RESOLVING THE AMBIGUITY BEHIND THE BRIGHT-LINE RULE: THE EFFECT OF *CRAWFORD V. WASHINGTON* ON THE ADMISSIBILITY OF 911 CALLS IN EVIDENCE-BASED DOMESTIC VIOLENCE PROSECUTIONS

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Crawford v. Washington *changed the focus of Confrontation Clause jurisprudence. Before* Crawford*, hearsay could be admitted against a criminal defendant if the declarant was unavailable and the statement bore sufficient indicia of reliability. After* Crawford*, the central focus is no longer on a statement's reliability, but on whether the statement was "testimonial" in nature. Although the Court did not define the word "testimonial," the author teases out three possible definitions of "testimonial" from the Court's opinion in* Crawford*. In light of the dual function of 911 calls, and the peculiar phenomenon of domestic violence, the author suggests that five factors are relevant to whether any statement made during the course of a 911 call reporting an incident of domestic violence is "testimonial." The author proposes that courts use these five factors on a case-by-case basis to determine whether such statements are testimonial.*

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.[1]

I. INTRODUCTION

Consider the following scenario. A woman, Jane, calls 911 after being beaten by her husband. The operator asks, "What's the emergency?" Jane, stuttering and gasping, tells the operator that her husband just threw her against the wall and hit her. The operator asks for Jane's address; Jane gives a vague description and pleads again for the operator to send help right away. The questions continue—Is her husband still there? Are there weapons around? What does her husband look like? What is her husband wearing? Jane answers as best she can; her answers are inaudible at times and muffled at others. Amid the responses, the

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1. U.S. CONST. amend. VI.

operator hears a baby crying, something banging against a door, and a male voice screaming. The police arrive, take Jane's husband into custody, and several days later the prosecutor files criminal charges against him. Before trial, Jane changes her story; she now maintains that her husband did not beat her and refuses to testify against him. Without Jane, the prosecutor's only chance to prove the assault lies in the admission of the statements Jane made to the 911 operator. If Jane refuses to testify, thereby removing any opportunity for Jane's husband to "confront" her, may the court nevertheless admit the 911 call to prove that the assault occurred?

For nearly a quarter of a century, the answer to this question turned on the "reliability" of Jane's statements.[2] Since *Crawford v. Washington* was decided on March 8, 2004, however, the answer to this question turns on whether Jane's statements were "testimonial" in nature.[3] The *Crawford* Court did not define "testimonial," even though it acknowledged that leaving the definition open would cause "interim uncertainty."[4] The definition of "testimonial" will play a significant role in resolving a variety of issues that the Court did not address in *Crawford*. One such issue concerns whether *Crawford* precludes the admission of hearsay evidence frequently used in criminal prosecutions involving domestic violence. Prosecutors have used hearsay exceptions to admit evidence and successfully try cases similar to Jane's based on evidence other than the victim's

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

3. Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

4. *Id.* at 68 n.10. After over a year and a half of "interim uncertainty" regarding the question of what qualifies as "testimonial," the Supreme Court recently agreed to revisit the issue. On October 31, 2005, the Supreme Court granted *certiorari* in *Davis v. Washington* to resolve the question of whether statements made by an alleged victim to a 911 operator that name her attacker are "testimonial," as defined by *Crawford* v. *Washington*. State v. Davis, 111 P.3d 844 (Wash. 2005), *cert. granted sub nom.* Davis v. Washington, 74 U.S.L.W. 3272 (U.S. Oct. 31, 2005) (No. 05-5224). The Court also granted certiorari in *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *cert. granted sub nom.* Hammon v. Indiana, 74 U.S.L.W. 3272 (U.S. Oct. 31, 2005) (No. 05-5705), and will hear the two cases in tandem.

In *Davis*, the Supreme Court of Washington held that the testimonial nature of statements made to a 911 operator should be analyzed on a case-by-case basis. *Davis*, 111 P.3d at 846. Further, the court held that a single 911 call could contain both testimonial and nontestimonial statements. *Id.* at 852. The specific question now before the U.S. Supreme Court is "[w]hether an alleged victim's statements to a 911 operator naming her assailant—admitted as 'excited utterances' under a jurisdiction's hearsay law—constitute 'testimonial' statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington*." *Davis*, 74 U.S.L.W at 3272 (citation omitted).

Hammon, in contrast, does not involve statements made to a 911 operator. Rather, the case involves the testimonial analysis of an alleged victim's statements to a police officer who went to the scene of the alleged crime in response to a domestic disturbance report. *Hammon*, 829 N.E.2d at 446–47. The Indiana Supreme Court made two primary findings. First, a statement that meets the "excited utterance" hearsay requirements is not necessarily "nontestimonial." *Id.* at 453. Second, statements made to a police officer are not necessarily testimonial; the testimonial status will depend on both "the intent of the declarant in making the statement and the purpose for which the police officer elicited the statement." *Id.* at 457. The U.S. Supreme Court, upon review of the case, will answer the question, "[w]hether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*." *Hammon*, 74 U.S.L.W. at 3272.

direct testimony in what has been labeled "evidence-based" prosecution.[5] As Jane's case illustrates, statements made to 911 operators by victims of domestic violence can play an essential role in domestic violence prosecutions when the victim later recants or refuses to testify.[6] Therefore, this note's analysis, which examines the effect of *Crawford* on the admissibility of statements made during 911 calls in evidence-based domestic violence prosecutions, can be both important and timely.

Part II will sketch the background of the Confrontation Clause from *Ohio v. Roberts* through its displacement by *Crawford*. Part II then describes the unique phenomenon of domestic violence and shows how growing awareness of it led to widespread use of evidence-based prosecutions.

Part III analyzes *Crawford*'s guidelines to determine if a statement is testimonial, how these guidelines affect the admissibility of victim statements in 911 calls, and how they may be considered "testimonial." Part III then analyzes the current admissibility status of these statements in light of the purpose of the Confrontation Clause, the guidelines and rationale set forth in *Crawford*, and the dual objectives of the 911 call system. This analysis reveals that a blanket prohibition on the admissibility of statements made by an unavailable victim in a 911 call in evidence-based prosecutions is not mandated by *Crawford*. Rather, whether the 911 call is "testimonial" should be determined on a case-by-case basis, in light of the purpose and nature of the 911 call and statements made during the call. Part IV proposes five factors that courts should consider in making determinations in specific cases.[7]

II. BACKGROUND

The Sixth Amendment's Confrontation Clause guarantees that, in all state and federal criminal trials, the accused will have the right to confront and cross-examine witnesses testifying against him.[8] Historically, courts and legal practitioners have not viewed the clause as a constitutional bar to all hearsay statements against a criminal defendant. Instead, until its displacement by *Crawford*, courts have followed a framework established in *Ohio v. Roberts* to determine when an unavailable witness's out-of-court statement was barred by the Confrontation

5. Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid*, PROSECUTOR, Nov.–Dec. 2004, at 14, 14.

6. Richard D. Friedman, *Adjusting to* Crawford: *High Court Decision Restores Confrontation Clause Protection*, CRIM. JUST., Summer 2004, at 9–10.

7. This note does not take a position on the *Davis* court's fact-specific holding regarding the admissibility of the declarant's 911 statements at issue in the case. However, the solution presented in Part IV does support the general approach articulated by the court in *Davis*. Specifically, this note supports the conclusion that the testimonial nature of each individual statement made by an alleged victim to a 911 operator must be determined on a case-by-case basis.

8. Pointer v. Texas, 380 U.S. 400, 406 (1965).

Clause.[9] In order to understand how *Crawford* affects the admissibility of 911 calls in evidence-based prosecutions, one must understand the history behind the *Crawford* decision, the Court's justification for superseding the *Roberts* test with a testimonial analysis, and how evidence-based prosecutions emerged to combat evidentiary problems in domestic violence prosecutions.

A. Crawford v. Washington

In *Crawford*, the Court dramatically shifted the focus of the Confrontation Clause inquiry. Under the old *Roberts* test, hearsay was admissible against a criminal defendant only if the declarant was "unavailable" and the statement bore sufficient "indicia of reliability."[10] The *Crawford* Court abrogated this test, holding that "testimonial" hearsay is admissible against a criminal defendant under the Confrontation Clause only if the declarant is unavailable and the accused had a prior opportunity to cross-examine the declarant.[11]

Michael Crawford was charged with the assault and attempted murder of Kenneth Lee in August 1999.[12] In a police interrogation, Crawford's wife, Sylvia, corroborated a majority of her husband's story but differed in some relevant respects, including whether or not Lee drew a weapon before Michael Crawford stabbed him.[13]

At trial, Crawford claimed self-defense.[14] Sylvia did not testify due to a state marital privilege, but the trial court used the *Roberts* test to admit Sylvia's previously tape-recorded statements under the firmly rooted "statement against penal interest" hearsay exception, and Crawford was subsequently convicted.[15] The Washington Court of Appeals reversed the conviction, applying a nine-factor test to conclude that Sylvia's statements did not bear particularized guarantees of trustworthiness.[16] However, the Washington Supreme Court reinstated the trial court conviction, finding that the "interlocking" nature of Sylvia's and Michael Crawford's statements satisfied the reliability requirement.[17] Finally, the U.S. Supreme Court reversed the conviction.[18] The Court ana-

9. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).
10. *Id.*
11. Crawford v. Washington, 541 U.S. 36, 59 (2004).
12. *Id.* at 38.
13. *Id.* at 39.
14. *Id.* at 40.
15. *Id.* at 40–41.
16. *Id.* at 41. According to the court, despite the "interlocking" nature of Sylvia's statement with Michael Crawford's statements, discrepancies regarding whether or not Lee may have been holding something when Crawford stabbed him cast doubt on the reliability of the statements. *Id.*
17. *Id.* According to the Washington Supreme Court, the discrepancies used by the appellate court to deny admissibility actually showed that Sylvia and Michael Crawford were "'equally unsure'" about whether Lee was holding a weapon. *Id.* This overlap made Sylvia's statements more reliable. *Id.* at 42.
18. *Id.* at 69.

lyzed the historical underpinnings of the Sixth Amendment and concluded that the Confrontation Clause primarily focuses on "testimonial" statements. In so concluding, the *Crawford* Court dramatically shifted the focus of the Confrontation Clause inquiry.

Although the goal of the Confrontation Clause is to ensure that evidence is reliable, it is not a "substantive guarantee" of reliability.[19] Rather, the Confrontation Clause reflects a judgment that the best procedure for assuring reliability is cross-examination.[20] Thus, the Confrontation Clause inquiry does not focus on the reliability of out-of-court statements; instead, it focuses on whether the statement is "testimonial" in nature.

Unfortunately, the Court deferred any effort to explicitly define the words "per testimonial."[21] Absent an explicit definition, courts must look to the rationale behind the adoption of the *Crawford* test. Specifically, courts should consider the problems that arose under the *Roberts* test, the historical analysis used by the *Crawford* Court, and the broad principles laid down by the Court that give some shape to the definition of "testimonial."

1. Problems with the Roberts *Framework*

Under the *Roberts* test, a hearsay statement made by an unavailable declarant that was offered against a criminal defendant could be admitted if the witness was "unavailable," in the constitutional sense, and the statement was "reliable."[22] A statement was reliable if it fell within a "firmly rooted hearsay exception"[23] or bore "particularized guarantees of trustworthiness."[24] The *Crawford* Court found that the *Roberts* framework was inadequate because it was too broad, too narrow, and too unpredictable to meet the main confrontation principles articulated by the *Crawford* Court.[25]

First, the *Roberts* test was too broad because it applied the same analysis to hearsay statements regardless of whether they contained ex

19. *Id.* at 61.

20. *Id.*

21. The Court acknowledged that refusing to define testimonial would cause uncertainty, but noted that the uncertainty could "hardly be worse than the status quo." *Id.* at 68 n.10.

22. Ohio v. Roberts, 448 U.S. 56, 65–66 (1980).

23. Firmly rooted hearsay exceptions included the following: agent admissions, excited utterances, statements to treating physicians, dying declarations, prior testimony, public records, and business records. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 398 (2d ed. 2004).

24. *Roberts*, 448 U.S. at 66. Applying this test to the facts presented in *Roberts*, the Court concluded that the prosecution sufficiently proved both prongs. First, the declarant was unavailable in the constitutional sense because she was absent from trial, and the prosecution's five attempts to subpoena her proved unsuccessful. *Id.* at 76. Second, the unavailable declarant's statements were reliable because they were made at a preliminary hearing, and the defendant's questioning of the declarant at that hearing was equivalent to cross-examination. *Id.* at 70–71, 75.

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

parte testimony.[26] As a result, courts were excluding statements that were not necessarily a concern of the Confrontation Clause.[27] Conversely, because the test admitted "reliable" statements which contained ex parte testimony, the test was also too narrow to prevent "paradigmatic" Confrontation Clause violations.[28] The "unpardonable vice" of the test was its capacity to admit statements that the Confrontation Clause unmistakably intended to exclude, including accomplice statements and plea allocutions showing conspiracy.[29]

Moreover, the reliability standard was too unpredictable to provide the protection required by the Confrontation Clause. In general, trials are not limited only to "reliable" evidence; the trier of fact must consider all evidence.[30] Rather than bar all unreliable evidence, the Confrontation Clause ensures reliability by requiring that the evidence be tested by a method that best determines reliability: cross-examination.[31] A firmly rooted hearsay exception does not necessarily distinguish between unreliable and reliable evidence. By qualifying all firmly rooted hearsay exceptions as "reliable," the *Roberts* test left constitutional protections to "the vagaries of the rules of evidence."[32] Further, the "particularized guarantees of trustworthiness" standard was "manipulable" and "amorphous."[33] Courts were using a multifactor test for reliability that was subjective, unpredictable, and fell short of providing constitutional protection for confrontation violations.[34]

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 63–64.
30. Friedman, *supra* note 6, at 5–6.
31. *Crawford*, 541 U.S. at 61.
32. *Id.*
33. *See id.* at 41, 63.
34. As the Court highlighted:

> Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable. . . .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. For example, the Colorado Supreme Court held a statement more reliable because its inculpation of the defendant was "detailed," while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeting." The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given "immediately after" the events at issue, while that same court, in another case, found a statement more reliable because two years had elapsed.

Id. at 63 (citations omitted).

The *Crawford* proceedings in the courts below demonstrated the "unpredictable and inconsistent application" of the *Roberts* test. Each level of the state court relied on different reasons to convict, reverse, or reinstate the conviction. *Id.* at 65–66. Further, each court made assumptions that may have been undermined by cross-examination. For instance, the trial court concluded that Sylvia's statements were reliable because Sylvia was questioned by a "neutral" law enforcement officer, and she was "an eyewitness with direct knowledge." *Id.* at 66. However, the trial court ignored the fact that Sylvia told officers that she shut her eyes at one point. *Id.* The Washington Supreme Court relied on

2. An Original Meaning Archetype

"The *Crawford* opinion is an 'original meaning' archetype. It applies the words of the constitutional text informed by the historical context in which they were written and adopted."[35] *Crawford* draws on the language of the Confrontation Clause and its history to arrive at the two crucial principles that form the basis of the *Crawford* test.[36] To lay the historical foundation and give the Clause effect, the Court examined the application of confrontation principles in English common law and the Colonies.

The Court first focused on the trial of Sir Walter Raleigh in 1603 and used his treason conviction to illustrate the problems inherent in the civil-law examination system.[37] Raleigh's conviction was based on a set of out-of-court statements drawn from a letter and a private examination of Raleigh's alleged accomplice, Lord Cobham, despite Raleigh's demands that Cobham personally appear in court and allegations that Cobham lied to save himself.[38] Although Raleigh was convicted and sentenced to death, the admission of Cobham's letters revealed fundamental flaws in the English trial system.[39] Consequently, English law further developed the right of confrontation and, in 1848, Parliament made this equitable trial right to cross-examination an explicit statutory requirement.[40]

The Court also noted that the American Colonies protested controversial ex parte type examinations.[41] Many states' declarations of rights contained a right to confrontation.[42] Further, early state decisions after the adoption of the Sixth Amendment reaffirmed that the clause mandated a prior opportunity to cross-examination as a prerequisite for admissibility.[43]

Sylvia's statements, by concluding that the gaps in both her and Michael's statements made each "equally ambiguous" and that this ambiguity reinforced the interlocking nature of the statements. *Id.* Ultimately, the procedural history illustrated how the "open-ended balancing tests . . . do violence to [the Framers'] design." *Id.* at 67–68. In contrast, the Supreme Court held that because Crawford had no prior opportunity to cross-examine the witness, the testimony was inadmissible. *Id.* at 68.

35. John F. Yetter, *Wrestling With* Crawford v. Washington, *and the New Constitutional Law of Confrontation*, FLA. B. J., Oct. 2004, at 26, 28.

36. *See Crawford*, 541 U.S. at 47–56.

37. *Id.* at 44.

38. Raleigh argued, "'[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face.'" *Id.* (quoting Raleigh's Case, 2 How. St. Tr. 1, 15–16 (1603)).

39. Notably, a trial judge in Raleigh's case later commented, "'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'" *Id.* (quoting 1 D. Jardine, Criminal Trials 435, 520 (1832)).

40. *Id*. at 47.

41. *Id.* at 47–49.

42. *Id.* For example, the declaration of rights in Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire all contained a right to confrontation. *Id.*

43. *See* State v. Webb, 2 N.C. 103 (1794) (per curiam); State v. Campbell, 30 S.C.L. (1 Rich. 1844).

According to the Court, this history supported two main principles. First, the "principal evil" that the Clause sought to address was the civil-law use of ex parte examinations offered against the accused.[44] The Court reinforced this conclusion with the text of the Confrontation Clause, stating, "[the Clause] applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[45] Emphasizing the nature of the statements that concerned the Confrontation Clause, the Court further stated that, "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[46] Thus, the "focus" of the Confrontation Clause was "testimonial" statements.[47] Second, the law at the time of the Founding would not have allowed the admission of out-of-court testimonial statements unless the witness was unavailable and the defendant had an earlier opportunity to confront that witness.[48] Therefore, "[w]here testimonial evidence is at issue" and is used to prove the truth of the matter asserted, "the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination."[49] These principles, which the majority read into the Sixth Amendment, must be considered to establish the proper boundaries for the definition of "testimonial."

B. Evolution of Evidence-Based Prosecution

1. The Cyclical Nature of Domestic Violence

In the United States, a woman is beaten every 15 seconds.[50] It is estimated that up to ninety percent of battered women never report the abuse and that one in five victims are subject to repeated occurrences of abuse.[51] Domestic violence is "the emotional, physical, psychological, or sexual abuse perpetrated against a person by that person's spouse, former spouse, partner, former partner or by the other parent of a minor child."[52] The abusive relationship is often seen as a three-stage cycle: the tension builds in the first stage, results in a serious assault in the second stage, and decreases in the third stage.[53] The tension rebuilds again, and the violence becomes a pattern of behavior.[54]

44. *Crawford*, 541 U.S. at 50.
45. *Id.* at 51 (citations omitted).
46. *Id*.
47. *Id.*
48. *Id.* at 53–54.
49. *Id.* at 68–69.
50. Alana Dunnigan, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F. L. REV. 1031, 1038 (2003).
51. *Id.* at 1038–40.
52. *Id.* at 1038.
53. LENORE E. WALKER, THE BATTERED WOMAN 56–65 (1979).
54. *Id.* at 69.

Many domestic violence victims caught in this cycle experience feelings of "learned helplessness."[55] Victims experiencing learned helplessness often feel powerless when attempting to protect themselves or control the situation.[56] Studies indicate that many victims cannot "fully extricate themselves" from the relationship until their fifth attempt and wait until the seventh time they are assaulted before they call the police.[57] Thus, the learned helplessness, combined with the cyclical nature of domestic violence, creates a very powerful and controlling position for the abuser over the abused.

2. The Growing Awareness: Development of Evidence-Based Prosecutions

Until the battered women's movement of the 1970s, domestic violence was commonly understood to be a private issue between partners in a relationship.[58] Growing awareness has dramatically shifted society's perception of domestic violence away from that traditional belief and spurred a series of changes in the criminal justice system that allow police and prosecutors better to handle incidents of domestic violence.[59]

The criminal justice system first responded to domestic violence by criminalizing incidents of domestic violence as "assault."[60] Many states also enacted "mandatory arrest laws," which require an officer to make an arrest if the officer has probable cause to believe that a domestic violence crime occurred.[61] While the laws increased the number of domestic violence cases filed, prosecutors still faced great difficulties prosecuting those arrested because a large number of victims recanted their stories, requested that the charges be dropped, or refused to testify against the abuser.[62]

As a result of this victim reluctance, many state prosecutor's offices enacted "no-drop" policies.[63] "No-drop" policies take the decision to prosecute away from the victim and require prosecutors to pursue any

55. *Id.* at 174.

56. Dunnigan, *supra* note 50, at 1040.

57. Andrew King-Ries, Crawford v. Washington: *The End of Victimless Prosecution?*, 28 SEATTLE U. L. REV. 301, 319 (2005).

58. Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 9 (2004).

59. *Id.* at 8.

60. *Id.* at 13.

61. *Id.* at 15. At least twenty states and the District of Columbia have enacted these laws. *Id.* For example, Illinois State Police must "take action to protect the victim of domestic abuse" by arresting the abuser if there is probable cause that a crime was committed, accompany the victim to retrieve personal items from their home, and furnish transportation to a safe place. Illinois State Police, *Domestic Violence—What Must Police Do?*, http://www.isp.state.il.us/crime/dvwhatpolicedo.cfm (last visited Oct. 26, 2005).

62. Goodmark, *supra* note 58, at 16.

63. *Id.*

domestic violence case in which there is enough evidence to do so.[64] Nonetheless, the "no-drop" policies only eliminate the prosecutor's problem of a victim requesting that the case be dropped; prosecutors still reach an evidentiary impasse when the victim refuses to testify or recants a previous story. Some reports estimate up to an eighty-percent non-cooperation rate among battered woman.[65] Common reasons for this reluctance include hesitance to use the legal system against their partner, distrust of the legal system, and fear of retaliation.[66] Other factors, such as financial or emotional dependency, or hesitancy to break up the family, also prevent the victim from acting.[67]

To combat these problems, prosecutors have turned to evidence-based prosecution, also commonly referred to as victimless prosecution.[68] With an evidence-based prosecution, the prosecutor can proceed with criminal charges against the abuser regardless of whether the victim testifies.[69] Absent victim testimony, prosecutors build their cases with physical and other evidence such as photographs of injuries, witness statements, and statements made to medical personnel, social workers, and responding officers.[70] The victim's statements made during a 911 call can also play a crucial role in these prosecutions.[71] Often, the prosecutor needs the 911 call to prove essential elements of the crime; without a victim's testimony or a recording of the victim's 911 call, many domestic violence crimes cannot be successfully prosecuted.[72] Before *Crawford*, prosecutors relied on "firmly rooted hearsay exceptions," including the "excited utterance" and "present-sense impression" exceptions, to meet the *Roberts* reliability test and avoid violating the Confrontation Clause.[73]

Reliance on evidence-based prosecutions changed the way in which police and prosecutors approached domestic violence investigations and prosecutions.[74] The evidence-based approach is a powerful weapon for prosecutors fighting the domestic-abuse battle because it allows prosecu-

64. *Id.* Studies tracking the effectiveness of these policies have revealed that "no-drop" jurisdictions convict more batterers and dismiss fewer cases. *Id.* at 18.

65. Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 IND. L. REV. 687, 709 n.76 (2003).

66. Goodmark, *supra* note 58, at 16.

67. People v. Moscat, 777 N.Y.S.2d 875, 878 (Crim. Ct. 2004).

68. King-Ries, *supra* note 57, at 306.

69. Krischer, *supra* note 5, at 14. The rationale for evidence-based prosecution is threefold: domestic violence harms society, the initial description from the victim is likely the most accurate description, and the State should give weight to initial reports that are consistent with other evidence. King-Ries, *supra* note 57, at 306–08.

70. Goodmark, *supra* note 58, at 17–18.

71. *Id.* at 18.

72. *See Moscat*, 777 N.Y.S.2d at 878.

73. *See* Friedman, *supra* note 6, at 5; King-Ries, *supra* note 57, at 318–19.

74. King-Ries, *supra* note 57, at 310–11. Many police officers start their investigation assuming that the victim will not testify and make a greater effort to document demeanor, record statements, revisit victims, photograph injuries, save 911 calls, and take other steps to gather information. *Id.* at 310.

tors to take legal action against the abuser without relying on the victim's cooperation.[75] The new test articulated in *Crawford* threatens once again to change the way in which police and prosecutors approach domestic violence prosecutions.[76] One question attracting much attention is the status of statements made during 911 calls. Although *Crawford* will affect the admissibility of some 911 calls, a close examination of the Court's holding reveals that the *Crawford* testimonial guidelines do not mandate a categorical brand on all 911 calls as testimonial because a 911 call is not per se testimonial.

III. ANALYSIS

Discussing *Crawford*, Jeffrey Fisher, Michael Crawford's defense lawyer, commented,

> The lesson . . . is not that criminal defense lawyers (or anyone else) should woodenly advocate bright-line rules to the exclusion of fairness and justice. To the contrary, the lesson is that bright-line rules are often the best way to achieve fairness and justice. Certain rights can be preserved through strict enforcement of categorical guarantees, and when the Framers drafted certain rights in absolute terms, they had good reason to do so.[77]

Although *Crawford* established a rule based on this type of "strict enforcement of categorical guarantees,"[78] the vague "testimonial" concept has created a flood of questions. Even in the absence of a precise definition of "testimonial," however, a close examination of the *Crawford* Court's reasoning reveals that the new standard does not require courts to label all 911 calls in domestic violence prosecutions as testimonial. Rather, courts must consider the purpose and nature of each emergency call on a case-by-case basis to determine whether the statements are testimonial. To reach this conclusion, it is necessary to examine how the *Crawford* testimonial guidelines apply to 911 calls as well as the current legal positions adopted on the issue. This examination reveals that two *Crawford* testimonial formulations are applicable to 911 calls: interrogations and the "objective witness" standard. However, while the formulations are applicable to 911 calls, the dual purposes of the 911 system prevents categorical branding of all 911 calls as testimonial. Instead, the testimonial nature of a 911 call must be determined on a case-by-case basis. In so doing, courts can admit certain 911 statements when the caller is unavailable at trial, but continue to maintain the "categorical guaran-

75. Goodmark, *supra* note 58, at 17.

76. *See* Friedman, *supra* note 6, at 9–10; King-Ries, *supra* note 57, at 321–28; Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 607–15 (2005).

77. Jeffrey L. Fisher, *A* Blakely *Primer: Drawing the Line in* Crawford *and* Blakely, CHAMPION, Aug. 2004, at 18.

78. *Id.*

tees" and "achieve fairness and justice" within the scope of the Sixth Amendment's Confrontation Clause.

A. Crawford*'s Testimonial Guidelines*

Although the *Crawford* Court did not explicitly define "testimonial," it suggested that, at a minimum, prior testimony before a grand jury, at a former trial, or at a preliminary hearing, as well as statements made during police interrogations, are testimonial.[79]

The Court provided three possible "formulations" of the "core class of 'testimonial statements,'" noting that all three share a "common nucleus" because they "define the Clause's coverage at various levels of abstractions around it."[80] The first class includes "*ex parte* in-court testimony or its functional equivalent."[81] This category encompasses custodial examinations, affidavits, prior testimony that the defendant could not cross-examine, or "similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[82] The second class includes "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[83] The final group is composed of "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[84]

In addition, statements taken by a police officer during police interrogations are testimonial because of the "striking resemblance" a police interrogation bears to the examinations conducted by English Justices of the peace.[85] The *Crawford* Court noted that the examinations carried out by Justices of the peace under the Marian statutes had "an essentially investigative and prosecutorial" function.[86] In the absence of a "professional police force" in England until the nineteenth century, the Justices of the peace provided those "investigative functions now associated primarily with the police."[87] Regardless, "[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."[88] The Court later emphasized the focus on government involvement by noting that the "[i]nvolvement of government officers in the production of testimony

79. Crawford v. Washington, 541 U.S. 36, 51–52 (2004).
80. *Id.*
81. *Id.* at 51 (citation omitted).
82. *Id.* (citation omitted).
83. *Id.* at 51–52 (citations omitted) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).
84. *Id.* at 52 (citation omitted). This formulation was recommended by the National Association of Criminal Defense Lawyers (NACDL) in conjunction with the American Civil Liberties Union (ACLU) and the ACLU of Washington. *Id.*
85. *Id.*
86. *Id.* at 53.
87. *Id.*
88. *Id.*

with an eye toward trial presents unique potential for prosecutorial abuse."[89] Ultimately, however, the Court added to the ambiguity created by the vague testimonial standards by declining to define "interrogation."[90] Instead, it noted that "interrogation" is used in its "colloquial" sense rather than a "technical legal, sense."[91]

Thus, the Court suggested that affidavits, depositions, statements made during police interrogations, as well as testimony at a preliminary hearing, before a grand jury or at an earlier trial, would likely be considered "testimonial."[92]

B. The Effect of Crawford *on 911 Statements in Evidence-Based Prosecutions*

1. 911 Emergency System: The Dual Function Framework

A 911 call placed by a victim after an incident of domestic violence is one of the most common forms of evidence used by prosecutors in the evidence-based prosecution.[93] Typically, the victim "tells the 911 operator . . . that her [partner] has just shot, stabbed or beaten her (and may be about to do so again); usually, the woman hurriedly answers a few questions from the operator and then asks the operator to send police officers and an ambulance."[94] The uncertainty concerning whether 911 calls are testimonial stems from the dual functions served by the emergency call network and the two corresponding purposes that a caller may have for calling.[95] These two functions/purposes are: first, "to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous, situation" and, second, "to provide information to aid investigation and possible prosecution related to that situation."[96] The dual functions

89. *Id.* at 56 n.7.

90. "Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and [the Court] need not select among them . . ." *Id.* at 53 n.4.

91. *Id.*

92. *Id.* at 51. In contrast, some hearsay, including business records and coconspirator statements, would likely be considered nontestimonial. *Id.* at 56. Briefly addressing admissibility of nontestimonial hearsay, the Court used the 'Framer's intent' analysis and granted States the flexibility to develop hearsay law to govern this class of statements. *Id.* at 68. In dicta, the Court implied that states may be free to use the *Roberts* test or exempt nontestimonial statements from the Confrontation Clause inquiry altogether. *Id.* The *Crawford* decision also preserved the settled rule that the right of confrontation can be forfeited through misconduct or wrongdoing. *Id.* at 62 ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds"). Read in the context of Federal Rule of Evidence 804(b)(6), which makes admissible statements "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant," many testimonial statements may still be admissible if the accused forfeits his right to Confrontation, including statements made to police during a crime investigation. FED. R. EVID. 804(b)(6).

93. People v. Moscat, 777 N.Y.S.2d 875, 878 (Crim. Ct. 2004).

94. *Id.*

95. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1242 (2002).

96. *Id*.

served by the 911 system prevent one from categorically branding a victim's statements made during a 911 call as testimonial.

Two of the four main guidelines articulated in *Crawford* have the potential to qualify 911 statements as testimonial: (1) statements as a product of an interrogation,[97] and (2) statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[98] Thus, because of the dual objectives served by the 911 emergency system, and motives a caller may have for making statements during the call, the 911 call is not testimonial in nature under *Crawford*'s testimonial formulations. Instead, courts should consider the statements in each 911 call on a case-by-case basis.

2. *The* Crawford *Divides*

> Citing Raleigh's case as 'the paradigmatic confrontation violation,' the [*Crawford*] Court made clear that the term 'testimony' encompasses those modern day practices which bear 'closest kinship' to the inquisitorial abuses of 16th and 17th Century England. The question . . . is whether a recorded 911 call fits within this description.[99]

Courts and scholars have taken three positions. The first group adopts a narrow interpretation of "testimonial" and contends that the Confrontation Clause does not bar statements made in the 911 calls and that the statements pass the *Crawford* test.[100] In contrast, the second group, applying a broad testimonial interpretation, maintains that 911 calls that report crimes are testimonial per se.[101] Finally, the third group, now the majority of courts, does not categorically brand all calls as either testimonial or nontestimonial; instead, this group assesses the testimonial nature of the call on a case-by-case basis.[102]

97. *Crawford*, 541 U.S. at 53.

98. *Id.* at 52. By the plain terms of the first testimonial formulation articulated by the *Crawford* Court—"*ex-parte* in-court testimony or its functional equivalent . . . such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"—and the second formulation—"extrajudicial statements . . . contained in formalized testimonial materials"—a 911 call does not qualify as testimonial. A 911 call is initiated by the witness who is not in custody or under arrest, the statements are not made in a formal environment, and the call is an "informal report" made for the purpose of reporting a crime or requesting assistance. People v. Caudillo, 19 Cal. Rptr. 3d 574, 590 (Ct. App. 2004), *cert. granted*, 23 Cal. Rptr. 3d 294 (Cal. Jan. 12, 2005) (No. S129212).

99. Petition for Review at 6, *Caudillo*, 23 Cal. Rptr. 3d 294 (Nos. S129212, H026166) (citations omitted).

100. *See* White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring).

101. *See* People v. Cortes, 781 N.Y.S.2d 401, 415 (Sup. Ct. 2004).

102. People v. West, 823 N.E.2d 82, 91 (Ill. App. Ct. 2005); *cf.* People v. Moscat, 777 N.Y.S.2d 875, 879–80 (Crim. Ct. 2004); State v. Powers, 99 P.3d 1262, 1266 (Wash. Ct. App. 2004); *see also* Mosteller, *supra* note 76, at 613.

a. Group 1: Narrow Definition, Broad Admissibility

Scholars in the first group argue that courts should adopt the narrow definition of testimonial,[103] encompassing "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[104] While courts have yet to adopt the first position, a handful of legal scholars have pushed for the admissibility of 911 calls on these terms.[105] The idea that the Confrontation Clause is only applicable to "formalized testimonial materials" predates *Crawford.* Justice Thomas advanced the theory that the Confrontation Clause is focused on "formalized testimonial materials" in his concurrence in *White v. Illinois*.[106] Others support a collateral view that emphasizes the role of the government in preparing the statement in conjunction with the "formalized" characteristic.[107] This approach interprets the Clause as "encompass[ing] only those 'witnesses' who testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like."[108] Supporters of the "formalized testimonial materials" definition argue that 911 calls would not be prohibited by the Confrontation Clause. According to this argument, even if the 911 statements are "formalized" because they are recorded, the statements are nontestimonial because they are "preserved for purposes largely unconnected to the production of evidence for use at a later trial."[109]

103. King-Ries, *supra* note 57, at 319.

104. Crawford v. Washington, 541 U.S. 36, 51 (2004) (quoting *White*, 502 U.S. at 365 (Thomas, J., concurring)).

105. As stated, courts have not adopted this approach, but the arguments underlying the rationale bear noting because it highlights the extremely broad application of the blanket-prohibition approach. Consequently, one can see how the testimonial status of the calls must be determined on a case-by-case basis.

106. 502 U.S. at 365 (Thomas, J., concurring).

107. *See* Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045 (1998).

108. *Id.* Professor Amar grounds his interpretation of the Confrontation Clause "witness" by arguing that common sense and the text, history, and structure of the Constitution support his interpretation. *Id.* at 1046. First, Professor Amar asserts that the "common-sense understanding" of a "witness" is "someone who testifies in the courtroom," not any "eyewitness" to an event, even if the person never testifies. *Id.* Examining the Constitution, Amar highlights that other language in the Sixth Amendment confirms this interpretation because the whole text concerns "in-court rules" including "formal criminal 'prosecutions,'" with a "speedy and public trial" in front of "an in-court 'jury' hearing 'witnesses' and listening to the legal 'counsel' of the man who stands formally 'accused.'" *Id.* (citations omitted). Further, examining the Constitution as a whole, the Treason Clause, Fifth Amendment Self-Incrimination Clause, and Compulsory Process Clause—"the fraternal twin of the Confrontation Clause"—supports the idea that "witness" refers to in-court witnesses and the necessity of government involvement in preparation of the statement. *Id.* at 1046–47.

109. King-Ries, *supra* note 57, at 321 (arguing that the Court should adopt a testimonial definition that would not include excited utterances, present sense impressions, or statements to medical personnel because the nature of statements made in the domestic violence context are not testimonial, history indicates that the three hearsay exceptions should not be subject to the confrontation requirements, and policy favors admissibility).

This latter open admissibility approach has been criticized by the two other groups that concentrate their studies in this disputed area. One of the main weaknesses of the open admissibility approach is the overemphasis placed on formalization as sufficient to make a statement testimonial; while formalization may be necessary to make testimony *acceptable*, formalities are not necessary to make a statement testimonial.[110] Requiring formality to qualify a statement as testimonial would result in perverse incentives that encourage witnesses to make informal statements because statements that lack formality would be categorized as nontestimonial.[111]

The theory's requirement of government involvement in statement preparation also falls prey to criticism. While government involvement may cause a statement to be testimonial, categorizing all statements that lack this official participation as nontestimonial would overlook certain accusatory statements that the Confrontation Clause meant to exclude.[112] For instance, if a person voluntarily writes an accusatory statement and, of her own volition, delivers the statement to the police in a manner such that it is ready to be presented to the jury, it is hard to believe that the Confrontation Clause would not be concerned with the substantive use of this statement at trial, absent confrontation.[113] Further, the historical underpinnings of the Confrontation Clause also support the theory that government involvement is not a testimonial prerequisite. Throughout the sixteenth, seventeenth, and eighteenth centuries, many prosecutions were driven by private lawsuits against the accused.[114] However, the confrontation right was not lessened when the accuser was an adverse, private party, instead of the State.[115] Thus, a theory that only "formalized" materials or statements prepared through government participation can be testimonial is inconsistent with the rationale underlying the Confrontation Clause. While adopting this narrow definition would allow for open admissibility of 911 calls, the standard would also categorize many statements as nontestimonial, despite their apparent accusatory nature.

110. Friedman & McCormack, *supra* note 85, at 1246–47 ("The trouble with making formalization a prerequisite to coverage by the Confrontation Clause is that it gets matters almost precisely backwards. Formalities such as the oath are not necessary to render a statement testimonial. Rather, they are necessary, but not sufficient, to render testimonial *acceptable*.").

111. *Id.* at 1247. In making this argument, Friedman and McCormack specifically mention 911 calls as an example of the statements made which lack formality and would be encouraged with the perverse incentives. *Id.* The theory that nontestimonial statements would not trigger the Confrontation Clause requirements is based on the assumption that the Confrontation Clause is concerned only with testimonial statements. The *Crawford* Court alluded to, but did not firmly establish, the effect of its holding on nontestimonial statements after the upheaval of the *Roberts* reliability test. *See* Crawford v. Washington, 541 U.S. 36, 67–68 (2004).

112. Friedman & McCormack, *supra* note 95, at 1248–50.

113. *Id.* at 1249–50.

114. *Id.* at 1248–49. *But see* Amar, *supra* note 107, at 1048 (arguing that the Constitution mainly addresses "*state* action" and the Sixth Amendment guarantees are awakened by a State accusation against the accused).

115. Friedman & McCormack, *supra* note 95, at 1249.

b. Group 2: Broad Definition, Narrow Admissibility

The second group maintains that 911 calls that report crimes are testimonial because they are the product of interrogation, and that an objective person would reasonably believe that the statements would be used in future prosecutions.[116] The premise for this assertion is that when someone calls 911, she reports a crime and provides information regarding the people and circumstances connected to that crime.[117] Regardless of the caller's belief, "the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding."[118] Consequently, the statement, although oral, is "recorded as would a statement made to a police officer, a prosecutor or a prosecutor's stenographer who then writes it down."[119]

Additionally, the objective caller knows that the statements made when reporting a crime will be used in the related investigation and prosecution proceedings that follow.[120] Accordingly, because the reasonable caller is aware of the future use, the caller will choose to remain anonymous and refuse to reveal his or her identity.[121] The 911 system supports this choice with technology that allows the operator to track the caller's location through a phone number instead of demanding that the caller disclose his or her name.[122] Thus, "[t]he 911 call reporting a crime preserved on tape is the modern equivalent, made possible by technology, to the depositions taken by magistrates or JPs under the Marian committal statute,"[123] and is per se testimonial.

While the open admissibility afforded by the "formalized testimonial materials" approach is too narrow, the categorical brand on 911 calls as per se testimonial in domestic violence prosecutions is too broad. As discussed in more detail in the following section, in the context of domestic violence situations, 911 calls are not always the product of an interrogation, and an objective witness might not reasonably believe her statements will be used in future prosecutions. The dual purposes served by the emergency call system, specifically, the reporting of crimes and request for immediate assistance, make it impossible to characterize all 911 statements as testimonial. Therefore, 911 calls are not per se testimonial and should instead be examined on an individual case-by-case basis.

116. People v. Cortes, 781 N.Y.S.2d 401, 404–05, 414 (Sup. Ct. 2004).
117. *Id.* at 415.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

3. Is a 911 Call an Interrogation?

a. What Is an "Interrogation" in the "Colloquial" Sense?

An interrogation by law enforcement officers is among the core class of testimonial statements that concern the Sixth Amendment.[124] When one categorizes the substance of all emergency calls that report crimes as statements "provided in response to an interrogation, the purpose of which was to gather evidence for use in a criminal prosecution," one necessarily brands the statement as testimonial in nature.[125] However, this broad categorization of 911 calls is inaccurate. The Court's historical reasoning, and the Court's application of the interrogation concept to the factual scenario presented in *Crawford*, reveals that statements made in 911 calls are not always in response to an interrogation and, consequently, are not per se testimonial.

The *Crawford* Court analogizes a police interrogation to the English Justices of the peace pretrial examinations of witnesses and victims.[126] Under the Marian statutes, Justices of the peace examined suspects and witnesses to make determinations regarding bail and pretrial detention and were required to "bind over or issue an order compelling the victim and accusing witnesses to appear at trial."[127] While the suspects examined were already in custody and an arrest was assumed, the same was not true for the witnesses.[128] Instead, witnesses were not in custody and were brought before a Justice of the peace in "a modestly formal setting," such as a parlor.[129] Despite the fact that, in the modern criminal justice setting, interrogations are conducted by police officers rather than by Justices of the peace or magistrates, the common characteristic at the center of the historical analogy was that the government officer had "essentially [an] investigative and prosecutorial function."[130]

The *Crawford* opinion sheds further light on the elements of an "interrogation." First, although the Court declined to define "interrogation,"[131] the Court noted that it was using the term in its "colloquial, rather than any technical legal, sense."[132] Second, the *Crawford* Court stated that a recorded statement "knowingly given in response to structured police questioning, qualifies under any conceivable definition [of interrogation]."[133] From these clues, one can identify three elements that

124. Crawford v. Washington, 541 U.S. 36, 53 (2004).
125. People v. West, 823 N.E.2d 82, 91 (Ill. App. 2005).
126. *Crawford*, 541 U.S. at 53.
127. Mosteller, *supra* note 76, at 559.
128. *Id.*
129. *Id.*
130. *Crawford*, 541 U.S. at 53.
131. *Id.* at 53 n.4.
132. *Id.* The Court cited *Rhode Island v. Innis*, 446 U.S. 291 (1980), as a comparison. *Innis* defined "interrogation" as "express questioning or its functional equivalent." *Id.* at 300–01.
133. *Crawford*, 541 U.S. at 53. The Court used this rationale when categorizing Sylvia Crawford's recorded statement as testimonial.

can help define "interrogation" in the "colloquial" sense: (1) "knowingly given" by the witness; (2) the witness is responding to a government officer's questions; and (3) the government questioning is "structured."

Therefore, from the Court's analogy to examinations conducted by Justices of the peace, description of "interrogation," and application of "interrogation" to the facts of the case, there are four factors to help determine whether a 911 call is an "interrogation." The four factors are: (1) statements *knowingly* given by the witness; (2) the witness is *responding* to government officer questioning; (3) the government questioning is "*structured*"; and (4) the questioning officer is acting in an "*investigative and prosecutorial" function*. The last two factors, explicitly highlighted as the minimal requirements of an interrogation, are the two characteristics which most conflict with the dual-function framework of the 911 system. In the context of emergency calls placed by victims of domestic violence, the interaction between the victim and operator is not always characterized by these four factors.

b. The Effect of the Dual Function Framework on the Elements of an Interrogation

A victim may call 911 in order to "gain immediate official assistance in ending or relieving an exigent, perhaps dangerous, situation" or to report information that will further or aid an investigation and future prosecution.[134] Simultaneously, the operator may adopt a role which functions as an emergency-service provider responding to a plea for help or, conversely, a role that requires the operator to serve in his or her "investigative and prosecutorial" capacity.[135] The situation becomes even more complicated when the caller has multiple motives for placing the call or the operator adopts both roles when responding. Three of the four factors stated above—namely, the statement is made knowingly, the witness is responding to government officer questioning, and the questioning is "structured"—remain relatively consistent in either or all of these circumstances and generally weigh in favor of viewing the 911 call as an "interrogation." However, the same cannot be said for the fourth factor. Ultimately, whether the call is, in effect, an "interrogation" for purposes of the Confrontation Clause hinges on the purpose behind the call and the role adopted by the operator.

i. Factors One and Two: Statements Knowingly Made in Response to Government Officer Questioning

The first factor is clearly met in the 911 scenario. The caller dials 911 and speaks directly with a 911 operator. Thus, the statement is

134. Friedman & McCormack, *supra* note 95, at 1242.
135. Friedman, *supra* note 6, at 10.

knowingly made. The second factor—whether the witness is responding to government officer questioning—has two subissues: who initiated the call and whether the operator is a government officer. While courts have considered both of these subissues, neither is dispositive and this factor consistently favors the position that a 911 call is an interrogation.

First, the nature of the emergency call system requires the caller to initiate the communication. Because the caller must seek out the government, rather than the government seeking out the witness and initiating communication, some courts take the position that the statement is nontestimonial.[136] However, critics are quick to point out that courts should not place so much emphasis on this consideration because nothing in *Crawford* suggests that this factor is dispositive.[137] Further, if this consideration were outcome determinative, it would create absurd results. For instance, "a two-hour question-by-question police interview would be considered nontestimonial, provided a witness walked down to the police station on his own initiative."[138] Such statements are paradigmatic concerns of the Confrontation Clause, so they cannot be admissible by virtue of being nontestimonial unless the accused has had an opportunity to cross-examine the declarant. Therefore, the fact that the caller seeks out the government by placing the call does not conclusively determine whether a 911 call is testimonial in nature.

Second, 911 systems are not uniformly operated by the government. Depending on the area, the 911 system may be operated by a governmental agency,[139] a regional telephone company, or another private organization.[140] It could be argued that, even if a private organization or telephone company owns and operates the system such that the caller does not actually speak with a government officer, the private organization may still have a contract with the government,[141] and thereby be an

136. People v. Moscat, 777 N.Y.S.2d 875, 879 (Crim. Ct. 2004) ("A testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call, it is the citizen who summons the government to her aid."); *see also* People v. Corella, 18 Cal. Rptr. 3d 770, 776 (Ct. App. 2004) (emphasizing that the abused wife in a domestic violence dispute initiated contact by calling 911 to request help).

137. Petition for Review at 10, People v. Caudillo, 23 Cal. Rptr. 3d 294 (Nos. S129212, H026166).

138. *Id.*

139. For instance, in the City of Chicago, 911 services are regulated by the Office of Emergency Management and Communications. City of Chicago, Questions about 911, http://egov.cityofchicago.org/city/webportal/portalDeptCategoryAction.do?BV_SessionID=@@@@0693548907.1108251748@@@@&BV_EngineID=cccdadddkgejkfkcefecelldffhdfgn.0&deptCategoryOID=536886518&contentype=COC_EDITORIAL&topChannelName=Dept&entityName=Emergency+Communications&deptMainCategoryOID=-536886518 (last visited Oct. 26, 2005) [hereinafter Questions about 911]. Chicago is divided into thirteen radio zones and calls are routed to the appropriate zone depending on the call origin. City of Chicago, Use 9-1-1 to Report Emergencies, http://egov.cityofchicago.org/city/webportal/portalContentItemAction.do?BV_SessionID=@@@@2124011918.1130380677@@@@&BV_EngineID=ccceaddfmfdjgkfcefecelldffhdffn.0&contentOID=11629&contenTypeName=COC_EDITORIAL&topChannelName=HomePage (last visited Oct. 26, 2005) [hereinafter Use 9-1-1 to Report Emergencies].

140. Friedman & McCormack, *supra* note 95, at 1250.

141. *Id.* at 1251.

agent of the government. Proponents of this "agency theory" acknowledge that it stretches the concept of agency because, even with a contract, a nongovernment operator would likely be considered an independent contractor.[142] Nevertheless, recent opinions issued in the wake of *Crawford* have established a type of government-agency theory, holding that statements made to private agents may be testimonial when the agent "serv[es] as a proxy for the police"[143] or as a "prosecutorial arm of the State."[144]

Leaving aside the agency theory, however, it is generally accepted that a citizen calls 911 in order to request *government* assistance.[145] Even if the 911 caller knows that the operator is not a police officer, the caller knows that her statements will be relayed to the police.[146] Therefore, when evaluating whether a 911 call is an interrogation, an inquiry into whether the caller is *responding* to a *government officer's* questions should not be a controlling factor.

ii. Factor Three: The Necessity of Structured Questioning in an Emergency Situation

The third factor, structured questioning, is sometimes analyzed in conjunction with the fourth factor, whether the questioning officer acts in an "investigative or prosecutorial" function.[147] The nature of the emergency call system necessitates that the operator's questioning maintain a certain degree of structure. However, regardless of whether the structured nature of 911 questioning is considered independently or jointly with the fourth factor, formal or controlled questioning does not necessarily make the statements testimonial.

When a caller reaches the operator, the operator "ask[s] critical questions to determine the nature of the emergency" and "gather[s] key details to provide accurate and specific information to the emergency responders."[148] Because of the dual purpose of the 911 emergency systems, structured questioning is necessary to distinguish between emergency and non-emergency situations. When the operator answers a 911 call, "his/her first task is to determine if the caller is reporting an emer-

142. *Id.*

143. State v. Mack, 101 P.3d 349, 352 (Or. 2004) (holding that a child's statements to a social worker were testimonial when the social worker took over the interview for a police officer who could not establish a dialogue with the child).

144. T.T. v. T.T., 815 N.E.2d 789, 801 (Ill. App. Ct. 2004).

145. *Cf.* People v. Corella, 18 Cal. Rptr. 3d 770, 776 (Ct. App. 2004); People v. Moscat, 777 N.Y.S.2d 875, 879 (Crim. Ct. 2004) ("[I]n a 911 call, it is the citizen who summons the government to her aid.").

146. "[A] 911 caller knows that, even if she is not connected to the police, her message will be transmitted to the police." Friedman & McCormack, *supra* note 95, at 1250.

147. *See* discussion *infra* Part III.B.3.b.iii.

148. Questions about 911, *supra* note 139.

gency."[149] If the nature of the call is not readily apparent, the operator must ask questions that will help establish the reason for the call and what assistance is necessary.[150] Once the call-taker establishes the purpose of the call (emergency or non-emergency reporting), "the call can procede [sic] one of two ways—either quickly begin a series of questions to obtain the necessary information to assist the caller with the emergency, or a more leisurely conversation to obtain information."[151] Thus, if the caller is reporting an emergency, the call-taker proceeds through a more structured set of questions aimed at gathering the essential information so that authorities know how to respond.[152] Consider the following description regarding the emergency-call procedures:

> The call-taker obtains the information in a particular order—the location of the incident is critical so that an incident can be entered in (usually) the computer-aided dispatch (CAD) system, and officers can be dispatched. The offense should be determined so the proper response (number and type of officers) can be dispatched. Next, the call-taker determines the presence of any weapons, to insure safety. Next the call-taker asks about the descriptions of any persons or vehicles invovled [sic], information about the caller or witness so that an officer can contact them for statements and reports, and then a series of re-questioning of the caller to obtain more detailed information, or anything that has occurred while the caller has been on the telephone. If the caller is reporting an in-progress crime, the call-taker may keep the person on the line and relay more information to the officers via the radio dispatcher.[153]

In contrast, the call-taker in a non-emergency setting may ask the same type of questions, "but the order can be varied, since there is usually less urgency."[154]

Ultimately, the urgency of the emergency-call situation demands a more structured approach to the questioning; without structure, the system would not provide adequate assistance in emergency situations. The structured questioning may or may not be tied to investigatory or prosecutorial functions. Thus, although structured questioning may suggest that the statements elicited are the product of an interrogation and testimonial in nature, this characterization is not always accurate. One court has maintained that 911 calls are formal statements that "follow established procedures, rules, and patterns of information collection."[155] However, it seems more likely that, in the context of 911 calls, requests

149. *Public Safety Dispatching*, *Call-Taking Process,* DISPATCH MONTHLY MAG. (1999), *available at* http://www.alldispatch.com/info/calltalking/calltaking/calltaker.html [hereinafter *Public Safety Dispatching*, *Call-Taking Process*] (follow "Emergency" hyperlink).

150. *Id.*

151. *Id.*

152. *Id.* (follow "emergency" hyperlink; then follow "yes" hyperlink).

153. *Id.*

154. *Id.*

155. People v. Cortes, 781 N.Y.S.2d 401, 406 (Sup. Ct. 2004).

for immediate assistance in emergency situations require the operator to follow patterned questioning in order to "determine the appropriate response."[156] Non-emergency calls, on the other hand, allow the operator more discretion to avoid structured questioning and gather information for uses other than providing emergency assistance. Thus, the existence of structured questioning may be a sign that the interaction between caller and operator is not an interrogation, but rather a response to a plea for help, which does not produce testimonial statements.

Further, while this proposition seems contrary to the four interrogation factors identified, it may be the case that a structured questioning requirement is "historically inaccurate."[157] Many of the witnesses examined by Justices of the peace were "extremely willing witnesses."[158] Thus, "[w]hile the magistrates had a clear prosecutorial bent, leading, rather than clarifying questions were likely unnecessary."[159] This historical evidence suggests that structured questioning was not essential to early magistrate interrogations. Therefore, while "structured questioning" may be evidence of an interrogation, it is neither necessary nor sufficient to qualify a 911 call as an interrogation.

iii. Factor Four: The "Investigative and Prosecutorial" Function and the Dual Roles of the 911 Operator

The first three interrogation characteristics are generally found in 911 calls, but are not necessarily indicative of the testimonial or nontestimonial nature of the calls. As such, one must ultimately look to the fourth factor, whether the questioning officer acts in an "investigative and prosecutorial" function, to make this determination. The existence of this final element is dependant on the operator's belief regarding the underlying purpose of the call. Because of the dual functions of the 911 system, an operator who fields a call could potentially be speaking with a caller in an emergency situation who is in need of immediate assistance or, in the alternative, to a caller who is in a non-emergency situation and is reporting a crime. The motive behind the operator's questioning is dramatically different, depending on which situation he is confronted with.

When the caller is reporting an emergency, the operator asks "a series of questions to obtain the necessary information to assist the caller with the emergency."[160] The 911 call is made "while an assault or homi-

156. "Not only is a victim making a 911 call in need of assistance, the 911 operator is determining the appropriate response, not conducting a police interrogation in contemplation of a future prosecution." People v. Corella, 18 Cal. Rptr. 3d 770, 776 (Ct. App. 2004).

157. Mosteller, *supra* note 76, at 568.

158. *Id.*

159. *Id.*

160. *Public Safety Dispatching, Call Taking Process*, *supra* note 135 (follow "emergency" hyperlink).

cide is still in progress" or "in the *immediate* aftermath of the crime" and can be seen as "part of the criminal incident itself, rather than as part of the prosecution that follows."[161] In the domestic violence context, the victim "literally calls out to the state for assistance, and the state does not initiate the contact to produce incriminating information."[162] The operator is an active participant in the exchange because he must determine what response is appropriate in the situation.[163] The "response" may be an attempt to ensure the immediate safety of the caller,[164] responding officers, or other civilians.

In contrast, in a non-emergency situation or a "cold crime" situation,[165] the operator's primary purpose is not to determine what assistance is immediately necessary to resolve an urgent situation, but to "determine that the call[er] has witnessed or been the victim of a crime, and that an officer must take a report" or "that some other type of action is necessary to assist the caller."[166] The operator's questions in the emergency situation are primarily directed at resolving the urgency. The operator uses the questions and answers as a vehicle to reach this goal. In contrast, the primary goal of questioning in the non-emergency situation is to obtain the information for investigatory or prosecutorial purposes. The questions and answers are not a means to an end, but the end itself.

In this latter situation, the 911 call may become an "interrogation" in the colloquial sense. Even if the questions asked in the non-emergency situation are similar to those asked in the emergency situation, the underlying purpose of the call should determine whether the exchange is an interrogation.

This analysis suggests that the determinative factor in the interrogation analysis will most often be the fourth factor, namely, whether the questioning officer is acting in an "*investigative and prosecutorial" capacity*. Nevertheless, some argue that 911 calls, especially those that report crimes, are testimonial because they are interrogations.[167] Citing the *Crawford* Court's reference to "formal" statements, this argument emphasizes that the 911 call is formal: "[t]hey follow established procedures, rules, and patterns of information collection; they are conducted in due form."[168] However, this standard is too broad because it sweeps

161. People v. Moscat, 777 N.Y.S.2d 875, 880 (Crim. Ct. 2004).

162. King-Ries, *supra* note 57, at 322–23.

163. People v. Corella, 18 Cal. Rptr. 3d 770, 776 (Ct. App. 2004).

164. State v. Wright, 686 N.W.2d 295, 303 (Minn. Ct. App. 2004) (holding that statements made to a 911 operator to report that the defendant threatened the caller and the caller's younger sister and pulled a gun on them were not testimonial because the dialogue was aimed at ensuring caller safety and resolving "an emergent situation").

165. *Public Safety Dispatching, Call Taking Process*, *supra* note 135 (follow "Cold Crime?" hyperlink).

166. *Id.*

167. People v. Cortes, 781 N.Y.S.2d 401, 405 (Sup. Ct. 2004).

168. *Id.* at 406.

all calls that report a crime, either purposefully or incidentally, into the testimonial category.[169]

Even if some 911 calls that report a crime produce statements that are the result of an interrogation, one cannot overlook the fact that the 911 call serves two purposes. These two purposes help distinguish questions asked for investigatory or prosecutorial purposes from those made to obtain appropriate emergency assistance. When an operator determines that the caller is seeking emergency assistance, he asks questions to ensure that the most effective assistance is delivered. That the caller incidentally may also report a crime should not automatically make the entire call testimonial because the purpose of questioning is not always to gain information for a future investigation or prosecution. Stated another way, the primary purpose of the questioning and the 911 call is not always "the electronic equivalent of sending a constable to the scene of the crime to take statements from witnesses."[170] Instead, the 911 call may be "a hurried and panicked conversation between an injured victim and a police telephone operator [which] is simply *not* equivalent to a formal pre-trial examination by a Justice of the Peace."[171] In this circumstance, the call could be considered "the electronically augmented equivalent of a loud cry for help," which was not the focus of the Confrontation Clause or *Crawford*.[172]

When considering statements made in a 911 call that reports an ongoing crime and relevant descriptions, *Crawford* requires one to ask if the statements were the "product of interrogation."[173] One must be careful not to broadly sweep all statements made in 911 calls that report crimes into the interrogation definition; it is only when the operator asks questions with an investigative or prosecutorial purpose that the 911 call can be categorized as an interrogation and, therefore, the statements as testimonial. This distinction is particularly important in the context of domestic violence. "Statements in a 911 call by a victim struggling for self-control and survival only moments after an assault simply do not

169. Consider the leading case for this broad proposition, *People v. Cortes*. The *Cortes* court held that statements made in a 911 call by a third party who "report[ed] observations of a shooting" were the "product of 'interrogation.'" *Id.* at 402. The caller reported that he "just saw a man running with a gun," the 911 operator followed with questions regarding the location of the shooter, the direction in which the shooter was headed, and what the shooter looked like. *Id.* at 404. The caller then stated, "he's shooting at him, he's shooting at him . . . . He's killing him, he's killing him, he's shooting him again." *Id.* The *Cortes* Court ruled that "[w]hen a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding; it makes no difference what the caller believes." *Id.* at 415. Analogizing the 911 call to report a crime to the Justices of the Peace or Magistrate depositions, the *Cortes* Court noted, "[t]he 911 call reporting a crime preserved on tape is the modern equivalent, made possible by technology, to the depositions taken by magistrates or JPs under the Marian committal statute." *Id.*

170. Petition for Review at 14, People v. Caudillo, 23 Cal. Rptr. 3d 294 (2005) (Nos. S129212, H026166).

171. People v. Moscat, 777 N.Y.S.2d 875, 880 (Crim. Ct. 2004).

172. *Id.*

173. *Cortes*, 781 N.Y.S.2d at 404.

qualify as knowing responses to structured questioning in an investigative environment in which the declarant reasonably expects that the responses will be used in later judicial proceedings."[174]

4. The Reasonable Belief of the Objective 911 Caller

Among the three formulations articulated in the *Crawford* opinion, the broadest is the "objective witness'" reasonable belief standard.[175] The standard would consider as testimonial "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[176] The justification for this formulation is that an objective witness who makes a statement with this reasonable belief is, in effect, "bearing witness" within the meaning of the Confrontation Clause.[177]

a. The Effect of the 911 Dual Function Framework on the Objective Witness Standard

The primary focus of the Confrontation Clause is to minimize the use of statements made in private, ex parte examinations, when the defendant is not afforded an opportunity to confront the witness at trial.[178] Similar to an interrogation analysis, 911 calls present difficulties because of the dual purposes served by the call system. As stated earlier, the 911 call system is typically used to gain assistance in an emergency situation as well as to gather information for law enforcement and prosecution.[179] By the terms of the objective standard, the possibility of two different purposes for the call necessitates an inquiry into the caller's motive for placing the call, which will likely include an examination of the surrounding circumstances.[180] However, in the domestic violence context, the motives are not easily discernible.[181] The dual purpose system combined

174. State v. Wright, 686 N.W.2d 295, 302 (Minn. Ct. App. 2004).

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

176. *Id.* (quoting Brief of Amici Curiae The National Ass'n of Criminal Defense Lawyers et al. in Support of Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02-9410)).

177. People v. West, 823 N.E.2d 82, 91 (Ill. App. Ct. 2005).

178. *Crawford*, 541 U.S. at 52–54.

179. Friedman & McCormack, *supra* note 95, at 1242.

180. This distinction is crucial, especially when applied to the domestic violence situation. Because of the patterned behavior in domestic violence cases, the victim may have repeated exposure to the criminal justice system. King-Ries, *supra* note 57, at 320. Under the subjective approach, 911 calls made under these circumstances will likely always be deemed testimonial because a victim who has had prior exposure to the system could have a "reasonable expectation" that the statements would be used at trial. *Id.* In contrast, an objective standard and consideration of the circumstances under which the 911 call is placed may or may not result in the categorization of the 911 call as testimonial. *See* discussion *infra* Part III.B.4.b.

181. King-Ries also noted that results will also depend on what standard courts use when defining the "objective witness." King-Ries, *supra* note 57, at 320. If the objective witness is a "reasonable person without experience in domestic violence—and therefore without experience with the criminal justice system," the 911 call may be admissible. *Id.* However, if the Court uses an "average domestic violence victim" standard with repeated exposure to the system, then the statement will likely be sub-

with the repetitive and oppressive nature of domestic violence creates problems in the application of the objective standard.

b. The Gray Area: Mixed Motive Calls and Mixed Purpose Questioning

When advocating for the objective standard in *Crawford*, the NACDL and ACLU specifically noted the standard's applicability to the 911 scenario.[182] According to those organizations, because of the dual role of the 911 system as a part of the law enforcement and emergency response system, the testimonial status of the statement under the standard depends on "which capacity the caller [is] using when contacting the system."[183] Generally, when the caller's motive and circumstances are clear, a testimonial analysis will not be difficult. However, this is not often the case in 911 domestic violence calls. Because of the dual functions of the 911 system, the analysis becomes increasingly complex in "mixed motive" situations where the declarant is unavailable to clarify her motive and the circumstances surrounding the call fail to suggest a motive.[184] The "mixed motive" scenario is one of the major difficulties one encounters when applying this standard.[185]

Thus, because some calls serve as a plea for help, one cannot categorize all 911 calls as "statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[186] In this situation, when "the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril," the caller does not necessarily contemplate the future criminal charges.[187]

Critics might argue, however, that it is unreasonable not to know that statements made during a 911 call could be used later in a criminal

ject to the testimonial requirements. *Id.* This note does not make a distinction between the two versions of an objective standard. Instead, the repeated exposure element is considered as a "circumstance" under which the 911 call is placed. *See infra* Part IV.B.5.

182. Brief of Amici Curiae the National Association of Criminal Defense Lawyers, et al. in Support of Petitioner at 25, *Crawford* 541 U.S. 36 (No. 02-9410) [hereinafter NACDL Brief].

183. *Id.*

184. SIMONS CALIFORNIA EVID. MANUAL § 2:114 (2005 ed.).

185. The significance of this problem in the domestic violence context was highlighted in a recent concurring opinion:

> There will be . . . many cases where the 911 caller has multiple expectations and/or motives. In a domestic violation situation, for example, the caller . . . may genuinely be frightened, but nevertheless fully cognizant that what she says may be used by the state to investigate and prosecute the assailant. This is particularly true when the 911 call occurs hours or days after the assault. Depending on the circumstances, the call may . . . be testimonial because the caller is likely to believe and/or understand that her statements will be used at a later trial; indeed that may be the primary purpose for the call. Similarly, some 911 calls are made specifically to invoke the investigation and prosecutorial function of the police.

State v. Wright, 686 N.W.2d 295, 309 (Minn. Ct. App. 2004) (Hudson, J., concurring in part and dissenting in part).

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

187. People v. Moscat, 777 N.Y.S.2d 875, 878–79 (Crim. Ct. 2004).

prosecution. In general, a 911 caller knows that she is giving information to the police that will most likely lead to a response from law enforcement and future prosecution.[188] Even a first time caller has indirect exposure to the 911 system through sources such as official public law enforcement communications, television shows, increased broadcasting of criminal trials, and news reports.[189] The argument follows, then, that the objectively reasonable person knows that the information provided will be used in future investigations and prosecution stages, even when the call is placed to obtain immediate emergency assistance. Therefore, admitting 911 testimony when the declarant is unavailable and there has been no opportunity to cross-examine the witness violates the Confrontation Clause.

Further, these pro-testimonial advocates point to the anonymity feature of the 911 call to buttress their argument. The option for a caller to remain anonymous is often included in informational materials regarding the system.[190] A caller, in many cases, has the option to remain anonymous, and may choose not to disclose her identity or location.[191] Thus, a caller may choose to remain anonymous because the caller knows that the information will be used in future investigations or prosecutions.[192] However, to cast the anonymity feature in this light is to downplay one of the two main functions of the 911 system. While a caller may choose to remain anonymous in order to avoid future in-

188. Friedman & McCormack, *supra* note 95, at 1181.

189. For instance, a quick glance at the City of Chicago website provides the viewer with general information about the 911 system, including instructions on how to describe a suspect. Use 9-1-1 to Report Emergencies, *supra* note 139. These instructions emphasize the importance of accurate descriptions to apprehending suspects. *Id.* Other cities have similar descriptions: the New York City Police Department website's "frequently asked questions" section advises the public to call 911 when "there is an emergency, lives are in danger, serious injury, serious medical condition, crime in progress, or any other situation needing immediate attention." New York City Police Department, Frequently Asked Questions, http://www.nyc.gov/html/nypd/html/misc/pdfaq2.html#1 (last visited Oct. 26, 2005) [hereinafter NYPD FAQ's]. If a citizen sees a crime occurring, the website also instructs the caller to immediately call 911, and to "[b]e observant and make mental notes" about the existence of weapons, address, physical characteristics (including race, height, weight, clothing, and distinguishing features like a beard or scars), number of people involved, and if the people involved are on foot or in a car. NYPD FAQ's, *supra*.

190. For example, the City of Chicago website notes:

> *Shhh . . . It's between us.* The Office of Emergency Management and Communications is serious about your safety. That's why you always have the option to remain anonymous any time you call 911, especially when reporting narcotics or gang-related activity. Simply tell the 911 call-taker that that you would like your information to remain private, and your name, address, and telephone number will not be made available to the police dispatcher or responding police officer.

City of Chicago, 911 Caller Anonymity, http://egov.cityofchicago.org/city/webportal/portalContentItemAction.do?BV_SessionID=@@@@0240385860.1110652812@@@@&BV_EngineID=cccfaddediejhlhcefecelldffhdfhg.0&contentOID=536898493&contenTypeName=COC_EDITORIAL&topChannelName=Dept&blockName=Emergency+Communications%2F911+Emergency%2FI+Want+To&context=dept&channelId=0&programId=0&entityName=Emergency+Communications&deptMainCategoryOID=-536886518 (last visited Oct. 26, 2005). Similarly, the New York City Police Department website instructs citizens that, "[i]f you wish to remain anonymous or keep information confidential just tell the operator." NYPD FAQ's, *supra* note 189.

191. People v. Cortes, 781 N.Y.S.2d 401, 415 (Sup. Ct. 2004).

192. *Id.*

volvement in prosecution, the choice to remain anonymous must be understood under the circumstances in which the decision is made. As the Court of Appeals of Minnesota emphasized in *State v. Wright*, the call may be made because "the caller wants protection from an immediate danger, not because the 911 caller expects the report to be used later at trial with the caller bearing witness—rather, there is a cloak of anonymity . . . that encourages citizens to make emergency calls and not fear repercussion."[193]

The "repercussions" feared are not limited to the expectation that the statement will be used in a later trial. For instance, the caller may fear retaliation (regardless of whether the caller expects that the call will result in a future trial) or that she will acquire a reputation for reporting, not necessarily because anything would result from the call except emergency assistance. This is even more apparent in the domestic violence context. The victim's learned helplessness combined with the cyclical nature of domestic violence puts the batterer in a controlling position; the victim often refuses to report and/or pursue a charge for an incident of battery for fear of retaliation, the loss of economic support, and breaking up the family.[194] Whether the caller's decision to remain anonymous is an actual indication of the testimonial nature of the call varies. A proper determination is contingent upon the circumstances under which the call was made, not by the fact that a 911 call can be considered per se testimonial.

Making the "mixed purpose" determination even more difficult in the domestic violence context is the "repeat-player" dilemma. Because domestic violence often follows a behavioral pattern that repeats itself over time, and victims tend to have a difficult time fully removing themselves from the relationship, many domestic violence victims and offenders have recurring contact with the law enforcement and criminal justice systems.[195] Public laws and programs originally aimed at creating awareness about domestic violence have also increased general awareness about the repercussions of calling the police or 911.[196] "Repeat-players" who have previously been involved in domestic violence disputes often expect that an officer will likely take at least one person into custody.[197] Further, adding to the expectations in the "repeat-player" scenario is the argument that the "repeat players" engage in what Friedman and McCormack have labeled as the "race to the phone" phenomenon:

193. State v. Wright, 686 N.W.2d 295, 302 (Minn. Ct. App. 2004).

194. *See* discussion *supra* Part II.B.1–2.

195. King-Ries, *supra* note 57, at 319.

196. For instance, mandatory arrest policies and no drop prosecutions were met with positive attention from the media and reinforced with an increase in the number of victims reporting domestic violence. Friedman & McCormack, *supra* note 95, at 1196. Friedman and McCormack list the popular media, public initiatives such as National Domestic Violence Awareness Month, pamphlets which reassure victims that their complaints will be taken seriously, mandatory arrest laws, and no drop prosecution policies to be among the factors which have increased awareness. *Id.* at 1193–97.

197. *Id.* at 1196–97.

"[t]he person first to call and complain is most likely to get to stay home, while the other person is the one charged and taken in custody."[198] Accordingly, batterers who have been through the criminal justice system will manipulate the system and be more apt to call because it will put them in a better position.[199]

However, while the repetitive nature of domestic violence may result in repeated exposure to the law enforcement and criminal justice systems,[200] this does not necessarily transform the 911 call into a testimonial statement under the objective approach. The objective standard, although based on the reasonable belief of an objective person, requires an analysis of the circumstances in which the statement is made. Even if the caller would ordinarily be cognizant of the potential legal ramifications stemming from the 911 call, one must judge the reasonable belief *at the time the call is placed*. The reasonable belief associated with a victim in the midst of an incident of domestic violence may not match the general understanding that may come from the media or instructional materials. That the third formulation incorporates an objective standard rather than a subjective one does not prohibit an analysis of this sort; the testimonial determination should necessarily involve a consideration that the victim, when placing a call in hopes of relieving an urgent situation, does not always have time to contemplate the legal consequences of the call. The amount of time between the incident and the call may leave little time for reflection.[201] It is for this reason that many of these statements also qualify as excited utterances.[202]

Further, the repeated exposure argument, and particularly the "race to the phone" theory, "distorts the reality of the situation" because "[a] race calls to mind a competition between equals with similar objectives."[203] However, this misinterprets the victim's intent and the "dynamics of power and control" associated with domestic violence.[204] In a majority of instances, the victim is calling to stop the violence or obtain protection after multiple battering incidents. Thus, even assuming that repeat players will know how to manipulate the system, this "race to the phone" theory is likely not the norm and should not place a testimonial

198. *Id.* at 1197.

199. *Id.* While Friedman and McCormack argue that this manipulation occurs, they are also quick to note that the technique is not always successful in obtaining a trial and conviction against the other person. *Id.* at 1198. The important point, however, is that the caller realizes that by calling 911, she is creating evidence. *Id.* at 1199.

200. *See, e.g.*, *id.* at 1197; King-Ries, *supra* note 57, at 319.

201. People v. Moscat, 777 N.Y.S.2d 875, 880 (Crim. Ct. 2004).

202. *Id.* Although the excited utterance hearsay exception analysis, and the analysis for hearsay exceptions in general, is divorced from the Confrontation Clause analysis, the two separate analyses share a common consideration—namely, the absence of time to reflect in an excited or urgent situation. *Id.* As King-Ries stated, "[i]t is cynical to suggest that [knowledge of the ability to use the statement for investigation or prosecution purposes] so permeates an individual's consciousness that she is unable to make a reliable, spontaneous statement." King-Ries, *supra* note 57, at 324.

203. King-Ries, *supra* note 57, at 324.

204. *Id.*

label on all 911 calls in domestic violence situations. Additionally, because most calls are made during or immediately after the criminal incident, the calls "can usually be seen as part of the criminal incident itself, rather than as part of the prosecution that follows."[205] The caller's intention when calling 911 is to acquire assistance, "not to consider the legal ramifications . . . as a witness in a future proceeding."[206] Therefore, when ascertaining what an objective witness should believe under the circumstances, a caller will not necessarily make *that* 911 call while contemplating the legal repercussions. As stated by the Criminal Court of the City of New York, "a woman who calls 911 for help because she has just been stabbed or shot is not contemplating being a 'witness' in future legal proceedings; she is usually trying simply to save her own life."[207] Other courts have made a similar distinction, considering whether the caller reacted to a "life threatening crisis unfolding before [the caller's] eyes,"[208] and connecting this to the determination of whether or not the call was part of the criminal incident.[209] Thus, this analysis must necessarily integrate other factors in a case-by-case determination because an objective witness, even with prior exposure to the 911 system, may not reasonably believe that, under the circumstances, the statements would be available for use in a future trial.

While categorizing some 911 calls is unproblematic upon first glance, determining whether or not the objective witness reasonably believes that the call will be available for use at trial will hinge on an analysis of "the circumstances." Whether a 911 call will be considered testimonial under the "objective witness" approach will depend on "which capacity" the caller uses the call system for.[210] However, while the NACDL and ACLU predicted that using this standard would make difficult determinations the exception rather than the norm,[211] "mixed motive" 911 calls in the domestic violence area have made the testimonial determination challenging for courts. Even if the caller has had prior knowledge or exposure to the 911 system and the legal repercussions that may flow from the 911 call, the objective standard necessitates a case-by-case determination of whether the 911 statements reporting a domestic violence incident are testimonial.

205. *Moscat*, 777 N.Y.S.2d at 880.
206. People v. Conyers, 777 N.Y.S.2d 274, 277 (Sup. Ct. 2004).
207. *Moscat*, 777 N.Y.S.2d at 880.
208. People v. Isaac, No. 23398/02, slip op. at 5 (N.Y. D. Ct. June 16, 2004) (quoting *Conyers*, 777 N.Y.S. 2d at 276).
209. *Id.*
210. NACDL Brief, *supra* note 134, at 25.
211. *Id.*

IV. RESOLUTION

As the discussion in Part II illustrates, the absence of a clear testimonial definition to accompany *Crawford*'s bright-line rule has created scores of new questions and concerns. In the area of domestic violence prosecutions, the ambiguity has threatened the effectiveness of evidence-based prosecutions by challenging the admissibility of essential evidence, including 911 calls. However, the analysis in Part III shows that, even in the absence of an exact definition for "testimonial," *Crawford* does not imply that all 911 calls are testimonial. Instead, because of the dual functions served by the 911 system—namely, to provide assistance or protection in urgent situations and to gather information and reports of criminal incidents—the testimonial nature of statements made during 911 calls in domestic violence situations must be judged on a case-by-case basis. The resolution that follows establishes a set of presumptions and considerations, drawn from the *Crawford* decision, and subsequent judicial opinions which applied the *Crawford* standard, to aid in the case-by-case analysis determination.

A. Step 1: Initial Considerations

At the outset, it must be noted that one should begin the factor-based analysis with the following considerations in mind. First, 911 calls are often admitted in evidence-based prosecutions to establish essential elements of the crime in the absence of victim testimony or to impeach a victim who subsequently recants. Every attempt should be made to encourage the victim to testify truthfully and honestly about the incident. Prosecutors can no longer rely on a firmly rooted hearsay exception and the unavailability of their victim to admit the 911 call. Second, the right to confrontation is an absolute right, subject to waiver and forfeiture. While a case-by-case analysis provides an opportunity to admit some out-of-court statements, courts and practitioners must respect the limitations imposed by the Constitution, and not work against them. Third, the analysis regarding the admissibility of a statement in accordance with the Confrontation Clause must be divorced from that of the admissibility of a statement under the rules of hearsay. Before a statement reaches the hearsay hurdles, it must meet the *Crawford* requirements for admissibility.[212] Finally, each 911 call is placed in a distinct factual scenario, and the case-by-case analysis must account for the variations in each. Prior court decisions can only give so much guidance; words on paper may not accu-

212. This consideration is consistent with the Indiana Supreme Court's recent decision in *Hammon v. Indiana*, 829 N.E.2d 444, 453 (Ind. 2005) ("We do not agree . . . that a statement that qualifies as an 'excited utterance' is necessarily nontestimonial."); *see also* Stancil v. United States, 866 A.2d 799, 808–09 (D.C. 2005) (noting that statements qualifying as excited utterances cannot automatically be considered nontestimonial because an excited utterance may be reliable, but reliability is not the focus of the Confrontation Clause).

rately capture the dynamics of any one specific situation. With these considerations in mind, courts and practitioners should evaluate the testimonial nature of the specific 911 call at issue, using the following factors for guidance.

B. Step 2: The Factor-Based Test

The dual-purposes served by 911 calls and the unique nature of domestic violence necessitate a testimonial analysis that, at a minimum, incorporates the following five general factors: (1) primary purpose of the call, (2) caller motivation for placing the call, (3) operator motivation for asking questions, (4) substance of the call, and (5) circumstances in which the call is placed. These factors emphasize the perspective of both the caller and the operator because each addresses a separate Confrontation Clause concern raised by the 911 call. Examining the caller's motivation incorporates the Clause's focus on accusatory statements and the objective witness's reasonable belief that the statement will be used in a later trial. Conversely, consideration of the operator's motivation incorporates the Clause's concern for prosecutorial abuse in the production of testimony, and whether the call-taker is acting in an investigatory or prosecutorial capacity.

1. Factor 1: Primary Purpose of the Call

Ascertaining the primary purpose of the call is the ultimate goal of the analysis. The point of departure for the first factor is the dual-function framework of the 911 system. One should consider whether or not the *primary purpose* of the call is to procure assistance in an urgent situation or to report a crime and other information. Indications of the former purpose may be shown by an affirmative answer to the question: is the call a plea for help, or for immediate assistance to end an exigency, rather than a call placed to report a violation?[213] If the purpose is clearly only to procure assistance in an urgent situation, then the statement is nontestimonial and not subject to the Confrontation Clause requirements. However, in the more difficult cases, where the primary purpose is unclear or it seems that the call placed is with mixed purposes, the additional four factors will provide guidance to make the determination.

213. *Compare* People v. Conyers, 777 N.Y.S.2d 274, 277 (Sup. Ct. 2004) (finding a 911 call placed by the mother-in-law of an assault victim nontestimonial because the call was placed with the purpose of securing assistance to stop the assault in progress), *with* State v. Powers, 99 P.3d 1262, 1266 (Wash. Ct. App. 2004) (holding that the 911 call was testimonial when the purpose of the call was not to acquire protection from defendant, but rather, to report his violation of a protective order and provide a physical description to aid in his apprehension).

2. Factor 2: Caller Motivation

The second factor, the caller's motivation for placing the call or making the statements, is distinct from the first because it focuses on the caller's intent using a subjective standard. The analysis considers whether the caller is involved in a "'life threatening crisis unfolding before the [declarant's] eyes,"[214] whether the caller believes she is in a dangerous situation,[215] and whether the caller wishes to provide information to trigger future investigation or prosecution. While the presence of the first two factors suggest that the statements are nontestimonial, the presence of the last factor may indicate that the statement is testimonial. Courts and practitioners should also consider whether the motivation for making the call changes between initiation of the call and statements given later that are volunteered or given in response to the dispatcher's questioning. If the motivation does change, courts should admit only those statements made for a nontestimonial purpose.

3. Factor 3: Operator Motivation

Because an operator will ask many of the same questions regardless of the purpose of the call, it is important to ascertain the operator's motivation for asking the question. Consider whether, upon receiving the call, the dispatcher believes that the caller is in an emergency situation. If so, this may indicate that the operator's primary purpose when making the inquiry is to gauge the situation, determine the appropriate official response, and ensure the safety of both the victim as well as any responding police officers.[216] Likewise, if the dispatcher believes that the caller is in a non-emergency situation, or that the caller's purpose is to provide information to aid in investigation or prosecution, that would suggest more investigatory or prosecutorial goals. Statements resulting from dispatcher questioning in this situation may fall in the testimonial category. Finally, courts and practitioners should also be cognizant of the point at which the purpose of the questioning shifts from determining the appropriate response in an emergency situation to ascertaining information to aid in investigation and prosecution. If the transition occurs, the court

214. *Compare Conyers*, 777 N.Y.S.2d at 276–77 (an assault in progress was a "life threatening crisis unfolding before [the caller's] eyes" and the caller's intent when making the nontestimonial call was to stop the assault), *with Isaac*, No. 23398/02, slip op. at 5 (a 911 call regarding the "alleged making of an ultimately unfulfilled implied threat" was not a life-threatening crisis unfolding before the caller's eyes).

215. *Isaac*, No. 23398/02, slip op. at 5 (noting that the fact that the caller declined to wait for the police and that the defendant was no longer in the caller's presence suggested that the caller did not believe he was in "imminent danger").

216. For example, in *State v. Wright*, 686 N.W.2d 295, 303 (Minn. Ct. App. 2004), the court held that statements made in a "911 dialogue . . . aimed at resolving an emergent situation by apprehending a threatening aggressor and providing [the victims] with information to ensure their safety" were not testimonial because the victims were "providing information for immediate intervention, not eventual prosecution."

should admit the statements made before the shift because they maintain their nontestimonial nature and require fulfillment of the Confrontation Clause requirements for the latter statements.[217]

4. Factor 4: The 911 Dialogue

Evaluating the 911 dialogue, one should focus on whether the questions and answers are aimed at resolving the emergency or if they are aimed at developing the details of the crime. Because many of the questions asked in the non-emergency and emergency situation overlap, the analysis should consider the dialogue as a whole. Dialogue focused on resolving an emergency would suggest that the statements are nontestimonial. Questioning focused on police officer safety, victim safety, medical concerns, the security of the scene,[218] or the nature of the incident also weighs in favor of the nontestimonial characterization.[219] Dialogue that strays from these main objectives to more remote subjects, such as relationship history, non-incident related matters, or more detailed statements that "narrates events, rather than merely asking for help,"[220] might suggest the statements are testimonial.

5. Factor 5: Consider the Circumstances

The final suggested consideration falls under the umbrella heading of the circumstances in which the 911 call is made. "Circumstance" provides a number of possible factors which would suggest that a 911 call is testimonial. For instance, one should consider the timing of the call. Calls placed during or immediately after the incident in question may suggest that the call is part of the criminal incident and therefore, nontestimonial.[221] Also, the "urgency" of the situation should be examined. A victim who believes that criminal incidents will recur, or who does not

217. *Cf.* State v. West, 823 N.E.2d 82, 91 (Ill. App. Ct. 2005) (holding that a victim's 911 statements concerning the nature of the attack and her medical needs, age, and location were not testimonial because they were made with the purpose of obtaining medical and police assistance, but subsequent statements that described her car, the direction in which her attackers went, and the objects they took were testimonial because the statements were made in response to questions by the operator with the purpose of involving the police).

218. *Cf.* Stancil v. United States, 866 A.2d 799, 812 (D.C. 2005) (noting that preliminary on the scene police questioning to determine if the police, victim, or other citizens are in danger is not testimonial because it is focused on "securing the scene").

219. Consider the test suggested by the Appellate Court of Illinois in *West*, 823 N.E.2d at 91, where the court analogized victim statements in a 911 call to victim statements made to a medical professional. According to the test, statements made to obtain assistance in an emergency situation are similar to statements made to a treating medical professional "regarding 'descriptions of the cause of the symptom, pain or sensations, or the inception or general character of the cause or external source thereof'" and nontestimonial. *Id.* In contrast, if the purpose for making the statements is to "'invok[e] police action and the prosecutorial process' or [the statements] are responses to questions posed for the purpose of collecting information 'useful to the criminal justice system,'" the statements are testimonial. *Id*. (citations omitted).

220. Friedman & McCormack, *supra* note 84, at 1242–43.

221. People v. Moscat, 777 N.Y.S.2d 875, 880 (Crim. Ct. 2004).

know whether the perpetrator is still a potential threat, suggests a more urgent situation. Under these circumstances, the caller's primary purpose is to procure assistance and the operator's purpose is to help secure the scene. That the attacker is no longer at the scene and both the caller and operator believe that the attacker will not return may indicate that the statements are for investigative or prosecutorial purposes. Whether the victim's children or other civilians are at the scene also affects the urgency of the situation. Courts should place extra scrutiny on situations where the caller has prior experience with the 911 system and domestic violence prosecutions. Finally, the caller's demeanor, voice, and ability to answer questions should also be considered. An inability to answer simple questions involving common knowledge or basic personal information may suggest lack of reflection capacity. If so, this may indicate that the objective caller would not have a reasonable belief under the circumstances that the statements would be used in a future trial. Similarly, if voice or manner of speech indicates that the caller is "struggling for self control,"[222] or there is sufficient agitation to suggest stress which affects the "reflective faculties," this weighs in favor of a nontestimonial determination.[223]

While some may argue that a factor-based test creates ambiguity and forces attorneys to play a numbers game with every 911 call, the nature of the 911 emergency system requires a fact-specific inquiry. This is particularly true in evidence-based prosecutions. A bright-line rule either admitting or excluding all 911 calls would admit testimonial statements that the Confrontation Clause intends to exclude, or exclude nontestimonial statements that were not the concern of the Clause. Although the factor-based approach vests a substantial amount of discretion in the judge at the trial court level, and admissibility may hinge on minute details, consistency will develop with the accumulation of judicial opinions. Over time, this will lessen the unpredictability attached to the "numbers game." The alternative, a bright-line rule, would bring immediate predictability, but at the great cost of sacrificing core constitutional principles or undermining the principal concerns of *Crawford*. These costs would outweigh the benefit of improved predictability.

V. CONCLUSION

On March 8, 2004, the Supreme Court radically altered the focus of the Confrontation Clause from the reliability of an unavailable witness' out-of-court statement to that statement's "testimonial" nature. How-

222. State v. Wright, 686 N.W.2d 295, 302 (Minn. Ct. App. 2004).

223. People v. Isaac, No. 23398/02, slip op. at 5 (D.N.Y. June 16, 2004) (holding that statements in a 911 call were testimonial because the caller did not believe he was in imminent danger, was "sufficiently self-possessed" to tell the operator the attacker's name, the attacker was no longer present, and the "demeanor of his voice or manner of speaking" did not seem sufficiently stressed to frustrate his "reflective faculties").

ever, by declining to define "testimonial," *Crawford* left courts, practitioners, and scholars ill-informed and ill-equipped to deal with questions concerning the scope of the Confrontation Clause as they arise. One such question is how *Crawford* affects the admissibility of statements made to 911 operators by victims of domestic violence in evidence-based domestic violence prosecutions. This note analyzed the admissibility of these 911 calls based on testimonial guidelines drawn from *Crawford* and concluded that 911 calls are not per se testimonial. Instead, courts should use a five-factor test and determine whether or not the 911 call is testimonial on a case-by-case basis. Thus, it supports the two general conclusions reached in *Davis*: (1) the testimonial nature of statements made to a 911 operator during an emergency call must be analyzed on a case-by-case basis, and (2) a single 911 call may consist of both testimonial and nontestimonial statements.[224] In addition, this note goes one step further than *Davis* by articulating a five-factor test to guide the determination of whether statements made in the 911 call are testimonial.

As one practitioner noted, "[i]f the Constitution is more concerned with protecting the citizen from the state, the prosecutor must be more concerned with protecting the citizen from his fellow citizen."[225] Given the recurrent and oppressive nature of domestic violence, evidence-based prosecutions are often the only way the prosecutor can provide this protection to citizens. The statements made to a 911 operator by a victim of domestic violence often play a central role in establishing the basic criminal elements in the State's case against the accused. While essential, the prosecutor's evidentiary need for the statements cannot outweigh the Constitutional rights of the accused. Thus, a factor-based, case-by-case approach will allow the prosecutor to use a victim's out-of-court statements and proceed with evidence-based prosecutions, but only when doing so will not sacrifice the defendant's Constitutional right to confrontation.

224. State v. Davis, 111 P.3d 844, 846, 852 (Wash. 2005), *cert. granted sub nom.* Davis v. Washington, 74 U.S.L.W. 3272 (U.S. Oct. 31, 2005) (No. 05-5224).

225. Krischer, *supra* note 5, at 14.