, 541 U.S. at 42–56.

categorical rule *Crawford* purports to establish on the basis of that distinction, is but one possible inference from that set of historical facts, and does not necessarily flow from those facts, as the majority asserts.⁸¹ In any event, the state of the confrontation right at the time of the framing was, at best, debatable, thus making the *Crawford* holding questionable at its base.⁸²

Roberts further calls *Crawford*'s reliance on history into question by laying claim, however indirectly, to historical support for its own holding. In an ostensibly comprehensive survey of scholarly commentary on Confrontation Clause jurisprudence, which was then eighty-five years old, the Court noted that while there was a wealth of criticism of the Court's chosen route, no one had charged that it was contrary to the Framers' intentions.⁸³ Of course, asserting that a rationale is *not unsupported* by history is not logically equivalent to asserting that the same rationale *is supported* by history. So, if we were to accept that original intent is the principle by which we should interpret the Confrontation Clause, *Roberts*'s rationale is no better than *Crawford*'s, and, in fact, *Crawford*'s may be the better of the two.

However, *Roberts* presents redeeming qualities beyond its supposed compliance with the Framers' understanding of the confrontation right. Its rationale was grounded in stare decisis,⁸⁴ and gave due consideration to the competing interests deemed to be important in Confrontation Clause analysis for nearly a century.⁸⁵ *Roberts* and its predecessors reflect the Court's efforts to "steer[] a middle course" between a defendant's interest in confrontation, and society's interest in effective prosecution of crime.⁸⁶ Thus, rather than disqualifying all evidence that falls into a certain category, as *Crawford* does,⁸⁷ *Roberts* sets forth a general rule of exclusion to protect criminal defendants, but leaves exceptions open to the prosecution to accommodate the public interest.⁸⁸ *Crawford*'s

⁸¹ *Id.* at 50.

⁸² The Chief Justice described the *Crawford* Court's "interpretation of the Confrontation Clause [as] not backed by sufficiently persuasive reasoning." *Id.* at 69 (Rehnquist, C.J., concurring).

⁸³ *Ohio v. Roberts*, 448 U.S. 56, 68 n.9 (1980) ("Nor has any commentator demonstrated that prevailing analysis is out of line with the intentions of the Framers of the Sixth Amendment.").

⁸⁴ See *supra* Part II. See also *Crawford*, 541 U.S. at 75 (Rehnquist, C.J., concurring).

⁸⁵ *Roberts*, 448 U.S. at 66 n.9.

⁸⁶ *Id.*

⁸⁷ *Crawford*, 541 U.S. at 53–54, 61.

⁸⁸ *Roberts*, 448 U.S. at 66.

criticism of *Roberts* is essentially a charge that these exceptions are too permissive,⁸⁹ but *Roberts's* approach, the substantive approach, is not effectively condemned by the majority's declaration that the Framers intended an absolute prohibition of all statements that are "testimonial," or by the Court's assessment of the historical facts in which that holding is grounded.⁹⁰

B. *Judicial Discretion*

At the heart of *Crawford's* objection to the substantive approach articulated in *Roberts* is the need for judicial assessment of the reliability of offered hearsay statements.⁹¹ A primary rationale underlying the majority's objection to judicial discretion is, once again, history. The Framers, the majority says, "intended [the Confrontation Clause to be a] constraint on judicial discretion"⁹² because the Framers "knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people."⁹³ Concededly, the latter is a valid point. There is no reason to ignore the fact that judges are political animals, just like attorneys general and district attorneys.⁹⁴ However, in the vast majority of cases, a judge's ruling on the admissibility of evidence against a criminal defendant is unlikely to have significant political implications. The majority addresses this point:

Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like [the one at issue in *Crawford*], the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear.⁹⁵

⁸⁹ *Crawford*, 541 U.S. at 60, 63.

⁹⁰ *Id.* at 61; see also *supra* text accompanying notes 69–73.

⁹¹ *Crawford*, 541 U.S. at 67–68.

⁹² *Id.* at 67.

⁹³ *Id.*

⁹⁴ Political motivations aside, the majority also seems troubled by the potential for other personal influences, particularly individual judges' "notions of 'reliability,'" to affect rulings on Confrontation Clause issues. *Id.* at 61. Once again, it invokes history to support its objection. *Id.* ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'")

⁹⁵ *Id.* at 68. The trial of Sir Walter Raleigh is cited in *Crawford* as the "paradigmatic confrontation violation." *Id.* at 52. According to the majority's historical account, Raleigh was convicted of treason on the basis of his alleged accomplice's unsworn, ex parte statements, despite Raleigh's plea that "[t]he [p]roof of the Common Law is by witness and jury: let

By the majority's own admission, judicial discretion is of little concern in the vast majority of criminal prosecutions, at least as far as the Framers were concerned.⁹⁶

The majority also lodged a practical objection to the judicial discretion inherent in *Roberts's* substantive approach. Reliability, it says, is a "malleable standard"; "an amorphous, if not entirely subjective, concept" which yields unpredictable results in the hands of the judges who apply it.⁹⁷ The Court cites the "countless factors bearing on whether a statement is reliable" and the variable weight judges give to each factor.⁹⁸ To be fair, that the standard set forth in *Roberts* for determining reliability is highly manipulable is beyond dispute. "[P]articuliarized guarantees of trustworthiness"⁹⁹ is as vague and open-ended a standard as one might imagine, and it is not difficult to see how the broad discretion required in the application of it could lead to the admission of almost anything. In *Crawford*, the majority aptly lays out numerous examples of this flaw, not the least persuasive of which is the *Crawford* case's own history in the lower courts.¹⁰⁰ However, as poignant as these examples are, it does not follow that reliability is a per se inappropriate basis on which to decide the admissibility of evidence under the Confrontation Clause. It means merely that the Court's

Cobham [(the accomplice)] be here, let him speak it. Call my accuser before my face . . ." *Id.* at 44 (quoting *The Trial of Sir Walter Raleigh*, 2 How. St. Tr. 1, 15–16 (1603)). The judges denied his request, and Raleigh was put to death. *Id.* The majority goes on to note that "[o]ne of Raleigh's trial judges later lamented that 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'" *Id.* (quoting 1 DAVID JARDINE, *Sir Walter Raleigh's Imprisonment, Voyage to Guiana, and Execution*, in CRIMINAL TRIALS 476, 520 (1832)).

⁹⁶ It seems, then, that the majority is willing to destroy the possibility of balancing the competing interests the Court has repeatedly recognized in order to ensure that the rights of such persons as Scooter Libby and Alan Hevesi will not be violated. This seems to ignore that the nature of modern politics is such that those at the highest levels of government are those likely to have the best representation to protect their rights (or at least the ability to pay for it), and are those whose trials are likely to be subject to the most public scrutiny. See Cicchini & Rust, *supra* note 15, at 553 (arguing that the second serious defect of originalism is 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" (quoting Davies, *supra* note 78, at 207)).

⁹⁷ *Crawford*, 541 U.S. at 60, 63.

⁹⁸ *Id.* at 63. As examples, the Court gives the nine-factor test used by the Washington Court of Appeals to decide *Crawford* below, and an eight-factor test used in *People v. Farrell*. *Id.*; *People v. Farrell*, 34 P.3d 401, 406–407 (Colo. 2001).

⁹⁹ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

¹⁰⁰ *Crawford*, 541 U.S. at 63 (citing *United States v. Photogrammetric Data Servs., Inc.*, 259 F.3d 229 (4th Cir. 2001); *Farrell*, 34 P.3d at 401; *Stevens v. People*, 29 P.3d 305 (Colo. 2001); *Nowlin v. Commonwealth*, 579 S.E.2d 367 (Va. 2003); and *State v. Bintz*, 650 N.W.2d 913 (Wis. 2002), in addition to *Crawford's* own case history).

articulated standards for determining reliability are too lax.¹⁰¹ Indeed, the majority readily concedes that “the Clause’s ultimate goal is to ensure reliability of evidence.”¹⁰² Nor does it follow from accepting that the *Roberts* standard affords too much discretion to judges that the answer to the problem is to eliminate judicial discretion entirely. Substantive approach jurisprudence instructs that some discretion is necessary to accommodate the basic interests involved in all criminal trials.¹⁰³ Yet, the *Crawford* Court elected to remedy *Roberts*’s shortcomings, not with measured, conservative adjustment that would preserve the judiciary’s ability to meet the “necessities of the case,” but with a drastic doctrinal shift to a categorical rule of procedure that purports to destroy that ability.¹⁰⁴

Perhaps fortunately, the Court has failed to completely eliminate judicial discretion from Confrontation Clause jurisprudence.¹⁰⁵ Even before *Davis* was handed down, all avenues for discretion were not closed off. The first of the three possible formulations of “testimonial” statements given in *Crawford* includes “statements that declarants would reasonably expect to be used prosecutorially,” and the third is made up entirely of “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.”¹⁰⁶ Perhaps the majority knew on some level that an absolute categorical standard would be unworkable.¹⁰⁷ Consistent with this notion, and with the equivocation inherent in declaring a bright-line rule then defining it in terms of an objective

¹⁰¹ See *Crawford*, 541 U.S. at 60.

¹⁰² *Id.* at 61.

¹⁰³ See, e.g., *Roberts*, 448 U.S. at 66 n.9; *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Mancusi v. Stubbs*, 408 U.S. 204, 212–13 (1972); *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Barber v. Page*, 390 U.S. 719, 722 (1968); *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934); *Mattox v. United States*, 156 U.S. 237, 243 (1895) (demonstrating that, by the Court’s repeated acknowledgment that countervailing policy considerations must be balanced against the confrontation right, it implicitly condones at least some measure of judicial discretion).

¹⁰⁴ *Mattox v. United States*, 156 U.S. at 243; *Crawford*, 541 U.S. at 67–68 (“By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.”).

¹⁰⁵ See *Crawford*, 541 U.S., at 51–52; *Davis v. Washington*, 547 U.S. 813, 822–23 (2006). See also *Cicchini & Rust*, *supra* note 15, at 540–43.

¹⁰⁶ *Crawford*, 541 U.S. at 51–52 (citation omitted).

¹⁰⁷ It must have at least been warned of this possibility by Rehnquist, who suggested it in his concurrence. *Id.* at 74–75 (Rehnquist, C.J., concurring) (“By creating an immutable category of excluded evidence, the Court adds little to a trial’s truth-finding function and ignores [the] longstanding guidance [that the competing interests in a criminal trial must be accommodated].”).

person's reasonable belief, *Davis's* attempt to clarify what constitutes a "testimonial" statement uses similarly vague language.¹⁰⁸ By hinging the admissibility of hearsay under the Confrontation Clause on whether "circumstances objectively indicat[e] that the primary purpose of [a statement] is to enable police [to respond to] an ongoing emergency," the Court clearly backs away from *Crawford's* declaration that the Confrontation Clause requires a categorical rule for its proper effectuation.¹⁰⁹ The Court's language in both *Crawford* and *Davis* expressly mandates a fact-based inquiry to assess a statement's testimonial nature and thereby empowers judges to make rulings on such matters according to subjective criteria. Moreover, as Justice Thomas points out, "[t]he Court's repeated invocation of the word 'objectiv[e]' to describe its test" does not save the test from the fate the Court deemed to be so awful in *Crawford*.¹¹⁰ Thus, rather than slamming the door on the potential for subjectivity inherent in the first and third of the suggested formulations of "testimonial,"¹¹¹ the Court swung the door open and welcomed judicial discretion home with open arms.¹¹²

The *Crawford* rule's capacity to permit judicial discretion was on full display in the State of New York, when the state's courts began to wrestle with the admission of foundation documents for breath test evidence in driving while intoxicated (DWI) prosecutions.¹¹³ The authors of these documents, which are essentially statements that a particular breath test instrument is in working order, and that its readings will be accurate, are generally not present at DWI trials to be cross-examined. To demand the presence of these persons presents serious "practical concerns" for the people of New York State, including the radically increased cost of producing the New York Division of Criminal Justice Services (DCJS), and New York State Police Forensic Investigation Center (NYSP) personnel that perform the testing at all DWI trials throughout the state.¹¹⁴

¹⁰⁸ *Davis*, 547 U.S. at 822–23.

¹⁰⁹ *Id.* at 822.

¹¹⁰ *Id.* at 839–40 (Thomas, J., concurring in part and dissenting in part).

¹¹¹ See *supra* text accompanying notes 54, 56.

¹¹² *Davis*, 547 U.S. at 822.

¹¹³ The documents referred to include "record[s] of inspection, maintenance, and calibration" of breath test instruments performed by the New York Division of Criminal Justice Services (DCJS), and "certification[s] of analysis" of the simulator solution to calibrate the instruments by the New York State Police Forensic Investigation Center (NYSP). *People v. Orpin*, 796 N.Y.S.2d 512, 513 (Just. Ct. 2005).

¹¹⁴ *Id.* at 517.

The people of New York deserve the prosecutorial capacity to keep their streets safe by punishing drunk driving, so such documents were routinely admitted as business records prior to *Crawford*.¹¹⁵ On the other hand, there have been “[s]ubstantial problems” with DWI testing in New York State in the past, which highlights the importance of defendants’ confrontation right in DWI trials.¹¹⁶

These two opposing, compelling interests implicate the importance of local courts’ abilities to balance them. However, consistent with *Crawford*’s stated purpose, initial decisions in New York took a hard line and failed to accommodate the people’s interests.¹¹⁷ In *People v. Orpin*, Irondequoit Town Justice John L. DeMarco concluded that “what matters under the *Crawford* analysis is that the declarant knows that the statement will be used in a prosecution.”¹¹⁸ He therefore held that documents offered as foundation for the breath test evidence against Orpin were testimonial, and that failure to produce the declarant violated Orpin’s confrontation right.¹¹⁹

The obvious implication of this holding was that DCJS and NYSP personnel would be required to travel the state, at great cost to taxpayers, otherwise per se DWI would be a thing of the past.¹²⁰ Yet, Justice Demarco’s holding is supported by substantial logical force. The DCJS and NYSP personnel performing the testing of DWI instruments and certifying their accuracy are doubtless doing so not only with an objectively reasonable belief that their statements would be available for later use at trial, but with the express purpose of so using them.¹²¹ Justice DeMarco noted the Supreme Court’s recognition that “[i]nvolvement of government [officers] in the production of testimony with an eye toward trial

¹¹⁵ *Id.* at 514. See also *People v. Mertz*, 497 N.E.2d 657, 663 (N.Y. 1986); *People v. Dailey*, 700 N.Y.S.2d 307, 309 (App. Div. 1999).

¹¹⁶ *Orpin*, 796 N.Y.S.2d at 517.

¹¹⁷ See *id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney 2007). New York State recognizes two forms of DWI: section 1192(2) establishes that a person having a blood alcohol content (BAC) of 0.08% or more is deemed to be intoxicated, per se, and section 1192 (3) simply proscribes “operat[ing] a motor vehicle while in an intoxicated condition.” § 1192 (2), (3). The problems created by the absence of otherwise available scientific evidence are clear. Such evidence is not only the only way to establish the per se violation, it is also the best evidence of the ordinary DWI violation. Without it, local justice courts are left to sift through the he-said, she-said testimony provided by prosecution and defense to establish that the defendant was, in fact, intoxicated when he or she operated the vehicle.

¹²¹ See *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004).

presents unique potential for prosecutorial abuse.”¹²² There is no reason to believe that this potential is eliminated merely because the documents are created as part of DCJS or NYSP routine procedure.

Nonetheless, later decisions distinguished these types of statements as non-testimonial on that very basis. In two subsequent cases, local courts held that because foundation documents for breath test results were created as part of the routine business of criminal prosecution, rather than for the purpose of any specific prosecution, they were not testimonial under *Crawford*.¹²³ Additionally, Justice DeMarco’s ruling was successfully collaterally attacked by Monroe County District Attorney Michael Green on that same basis, and the foundation documents offered in *Orpin* were declared admissible as not in violation of *Orpin*’s confrontation right.¹²⁴ While none of these opinions addressed the interest balancing as explicitly as *Orpin* did, it would be unsafe to assume that public concerns of efficient prosecution did not weigh into the decisions merely because the judges chose not to mention them expressly.¹²⁵

The bottom line is that underlying the discrepancy between these rationales is the discretion left to each judge to determine what is admissible under the Confrontation Clause. The difference between discretion under the substantive approach and that under the procedural approach is that admission based on a statement’s substance allows a judge to look directly at what the Confrontation Clause ultimately protects: the accused’s right to have reliable evidence presented against him at trial,¹²⁶ while under the procedural approach, judges are forced to resort to the creation of legal fiction to properly balance competing interests and obtain substantive justice.¹²⁷

¹²² *Orpin*, 796 N.Y.S.2d at 516 (quoting *Crawford*, 541 U.S. at 56 n.7).

¹²³ *People v. Lebrecht*, 823 N.Y.S.2d 824, 827–28 (App. Term 2006); *People v. Fisher*, No. 04-1556, 2005 WL 2780686, at *1, *6, *7 (N.Y. City Ct. Oct. 25, 2005).

¹²⁴ *Green v. DeMarco*, 812 N.Y.S.2d 772, 779, 783, 785 (Sup. Ct. 2005).

¹²⁵ Note that strict application of the *Crawford* rule, as in *Orpin*, would allow scores of drunk drivers to escape the repercussions of their dangerous behavior, and, consequently, New York State’s roadways would be less safe. This is an example of the imprecision of the procedural approach. See *infra* Part IV.C.

¹²⁶ See *infra* Part IV.C.

¹²⁷ The Monroe County Court’s decision in *Green* provides several examples of the fictions referred to. There, breath test instrument certifications were likened unto automobile inspections to imply that their purpose was more regulatory than criminal in nature, and the somewhat ridiculous assertion was made that some purpose for the foundation documents existed in the absence of any litigation. *Green*, 812 N.Y.S.2d at 781–82. The *Green* court also

Furthermore, the discretion left to local court judges tends to breed the same inconsistency (and thus unpredictability) decried by the *Crawford* majority.¹²⁸ In *Green*, the court placed emphasis on the fact that “the evidence at issue . . . records facts as easily and reliably proven by the documents themselves as by live testimony. . . . These matters are neither discretionary nor based upon opinion.”¹²⁹

The same might be said of Department of Motor Vehicles (DMV) affidavits in prosecutions for aggravated unlicensed operation of a motor vehicle (AUO).¹³⁰ Prosecution of that crime requires DMV personnel to review their records and certify that the defendant was notified of the revocation of his license.¹³¹ The DMV records either reflect that the defendant was notified by ordinary means or they do not; the matter is not discretionary. Additionally, since both DMV records and breath test instrument calibrations are maintained statewide by a relatively few individuals, it is unlikely that personnel dealing with either will have any recollection of specific tests or license revocations. In both cases, it is difficult to imagine what more a live witness could offer to a tribunal than what is already provided in document form, and in both cases the evidence was crucial to the prosecution’s case.¹³² It would seem that the only difference between the calibrator’s certification and the DMV worker’s affidavit is the specificity of the prosecutorial purpose of the statement. The *Pacer* court hung on this distinction, giving no weight to the other considerations deemed important in *Green*, when it held the DMV affidavit to be testimonial.¹³³

In light of all this, the elimination of judicial discretion obviously cannot provide sufficient basis for ignoring 110 years of precedent. Judicial discretion, though certainly objectionable when taken to extremes, is necessary in moderation to appropriately account for

asserted that foundation documents for breath test evidence were not testimonial because they did not establish a fact that was an element of the crime. *Id.* at 783–84. However, neither *Crawford* nor *Davis* mentions this as a factor bearing on whether a statement is testimonial. To the contrary, as “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits,” the DCJS and NYSP personnel’s certifications of accuracy would seem to fall squarely within the “common nucleus” of *Crawford*’s various definitions of “testimonial.” *Crawford*, 541 U.S. at 51–52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)).

¹²⁸ See *supra* text accompanying notes 87, 88.

¹²⁹ *Green*, 812 N.Y.S.2d at 784.

¹³⁰ See *People v. Pacer*, 847 N.E.2d 1149, 1150–51 (N.Y. 2006).

¹³¹ *Id.* at 1151.

¹³² *Id.* at 1153–54. See *supra* notes 111–16 and accompanying text.

¹³³ *Pacer*, 847 N.E.2d at 1153.

the various competing interests involved in criminal trials. In any event, the procedural approach developed in *Crawford* and *Davis*, though facially categorical, does no more than “transfer[] [judicial discretion] from one determinative issue—whether the hearsay is reliable—to another determinative issue—whether the hearsay is testimonial.”¹³⁴

C. “*The Unpardonable Vice*”¹³⁵

The *Crawford* majority refers to *Roberts*’s “demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude” as its “unpardonable vice.”¹³⁶ The majority is correct to assert that the *Roberts* “framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations,”¹³⁷ and that this is an “*inherent*[], and therefore *permanent*[]” flaw.¹³⁸ However, in equating the “testimonial” nature of a statement with its veracity, the majority has misidentified the true nature of the “core confrontation violation[].”¹³⁹

“[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure”¹⁴⁰ So what makes the civil law mode of criminal procedure so evil? The answer is that the general practice of anonymous prosecution by *ex parte* affidavits or depositions has the capacity to undermine the judicial function of determining the truth.¹⁴¹ The majority’s “paradigmatic confrontation violation” in the trial of Sir Walter Raleigh is illustrative.¹⁴² There, Raleigh demanded that his accuser be called before him because the accuser was “absolutely in the King’s mercy; to excuse [Raleigh could not] avail him; by accusing

¹³⁴ Cicchini & Rust, *supra* note 15, at 540.

¹³⁵ *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 68 n.10.

¹³⁹ *Id.* at 62–63. The majority states that the “ultimate goal [of the Clause] is to ensure reliability,” and that the Clause is only satisfied by cross-examination on all testimonial statements. *Id.* at 61. Therefore, the majority is simply treating testimonial statements as presumptively unreliable.

¹⁴⁰ *Id.* at 50; *see also* *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (explaining “[t]he primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits . . . [from] being used against . . . prisoner[s]” in the same manner as against opposing parties in civil cases).

¹⁴¹ *See Crawford*, 541 U.S. at 43–44 (discussing implications from a historical perspective).

¹⁴² *Id.* at 52.

[Raleigh] he may [have] hope[d] for favour.”¹⁴³ In plain (modern) English, this is essentially a charge that the statements implicating Raleigh made by the accuser during his *ex parte* examination by the Privy Council, and in a letter, were lies told to gain the favor and mercy of the king; a charge that the statements were unreliable, and that Raleigh could expose this unreliability if only he could confront his accuser.¹⁴⁴

Roberts's “unpardonable vice” is not that it fails to exclude evidence based on the majority’s own novel distinction between testimonial and non-testimonial,¹⁴⁵ but that it fails to adequately exclude evidence that is unreliable. Despite *Roberts's* announced purpose to ensure the reliability of evidence received against an accused, the exceptions to the general rule of exclusion the *Roberts* Court set up are of such breadth that, in practice, they threaten to swallow the rule.¹⁴⁶ *Roberts's* articulation of the substantive approach is overly permissive in that its vagaries invite, and indeed require, the exercise of judicial discretion to such an extent that defendants’ confrontation rights are not sufficiently protected by the standard.¹⁴⁷ The result is, in many instances, criminal trials that include an inappropriate element of civil-law prosecution.¹⁴⁸ Additionally, inasmuch as the long-recognized “ultimate goal [of the Confrontation Clause has been] to ensure reliability of evidence” received against an accused, it makes sense to conceive of the “core confrontation violation[]” as the receipt of evidence without such assurances.¹⁴⁹ Once again we are led to the conclusion that it is not the theory behind the substantive approach, but the formulation of that theory in *Roberts* that is subject to *Crawford's* criticism.

The same cannot be said of the procedural approach, which itself suffers the same “unpardonable vice” as the *Roberts* articulation of the substantive approach. Whereas the *Roberts* standard undermines the discovery of truth at trial through its malleability and excessive dependence on judicial discretion, the *Crawford* standard undermines the discovery of truth by excluding untested

¹⁴³ *Id.* at 44.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 63; *id.* at 72 (Rehnquist, C.J., concurring).

¹⁴⁶ *Id.* at 72 (Rehnquist, C.J., concurring); *see also supra* text accompanying notes 87–90.

¹⁴⁷ *Crawford*, 541 U.S. at 67–68.

¹⁴⁸ *Id.* at 63–65.

¹⁴⁹ *Id.* at 61, 63; *id.* at 74 (Rehnquist, C.J., concurring); *Maryland v. Craig*, 497 U.S. 836, 845 (1990); *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987); *Ohio v. Roberts*, 448 U.S. 56, 65 (1980); *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

evidence fitting the amorphous definition of “testimonial,” without regard to whether cross-examination on it would make any contribution to the judiciary’s truth-finding role.¹⁵⁰ Additionally, those statements deemed non-testimonial escape the Clause’s coverage, no matter how unreliable they are, and are left to the “vagaries of the rules of evidence,” which the majority declares to be insufficient protection under the Sixth Amendment.¹⁵¹

The procedural approach suffers an additional vice: rigidity. Notwithstanding that “testimonial” is left largely undefined, the standard set forth in *Crawford* is a categorical procedural rule of exclusion, the aim of which is to obtain procedural justice for the accused.¹⁵² Procedural justice, as it is conceived in this Paper, refers to a presumption inherent in the *Crawford* rule that if a defendant is afforded an opportunity to cross-examine on all testimonial statements, then justice has been done.¹⁵³ However, as noted, a statement’s testimonial nature has no necessary relation to its veracity.¹⁵⁴ Therefore, if the end goal of the Confrontation Clause is to ensure the reliability of evidence received against an accused, then the *Crawford* rule is indeed, as Rehnquist described it, an “imprecise approximation.”¹⁵⁵ Moreover, the very nature of the procedural approach locks this imprecision in. Since, under this approach, the just result in criminal trials cannot be divorced from the procedure that is assumed to afford it, the procedure must be applied in all instances, even where the procedure would undermine a tribunal’s truth-finding function, or result in “manifest failure of justice.”¹⁵⁶ Thus the procedural approach destroys the abilities of courts to accommodate these interests, which are central to the general public interest in effective enforcement of the criminal law,¹⁵⁷ unless courts resort to substantive grounds to justify departure from the procedural rule.

Notwithstanding the overbreadth of the *Roberts* rule, the substantive approach has the capacity to both protect a defendant’s

¹⁵⁰ *Crawford*, 541 U.S. at 75 (Rehnquist, C.J., concurring).

¹⁵¹ *Id.* at 61 (majority opinion).

¹⁵² *See supra* note 24.

¹⁵³ *Crawford*, 541 U.S. at 61. *See supra* note 24 (discussing justice and substantive versus procedural justice).

¹⁵⁴ *See supra* note 109 and accompanying text.

¹⁵⁵ *Crawford*, 541 U.S. at 72 (Rehnquist, C.J., concurring). Admittedly, the “imprecise approximation” the Chief Justice referred to was the majority’s approximation of the Framers’ intent. *Id.* Nonetheless, the verbiage is apropos here.

¹⁵⁶ *Id.* at 73–76; *Mattox v. United States*, 156 U.S. 237, 244 (1895).

¹⁵⁷ *See supra* notes 16, 24.

right under the Confrontation Clause to have reliable evidence presented at trial, and maintain public confidence in the criminal justice system by enabling courts to glean the truth about events and circumstances at issue.¹⁵⁸ Thus, although the rules from both *Crawford* and *Roberts* share the same “unpardonable vice,”¹⁵⁹ the procedural approach is irretrievably married to the rigidity that hinders its ability to accurately determine the truth at trial according to the particular “necessities of [a] case,”¹⁶⁰ while the substantive approach’s flexibility provides the means to a more precise measure of justice. The importance of this precision has been recognized for over a century.¹⁶¹ As Rehnquist observed in *Crawford*, “[t]o find exceptions to exclusion under the Clause is not to denigrate it Exceptions to confrontation have always been derived from the experience that some out-of-court statements are just as reliable as cross-examined in-court testimony [C]ross-examination is a tool used to flesh out the truth, not an empty procedure.”¹⁶²

Domestic violence prosecutions provide a poignant illustration of the importance of the interest balancing the substantive approach accommodates, and that the procedural approach threatens. “Domestic violence” refers to a number of coercive relationships including child abuse and violence between intimate partners.¹⁶³ Both of these forms implicate compelling interests which must be appropriately balanced against a putative abuser’s confrontation right.¹⁶⁴ Prior to *Crawford*, courts and prosecutors had the ability to strike this balance, but the bright-line procedural rule now threatens to expose children to “public degradation, humiliation, demoralization, and psychological damage,” to jeopardize victim safety, and to permit abusers to escape conviction, ironically, through the continued abuse of their victims.¹⁶⁵

¹⁵⁸ See *supra* text accompanying notes 25–30.

¹⁵⁹ *Crawford*, 541 U.S. at 63 (majority opinion); see *supra* Part IV.C.

¹⁶⁰ *Mattox*, 156 U.S. at 244; see *supra* Part IV.C.

¹⁶¹ See *supra* Part II.

¹⁶² *Crawford*, 541 U.S. at 73–74 (Rehnquist, C.J., concurring).

¹⁶³ Karen Morao, *Criminal Law Chapter: Domestic Violence and the State*, 7 GEO. J. GENDER & L. 787, 787 (2006).

¹⁶⁴ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); Andrew King-Ries, *Crawford v. Washington: The End of Victimless Prosecution?*, 28 SEATTLE U. L. R. 301, 301 (2005); Sophia Rowlands, *Review of Selected 2005 California Legislation: Penal: Cole’s Law Confronts Constitutional Issues: Expanding the Availability of Closed-Circuit Child Testimony in the Face of the Confrontation Clause*, 37 MCGEORGE L. REV. 294, 294–95 (2006).

¹⁶⁵ *Globe Newspaper Co.*, 457 U.S. at 607 n.18; Rowlands, *supra* note 164, at 294; King-Ries, *supra* note 164, at 301, 305–06.

The now questionable decision by the Court in *White v. Illinois*¹⁶⁶ provides an example of the substantive approach's interest balancing in action. In that case, the defendant was on trial for the sexual abuse of a four-year-old girl.¹⁶⁷ The prosecution twice attempted to call the girl as a witness, but she was emotionally unable to testify.¹⁶⁸ Instead, the prosecution offered the child's pre-trial statements, as excited utterances and statements to medical professionals, through the testimony of five other people.¹⁶⁹ The first person was the girl's babysitter to whom the child gave an account of the incident immediately after it occurred.¹⁷⁰ The second was the child's mother, who arrived at the scene approximately thirty minutes later.¹⁷¹ The third was a police officer who questioned the girl alone in the kitchen about forty-five minutes after the incident.¹⁷² Last were the emergency room doctor and nurse that attended the girl at the hospital about four hours after the incident.¹⁷³ Each account of the events given to each witness by the child was "essentially identical."¹⁷⁴ The Court affirmed the Illinois Appellate Court's admission of the statements under those exceptions,¹⁷⁵ finding "substantial probative value" in the statements.¹⁷⁶

Note how the Court was able to accommodate both the defendant's core confrontation right to have reliable evidence presented and the compelling interest in avoiding the potentially devastating effect on the girl of testifying in public about the sexual abuse she suffered.¹⁷⁷ The Court noted the firm establishment of the spontaneous declaration and medical treatment hearsay exceptions,¹⁷⁸ and the reliability of the hearsay was further

¹⁶⁶ 502 U.S. 346 (1992).

¹⁶⁷ *Id.* at 349.

¹⁶⁸ *Id.* at 350.

¹⁶⁹ *Id.* at 349–51. Though various formulations may exist from state to state, excited utterances and statements to medical professionals may be understood to mean statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," and "[s]tatements made for purposes of medical diagnosis or treatment and describing [facts or conditions] pertinent to [the same]," respectively. FED. R. EVID. 803(2), (4).

¹⁷⁰ *White*, 502 U.S. at 349.

¹⁷¹ *Id.* at 349.

¹⁷² *Id.* at 349–50.

¹⁷³ *Id.* at 350.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 358.

¹⁷⁶ *Id.* at 356.

¹⁷⁷ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

¹⁷⁸ *White*, 502 U.S. at 356 n.8 (noting that the spontaneous declaration exception is 200

bolstered by the consistency between the statements made to each testifying witness.¹⁷⁹ At the same time, the child was spared what would obviously have been “public degradation, humiliation, demoralization, and psychological damage,”¹⁸⁰ and substantive justice was realized by conviction based on the closest approximation of the truth about the abuse that the trial court was able to provide to the jury.¹⁸¹

Admittedly, good arguments could be made that most of the hearsay offered in *White* would be admitted even under the *Crawford* rule. The child’s statements to her babysitter and her mother would likely not have been testimonial.¹⁸² Her statements to the medical professionals are perhaps a closer question, but are at least as likely as not to avoid exclusion.¹⁸³ However, the similarity between the circumstances surrounding the statement at issue in *Davis v. Washington*,¹⁸⁴ and those surrounding the statement the victim in *White* gave to the responding police officer, would seem to indicate that the latter would be held testimonial.¹⁸⁵ With three of four statements getting admitted, it is safe to assume that the result would be the same under *Crawford*.

Note, however, that it is only by analyzing the facts and circumstances surrounding the statements (i.e., by undertaking a substantive analysis) that we are able to decide what gets admitted. Note also, that the analysis undertaken has no bearing on whether the statement is reliable, which is the core concern of the Confrontation Clause. In fact, the statement that would be precluded is clearly just as reliable as the ones that would be admitted. If we are going to set out to evaluate the substantive

years old, and that both exceptions are recognized by the majority of states).

¹⁷⁹ *Id.* at 350.

¹⁸⁰ *Globe Newspaper Co.*, 457 U.S. at 607 n.18.; *see also White*, 502 U.S. at 350 (referring to the “emotional difficulty” experienced by a witness who was testifying against her abuser).

¹⁸¹ *White*, 502 U.S. at 349.

¹⁸² *Id.*

¹⁸³ *Id.* at 350–51.

¹⁸⁴ 547 U.S. 813, 819–22 (2006).

¹⁸⁵ *Id.*; *White*, 502 U.S. at 349. In both cases, the police took the victim’s statement after the assault was over, while the officer was alone with the victim, with a clear prosecutorial purpose. *Davis*, 547 U.S. at 819–820; *White*, 502 U.S. at 349–50. Of course, although *Davis* offers no guidance as to whose purpose is at issue, *Crawford*’s suggested definitions place the focus squarely on the declarant’s purpose, so we would have to assume that a child has the capacity to form a prosecutorial purpose in the first place. *Davis*, 547 U.S. at 821–22; *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004). This is an entirely different issue stemming from the vagaries of the current formulations of “testimonial,” and is beyond the scope of this Paper. *See supra* Part III.B.

qualities of hearsay statements to decide their admissibility under the Clause, should we not focus on those substantive qualities that bear on the protections the Clause is meant to offer?

In any event, a victim may not have had the opportunity or foresight to tell her story to numerous individuals so soon after a traumatic event, prior to the formation of a prosecutorial purpose.¹⁸⁶ This may especially be the case with domestic violence.¹⁸⁷ Victims of domestic violence suffer a pattern of abuse over time.¹⁸⁸ Victims are often assaulted numerous times before reporting it,¹⁸⁹ and there is a high rate of recidivism in cases of domestic violence,¹⁹⁰ so victims may have repeated contact with police and social workers. This frequent contact can have an adverse affect on whether a victim's statement is testimonial because the victim's first-hand knowledge of how a statement will be used gives rise to a prosecutorial purpose for its making.¹⁹¹ And, since abuse victims are frequently unwilling to testify because of threats and coercion by their abusers, the statements they make to others are often the only evidence of the abuse available.¹⁹² Moreover, initial reports by domestic violence victims tend to be the most accurate since victims later recant, or change their stories to exculpate their attackers.¹⁹³

Clearly, cases involving domestic violence present special "necessities" which may preclude the procedural approach from affording any justice at all, procedural or otherwise, a result we have been wary of for over 110 years.¹⁹⁴

Finally, in this discussion of the "manifest failure of justice"¹⁹⁵ threatened by the procedural approach, it is worth revisiting New

¹⁸⁶ Even if they did, the retelling of a traumatic story, and the attendant reliving of the traumatic event, may actually cause further emotional damage to a recent victim.

¹⁸⁷ King-Ries, *supra* note 164, at 319.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See American Bar Association, Commission on Domestic Violence, Survey of Recent Statistics, <http://www.abanet.org/domviol/statistics.html#recidivism> (last visited Sept. 1, 2008).

¹⁹¹ King-Ries, *supra* note 164, at 319–20.

¹⁹² *Id.* at 305–06. The doctrine of forfeiture is unlikely to be of help here since the abuser's wrongdoing is indistinguishable from the charged crime, and the victim will frequently be the only one who can offer evidence of the wrongdoing. Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 43–45 (2006) (arguing that "paradigmatic witness tampering . . . and paradigmatic battering are too factually disparate to be yoked by a single, undifferentiating legal doctrine").

¹⁹³ King-Ries, *supra* note 164, at 307.

¹⁹⁴ *Mattox v. United States*, 156 U.S. 237, 244 (1895) (warning that the confrontation right must sometimes yield to prevent "manifest failure of justice").

¹⁹⁵ *Id.*

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York State's prosecution of AUOs. New York's Vehicle and Traffic Law requires that a person driving without a license know or have reason to know that their license has been suspended or revoked when they operate a vehicle in order to be guilty of an AUO infraction.¹⁹⁶ To establish this element prior to *Crawford*, DMV personnel swore out an affidavit that stated that the notice of suspension was mailed to the defendant according to regular DMV procedure.¹⁹⁷ The presumption of regularity of mail sufficed to establish that the defendant knew his license was suspended when he drove, absent proof to the contrary.¹⁹⁸ Notwithstanding the unlikely contingency that a prosecutor is able find witnesses that can testify that they somehow knew that the defendant was aware of his license suspension, DMV affidavit is the only way to prove the "knowing or having reason to know" element of the offense.¹⁹⁹ However, pursuant to *Crawford*, the New York Court of Appeals, in *People v. Pacer*, held that such affidavits are testimonial because they are prepared in anticipation of litigation by a non-neutral government agent.²⁰⁰ Seemingly, under the reasoning New York's courts have applied to foundation documents for DWI prosecution,²⁰¹ such an affidavit—sworn out contemporaneously with the mailing of the notice pursuant to general practice, before any cause for prosecution had accrued, or any request from a prosecutor had been made—would be non-testimonial, and therefore admissible under the Clause. Yet there would seem to be no discernable difference between the two affidavits. Each is likely to be an accurate reflection of DMV records, and neither is likely to be meaningfully supplemented by cross-examination.²⁰²

On the other hand, preclusion of DMV affidavits makes AUO offenses effectively un-prosecutable. The inequity here is apparent. The procedural rule has done little to further protect the defendant's confrontation right, but has severely prejudiced the public interest in effective enforcement of the criminal law. Once

¹⁹⁶ N.Y. VEH. & TRAF. LAW § 511(1)(a) (McKinney 2007).

¹⁹⁷ See *People v. Pacer*, 847 N.E.2d 1148, 1151 (N.Y. 2006); *People v. Capellan*, 791 N.Y.S.2d 315, 316 (Crim. Ct. 2004). Prior to *Crawford*, this was common practice for any offense involving unlicensed conduct. See, e.g., *People v. Niene*, 798 N.Y.S.2d 891, 892 (Crim. Ct. 2005) (discussing the use of a sworn affidavit from the New York State Department of Consumer Affairs).

¹⁹⁸ *Pacer*, 847 N.E.2d at 1151 n.2; *Capellan*, 791 N.Y.S.2d at 316.

¹⁹⁹ § 511(1)(a).

²⁰⁰ *Pacer*, 847 N.E.2d at 1152.

²⁰¹ See *supra* Part IV.B.

²⁰² See *supra* Part IV.B.

again we see that the testimonial nature of a statement has no necessary bearing on whether the core concerns of the Confrontation Clause are implicated, and that imposition of a procedural bright-line rule destroys courts' abilities to accommodate the varying interests involved in a criminal trial.

V. CONCLUSION

Part I laid out the substantive approach to the Confrontation Clause as it is articulated in *Roberts* and noted that its flexibility allowed courts to accommodate the various interests involved in criminal prosecution. Part II introduced the procedural approach taken in *Crawford* and commented on its development in the short time since that decision was handed down. Part III addressed the criticisms lodged against *Roberts* in *Crawford* and demonstrated that they provided insufficient basis for the complete overhaul of Confrontation Clause jurisprudence that the majority undertook—especially since the rule introduced in *Crawford* perpetuated, rather than eliminated, those aspects of the substantive approach it identified as flaws.

In Part III, three criticisms were specifically addressed. First, it was shown that neither the deviation from the substantive approach, nor the testimonial/non-testimonial distinction made in *Crawford*, is necessarily supported by the majority's account of the Confrontation Clause's historical background. Next, it was shown that the complete removal of judicial discretion from application of the Confrontation Clause is neither prudent, nor possible, and that, in any event, it had not been accomplished. While acknowledging the validity of the observation that judicial discretion left unfettered, as it was in *Roberts*, can have deleterious effects on the preservation of a defendant's confrontation right, Part III took issue with the pendulum swing to the opposite extreme that *Crawford*'s procedural approach represents, and argued that *Crawford* has an analogously deleterious affect on the public interests that oppose a defendant's confrontation right at trial. It was suggested that a more moderate approach to dealing with an admittedly serious issue was in order. Finally, *Roberts*'s "unpardonable vice" was addressed, and it was demonstrated that the majority missed the mark when it asserted that the gravamen of confrontation violation is the admission of core testimonial statements, rather than the admission of statements that are not sufficiently reliable. Additionally, without attempting to defend *Roberts*'s failure to

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adequately ensure the reliability of hearsay admitted against an accused, it was pointed out that the *Crawford* rule does as little to ensure the reliability of a statement as the *Roberts* rule did. However, unlike a rule focused on substance, a categorical procedural rule is incapable of even that moderate malleability needed to account for all the varied interests involved in a criminal trial. Procedural justice, it was concluded, is simply not as fair as substantive justice.

That said, I do not advocate a return to the *Roberts* standard of reliability, nor do I assert that there is no place in Confrontation Clause jurisprudence for a firm (but not unyielding) procedural rule. The majority's criticism of *Roberts* is well received. Whether or not history supports its testimonial/non-testimonial distinction, it was right that something needed to be done about *Roberts's* potential to admit inadequately tested statements in derogation of the very principle it was crafted to uphold.

At this point, *Crawford* is approaching four years old, and the Court, led by Justice Scalia, has delivered a second landmark majority decision advancing the testimonial distinction, and replacing the *Roberts* rule. It would seem that the procedural approach is here to stay, and that the required procedure will be triggered by a statement's testimonial nature. This is not all bad, so long as the Court is willing to moderate the *Crawford* rule.²⁰³ As time goes by, the Court will assuredly offer more guidance as to the meaning of the term "testimonial," and state courts will continue to refine their own definitions of it. But the categorical rule of exclusion of testimonial statements will remain, so courts' abilities to consider even the most reliable testimonial statements and thereby vindicate interests other than the defendant's right of confrontation will continue to be stunted.

I, therefore, decline to oppose the testimonial distinction, but suggest that it be merely a starting point for Confrontation Clause analysis, and that the Court consider exceptions to the rule excluding testimonial statements in order to obtain a more precise measure of justice in criminal trials. The rule should capture the best aspects of both the procedural and the substantive approaches,

²⁰³ Notably, despite the strong anti-*Roberts* language in *Crawford*, and the complete overhaul of Confrontation Clause jurisprudence *Crawford* represents, the Court has since ruled that *Crawford* is not a watershed decision. *Whorton v. Bockting*, 127 S. Ct. 1173, 1184 (2007). This, along with the softening of the formulation of "testimonial" in *Davis*, tends to indicate that the Court is so inclined.

and minimize the effects of the shortcomings of both as well. That is, by coupling the categorical protection afforded defendants by the *Crawford* rule with the flexibility of substantive approach we can empower our courts to attain the closest approximation of true justice in any given case; we can protect the confrontation right and still vindicate the public interest without “material departure from the reason of the general rule.”²⁰⁴

Specifically, I propose that when an uncross-examined, out-of-court statement is offered against an accused, a three step inquiry should take place. First, the statement should be examined for its testimonial nature. Retention of the testimonial distinction establishes a strict procedural rule of exclusion as a starting point and thereby gives precedence to the confrontation right, while at the same time honoring what the majority of the Supreme Court believes to be the Founders’ intent. If the statement is non-testimonial, then the Clause is not implicated, and admissibility should be controlled by hearsay rules. If a statement is testimonial, then it should be viewed as presumptively unreliable,²⁰⁵ and in the second inquiry, the burden should fall on the prosecution to overcome the presumption by a showing that the statement fits within a firmly established hearsay exception. The “particularized guarantees of trustworthiness” prong of the *Roberts* test should not be retained as an alternative vehicle for admissibility.²⁰⁶ This would give due weight to the “truism” recognized for time nearly immemorial that “hearsay rules and the Confrontation Clause are generally designed to protect similar values”²⁰⁷ and ‘stem from the same roots,’²⁰⁸ and provide the flexibility courts need to accommodate the “necessities of [each] case, and . . . prevent a manifest failure of justice.”²⁰⁹ It would also eliminate the potential for unfettered judicial discretion to erode the otherwise categorical cross-examination requirement. Finally, consistent with *Crawford*’s avowed purpose to give greater protection to the accused at trial,²¹⁰ even where a statement is shown to fit a firmly rooted hearsay exception, reliability should merely be presumed, not established,

²⁰⁴ *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)).

²⁰⁵ *See supra* note 129.

²⁰⁶ *Roberts*, 448 U.S. at 66.

²⁰⁷ *Id.* (quoting *California v. Green*, 399 U.S. 149, 155 (1970)).

²⁰⁸ *Id.* (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970)).

²⁰⁹ *Mattox v. United States*, 156 U.S. 237, 244 (1895).

²¹⁰ *Crawford v. Washington*, 541 U.S. 36, 61–63 (2004).

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and the defendant should then have the opportunity to demonstrate, through particularized indicia, that the statement is unreliable. This final inquiry would act as a safety net to ensure that the Sixth Amendment's protections are not simply left to "the vagaries of the rules of evidence"²¹¹ by permitting the exercise of judicial discretion, within limited bounds, to look at other factors weighing on the statement's veracity and exclude it, notwithstanding that it satisfies some hearsay exception.

The approach outlined represents the "measured, conservative adjustment" referred to in Part III.B. Under our criminal justice system, defendants deserve the protection that the Confrontation Clause gives them. No less deserved, though, is the protection to the public that the criminal justice system provides. By blending the substantive and procedural approaches, i.e., by tempering the flaws of one with the virtues of the other, the rule enables courts to fulfill their duties both to the public and to defendants, and to achieve the closest possible approximation of justice.

²¹¹ *Id.* at 61.