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ABSTRACT

The Sixth Amendment's Confrontation Clause works in conjunction with the right to counsel and trial by jury to protect the people against the government's abuse of its prosecutorial monopoly. However, the history of the Court's Confrontation Clause jurisprudence has not always focused on the Sixth Amendment's goal of limiting government power and was treated as virtually synonymous with the hearsay rules. In Crawford v. Washington, the Court restored the Confrontation Clause to constitutional significance by correctly identifying it as a procedural guaranty that empowers the jury to evaluate the reliability of government witnesses through live testimony subject to cross-examination. Unfortunately, the Court's exclusive focus on testimonial statements as a limitation on the right was misplaced from the beginning, and the multifactor "primary purpose" test for identifying a testimonial statement allows government actors to avoid having to produce live witnesses subject to cross-examination.

This Article proposes to replace the testimonial statement and the "primary purpose" test with a "state action" test that focuses on the government's role in the creation of the out-of-court statement and thereby prevents government efforts to avoid live testimony and cross-examination at trial. First, the Article explains that the Confrontation Clause must be understood within the context of the right to counsel and trial by jury to ensure that jurors—the people—evaluate the reliability of government witnesses through live testimony subject to cross-examination by the defense counsel. It then demonstrates that the "primary purpose" test results in too much judicial discretion and emboldens police and prosecutors to manipulate the creation of out-of-court statements that will not trigger the right of confrontation. As a result, it empowers judges, police, and prosecutors—the very government actors the Sixth Amendment seeks to control.

Second, the Article describes the alternative "state action" test that focuses on the government's role in the creation of the out-of-court statement. The "state action" test would simplify the Confrontation Clause analysis and improve the truth-finding function of criminal trials. Under this test, the

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analysis is focused on government involvement in the creation of the out-of-court statements and thereby prevents the "primary evil" at which it was originally directed—the government's "use of ex-parte examination as evidence against the accused."

Finally, the Article applies the proposed state action test and demonstrates how it would eliminate judicial discretion in mixed-motive cases, prevent the admission of out-of-court statements made to undercover government agents, and require forensic experts working for the government to testify live subject to cross-examination. In short, it preserves the right of confrontation—the constitutionally mandated means of testing the reliability of government witnesses—in cases where the potential for government abuse exists.

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I. INTRODUCTION

THE Sixth Amendment's Confrontation Clause guarantees the accused the procedural right to test the reliability of the government's witnesses through the crucible of cross-examination in the presence of the jury.[1] It works in conjunction with the Sixth Amendment's right to counsel and trial by jury to reject the "civil-law mode of criminal procedure"[2] and constitutionalize an adversarial system of criminal procedure.[3] It empowers the jury—not the court—to evaluate the credibility and reliability of government witnesses.[4] In doing so, the Clause, like the other constitutional rights secured by the Sixth Amendment, protects the people from government abuse of its immense prosecutorial power.[5]

Unfortunately, Confrontation Clause jurisprudence has not always focused on the Sixth Amendment's goal of creating an adversarial system of criminal procedure as a means of checking government abuse of its monopoly over criminal prosecutions. In *Ohio v. Roberts*, the Court interpreted the Clause as permitting the government to introduce hearsay statements without providing the defendant the opportunity to cross-examine the declarant—as long as the trial judge determined the statement fell within a "firmly rooted hearsay exception" or otherwise bore adequate "indicia of reliability."[6] This denied defendants the right to cross-examine the

1. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004).
2. *Id.* at 50.
3. *See* Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 Rutgers L.J. 77, 81–82 (1995) (explaining that the purpose of the Sixth Amendment is not accurate trials, but adversarial trials in which the government's power is more constrained and the accused is empowered); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 562 (1992) (asserting that the Confrontation Clause must be interpreted with the Sixth Amendment broadly "as a package of rights concerned with protecting the people against government oppression").
4. *See Crawford*, 541 U.S. at 67 ("[The Framers] knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people.").
5. *See* Jonakait, *supra* note 3, at 81–82 (explaining that the purpose of the Sixth Amendment is not accurate trials, but adversarial trials in which the government's power is constrained and the accused is empowered).
6. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

declarants of some out-of-court statements introduced by the government.[7] In so doing, it diminished the value of the right to counsel.[8] The Court's decision also denied the jury the opportunity to evaluate the reliability of those declarants.[9] Instead, that power was left to judges—quintessential government actors.[10] *Roberts* undermined not only the Confrontation Clause, but also the right to counsel and the right to trial by jury.[11]

In *Crawford v. Washington*, the Court took a giant step toward correcting the misguided course of Confrontation Clause jurisprudence in holding that the Clause "is a procedural rather than a substantive guarantee" that commands that the reliability of government witnesses is tested by cross-examination.[12] The Clause was aimed at preventing the "civil-law mode of criminal procedure and particularly its use of ex parte examinations as evidence against the accused."[13] The *Roberts* test "d[id] violence to" this design by empowering judicial evaluation of the reliability of out-of-court statements.[14] The Framers were "loath to leave too much discretion" in the hands of judges who "could not always be trusted to safeguard the rights of the people."[15] The Confrontation Clause empowered the people with a meaningful opportunity to challenge the government's case.[16] Therefore, the Court overturned *Roberts* and held the Clause prohibits the admission of many out-of-court statements, even if the rules of evidence would not, unless the defendant has the opportunity to cross-examine the declarant.[17] So far, so good.

But the devil is in the details. *Crawford* linked the right of confrontation to "testimonial statements" because "witnesses" bear testimony, but did not define the parameters of testimonial statements.[18] Ever since, the

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7. *Id.* at 71–72.
8. *See id.* at 72.
9. *See id.* at 73.
10. *See* Crawford v. Washington, 541 U.S. 36, 62 (2004) ("The Roberts test allow[ed] [the] jury to hear evidence, untested by the adversarial process, based on a mere judicial determination of reliability.").
11. *See* Berger, *supra* note 3, at 562 (explaining how the Confrontation Clause must be interpreted with the Sixth Amendment broadly "as . . . a package of rights concerned with protecting the people against governmental oppression"); Jonakait, *supra* note 3, at 81–82 (focusing on the Confrontation Clause as one of many constitutional provisions that reinforce each other and guarantee an adversarial system).
12. *See Crawford*, 541 U.S. at 61.
13. *Id.* at 51.
14. *Id.* at 68.
15. *Id.* at 67.
16. *See* Jonakait, *supra* note 3, at 82.
17. *See Crawford*, 541 U.S. at 63–64.
18. *Id.* at 51. Numerous academics have convincingly explained how *Crawford*'s textual analysis led to a flawed focus on testimonial statements. *See* Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. Rev. 1865, 1878–94 (2012); Randolph N. Jonakait, *"Witnesses" in the Confrontation Clause:* Crawford v. Washington, *Noah Webster, and Compulsory Process*, 79 Temp. L. Rev. 155, 155 (2006); Thomas Y. Davies, *Not "The Framers Design": How the Framing Era Ban Against Hearsay Evidence Refutes the* Crawford-Davis *"Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & Pol'y 349, 349 (2007) (arguing that *Crawford*'s textual interpretation that the Confrontation Clause is limited to testimonial hearsay is inconsistent with the Framers' design and framing-era practice); Liza I. Karsai, *The "Horse-Stealer's" Trial Returns: How* Crawford*'s Testimonial-Nontestimonial Dichotomy Harms the Right to Confront Witnesses, the Presumption of*

Court has been divided over what factors define testimonial statements and how to apply the factors to specific facts.[19] Rather than adopting a simple test focused on the government's efforts to create ex parte statements, the Court devised a multifactor "primary purpose test."[20] In its present form, the primary purpose test requires a fact-intensive weighing of the intent of both the declarant and the questioner, the formality of the statement, and a renewed interest in *Roberts* indicia of reliability.[21] This evaluation results in the very exercise of judicial discretion the Clause sought to avoid.[22] Moreover, the test is subject to manipulation by police and prosecutors, and guides their efforts to make an "end-run" around "the Confrontation Clause, and make a parody of its strictures."[23]

The problems of the primary purpose test can be illustrated through a hypothetical modification of the infamous 1603 trial of Sir Walter Raleigh, perhaps the most notorious instance of ex parte examination which the Clause was meant to prevent.[24] Raleigh was accused of treason for participating in a plot to depose King James I and seat Arabella Stuart in his place upon the throne.[25] The primary evidence of Raleigh's guilt was a written report of the confession of Lord Cobham admitting to his own participation in the plot and naming Raleigh as his co-conspirator.[26] However, Raleigh believed Cobham had recanted the statement.[27] Accordingly, Raleigh demanded that Cobham be brought into court where Raleigh could confront him to expose the false accusation in front of the jury.[28] The court denied Raleigh's request.[29] As a result, the jury convicted Raleigh and he was sentenced to death.[30]

Innocence, and the "Beyond a Reasonable Doubt" Standard, 62 Drake L. Rev. 129, 132–33 (2013) (arguing that *Crawford*'s testimonial limitation undermines the criminal defendant's right to a fair trial).

19. *See generally* Michigan v. Bryant, 562 U.S. 344, 393–95 (2011) (Scalia, J., dissenting) (showing the disagreement as to the existence of an ongoing emergency and whose perspective matters when assessing the purpose of the questioning).

20. *Id.* at 374–78 (majority opinion).

21. *See* Ohio v. Clark, 576 U.S. 237, 244–45 (2015).

22. *See Crawford*, 541 U.S. at 67–68.

23. Williams v. Illinois, 567 U.S. 50, 128 (2012) (Kagan, J., dissenting).

24. *See Crawford*, 541 U.S. at 50.

25. *See* Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 Geo. L.J. 879, 881 (2015) (describing Raleigh's trial for high treason); 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, 877 (2005) (describing the evidence and law of the famous treason trial).

26. *See* Boyer, *supra* note 25, at 885 (explaining that Lord Cobham refused to sign the written report of his confession and had recanted it).

27. *See* Sevier, *supra* note 25, at 881.

28. *See id.*; Boyer, *supra* note 25, at 885.

29. It appears that the Court feared that Cobham might retract his sworn statement and thereby weaken the government's case. *See* Mathew Lyons, *The Trial of Sir Walter Raleigh: A Transcript*, https://mathewlyons.co.uk/2011/11/18/the-trial-of-sir-walter-ralegh-a-transcript [https://perma.cc/FV2B-2679]. Lord Popham stated that "[t]he accuser is not to be produced; for having first confessed against himself voluntarily, and so charged another person, if we shall now hear him again in person, he may for favor or fear retract what formerly he hath said, and the jury may, by that means, be inveigled." *Id.*

30. *See* Boyer, *supra* note 25, at 871.

Remember, the Confrontation Clause was intended to end the government practice of conducting ex parte examinations as a substitute for trial testimony.[31] Nevertheless, if Raleigh were tried in federal court today, the primary purpose test would allow the government to avoid confrontation through use of a surrogate interrogator. Rather than have the Privy Council take Cobham's statement, an undercover government agent or confidential informant could question Cobham and repeat his confession in court. Under these circumstances, Cobham's statement would not be considered testimonial under the primary purpose test because, presumably, Cobham would have been unaware he was talking to a government agent, the setting would have been informal, and the self-inculpatory nature of the statement would have made it appear reliable.[32] The Framers did not intend for the right of confrontation to be thwarted by such a simple artifice.[33]

This Article proposes replacing the "testimonial statement" limitation to the right of confrontation, and the primary purpose test, with a "state action" test that focuses on the government's role in the creation of the out-of-court statement.[34] If the right to confrontation is designed to control the government, state action in the creation of the evidence should be the Court's focus.[35] To prevent the government from abusing its immense prosecutorial powers, the Clause should prohibit the admission of out-of-court statements where the government was involved in the creation of the statement, unless the defendant has an opportunity to cross-examine the declarant.[36] Therefore, where the declarant is a government actor, or the statement was solicited either by a government actor or a seemingly private actor working with the government, the right to confrontation should apply.

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31. Crawford v. Washington, 541 U.S. 36, 49 (2004).

32. *See generally* Ohio v. Clark, 576 U.S. 237, 244–45 (2015) (listing the relevant factors for the primary purpose test).

33. *See* Williams v. Illinois, 567 U.S. 50, 133 (2012) (Kagan, J., dissenting) (criticizing the plurality's determination that an expert witnesses' testimony on the accuracy of a DNA profile prepared by another lab is *nontestimonial* because the witness was simply stating the basis for her opinions—not repeating the results of the other lab's DNA test for the truth of the matter asserted by the test: "The plurality thus would countenance the Constitution's circumvention. If the Confrontation Clause prevents the State from getting its evidence in through the front door, then the State could sneak it in through the back.").

34. The state action doctrine does not directly require this result. The Confrontation Clause only applies to evidence the prosecutor seeks to introduce against the accused. The prosecutor is a quintessential state actor; everything she does in this role is subject to applicable constitutional limitations. However, not every out-of-court statement introduced by the government is subject to the Confrontation Clause requirements simply because a state actor has sought to introduce the evidence. The Court's Confrontation Clause analysis under both *Roberts* and *Crawford* has always focused on the circumstances of the creation of the out-of-court statement, rather than the introduction of the statement by the government at trial. Similarly, the state action test must focus on the government involvement in the creation of the out-of-court statement. *See* Davis v. Washington, 547 U.S. 813, 839 (2006) (Thomas, J., dissenting).

35. *See Williams*, 567 U.S. at 114–15.

36. *See* Berger, *supra* note 3, at 557 (arguing, ten years before *Crawford*, that the Confrontation Clause should bar hearsay statements elicited by government agents unless special procedures are followed).

Some of these statements are already excluded by the Court's primary purpose test. Statements made during classic police interrogation (where the primary purpose is clearly the production of evidence) are currently subject to the right of confrontation.[37] Yet, the primary purpose test treats other out-of-court statements as nontestimonial despite state action in the production of the statements.[38] As a result, the statements can be admitted without a defendant having an opportunity to cross-examine the declarant through counsel.[39] This also denies jurors the opportunity to observe declarants' demeanor and evaluate the reliability of their statements.[40] This results in an anathema to the right of confrontation, which in turn devalues the Sixth Amendment's right to trial by jury and the right to assistance of counsel.[41]

The primary purpose test often fails to exclude out-of-court statements solicited by undercover agents because the statement is not testimonial from the declarant's perspective.[42] Similarly, statements solicited by government informants and other private persons acting at the direction of government actors are generally not treated as testimonial.[43] These nominally private actors should be treated as state actors under existing entanglement analyses, and the out-of-court statements they solicit should be excluded unless the defendant has the opportunity to cross-examine the declarant. Furthermore, the test has led to confusion and disagreement on the Court as to whether out-of-court statements made by technicians at a private laboratory contracting with the government and government laboratory workers (not primarily charged with law enforcement responsibility) should be regarded as testimonial.[44] All of these out-of-court statements

37. *See* Crawford v. Washington, 541 U.S. 36, 52 (2004).

38. *See, e.g.*, *Davis*, 547 U.S. at 823 (holding that statements made during a police interrogation with the primary purpose of meeting an ongoing emergency are nontestimonial).

39. *See id.* at 828.

40. *See id.* at 829.

41. *See generally* Berger, *supra* note 3, at 557; Jonakait, *supra* note 3, at 81–82 (interpreting the Confrontation Clause holistically with the other rights of the Sixth Amendment).

42. *See, e.g.*, *Crawford*, 541 U.S. at 58 (approving the result in *Bourjaily*, allowing the admission of an out-of-court statement made to an FBI informant, unknown to the declarant); United States v. Volpendesto, 746 F.3d 273, 273 (2014); United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008).

43. *See* United States v. Smalls, 605 F.3d 765, 778 (10th Cir. 2010) (holding that statements made to a confidential informant, where the informant's status was unknown to the declarant, are nontestimonial); *accord* United States v. Johnson, 581 F.3d 320, 324 (6th Cir. 2009); *Volpendesto*, 746 F.3d at 273; *Watson*, 525 F.3d at 589 ("Anthony's private statement to a confederate, which was secretly recorded, does not fit into any of *Crawford*'s broad categories of testimonial evidence."); United States v. Underwood, 446 F.3d 1340, 1347 (11th Cir. 2006) (statements made to a confidential informant are not testimonial); United States v. Hendricks, 395 F.3d 173, 183–84 (3d Cir. 2005) (although the court acknowledged that "obtaining evidence for the prosecution is, after all, the *raison d'etre* of being a confidential informant," the court nevertheless concluded surreptitious recordings were nontestimonial); United States v. Saget, 377 F.3d 223, 229 (2d Cir. 2004) ("[A] declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*."); United States v. Failing, 553 F. App'x 71, 72 (2d Cir. 2014); United States v. Vega, No. 07-126, 2008 U.S. Dist. LEXIS 138763, at *4 (D.P.R. 2008).

44. *See* Bullcoming v. New Mexico, 564 U.S. 647, 677 (2011) (Kennedy, J., dissenting) ("[C]alling the technician who filled out a form [blood-alcohol certificate of analyst] and recorded the results of the test is a hollow formality.").

should be subject to confrontation if the Clause is to fulfill its function within the broader Sixth Amendment's purpose of creating an adversarial system capable of preventing and uncovering government abuse of its prosecutorial powers.

Part II of this Article begins with a review of the history and purpose of the Confrontation Clause. It examines the Clause's place within the broader constitutional framework, the Sixth Amendment in particular, as well as the specific practices the Clause was designed to address. It explains how the Confrontation Clause works with the other provisions of the Sixth Amendment to protect the people from government oppression. Public jury trials, the assistance of counsel, and cross-examination work in tandem to deter and expose police misconduct, government manipulation of witnesses, targeting of political minorities, and efforts to silence or destroy political opponents and government critics.[45] Understanding the role of confrontation within the broader adversarial system guaranteed by the Constitution highlights how the ill-conceived primary purpose test frustrates the Framers' design.[46]

Part III examines the origin and evolution of the primary purpose test currently used to identify "testimonial statements" subject to the constitutional guarantee of confrontation. It highlights how the primary purpose test has evolved into a multifactor analysis that requires a judicial evaluation of the mixed motives of both interrogators and declarants, the formality of out-of-court statements, and the inherent reliability of those statements.[47] This multifactor test is difficult to apply and is vulnerable to manipulation by police, prosecutors, and judges—the very state actors the Confrontation Clause seeks to restrain.[48]

Part IV proposes an alternative test, which focuses on state action in the creation of the out-of-court statement. The test would require confrontation whenever the declarant is a government actor, or when the statement is solicited either by a government actor or nominally private actors working with the government. Part IV also puts this theory into practice by demonstrating how the existing state action doctrine, and its exceptions, can be utilized to identify when government involvement in the creation of out-of-court statements will trigger the Clause's guarantees.[49] This alternative test would prevent the admission of out-of-court statements made to undercover government agents or private persons soliciting statements at the behest of government agents.[50] Moreover, the test would require

45. *See generally* Jonakait, *supra* note 3; Berger, *supra* note 3.

46. *See* Ohio v. Clark, 576 U.S. 237, 254 (2015) (Thomas J., concurring).

47. *See* Michigan v. Bryant, 562 U.S. 344, 367–69 (2011) (discussing the factors involved in identifying testimonial statements).

48. *See id.* at 394 (Scalia, J., dissenting) ("Not even the least dangerous branch can be trusted to assess the reliability of uncross-examined testimony in politically charged trials or trials implicating threats to national security.").

49. *Id.*

50. *See* United States v. Saget, 377 F.3d 223, 229 (2d Cir. 2004) ("[A] declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*."); United States v. Johnson, 581 F.3d 320, 325 (6th Cir. 2009); United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008); United States

forensic experts working for the government to testify live, subject to the crucible of adversarial confrontation, ensuring reliable methodology and exposing bias.[51] Focusing the analysis on government action in creation of the out-of-court statement guarantees the right of confrontation—the constitutionally mandated means of testing the reliability of government witnesses—in cases where the potential for government abuse exists.

Lastly, Part V explains why a "state action" test will not unduly hamper legitimate efforts to prosecute criminal activity. In fact, the government need not change the way crimes are investigated. The only significant consequence of focusing on government involvement, in the creation of out-of-court statements, is that government witnesses would have to testify subject to cross-examination. This process would improve the truth-finding function of the trial and would allow the jury, rather than the judge, to determine the reliability of the testimony.

II. THE HISTORY AND PURPOSE OF THE CONFRONTATION CLAUSE

This Section offers an overview of the history and evolution of the Confrontation Clause. Subsection A explains how the Clause should be understood and interpreted to support the collective goal of each of the Sixth Amendment rights to prevent prosecutorial overreach and abuse. Subsection B reviews how, prior to *Crawford*, the Court lost sight of this goal and treated the right to confrontation as virtually synonymous with the rules against hearsay. *Crawford* is the focus of Subsection C, which discusses how the Court's decision affirmed the procedural right to confrontation but created a "testimonial statement" limitation which fails to properly define the scope of the right.

A. The Confrontation Clause is One of a Bundle of Sixth Amendment Rights Designed to Prevent the Government's Abuse of its Prosecutorial Powers

The Confrontation Clause must be interpreted holistically within the broader design of the Constitution, the Bill of Rights generally, and the Sixth Amendment specifically.[52] These constitutional constraints have specific purposes but work together as a collective whole to help prevent the repeat of the long history of governmental abuses familiar to the Framers.[53]

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v. Udeozor, 515 F.3d 260, 270 (4th Cir. 2008); United States v. Underwood, 446 F.3d 1340, 1347 (11th Cir. 2006); United States v. Hendricks, 395 F.3d 173, 182–84 (3d Cir. 2005).

51. *See generally* Bullcoming v. New Mexico, 564 U.S. 647, 677 (2011) (Kennedy, J., dissenting) (arguing that scientific witnesses should not be subject to confrontation).

52. *See generally* Berger, *supra* note 3; Jonakait, *supra* note 3; Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 167–69 (2012) (describing the whole-text canon of construction which requires consideration of the overall meaning of a text in relation to its parts).

53. *See, e.g.*, *Ex parte* Milligan, 71 U.S. 2, 119–20 (1866) ("The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages.").

Federalism,[54] and the separation of powers, provide familiar structural protections.[55] Public elections ensure elected representatives are answerable to the will of the people and will respect the people's rights.[56] An independent judiciary guards against overreach by the political branches.[57] Lastly, the Bill of Rights imposes both procedural and substantive guarantees to prevent government actors from trampling upon individual liberties.[58]

More particularly, the Sixth Amendment enshrined an adversarial criminal justice system as a check on government prosecutorial power.[59] The defendant's right to compulsory process prevents one-sided prosecutions—like common law treason and felony cases where the defendant was prohibited from calling witnesses.[60] The right to a speedy trial prevents the government from branding its enemies with criminal accusations—which subjects those people "to public scorn" and "force[s] curtailment of [their] speech, associations and participation for unpopular" or anti-government causes—without first giving them an opportunity to clear their name.[61] Public trials serve as a contemporaneous check against "indolent and arbitrary"[62] judges and prosecutors who would turn the courts into instruments of "political and religious" persecution.[63] The right to trial by jury in criminal cases is an additional safeguard against both "the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[64] Finally, the right to counsel is preservative of all rights of the criminal defendant[65]

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54. *See, e.g.*, New York v. United States, 505 U.S. 144, 181 (1992):

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

55. *See, e.g.*, Clinton v. New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.").

56. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964) ("[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other civil and political rights . . . .").

57. *See generally* Marbury v. Madison, 5 U.S. 137 (1803).

58. *Ex parte Milligan*, 71 U.S. at 119 (stating that the Bill of Rights protects the people from "wicked rulers" and the "clamor of an excited people").

59. *See* Jonakait, *supra* note 3, at 100–08 (describing the defendant's right to counsel as a necessary "counterbalance" to the American creation of public prosecutors and describing the right to a jury trial as a check on the power of legislatures and judges).

60. Washington v. Texas, 388 U.S. 14, 19 (1967) (citing JOSEPH L. STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1786–88 (1st ed. 1833)).

61. Klopfer v. North Carolina, 386 U.S. 213, 222 (1967) (incorporating the Sixth Amendment's guarantee of a speedy trial to the states through the Fourteenth Amendment's due process clause).

62. *In re* Oliver, 333 U.S. 257, 271 (1949) (quoting JEREMY BENTHAM, 1 RATIONALE OF JUDICIAL EVIDENCE 524 (London, Hunt & Clark 1827)).

63. *Id.* at 268–70 (discussing the secret trials of the Spanish Inquisition, The Star Chamber, and the French *letter de cachet* as the reason for the inclusion of the right to a public trial in the Sixth Amendment).

64. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

65. United States v. Cronic, 466 U.S. 648, 653 (1984) (discussing the right to effective assistance of counsel); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (inferring a Fifth Amendment right to counsel as necessary to safeguard the defendant's Fifth Amendment right to remain silent).

and requires "the prosecution's case to survive the crucible of meaningful adversarial testing."[66]

Like the other provisions of the Sixth Amendment, the Confrontation Clause prevents government abuse of its prosecutorial power.[67] The Clause does so by ensuring the government's evidence is subject to all the constitutional requirements of an adversarial criminal trial.[68] While direct evidence of the Framers' intent is sparse, the Court has concluded that the "principle evil at which the Confrontation clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examination as evidence against the accused."[69] Although the common law generally rejected these continental civil law practices, England did occasionally adopt them with the trial of Sir Walter Raleigh as the most infamous example.[70] Closer to home, the Framers were exposed to and abhorred civil-law practices employed by admiralty courts enforcing the hated Stamp Act.[71]

The 1807 trial of Aaron Burr illustrates the Framers' contemporaneous understanding that cross-examination of government witnesses was central to the emerging American adversarial system. The Burr trial exists as an archetypal example of the need for the Sixth Amendment's guarantees to guard against the executive's abuse of prosecutorial power.[72] Burr was accused of plotting to separate the Western states from the Union.[73] President Jefferson placed tremendous political pressure on the federal judiciary by proclaiming Burr's guilt before the trial even began.[74] Jefferson was personally involved in the gathering of evidence, taking depositions, directing trial tactics, and shaping public opinion."[75] Jefferson regarded the entire proceeding as a partisan effort by the federalists to embarrass his administration, and he intended to impeach Chief Justice John Marshall,

66. *Cronic*, 466 U.S. at 656.

67. *See* Jonakait, *supra* note 3, at 81–82.

68. *See id.* at 80–82 (explaining that the Bill of Rights constitutionalized the existing and emerging colonial and early American adversarial system rather than English common law). *See generally* Faretta v. California, 422 U.S. 806, 818 (1975):

> The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.

69. Crawford v. Washington, 541 U.S. 36, 50 (2004); *see also* David Alan Sklansky, *Anti-Inquisitorialism*, 122 Harv. L. Rev. 1634, 1643–47 (2009) (discussing and criticizing the Court's use of the inquisitorial system as an anti-guide when interpreting the confrontation clause).

70. *See Crawford*, 541 U.S. at 43 (discussing the Marian bail and committal statutes).

71. *Id.* at 48–49; *see* Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 Iowa L. Rev. 145, 165–66 (discussing how extending admiralty jurisdiction to the Stamp Act was a "major source of friction between the colonists and the English Government" because admiralty's civil law practice precluded trial by jury).

72. *See* United States v. Burr, 25 F. Cas. 187, 193 (C.C.D. Va. 1807).

73. John C. Yoo, *The First Claim: The Burr Trial*, United States v. Nixon, *and Presidential Power*, 83 Minn. L. Rev. 1435, 1440 (1990).

74. *Id.* at 1441–43.

75. *Id.* at 1443–44.

the presiding judge over Burr's trial, if Burr were acquitted.[76] Nevertheless, Marshall refused to allow a witness to repeat the out-of-court statements of Harman Blennerhassett, Burr's alleged co-conspirator.[77] In his ruling, Marshall explained how important the right of confrontation was to protect the people from abuse of power:

> I know not why a declaration in court should be unavailing, unless made upon oath, if a declaration out-of-court was to criminate others than him who made it; *nor why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him.* I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.[78]

As the *Crawford* Court observed almost two hundred years later, only a "categorical constitutional guarantee[]" could protect the rights of defendants in "politically charged cases" where judges, even those at the highest levels, could not be trusted with vague manipulable standards.[79]

Few other early American trials discuss the Confrontation Clause because, at that time, American courts did not regard hearsay as admissible against a criminal defendant unless the defendant was provided with an opportunity to examine the witness.[80] Other than the forfeiture by wrongdoing and the dying declaration exceptions, early federal cases are devoid of examples of out-of-court statements being introduced against the defendant where the defendant did not have an opportunity to confront the witnesses.[81] When the Supreme Court did address the purpose and scope of the Clause, it emphasized the Clause's twofold purpose of preventing ex parte affidavits and guaranteeing the defendant an opportunity to cross-examine the declarant witness.[82] In-court confrontation allows the defendant to "shift[] the conscience of the witness," to test the witness's recollection of facts and bias, and to provide the jury the opportunity to evaluate the witness's credibility through face-to-face observation of "his demeanor upon the stand and the manner in which he gives his testimony."[83]

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76. *Id.* at 1441–42.
77. *Burr*, 25 F. Cas. at 195.
78. *Id.* at 193 (emphasis added).
79. Crawford v. Washington, 541 U.S. 36, 67–68 (2004).
80. *See* Jonakait, *supra* note 3, at 117–19 (discussing Colonial Virginia practice specifically and early American practice generally); Bellin, *supra* note 18, at 1888–93 (arguing that the historical record suggests that at the time of the framing, hearsay was not admissible to convict a criminal defendant). When the clause was addressed, it was in the context of presenting live testimony where the defendant was not present in court. *See, e.g.*, Perine v. Van Note, 4 N.J.L. 165, 171 (N.J. 1818).
81. *See* Jonakait, *supra* note 3, at 117–19; Bellin, *supra* note 18, at 1888–93 (arguing that the historical record suggests that at the time of the Framing, hearsay was not admissible to convict a criminal defendant); *see also* David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 5 (2009) (noting that the eighteenth-century hearsay rule had far fewer exceptions than those of the Federal Rules of Evidence).
82. *See Crawford*, 541 U.S. at 50–52.
83. Mattox v. United States, 156 U.S. 237, 242–43 (1895).

B. The Court Gradually Reduced the Confrontation Clause to an Analog of the Hearsay Rules

Across the fog of years, memory of the abuses that gave rise to the Clause dimmed. The Court crafted more exceptions both to the hearsay rule and to the right to confront witnesses. These exceptions were designed to further a perceived need for more "effective law enforcement," and to allow room for the "development . . . of the rules of evidence applicable in criminal proceedings."[84] These Confrontation Clause exceptions developed alongside the law of hearsay and both were based upon the same "indicia of reliability" rationale.[85] With the adoption of the Federal Rules of Evidence, the Court began to treat the right of confrontation as synonymous with the law of hearsay.[86]

In *Ohio v. Roberts*, the Court held the right of face-to-face confrontation and cross-examination must yield to countervailing public policies, at least when the declarant is unavailable and the out-of-court statement bears a sufficient indicia of reliability.[87] However, just six years later, the Court expanded *Roberts* by holding that declarant unavailability is not required across the broad spectrum of Confrontation Clause cases.[88] Subsequent cases clarified that the indicia of reliability requirement for Confrontation Clause exceptions was inherently satisfied whenever an established hearsay exception applied.[89] Thus, the right to confrontation was subsumed by the law of hearsay.

C. *Crawford* Restored the Procedural Guarantee of the Confrontation Clause but Limited the Right to "Testimonial Statements"

In *Crawford v. Washington*, the Court returned Confrontation Clause jurisprudence to its historical foundation.[90] The Court recognized the procedural character of the right to confront and cross-examine witnesses, rather than the substantive focus on reliability.[91] Unfortunately, the Court failed to identify a triggering principle that would allow the right of confrontation to fully perform its role in preserving an adversarial system.[92]

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84. Ohio v. Roberts, 448 U.S. 56, 64 (1980) (first citing Snyder v. Massachusetts, 291 U.S. 97, 107 (1934); and then citing California v. Green, 399 U.S. 149, 171–72 (1970)).

85. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1224–27 (2002) (detailing the transformation of confrontation clause jurisprudence from an emphasis on cross-examination to a focus on reliability coextensive with hearsay law).

86. *See generally* United States v. Inadi, 475 U.S. 387, 394–95 (1986); White v. Illinois, 502 U.S. 346, 356–57 (1992); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1016–18 (1998) (describing the parallel treatment of hearsay in the Federal Rules of Evidence and the Court's Confrontation Clause interpretation).

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

88. *Inadi*, 475 U.S. at 394–95 (noting that the hearsay exception at issue in *Roberts* was the prior testimony exception which does require declarant unavailability).

89. *See id.* at 398–400; *White*, 502 U.S. at 356–57.

90. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004).

91. *Id.*

92. *See id.*

As one would expect from an opinion authored by Justice Scalia, the analysis began with the text of the Confrontation Clause.[93] However, the Court quickly recognized that the text alone would not resolve the case.[94] After reviewing the history and purpose of the Clause, the Court concluded that the "principal evil" at which it was directed was the inquisitorial practice of using ex parte statements as evidence against the accused.[95] A plain reading of the text suggests the clause only grants a right to confront government witnesses who actually testify live against the accused at trial.[96] While the Clause certainly grants the right to confront witnesses at trial, the Court held that the historical purpose of the Confrontation Clause, preventing civil law practices of ex parte witness examination, foreclosed such a narrow interpretation.[97] A reading of the text that would limit its application to in-court testimony, leaving out-of-court statements beyond its scope, "would render the Confrontation Clause powerless" to prevent even the most flagrant inquisitorial practices.[98]

Despite acknowledging the textual limitation, the Court returned to the text to determine the scope of the right of confrontation and focused on the word "witnesses."[99] Of the many contemporaneous framing-era definitions of witnesses, the Court settled on one who "bear[s] testimony" as being the most natural meaning of the text.[100] Testimony was further defined as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[101] Thus, the Court concluded testimonial statements were the primary object of the Clause, if not its exclusive concern.[102] Because the Clause is a procedural—rather than a substantive—guarantee, testimonial statements must be subject to confrontation by the accused through cross-examination.[103] The Court held the Clause imposes an absolute bar to the admission of out-of-court statements that are testimonial unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.[104]

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93. *Id.* at 41–43.
94. *Id.* at 43.
95. *Id.* at 43–50.
96. *Id.* at 42–43.
97. *See id.* at 50.
98. *Id.* at 50–51. The anti-inquisitorial origins of the Clause also illuminated the failure of *Roberts*'s reliability-based exceptions to the right to confrontation. *Id.* A judicial determination of admissibility based upon a case-by-case review of reliability left tremendous discretion in the hands of judges. *Id.* at 63 ("Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts."). A focus on reliability alone often resulted in the admission of out-of-court statements shockingly similar to the inquisitorial practices the Clause was intended to prevent. *Id.*
99. *Id.* at 51.
100. *Id.* (citing 2 Noah Webster, An American Dictionary of the English Language (1828)).
101. *Id.*
102. *Id.* at 61.
103. *Id.*
104. *Id.* at 68.

The *Crawford* Court did not attempt to fully define what would constitute a testimonial statement but did provide some guidance.[105] The Court made clear that "statements taken by police officers in the course of an interrogation" are testimonial under any definition because of the striking similarities to the examination by English justices of the peace.[106] As the Court explained, "[t]he involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace."[107] Conversely, casual remarks to an acquaintance, whether reliable or not, were clearly not the type of out-of-court statements with which the Clause was concerned.[108] The Court did not address how the broad spectrum of statements between these two clear examples should be treated.[109]

Nevertheless, much of the opinion suggested the identification of testimonial statements within this zone of uncertainty would be geared towards preventing government efforts to avoid exposing its witnesses to the Sixth Amendment's adversarial process.[110] The Court highlighted the inability of a manipulable test to protect the people from the abuse of governmental power exemplified by a politically charged case like Sir Walter Raleigh's treason trial.[111] In these cases, only cross-examination in front of the jury would provide a check against the potential bias and outright corruption of government actors. Even in ordinary criminal cases, government involvement "in the production of testimony with an eye towards trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar."[112] Just as the precise parameters of other constitutional rights evolved to address the tremendous growth of government power and sophistication,[113] it appeared the application of the Confrontation Clause would likewise focus on and evolve in response to government methods and tactics employed in the creation of out-of-court statements.

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105. *Id.* at 51–52.
106. *Id.* at 52.
107. *Id.* at 53.
108. *Id.* at 51.
109. *Id.* at 68 n.10 ("We acknowledge that the Chief Judge's objection that our refusal to articulate a comprehensive definition in this case will cause interim uncertainty.").
110. *Id.* at 61.
111. *Id.* at 68:

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

112. *See id.* at 56 n.7.
113. *See generally* Miranda v. Arizona, 384 U.S. 436, 467 (1966) (holding that the government's use of sophisticated psychological techniques to coerce confessions required the giving of an adequate warning to protect the Fifth Amendment privilege).

III. TESTIMONIAL STATEMENTS AND THE MULTIFACTOR PRIMARY PURPOSE TEST SHELL GAME DISTRACT FROM THE CONFRONTATION CLAUSE AND THE SIXTH AMENDMENT PURPOSE

Yet, all was not well. While *Crawford* correctly identified the Confrontation Clause as a procedural protection and restored it to constitutional significance, the Court's exclusive focus on testimonial statements as a limitation on the right was misplaced from the beginning.[114] Among the various formulations of testimonial statements discussed in *Crawford*, all focused on formal declarations that, from the declarant's point of view, would be available as proof in a criminal prosecution.[115] If the goal of the Clause is to prevent the government's mischievous efforts to substitute out-of-court statements for in-court confrontation, why was the Court so focused on the objective intent of the declarant or the formality of the statement?[116] This emphasis distracts the analysis from what should be the focal point: the government's involvement in the creation of the statement.[117] As a result, it fails to deter government efforts to create out-of-court statements as a substitute for live testimony subject to confrontation.[118] Without a clear focus on the government actors the Clause seeks to restrain, the *Crawford* decision saved the sinking ship but failed to put it on a proper course.

A. The Malleable Objective Purpose Analysis Empowers Judges

Immediately after *Crawford*, the Court began to define testimonial statements more narrowly. In the process, it lost sight of the Clause's purpose of preventing government efforts to create out-of-court statements as a substitute for live testimony subject to cross-examination.[119] Rather than adopting a simple test for what constitutes a testimonial statement to safeguard the rights of the people from government use at trial of ex parte

114. *See supra* note 18 and accompanying text.

115. *Crawford*, 541 U.S. at 51–52.

116. It may be the Court did not want to overturn prior decisions. The *Crawford* Court's focus on the declarant, rather than the government actor soliciting the out-of-court statement, allowed the Court to conclude its recent Confrontation Clause cases reached the correct result even if the rationale for those decisions was wrong. *Id.* at 57–60. For example, the Court approved the result of *Bourjaily v. United States* in which it upheld the admission of out-of-court statements made unwittingly to an FBI informant, even though the defendant had no opportunity to confront the declarant. *Id.* at 58; *see* Bourjaily v. United States, 483 U.S. 171, 183–84 (1987). Apparently, the *Crawford* Court thought the Clause did not apply because the declarant was unaware the statement was solicited for use in court. *Crawford*, 541 U.S. at 58. Therefore, the statement was not testimonial from the perspective of the declarant.

117. *See generally Crawford*, 541 U.S. at 50.

118. *See* Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 521 (2005) (explaining how the police and prosecutors will alter investigative methods to avoid *Crawford*'s testimonial limitation); Karsai, *supra* note 18, at 169 (discussing the potential for government use of nontestimonial hearsay specifically to avoid cases where cross-examination would be most beneficial in revealing falsehoods and misimpressions).

119. Davis v. Washington, 547 U.S. 813, 830–40 (2006) (Thomas, J., dissenting).

statements, the Court devised a multifactor "primary purpose test" that is easily manipulated by police, prosecutors, and the judiciary.[120]

In *Davis v. Washington*, a largely unified Court[121] limited the right of confrontation in two ways. First, the Court held the testimonial hearsay described in *Crawford* was not just the Confrontation Clause's "core" concern, but its only concern.[122] Second, the Court held that not all police interrogations result in testimonial statements.[123] More precisely, police interrogations that, objectively considered, are designed primarily to resolve an ongoing emergency (rather than to establish or prove past facts) do not produce testimonial statements.[124] Thus, statements made during an ongoing emergency to seek the assistance of the police are not testimonial because these statements describe events as they actually occur and do not resemble what a witness does when testifying.[125] After all, the Court explained: "no witness goes into court to proclaim an emergency and seek help."[126] On the other hand, once the police secured the scene and removed the suspect, any questioning of a witness about what happened has the primary purpose of investigating a possible crime and results in testimonial statements.[127] Responses to official interrogations about past events are "precisely what a witness does on direct examination."[128] The Court acknowledged that interrogations aimed at resolving an ongoing emergency may transition into criminal investigations of past events.[129] However, the Court optimistically believed police officers and trial courts would intuitively recognize the point at which statements become testimonial.[130] This hope proved to be short-lived.

Just four years later, in *Michigan v. Bryant*, a divided court vigorously disagreed about how to determine the primary purpose of police questioning.[131] In *Bryant*, police questioned a gunshot victim who was lying next to his car at a gas station.[132] The victim disclosed the shooting took place at Bryant's home some distance from the gas station.[133] The questioning lasted for five to ten minutes before the victim was taken to a hospital where he

120. Williams v. Illinois, 567 U.S. 50, 120 (2012) (Kagan, J., dissenting).
121. *Davis*, 547 U.S. at 813.
122. *Id.* at 824–25 (explaining that this reading was supported by the common-law right to confrontation, early American cases invoking the Confrontation Clause and even the practice, if not the rationale, of the Court's prior cases decided under the reasoning of *Ohio v. Roberts*).
123. *Id.*
124. *Id.* at 826–27.
125. *Id.*
126. *Id.* at 828.
127. *Id.* at 829–30.
128. *Id.* at 830.
129. *Id.* at 828.
130. *Id.* at 829 ("[P]olice officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." (quoting New York v. Quarles, 467 U.S. 649, 658–59 (1984))).
131. Michigan v. Bryant, 562 U.S. 344, 375–76 (2011).
132. *Id.* at 349.
133. *Id.*

succumbed to his wounds and died within hours.[134] At trial, the police were permitted to repeat the victim's statement, and the jury convicted Bryant on several charges.[135] The Supreme Court of Michigan overturned the conviction, holding that the victim's statements to police were made with the primary purpose of telling the police the who, what, when, and where of the crime, and not to resolve an ongoing emergency.[136]

The Supreme Court reversed, holding the statements were not testimonial because they were not made with the "objective primary purpose" of proving past events but to resolve an ongoing emergency.[137] Although the Court's decisions in *Crawford* and *Davis* established that the primary purpose analysis involves an objective review of the circumstances and statements, those decisions did not clarify whose perspective matters when assessing the primary purpose of the interrogation.[138] The *Bryant* majority concluded the primary purpose analysis requires consideration of the objective purpose of both the questioner and the declarant.[139] The Court acknowledged that sifting through the potentially mixed motives of the participants requires substantial factual development and cautioned that trial courts should not be "unjustifiably restrained from consulting all relevant information."[140] The Court asserted this exhaustive factual inquiry into all the participants involved in the creation of the declarant's statement would result in a more accurate, if not simpler, analysis.[141]

Conversely, Justice Scalia, in a dissenting opinion joined by Justice Ginsburg, insisted that only "the declarant's intent is what counts."[142] The dissenters argued out-of-court statements are testimonial only when the declarant makes a solemn declaration "with the understanding that it may be used to invoke the coercive machinery of the State against the accused."[143] The interrogators' identity, demeanor, and the substance of the questions matter only to the extent they impact the declarant's intent to make a testimonial statement.[144] Justice Scalia reasoned the hidden purpose of the interrogator cannot influence the declarant's primary purpose.[145]

Perhaps, but the interrogator's hidden purpose can influence the declarant's statement and interrogator's memory and retelling of the statement at trial.[146] The questions could lead or mislead the declarant into giving

134. *Id.*
135. *Id.*
136. *Id.* at 351. The Supreme Court of Michigan also noted that the officers' actions did not indicate that they perceived there was an ongoing emergency and held that an ongoing emergency did not exist. *Id.*
137. *Id.* at 374–78.
138. *Id.* at 381 (Scalia, J., dissenting).
139. *Id.* at 367–68 (majority opinion).
140. *See id.* at 369–70.
141. *Id.*
142. *Id.* at 381 (Scalia, J., dissenting).
143. *Id.*
144. *See id.* at 382.
145. *Id.* at 381–82.
146. *See* Sandra Guerra Thompson, *Criminal Law: Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. Crim. L. & Criminology 329, 330–32 (2012) (explaining how suggestive and coercive questioning of witnesses and informants by the police leads to

statements that do not accurately communicate what happened.[147] Where the interrogator is a government actor, her confirmation bias and desire to convict the defendant will color the phrasing and tone of her questions, her interpretation of the answers, and her memory and retelling of the declarant's statements.[148] The Confrontation Clause's purpose is to prevent the government's use of ex parte examination in lieu of in-court testimony, subject to cross-examination.[149] If the interrogator is seeking to create statements for use at trial, then the *Bryant* dissent is surely mistaken in concluding the interrogator's motivation is irrelevant to the inquiry.[150] The *Bryant* majority at least considers the interrogator's purpose.[151]

Closer to the mark, however, is Scalia's concern that requiring judicial consideration, of the objective intent of everyone involved in the statement empowers judges to avoid the "guarantee of confrontation"[152] by focusing on "whatever perspective is necessary to declare damning hearsay nontestimonial."[153] The prospect of judicial manipulation was one of the fundamental dangers of the *Roberts* test.[154] The *Bryant* Court unanimously agreed the primary purpose analysis focuses on the objective intent—rather than the subjective intent—of the interrogators and/or declarant for the same reason the Court has rejected subjective inquiries in other areas of criminal law.[155] Generally, the Court avoids subjective inquiries to simplify the analysis, prevent problems of proof, and eliminate the perverse results that might result from such inquires and conclusions.[156] Nonetheless, the objective test suffers from significant uncertainty, permits broad judicial discretion, and facilitates manipulation by government investigators

unreliable or false statement); *see generally* Taylor v. Smith, No. 4:09-cv-3148, 2009 U.S. Dist. LEXIS 110502, at *30–33 (D. Neb. Nov. 25, 2009) (detailing how alleged police and prosecutor manipulation and leading of witnesses lead to a wrongful conviction).

147. *See generally* Thompson, *supra* note 146, at 330–31 (discussing how suggestive and coercive questioning of witnesses and informants by the police leads to unreliable or false statements).

148. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 292 (discussing the various ways confirmation bias or "tunnel vision" negatively impacts the truth finding of criminal investigations and prosecutions).

149. Crawford v. Washington, 541 U.S. 36, 51 (2004).

150. Michigan v. Bryant, 562 U.S. 344, 381 (2011) (Scalia, J., dissenting) ("The declarant's intent is what counts . . . . The hidden purpose of an interrogator cannot substitute for the declarant's intentional solemnity or his understanding of how his words may be used.").

151. *See id.* at 368.

152. *Id.* at 384 (Scalia, J., dissenting).

153. *Id.* at 383.

154. *Crawford*, 541 U.S. at 63–64.

155. *Bryant*, 562 U.S. at 360 n.7; *see, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) (refusing to evaluate Fourth Amendment reasonableness subjectively in light of the officers' actual motivations); New York v. Quarles, 467 U.S. 649, 655–56, 656 n.6 (1984) (holding that an officer's subjective motivation is irrelevant to determining the applicability of the public safety exception of *Miranda*); Rhode Island v. Innis, 446 U.S. 291, 301–02 (1980) (holding that a police officer's subjective intent to obtain incriminatory statements is not relevant to determining whether an interrogation has occurred).

156. *Quarles*, 467 U.S. at 656 (applying the public safety exception to *Miranda* warnings) ("Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.").

who are almost always, to some degree, motivated to create evidence for use in a criminal prosecution.[157] Worse still, the actual subjective intention of the government actor may have been to produce a substitute for live in court statements—the very thing the Clause sought to prevent.[158]

The Seventh Circuit Court of Appeals' decision in *United States v. Volpendesto* illustrates just how malleable and confusing the objective primary purpose test can be in application.[159] In *Volpendesto*, the government convinced one member of a criminal enterprise, Hay, to plead guilty and cooperate as an undercover informant.[160] Hay agreed to record his conversations with another member of the criminal enterprise, Volpendesto, about the crimes they and others had committed.[161] The recorded conversations were then introduced against Volpendesto and a third member of the criminal enterprise, Polchan, who had not been a party to the recorded conversation.[162] Volpendesto invoked his Fifth Amendment right to remain silent, but his recorded statements were admitted against both him and Polchan under the statement against interest exception to the hearsay rule.[163] Polchan appealed the admission of Volpendesto's statement against him as violating his right to confront and cross-examine Volpendesto.[164]

Previously, in *United States v. Watson*, the Seventh Circuit held the right to confrontation did not apply where one defendant made "a statement unwittingly" to a confidential informant, and that statement was later introduced against another defendant.[165] However, *Watson* focused entirely on the perspective of the declarant.[166] Polchan argued the subsequent *Bryant* decision required the court to consider the objective intent of both parties to the conversation when determining the primary purpose of that conversation.[167] Polchan insisted the objective purpose of the cooperating informant, Hay, was to gather statements "with an eye toward[s] trial."[168]

The Seventh Circuit agreed that the objective purpose of the interrogator and the declarant is relevant to the primary purpose analysis, but

157. *See* Davis v. Washington, 547 U.S. 813, 839 (2006) (Thomas, J., concurring in part and dissenting in part) ("In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence.").

158. *See Crawford*, 541 U.S. at 50.

159. *See generally* United States v. Volpendesto, 746 F.3d 273, 288–89 (7th Cir. 2014).

160. *Id.* at 279.

161. *Id.* at 280.

162. *Id.* at 287.

163. *Id.* at 287–88 (applying Federal Rule of Evidence 804(b)(3)); *see generally* FED. R. EVID. 804(b)(3).

164. *See Volpendesto*, 746 F.3d at 289. Volpendesto could not appeal this ruling because he was the declarant and could always choose to testify. *Id.*

165. United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008).

166. *Id.* (explaining that the declarant could not have reasonably believed that the statement would be preserved for later use at a trial "because he did not know that the FBI was secretly recording the conversation").

167. *Id.* (citing Michigan v. Bryant, 562 U.S. 344, 367 (2011)).

168. *Id.*

disagreed about how to conduct that inquiry.[169] The court said the focus was the objective "purpose that reasonable participants would have had, as ascertained from the individuals' statements and action and circumstances in which the encounter occurred."[170] The Court concluded that from an objective perspective, the conversation looked like a casual discussion between co-conspirators; therefore, it was nontestimonial.[171]

The Seventh Circuit's analysis in *Volpendesto* misapplied the objective analysis and demonstrated the manipulability of the primary purpose test. The determination of the objective intent of the questioner should have included the actual circumstances that would influence the motivations of a reasonable person participating in the questioning.[172] This is why the *Bryant* Court took into account the effect the victim's actual injuries would have had upon the motivations of both a reasonable interrogator and a reasonable declarant under the circumstances.[173] Similarly, the Seventh Circuit should have attributed to the objective reasonable questioner the actual circumstance acting upon him in the case at hand. Hay was a confidential undercover informant recording a conversation for the government.[174] A reasonable person under these circumstances is objectively seeking to gather evidence for trial, even if that person is also motivated by some other subjective purpose.

In *Bryant*, neither the approach of the majority nor the dissent ensures the Confrontation Clause will prevent the inquisitorial practice of using *ex parte* statements as evidence against the accused. *Crawford* held that the Clause is a procedural guarantee that empowers jurors, not judges, to determine the reliability of government witnesses.[175] Yet, both opinions in *Bryant* empower judges to evaluate mixed motives of the declarant, the interrogator, or both in the primary purpose analysis.[176] Declarants and interrogators often have more than one purpose in making or soliciting a statement.[177] Police officers may interrogate victims or witnesses to resolve an emergency and to gather evidence "simultaneously or in quick succession."[178] Declarants, whether victims, witnesses, or suspects, may want to resolve an ongoing crisis, be the center of attention, seek to mislead police, garner favorable treatment, or provide evidence.[179] All of these possibilities should be explored through cross-examination of

169. *Id.*
170. *Id.* (quoting *Bryant*, 562 U.S. at 359).
171. *Id.* at 290.
172. *Bryant*, 562 U.S. at 369 ("Taking into account a victim's injuries does not transform this objective inquiry into a subjective one. The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim—circumstances that prominently include the victim's physical state.").
173. *Id.*
174. United States v. Volpendesto, 746 F.3d 273, 287 (7th Cir. 2014).
175. Crawford v. Washington, 541 U.S. 36, 61 (2004).
176. *See Bryant*, 562 U.S. at 369–70.
177. *Id.* at 368.
178. *Id.*
179. *Id.* at 368–69.

the declarant in a public trial where the jury can properly evaluate these motives and determine the proper weight to give the testimony.[180]

The mixed motive problem is avoided entirely by shifting the focus away from the purpose of the actors and onto the government's role in creation of the out-of-court statement. Whenever the government is involved in the creation of the out-of-court statement, the Clause should guarantee the right of confrontation. The Constitution requires live testimony and cross-examination to ensure government actors, regardless of their objective purpose, do not intentionally or unconsciously manipulate the declarant in ways that distort or color the evidence.[181] This protection is significantly eroded when judges, on a case-by-case basis, determine there is no need to cross-examine the declarant because the objective intent of the government actor was not primarily focused on the creation of evidence.[182] Focus on government involvement in creation of the out-of-court statement completely eliminates the need to determine the government actor's mixed motives or actual intent.

B. The Formality Factor Incentivizes Government Investigators to Circumvent the Confrontation Clause by Employing Informal Methods of Questioning

The primary purpose analysis is further complicated by the need to consider the formality of the out-of-court statement as a factor of indeterminate weight.[183] From the beginning, the Court established that affidavits, custodial examination, prior testimony, and police interrogation all qualify as testimonial statements.[184] These extrajudicial statements clearly exemplify the type of "solemn declarations" that "declarants would expect to be used prosecutorially."[185] While Thomas has been the sole voice on the Court urging a test that focuses exclusively on the formal nature of the out-of-court statement,[186] the entire *Bryant* Court agreed the formality of the statement is a factor in the primary purpose analysis.[187] After all, formality

180. *See generally Crawford*, 541 U.S. at 61 ("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.").

181. *See generally* Thompson, *supra* note 146, at 331 (discussing how police suggestive and coercive questioning of witnesses and informants leads to unreliable or false statements); Taylor v. Smith, No. 4:09-cv-3148, 2009 U.S. Dist. LEXIS 110502 (D. Neb. Nov. 25, 2009) (detailing the allegations of how police and prosecutor manipulation and leading of witnesses lead to wrongful convictions).

182. *Crawford*, 541 U.S. at 67 ("[The Framers] were loath to leave too much discretion in judicial hands."); *cf.* U.S. Const. amend. VI (criminal jury trial); U.S. Const. amend. VII (civil jury trial).

183. *See Bryant*, 562 U.S. at 377.

184. *Crawford*, 541 U.S. at 51–52.

185. *Id.*

186. *Bryant*, 562 U.S. at 378–79 (Thomas, J., concurring) (arguing that the Clause should apply only to formal interrogations and statements, such as depositions or affidavits, which would resemble the historical practices under English bail and Marian committal practices).

187. *Id.* at 366 (majority opinion); *id.* at 381 (Thomas, J., concurring); *id.* at 395 (Scalia, J., dissenting).

inherently demonstrates that the statement was made with an eye toward prosecution.[188]

On the other hand, informality does not necessarily establish the government did not intend, either partially or entirely, to produce out-of-court statements as a substitute for live in court testimony subject to cross-examination.[189] Because the government knows formal statements will not be admitted without confrontation, government agents have an incentive to employ less formal methods as a strategy to avoid witness production and cross-examination.[190] For example, police know that the primary purpose of a statement made immediately after the alleged criminal conduct is more likely to be regarded as resolving an ongoing emergency, making the statement nontestimonial.[191] Similarly, police and prosecutors can utilize undercover agents or cooperative private persons to solicit statements under circumstances that objectively appear informal and nontestimonial, but, from the government's subjective perspective, were conducted solely to inquire about past facts and develop evidence for future prosecution.[192] Even then, the out-of-court declarant might be aware of the secretive role of the undercover law enforcement officer or cooperating informant.[193] Shrewd declarants might even use these undercover, ostensibly informal, discussions as an opportunity to curry government favor, eliminate enemies or competitors, or implicate others for their own criminal acts.[194] Yet because these statements objectively appear analogous to casual conversations, the primary purpose test denies the defendant the opportunity to confront and disclose the declarant's motives, bias, falsehoods, and mischaracterizations.[195]

The Court's Confrontation Clause analysis should seek to ferret out government attempts to circumvent this constitutional limitation on its power.[196] Instead of obstructing government efforts to avoid the constitutionally mandated limitation on government power, the Court's focus on formality provides law enforcement with a roadmap to navigate around the

188. *Id.* at 377 (majority opinion).

189. *See* Mosteller, *supra* note 118, at 521 (explaining how the police and prosecutors will alter investigative methods to avoid *Crawford*'s testimonial limitation).

190. *See id.*

191. *See Bryant*, 562 U.S. at 375–78.

192. *See* United States v. Aviles-Colon, 536 F.3d 1, 16 (1st Cir. 2008) (defendant claimed co-conspirator's statement repeated by informant under Rule 801(d)(2)(e)(E) was not in furtherance of a conspiracy because co-conspirator knew the witness was an informant and made the statement to implicate the defendant).

193. *Id.*

194. *See generally* Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737 (2016) (discussing the many motivations of informants to lie and manipulate); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107, 107–08 (2006) (asserting that informants are inherently unreliable because of their numerous motivations to lie).

195. *See* cases cited *supra* note 43.

196. In the context of Fourth and Fifth Amendment rights, the Court has always sought to prevent the government from devising methods and tactics designed to undermine the value to these constitutional protections against government abuse of power. *See* Wong Sun v. United States, 371 U.S. 471, 485–86 (1963); New York v. Quarles, 467 U.S. 649, 654 (1984).

defendant's constitutional right to confront witnesses.[197] The Confrontation Clause's goal of requiring live testimony of government witnesses subject to cross-examination by the defendant should not be avoidable by simple manipulations of the interrogation setting and techniques.[198]

C. Incorporating the *Roberts* Reliability Test Undermined the Procedural Guarantee of the Confrontation Clause by Preventing Jurors from Weighing the Evidence

The most disturbing development in the evolution of the Court's primary purpose test is the reintroduction of the *Roberts* test into the testimonial statement analysis.[199] Twice the majority of the Court has stated "standard rules of hearsay, designed to identify some statements as reliable, will be relevant" to the primary purpose analysis.[200] The Court claimed this reliability rationale was implicit in the *Davis* decision because statements primarily made for the purpose of resolving an ongoing emergency were analogous to the excited utterance hearsay exception.[201] Excited utterances have a reduced risk of fabrication; therefore, the "Confrontation Clause does not require such statements to be subject to the crucible of cross-examination."[202] Similarly, in *Williams v. Illinois*, Justice Breyer's concurring opinion insisted forensic laboratory reports fall outside the scope of the Confrontation Clause for the same reason the Federal Rules of Evidence codified the business records exception: they are thought to be inherently reliable.[203] Consideration of hearsay's reliability analysis into the primary purpose test is a substantial retreat from *Crawford*'s proclamation that the Confrontation Clause guarantees cross-examination as the procedure for determining reliability.[204]

While the rules against hearsay and the Confrontation Clause are related—both express a preference for live testimony subject to cross-examination—the Clause is both broader and narrower than the hearsay rule. The Clause is broader because it excludes many out-of-court statements that would be admissible under traditional hearsay exceptions.[205] The Clause is also narrower as it only applies to government evidence in

197. *See* Mosteller, *supra* note 118, at 521 (explaining how the police and prosecutors will alter investigative methods to avoid *Crawford*'s testimonial limitation).

198. *See generally id.*

199. Michigan v. Bryant, 562 U.S. 344, 392 (2011) (Scalia, J., dissenting) ("We tried that approach to the Confrontation Clause for nearly 25 years before *Crawford* rejected it as an unworkable standard unmoored from the text and the historical roots of the Confrontation Clause.").

200. *Id.* at 359–60; *see also* Ohio v. Clark, 576 U.S. 237, 245 (2015).

201. *Bryant*, 562 U.S. at 361–62.

202. *Id.* at 361.

203. Williams v. Illinois, 567 U.S. 50, 93–98 (2012) (Breyer, J., concurring).

204. *Clark*, 576 U.S. at 253 (Scalia, J., concurring) ("A suspicious mind (or even one that is merely not naïve) might regard this distortion as the first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause—in other words, an attempt to return to *Ohio v. Roberts*.").

205. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004) (reversing a conviction where a statement against interest was admitted against the defendant because it was testimonial, and the defendant never had the opportunity to confront the declarant).

criminal cases.[206] The scope of the Clause differs from that of the hearsay rules because its purpose is different.[207] The Confrontation clause is a procedural component of an adversarial system that enables defendants to meaningfully challenge the government's evidence and empower jurors, not judges, to determine the reliability of evidence in criminal cases.[208]

Conversely, the hearsay rules empower judges to determine the applicability of the exceptions and, given the fact-specific nature of these rulings, the trial court's decision regarding the application of a hearsay exception is given tremendous deference.[209] "A child of the jury system,"[210] the law of evidence, and the rules of hearsay in particular, seek to protect lay jurors from evidence they may attach too much significance to or otherwise misuse.[211] Hearsay is disfavored because, without the presence of the witness in court, under oath, and subject to cross-examination, the jury is unable to properly evaluate the witness's perception, memory, narration, and sincerity.[212] Hearsay exceptions are often justified because one or more of these concerns is less compelling where the exception's requirements are satisfied, such that the remaining concerns are insufficient to justify the loss of probative evidence.[213] Many hearsay exceptions are based on the rationale that the statement was made under circumstances where the sincerity of the declarant is less suspect than ordinary hearsay.[214] However, these hearsay exceptions may not reduce the reliability problems associated with ambiguity, faulty perception, and erroneous memory.[215] Even as to sincerity, these hearsay exceptions only offer a rationale as to why a particular type of hearsay may be more reliable than the typical out-of-court declaration.[216] In any given case, the specific application of the rule may not

206. U.S. Const. amend. VI ("In criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

207. *See Crawford*, 541 U.S. at 74.

208. *Id.*

209. *See, e.g.*, Estate of Trentadue *ex rel.* Aguilar v. United States, 397 F.3d 840, 866 (10th Cir. 2005) ("Given the fact specific nature of hearsay objections, we accord greater deference to the district court's hearsay rulings.").

210. James Bradley Thayer, A Preliminary Treatise on Evidence at The Common Law 266 (Boston, Little, Brown & Co. 1898).

211. *See* Bruton v. United States, 391 U.S. 123, 137 (1968) (rejecting a limiting instruction as an adequate substitute for the right of confrontation).

212. Laurence H. Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957, 958 (1974).

213. *See generally* Fed R. Evid. 803 (providing in an Advisory Committee Note: "The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.").

214. *See* Tribe, *supra* note 213, at 964.

215. *See generally* Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. Rev. 1 (1987) (criticizing *Roberts* firmly rooted hearsay exception to the right to confrontation because many such exceptions are not based on the statement's trustworthiness).

216. *See generally* Melissa Hamilton, *The Reliability of Assault Victims' Immediate Accounts: Evidence from Trauma Studies*, 26 Stan. L. & Pol'y Rev. 269 (2015) (discussing how science has undermined the reliability assumptions supporting the excited utterance and present sense impression exception to the hearsay rule); Goldman, *supra* note 215 (explaining that many hearsay exceptions do not actually ensure that the statements are trustworthy).

ensure the statement is, in fact, free from sincerity concerns.[217] The judge may admit statements that in a given instance may not be particularly reliable although, in the court's view, fall within the exception's parameters.[218] All this means is the trial court has tremendous power to shape the evidence the jury is permitted to hear.[219] Across the broad spectrum of civil cases, the hearsay rules probably further the search for truth, or are at least not an obvious hindrance to it.

In criminal cases, where the government has played a role in the creation of a hearsay statement offered against the accused, the right of confrontation empowers jurors and defendants to control government abuse of power.[220] The sovereign's monopoly over the power to criminally prosecute creates systemic influence, and the government's power to pressure the judiciary and witnesses is unmatched by any private litigant.[221] The government is perhaps most likely to abuse its power when the criminal prosecution takes on a political dimension.[222] Guaranteeing the accused the right to cross-examine witnesses may enhance the truth-finding process of the trial, but it places the power in the hands of lay jurors.[223] It guarantees the jury, not the judge, will determine the reliability of government witnesses based upon live testimony and the benefit of cross-examination.[224] Like the due process requirement of proof beyond a reasonable doubt, and the right to trial by jury, the Confrontation Clause guards against the government's abuse of prosecutorial power.[225]

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217. *See generally* Goldman, *supra* note 215 (explaining why the rationale for any given hearsay exception may not logically apply to specific applications of the rules).

218. Crawford v. Washington, 541 U.S. 36, 63 (2004) ("Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them.").

219. *Id.*

220. *Id.* at 56 n.7:

> Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

221. *See generally* Kevin Sali & John Robb, *Fighting Government Witness Tampering: (Or, You Can Have Our Defense Witnesses When You Pry Them From Our Cold, Dead Hands)*, 41 Champion 34 (2017) (discussing the many ways the government may pressure, influence, and alter the testimony of witnesses).

222. *Crawford*, 541 U.S. at 68.

223. *Id.* at 67 ("[The Framers] knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people.").

224. *Id.*

225. State v. McLaughlin, 860 P.2d 1270, 1276 (Alaska Ct. App. 1993) (explaining that the right to indictment by a grand jury, the guarantee of public trial, the privilege against self-incrimination, the presumption of innocence, the burden of proof *beyond a reasonable doubt*, the right of confrontation, and the right to compulsory process are all procedural devices aimed at holding disproportionate *government power* in check); *see* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (stating that these protections "guard against a spirt of oppression and tyranny on the part of rulers").

IV. A STATE ACTION TEST WOULD RESTORE THE CONFRONTATION CLAUSE TO ITS PROPER FUNCTION AND SIMPLIFY THE ANALYSIS

Even if it is assumed trial courts can accurately navigate through the muddled collection of factors relevant to the primary purpose test, the test misses the point.[226] Government involvement in creating the out-of-court statements must trigger confrontation because it is the constitutionally mandated procedural means of determining the reliability of government evidence.[227] Otherwise, the inquisitorial practices that gave rise to the Confrontation Clause will be replicated and replaced by different (perhaps more dangerous) methods for the government to solicit out-of-court statements while avoiding the right of confrontation and undermining the Sixth Amendment's rights to counsel and trial by jury.[228] Government involvement in the creation of the statement should grant the accused the opportunity to confront the declarant to disclose and prevent government misconduct and bias.[229]

Any interpretation of the Confrontation Clause must preserve its procedural guarantee that the reliability of "'witnesses' against the accused" be tested in the "crucible of cross-examination."[230] The scope of this right must be broad enough to encompass the "principal evil" the Clause was intended to prevent: the "use of ex parte examinations as evidence against the accused."[231] The Constitution guarantees the accused the right to confront these witnesses as part of the Sixth Amendment's bundle of rights designed to protect the people from government abuse of its monopoly over the power to criminally prosecute.[232] The right of confrontation works in conjunction with the rights to compulsory process, to a speedy and public jury trial, and to assistance of counsel.[233] Together these rights ensure the government's evidence is subject to the crucible of the adversarial process and subject to the common sense and scrutiny of the people.[234] To fulfill its

226. Michigan v. Bryant, 562 U.S. 344, 390–94 (2011) (Scalia, J., dissenting).
227. *Id.* at 392 (Scalia, J., dissenting).
228. *See id.* (Scalia, J., dissenting):

> The Framers placed the Confrontation Clause in the Bill of Rights to ensure that those abuses (and the abuses by the admiralty courts in colonial America) would not be repeated in this country. . . . Not even the least dangerous branch can be trusted to assess the reliability of uncross-examined testimony in politically charged trials or trials implicating threats to national security.

229. *See generally* Findley & Scott, *supra* note 148.
230. Crawford v. Washington, 541 U.S. 36, 51, 61 (2004).
231. *Id.* at 50.
232. *See* Berger, *supra* note 3, at 562 (explaining how the Confrontation Clause must be interpreted with the Sixth Amendment broadly "as a package of rights concerned with protecting the people against government oppression"); *see generally* Jonakait, *supra* note 3 (focusing on the Confrontation Clause as one of many constitutional provisions that reinforce each other and guarantee an adversarial system).
233. Jonakait, *supra* note 3, at 164.
234. *Id.*

role, the right of confrontation must apply to all out-of-court statements where the government was involved in the production of the evidence.[235]

Focusing on state action in the creation of the out-of-court statement directs the court's attention where it belongs: on the government. The state action doctrine provides that the Constitution's protections of individual liberties, as well as its requirements of due process and equal protection, constrains only government actions.[236] The Constitution constrains state action, and not private action, because of the unique risks associated with the scope and nature of governmental power.[237] As with other protections of the Sixth Amendment, the Confrontation Clause seeks to protect the people from government abuse of its criminal investigative and prosecutorial powers.[238] This is why the Clause does not apply to civil lawsuits or evidence presented by criminal defendants.[239] The dangers associated with the sovereign's monopoly on the power to criminally punish—the loss of liberty, the stigma, and secondary effects of a criminal conviction—are different in kind from the comparably minor consequences of civil litigation, even where the government is a party to the suit.[240] The Sixth Amendment makes the government's exercise of this power subject to the common sense and judgment of the people to prevent a repeat of the long history of criminal justice abuse familiar to the Founding Fathers.[241]

The state action analysis is easy to apply when police formally interrogate witnesses out-of-court, and prosecutors then seek to introduce these statements against the accused in a criminal trial. These statements are already excluded by the Court's current "testimonial statement" jurisprudence.[242] Conversely, when the declarant and the questioner are both truly private actors, the concerns that gave rise to the Clause, the civil-law mode of criminal procedure, are not implicated.[243] The Court's current primary

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235. *Crawford*, 541 U.S at 52–53 ("The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.").

236. John L. Watts, *Tyranny By Proxy: State Action And The Private Use of Deadly Force*, 89 Notre Dame L. Rev. 1237, 1250–52 (2014) (explaining how the state action doctrine protects individual liberty, preserves separation of powers, and prevents government abuse of power).

237. *Id.*

238. Berger, *supra* note 3; Jonakait, *supra* note 3.

239. U.S. Const. amend. VI.

240. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (In order to guard against erroneous loss of liberty and imposition of stigma, the Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt").

241. *See* Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968):

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.

242. Crawford v. Washington, 541 U.S. 36, 52 (2004).

243. Ohio v. Clark, 576 U.S. 237, 246 (2015) (explaining that statements made to individuals who are not law enforcement officers are much less likely to be testimonial). There may well be instances where the declarant intends the statement to be testimonial and good arguments can be made for ensuring that the witness is subject to cross-examination under the

purpose test also permits most of these statements to be admitted, subject to ordinary evidence rules.[244]

In other circumstances, a state action test would guarantee the right of confrontation where the primary purpose test would not. Wherever the questioner or the declarant is a government actor, the right of confrontation would apply. Focusing on state action in the creation of the out-of-court statement would eliminate the need to determine the primary purpose of the statement and would have three major implications. First, this would end the courts' confusion over the ongoing emergency, mixed motive, and primary purpose facets of the current test.[245] Second, the state action test dictates that statements produced as a result of questioning by undercover law enforcement agents would be subject to the right of confrontation.[246] Third, statements solicited by a confidential informant, or other nominally private person working for the government, would also be subject to the right of confrontation.[247] The primary purpose test often fails to require confrontation of these declarants because, from their perspective, the statements were not testimonial because the declarants were not aware they were speaking to the government. Finally, the state action alternative would eliminate the uncertainty created by the primary purpose test's application to forensic experts either employed by the government or working at its request.[248]

A. Questioning by Government Agents, Whether Their Status is Known or Unknown to the Declarant, Creates Dangers Requiring In-Court Confrontation of the Declarant

To paraphrase the *Crawford* Court, the involvement of government actors in the production of out-of-court statements presents the same risks whether the questioning is done by police officers, prosecutors, or the types of judicial officers who took Cobham's statement in Raleigh's treason trial.[249] Unfortunately, the testimonial statement inquiry and the primary purpose test do not subject all statements solicited by these state actors to the right of confrontation.[250] Focusing on state action would ensure no statement resulting from any of these government actors would be

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guarantees of the Confrontation Clause. But the danger of government abuse of the criminal justice system—the danger the Clause seeks to control—is simply not present.

244. *Id.*

245. *See* Michigan v. Bryant, 562 U.S. 344, 393 (2011) (Scalia, J., dissenting) (discussing the difficulties and dangers of applying the multifactor test).

246. Watts, *supra* note 236, at 1256–57.

247. *Id.*

248. *See generally* Taryn Jones, *Confronting* Williams: *The Confrontation Clause and Forensic Witnesses in the Post-*Williams *Era*, 67 Hastings L.J. 1087, 1101 (2016) (discussing the confusion created by the Court's plurality decision in *Williams*).

249. Crawford v. Washington, 541 U.S. 36, 53 ("The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.").

250. *See infra* Part IV.B.

admitted without the accused having the opportunity to cross-examine the declarant.

The dangers of custodial interrogation are well known. The coercive nature of custodial interrogation combined with sophisticated psychological tactics and trickery are capable of producing false, distorted, or non-volitional statements.[251] The Court has long recognized these techniques as particularly threatening to the Fifth Amendment privilege against self-incrimination.[252] In response to these dangers and to protect "our adversarial system," the Court requires government interrogators to provide the familiar *Miranda* warnings before engaging in custodial interrogation.[253]

The exclusionary rule—the only effective remedy and deterrent to Fourth and Fifth Amendment violations[254]—applies only when the defendant is the person whose rights have been violated.[255] When someone other than the defendant is interrogated, the defendant cannot exclude the evidence on the grounds that the declarant's Miranda rights were violated.[256] Statements taken in violation of Miranda, or when the witness waived her Miranda rights, are clearly testimonial and subject to the right of confrontation under existing law.[257] The Sixth Amendment's right of Confrontation empowers the defendant to insist that these witnesses be produced and confronted in front of the finder of fact.[258] Confrontation and cross-examination ensure the defendant has the opportunity to expose misleading or false statements that might result from these interrogation techniques.[259]

Unfortunately, when the interrogation of the witness is not custodial, the Court's current interpretation of the Clause does not always preserve the right to cross-examine the declarant even though many of the same concerns remain.[260] Non-custodial interrogation by law enforcement

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251. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966) (discussing the methods and dangers of custodial interrogation).

252. *See generally id.*

253. *Id.* at 460.

254. *See generally* Mapp v. Ohio, 367 U.S. 643 (1961) (showing that the exclusionary rule is the only effective remedy for Fourth Amendment violations); *Miranda*, 384 U.S. at 436 (emphasizing that the exclusionary rule is the only effective remedy for Fifth Amendment violations).

255. Alderman v. United States, 394 U.S. 165, 171–72 (1969).

256. United States v. Anderson, 772 F.3d 969, 974 (2d Cir. 2014) (holding that a criminal defendant cannot seek suppression of evidence obtained in violation of the constitutional rights of a third party); United States v. Fredericks, 586 F.2d 470, 480 (1978) (holding that a defendant cannot suppress statements made in violation of a co-conspirator's *Miranda* rights).

257. Crawford v. Washington, 541 U.S. 36, 52 (2004).

258. *Id.* at 74 (citing Maryland v. Craig, 497 U.S. 863, 845 (1990)).

259. This is particularly problematic where co-defendants are tried together and the out-of-court statements of one defendant directly implicates the other. If a hearsay exception applies as to both defendants but the co-defendant invokes his Fifth Amendment right and refuses to testify, the defendant against whom the statement is admitted has no opportunity to cross-examine the co-defendant. This is especially concerning because of the many incentives a co-defendant might have to portray the other defendant as the primary culpable party. *See* Nelson v. O'Neil, 402 U.S. 622, 626–30 (1971).

260. *See generally* Davis v. Washington, 547 U.S. 813, 823–29 (2006) (discussing the ongoing emergency exception).

personnel, while less coercive than custodial interrogations, still has the potential to intimidate the declarant and cause the declarant to say what the police want to hear.[261] Indeed, law enforcement personnel under the stress and excitement of an ongoing emergency might appear particularly intimidating.[262] Even when interrogation does not lead to the false accusation of an innocent person, the questioning may cause the declarant to color his statement in ways that favor the government's case or to omit facts that would weaken the government's case.[263] A state action test would guarantee defendants the right to confront these declarants under oath, in front of the jury, and with the aid of counsel to explore these possibilities.[264]

Intimidation aside, all law enforcement questioning, including that of undercover officers whose government identity is unknown to the declarant, may lead to unreliable statements which require cross-examination of the declarant to clarify what the witness actually perceived or meant to communicate.[265] Government interrogators may employ leading questions that would not be permitted if the government were forced to examine the witness in court.[266] If the out-of-court declarant wants to please the interrogator, leading questions allow her to agree to a set of facts that help the government's case even though those facts may not accurately describe what actually transpired.[267] Where the interrogator is a known government actor, the declarant may hope to receive favorable treatment with regard to her own wrongdoing if she assists the government.[268] This provides powerful incentives to fabricate, mislead, or describe facts in ways that improve the government's case against the accused.[269] Where the interrogator is an undercover agent, more powerful incentives—fear, loyalty, love, and hate—may induce misleading or false statements.[270] These dangers are present even where a trial court might conclude the production of evidence was not the primary purpose of the exchange.

Arguably, ex parte examinations, where a declarant is not aware she is speaking to a government agent, are even less reliable and subject to greater manipulation than those where the declarant is aware that her

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261. *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977) ("Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime.").

262. New York v. Quarles, 467 U.S. 649, 685 (1984) (Marshall, J., dissenting) (arguing against the public safety exception to *Miranda* because an interrogation during an ongoing emergency would be particularly coercive).

263. *See generally* Thompson, *supra* note 146, at 329.

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

265. *See* Thompson, *supra* note 146.

266. Fed. R. Evid. 611 ("[L]eading questions should not be used on direct examination . . . .").

267. *See* Taylor v. Smith, No. 4:09-cv-3148, 2009 U.S. Dist. LEXIS 110502, at *12–13 (D. Neb. Nov. 25, 2009).

268. *See id.*

269. *See generally* Roth, *supra* note 194, at 751 (discussing the many motivations of informants to lie and manipulate); Natapoff, *supra* note 194, at 107–08 (2006) (stating that informants are inherently unreliable because of their numerous motivations to lie).

270. *See* Roth, *supra* note 194, at 765–66; Natapoff, *supra* note 194, at 123.

statement is being solicited for use at trial.[271] The declarant, unaware her statement is being solicited for use in court, may not perceive the need to clarify answers to leading questions, to correct misunderstanding, or to be truthful.[272] The Sixth Amendment guarantees the right to cross-examine government witnesses, with the assistance of counsel, to reveal bias, miscommunication, and government manipulation of witnesses.[273] The very prospect of confrontation discourages government misconduct in the first instance.[274] Denial of the right to confront these declarants prevents the Clause from performing its function and undermines the Sixth Amendment's rights to counsel and trial by jury.[275]

Cross-examination of a law enforcement officer testifying about a declarant's out-of-court statements is a particularly poor substitute for the right to confront the declarant.[276] All of the hearsay concerns remain: did the witness accurately perceive what the declarant described, did the witness accurately remember what the declarant stated, did the declarant communicate to the witness what she intended, and was the declarant truthful? Additionally, confirmation bias likely distorts the government interrogator's perception and interpretation of what the declarant stated.[277] Most investigators are biased by their personal involvement in the "often competitive enterprise of ferreting out crime."[278] Once an investigator has formed a theory regarding the who, what, when, where, and why of a given event, he is prone to interpret witness statements in ways that conform with what the investigator believes to be true.[279] The power of confirmation bias is well documented and the subject of innumerable scientific studies and is known to have played a powerful role in many false convictions.[280]

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271. *See* Massiah v. United States, 377 U.S. 201, 206 (1964) (explaining that once the Sixth Amendment right to counsel attached, indirect and surreptitious interrogation by a co-defendant cooperating with government agents was a more serious imposition on the right because the defendant "did not even know he was under interrogation by a government agent"); *see also* Bourjaily v. United States, 483 U.S. 171, 197 (1987) (Blackmun, J., dissenting) (describing co-conspirator statements as unreliable idle chatter and malicious gossip).

272. *See generally* Karsai, *supra* note 18 (discussing the potential for government use of nontestimonial hearsay specifically to avoid cross-examination).

273. *See* Crawford v. Washington, 541 U.S. 36, 65 (2004).

274. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 317–20 (2009) (explaining that confrontation of forensic experts is necessary to deter and expose both fraudulent and incompetent evidence).

275. *See* Berger, *supra* note 3, at 562 (discussing the right to confrontation as working with other Sixth Amendment rights to protect the people against government oppression).

276. *See* Mosteller, *supra* note 118, at 570.

277. *See* Findley & Scott, *supra* note 148, at 292 (discussing the various ways confirmation bias or "tunnel vision" negatively impacts the truth finding of criminal investigations and prosecutions); *see also* Steven B. Duke, Ann Seung-Eun Lee & Chet K.W. Pager, *A Picture's Worth A Thousand Words: Conversational Versus Eyewitness Testimony In Criminal Convictions*, 44 Am. Crim. L. Rev. 1, 16–19 (2007) (discussing the error rate of conversational memories and the tendency to "recreate them in a manner consistent with his or her motivational biases or ego").

278. Johnson v. United States, 333 U.S. 10, 14 (1948) (discussing the need for a disinterested magistrate to check overly zealous officers in the Fourth Amendment context).

279. *Id.*

280. *See* Findley & Scott, *supra* note 148, 296–307 (presenting several case studies of wrongful convictions as a result of confirmation bias).

The interrogator's perception, memory, and interpretation of the witness's statement may be influenced by his desire for the statement to lead to a conviction.[281] Although the interrogator may be available for cross-examination, it is very difficult to prove the interrogator's confirmation bias resulted in misinterpretation or mischaracterization.[282] Cross-examination of the interrogator is particularly difficult when the interrogator honestly believes the misinterpretation.[283] Only if the defendant can cross-examine the declarant can these misinterpretations be disclosed to the jury.[284]

Cross-examination of government interrogators is further hampered by the fact that they are repeat professional witnesses in the criminal justice system who are unintimidated by the oath and other courtroom formalities.[285] They are often familiar with the rules of evidence and may have been coached by the prosecutor on what to say to ensure the declarant's statement fits into a hearsay exception.[286] When the government actor knows the declarant is not required to appear and testify regarding the out-of-court statement, he can confidently tailor his retelling of the statement in the light most favorable to the government's case.[287] These government investigators probably believe in the defendant's guilt and need for punishment.[288] As a result, they may have no moral qualms about embellishing the declarant's statements, omitting unhelpful statements, and misquoting the declarant's vague statements to get their own biased conclusions before the court.[289]

If the goal is to guarantee confrontation to prevent and expose government abuse, then the solution is to focus on the government involvement in the production of the statement. If courts focus on state action in the creation of the out-of-court statement, rather than the testimonial statement analysis, the right of confrontation would clearly apply whenever a statement is the result of interrogation by government actors. The focus on state action eliminates the difficulty and uncertainty of determining the primary purpose of police interrogations involving mixed motivations. More importantly, confrontation fortifies the constitutionally mandated adversarial system and ensures the people, not the court, determine the reliability of government witnesses against the accused.[290] All out-of-court statements produced by government solicitation must be subject to the guarantees of

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281. *Id.*
282. *Id.* at 292–93.
283. *Id.* at 295.
284. *Id.* at 331.
285. *See* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. Colo. L. Rev. 1037, 1044 (1996).
286. *See* Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 Cardozo L. Rev. 829, 852–54 (2002) (discussing prosecutorial witness coaching generally and the potential for its misuse).
287. *See id.*
288. *See* Slobogin, *supra* note 285, at 1044–47 (explaining that police are experts at deceit and are aware that many prosecutors and judges are reluctant to confront them).
289. *See id.*
290. Crawford v. Washington, 541 U.S. 36, 61–62 (2004); *see* Jonakait, *supra* note 3, at 91.

the Confrontation Clause regardless of whether the declarant was aware of the government's involvement.

B. The Government's Use of Informants and Nominally Private Actors to Question Declarants is State Action and Should Trigger the Right to Confrontation

Currently, lower courts often treat statements made to confidential informants as nontestimonial because the declarant is unaware that the other party to the conversation is seeking to gather evidence to be used against someone at trial.[291] In *Washington v. Davis*, the Court suggested that statements unwittingly made to government informants[292] and statements made from one prisoner to another[293] were clearly not testimonial and, therefore, exempt from the Confrontation Clause. Since the Court's decision in *Bryant*, most courts at least consider the perspective of both the declarant and the informant when applying the primary purpose test. Under the primary purpose test, when viewed from the perspective of the declarant, the statements are not made with an eye towards trial, and the conversation lacks the formality of a police interrogation or affidavit. From the questioner's perspective, gathering evidence for use in a criminal prosecution is always a motivating factor, even if not the primary purpose, of the conversation. However, despite the questioner's motivations, the determinative factor is most often the declarant's objective unawareness that her statements were solicited for use in court.[294]

The state action doctrine would ensure these nominally private actors cannot be used to do the government's work while avoiding the constitutional limitations placed on government actors. The Supreme Court has created two exceptions to the state action doctrine that apply constitutional constraints to all action attributable to the government, even when the most immediate cause of the infringement is the act of a private party.[295] These exceptions are generally known as the entanglement exception and the public function exception.[296] The entanglement exception applies where the government commands, encourages, or facilitates a private person to infringe upon another's individual rights when the Constitution prohibits

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291. *See* cases cited *supra* note 43.

292. Davis v. Washington, 547 U.S. 813, 825 (citing Bourjaily v. United States, 483 U.S. 171, 181–84 (1987)).

293. *Id.* (citing Dutton v. Evans, 400 U.S. 74, 87–89 (1986)).

294. *See* cases cited *supra* note 43. The propensity to find such statements nontestimonial is perhaps motivated by the court's belief that the defendant is in fact guilty. *See generally* Shontel Stewart, *Addressing Potential Bias: The Imbalance of Former Prosecutors and Former Public Defenders on the Bench*, 44 J. Legal Prof. 127, 129–30 (2019) (detailing how the disproportionate number of former prosecutors on the bench fosters a potential prosecutorial perspective).

295. Many of the Court's cases evaluating these exceptions discuss both, and sometimes it is not clear which exception is being applied or that they work together. *See, e.g.*, Erwin Chemerinsky, Constitutional Law 537 (6th ed. 2019).

296. *See generally* Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 B.Y.U. L. Rev. 575, 585–93 (discussing the exceptions).

the government from directly doing so.[297] Accordingly, it is not so much an exception as it is a means of assessing government responsibility for a constitutional violation in the same way that tort law determines causation and apportionment of liability in a case involving joint tortfeasors.[298] The public function exception ensures constitutional constraints apply whenever the government has passively permitted a private person to perform an activity that is "traditionally and exclusively performed by the state."[299] The Court's decisions applying these exceptions have not been a "model of consistency,"[300] but these exceptions provide guidance in the case-by-case "normative judgment" that the state ultimately bears responsibility.[301]

The entanglement exception prevents the government from using private proxies to make an end run around the Confrontation Clause.[302] Whenever the government commands, encourages, or facilitates private persons—informants, cooperating witnesses, co-defendants and cellmates—to interrogate witnesses, any resulting statement must be considered the product of state action.[303] This is true whether the government gains cooperation by paying informants, offering plea deals with sentencing leniency, or providing other benefits (such as immigration relief) to the informant or a relative.[304] Even informants who assist the government simply because of the government's request should be treated as government actors. Otherwise, the government could delegate its criminal investigative functions to private actors, thereby circumventing the constitutional limitations the Founding Fathers knew were necessary to protect the people from this awesome power.[305]

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297. *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (holding that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State"); United States v. Ziegler, 474 F.3d 1184, 1188–90 (9th Cir. 2007) (private employees are state actors when cooperating with FBI to enter coworker's locked office); *see generally* Schmidt, *supra* note 296, at 589–93 (discussing the entanglement exception and the confusion over how much government involvement is necessary for a finding of state action).

298. Watts, *supra* note 236, at 1254.

299. Unfortunately, the public function exception has been so narrowly interpreted that it is less likely to apply to recurring Confrontation Clause scenarios than the entanglement exception. *See id.* at 1259 (criticizing the Court's formulation of the public function exception and proposing an alternative test that focuses on the governmental function involved, rather than the historical exclusive government performance of that function).

300. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting).

301. Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 295 (2001).

302. *See* Schmidt, *supra* note 296, at 589.

303. *See generally* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988):

> In the typical case, raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct . . . if it delegates its authority to the private actor . . . or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior.

304. *See generally* Roth, *supra* note 194, at 752.

305. See Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 172 n.8 (1978) (Stevens, J., dissenting) ("For instance, it is clear that the maintenance of a police force is a unique sovereign function, and the delegation of police power to a private party will entail state action.").

The public function exception might also apply under some circumstances. If a state or local government completely delegated its criminal investigative tasks to private persons, the public function exception would likely apply.[306] Not only are criminal investigations a core governmental function, but these private actors would also be seeking to further the government's prosecutorial interest.[307] However, in most instances where the public function exception applies, the entanglement exception would also apply because the government has incentivized a private actor to question the declarant.

There are sound reasons for treating statements made to government informants differently from statements made to private persons not acting on behalf of the government. Informants are likely to have the same or more powerful motivation than the police to use leading questions to manipulate declarants and selectively recall the out-of-court statements when testifying in court.[308] Informants may be rewarded for their assistance, receive favorable treatment with regard to their own criminal activity, or seek to eliminate a criminal competitor.[309] Thus, these informants may be subject to the same confirmation bias as police officers and use all the trickery and manipulation tactics known to law enforcement. Worse still, these informants differ from police in that they operate without the constraints placed on law enforcement through training, procedure, and respect for the law.[310] The right to counsel and the trial by jury are undermined if the government is not forced to produce the declarant when an informant, using all the tools as a police interrogator, induced the out-of-court statement at the government's behest.[311]

C. The State Action Test Would Guarantee the Right to Cross-Examine Forensic Experts and Would Improve Their Training, Independence, and the Integrity of Their Practices

Application of the state action test would require lab technicians and scientific experts employed (or contracted) by the government to testify live,

306. *Id.*

307. *See* Corngold v. United States, 367 F.2d 1, 8 (9th Cir. 1966) (holding that a TWA agent's search of a package was government action because it was conducted solely to aid the law enforcement efforts of customs agents); *see also* Nicholas Poppe, *Discriminatory Deplaning: Aviation Security and the Constitution*, 79 J. Air L. & Com. 113, 124–25 (2014) (discussing the application of the public function exception to a private person performing criminal investigation and discussing the importance of the absence or presence of private motivation other than law enforcement).

308. *See* Evan Haglund, *Impeaching the Underworld Informant*, 63 S. Cal. L. Rev. 1405, 1408–09 (1990) (discussing the wide variety of informants and their various motivations to lie and color their testimony); Robert M. Bloom, Ratting: The Use and Abuse of Informants in the American Justice System 63 (2002) (same).

309. *See* Bloom, *supra* note 308, at 81 (discussing two informants "whose major incentive for serving as informants was to promote their own criminal enterprises through the elimination of their competition").

310. *See* Haglund, *supra* note 308, at 1420–21.

311. *Id.* at 1420.

subject to cross-examination.[312] Evidence produced by forensic experts is often some of the government's most important proof.[313] The prospect of cross-examination will help ensure these experts are appropriately trained, follow proper procedures, and accurately apply the science to the facts of the case. Cross-examination also allows the defendant to explore whether the technician's testimony is skewed by pressure to please the government or desire to convict the defendant.

Since the Court's first post-*Crawford* forensic evidence case, a narrow majority of the Court has held experts who perform forensic tests or offer scientific expert opinions on behalf of government prosecutors are subject to the Confrontation Clause's requirement of live testimony subject to cross-examination.[314] The majority in Melendez-Diaz focused on the testimonial nature of sworn lab results and the value confrontation will have in preventing and deterring incompetence and bias.[315]

Conversely, the dissenting justices maintained that confronting such witnesses was a formalistic and pointless application of the Clause because laboratory technicians are scientists as opposed to "accusatory" witnesses.[316] The dissent assumed forensic witnesses were not subject to undue pressure for police or prosecutors, lacked personal knowledge of the defendant, and were not personally invested in achieving a conviction in the same way as police and prosecutors.[317] While this may be true in the run-of-the-line cases, the purpose of the Clause is to allow the defendant an opportunity to question these premises in cases where the expert is pressured to produce evidence that will aid in conviction or even to fabricate evidence.[318]

Furthermore, if the purpose of the Clause is to protect against abuse of the government's prosecutorial powers, the right to question these assumptions will help ensure the truth of their underlying premises.[319] Stated another way, if not subject to confrontation, it is not hard to imagine that investigators or prosecutors might seek the aid of forensic experts in fabricating evidence against unpopular political opponents or persons they believe to be guilty of heinous crimes when other evidence of guilt is lacking.[320] Forensic experts might succumb to government pressure or

312. *See* Williams v. Illinois, 567 U.S. 50, 93 (2012) (Breyer, J., concurring).

313. *See, e.g.*, Paul C. Giannelli, Ake v. Oklahoma*: The Right to Expert Assistance in a Post-*Daubert, *Post-DNA World*, 89 Cornell L. Rev. 1305, 1307–08 (2004) (discussing the importance of scientific experts in criminal cases generally and the need for public funding of defense experts).

314. *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 329 (2009).

315. *Id.* at 318–19.

316. *Id.* at 330–57 (Kennedy, J., dissenting).

317. *Id.* at 339–40.

318. *Id.* at 318–19 (majority opinion) ("Because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." (citing National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 183 (2009))).

319. *Id.*

320. *Id.* at 318; Stuart v. Alabama, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting from the denial of certiorari).

to a misguided sense of duty.[321] They are much more likely to do so if they believe they will never be cross-examined in court regarding how the tests were performed, the test results, or their communications with police or prosecutors.[322]

Even where the experts are disinterested scientists, cross-examination allows for an opportunity to reveal incompetent training or methods that would go unquestioned in the absence of the production of the live witness.[323] The prospect of being called to testify live, under oath, and subject to cross-examination is a powerful incentive to carefully follow appropriate procedures and methodology.[324] Moreover, when called to testify, experts may review their work in preparation for trial and discover errors in interpretation or methodology that would not have otherwise been revealed.[325] The mere prospect of cross-examination would improve the training, methods, and quality of forensic evidence, as well as deter experts from succumbing to bias or government pressure.[326]

Finally, the state action doctrine would eliminate one of the two independent rationales for the plurality opinion in *Williams*.[327] In a rape case, the *Williams* plurality held a government expert could testify that a DNA profile of vaginal swabs taken from the victim created by Cellmark, a private laboratory contracting with the government, matched a DNA profile of the defendant produced by the state police lab using a sample of the defendant's blood.[328] The defendant objected that the Cellmark employee who created the DNA profile from the vaginal swabs of the victim had to testify live subject to confrontation.[329] The Court held that the government did not have to produce the Cellmark technician but did not agree on the rationale.[330]

Four members of the Court concluded the expert's testimony regarding the Cellmark DNA profile was not introduced to prove the truth of the matter asserted.[331] Rather, the report was referenced "solely for the purpose of explaining the assumptions on which" the testifying expert's opinions were based.[332] While this conclusion is subject to criticism, and

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321. *Melendez-Diaz*, 557 U.S. at 318.
322. *See id.* at 319.
323. *Id.* at 320.
324. *See id.* at 319.
325. Williams v. Illinois, 567 U.S. 50, 118–19 (2012) (Kagan, J., dissenting) (discussing an instance where a DNA analyst only realized on cross-examination that she had misidentified the victim's blood sample as the defendant's).
326. *Melendez-Diaz*, 557 U.S. at 316–21; *see, e.g.*, Janine Arvizu, *Shattering The Myth: Forensic Laboratories*, 24 Champion 18, 19 (2000) (cataloging instances of fraud, incompetence, and errors by forensic laboratories); Nicole B. Cásarez & Sandra G. Thompson, *Three Transformative Ideas to Build a Better Crime Lab*, 34 Ga. St. U. L. Rev. 1007, 1011 (2018) (discussing the failures of forensic laboratories and proposing solutions).
327. *Williams*, 567 U.S. at 58.
328. *Id.*
329. *Id.* at 61–63.
330. *Id.* at 85–86, 92 (comparing views of the plurality and the dissent).
331. *Id.* at 57–58 (five Justices rejected this rationale: Justice Thomas concurred; Justices Kagan, Scalia, Ginsburg, and Sotomayor dissented).
332. *Id.* at 58.

a majority of the court rejected it,[333] if valid, the state action test would not affect the analysis because the right to confrontation does not apply to an out-of-court statement not offered to prove the truth of the matter asserted.[334]

However, a state action test would have eliminated the second independent basis for the plurality's decision.[335] Four members of the Court held that the term "witnesses against" the accused did not apply to the Cellmark technician because the DNA report was not prepared for the primary purpose of accusing a targeted individual.[336] The report was prepared to identify an unknown rapist who was still at large, in the event a suspect was identified.[337] Therefore, the plurality believed there was no "prospect of fabrication" and thus, no need to confront the Cellmark technician who performed the test.[338] This rationale is irrelevant under a state action test because the Cellmark DNA repost was prepared under a contract with the government.[339]

The problem with the plurality analysis is the assumption that cross-examination could reveal nothing helpful to the finder of fact.[340] Cross-examination is the constitutionally required procedure by which the defendant can challenge the reliability of the government witnesses.[341] The defendant might have included whether the Cellmark tech performing the test knew anything about the case or the identity of suspects, whether the tech had motivation to fabricate, and whether the tech was poorly trained or outright careless.[342] In the ordinary case, the plurality's assumptions are well founded, but the Clause guarantees a right of confrontation to question those assumptions in politically charged cases where routine practices may not have been followed or evidence may have been manipulated behind the scenes.[343] A procedural requirement mandating these witnesses' appearance and live testimony at trial would help ensure nothing inappropriate takes place in the first instance.[344] Even if the deterrent effect was insufficient, confrontation would at least provide an opportunity for the misconduct to be exposed through cross-examination.[345]

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333. Stuart v. Alabama, 139 S. Ct. 36, 37 (2018) (Gorsuch, J., dissenting from the denial of certiorari).

334. *Williams*, 567 U.S. at 79 (citing Crawford v. Washington, 541 U.S. 36, 59–60, 60 n.9 (2004)).

335. *Id.* at 58.

336. *Id.* at 82–84.

337. *Id.*

338. *Id.* at 85.

339. *See id.* at 58.

340. *Id.* at 138 (Kagan, J., dissenting) ("Dispensing with [cross-examination] because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." (quoting *Crawford*, 541 U.S. at 62)).

341. *Id.* at 64.

342. *See id.* at 121–23 (Kagan, J., dissenting).

343. *Crawford*, 541 U.S. at 68; Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318 (2009) ("A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.").

344. *Melendez-Diaz*, 557 U.S. at 319 ("And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.").

345. *Id.*

V. THE BENEFITS OF A STATE ACTION TEST OUTWEIGH WHATEVER BURDENS IT IMPOSES ON THE GOVERNMENT

Despite claims to the contrary, a state action test for triggering the right of confrontation would not unduly hamper legitimate efforts to prosecute criminal activity.[346] Law enforcement and prosecutors need not change any practices they currently use to investigate crimes or identify suspects.[347] The state action approach only impacts the presentation of the evidence at trial. To the extent this increases the cost or length of criminal trials, or makes it more difficult to achieve a conviction, these factors have never been thought too high a price to pay for the preservation of constitutional rights.[348]

Justice Breyer, in his concurring opinion in *Williams*, insisted the exclusion of out-of-court forensic records would "undermine . . . the accuracy of fact-finding at a criminal trial" and "increase the risk of convicting the innocent."[349] Certainly, there are some additional costs involved in prosecuting defendants where laboratory technicians are forced to testify, but these costs have not proven to be overly burdensome thus far.[350] Some of these costs can be mitigated by having fewer technicians involved in the process of testing any particular sample so that fewer witnesses would be required at trial.[351] The laboratories should change their practices to conform to the demands of the criminal justice system, rather than compromise constitutional rights to accommodate laboratory methodologies designed to minimize cost and maximize production.

There is no reason to believe law enforcement and prosecutors will order fewer DNA tests because of the cost of producing laboratory technicians at criminal trials. DNA tests would continue to have utility during the investigation stage in excluding innocent defendants and identifying possible suspects.[352] The costs to produce the tests for these purposes would be no more than they are now; the only added cost would come from their use at criminal trials. Moreover, defendants need not comply with the demands of the Confrontation Clause.[353] Innocent defendants could always produce DNA reports if the reports satisfy a hearsay exception—without calling the laboratory analyst to testify live in court. As a result, concerns that innocent defendants will be convicted because law enforcement will avoid

346. *See id.* at 325–28.
347. *See id.* at 325–26.
348. *Id.* at 325.
349. Williams v. Illinois, 567 U.S. 50, 97–98 (2012) (Breyer, J., concurring).
350. *Melendez-Diaz*, 557 U.S. at 325–26 (noting that prior to that decision, many states had already adopted a rule requiring production of lab technicians at trial without any evidence that their criminal justice systems have been overwhelmed as a result).
351. *See Williams*, 567 U.S. at 90 (Breyer, J. concurring) (suggesting that confrontation will require the production of numerous lab technicians because of the number involved under some laboratory procedures).
352. *Id.* at 98.
353. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

DNA analysis and other scientific tests that would have otherwise exonerated them are misguided.[354]

Similarly, government informants and undercover government agents will continue to produce evidence for use by the government in criminal investigations and prosecution. The only change required by a state action test is the government would have to produce the declarant at trial whenever it uses the evidence to prosecute rather than investigate.[355] If the declarant is available for confrontation, the government is free to have others repeat the declarant's out-of-court statement subject only to the rules of evidence. Whatever additional cost the Clause imposes on the criminal justice system is simply part and parcel of a constitutional system of rights designed to protect the people from government tyranny.[356]

VI. CONCLUSION

The Sixth Amendment exists as a check on the government's monopoly over its power of prosecution by arming the criminal defendant to effectively participate in an adversarial criminal justice system. This Article proposes replacing the primary purpose test with a state action test for triggering the right of confrontation to ensure the right will play its intended role in conjunction with the holistic goals of the Sixth Amendment to satisfy the constitutionally mandated adversarial system. Where the declarant is a government actor, the statement was solicited by a government actor, or the government commands, encourages, or facilitates a private person to solicit statements from a declarant, any statements made must be considered the product of state action and therefore subject to the right of confrontation. Confrontation's purpose is twofold: it guarantees the constitutionally mandated advocate for the defendant has the opportunity to cross-examine those with firsthand knowledge of the facts, and it empowers the jury, rather than the judge, to evaluate the reliability of the government's evidence. The focus on state action in the creation of the out-of-court statement would ensure the proper function of the Confrontation Clause.

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354. *See Williams*, 567 U.S. at 97–98 (Breyer, J., concurring):

> [T]he additional cost and complexity involved in requiring live testimony from perhaps dozens of ordinary laboratory technicians who participate in the preparation of a DNA profile may well force a laboratory "to reduce the amount of DNA testing it conducts, and force prosecutors to forgo forensic DNA analysis in cases where it might be highly probative.

355. *See Melendez-Diaz*, 557 U.S. at 325–26 (noting that approximately 95% of convictions are guilty pleas, and that few "defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis").

356. *Ex parte* Milligan, 71 U.S. 2, 119–20 (1866):

> [I]t is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.