WHAT'S RELIABILITY GOT TO DO WITH THE CONFRONTATION CLAUSE AFTER *CRAWFORD*?

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"To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence . . . ."[1]

I. INTRODUCTION: RELIABILITY, CROSS-EXAMINATION, AND THE RIGHT TO CONFRONT ONE'S ACCUSERS

There is an indispensable connection between cross-examination and the Sixth Amendment right to confront one's accusers. On the most basic level, the right to confront one's accusers encompasses the right to cross-examine them. The Confrontation Clause also relates to the reliability of evidence, because its guarantee embodies the principle that cross-examination is the method for testing the trustworthiness and reliability of the evidence against a criminal defendant. In 2004, *Crawford v. Washington* reiterated the connection between the Confrontation Clause, cross-examination, and reliability determinations.[2] *Crawford* stated that the Clause provides "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."[3]

Scholars are split on the question of whether *Crawford* made reliability the ultimate goal of the Clause.[4] "Practitioners and academics generally agree that the primary goal of the Confrontation Clause is to ensure the reliability of evidence."[5] Many other scholars, however, have opined that *Crawford* rejected reliability as a primary goal of the Confrontation Clause in favor of other

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1. Crawford v. Washington, 541 U.S. 36, 61 (2004).

2. *See generally Crawford*, 541 U.S. 36.

3. *Id.* at 61.

4. *See id.* Scholars who believe that *Crawford* meant what it said include: Michael German, *Trying Enemy Combatants in Civilian Courts*, 75 GEO. WASH. L. REV. 1421, 1423 (2007); Ted Sampsell-Jones, *Reviving* Saucier*: Prospective Interpretations of Criminal Laws*, 14 GEO. MASON L. REV. 725, 743-44 (2007); Penny J. White, *"He Said," "She Said," and Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387, 425 (2007). For scholars who do not believe that *Crawford* meant what it said, see *infra* note 5.

5. Pamela R. Metzger, *Cheating the Constitution,* 59 VAND. L. REV. 475, 501 (2006). *See also* Josephine Ross, *After* Crawford *Double-Speak: "Testimony" Does Not Mean Testimony and "Witness" Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147 (2006) [hereinafter Ross, *After* Crawford *Double-Speak*] (arguing that before *Davis v. Washington*, *Crawford* should have been interpreted broadly).

goals.[6] Christopher Mueller wrote: "As conceived in *Crawford*, the Confrontation Clause is an independent check on the conduct of police and prosecutors in preparing and trying cases."[7] Mueller approved of this shift, stating, "*Crawford* was right to shift the focus of the Confrontation Clause away from reliability and to look instead at the nature of statements offered against the accused, and especially at the intent or expectations of witnesses who make them and the role of police who gather or generate them."[8] Similarly, in commending the Supreme Court for its decisions in *Crawford* and *Davis v. Washington*,[9] Richard Friedman wrote that "what *Crawford* tells us is that reliability is not what confrontation is all about."[10] The Sixth Amendment right to confront witnesses "doesn't say anything about hearsay. It doesn't say anything about exceptions. It doesn't say anything about reliability."[11] Andrew Taslitz advised readers that after *Crawford* the Confrontation Clause is concerned with serving primary goals other than reliability.[12] One must look beyond the Confrontation Clause for reliability and fairness of verdicts.[13]

It is not that these scholars failed to read *Crawford*'s language about reliability being the Clause's ultimate goal, nor to properly appreciate such uncompromising language as "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[14] In fact, it is the limiting term "testimonial" before the word "statements" that undercuts the stated goals of reliability.[15] Thanks to the inclusion of the new term,

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6. *See, e.g.*, Won Shin, Crawford v. Washington*: Confrontation Clause Forbids Admission of Testimonial Out-of-Court Statements Without Prior Opportunity to Cross-Examine*, 40 HARV. C.R.-C.L. L. REV. 223, 234 (2005) (*Crawford* hurled "reliability into the dustbin of confrontation theory."); W. Jeremy Counseller & Shannon Rickett, *The Confrontation Clause After* Crawford v. Washington: *Smaller Mouth, Bigger Teeth*, 57 BAYLOR L. REV. 1, 10 (2005) (the Clause's main purpose now is to keep government power in check); Carol A. Chase, *Is* Crawford *a "Get Out of Jail Free" Card for Batterers and Abusers? An Argument for a Narrow Definition of "Testimonial,"* 84 OR. L. REV. 1093, 1109, 1125 (2005) (the goal is now to prohibit "admitting in criminal trials statements produced by government officials' ex parte pretrial examination of witnesses").

7. Christopher B. Mueller, *Cross-Examination Earlier or Later: When is it Enough to Satisfy* Crawford*?*, 19 REGENT U. L. REV. 319, 320 (2007).

8. *Id.*

9. 426 U.S. 229 (1976).

10. Richard D. Friedman, *Forfeiture of the Confrontation Right After* Crawford *and* Davis, 19 REGENT U. L. REV. 489, 491-92 (2007).

11. Richard D. Friedman, Crawford *and* Davis: *A Personal Reflection*, 19 REGENT U. L. REV. 303, 305 (2007).

12. Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After* Crawford v. Washington, CRIM. JUST., Summer 2005, at 40.

13. *Id.* at 43.

14 Crawford v. Washington, 541 U.S. 36, 68-69 (2004).

15. In fact, the paragraph that contains the phrase "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee," starts with this sentence: "Where testimonial statements are involved, we do not

confrontation jurisprudence hereafter will not be a search for reliability at all, but a search for what is testimonial—a term divorced from what the Confrontation Clause actually effectuates at trial. Ironically, *Crawford* actually heralded in a new Confrontation Clause jurisprudence that overturned the Clause's historical assurance of reliability. After *Crawford*, the government is free to introduce many types of unreliable accusations without any right of confrontation attaching. In contrast, the government is prevented from introducing more reliable types of out-of-court accusations without producing the live witness for purposes of cross-examination.[16] My disagreement is only with those scholars who think that the divorce between the Clause and reliability is a positive result.[17] As I stated in an article published in 2006,[18] the *Crawford* Court's opinion would have been much more consistent with prior case law and reason had it looked at the purpose of the Confrontation Clause—particularly at the role that cross-examination plays in a trial—and defined the goals in light of its purpose. Instead, in post-*Crawford* Confrontation Clause analysis, government witnesses, whose credibility and motive to lie would be excellent fodder for cross-examination, remain out-of-reach, while witnesses whose cross-examination barely helps the defense must appear.

This article will consider the current situation for two different types of hearsay statements: (1) a statement to physicians that details the wrong allegedly done to the victim, and (2) chemist reports stating that a particular substance was found to contain an illegal contraband. An examination of how the courts currently treat these types of evidence will illuminate the relationship between reliability and the newly interpreted Confrontation Clause.

II. A MODERN VIEW OF WHAT CROSS-EXAMINATION ACCOMPLISHES

There are three arguments to justify limiting confrontation rights so that they apply only to certain types of statements, such as statements made during interrogation or statements generated by the government with the intention of

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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.'" *Id.* at 61.

16. *See* Whorton v. Bockting, 549 U.S. 406, 407 (2007) ("[W]hatever improvement in reliability *Crawford* produced must be considered together with *Crawford*'s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements."). *Whorton* held that *Crawford* was a new rule that could not be applied retroactively on collateral review because the Court cannot say that "testimony admissible under *Roberts* is so much more unreliable that, without the *Crawford* rule, 'the likelihood of an accurate conviction is seriously diminished.'" *Id.* (citation omitted).

17. Mueller, *supra* note 7, at 320; Friedman, *supra* note 11, at 305.

18. *See generally* Ross, *After* Crawford *Double-Speak*, *supra* note 5. In this article, I proposed a different definition of the term testimonial that is consistent with the function and purpose of the Clause.

bringing a prosecution.[19] Akhil Amar argued that informal statements are not worthy of Confrontation Clause protection because less formal statements carry less weight than formal statements.[20] One can hear the echo of this argument in *Crawford*'s statement that an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[21] This argument is flawed because it is possible to imagine jurors giving a great deal of weight to accusations against a defendant that were initially delivered in a casual manner. At trial, the accusation will be repeated in a much more formal setting and may gain gravitas in the translation. In addition, cases like the one described in this article indicate that jurors often believe statements made to doctors, even though they are not formal statements akin to a deposition or grand jury testimony.[22] Although flawed, Amar's argument at least connects the scope of the Confrontation Clause to its purpose. If juries are inclined to disbelieve the statements without confrontation, then cross-examination will do little to alter a jury's reliability determination.

The second argument to justify limiting the scope of the Confrontation Clause is the one that Justice Thomas made in his concurrence in *White v. Illinois*,[23] and again in his partial dissent in *Davis*.[24] As an originalist, Justice

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19. Davis v. Washington, 126 S. Ct. 2266 (2006) (holding that statements are not testimonial if they are made primarily to enable police assistance to meet ongoing emergency).

20. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 129 (1997) [hereinafter AMAR, THE CONSTITUTION]; Akhil Reed Amar, Forward: *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 694 (1996) [hereinafter Amar, *Sixth Amendment*]. Margaret Berger, a pronounced advocate of the theory that the Confrontation Clause's core concern is police involvement in the gathering of evidence, suggests that there is a greater likelihood of unreliable verdicts where police have the ability to manipulate evidence. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992). However, she argues that a child's statement to a prosecutorial agent "should not be admitted regardless of whether it is reliable or the child is produced, unless a contemporaneous recording is available . . . [to] ensure that the jury hears the child's version rather [than] the witness's paraphrase." *Id.* at 612 (footnotes omitted). This argument is particularly interesting because it opposes the formality rationale taken by Amar.

21. Crawford v. Washington, 541 U.S. 36, 51 (2004); *id.* at 61 (citing AMAR, THE CONSTITUTION, *supra* note 20, at 124-31). Delaware's Supreme Court also cited to Amar in Johnson v. State, 711 A.2d 18, 22 (Del. 1998). Professor Amar believes that Justice Thomas and Justice Scalia (who joined Justice Thomas's opinion) have properly drawn the distinction between general out-of-court declarations and governmentally prepared depositions. AMAR, THE CONSTITUTION, *supra* note 20, at 131, n.194.

22. *See, e.g.*, People v. Cage, 155 P.3d 205 (Cal. 2007). There have been convictions in cases where the only proof that the defendant was the perpetrator is that the defendant was named in the nontestimonial statement. *See also* State v. Davis, 111 P.3d 844, 847 (Wash. 2005) (the only evidence that the defendant was the perpetrator was an out of court statement introduced for the truth).

23. 502 U.S. 346, 363-64 (1992) (Thomas, J., concurring in part and concurring in the judgment) "Reliability is more properly a due process concern. There is no reason to strain the

Thomas believes that the Court should determine which abuses threatened confrontation rights at the time of the Founders, and freeze the application of the Clause to cover only those abuses.[25] Under this view, the Confrontation Clause would cover "affidavits, depositions, prior testimony, or confessions"[26] because the Framers contemplated those abuses; however, the Clause would not cover less formal abuses, perhaps because the Framers did not foresee casual comments being substituted for live testimony.[27] Reliability of trial evidence is not a goal of the Confrontation Clause under this view, with the exception of statements that conform to all three characteristics *Crawford* deemed "historical abuses": the government had a hand in creating the evidence, made the evidence appear almost the equivalent of in-court testimony, and intended the evidence to substitute for live testimony.[28]

The third argument for limiting confrontation rights is that cross-examination is not a useful method for determining reliability. Some modern scholars view cross-examination not as an engine of truth, but as a barrier to truth.[29] For example, in *Domestic Violence, Child Abuse, and*

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text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them." *Id.* at 364.

24. Davis v. Washington, 126 S. Ct. 2266, 2280-85 (2006).

25. *See* Ross, *After* Crawford *Double-Speak*, *supra* note 5, at 164-65:

> Another way to frame *Crawford*'s contradiction is by asking whether the Confrontation Clause should look at historical rights or historical abuses. Is the goal of the clause to give current criminal defendants the same rights as they would have had when the Amendment was ratified, or should the Confrontation Clause be interpreted only to prevent the introduction of evidence that the Framers feared would be introduced?

26. *Crawford*, 541 U.S. at 51-52 (citing White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment)).

27. The history of the Confrontation Clause and the early hearsay rules are not fully known. *See* Randolph N. Jonakait, *The Too-Easy Historical Assumptions of* Crawford v. Washington, 71 BROOK. L. REV. 219 (2005). "Nevertheless, by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases." MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 3, 7 (1997) (discussing the importance of the jury to cross-examination).

28. *Crawford*, 541 U.S. at 43-56. Several scholars have taken issue with the Supreme Court's historical assumption in *Crawford*. *See, e.g.*, Tom Harbinson, Crawford v. Washington *and* Davis v. Washington*'s Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians are Nontestimonial and Admissible as an Exception to the Confrontation Clause*, 58 MERCER L. REV. 569, 575 (2007); Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 923-33 (2007) [hereinafter Mosteller, *Testing the Testimonial*]; Jonakait, *The Too-Easy Historical Assumptions*, *supra* note 27.

29. *See* Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1355 (2005) ("Cross-examination is particularly agonizing for accusers in prosecution of domestic violence and sexual assault."); *id.* at 1354 ("The renewed ardor of confrontation after *Crawford* may enhance the adversarial system in the aggregate, but this salutary effect is little consolation to the witness undergoing a grueling interrogation."); Andrew King-Ries, Crawford v. Washington: *The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 327 (2005) (arguing that abused women

Trustworthiness Exceptions After Crawford, Myrna Raeder's reaction to *Crawford* focused on the pitfalls of cross-examination for real victims.[30] Because of *Crawford*, she wrote, "prosecutors have had to return to square one to determine whether they can win an individual case if the witness does not testify, as well as how to combat the inevitable credibility attack if she does."[31]

There are several problems with this argument against confrontation rights. This section will demonstrate that this view actually starts with the assumption that witnesses are telling the truth when they make out-of-court accusations. This section also asserts that cross-examination does have the power to ferret out lies, evasions, and exaggerations, even if it may not do so in all cases.

It is cross-examination's power to attack a witness's credibility—the essential attribute of cross-examination—that concerned Raeder.[32] In the above quote, Raeder assumed that the alleged victim is really a victim, and that he or she did not embellish or alter the facts in his or her crime report. The out-of-court statement is the truth, while the in-court testimony adds nothing helpful for the fact-finder. While this may be true in most cases, it certainly turns the concept of cross-examination on its head. Instead of perceiving cross-examination as essential to fairness because the government's evidence is put through a rigorous testing process, Raeder considered the confrontation right problematic precisely because it puts the government's evidence through the testing process.[33]

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are more credible when speaking to 911 operators than they are later, including at trial); Melissa Moody, *A Blow to Domestic Violence Victims: Applying the "Testimonial Statements" Test in* Crawford v. Washington, 11 WM. & MARY J. WOMEN & L. 387, 399 (2005) (The author, an assistant attorney general, assumes that complainants who do not show up to trial are actual victims, and writes that under *Crawford* "hundreds of thousands of 'run-of-the-mill' domestic violence victims are pitted against the rare victim of a false treason charge." (footnote omitted)). Mark Brodin notes that "California recently reaffirmed its rulings admitting on credibility grounds the testimony of police officers and domestic violence counselors to the effect that victims usually tell the truth about their abuse within 48 hours of the incident, but then often recant or minimize it later on." Mark S. Brodin, *Behavioral Science Evidence in the Age of* Daubert*: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 920 (2005) (footnote omitted). Many have written that cross-examination is a re-victimization in rape cases. State v. Sheline, 955 S.W.2d 42, 44 (Tenn. 1997) ("It has been said that the victim of a sexual assault is actually assaulted twice—once by the offender and once by the criminal justice system."); Lininger, *supra* at 1355 ("The characterization of cross-examination as 'revictimization' is hardly a fresh insight."); Major Paul M. Schimpf, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military*, 185 MIL. L. REV. 149, 150 (2005) ("[C]ross examination represents part of an overall campaign to re-victimize a sexual assault survivor . . . . .").

30. *See* Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After* Crawford, CRIM. JUST., Summer 2005, at 24.

31. *Id.* at 24-25; *see also* King-Ries, *supra* note 29, at 305; Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 748-50 (2005).

32. *See* Raeder, *supra* note 30, at 24-25.

33. *Id.*

Victims' advocates are also likely to take a stance similar to Raeder's.[34] Mindful of the particular difficulties in obtaining cooperation from the accusers in domestic violence cases, a number of scholars have sought to expand the use of out-of-court statements that may be admitted without any live testimony. These realists are understandably concerned that a return to requiring accusers to come to court for subjection to cross-examination will result in the dismissal of the majority of domestic violence cases.[35] However, anti-domestic violence advocates do not propose alternatives to cross-examination, nor do they offer an alternative method to expose the mistakes, misstatements, or motives of out-of-court declarants. In essence, the advocacy view is a call for Americans to trust that prosecutors will prosecute only factually guilty people. Consequently, the requirement of face-to-face confrontation is likely to produce recantations, presumably false, or dismissals of the charges. And even if a witness does not recant, the requirement of cross-examination is likely to bring out reasons for a jury to disbelieve the witness. If one starts with the assumption that the out-of-court statements are reliable, then one would naturally view the Sixth Amendment as a barrier to reliable verdicts. The anti-domestic violence view is based on the assumption of guilt, a view that conflicts with the constitutional structure of the criminal justice system.

The domestic violence community is quite possibly correct that for the "best" results in most cases, trials should dispense with the requirement that complainants testify subject to cross-examination. However, implementing this domestic violence view would require a constitutional amendment that would be based upon a presumption of guilt, not a presumption of innocence. Such a drastic change in the structure of our judicial system should be undertaken as part of a national dialogue to dispense with certain rights in certain cases, not simply as a determination by a few that cross-examination does not improve the reliability of verdicts. The Sixth Amendment, as with the other Bill of Rights provisions concerning criminal accusations, was written to protect the guilty along with the innocent, because only by protecting the guilty will the innocent have access to such protections.[36] To

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34. *See*, *e.g.*, King-Ries, *supra* note 29.

35. Lininger, *supra* note 29, at 1355-56.

36. Amar, *Sixth Amendment*, *supra* note 20, at 643. Amar provides:

> To say, as I do, that the Sixth Amendment is generally designed to elicit truth and protect innocence might at first seem either dangerous or trivial. If my reading of the Amendment protects *only* innocent men and women, it would indeed be dangerous—surely the Amendment protects all accused persons, the guilty along with the innocent, in affirming rights to speedy, public, and fair trials.

The quote "better that ten guilty persons escape, than that one innocent suffer," by William Blackstone, is often quoted in terms of the Bill of Rights as it relates to criminal prosecution. Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 174 (1998) (citing 4

interpret the Sixth Amendment properly, one cannot assume the guilt of the accused without drastically altering the Framers' intent. To assume guilt would be akin to substituting the government's accusation for the jury trial, and that is precisely what the Confrontation Clause forbids. Thus, there is no way to reconcile the advocate's view of cross-examination with the Framers' understanding, or with *Crawford*'s holding.[37]

On the other hand, it is important to explore what function cross-examination serves in the modern trial. What role, that is, does cross-examination actually play when there is a live witness?[38]

Dean Wigmore, an author at the beginning of the twentieth century, famously stated that cross-examination is "the greatest legal engine ever invented for the discovery of truth."[39] He also unequivocally stated:

> The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.[40]

Jurors are informed during the jury instructions that they can believe all, some, or none of the information to which a witness testifies. They are usually

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WILLIAM BLACKSTONE, COMMENTARIES *352).

37. Sir Walter Raleigh's trial is emblematic of the Confrontation Clause in part because of the supposition that he may have been innocent. 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6342 (1997 & Supp. 2006). One quote from his trial is from a justice on the bench in response to Raleigh's request to produce his accuser: "I marvel, Sir Walter, that you being of such experience and wit, should stand on this point; for many horse-stealers would escape if they may not be condemned without witnesses." *Id.* (footnote omitted). Wright and Graham comment as follows: "Substitute 'child molesters' in this remark, and it would fit nicely in modern opinions denying confrontation." *Id.* (footnote omitted). The Supreme Court's discussion of Sir Raleigh and his cry to "Call my accuser before my face" implies that if Lord Cobham had been brought forth and recanted then Sir Raleigh should have been acquitted. Crawford v. Washington, 541 U.S. 36, 44 (2004); *see also* David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 HOFSTRA L. REV. 585, 619 n.140 (2006) ("Raleigh emphatically argued lack of reliability, the very rationale that the *Crawford* Court rejected.").

38. The right to confront witnesses is often divided into the oath, the physical face-to-face nature of the witness when he makes his accusation during direct testimony, and the cross-examination. There has been a general sense that the oath is no longer a guarantee of truth-telling and therefore does not necessarily provide much aid to the jury's truth determination. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 659-60 (1997); *accord* Mosteller, *Testing the Testimonial*, supra note 28, at 926 (noting that personal presence and cross-examination are "the central features of the modern confrontation right," while the oath was of primary importance in the eighteenth century).

39. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT THE COMMON LAW § 1367 (Chadbourn rev. 1974).

40. *Id.*, § 1395 (emphasis added).

told that they may make credibility determinations by observing the witness's demeanor as well as the witness's answers to questions.[41] When the witness is not produced, the right to have jurors render an independent judgment is reduced. The Confrontation Clause certainly concerns reliability.

More than a decade earlier, Blackstone wrote that only through direct and cross-examination of live witnesses do jurors or persons deciding "the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness."[42]

A modern view of what cross-examination accomplishes can be found in *A Theory of the Trial* by Robert Burns. In his book, Burns set forth a nuanced understanding of how jury trials work, comparing the "received view" of the trial (meaning the widely held view) with his own.[43] Under the received view, cross-examination is central to the jury's function of determining credibility and reaching accurate outcomes.[44] Burns offered a more sophisticated view of the role of cross-examination in the modern trial.

Dividing cross-examination into six devices that lawyers use to affect the way a fact-finder views a case, Burns laid out the methods of cross-examination that lawyers use to help juries evaluate evidence:[45]

> 1. Cross-examination allows lawyers to point out what helps their case by bringing out facts in direct examination that favor their side, including showing that certain things were not done.[46]
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> 2. A lawyer's cross may suggest explanations for events quite different from the spin they are given on direct.[47] This aspect of cross can often uncover bias, suggesting that the witness was consciously or unconsciously motivated by self-interest.[48]
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> 3. Cross-examination can cast doubt on an opponent's story, pointing to facets that make the story seem unlikely.[49]

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41. *See*, *e.g.*, Stephanie Martin Glennon & Mary O' Sullivan Smith, *Instructions Common to All Criminal Cases*, *in* 1 MASS. SUPERIOR COURT CRIM. PRACTICE JURY INSTRUCTIONS § 1.8 (2003).

42. WILLIAM BLACKSTONE, 3 COMMENTARIES *373.

43. *See generally* ROBERT P. BURNS, A THEORY OF THE TRIAL (1999). Robert Burns is Professor of Law at the Northwestern University School of Law. His book has been well received and was the topic of a symposium for the Spring 2003 issue of *Law and Social Inquiry*. *See*, *e.g.*, Marianne Constable, *Introduction: Robert Burns's* A Theory of the Trial, 28 LAW & SOC. INQUIRY 523, 523 (2003) ("Robert P. Burns's *A Theory of the Trial* should be required reading for scholars interested in law and society.").

44. BURNS, *supra* note 43, at 44-45.

45. *Id.* at 63-67.

46. *Id.* at 63.

47. *Id.*

48. *Id.*

49. *Id.* at 64.

4. Cross-examination allows the jury to see the witness's personality.[50] Although direct examination also allows a jury to observe the defendant's demeanor, "[h]ow a person acts when he is not getting his way can be very revealing, especially when what is being challenged is the story he actually tells himself."[51]

5. A good cross-examiner can "reveal relevant dispositions" of the witness.[52] One example Burns discusses is of a police officer who refuses to see that he put a store owner into a bad position by not paying for goods, and how that sheds light on the officer's recounting of the events.[53]

6. Cross-examiners know how to impeach witnesses with prior inconsistencies.[54] Methods of impeachment, writes Burns, constitute "the devices for undermining the credibility of the witness."[55]

This description of the trial actually fleshes out the relationship between cross-examination and reliability determinations. Many, if not all, of the functions of cross-examination described by Burns attempt to undercut witness credibility. In fact, Burns stated that "[m]ost 'triable' cases depend on witness credibility."[56] Cross-examination may probe the witness's memory, sincerity, clarity, and use of language.[57] Thus, even though modern understanding of the trial and the role of cross-examination has changed from the time of the Founders, the primary purpose—to challenge credibility—has not diminished. In fact, the picture Burns painted of the modern trial accurately discloses how significant a role cross-examination plays in juror fact-finding. It is cross-examination, much more than face-to-face accusation, that is the fundamental way the Confrontation Clause functions in the modern trial.

Not every function comes into play in every case. Rather, Burns gave us the territory of cross-examination to better recognize its range and power in convincing the fact-finder. By breaking down cross-examination into these subsets, one can understand how much is taken away from criminal defendants when the primary evidence against them is shielded from this type of probing.

One aspect of the modern view of cross-examination that differs from Blackstone's is that Burns did not extol the truth-finding function of cross-examination or the trial. An example he gives involves jurors

50. BURNS, *supra* note 43, at 64.
51. *Id.*
52. *Id.*
53. *Id.* at 64-65.
54. *Id.* at 65-66.
55. *Id.* at 65.
56. BURNS, *supra* note 43, at 44 ("even within the Received View").
57. *Id.* at 65.

determining that the plaintiff did not deserve compensation for a tort because the plaintiff lied to the jurors.[58] Thus, there is a modern recognition that cross-examination is a powerful tool that does not always produce accurate and reliable outcomes. Nevertheless, on balance the modern view still supports the conclusion that cross-examination is a means to get to the truth.

There is a distinct difference between Burns's philosophy that cross-examination does not always point jurors towards the correct outcome and the views of Raeder. Burns did not seek to limit cross-examination or eliminate it, nor did he propose another method of determining truth. Even though Burns recognized that cross-examination is a powerful tool not always harnessed to truthful outcomes, he ultimately held cross-examination in high regard for its power to expose dissimulation and hidden motives of witnesses. In determining whether reliability of verdicts should rest on the right to cross-examine witnesses, one must start with a presumption of innocence and with the possibility that the person who made the out-of-court statement was not completely candid or was mistaken. Overall, cross-examination provides an effective way for fact-finders to test statements and determine their reliability.

The next section illustrates how the new jurisprudence disregards the importance of using cross-examination of witnesses to determine if their out-of-court statements are reliable.

III. STATEMENTS TO PHYSICIANS ARE NONTESTIMONIAL

Turning to a state appellate decision based on *Crawford* and *Davis*, one can see how the issues of reliability and the right to cross-examine unfold under the new jurisprudence. The California case of *People v. Cage*[59] concerned the treatment of statements made to medical personnel.

John, a fifteen-year-old youth, was taken to a California hospital for a deep cut to his face.[60] The surgeon asked him what happened and he explained that, "he had been held down by his grandmother and cut by his mother."[61] Lisa Marie Cage was charged with aggravated assault under the theory that she had cut her son with a shard of glass.[62] At trial, John did not testify.[63] Nevertheless, his accusation came in to prove precisely what he told the doctor: that his mother, Ms. Cage, had cut him while his grandmother held him down.[64] Additional statements to the police were admitted in violation of

58. *See id.* at 66. In the criminal context, we know that people may be made to look like liars when they are not, or they may be liars generally yet still have been victimized in a particular case.

59. 155 P.3d 205 (Cal. 2007).

60. *Id.* at 208 (by ambulance).

61. *Id.*

62. *Id.*

63. *Id.* at 209.

64. *Id.* at 208.

Crawford and *Davis*, but were deemed harmless error.[65] The accused was convicted and sentenced to thirteen years in prison.[66]

On appeal, the Supreme Court of California affirmed the conviction, holding that the accused had no right to confront John regarding his statement.[67] The statement was introduced under the state's evidentiary rule admitting statements that purport to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.[68] The court held that this statement was admissible because the doctor asked the question for purposes of treatment or diagnosis, and because he only asked "a single question—'what happened?'"[69] Following the logic of *Crawford* and particularly *Davis*, the

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65. *Cage*, 155 P.3d at 209-10. There were many other statements of John's allowed into evidence at trial. Although these were later determined to be improperly admitted, their admission constituted harmless error. *Id.* at 222. The statements to police were deemed testimonial, including a tape-recorded statement John made after he was released from the hospital. *Id.* at 217.

66. *Id.* at 210.

67. *Id.* at 208.

68. *Id.* at 207-08; CAL. EVID. CODE, § 1370 *amended by* Stats. 2000, c. 1001 (S.B. 1944), § 1 (1995) (detailed *infra* notes 69 & 96). This is broader than the common law hearsay exception permitting statements for purposes of treatment or diagnosis. Robert Mosteller notes that the "hearsay exception for statements made to a medical doctor for the purpose of treatment has a long history under the common law." Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatmen*t, 67 N.C. L. REV. 257, 259 n.6 (1989) [hereinafter Mosteller, *Child Sexual Abuse*] (citing MCCORMICK ON EVIDENCE § 292 (Edward W. Cleary ed., 3d ed. 1984, for the proposition that at common law some jurisdictions allowed statements to doctors relating to medical history and all jurisdictions allowed statements to doctors "of presently existing bodily condition."). Federal Rule of Evidence 803(4), passed in 1975, expanded the common law rule to allow statements of general causation of the condition or injury, past symptoms and medical history, and statements made to a doctor only for the purpose of diagnosis. *Id.* at 260, n.10. In the 1980s, courts also began admitting narratives from the absent declarant concerning details of the crime and the identity of the perpetrator in child abuse cases. *Id.* at 264.

69. *Cage*, 155 P.3d at 207. Section 1370(a) of the California evidence statute requires the following:

> (1) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
> (2) The declarant is unavailable as a witness pursuant to Section 240.
> (3) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of statements made more than five years before the filing of the current action or proceeding shall be inadmissible under this section.
> (4) The statement was made under circumstances that would indicate its trustworthiness.
> (5) The statement was made in writing, was electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official.

CAL. EVID. CODE § 1370(a).

California court correctly concluded that the Sixth Amendment right to confront one's accusers would no longer apply to John's statement to the treating physician.[70] In fact, it could simply have ruled that the doctor was not an agent of the police and, after *Davis*, statements to non-police are no longer covered by the Clause.[71] In other words, for the statement "my mother cut me," John was not the "witness against" his mother under the new Confrontation Clause jurisprudence.

The result in *Cage* is hardly an anomaly. Most states have held that statements to doctors or nurses are nontestimonial and, therefore, the

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Section 1370(b) of California's evidence code allows a trial judge to determine the trustworthiness of the out-of-court statement. Circumstances relevant to the issue of trustworthiness include, but are not limited to, the following:

> (1) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
> (2) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
> (3) Whether the statement is corroborated by evidence other than statements that are admissible only pursuant to this section.

CAL. EVID. CODE § 1370(b).

Note that under the California statue, unavailability of John could be premised upon the exercise of a privilege such as his Fifth Amendment right against self-incrimination, or, more likely, the section that reads: "Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." CAL. EVID. CODE § 240(a)(5). The statute also has a trauma section for witnesses "unable to testify without suffering substantial trauma." § 240(c). The *Cage* opinion is silent regarding the reason for declaring the complaining witness to be unavailable.

70. *Cage*, 155 P.3d at 207-08 ("The primary purpose of the physician's general question, objectively considered, was not to obtain proof of a past criminal act, or the identity of the perpetrator, for possible use in court, but to deal with a contemporaneous medical situation that required immediate information about what had caused the victim's wound." (citing Davis v. Washington, 126 S. Ct. 2266, 2276 (2006))).

71. *See* United States v. Ellis, 460 F.3d 920, 926 (7th Cir. 2006) (stating the reasonable person standard suggested as a possible core definition of "testimonial" in *Crawford* will not survive *Davis*). "A reasonable person reporting a domestic disturbance, which is what the declarant in *Davis* was doing, will be aware that the result is the arrest and possible prosecution of the perpetrator." *Id.* The holding in *Davis* "necessarily implies that consciousness on the part of the person reporting an emergency . . . that his or her statements might be used as evidence in a crime does not lead to the conclusion ipso facto that the statement is testimonial." *Id.* Similar reasoning can be found in *Cage*: "*Davis* now confirms that the proper focus is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial." *Cage*, 155 P.3d at 217 n.14. However, *Cage* viewed statements to non-law personnel as potentially testimonial even after *Davis*, but only those "statements, made with some formality, which, *viewed objectively*, are for the *primary purpose* of establishing or proving facts for possible use in a criminal trial." *Id.*; *see also* Allie Phillips, *Health Care Providers' Roles After* Crawford, Davis *&* Hammon, THE PROSECUTOR, Sept.-Oct. 2006, at 18, 19 (arguing that *Davis*'s primary purpose rule should not apply to health care providers); *cf.* Richard D. Friedman, *We Really (For the Most Part) Mean It!*, 105 MICH. L. REV. 1, 5 (2006) (stating that *Davis* "will probably not remove all doubt with respect to the applicability of *Crawford* to statements . . . and to private recipients.").

government can introduce these statements without issuing trial subpoenas for the people who utter them.[72]

There is a massive contradiction between the notion that cross-examination is the method of assuring that evidence is reliable and the result in *Cage* and similar cases involving the diagnosis and treatment hearsay exception. Cross-examination of this young man, John, could have made a real and powerful difference in the outcome of the case. The defense attorney could have probed for biases, inconsistencies in John's story, and motives to lie. After a successful cross-examination, the jury might have been persuaded that John was angry at his mother for many unrelated reasons, or that he was scared of the person or persons who actually injured him him and therefore lied rather than name the real perpetrators.[73] It is even possible that the reason why John

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72. Mosteller, *Testing the Testimonial*, *supra* note 28, at 943 ("[Statements made] to doctors are uniformly treated as nontestimonial, except that a few courts consider statements identifying the perpetrator as testimonial."); *see generally* Elizabeth J Stevens, *Deputy-Doctors: The Medical Treatment Exception After* Davis v. Washington, 43 CAL. W. L. REV. 451 (2007). Examples of cases include: People v. Vigil, 127 P.3d 916 (Colo. 2006); Griner v. State, 899 A.2d 189 (Md. Ct. Spec. App. 2006); *In re T.T.*, No. 1-03-0551, 2007 WL 2579869, at *12-13 (Ill. App. Ct. Sept. 7, 2007) ("a victim's statements to medical personnel regarding 'descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof' are not testimonial in nature" but a "statement identifying respondent as the perpetrator was testimonial"); State v. Vaught, 682 N.W.2d 284, 291 (Neb. 2004) (statement was nontestimonial because "the victim's identification of Vaught as the perpetrator was a statement made for the purpose of medical diagnosis or treatment"); Moses v. Payne, No. C06-1105P, 2007 WL 1101494, at *14 (W.D. Wash. Apr. 10, 2007) ("Although statements attributing fault are generally not relevant to diagnosis or treatment, this court has found statements attributing fault to an abuser in a domestic violence case are an exception because the identity of the abuser is pertinent and necessary to the victim's treatment.").

73. One judge dissented on the ground that the admission of statements to police was not harmless error. *See Cage*, 155 P.3d at 224 (Kennard, J., dissenting). Judge Kennard disputed the government's conclusion that "John had every reason to answer the treating physician's questions *truthfully*" with these observations:

> Perhaps. Perhaps not. As John acknowledged in his recorded statement to Deputy Mullin, he knew that there was a warrant for his arrest on an unrelated matter, and that he would be taken to juvenile hall. John also knew that Deputy Mullin had come to the hospital to investigate the circumstances of his injury, and it is reasonable to infer that John expected Dr. Russell to pass on to Deputy Mullin anything John would say about the cause of the injury. Thus, if John was the initial aggressor in his encounter with defendant, he might have had reason to give Dr. Russell an inaccurate account of the incident because of fear of prosecution if he told the truth. Moreover, John had reason to be angry at defendant because, by his own account, she had berated him and had torn his shirt before the injury occurred. His anger at his mother could have prompted him to falsely blame her for his injury. Furthermore, during pretrial discussions pertaining to the admissibility of John's statements to Dr. Russell and Deputy Mullin, defense counsel commented that John had been diagnosed as schizophrenic. If so, John may have suffered from a delusion that caused

did not appear at trial is that he did not want to expose his lie to the crucible of cross-examination.

A cross-examiner using the techniques Burns discussed would have been aided by some additional facts in *Cage*. One fact is that there was a warrant out for John's arrest when he made the incriminating statement to the doctor.[74] In fact, the police should have taken John to juvenile hall for detention after he was treated. Also, a deputy arrived at the hospital and interviewed John in the emergency room before John made his statement to the doctor.[75] Such information would have helped a good defense attorney during cross-examination to probe the motive of the witness, consistent with Burns's description.[76] Jurors might have expected that John felt some pressure, due to the outstanding warrant and looming detention, thereby making him want to appear cooperative with the police, even if it meant making up a story and sticking to it. If John had claimed at trial that he didn't know there was a warrant out for his arrest, it would have been a dramatic exposure of John's lack of credibility when counsel contradicted this claim with a prior inconsistent statement. Additionally, the defense attorney in *Cage* had claimed during a pre-trial hearing that John was a diagnosed schizophrenic who had a pattern of untruthfulness.[77] Had John exhibited some symptoms of mental illness before the jury or admitted to a pattern of untruthfulness towards his mother or grandmother, the jury may not have viewed him as credible and might have found there was reasonable doubt that it was his mother who was responsible for his wound.[78] Even if the defense had no wonderful nuggets to suggest a motive to lie, cross-examination may have still been effective. Imagine that John was the type of person that if you ask for directions and he tells you to go right, your reaction is that you probably should go left.[79] In other words, if through his demeanor and attitude, John

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> him to inaccurately describe the manner in which he was injured. In short, because the defense had no chance to cross-examine John, the veracity of his statement to Dr. Russell cannot be ascertained."

Id. at 225-26.

74. *Id.* at 226.

75. *Id.* at 208; People v. Cage, 15 Cal. Rptr. 3d 846, 849 (Cal. Ct. App. 2004).

76. *See supra* notes 50-55 and accompanying text.

77. *Cage*, 155 P.3d at 226.

78. *Id.* (Kennard, J., dissenting). As the dissent noted, the majority made much of the fact that the accused mounted a defense that admitted to certain key pieces of evidence. However, if the accuser had testified and cross-examination went well for the defense, counsel most likely would have waived the right to call defense witnesses.

79. *See* Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L REV 1157, 1158 (1993) ("Research has indicated that when there is disagreement among witnesses, jurors often tend to make their determinations based on witnesses' demeanor, rather than on the substance of witness testimony." (citing Kenneth K. Sereno, *Source Credibility*, 28 J. FORENSIC SCI. 532, 534-35 (1983))). *See* James P. Timothy, *Demeanor Credibility*, 49 CATHOLIC U. L REV. 903, 919 nn.71 -72, 940, 942 (2000) (discussing Dr. Paul Ekman's studies proving that demeanor detection skills may be acquired through experience and learning.)

appears to be someone of little integrity and little credibility, then the reliability of his statements in and out of the courtroom become suspect.

In the trial of Lisa Marie Cage, her lawyer had an opportunity to cross-examine the doctor about John's statement. This is small comfort to counsel practicing in the adversary system of justice. As Burns's theory indicates, any American defense attorney would happily trade the right to cross-examine the surgeon for the opportunity to cross the person who made the incriminating statement. In any commonsense understanding of the Sixth Amendment "right to confront the witnesses," John is the primary witness to the accusation of battery, not the doctor. John was there as an eye-witness to his own injury, while the doctor only can repeat what John said. If one takes at face value *Crawford*'s assertion that the ultimate goal of the Confrontation Clause is to ensure reliability, and reliability must be determined through cross-examination, then this result is absurd. Reliability of the accusation cannot be probed through the cross-examination of the doctor.

The way that the Supreme Court reached this contradictory result is through its flawed definition of a testimonial statement. The term "testimonial statement" comes from *Crawford*'s observation that the term "witness" within the Confrontation Clause should not mean just any out-of-court declarant, but rather witnesses who provide testimonial statements. The Court's primary support for this new limitation on the scope of the Clause is Webster's dictionary definition of witness within the Sixth Amendment text as "those who 'bear testimony.'"[80] Randolph Jonakait criticized that leap of logic, noting that the term witness has another equally valid definition.[81] Webster also defined witness as an eye-witness, a "person who knows or sees any thing" or is "personally present."[82] Even if one accepts that the word witness should be limited to testimonial statements, the term testimonial or testimony should be given a meaning that comports with the goals and purposes of the Confrontation Clause. Given that the Court declared that the ultimate goal of the Clause is to secure the reliability of evidence and the method of determining reliability, there should be a nexus between what is testimonial and the purposes of cross-examination.

The *Cage* case also showcases the problems with the reliability reasoning that underpins the evidence rules. Presumably, someone in John's position

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80. Crawford v. Washington, 541 U.S. 36, 51 (2004) (citing 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). The Sixth Amendment reads quite simply: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend VI.

81. Randolph N. Jonakait, *"Witness" in the Confrontation Clause:* Crawford v. Washington, *Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155, 159 (2006). *See also* Judge Charles F. Baird, *The Confrontation Clause: Why* Crawford v. Washington *Does Nothing More than Maintain the Status Quo*, 47 S. TEX. L. REV. 305, 306 (2005).

82. 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

would want the surgeon to know that he was cut and what object cut him so that the surgeon could do his job. But, whether John told the doctor that his mother or someone else did it would not change the course of treatment.[83] The parts of statements that accuse particular persons by name are not necessarily more reliable because they are made to a doctor than to a police officer or anyone else.[84] This stretching of the common law evidentiary rule about statements made for diagnosis and treatment exemplifies what made the *Ohio v. Roberts*[85] test so problematic.[86] *Roberts*, the case overruled by *Crawford*, held that particularly reliable evidence satisfied the Confrontation Clause without need for live testimony or the opportunity to cross-examine.[87] Reliability could be inferred without more in a case where the evidence fell within a firmly rooted hearsay exception.[88] Even where the evidentiary exception grew far beyond its original boundaries, courts continued to define the exception as firmly rooted, and therefore so reliable that the live testimony was unnecessary to satisfy the Clause.[89] The *Roberts* test encouraged courts to avoid confrontation rights for whole classes of statements, based upon a generalized assessment that these types of statements were so reliable that, in essence, nothing could be gained by cross-examination.[90]

There is nothing in the Constitution about confrontation rights only applying to statements made to police. John's statement is still accusatory,

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83. MCCORMICK ON EVIDENCE, *supra* note 68, § 277; FED. R. EVID. 803(4); 6 WIGMORE, *supra* note 39, §§ 1718-23.

84. Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, 65 L. & CONTEMP. PROBS. 47, 54-55 (2002) [hereinafter Mosteller, *The Maturation and Disintegration*]. But the government's need to prove identity through the medical exception is clearly stated in Moody, *supra* note 29, at 400 ("The impact of excluding statements to medical personnel is especially severe for prosecutors when the victim refuses to testify. Apart from the victim's statements to the physician, there may be no evidence to establish causation or the identity of the abuser.").

85. 448 U.S. 56 (1980).

86. Mosteller, *The Maturation And Disintegration, supra* note 84, at 47 (finding "this exception as applied in child sexual abuse prosecutions . . . being stretched beyond the bounds of its theoretical justification" (citing Mosteller, *Child Sexual Abuse*, *supra* note 68, at 257)). Mosteller concluded "that the current interpretation of the Rule that broadly admits statements identifying the abuser when the auditor's credentials are medically related both constitutes poor hearsay analysis and sometimes violates the Constitution." Mosteller, *The Maturation and Disintegration, supra* note 84, at 53, 60-63.

87. *Roberts*, 448 U.S. at 66.

88. *Id.* (where the evidence does not fall within a firmly rooted hearsay exception, it may be admitted upon a showing of "particularized guarantees of trustworthiness" when the declarant is absent).

89. See Ross, *After* Crawford *Double-Speak*, *supra* note 5, at 153-54 (detailing how the excited utterance exception expanded and was still considered a firmly rooted exception for purposes of the Confrontation Clause.); *see also supra* note 23; *infra* note 165 and accompanying text.

90. Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1028 (1998) ("If a witness delivers live testimony at trial, the court does not excuse the witness from cross-examination on the ground that the evidence is so reliable that cross-examination is unnecessary to assist the determination of truth.").

even though it was made to a doctor and not to a police officer, especially in the context of the trial. The reason to cross-examine a witness for credibility and bias at trial is not dependent upon whether the witness originally spoke to police or to a layperson. Nevertheless, someone in Ms. Cage's position would be unwise to petition the Supreme Court arguing that John would have known that his statement to the doctor would be used by the police to incriminate her, especially given John's experience with the criminal courts. Although *Crawford* formulated a possible core definition of testimonial as "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,"[91] after *Davis* it would be difficult for any statements made to those other than government officials or agents to qualify as testimonial statements.[92]

A related reason for criticizing the formulation of testimonial in *Davis* is that, under *Davis*, the quest for determining confrontation rights in any particular case bears an unwelcome resemblance to a Motion to Suppress. When defense counsel raises the confrontation right to exclude a statement, the trial court holds a hearing to determine the background surrounding the taking of a statement by a police officer. If the police officer asked questions for certain reasons, such as to prove the case at trial, then the statement will be excluded. This confrontation hearing mimics a Motion to Suppress, where evidence is excluded from trial when the police do something contrary to the Constitution. Yet, in the context of the right to confrontation, police are not accused of any wrongdoing. In fact, the public wants police officers to continue finding guilty parties, to question witnesses in a formal manner so that the eye witness understands the seriousness of their accusation, and to preserve evidence. Far from an abuse, the taping of statements constitutes a safeguard to preserve exculpatory evidence, in case the witness changes his or her testimony at trial. Because the *Davis* formulation of confrontation rights focuses on the police behavior and not on the function of the statement, *Davis* sends the wrong message to police about the way to do their jobs and the wrong message to judges about the meaning of confrontation rights.

Writing for the majority, Justice Scalia condemned the *Roberts* formula, stating, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[93] Yet that is precisely what occurred in the trial of Ms. Cage.[94] A trial judge determined that the statement John made to the doctor was particularly reliable because "the conditions

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91. Crawford v. Washington, 541 U.S. 36, 52 (2004) (citation omitted).

92. *See* United States v. Ellis, 460 F.3d 920, 926 (7th Cir. 2006).

93. *Crawford*, 541 U.S. at 62.

94. The trial occurred before *Crawford* was decided. People v. Cage, 155 P.3d 205, 207 (Cal. 2007) ("Though *Crawford* was decided after defendant's trial, while her appeal was pending, the high court's ruling applies retroactively to her case.").

under which it was made were conducive to truth."[95] The evidentiary exception requires that the statement be "made under circumstances that would indicate its trustworthiness."[96] The trial judge rejected defense counsel's proffer that the declarant's schizophrenia and pattern of untruthfulness deprived the statements of particular guarantees of truthfulness.[97] The California Supreme Court also concluded that the statement was truthful, without having the opportunity to review any in-court testimony or cross-examination, noting: "In a hospital emergency room for acute treatment of a serious injury, and visibly frightened, John had every reason to answer the treating physician's questions truthfully."[98] Because the Confrontation Clause does not apply to statements to doctors, the trial judge's reliability determination stands, and there is no opportunity for the jury to test the reliability of the statement through observation of rigorous cross-examination of the declarant. Moreover, it is even less comforting to think that the evidentiary rules may possibly dispense with reliability protections altogether under the new confrontation decisions.[99]

The central flaw in the new Clause jurisprudence is that the Court defined testimonial in terms of what the statement looked like at the time it was made, rather than when repeated at trial. After *Davis*, the spotlight is on what the declarant might have been thinking at the time he spoke to the police, what the questioner was thinking at the time he questioned the declarant, and the identity of the questioner.[100] None of these prongs has anything to do with whether the statement's reliability can be tested through cross-examination. In contrast, the proposal I make shines the spotlight on the trial itself. A statement is testimonial if it functions as testimony at trial. Thus, John's statement would be looked at to determine: (1) if the government introduced the statement as an accusation of the current charges; (2) whether the statement was fundamental or ancillary to the elements the government had to prove at trial; and (3) whether the purposes of cross-examination to test reliability could be served by another method. Similar to *Roberts*, my proposal looks at whether something can be gained from cross-examination. Unlike *Roberts*, my proposal is not based on whether evidence is so inherently reliable

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95. *Id.* at 223, n.24.

96. CAL. EVID. CODE § 1370(a)(4). Under § 1370(a)(2), a declarant must be deemed unavailable. *See also* CAL. EVID. CODE § 240.

97. People v. Cage, 15 Cal. Rptr. 3d 846, 850 (Cal. Ct. App. 2004).

98. *Cage*, 155 P.3d at 223.

99. *See* Whorton v. Bockting, 127 S. Ct. 1173, 1176 (2007) (holding that even though *Crawford* overruled *Roberts*, the change should not be applied retroactively because it did not announce a "watershed rule"). As Mosteller writes, *Whorton v. Bockting* "states in unmistakable terms that *Roberts* is dead and that the Confrontation Clause of the Sixth Amendment has no role in excluding unreliable hearsay that is nontestimonial." Robert Mosteller, *Confrontation As Constitutional Criminal Procedure:* Crawford*'s Birth Did Not Require That* Roberts *Had To Die*, 15 J.L. & POL'Y 685, 686 (2007); *see also id.* at 700, 697 ("I believe *Roberts*' death should be mourned rather than celebrated.").

100. Ross, *After* Crawford *Double-Speak*, *supra* note 5, at 177-95.

that nothing is to be gained by cross-examination. Instead, my proposal assumes that cross-examination has the potential to expose credibility issues wherever credibility of the declarant is material to the outcome of the trial, and especially where the declarant's words serve as the primary source of the accusation against the defendant at trial. Thus, I would have courts determine whether evidence is testimonial based on how the statement functions in the course of the trial, rather than at the time the statement was first uttered.[101]

Applying my testimonial definition to John's case, a trial judge would conclude that the true witness to the statement by John that his mother cut him was John, not the surgeon. A trial judge would also conclude that the statement served as an accusation against the mother, for this very assault. Finally, a judge would conclude that John's credibility and reliability would make a difference to the truth of the charges, for if the jury found the statement to be unreliable, either because they found John to be a witness lacking in credibility or for some other reason, the jury might acquit his mother. In sum, the statement at issue served the very same purpose as if John had taken the stand and testified that his mother had harmed him. Therefore, under my definition, the accusation uttered by John was a testimonial statement. The government in this situation could have filmed a deposition of John in advance of trial, providing full rights of cross-examination. That way, if John became unavailable, the government would not have had to dismiss the charges. Although the jury would have been deprived of the benefit of observing the witness testify live, a deposition would have ensured cross-examination to determine the statement's reliability. However, one should not expect the Supreme Court to require confrontation rights in medical statement cases any time soon.

In place of *Roberts*, the Supreme Court has substituted a new rule that permits courts to dispense with confrontation rights because testimony is dissimilar to categories of statements that were historically feared. The *Crawford* decision left open the meaning of testimonial, and *Davis* supplied an indefinite, multi-pronged definition for statements made to police.[102] Adhering to *Davis*, under the medical diagnosis and treatment exception, trial courts often "focus on the *purpose* of the declarant's encounter with the health care provider."[103] The *Davis* Court also looked at the declarant's behavior at the time she made the statement during the commencement of a 911 call and

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101. *See generally id.* My proposal looks at whether anything can be gained by cross-examination given the nature of the evidence: Does it function as an accusation? Is the declarant the true witness, the real accuser? Is it the declarant whose credibility and reliability would make a difference to the truth of the charges?

102. *See* Josephine Ross, Crawford*'s Short-Lived Revolution: How* Washington v. Davis *Reins In* Crawford*'s Reach*, 83 N.D. L. REV. 387, 405 (2007).

103. Moses v. Payne, 2007 WL 1101494, at *2 (W.D. Wash. Apr. 10, 2007); *see* People v. Cage, 155 P.3d 205, 207 (2007).

concluded: "She simply was not acting as a *witness;* she was not *testifying*."[104] If the health-care provider was not involved in the investigation and was not working with police or governmental officials to develop testimony, and if nothing indicates the declarant believed her statements to the health-care provider would be used at a trial, then these statements to the health-care provider are admissible.[105]

In determining whether a statement is testimonial, it is only by focusing on the statement's function at trial that courts will tie the right to confront witnesses to what is gained by cross-examining a witness—the ultimate goal of the Confrontation Clause. The *Davis* Court has clearly not taken that approach. The next section examines *Crawford*'s expressed intention as to the role of reliability in the new jurisprudence.

IV. THE RELIABILITY LANGUAGE OF THE SUPREME COURT

To discuss reliability in the context of the Clause, one must untangle two separate ideas: the jury's method of determining reliability and the judge's determination of whether evidence meets a threshold test. Credibility of accusations and reliability of testimony are related concepts.[106] If the jury finds the testimony believable or credible, then they also find it reliable, and are more likely to rely upon it. Reliability is a broader term than credibility because it is the standard for all evidence, including physical evidence; but again, the jury determines the reliability of the all evidence that is presented to it. There is a big difference between judges determining that evidence is reliable enough to get to a jury, and judges determining that evidence is so reliable that the jury need not engage in the usual tests of reliability, including observing the witness undergo cross-examination.[107]

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104. Davis v. Washington, 126 S. Ct. 2266, 2277 (2006).

105. *See id.*; *see* Phillips, *supra* note 71, at 18. The author advises prosecutors: "In all criminal prosecutions, whether with child or adult victims of violence, prosecutors must prepare their health care providers before testifying. In order to properly admit a victim's statement to a health care provider through the medical hearsay exception . . . (particularly if the victim does not testify), the medical witness should be prepared to answer [certain] questions." Phillips, *supra* note 71, at 23. "When a health care provider questions the victim (e.g., 'Who was the perpetrator/assailant?') be prepared to answer why the health care provider must know that information in order to properly treat the victim." *Id.* at 26.

106. Reliable is defined as "dependable," whereas credibility is defined as "capacity for belief." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 305, 995 (1990). One thesaurus offers "believability" as the first synonym listed for both "reliability" and "credibility." Reliability—Synonyms from Thesaurus.com, http://thesaurus.reference.com/browse/reliability; Credibility—Synonyms from Thesaurus.com, http://thesaurus.reference.com/browse/credibility. One generally thinks of credibility in relation to testimony, while the term reliability is applied to other types of evidence.

107. As further discussed *infra*, this type of reliability is what *Crawford* forbade: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with [a] jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." Crawford v. Washington, 541 U.S. 36, 62 (2004).

The term "reliability" can be used to describe the judge's gatekeeper function; a judge determines whether evidence is sufficiently reliable to even get before a jury.[108] *Roberts* allowed trial judges to decide that certain out-of-court statements had "particularized guarantees of trustworthiness" or reliability and, therefore, permitted the government to introduce these statements at trial without producing the live witnesses who made them.[109] After *Crawford*, this type of reliability is no longer a concern of the Sixth Amendment.[110] The Clause, however, should still be concerned with how juries determine the reliability of statements and other evidence.

The *Crawford* opinion is full of language that conveys the appearance that reliability remains a core concern of the Clause. The clearest example is where the Court rejected the prior jurisprudence of allowing judges to determine that particular types of hearsay evidence are so reliable that there is no need to require confrontation rights of the witness, stating:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.[111]

Thus, the Court not only wrote that the ultimate goal is to ensure reliability of evidence, it also stated that the reliability of evidence is best determined through the "crucible of cross-examination." The "crucible of cross-examination" is an interesting phrase that echoes an earlier Supreme Court case.[112] Crucible has three meanings in the dictionary, two of which are

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108. *See* Jeffrey M. Schumm, *Precious Little Guidance to the "Gatekeepers" Regarding Admissibility of Nonscientific Evidence: An Analysis of* Kumho Tire Co. v. Carmichael*,* 27 FLA. ST. U. L. REV. 865, 891 (2000) (warning that judges should not take over the jury's credibility function).

109. *Id.* at 57; *accord* Idaho v. Wright, 497 U.S. 805, 820-21 (1990); *see also* Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting); Kentucky v. Stincer, 482 U.S. 730, 737 (1987).

110. For discussions about where *Crawford* breaks with reliability concerns, see generally Baird, *supra* note 81; Allen D. Boyer, *The Trial of Sir Walter Raleigh: The Law of Treason, the Trial of Treason and the Origins of the Confrontation Clause*, 74 MISS. L.J. 869, 870 (2005).

111. *Crawford*, 541 U.S. at 61.

112. Imbler v. Pachtman, 424 U.S. 409, 440 (1976) (emphasis added):

> A prosecutor faced with a decision whether or not to call a witness whom he believes, but whose credibility he knows will be in doubt and whose testimony may be disbelieved by the jury, should be given every incentive to submit that witness' testimony to the crucible of the judicial process so

"a severe test" or "a vessel…used for melting and calcining a substance that requires a high degree of heat."[113] The term "crucible of cross-examination," therefore, conveys the idea that by putting a witness through an ordeal, fact-finders obtain the essential material they need and can leave the extraneous matter, the ashy substance called calx. Reliability and cross-examination are completely integrated in the Court's description, and both co-exist within the newly announced confrontation rule. Cross-examination is the means of determining reliability and reliability is the ultimate goal.

This notion that cross-examination should determine reliability pulsated through much of the *Crawford* opinion. "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising."[114] Furthermore, "[n]othing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question . . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth."[115] The Court's very condemnation of *Roberts* elevated the importance of cross-examination in determining reliability, as can be seen in the sentence quoted earlier: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[116] Thus, it would appear that what appalled the *Crawford* Court was not the notion that the Sixth Amendment promoted reliability in the truth-finding functions of a trial, but that trial judges could jettison this method of determining reliability by substituting his or her own reliability determinations.

At the same time that the Court trumpeted the purposes of cross-examination, it also limited the reach of the Confrontation Clause to "testimonial statements."[117] The way that *Crawford* and *Davis* defined "testimonial statements" severed the meaning of the word witness from the value that cross-examination provides in promoting reliability. *Crawford* and

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> that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies.

Pachtman was the first case to use the term "crucible" to apply to the adversary process. The case gave absolute immunity to prosecutors for the knowing use of perjured testimony. *See generally id.*

113. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, *supra* note 106, at 311. "Calcine" means "to heat (as inorganic materials) to a high temperature but without fusing in order to drive off volatile matter or to effect changes (as oxidation or pulverization)." *Id.* at 196.

114. *Crawford*, 541 U.S. at 67. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69.

115. *Id.* at 49 (citing R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), *reprinted in* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 469, 473 (1971)) (alterations in original).

116. *Crawford*, 541 U.S. at 62; *see supra* note 93 and accompanying text.

117. *Crawford*, 541 U.S. at 68; Davis v. Washington, 126 S. Ct. 2266, 2273 (2006).

Davis's narrowing of the Clause through the term testimonial conflicts with its language about reliability and cross-examination.

Historically there were two primary ways in which confrontation rights serve to protect the accused. The first required a witness to appear in public, consciously "confronting" the accused, and the second permitted defense counsel to cross-examine the witness; these two concepts are related, and both share a long history in the criminal courts.[118] Turning first to the in-court aspect of confrontation right protections, it was thought that a man would more easily state a false accusation if he did not have to do so publicly and in front of the person he unfairly accused.[119] This purpose of the Clause is not served when out-of-court accusations form the basis of the evidence against the defendant at trial simply because these statements were made casually and with no intent to form an accusation. There is nothing in the history of the Clause that encourages accusations when the declarant does not recognize that the accusation will become public. In fact, casual accusations were the opposite of what the Clause mandated. It was the intent to accuse, deliberately and with full understanding, that was historically required to help ensure truthfulness. This theory of conscious accusation remained at the cornerstone of modern jurisprudence on the right to face-to-face confrontation, along with the right to cross-examination as a means of determining reliability.[120]

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118. Robert P. Mosteller, *Softening The Formality And Formalism Of The "Testimonial" Statement Concept*, 19 REGENT U. L. REV. 429, 439 (2007) ("[T]he ancient oath carried with it not only the possibility of punishment by the authorities, but the far more serious promise of divine punishment combined with the additional obligation to answer on pain of contempt."); MILLER & WRIGHT, *supra* note 27, at 10-11 ("Eventually English law came to recognize that without cross-examination on behalf of the accused, the J.P.'s [Justice of the Peace, the equivalent of policemen or detectives] notes were not of sufficient good credit to be admissible against the defendant."). Mattox v. United States, 156 U.S. 237, 244 (1895) (statements made under oath are presumed to "remove all temptation of falsehood, and to enforce [a] strict adherence to the truth" similar to statements made in contemplation of impending death). *Mattox* also discusses how cross-examination helps expose truth. *Id.* at 242-43. *See infra* note 126 and discussion therein.

119. Sir Walter Raleigh was thought to have been convicted on too little evidence, and some presumed that Lord Cobham would not have repeated his accusation face-to-face and under oath, perhaps because it was untrue. Even his contemporaries thought the evidence did not prove Raleigh guilty. WRIGHT & GRAHAM, *supra* note 37, at 100 & n.10. John George Phillimore also wrote about Lord Cobham as the "the most illustrious man England has produced." JOHN GEORGE PHILLIMORE, HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE 157 (1850). "To dilate upon Sir Walter Raleigh's murder is almost superfluous." *Id.* Professor Underwood adds, "We may, if we wish, treat Cobham as the perjurer that justifies the case's inclusion in our little collection." Richard H. Underwood, *Perjury: An Anthology*, 13 ARIZ. J. INT'L & COMP. L. 307, 320 (1996).

120. *See* Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105, 177 & n.230 (2005) [hereinafter Davies, *What Did the Framers Know*] (discussing how admissibility of out-of-court

Davis went through great pains to explain that its decision was consistent with precedent, even as it overruled the rationale *Roberts* set forth.[121] But in fact, *Davis*'s result conflicts with language in many of the Court's prior cases that uphold reliability as one of the Clause's purposes. Everyone seems to agree that the *Roberts* jurisprudence viewed the Clause as fundamentally about reliability.[122] Many cases decided before *Roberts* also heralded reliability as a primary goal of the Confrontation Clause. Without any reservation, the *Crawford* Court cited the early case of *State v. Webb* for the proposition that "it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine."[123] Even though the *Webb* case turned on the use of deposition in place of live testimony, it is difficult to equate the words "prejudiced by evidence" with the narrow construction of testimonial evidence found in parts of *Crawford* and in *Davis*.[124]

Also contained in the *Crawford* opinion are a couple of citations to early cases that emphasize cross-examination's importance in ferreting out truth.

> The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").[125]

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statements focused on the oath more than cross-examination until the end of eighteenth century); Thomas Y. Davies, *Revisiting the Fictional Originalism in* Crawford*'s "Cross-Examination Rule": A Reply To Mr. Kry*, 72 BROOK. L. REV. 557, 561 n.14 (2007) ("Justice Scalia's dismissal of the historical oath requirement was especially noteworthy because the importance of the oath as a condition for admissible evidence was emphatically stated in two English cases cited in Crawford."). Pointing to one of the cases cited in *Crawford*, King v. Woodcock, 1 Leach 500, 502-03, 168 Eng. Rep. 352, 353-54 (K.B. 1789), Professor Davies explains that the dying declaration exception focused on the oath, not cross-examination: "Dying declarations were admissible because the victim's awareness of imminent death was thought to be the functional equivalent of an oath." *Id.* at 578. "The usual framing-era rule was that only sworn statements could constitute evidence . . . . However, it appears that a speaker's anticipation of imminent death was thought to assure truthfulness to the same degree as an oath." Davies, *What Did the Framers Know*, *supra* at 166 n.191.

121. *Davis*, 126 S. Ct. at 2274 ("We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined.").

122. Mueller, *supra* note 7, at 320 ("Under the older *Roberts* approach, the Confrontation Clause was a kind of 'super standard' of reliability that turned for the most part on the same factors that already count in applying hearsay exceptions.").

123. Crawford v. Washington, 541 U.S. 36, 49 (2004) (citing State v. Webb, 1794 WL 98 (N.C. Super. Ct. L. & Eq. 1794) (per curiam)).

124. *Id.* (stating that the court in *Webb* held a deposition taken in absence of the accused must be excluded from trial).

125. *Id.* at 61.

The Blackstone[126] and Hale quotations extol examination of witnesses as a superior way to clear up the truth. The quote that examination "beats and bolts out the Truth" provides another metaphor to the earlier quote about the crucible of cross-examination, but with similar meaning.[127] Interestingly, the Court placed a compare indicator ("Cf.") before the two quotes that praise the virtues of face-to-face confrontation, suggesting that the Court itself did not side with either of the views expressed.[128] Nevertheless, the cases themselves indicate the connection between the Confrontation Clause and reliability is hardly a concept that began with *Roberts*.

In 1895, the Supreme Court embraced the Confrontation Clause, noting that cross-examination gives the accused

> an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[129]

This language from *Mattox* indicates the long-standing connection between reliability and the Clause. The case found that one of two essential elements of confrontation was subjecting the witness "to the ordeal of a cross-examination,"[130] a phrase much like "beats and bolts." *Mattox* continues to be cited for the importance of cross-examination to determining the truth. For example, in 1974 the Supreme Court wrote that a defendant denied the rights to cross-examine another man who had confessed to the crime and to introduce testimony of witnesses to those confessions, "was not allowed to test the witness' recollection, to probe into the details of his alibi, or to 'sift' his conscience so that the jury might judge for itself whether McDonald's testimony was worthy of belief."[131]

In 1965, the Court applied the Sixth Amendment to the states in *Pointer v. Texas* because the right to confront witnesses constituted "an essential and

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126. Blackstone wrote at length about the importance of cross-examination for determining truth. *See* BLACKSTONE, *supra* note 36, at 493-94 (discussing the importance of cross-examination and in-person testimony).

127. *Crawford*, 541 U.S. at 61; *see supra* Part IV.

128. As a citation signal, *cf.* directs the reader's attention to another authority or section of the work that "supports a . . . different proposition . . . but [is] sufficiently analogous to lend support." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 47 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

129. Mattox v. United States, 156 U.S. 237, 242, 238, 250 (1895) (affirming the defendant's murder conviction, and also affirming the second trial court's decision to allow the court reporter's notes to include the testimony of witnesses from the first trial who had subsequently died).

130. *Id.* at 244. The other principle was "seeing the witness face to face." *Id.*

131. Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (citing *Mattox*, 156 U.S. at 242-43).

fundamental requirement for the kind of fair trial which is this country's constitutional goal."[132] *Douglas v. Alabama*,[133] another case from that year, also considered cross-examination as a test for truth. While the petitioner could examine the police officers who took the stand, "cross-examination of them as to [the genuineness of his accuser's statement to them] could not substitute for cross-examination of Loyd [the accuser] to test the truth of the statement itself," the Court explained.[134] The Court also considered the evidence in the context of the trial in determining whether its introduction violated the Clause,[135] something I recommend the Court do with the word testimonial.

In 1970, the Court articulated the connection between confrontation and reliability in this way:

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[136]

The reasoning in *Green* is steeped in an understanding of the purposes of cross-examination as a method of evaluating credibility. In *Green*, the witness testified, but the appellant objected to the admission of an out-of-court statement made by the witness.[137] The Court denied the confrontation objection, noting:

> The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, thus

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132. Pointer v. Texas, 380 U.S. 400, 405, 407 (1965) (holding that the trial court incorrectly admitted the transcript of the chief witness's preliminary hearing testimony because the defendant could not cross-examine the witness at trial, and the right of confrontation is a trial right).

133. 380 U.S. 415 (1965).

134. *Id.* at 420.

135. *Id.* at 419:

> In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. Loyd's alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so; coupled with the description of the circumstances surrounding the shooting, this formed a crucial link in the proof both of petitioner's act and of the requisite intent to murder.

136. California v. Green, 399 U.S. 149, 158 (1970) (footnote omitted). The *Green* Court held that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *Id.*

137. *Id.* at 159-60.

> giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement. The jury is alerted by the inconsistency in the stories, and its attention is sharply focused on determining either that one of the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant its believing either story.[138]

That same year, *Dutton v. Evans* found no violation of the Confrontation Clause because "[i]t is inconceivable that cross-examination could have shown that [the declarant, an alleged accomplice] was not in a position to know whether or not Evans was involved in the murder[,] . . . the possibility that Williams' statement was founded on faulty recollection is remote in the extreme," and there were indicia of reliability that allowed the statements without confrontation.[139] Thus, a decade before *Robert*s, the Court continued to recognize the role of cross-examination to evaluate the truth, but started to recognize exceptions to the Clause based on indicia of reliability.[140] Disagreement about whether indicia of reliability were enough to substitute for confrontation's reliability test was present in the multiple decisions in *Dutton*. Justice Marshall, joined by Justices Black, Douglas, and Brennan, articulated a strong dissent that paired cross-examination with the discovery of truth:

> If "indicia of reliability" are so easy to come by, and prove so much, then it is only reasonable to ask whether the Confrontation Clause has any independent vitality at all in protecting a criminal defendant against the use of extrajudicial statements not subject to cross-examination and not exposed to a jury assessment of the declarant's demeanor at trial. I believe the Confrontation Clause has been sunk if any out-of-court statement bearing an indicium of a probative likelihood can come in, no matter how damaging the statement may be or how great the need for the truth-discovering test of cross-examination.[141]

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138. *Id.* at 160. *See also* Chambers v. Mississippi, 410 U.S. 284, 298-99 (1973) (citing *Green*, 399 U.S. at 158):

> Out-of-court statements are traditionally excluded [under the evidence rules] because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.

The *Green* Court also "conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values." *Green*, 399 U.S. at 155.

139. Dutton v. Evans, 400 U.S. 74, 88-89 (1970).

140. *See id.*; *see also Green*, 399 U.S. at 161.

141. *Dutton*, 400 U.S. at 110 (Marshall, J., dissenting) (footnote omitted); *cf. Green*, 399 U.S. at 161-62.

In 1974, the Supreme Court decided that the Confrontation Clause requires more than just allowing a defendant to see a witness against him at trial—it requires active engagement, i.e., cross-examination.[142] "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."[143] Then, three years before *Roberts*, the Court opined that the Confrontation Clause mandates cross-examination of witnesses because this is "essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial."[144] As *Maryland v. Craig* phrased it, "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[145]

The current Supreme Court's decision to jettison reliability as a concern of the Confrontation Clause appears at odds with this long history linking the Clause to reliability, as well as contradicting some of the language within *Crawford*. The Court seemed almost flippant in *Whorton v. Bockting* when it rejected a habeas corpus challenge of a man serving a life sentence based on testimonial evidence he was not at liberty to confront.[146] The Court held that *Crawford* rule did not effect "a profound and 'sweeping' change" in the law and thus did not apply retroactively to the defendant's case.[147] *Crawford's* "relationship to the accuracy of the factfinding process is far less direct and profound" than the right to counsel, the Court explained.[148] "*Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the Confrontation Clause, not because the *Crawford* rule's overall effect would be to improve the accuracy of factfinding in criminal trials."[149] The Court went on to observe that it may have hurt reliability overall in trials by eliminating "Confrontation Clause protection" for a host "of unreliable out-of-court nontestimonial statements."[150]

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142. Davis v. Alaska, 415 U.S. 308, 315-18 (1974) (holding that the defendant should have been allowed to cross-examine a key juvenile witness to determine bias). In *Davis*, the Supreme Court stated: "The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." *Id.* at 316 (quoting WIGMORE, *supra* note 39, § 1395).

143. *Id.* at 316.

144. Kentucky v. Stincer, 482 U.S. 730, 737, 747 (1987) (holding that the defendant's exclusion from a hearing on competency of key witnesses did not violate his confrontation rights because exclusion did not interfere with his ability to have effective cross-examination at trial); *see, e.g.,* Coy v. Iowa, 487 U.S. 1012, 1016-17, 1029 (1988) ("There never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination*." (quoting WIGMORE, *supra* note 39, § 1397)).

145. Maryland v. Craig, 497 U.S. 836, 845 (1990).

146. Whorton v. Bockting, 127 S. Ct. 1173 (2007).

147. *Id.* at 1176 (citation omitted); *see also supra* note 99.

148. *Whorton*, 127 S. Ct. at 1176.

149. *Id.*

150. *Id.*

V. DRUG CERTIFICATES: THE NEW CONTROVERSY

One area of continuing controversy is whether reports of scientific tests are within the scope of the Confrontation Clause. Drug certificates are a type of scientific test of particular interest because almost all states have statutes that allow certificates to be introduced at trial without live testimony from the chemists.[151] A drug certificate is an official statement signed by a chemist attesting to the results of laboratory tests to determine whether the items tested contain prohibited narcotics. In 2007, two petitions for *certiorari* were filed to the United States Supreme Court on the issue of whether drug certificates are testimonial or nontestimonial.[152] These petitions asked the Court whether drug certificates may be filed in the absence of live testimony by the chemist where there is no waiver of confrontation rights or prior opportunity for cross-examination.[153] The *March* petition was dismissed at the request of the moving party,[154] while the Supreme Court granted *certiorari* in *Melendez-Diaz v. Massachusetts* and heard oral arguments in November 2008.[155]

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151. Metzger, *supra* note 5, at 478, n.9 ("The vast majority of jurisdictions in the United States authorize the state to prove its forensic allegations by relying upon a forensic certificate in lieu of live testimony."). Metzger found that forty-four states and the District of Columbia have hearsay exceptions for controlled substances, while only six states did not have a statute permitting the prosecution to bring in a report in its case in chief without providing any confrontation to the defense. *Id.* at 478, n.9 & 10. *See, e.g.*, OHIO REV. CODE ANN. § 2925.51(B), (C) (Anderson 1987) (certificate of drug laboratory sets out prima facie case that substance is, in fact, a controlled substance); IOWA CODE ANN. § 691.2 (2003) (lab report admissible unless defendant requests analyst to 'testify in person'); ME. REV. STAT. ANN. tit. 17-A, § 1112(1) (1983) (lab report admissible unless defendant requests witness's testimony).

152. Application for *certiorari* in State v. March, 216 S.W.3d 663 (Mo. 2007) was filed by the prosecution in June 2007 and later withdrawn by the prosecution pursuant to SUP. CT. R. 46. Petition for Writ of Certiorari, *March*, 216 S.W.3d 663, 2007 WL 1812498 (2007) (No. 06-1699) [hereinafter *March* Petition]. The State entered into a plea bargain with the defendant and asserted that the case was therefore moot. *M*arch, 128 S. Ct. 1441 (2007) (No. 06-1699). Next, a petition for *certiorari* was filed by the defense in *Melendez-Diaz v. Massachusetts* on October 26, 2007. Petition for Writ of Certiorari, Melendez-Diaz v. Massachusetts, 870 N.E.2d 676, 2007 WL 3252033 (2007) (No. 07-591) [hereinafter *Melendez-Diaz* Petition], *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/02/07-591_pet.pdf. The Supreme Court granted *certiorari* in March 2008. *See Melendez-Diaz*, 128 S. Ct. 1647 (2008) (No. 07-591).

153. *See March* Petition, 2007 WL 1812498, at *1-2; *Melendez-Diaz* Petition, 2007 WL 3252033, at *3.

154. *See March*, 128 S. Ct. at 1441.

155. In his petition for *certiorari*, appellant Melendez-Diaz writes: "Federal courts of appeals and state courts of last resort are now divided six-to-five over whether state forensic laboratory reports prepared for use in criminal prosecutions are testimonial." *Melendez-Diaz* Petition, 2007 WL 3252033, at *9. The five opinions that ruled the Confrontation Clause applied to forensic laboratory reports include a decision regarding blood alcohol testing. *See* City of Las Vegas v. Walsh, 124 P.3d 203, 204 (Nev. 2005). Similarly, the five decisions the petitioners cite that ruled in favor of the government included only one drug certificate case, *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005). The other cases involved blood alcohol

Before *Crawford*, most states held that these statutes, allowing drug certificates in lieu of testimony from chemists, did not violate the Confrontation Clause because the evidence was particularly reliable.[156] After *Crawford*, many courts have held that the laboratory reports are only admissible if the doctor, technician, or person who created the report testifies at trial.[157] Unless the defense attorney waives the chemist's appearance at trial, chemists are now routinely subpoenaed to trial by prosecutors in these jurisdictions. In a notable change engendered by the *Crawford* decision, in thousands of drug prosecutions, chemists are subpoenaed to testify to the type of tests they performed, the results they noted, and the conclusions they reached. It remains to be seen whether the Supreme Court will allow drug certificates to serve in place of live testimony and what role the question of reliability plays in this determination. It is also important to consider how to compare live chemist testimony to live victim testimony, excluded from the Confrontation Clause, when the statements are made to medical personnel, discussed in Section III above.

The petition in *Melendez-Diaz v. Massachusetts* requested that the Court review a Massachusetts Supreme Judicial Court ruling that *Crawford* did not forbid criminal courts from allowing drug certificates to qualify as *prima facie* evidence that the substance introduced against the defendant constitutes contraband.[158] The Massachusetts Supreme Court held that a drug certificate is nontestimonial because it is not "'the principal evil at which the Confrontation Clause was directed[,]' . . . [b]ut [r]ather it is akin to a business or official record, which the [*Crawford*] Court stated was not testimonial in nature."[159] The first rationale argues that business records are exempted from *Crawford*'s interpretion of the Confrontation Clause.[160] The business record analogy,

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and DNA evidence. *See, e.g.*, United States v. Ellis, 460 F.3d 920 (7th Cir. 2006) (involving a police-directed blood test indicating the presence of methamphetamine).

156. *See* Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671, 701 (1988). These statutes were designed to improve the efficiency of the criminal justice system. *See Verde*, 827 N.E.2d at 703 n.1 ("The purpose of [the Massachusetts crime lab statute] is to reduce court delays and the inconvenience of having the analyst called as a witness in each case." (citation omitted)).

157. *See* Thomas v. United States, 914 A.2d 1 (D.D.C. 2006) (reading a requirement that there must first be a valid waiver by defense counsel into statute authorizing admission of a chemist's report without calling the chemist); State v. Caulfield, 722 N.W.2d 304, 308 (Minn. 2006) (holding that a laboratory report prepared by analyst would be admissible only if the analyst was unavailable and defendant had a prior opportunity to cross-examine the analyst); State v. Birchfield, 157 P.3d 216, 220 (Or. 2007) (holding trial court's admission of criminalist's laboratory report without requiring state to procure criminalist at trial or to demonstrate that criminalist was unavailable to testify violated the defendant's right of confrontation); Hinojos-Mendoza v. People, 169 P3d 662, 670 (Colo. 2007); *but see Verde*, 827 N.E.2d at 703 n.1; Pruitt v. State, 954 So. 2d 611 (Ala. Crim App. 2006) (intermediate court decision).

158. *See Melendez-Diaz* Petition, 2007 WL 3252033, at *3. The appeals court's decision in *Melendez-Diaz* did not analyze the confrontation issue except by applying the Supreme Judicial Court's decision in *Verde*. *Id.* at *8, 10-11.

159. *Verde*, 827 N.E.2d at 706 (quoting Crawford v. Washington, 541 U.S 36, 50, 56).

160. *Crawford*, 541 U.S. at 56 ("Most of the hearsay exceptions covered statements

Massachusetts's first rationale, will likely be rejected by the Supreme Court as a misreading of *Crawford*. The state court also reasoned that the Confrontation Clause did not apply because: "Certificates of chemical analysis are neither discretionary nor based on opinion; rather, they merely state the results of a well-recognized scientific test determining the composition and quantity of the substance."[161] This second rationale may be viewed as a further argument in support of the business record exception.[162] Or, one could also construe this rationale as a reliability determination, that statements recording well-recognized tests are more likely to be reliable. This reading raises the question as to whether or not reliability concerns survive *Crawford*.

The business record analogy was also advanced by the government in its petition for *certiorari* in the case of *Missouri v. March* to support the notion that drug certificates are nontestimonial.[163] *Crawford* pointed to business records as an example of a hearsay exception that is "by . . . nature *not* testimonial."[164] By categorizing the drug certificate as a business record, the government urged the Supreme Court to disregard the common law limits on the business record hearsay exception that exclude records created in anticipation of litigation.[165]

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that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy.").

161. *Verde*, 827 N.E.2d at 705 (citation omitted).

162. *See* Paul C. Giannelli, *Admissibility of Lab Reports: The Right of Confrontation Post-*Crawford, CRIM. JUST., Fall 2004, at 26, 28 ("If laboratory reports are considered routine and objective, they may be admissible under" the federal business record rule, Rule 803(8)(B)). *See* People v. McDaniel, 670 N.W.2d 659, 661 (Mich. 2003) (concluding that the report, "prepared by a police officer, was adversarial. It was destined to establish the identity of the substance—an element of the crime for which defendant was charged."); *cf.* Howard v. United States, 473 A.2d 835, 839 (D.D.C. 1984) (holding reports of chemical analyses that contain "objective facts rather than expressions of opinion" are admitted as business records).

163. *See March* Petition, 2007 WL 1812498, at *2. Robert March, the defendant in that case, was charged with drug trafficking on the basis of a search of his girlfriend's apartment, where the police seized what they believed to be several rocks of cocaine. State v. March, 216 S.W.3d 663, 664 (Mo. 2007). The drugs were sent to the state laboratory and the lab report indicated that the white rock substance seized contained a cocaine base and weighed a total of 2.7 grams. *Id.* At trial, the government sought to introduce the chemist's lab report as a business record, calling the custodian of the laboratory's records, not the chemist. *Id.* The chemist had moved out of state by the time of trial, and there had been no deposition or other opportunity to confront the chemist before he departed. *Id.* Although the trial judge allowed the report to be introduced into evidence, the Missouri Supreme Court reversed the conviction, holding that under *Crawford*'s construction of the Confrontation Clause, the drug certificate was testimonial and could not be introduced in the absence of the chemist who prepared the report. *Id.* at 667.

164. *Crawford*, 541 U.S. at 56 (emphasis added).

165. *See* Michael Ariens, *A Short History of Hearsay Reform, with Particular Reference to* Hoffman v. Palmer*, Eddie Morgan and Jerry Frank*, 28 IND. L. REV. 183, 203 (1995) (explaining that "the common law history of the business records exception was rooted in the requirement of an absence of a motive to misrepresent" and that records created with an eye to litigation would not satisfy the common law rule). This article discusses the case of *Palmer v. Hoffman*, 318

Drug certificates are generated precisely to create records for litigation.[166] Under the reliability standard set by *Roberts*, the Supreme Court accepted state court conclusions that items fit within the category of an historic hearsay exception even if that category was stretched beyond anything recognizable in common law.[167] For the Court to define drug certificates as business records would require it to re-link the Clause to the hearsay exceptions, and allow the hearsay exceptions to expand while correspondingly shrinking confrontation rights, as was the practice after *Roberts*.[168] One can discern the pitfalls of this definitional stance in *March*. The Missouri statute keeps with the usual rule that records created in anticipation of litigation do not fall within the business

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U.S. 109, 114 (1943), that limited the statutory expansion of business records. *Palmer* held that the statute using the phrase "regular course of business" should be read to exclude the transcript of a question and answer session made two days after the accident between the engineer of the train and another employee of the railroad, because the "reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading." *Palmer,* 318 U.S. at 205 n.138. *See also* James Wm. Moore & Helen I. Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9, 34 (1974) ("The history of the 'business records' exception is one of statutory relaxation of rigid common law rules."); *but see* Giannelli, *supra* note 162, at 27:

> Prior to the adoption of the Federal Rules of Evidence (FRE) in 1975, the federal courts generally admitted laboratory reports under the business or public records exceptions to the hearsay rule. (*E.g., United States v. Frattini*, 501 F.2d 1234 (2d Cir. 1974) (cocaine report); *United States v. Parker*, 491 F.2d 517 (8th Cir. 1973) (heroin report); *Kay v. United States*, 255 F.2d 476 (4th Cir. 1958) (blood alcohol test report).) The enactment of FRE, however, cast doubt on these decisions.

166. *See, e.g.*, MASS. GEN. LAWS ch. 111 § 12 (2003) (requiring the department of public health to make a chemical analysis of any narcotic drug "when submitted to it by police authorities . . . provided, that it is satisfied that the analysis is to be used for the enforcement of law"). The primary reason to send a suspect substance to the state laboratory is to prove at trial that it is in fact contraband. Although occasionally the substances turn out to be legal, the police send evidence that they believe to be contraband. Drug reports are then prepared according to a statute that governs their admission. *See*, *e.g.*, United States v. Feliz, 467 F.3d 227, 234-36 (2006) (holding that if a statement is found to be a business record, it is not testimonial and not subject to Confrontation Clause requirements, because business records cannot be made in anticipation of litigation); United States v. Oates, 560 F.2d 45, 67 (2d Cir. 1977) (holding chemist's official report and worksheet identifying a substance as heroin is not a public record because Federal Rule of Evidence 803(8)(C) explicitly excludes investigative reports in criminal cases when offered against the accused).

167. Ohio v. Roberts, 448 U.S. 56, 66 (1990) ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."); Lilly v. Virginia, 527 U.S. 116, 117 (1999) ("Statements are admissible under a 'firmly rooted' hearsay exception when they fall within a hearsay category whose conditions have proved over time 'to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath' and cross-examination at a trial." (quoting Mattox v. United States, 156 U.S. 237 (1895))); *see generally* White v. Illinois, 502 U.S. 346, 355 (1992) (accepting the state court's conclusion that evidence fit within the firmly rooted exceptions of excited utterance and medical records).

168. *See Crawford*, 541 U.S. at 63-64 (criticizing the expansion of the hearsay rule allowing in accomplice confessions and the corresponding depletion of confrontation rights); *see generally Roberts*, 448 U.S. at 56.

record definition.[169] However, this did not prevent the Missouri trial court from ruling that the business exception applied to drug certificates.[170] Against all logic, the Missouri trial court made a factual determination that the lab report was not created in anticipation of litigation, and consequently qualified as a business record.[171] Were the Supreme Court to accept as fact a trial judge's determination that chemist reports were not created in anticipation of litigation, it would potentially create an end run around any possible core testimonial statement. Grand jury statements and confessions could conceivably be labeled as business records and qualify as nontestimonial. To avoid this anomalous result, the Court in *Melendez-Diaz v. Massachusetts* must either reject the language in *Crawford*[172] that suggests that business records are by definition, nontestimonial, or in the alternative, the Court must read the term "business records" to exclude those business records that were created in anticipation of litigation.[173]

The business record analogy, Massachusetts's first rationale, will likely be rejected by the Supreme Court as a misreading of *Crawford*. During oral

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169. *See* MO. REV. STAT. § 490.680 (1996); State *ex rel* Hobbs v. Tuckness, 949 S.W.2d 651, 655 (Mo. Ct. App. 1997). "The term 'regular course of business' as used in the Uniform Law 'must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.'" Kitchen v. Wilson, 335 S.W.2d 38, 43 (1960) (quoting *Palmer,* 318 U.S. at 115) (determining that affidavit and accompanying statement were not prepared in the regular course of business, but rather as a result of litigation). *See March* Petition, 2007 WL 1812498, at *6-7. Missouri's business records statute requires the custodian to testify to the identity of the record "the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event." MO. REV. STAT. § 490.680. The court is also to decide if "the sources of information, method and time of preparation were such as to justify its admission." *Id.*

170. *See* State v. March, 216 S.W.3d 663, 664-65 (Mo. 2007).

171. *Id.* at 665. The State relied on dicta from *Crawford* as support that the laboratory report should still be admissible under the business records exception to the hearsay rule. *Id.* The Missouri court noted, however, that "falling within a hearsay exception does not resolve the Confrontation Clause issue because *Crawford* divorced the hearsay exceptions from the Confrontation Clause analysis." *Id.* Further, the State directed the court to "cases from other jurisdictions that hold that laboratory reports are business records, and such business records are not testimonial under the Confrontation Clause." *Id.* The Missouri court noted that "these cases seem to incorrectly focus on the reliability of such reports." *Id.* (footnote omitted).

172. *Crawford*, 541 U.S. at 76 (Rehnquist, C.J., concurring) ("To its credit, the Court's analysis of 'testimony' excludes at least some hearsay exceptions, such as business records . . . ."); *see id.* at 56 (majority opinion) (noting that while "'[t]here were always exceptions to the general rule of exclusion' of hearsay evidence . . . [m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records . . . ." (quoting *id.* at 73 (Rehnquist, C.J., concurring)).

173. *See, e.g.*, United States v. Feliz, 467 F.3d 227, 236 (2006) (holding "a business record as defined by FED. R. EVID. 803(6) . . . is not testimonial within the meaning of *Crawford*, even where the declarant is aware that it may be available for later use at trial."); *cf.* United States v. Smith, 521 F.2d 957, 967 (D.C. Cir. 1975) (holding police reports are only admissible when prepared with an eye towards litigation if they are offered against the party for whom they were made, i.e., the prosecution); FED. R. EVID. 803(6).

argument, Justice Scalia asked counsel for Mr. Melendez-Diaz whether a business record exception to the Confrontation Clause existed at common law and appeared satisfied with the response that the business records at common law, shop-book ledgers and entries, were created without contemplation of litigation.[174] Similarly, when the government attempted to argue that "there was a broad exception at common law for official records, those created by public officers doing their duty," Justice Scalia interposed: "[T]here was not a broad exception at common law for public records created in anticipation of criminal litigation."[175]

The Supreme Court also addressed the second rationale of the Massachusetts court, that drug certificates "are neither discretionary nor based on opinion," but rather mere statements of "the results of a well-recognized scientific test determining the composition and quantity of the substance."[176] To the extent that the Massachusetts court's reasoning is understood as raising reliability concerns, it is unlikely to succeed. At oral argument, Massachestts Attorney General Coakley essentially adopted the position that drug tests are reliable, although she explained that "I hesitate to use the word 'reliable,'" differentiating accuracy from reliability.[177] The result of a drug test is different from eye-witness testimony, the Attorney General argued, "because it can be tested and verified and isn't dependent upon a cross examination at trial."[178] This accuracy is important, she argued, because the reason that business records and public records have always been admissible "is precisely because we believe them to be accurate" and "the roots of whether it's hearsay or not and the Confrontation Clause arguments come from the same concern that

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174. Transcript of Oral Argument, Melendez-Diaz v. Massachusetts, 2008 WL 4892843, at 23-24 (Nov. 10, 2008) (No. 07-591), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-591.pdf. Consider this exchange, in which the Attorney General of Massachusetts tried to argue that public records as a class are exempted from the Clause:

> JUSTICE SOUTER: Well, have we ever had—have we ever had a—a kind of lab report, public record kind of case in—in which the record was prepared expressly for trial?
> MS. COAKLEY: I think that if you look at Dutton, for instance, and the concurring opinion by Justice Harlan talking about laboratory reports deemed to be whatever the analysis was, a business record, that would have been—
> JUSTICE SOUTER: Yes, but Justice Harlan did not take the majority view. I mean you—I don't know where you get authority for the proposition that the public record prepared for the purpose of litigation would have come in under the, in effect, the founding era—or would have been outside the founding era definition of testimonial.

Id. at 33.

175. *Id.* at 54-55.
176. Commonwealth v. Verde, 827 N.E.2d 701, 705 (Mass. 2005).
177. Transcript of Oral Argument, *supra* note 174, at 39.
178. *Id.* at 32.

somebody get a fair trial."[179] "No. No," responded Justice Scalia, "We are back to *Roberts* then."[180] In this way, the author of the *Crawford* majority opinion revealed his distaste for interests of reliability, fairness, or whether cross-examination is central to determining truth in the current context.

Significantly, neither the California Supreme Court in *Cage*, nor the Missouri Supreme Court opinions, nor the two applications for *certiorari* to the U.S. Supreme Court, touched on reliability concerns.[181] In fact, the Missouri Supreme Court explicitly rejected reliability as a criterion in its decision: "The reliability of the reports, once paramount under *Roberts*, is now irrelevant" the court decreed.[182] The Missouri court is actually right. Although it is difficult to square the notion that reliability is irrelevant with *Crawford*'s reasoning that "the Clause's ultimate goal is to ensure reliability of evidence,"[183] reliability has indeed become an irrelevant concern, along with the role of cross-examination in ferreting out truth. In fact, the much-perceived reliability of government evidence may enhance the likelihood that the evidence will be considered a core abuse. The abuses complained of in the Confrontation Clause realm had many indicia of reliability. The lab reports may look most like the abuses historically complained about, precisely because they are perceived as more reliable—just as the taped confession is perceived as more reliable than the untaped confession and the statement under oath more reliable than the unsworn statement.

While the Massachusetts rationale that drug certificates are nontestimonial because they are based upon well-recognized scientific tests, rather than opinion, will not succeed as an overture to reliability, the same line of reasoning had more cachet when phrased another way at oral argument in *Melendez-Diaz*. The Assistant to the Solicitor General, Lisa H. Schertler, argued that a drug report is not testimonial because it was "an instrument-generated result and therefore not the statement of a witness."[184] The government's argument was similar to the reasoning in *People v. Geier*,[185] a California case that held that the Confrontation Clause did not apply to DNA laboratory reports. The case relied on a present impression recorded rationale; *Geier* reasoned that, after *Davis*, it did not matter whether reports were written in anticipation of litigation.[186] The California Supreme Court wrote in *Geier* that "[a] reasonable person reporting a domestic disturbance . . . will be aware that the result is the arrest and possible prosecution of the perpetrator. So it

179. *Id.* at 43-44.
180. *Id.*
181. People v. Cage, 40 Cal. 4th 965 (2007); State v. March, 216 S.W.3d 663, 663 (Mo. 2007).
182. *March*, 216 S.W.3d at 665-66.
183. Crawford v. Washington, 541 U.S. 36, 61 (2004).
184. Transcript of Oral Argument, *supra* note 174, at 50.
185. 161 P.3d 104 (Cal. 2007).
186. *See id.* at 139-40.

cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially," yet *Davis* held a 911 call to be nontestimonial.[187] The court extracted a three-part test from *Crawford* and *Davis* in which all three criteria must be met in order for the evidence to be deemed testimonial. According to *Geier*, the Confrontation Clause only applies to a statement if: "(1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial."[188] In California, DNA scientists made a "contemporaneous recordation of observable events rather than the documentation of past events."[189] DNA lab reports are therefore not testimonial because they do not describe past facts and, consequently, fail the second criterion listed above.

Although drug lab certificates are different from California DNA reports, the Court could apply the logic from *Geier* to drug reports. In DNA trials there is a live witness who testifies to the significance of the results found by the lab technician,[190] whereas in drug lab trials the technician's report is introduced without live testimony. Unlike DNA reports, drug reports reach conclusions about the tests; the significance of the results of the drug tests are found within the four corners of the certificate. While some drug certificates are more detailed than others, including the weight or the percentage of contraband within the items tested, all conclude that the items found constituted a certain substance.[191] If the California Supreme Court's analysis wins the day, prosecutors can simply alter the way they present lab reports. The technicians will stay in the laboratory and another scientist will come to court to testify based on his reading of the laboratory technicians' contemporaneous notes. Recognizing the power of the argument that machine results are different from live witness statements, counsel for Mr. Melendez-Diaz conceded during oral argument that the state could call the supervisor at trial, rather than the chemist who performed the test, and this supervisor could "rely . . . on raw data and give his or her explanation of raw data. It's just that the person cannot take the stand and relay somebody else's conclusion to the jury."[192]

If the Supreme Court accepts the contemporaneous analysis, it will be because the Court does not think that scientific tests conducted in order to further prosecutions are the modern day analogs of "the abuses at which the Confrontation Clause was directed."[193] It will have nothing to do with whether

187. *Id.* at 139 (quoting United States v. Ellis, 460 F.3d 920, 926 (7th Cir. 2006)).

188. *Id.* at 138.

189. *Id.* at 139.

190. That scientist relied upon the scientific notes and reports made by the technician to reach conclusions about the substance tested. *Id.* at 131-32.

191. *See generally* Metzger, *supra* note 5, at 478-79.

192. Transcript of Oral Argument, *supra* note 174, at 28.

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

the lab reports are reliable or whether anything is to be gained from cross-examining the technicians.

Another appellate court that dismissed reliability as a concern for chemist reports was the District of Columbia Court of Appeals in *Thomas v. United States*.[194] The D.C. court stated, "[r]eliability no longer shields testimony from confrontation."[195] Nevertheless, the court in *Thomas* felt compelled to address the merits of the reliability claim. On appeal, the government argued that the reports were objective scientific evidence and that "[n]one of the historical examples of *ex parte* testimony discussed in *Crawford* involved such neutral, scientific evidence."[196] Even if chemist reports were testimonial, the government further argued, they are "seldom in dispute, and requiring the expert to appear in every drug prosecution therefore would be a waste of time and public resources."[197] On policy grounds, therefore, the government argued that the right to confront the chemist should "bow to accommodate other legitimate interests."[198] Countering the government's claim, the D.C. Court wrote that "government forensic laboratories are not immune from problems of dishonesty, sloppiness, poor training, bias, unsound methodology, and scientific or other error."[199]

Pamela Metzger argues that the history of abuses by government labs necessitates that the Confrontation Clause be applied to all forms of scientific reports.[200] While Metzger is persuasive that state laboratories need oversight and are not uniformly free of error, she does not set out to prove that the art of cross-examination will expose these errors. It is unclear from her article how known laboratory abuses were exposed—whether it was from internal

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194. 914 A.2d 1 (D.D.C 2006) (re-interpreting a statute authorizing the government to introduce a chemist's report without calling the chemist in its case-in-chief, but only if the defendant has validly waived his confrontation right.).

195. *Id.* at 15.

196. *See id.* at 14-15.

197. *See id.* at 17.

198. *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), for the notion that confrontation rights should be balanced against competing concerns). *Chambers* did state that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." *Chambers*, 410 U.S. at 295.

199. *Thomas*, 914 A.2d at 15. In footnote 16, the court notes two reports of Justice Department's Office of the Inspector General (OIG) released in May of 2004. One OIG report is on the FBI DNA laboratory, while the other report examines the Explosives, Materials Analysis and Chemistry-Toxicology Units. In contrast, some courts continue to consider reliability in assessing whether scientific reports are testimonial. *See e.g.*, State v. Dedman, 102 P.3d 628, 636 (N.M. 2004) (although blood alcohol reports are "prepared for trial," they are nontestimonial because "the process is routine, non-adversarial, and made to ensure an accurate measurement").

200. Metzger, *supra* note 5, at 491-500.

audits, investigative journalism, or at trial.[201] Metzger cites examples of false reports, but it is not clear whether these scientists regularly testified at trials, whether cross-examination helped uncover the falsifications, or whether confrontation rights would have made a difference in any of the examples she gives.[202] To be fair, the article does not actually discuss whether cross-examination—without better discovery rules or help from defense experts—can accomplish its task of undercutting the reliability of the reports enough to alter the outcome in the case. Similarly, Paul Giannelli writes that recent newspaper headlines prove the value of cross-examination of experts, but then does not include one example where cross-examination served to expose the errors.[203] Metzger notes that the "Innocence Project of Cardozo

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201. For example, Metzger writes, without further explanation, about audits: "In December of 2002, an audit disclosed major discrepancies in the forensic outcomes alleged by the Houston Police Department's crime laboratory . . . ." *Id.* at 476-77. *See also* Brief for Professor Pamela R. Metzger, et al., as Amici Curiae in Support of Petition for Certiorari, Melendez-Diaz v. Massachusetts (2007) (No. 07-591), 2007 WL 4287354. This brief argues cross-examination makes a difference and cites to *Ragland v. Kentucky*, 191 S.W.3d 569, 581 (Ky. 2006) (holding that erroneous admission of expert's false testimony regarding ammunition manufacturer's purchase of bullet lead was reversible error). However, in that case, the jury convicted the defendant despite the fact that the expert appeared at trial and faced vigorous cross-examination. The appellate court feared that this evidence might have tainted the verdict. In holding that FBI lead bullet composition analysis does not meet the threshold reliability standard of *Daubert*, the court seemed most persuaded by the results of a report by the National Research Council of the National Academies of Science (NRC) that evaluated the science for the FBI and concluded that bullet lead evidence does not meet the scientific reliability requirements established by *Daubert/Kumho*. *Ragland*, 191 S.W.3d at 578.

202. Metzger cites one example where cross-examination at a hearing clearly helped disclose the problems, but this hearing of a chemist, Concepcion Bacasnot, was during post-conviction proceedings, after DNA proved her testimony at trial on blood testing to have been inaccurate. *Id.* at 495 (citing Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show; She Acknowledged Report Was "Worthless" in 1987*, BALT. SUN, Mar. 19, 2003, at 1B); Stephanie Hanes, *Balto. Co. Reviews Cases Tied to Chemist; Former Police Researcher Criticized for Testimony Against Man Later Freed*, BALT. SUN, Mar. 12, 2003, at 3B. Thus, although the chemist testified at trial and was subject to cross-examination, Bernard Webster was still convicted of a rape he did not commit. Hanes, *Balto. Co. Reviews Cases*, *supra.* The Innocence Project called for an audit of all of Ms. Bacasnot's cases, stating her trial testimony suggested "gross incompetence, and at worst, deliberate fraud." The Baltimore County Police Department cooperated, agreeing to track down the 480 cases on which Ms. Bacasnot worked. *Id.; see* Stephanie Hanes, *Ex-Crime Lab Chemist's Work Questioned*, BALT. SUN, Feb. 22, 2003, at 1B. It would be interesting to learn whether Ms. Bacasnot testified at trial in those 480 cases and whether cross-examination was successful in any of them.

203. Giannelli, *supra* note 162, at 30. One highly pertinent example from Giannelli is the case of *Stevens v. Bordenkircher*, 746 F.2d 342 (6th Cir. 1984), where an autopsy report was introduced without confrontation rights. *Stevens*, 746 F.2d at 343. In ruling that the Sixth Amendment mandated that the author of the report appear at trial, the court stated the following:

> If petitioner had been permitted to cross-examine Dr. Begley, the jury would have learned that bones were all that remained of the body, that Dr. Begley was unable to identify the corpse, that Dr. Begley failed to find any trace of bullets or even metal fragments after x-raying the body, and that

Law School has demonstrated that forensic fraud, forensic error, and 'bad science' were significant factors in the first seventy wrongful convictions that were reversed when the Innocence Project used DNA to exonerate those

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> Dr. Begley had no knowledge concerning the cause of death other than information supplied to him by Bennett through the police. Accordingly, we conclude that admission of the death certificate without providing petitioner with the opportunity to cross-examine Dr. Begley violated the Confrontation Clause.

Id. at 348-49.

Giannelli stated that "[a]nyone who would question the value of cross-examination in this context need only look at recent newspaper headlines:"

> 1) Jim Yardley, *Oklahoma Inquiry Focuses on Scientist Employed by Prosecutors*, N.Y. TIMES, May 2, 2001, at A14 (discussing Joyce Gilchrist).
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> 2) Adam Liptak, *2 States to Review Lab Work of Expert Who Erred on ID*, N.Y. TIMES, Dec. 19, 2002, at A24 (discussing erroneous hair evidence in the trial of Jimmy Ray Bromgard, who spent 15 years in prison before being exonerated by DNA).
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> 3) Jim Dwyer, *Some Officials Shaken by New Central Park Jogger Inquiry*, N.Y. TIMES, Sept. 28, 2002, at B1, B3 ("At the trial, the prosecution had argued that hairs found on Mr. Richardson's clothes came from the jogger. Recent DNA tests show that claim to be wrong.").
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> 4) Nick Madigan, *Houston's Troubled DNA Crime Lab Faces Growing Scrutiny*, N.Y. TIMES, Feb. 9, 2003 at 120 (operations suspended in December after an audit found numerous problems).
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> 5) Ralph Blumenthal, *Double Blow, One Fatal, Strikes Police in Houston*, N.Y. TIMES, Oct. 30, 2003, at A23 ("The Houston police chief announced on Wednesday that he had shut down the Police Department's toxicology section after its manager failed a competency test . . .").
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> 6) Associated Press*, Ex-F.B.I. Biologist Admits Falsifying DNA Data*, L.A. TIMES*,* May 19, 2004, at A15 (Jacqueline A. Blake, former DNA biologist for the F.B.I., plead guilty to making false statements on official government reports.).
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> 7) Sara Kershaw, *Spain and U.S. at Odds on Mistaken Terror Arrest*, N.Y. TIMES, June 5, 2004, at A1 (Spain cleared Portland-area lawyer Brandon Mayfield. Although the F.B.I. found a fingerprint match, Spanish officials matched the fingerprints to an Algerian national.).

Id. at 30-31.

Giannelli cites the notorious government witness Joyce Gilchrist. *Id.* Yet Joyce Gilchrist testified in hundreds of cases and was presumably cross-examined by hundreds of defense lawyers. *See* Belinda Luscombe, *When the Evidence Lies,* TIME, May 13, 2001, *available at* http://www.time.com /time/nation/article/0,8599,109568,00.html.

innocent persons."[204] Unfortunately, the Innocence Project statistics and stories tend to suggest that cross-examination is not necessarily the best tool for ferreting out scientists who shade their conclusions.[205]

While I agree with Metzger and Giannelli that lab reports are not always reliable, I submit that there is an unintended irony in the notion that the drug laboratory reports invoke core confrontation goals, while the statements by alleged victims to doctors do not. The problem in viewing cross-examination of lab technicians as the "core" right of the Confrontation Clause is that cross-examination may not be the best vehicle for bringing out the deficits in the report and raising issues of reasonable doubt. In fact, most trial attorneys can accomplish very little by cross-examining the chemist, unless they are given full discovery and defense experts with whom they can confer.

A court in Kansas opined that lab technicians will rely heavily on their reports and notes when testifying in court because they are unlikely to have any independent memory of the testing other than their reports.[206] This is indeed possible and contributes to my suspicion that a chemist confrontation victory will be pyrrhic. It is likely that chemists will not remember the specific testing done in a case, will not know about general problems in the lab, and will not serve as experts on how a lab should run.

Similarly, during oral argument before the Supreme Court in *Melendez-Diaz*, Justice Breyer paraphrased one of the government's arguments as "We are not going to make the State do this because it's a waste of time, for the most part. It just delays the trial, and there is really nothing at issue."[207] While Jeffrey L. Fisher, counsel for Melendez-Diaz, conceded that often the chemist would not

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204. Metzger, *supra* note 5, at 491-92 (footnote omitted); *see* Innocence Project, *About the Innocence Project*, http://www.innocenceproject.org (discussing the use of DNA to exonerate innocent persons); *see also* EDWARD CONNORS, ET AL., U.S. DEPT. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996), *available at* http://www.ncjrs.gov/pdffiles/dnaevid.pdf (discussing the first 28 DNA exonerations); JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 244-52 (2000).

In other cases, DNA testing reveals the problem of relying on cross-examination of scientific experts for determining reliability. *See* Margaret Cronin Fisk, *Lawyer Frees Chicago Trio After Retesting of Lab Sample: Technician had Testified in Earlier Bad Conviction*, THE NAT'L L.J. , Dec. 17, 2001, at A6; Adam Liptak, *DNA Will Let a Montana Man Put Prison Behind Him, but Questions Linger*, N.Y. TIMES, Oct. 1, 2002, at A22 (manager of state crime lab testified that there was one in 10,000 chance that hair sample was not defendant's; years later, DNA evidence proved defendant could not have committed the crime).

205. Metzger, *supra* note 5, at 492 n. 64 ("Forensic scientists shade their conclusions or skip the tests altogether, to accommodate a presumption of guilt." (quoting DWYER ET AL., *supra* note 204, at 250)); *see also* The Innocence Project, *Understand the Cases: Government Misconduct*, http://www.innocenceproject.org/understand/Government-Misconduct.php.

206. *See* People v. Geier, 161 P.3d 104, 136 (Cal. 2007) (citing State v. Lackey, 120 P.3d 332 (Kan. 2005)).

207. Transcript of Oral Argument, *supra* note 174, at 17.

even remember performing the actual test,[208] Mr. Fisher exploited this seemingly unhelpful fact to his advantage, arguing that because cross-examination of chemists is generally unhelpful to a defendant's case, defense counsel will waive live testimony from chemists in most cases, and therefore, a decision in favor of confrontation rights for technicians will not create major practical difficulties for prosecutors.[209] Justice Alito inquired, "why does [it] support your argument" that what "you're arguing for [is] going to be an empty exercise?"[210] Counsel's apt response was that even if cross-examination would be fruitless, after *Crawford,* it is not for the courts to decide.[211]

The District of Columbia, where I practice criminal law, provides a good test of the fruitfulness of this core right. Since the *Thomas* case mandated prosecutors in the District of Columbia must produce the chemist who wrote the drug analysis report for trial, I have observed many trial attorneys waive the opportunity to confront the chemist.[212] This signifies that these lawyers think that they will not score enough points on cross-examination of the chemist to off-set the disadvantages, such as a loss of focus on the cross-examination of the primary witnesses in the case—namely, the witnesses who claim they observed facts proving the defendant had actual or constructive possession of the contraband. Some defense attorneys may also believe that there will be sentencing leniency from the judge if counsel waives the confrontation right. If the cross-examination of the chemist had a chance of winning the case, counsel would not waive the right in hopes for a sentencing advantage.

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208. *Id.* at 5-6. Counsel for Melendez-Diaz relied on the Law Professors' amicus brief, which stated "Experienced defense counsel do not insist on the live presentation unless there is some reason to belief the evidence is susceptible to challenge." Brief for Law Professors as Amici Curiae in Support of Petitioner, Melendez-Diaz v. Massachusetts, at 7-9 (2008) (No. 07-591), 2008 WL 2521264.

209. Transcript of Oral Argument, *supra* note 174, at 18-19.

210. *Id.* at 20.

211. *Id.* at 18.

212. In *Thomas*, the D.C. Court of Appeals addressed the reliability issue and discussed two reports issued by the Office of the Inspector General regarding federal laboratories. Thomas v. United States, 914 A.2d 1, 15 n.16 (2006). In one instance, the misconduct of a FBI biologist who falsified her reports was discovered merely by chance. *Id.* The second report regarded the Explosives, Materials Analysis, and Chemistry-Toxicology Units of the FBI Laboratory. *Id.* The report cited "'significant instances of testimonial errors, substandard analytical work, and deficient practices,' including 'scientifically flawed' and otherwise improperly prepared laboratory reports." *Id.*; *see* OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUSTICE, THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (1997), *available at* http://www.usdoj.gov/oig/special/9704a/00exesum.htm. Although the problems were not exposed through cross-examination, it is unclear whether any of these scientists testified in criminal trials or whether reports were used instead. (The other OIG report concerns the FBI DNA laboratory.)

Still, during oral argument before the Supreme Court, the government introduced statistics about the District of Columbia to prove that the confrontation right does burden the government with new costs. The Assistant U.S. Solicitor General argued that since the D.C. Court of Appeals started mandating live testimony or counsel waivers, "court appearances that have been required of DEA chemists at the Mid-Atlantic laboratory have increased by 500 percent, from seven to 10 appearances per month to routinely over 50 per month."[213] These statistics may mean that counsel are actively engaged in ferreting out mistakes committed during analysis, or perhaps, as the state's attorney general suggested during oral argument in *Melendez-Diaz*, they may mean that defense counsel "often will not stipulate . . . until the day of trial when they realize that the chemist is there. That's from my own experience and that's a commonsensical rule."[214] It is hard to fault defense lawyers for treating the Confrontation Clause as a game, when the legal system in which they practice treats confrontation rights as a game rather than as a true search for truth. In the District of Columbia, the report itself is often handed to the defense the same moment that the chemist arrives to testify. This allows no opportunity to carefully review the report and prepare meaningful cross-examination. In addition, even where the report is given in advance of trial, defense counsel usually would not have access to an expert to review the chemist's notes to help counsel prepare adequate cross-examination questions. Unless the press had reported on problems discovered in the state laboratory, it is unlikely that the defense counsel would know any problems existed.

The Massachusetts attorney general made an excellent point during oral argument in *Melendez-Diaz*, even though none of the justices seemed persuaded, that drug tests are different than other types of out-of-court statements "because it can be tested and verified and isn't dependent upon a cross examination at trial."[215] . It is interesting to compare the *Verde* trial in Massachusetts, which resulted in that state's highest court ruling that *Crawford* did not apply to drug tests, with the confrontation rights practiced daily now in the District of Columbia. In the case of *Verde*, the defense lawyer hired an expert, who went to the government's drug laboratory and weighed the drugs

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213. Transcript of Oral Argument, *supra* note 174, at 57. This should be compared the total number of exhibits analyzed. In federal and District of Columbia cases, the Drug Enforcement Administration analyzed 52,948 controlled substance exhibits in fiscal year 2007. *See* Brief for the United States as Amicus Curiae Supporting Respondent, Melendez-Diaz v. Massachusetts, at 24 & n.6 (2008) (No. 07-591), 2008 WL 4195142 (citing DEA, *Laboratories*, http://www.usdoj.gov/dea/programs/laboratories.htm).

214. Transcript of Oral Argument, *supra* note 174, at 46. In the District of Columbia, I heard a prosecutor complain to a trial court that the right to cross-examine the chemist was just a game for defense counsel. The prosecutor recalled a defense lawyer who always asserted the right to confront, hoping for a dismissal of the charge, but would waive the right when the chemist finally appeared in the courtroom.

215. *Id.* at 32. Justice Souter responded, "I don't see what [that's] got to do with . . . the basic confrontation right." *Id.* at 32-33.

himself.[216] "[H]e testified that he thought the concentration of cocaine stated on the certificate of analysis was misleading" and that "a piece of data was missing" from the chemist's reports.[217] Although the defendant lost the trial, this expert was able to poke holes in the government's case. The use of a defense expert coupled with advance discovery appears better suited to the discovery of truth than the blind cross-examination practiced in the District of Columbia.[218]

Hiring defense experts to evaluate the government's results and tests is the key to a successful cross-examination. One trial where the unreliability of the laboratory testing may have helped produce a not guilty verdict was the O.J. Simpson prosecution. Notably, counsel for Simpson had their own experts evaluate the problems in the Los Angeles laboratory, to help counsel counter the answers given by the technicians who testified for the government. The defense also called its own experts to the stand.[219]

Imagine if you gave defense counsel a choice: (1) confrontation rights to cross-examine the chemist, or (2) an expert of your choosing. Under this second option, counsel would receive the technician's notes prior to trial and hand them to his or her expert. Counsel could consult with the expert about problems in the notes and in the lab itself. Finally, counsel could call the expert to the stand to point out the problems in the laboratory and in the notes. Although in this option, the defense calls their own experts *or* the lab technician, I predict that defense lawyers would almost universally choose to obtain their own experts coupled with full discovery over confrontation. A defense expert is much more capable of finding flaws in the documentation or the testing, and of understanding the flaws in the laboratory, than a defense attorney, even in those jurisdictions where the attorney is given a chance to look at the report and data well in advance of the trial date.

It is difficult to rectify the notion that cross-examination of laboratory technicians is a "core" right of confrontation with the reality that much more could be accomplished in the way of helping the defense create doubt in the

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216. Commonwealth v. Verde, 827 N.E.2d 701, 704 (Mass. 2005).

217. *Id.* The chemist "further testified that he could not determine how inaccurate [the report] might be because he 'didn't have enough time to really study all the data.'" *Id.*

218. By blind, I mean that the lawyers are not given reports until the day of trial and not provided expert help, and not given audit reports of the laboratories.

219. For example, defense expert Dr. John Gerdes testified to a history of serious contamination problems at the lab. *See* William C. Thompson, *DNA Evidence in the O.J. Simpson Trial*, 67 U. COLO. L. REV. 827, 833 (1996). He also opined that there was likely cross-contamination of DNA due to poor sample handling procedures. *Id.* The defense argued that some of Simpson's blood was inadvertently transferred to evidentiary samples when LAPD criminalist Collin Yamauchi spilled some of Simpson's blood from a reference vile while working in the evidence room. *Id.* at 832-33. Also, the testimony of Dr. Robert Huizenga established that there were two cuts on Simpson's left middle finger and that the smaller, less conspicuous cut could have bled sufficiently to account for the quantity of Simpson's blood found in the Bronco and at his Rockingham residence. *Id.* at 831.

government's case were complaining witnesses viewed as witnesses under the Clause.

CONCLUSION

What does reliability have to do with the Confrontation Clause? Everything and nothing. It is the ultimate stated goal of the Confrontation Clause, but only for certain evidence. Whether evidence falls under the protections of the Clause has nothing to do with promoting reliability. If the ultimate goal of the Confrontation Clause is to assure reliability of evidence of only some statements, then it is odd that the selection of those statements has nothing to do with this ultimate goal.

Compare whether victims' statements to doctors should be deemed testimonial as compared to laboratory results. Laboratory reports look more like what *Crawford* described as historic abuses, but their reliability problems are not necessarily best addressed through confrontation rights. If the Supreme Court brands the laboratory reports as "core," as they should under *Crawford* analysis, many lawyers will simply waive this right, unless other protections are put in place to assure investigation of the laboratories, opportunities are provided for defense counsel to consult with its own expert, and there is timely discovery. Without these additional protections, rarely will this "core" confrontation right truly further the goal of testing evidence's reliability and help determine a case's outcome. Options other than cross-examination may, in fact, be more useful to uncover reliability concerns surrounding scientific testing.

In comparison, out-of-court statements to doctors by victims naming their attackers are much more conducive to reliability testing through cross-examination. One cannot simply hand the defense attorney funds for an expert to help uncover reliability issues in the case of statements to medical personnel. Looking at Burns's description of the modern trial, we can appreciate how lawyers use cross-examination of victims to probe reliability. Yet, the Supreme Court is not likely to find a right to cross-examine the victim who identified his perpetrator to a doctor. It is no wonder most scholars opine that *Crawford* ended the Clause's concern with reliability. The end result is a contradiction—the Supreme Court opining that the ultimate goal of the Clause is reliability, while pointing out that the Clause no longer protects the accused from a host of unreliable accusatory statements repeated at trial without any opportunity to cross-examine the witness.[220]

220. *See supra* note 16 and accompanying text, discussing *Whorton v. Bockting*, 127 S. Ct. 1173 (2007).