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Confrontation Clause in Light of its Past

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### Introduction to the Symposium

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# SYMPOSIUM

## *Crawford* and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past

### INTRODUCTION

*Robert M. Pitler*<sup>†</sup>

On February 18th, 2005, the Brooklyn Law School Moot Court Room was filled to capacity by some three hundred people from across the country attending an all-day program, “*Crawford* and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past.” The *Crawford* in the title, of course, refers to the Supreme Court’s landmark decision in *Crawford v. Washington*,<sup>1</sup> decided less than a year earlier.

### THE MAJORITY OPINION

Authored by Justice Antonin Scalia, the seven-justice *Crawford* majority opinion abandons the too “subjective” and “unpredictable”<sup>2</sup> “indicia of reliability” framework of *Ohio v. Roberts*,<sup>3</sup> which for nearly twenty-five years had governed

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<sup>1</sup> 541 U.S. 36 (2004).

<sup>2</sup> *Id.* at 63.

<sup>3</sup> 448 U.S. 56 (1980). Under *Roberts*, a hearsay statement satisfies the “indicia of reliability criteria” if, without more, it fits “within a firmly rooted hearsay exception” or if the statement has “particularized guarantees of trustworthiness.” *Id.* at 66. *Roberts* could easily be read to require a showing of declarant’s unavailability in order to admit a hearsay statement against a criminal defendant. *Id.* at 65, 66 (“[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable.”). See 2 MCCORMICK ON EVIDENCE § 252 at 123-24 (J. Strong ed., 5th ed. 1999). As the result of the decisions in *United States v. Inadi*, 475 U.S. 387, 395 (1986) and *White v. Illinois*, 502 U.S. 346, 353-55 (1992) the Court moved away from or clarified the unavailability

Confrontation Clause challenges to the admissibility of nontestifying declarants' hearsay statements at criminal trials.

The *Crawford* majority is dissatisfied with the indicia of reliability framework because of its proven capacity for and "unpardonable vice" of leading lower courts to admit the very kind of uncross-examined hearsay statements of a nontestifying declarant that the Confrontation Clause was designed to exclude, such as prior trial testimony, grand jury testimony, guilty plea colloquies, and custodial confessions of accomplices.<sup>4</sup> According to *Crawford*, confrontation requires cross-examination of a hearsay declarant, not a judicial inquiry into the reliability of a hearsay statement.<sup>5</sup> As Justice Scalia pithily puts it, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."<sup>6</sup>

In support of replacing the *Roberts* reliability framework with a more categorical approach, Justice Scalia describes the evil that the Confrontation Clause sought to address. According to Justice Scalia, that evil was the admission of statements by nontestifying witnesses obtained through *ex parte* examinations (some conducted by considerably less benign methods than others).<sup>7</sup> These

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requirement, apparently leaving untouched its application to prior testimony. Little, if any, of the requirement was left, however, with respect to firmly-rooted hearsay exceptions, which do not require a showing of unavailability, such as the twenty-three in Federal Rule of Evidence 803. See Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 711 n.96.

<sup>4</sup> 541 U.S. at 63-65.

<sup>5</sup> *Id.* at 61-62 (citations omitted).

<sup>6</sup> *Id.* at 62.

<sup>7</sup> *Id.* at 50. In at least four places, the *Crawford* majority points to Sir Walter Raleigh's 1603 treason trial as involving a prototypical confrontation violation. See 541 U.S. at 44, 50, 52, 62. At his trial, Raleigh futilely demanded at least thrice that his alleged co-conspirator and principal, if not only, accuser, Lord Cobham, appear at trial, face Raleigh, and repeat his out-of-court, *ex parte*-examination statement, as well as the contents of a letter Cobham had written to Raleigh. See *The Trial of Sir Walter Raleigh*, in 2 COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1, 15-16, 23 (T.B. Howell ed., 1816) [hereinafter HOW. ST. TR.]. It is likely that torture or threats of torture were used to secure oral or written statements of other witnesses against Raleigh. See, e.g., *id.* at 19, 22 (Privy Council commissioner Lord Howard acknowledging that a witness had been told that he deserved the rack, but that this was not a threat; and another commissioner, Sir Wade, acknowledging having "taught" a conspirator "his lesson" during an examination); see also, JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 325 (London, Macmillan 1883) (stating that suspects and accomplices in Privy Council cases were tortured). The record is silent as to the torture, if any, of Cobham. It appears that Cobham turned against Raleigh when shown a letter that Raleigh had sent to Lord

examinations were conducted under the “civil-law mode of criminal procedure”<sup>8</sup> as practiced by justices of the peace, magistrates, and other officers of the crown in sixteenth, seventeenth and, perhaps, early eighteenth century England, and in the American colonies, as well.<sup>9</sup>

Marshalling English common law and early American authority, Justice Scalia seeks to demonstrate that toward the end of the seventeenth century, and certainly no later than the middle of the eighteenth century, confrontation/cross-examination requirements with respect to *ex parte* examinations had taken hold in both the mother country<sup>10</sup> and the colonies (soon to declare themselves independent states).<sup>11</sup>

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Cecil, who was a moving force in the prosecution of Raleigh. See 1 DAVID JARDINE, HISTORICAL CRIMINAL TRIALS 436 (1832). In addition to the *Crawford* majority, many have observed that the *Raleigh* case is a forebearer of the Confrontation Clause. See, e.g., Erwin N. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711, 712 (1971) (stating that Raleigh’s trial was the “historical origin” of the Sixth Amendment Confrontation Clause). Others have been more doubtful. See, e.g., Mural A. Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH. L. REV. 67, 70 (1969). An informed close observer has described the relationship between the *Raleigh* trial and the Sixth Amendment Confrontation Clause as “a convenient, but highly romantic myth.” See Kenneth W. Graham Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 n.4 (1972).

The trial itself, however, is real, and its influence on the Framers well within the realm of possibility, as events of that kind can sear ideas into the political consciousness and then they are passed on from generation to generation. Cf. 5 JOHN HENRY WIGMORE, EVIDENCE § 1364 at 24 (3d ed. 1940). Compare *The Trial of Sir Walter Raleigh*, 2 HOW. ST. TR. at 15 (after rejection of his demands that Lord Cobham be brought to trial and accuse him to his face, Raleigh reportedly replied that he was being tried “by the Spanish Inquisition”), with 2 DEBATES ON THE FEDERAL CONSTITUTION 110-11 (Jonathan Elliot ed., 2d ed. 1863) (At the 1788 Massachusetts convention to decide whether to ratify the Federal Constitution, delegate Abraham Holmes objected to the omission of a constitutional provision detailing the mode of trial including “whether [a defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination . . .” As a result, Mr. Holmes argued that, in the future, it will be revealed that Congress has the power to create judicial procedures “little less inauspicious than a certain tribunal in Spain . . . the *Inquisition*.”). See generally 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE §§ 6344-48 at 346-794 [hereinafter WRIGHT & GRAHAM] (a thorough, interesting, and imaginative directed exploration of the English, American colonial and preratification background of the Sixth Amendment Confrontation Clause).

<sup>8</sup> *Crawford*, 541 U.S. at 50.

<sup>9</sup> *Id.* at 43-44, 47-48.

<sup>10</sup> *Id.* at 48-50 (citing 1776-83 declarations of rights issued by the recently self-declared independent states, the state ratifying conventions and early American cases following ratification of the Bill of Rights).

<sup>11</sup> 541 U.S. at 47. To establish *Crawford*’s continuity with much older vintage decisions, Justice Scalia concludes that “nothing in [nineteenth century] cases contradicts our holding in any way . . . . If nothing else, the test we announce is an empirically accurate explanation of the results our cases reached.” *Id.* at 59 n.9. With respect to the outcomes of more recent decisions, Justice Scalia also explains that they “hew[ed] closely to the traditional [testimonial] line and have thus remained faithful to

Given this history, *Crawford* concludes that a defendant's right to confrontation is violated by admission in evidence of present-day "testimonial statements" obtained by practices "with closest kinship to the abuses at which the Confrontation Clause was directed."<sup>12</sup>

Left for another day is "a comprehensive definition of 'testimonial.'"<sup>13</sup> Still, the opinion expressly states that, at a

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the Framers' understanding." *Id.* at 58-59. In a footnote, Justice Scalia acknowledges that *White v. Illinois*, 502 U.S. 346, discussed *infra* note 23, arguably is in tension with the approach in *Crawford*. 541 U.S. at 58 n.8. Nonetheless, he explains that the Court in *White* "had [taken] as a given" that the statements in issue fell within the relevant hearsay exceptions, *i.e.*, excited utterances and statements for the purpose of medical diagnosis and treatment, and *White* only required the Court to decide whether there was a constitutional unavailability requirement for statements coming within those exceptions. 541 U.S. at 58 n.8 (citing *White*, 502 U.S. at 348-49, 351 n.4).

More notably and most curiously, albeit explicable, is the omission of *Idaho v. Wright*, 497 U.S. 805 (1990), from recent cases described by Justice Scalia as "hew[ing] the traditional [testimonial] line." *Crawford*, 541 U.S. at 58. It seems unlikely that *Wright* was simply overlooked given that Chief Justice Rehnquist expressly and solely relied on it as the basis for concluding that *Crawford's* wife's statements were not clothed with the then *Roberts*-required particularized guarantees of trustworthiness. 541 U.S. at 76. In *Wright*, the Supreme Court upheld the Idaho Supreme Court's decision that the Confrontation Clause had been violated by admitting into evidence, under a state residual exception to the hearsay rule, the statements of a nontestifying two-and-a-half-year-old child sex abuse victim made in response to suggestive questions by a doctor because the statements did not possess the *Roberts*-required particularized guarantees of trustworthiness. *See Wright*, 497 U.S. at 820-24.

The facts of record in *Wright* certainly would have made it fair to infer that the doctor posing suggestive questions was doing so at the behest of the police. *See* Margaret Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 603-04 (1992) [hereinafter, Berger, *Prosecutorial Restraint*]; *see also* Transcript of Oral Argument, 2003 WL 22705281, at \*7-8, *Crawford*, 541 U.S. 36 (No. 02-9410) (counsel for petitioner states that the doctor was acting in cooperation with the police). Also, it was undisputed that the child had spent the night before the interview in police custody. *Wright*, 497 U.S. at 809. As a result, the little girl's statements could have certainly been viewed as testimonial and their exclusion would have been faithful to the Framers' testimonial understanding. The problem, however, is that there is nary a word in the *Wright* opinion that the doctor was a police agent. *See* Randolph Jonakait, *Commentary: A Response to Professor Berger; The Right to Confrontation: Not a Mere Restraint on Government*, 76 MINN. L. REV. 615, 618-19 (1992). Nor is there any suggestion that the two-and-a-half-year-old victim in *Wright* knew or understood the significance of making statements to the "police" even though she had spent the night before at the stationhouse. 497 U.S. at 825-27. So viewed, the exclusion of the nontestifying child's nontestimonial statement could not be seen as "hew[ing] the traditional [testimonial] line" unless the Confrontation Clause required cross-examination of nontestimonial statements (*i.e.* the child to the doctor), a result probably not favored by Justice Scalia. *See Lilly v. Virginia*, 527 U.S. 116, 143 (1999) (Scalia, J. concurring); *White*, 502 U.S. at 364-66 (Thomas, J. concurring, joined by Scalia, J.). Perhaps this explains the omission of *Wright* from the *Crawford* majority opinion.

<sup>12</sup> *Crawford*, 541 U.S. at 68.

<sup>13</sup> *Id.* Without choosing among them, the *Crawford* majority mentions at least three different formulations of the core class of testimonial statements: "ex parte in-court testimony or its functional equivalent – that is, material such as affidavits,

minimum, the testimonial category includes prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and statements made during “police interrogation.”<sup>14</sup> These statements are admissible only if the declarant is unavailable to testify at trial<sup>15</sup> and the defendant had the opportunity to cross-examine the declarant when he or she made the statement,<sup>16</sup> or if the declarant “appears for cross-examination” during the trial at which the statement is offered.<sup>17</sup> Also, as

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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” . . . “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions” . . . and “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.” *Id.* at 51-52 (citations omitted). According to the majority, these formulations share a common nucleus and the majority defines the “[Confrontation] Clause’s coverage at various levels of abstractions around [the nucleus].” *Id.* at 52. The abstraction, however, ought to be read in light of other confrontation principles articulated by the majority. For example, the manner in which the particular statements have been obtained should bear close kinship to the abuses that gave rise to the Confrontation Clause. *Id.* at 68. In addition, any testimonial formulation should take account of *Crawford’s* emphasis on involvement of governmental officers in producing testimonial evidence. *See* 541 U.S. at 53, 56 n.7.

<sup>14</sup> *Id.* The majority characterizes guilty plea colloquy statements as “plainly testimonial.” *Id.* at 64-65. Curiously, however, plea colloquy statements are not included within the enumerated types of statements that, at a minimum, comprise the testimonial category, set forth at the end of the opinion. *See id.* at 68. After *Crawford*, without referring to this omission, courts have encountered no difficulty concluding that plea colloquy statements are testimonial. *See, e.g.,* *United States v. McClain*, 377 F.3d 219, 222 (2d Cir. 2004); *People v. Hardy*, 824 N.E.2d 953, 957 (N.Y. 2005). To the extent that a guilty plea has an existence independent of the allocution it, too, has been held to be testimonial. *See United States v. Massino*, 319 F. Supp. 2d 295, 298-99 (E.D.N.Y. 2004). More than 100 years before *Crawford*, a judgment of conviction of one person offered as evidence against another person had been held to violate the Confrontation Clause. *See Kirby v. United States*, 174 U.S. 47 (1899). It is not self-evident why a judgment is testimonial, although it is hearsay in need of an exception. The federal hearsay exception for previous convictions incorporates the *Kirby* principle. *See* FED. R. EVID. 803 (22).

<sup>15</sup> The *Crawford* decision does not impact the principles governing the meaning of unavailability, in particular those requiring reasonable good faith prosecutorial efforts to secure the presence of the declarant to testify. *See, e.g.,* *Ohio v. Roberts*, 448 U.S. 56, 73-77 (1980); *Mancusi v. Stubbs*, 408 U.S. 204, 209-12 (1972); *Barber v. Page*, 390 U.S. 719, 724-25 (1968).

<sup>16</sup> *Crawford*, 541 U.S. at 68.

<sup>17</sup> *Id.* at 60 n.9 (citing *California v. Green*, 399 U.S. 149, 162 (1970)) (finding no confrontation violation occasioned by the introduction of the witness’ prior cross-examined preliminary hearing testimony that was inconsistent with that witness’ trial testimony); *see also* *United States v. Owens*, 484 U.S. 554, 559-60 (1988) (emphasizing that the Confrontation Clause guarantees only an opportunity for effective cross-examination; thus, there was no violation of the confrontation right by the introduction of the memory-challenged witness-victim’s out-of-court photographic identification of defendant because the victim had testified under oath and responded willingly on cross-examination, enabling defense counsel to elicit relevant information from the victim, such as his bad memory); *see generally* Mosteller, *supra* note 3, at 724-36.

the majority makes crystal clear, the Confrontation Clause does not bar the use of testimonial statements for purposes other than proving the truth of the facts asserted in the statement.<sup>18</sup>

Sprinkled throughout the majority opinion are little confrontation bits and not-so-little confrontation morsels. These bits and morsels describe characteristics of testimonial and nontestimonial statements, as well as other significant factors that will affect admissibility under the Confrontation Clause.

The Court leaves no doubt that statements made in response to police interrogation can be testimonial since those interrogations “bear a striking resemblance to examinations by Justices of the Peace in England.”<sup>19</sup> Although the majority opinion recognizes, as it does with “testimonial,”<sup>20</sup> that there can be several different definitions of “interrogations,” it refrains from choosing one.<sup>21</sup> Rather, the Court simply states that the custodial statement of Crawford’s wife Sylvia, which was knowingly given in response to structured police questioning, qualifies under any conceivable definition of interrogation.<sup>22</sup>

Thus, the testimonial police-interrogation subcategory includes accomplice and co-conspirator statements knowingly made to the police during structured custodial questioning,<sup>23</sup>

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<sup>18</sup> *Crawford*, 541 U.S. at 60 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 413-14 (1985)) (no confrontation violation by the introduction of accomplice’s confession, which had been introduced to rebut defendant’s claim that his own confession was a sheriff-coerced copy of that of the accomplice, not for the truth of the facts asserted in it. The only issues were what the accomplice said and what the sheriff did. Both of those questions could be addressed by cross-examining the trial-testifying sheriff who had first-hand knowledge of what had been said and done.).

<sup>19</sup> *Crawford*, 541 U.S. at 52.

<sup>20</sup> *See* 541 U.S. at 68; *see supra* note 13.

<sup>21</sup> 541 U.S. at 53 n.4. The majority does state that it is using interrogation in its “colloquial, rather than its technical legal sense” with a *cf.* citation to *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). *Crawford*, 541 U.S. at 53 n.4. At the cited pages, the *Innis* Court defined interrogation for *Miranda* purposes to include express questioning or its functional equivalent, *i.e.*, “any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response.” *Innis*, 446 U.S. at 300-01. Despite this language, *Innis* says that the standard is an objective one, focusing on the perspective of the defendant, although the intent of the police may, in some limited circumstances, be relevant. *See id.*

<sup>22</sup> *Crawford*, 541 U.S. at 53 n.4.

<sup>23</sup> *See id.* at 40, 41, 65 (noting that Crawford’s wife may have facilitated the stabbing and that she herself was a suspect); *id.* at 56, 58, (citing with approval *Lilly v. Virginia*, 527 U.S. 116, 134 (1999) (plurality opinion) (all nine justices seemingly agreed that the introduction of an accomplice’s stationhouse confession to the police

and perhaps noncustodial, structured questioning as well. Though not expressly recognized by the *Crawford* majority, statements of informants may be testimonial. Informant statements can be so characterized because they were part and parcel of the civil law mode of *ex parte* examination in the prosecution of smuggling cases in the Vice Admiralty courts in America, to which the majority made express reference.<sup>24</sup>

Witnesses' statements, including those of young children, may also be testimonial when made in knowing response to structured police questioning, as the text of a *Crawford* footnote clearly implies, albeit in *dicta*.<sup>25</sup> A witness' statement may be testimonial even if it fits within a modern-day exception to the hearsay rule, *e.g.*, an excited utterance.<sup>26</sup> The majority opinion, however, cannot be read to say that every police question is an interrogation; nor is every answer testimonial.

A common thread running throughout the majority opinion is concern with government-created (elicited) testimony. As stated by the majority opinion: “[I]nvolvement

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can violate the Confrontation Clause)). *See also supra* note 21 (suggesting that express questioning is not required).

<sup>24</sup> *See Crawford*, 541 U.S. at 48 (testimony was routinely taken by deposition or private judicial examination). As for the use of informants in American Vice Admiralty courts, see, for example, WRIGHT & GRAHAM, *supra* note 7, § 6345 at 489, 502, 503 n.506, 504 n.509, 536-41. The manner of Admiralty prosecution and enforcement was a major, if not obsessive, concern of the colonists-turned-revolutionists. *See id.* § 6345 at 483-540.

<sup>25</sup> *Crawford*, 541 U.S. at 58 n.8 (describing *White v. Illinois*, 502 U.S. 346, 349-51 (1992) as arguably in tension with a rule requiring a prior opportunity for cross-examination in order to introduce a testimonial statement of a nontestifying witness). The statement in *White v. Illinois* was that of an allegedly sexually abused four-year-old girl made during a police interview at her home some fifty minutes after the alleged abuse. *See People v. White*, 555 N.E.2d 1241, 1243-46 (Ill. App. 1990) (Under Illinois law, the four-year-old's statement was admissible as a spontaneous statement because it related to a startling event and it was made while the declarant was under the stress of excitement caused by that event.). To Justice Scalia, “[i]t is questionable whether testimonial statements would even have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made ‘immediately upon the hurt received, and before the declarant had time to devise or contrive anything for her own advantage.’” *Crawford*, 541 U.S. at 58 n.8 (quoting *Thompson v. Trevanion*, (1694) 90 Eng. Rep. 179 (K.B.)). Though somewhat ambiguous, footnote 8 certainly implies that a statement like the one involved in the 1694 case either would be a historical exception to confrontation or nontestimonial in nature because, under the circumstances, the declarant was not bearing testimony. Put another way, a 1694-like spontaneous *res gestae* non-narrative statement is not akin to the *ex parte* examination evils at which the confrontation right is directed. A modern day excited utterance, not made contemporaneously with the exciting event but a narrative of it in response to structured police questioning, may arguably be a next of kin.

<sup>26</sup> *See* 541 U.S. at 58 n.8, discussed *supra* note 25.



of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar.”<sup>27</sup>

The majority acknowledges that “an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”<sup>28</sup> Giving as an example “[a]n off-hand,

<sup>27</sup> *Id.* at 56 n.7.

<sup>28</sup> *See id.* at 51. “Imagine and consider if you will,” Rod Serling, *The Twilight Zone* (CBS television broadcast 1959-1964), the 1603 treason prosecution of Sir Walter Raleigh for conspiring, *inter alia*, to overthrow James I and replace him with a female cousin, to bring Roman Catholicism to England, and to have foreign powers invade the country, all to be financed by the King of Spain and the Archduke of Austria. *See* 2 HOW. ST. TR. at 1-3. At the trial, a prosecution witness, one Dyer, a pilot, testified in person (apparently the only one to do so) that:

I came to a merchant’s house in Lisbon, to see a boy that I had there; there came a gentleman into the house, and enquiring what countryman I was, I said, an Englishman. Whereupon he asked me, if the king was crowned? And I answered, No, but that I hoped he should be so shortly. Nay, saith he, he shall never be crowned; for Don Raleigh and Don Cobham will cut his throat ere that day come.

Trial of Sir Walter Raleigh, 2 HOW. ST. TR. at 25.

In one reported version of the trial, Raleigh responded by stating, “What infer you upon this?” 2 HOW. ST. TR. at 25. In a later version, Raleigh reportedly said, “This is the saying of some wild Jesuit or beggerly Priest; but what proof is it against me?” JARDINE, *supra* note 7, at 436. The Attorney General (Sir Edward Coke) replied to Raleigh, “That your treason hath wings.” *Id.* at 436; *see also* 2 HOW ST. TR., *supra* note 7, at 25 (“That your treason had wings.”). The first edition of State Trial Reports was published in 1719 and several editions followed. *See* 12 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 127-30 (2d ed. 1938); *see also* JARDINE, *supra* note 7, at 400. Jardine explains that his 1824 edition relies on previously unavailable manuscripts. *Id.* Perhaps it is an overly-suspicious nature, but this later edition seems to be written in a more modern style than the earlier versions, and that raises questions. *But see* WRIGHT & GRAHAM, *supra* note 7, § 6342 at 261 n.559 (agreeing with Jardine that the manuscript upon which he relies “is the most accurate and complete”).

Unlike his demand to be accused to his face by Lord Cobham, *see supra* note 7 and accompanying text, Raleigh made no similar demand with respect to the pilot Dyer. Perhaps by Raleigh’s rhetorical inquiry with respect to Dyer’s testimony, “what infer you by this?”, *id.* at 25, he was simply arguing the absence of probative value or a hearsay point because the gentleman’s statement to Dyer was “no evidence.” *See* 2 HOW. ST. TR. at 20 (where Raleigh made other hearsay points); JARDINE, *supra* note 7, at 429 (another hearsay point). Could it be that in 1603, prescient Sir Walter recognized the difference between the hearsay of an unavailable private person’s out-of-court statement offered for its truth by the prosecution, and the offer by the prosecution of government secured, *ex parte*-examined statements and letters of an available coconspirator? Finally, Attorney General Coke, was up to Raleigh’s hearsay challenge, if that it be, and in effect responded that the out-of-court statement of the gentleman in Portugal was offered not for its truth, but only that it had been said in Portugal, and thus the conspiracy was an active one. *See* 2 HOW. ST. TR. at 25. Upon conviction, Raleigh was sentenced to death; he spent the next fourteen years in the Tower of London, writing a History of the World and dabbling with chemistry. Subsequently, the King temporarily paroled him and sent him on a mission to mine gold in Guyana, incurring the wrath of the Spanish. The quest failed and, upon his

overheard remark” that might be unreliable evidence, and thus a good candidate for exclusion under the hearsay rule, the majority opinion expressly states that not all hearsay implicates the Confrontation Clause.<sup>29</sup> Such an off-handed remark, notes the majority, bears little resemblance to the civil-law abuses targeted by the Confrontation Clause.<sup>30</sup>

The Court also mentions some common hearsay statements that would not be testimonial. The majority opinion goes out of its way to expressly state that both business records and statements in furtherance of a conspiracy are not testimonial.<sup>31</sup> A private individual’s statement to another

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return to England, Raleigh was executed. See 2 HOW. ST. TR. at 31-33; JARDINE, *supra* note 7, at 476-79.

<sup>29</sup> *Crawford*, 541 U.S. at 51.

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

<sup>31</sup> *Id.* at 56; *accord id.* at 76 (Rehnquist, C.J., dissenting). In his dissent, the Chief Justice gave the majority credit for excluding from the testimonial category business and “official” records. *Id.* at 76 (Rehnquist, C.J., dissenting). The majority, however, mentions only business records. *Id.* at 56. This divergence in views leaves open the extent to which public records, in particular law enforcement reports and records, are nontestimonial. Like the business records of private enterprise, many public records and reports, including those of law enforcement, seem far removed from the evil civil-law *ex parte* examinations that lie at the core of *Crawford*. Interestingly, in 1974, relying on “confrontation concerns” about adversarial information contained in police reports expressed by members of the House of Representatives, see 120 CONG. REC. 2387-88 (remarks of Reps. Brasco, Dennis, Holtzman, Hunt Johnson, & Smith); S. REP. NO. 93-1277, at 17 (1974), as reprinted in 1974 U.S.C.C.A.N. 7051, 7064, the Congress amended Proposed Federal Rule of Evidence 803(8)(B) to exclude as hearsay certain law enforcement reports and records sought to be introduced as a public record in criminal cases. FED. R. EVID. 803(8); see H.R. REP. NO. 93-1597, at 11 (1974) (Conf. Rep.), as reprinted in 1974 U.S.C.C.A.N. 7098, 7104-05 (adopting the above-mentioned amendment). The potential breadth of this exclusion has been limited by federal decisions holding that the prohibition does not encompass routine, non-adversarial law enforcement reports when they do not involve a subjective investigation and evaluation of crime. See *United States v. Oates*, 560 F.2d 45, 66-84 (2d Cir. 1977) (under Rule 803(8)(B) & (C), error to admit a Customs Service chemist’s work sheets and report concluding that the white powdery substance analyzed was heroin). Moreover, the confrontation policy reflected by Rule 803’s special treatment of law enforcement reports, “applies with equal force to . . . any of the other exceptions to the hearsay rule.” *Id.* at 78. *Cf., e.g., United States v. Brown*, 9 F.3d 907, 911-12 (11th Cir. 1993) (Although Rule 803(6) cannot be used as a back door to admit evidence excluded under Rule 803(8)(B), a police property clerk receipt for a weapon is a business record within the meaning of Rule 803(6) and its admission does not run afoul of the Rule 803(8) exclusion for law enforcement reports because the police custodian, as part of his routine-everyday function, prepared the property receipt with no incentive to do anything other than mechanically record unambiguous information on that receipt.); *United States v. Orozco*, 590 F.2d 789, 793-94 (9th Cir. 1979) (the Rule 803(8)(B) exclusion of matters observed by law enforcement personnel was not intended to exclude records of routine non-adversarial matters such as these here – customs officials recording and entering in a computer the license plate numbers of every vehicle passing the border at a particular location, and the computer searching its memory to determine whether a license number has appeared within the previous seventy-two hours).

private party would appear to be nontestimonial,<sup>32</sup> as would statements unknowingly made to government officers, including informants.<sup>33</sup>

The majority coily implies that a testimonial dying declaration (one made to a government law enforcement officer) may be a *sui generis* historical exception to the cross-examination requirement because of its recognition at common law.<sup>34</sup> The opinion also expresses “acceptance” of a yet-to-be-defined rule of forfeiture of a confrontation objection to a hearsay statement. This rule “extinguishes confrontation claims on essentially equitable grounds.”<sup>35</sup> Those grounds are

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<sup>32</sup> 541 U.S. at 57 (citing with approval *Dutton v. Evans*, 400 U.S. 74, 81, 87-89 (1970) (considering reliability factors beyond a prior opportunity for cross-examination and rejecting a Confrontation Clause challenge to the admission against defendant of a co-conspirator’s statement to a fellow inmate under a unique Georgia exception to the hearsay rule for statements during the concealment stage of the conspiracy)).

<sup>33</sup> *Crawford*, 541 U.S. at 58 (citing with approval *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987)) (describing *Bourjaily* as “admitt[ing] statements made unwittingly to a Federal Bureau of Investigation informant after applying a more general test that did not make prior cross-examination an indispensable requirement”).

<sup>34</sup> *Id.* at 56 n.6. To date, the highest state courts in California and Minnesota have recognized dying declarations as a *sui generis* historical exception to confrontation right. See *People v. Monterroso*, 101 P.3d 956, 972 (Cal. 2004); *State v. Martin*, 695 N.W.2d 578, 585 (Minn. 2005). *Contra* *United States v. Jordan*, No. 04-CR-229-B, 2005 WL 513501, at \*3 (D. Colo.) (unpublished opinion). Rather than an exception to testimonial categorical exclusion, the Kansas Supreme Court has held that introduction of a dying declaration does not violate confrontation because the accused forfeited that right by killing the victim. See *State v. Meeks*, 88 P.3d 789, 793-94 (Kan. 2004).

<sup>35</sup> *Crawford*, 541 U.S. at 62 (citing with approval *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879) (“The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by [the accused’s] wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.”)). The Court’s acceptance of forfeiture notwithstanding, open issues remain. For example, identifying the burden of proof governing the determination of whether the defendant is responsible for the declarant’s failure to testify, compare, e.g., *People v. Geraci*, 649 N.E.2d 817, 821 (N.Y. 1995) (clear and convincing evidence is the standard), with 1997 Adv. Comm Note to FED. R. EVID. 804(b)(6) in Preface to 117 S.Ct. 118 (the usual FED. R. EVID. 104(a) preponderance of the evidence standard applies to misconduct issues). Another issue is whether the defendant must act with the purpose of preventing the declarant from testifying, compare *People v. Maher*, 677 N.E.2d 728, 731 (N.Y. 1997) (defendant’s conduct must be for the purpose of preventing the witness from testifying), and *United States v. Houlihan*, 92 F.3d 1271, 1278-79 (1st Cir. 1996) (intent to prevent witness need not be sole motivation), and cf. FED. R. EVID. 804(b)(6) (hearsay exception for statements made by an unavailable declarant offered against a party who intentionally engaged in or acquiesced in wrongdoing that rendered the declarant unavailable), with *State v. Meeks*, 88 P.3d 789, 792-94 (Kan. 2004) (requiring no intent to prevent witness from testifying), and *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (same) (even though FED. R. EVID. 804(b)(6) may require an intent to prevent a witness from testifying, the confrontation right does not turn on “vagaries of the rules of evidence,” (quoting *Crawford*, 541 U.S. at 61)). Additionally, there is the

present when a declarant is wrongfully prevented from testifying by conduct attributed to the defendant.

The majority muses and teases about nontestimonial statements: “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the states flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”<sup>36</sup> The majority refrains, however, from deciding whether there is any confrontation right or other constitutional protection regarding nontestimonial statements.<sup>37</sup>

Consequently, and finally, *Ohio v. Roberts* is never expressly overruled in *Crawford*, although its indicia of reliability framework no longer governs testimonial statements. Presumably, since *Roberts* has not been overruled, indicia of reliability is still the benchmark for nontestimonial hearsay statements, at least until the Court decides otherwise.<sup>38</sup>

#### THE CONCURRING OPINION

Chief Justice Rehnquist, joined by Justice O’Connor, concurred in the result reached by the *Crawford* majority. The Chief Justice viewed the majority’s exclusion for a yet-to-be-defined category of testimonial statements as unnecessarily

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question of whether the forfeiture will result in admission of the rankest sort of hearsay as well as multiple levels of it, *see, e.g.*, *United States v. Houlihan*, 92 F.3d at 1283; *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992); *United States v. White*, 838 F. Supp 618, 625 (D.C. Cir. 1993), *aff’d*, 116 F.3d 903, 913 (D.C. Cir. 1997). Finally, even if federal confrontation forfeiture principles encompass the least demanding of the above and other relevant forfeiture principles, there remains for resolution the more demanding forfeiture hearsay requirements, if any, peculiar to each state and the federal jurisdiction.

<sup>36</sup> *Crawford*, 541 U.S. at 68; *see also id.* at 53 (“[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object . . .”).

<sup>37</sup> *Id.* at 68. In *White v. Illinois*, the Court rejected an argument to limit *Roberts* and apply the Confrontation Clause only to testimonial statements, 502 U.S. 346, 352-53 (1992), thereby leaving remaining hearsay statements to regulation by federal and state evidentiary principles. Instead, the Court held that the scope of the confrontation protection encompassed both kinds of statements if they failed to meet the *Roberts* requirements. *See id.* at 353-54. The *Crawford* majority notes that its analysis casts doubt upon the *White* holding, but otherwise leaves the issue be. 541 U.S. at 61.

<sup>38</sup> *See, e.g.*, *United States v. Holmes*, 406 F.3d 337, 348 (5th Cir. 2005), *cert. denied* 126 S. Ct. 375 (2005); *United States v. Hendricks*, 395 F.3d 173, 179 n.7 (3d Cir. 2005); *United States v. Saget*, 377 F.3d 223, 227 (2d Cir. 2004), *cert. denied* 125 S. Ct. 938 (2005).

bringing major uncertainty to the everyday prosecution of criminal cases.<sup>39</sup> To the Chief Justice, the well-established *Roberts* indicia of reliability framework was well up to the task of resolving the confrontation-hearsay issue presented in *Crawford*, and presumably those arising in the future as well. Applying *Roberts* and its progeny to the custodial statements of Crawford's wife to the police – the crux of the *Crawford* case – the concurring Justices had no difficulty in determining that her statements failed to possess adequate indicia of reliability, thus reaching the same result as the majority.<sup>40</sup>

Turning to the same English and American sources relied upon by the majority, the Chief Justice, in his concurring opinion, concluded that the Scalian distinction between testimonial and nontestimonial statements “is no better rooted in history than our current [*Roberts*] doctrine.”<sup>41</sup> Indeed, the Chief Justice thought it an “odd conclusion . . . to think that the Framers created a cut-and-dried rule with respect to the admissibility [of this newly-minted category of] testimonial statements when the law during their own time was not fully settled.”<sup>42</sup> Moreover, Chief Justice Rehnquist remained unconvinced “that the Confrontation Clause categorically requires the exclusion of testimonial statements.”<sup>43</sup>

#### THE REACTION

Immediately, *Crawford* was editorially celebrated as “present[ing] an attractive vision of a Sixth Amendment that rigorously lives up to the rights it promises.”<sup>44</sup> Crawford's lead

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<sup>39</sup> *Crawford*, 541 U.S. at 75-76 (“The Court grandly declares that ‘[w]e leave for another day any effort to spell out a comprehensive definition of “testimonial” . . . . But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of ‘testimony’ the Court lists . . . is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.” (citations omitted)). Justice Scalia acknowledges the Chief Justice's objection, characterizing it as a concern “that the [majority's] refusal to articulate a comprehensive definition [of testimonial] will cause interim uncertainty.” *Id.* at 68 n.10. Justice Scalia continues: “But it can hardly be any worse than the status quo [*Roberts*]. The difference is that the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable.” *Id.* (emphasis in original).

<sup>40</sup> *Id.* at 76.

<sup>41</sup> *Id.* at 69.

<sup>42</sup> *Id.* at 73.

<sup>43</sup> *Id.* at 72.

<sup>44</sup> Editorial, WASH. POST, Mar. 18, 2004, at A30. Although welcoming *Crawford*, the editorial cautions that the Court “will have to take care to ensure that

attorney in the Supreme Court stated that the “decision will fundamentally alter the way that criminal defendants are tried . . . . No more will government be able to convict people of crimes on the basis of accusations that they are unable to cross-examine.”<sup>45</sup> The second seat attorney in the Supreme Court in *Crawford*, a leading confrontation scholar, wrote that *Crawford* “radically transformed”<sup>46</sup> confrontation doctrine; to the news media he called it a “wonderful development . . . the court is saying . . . that the confrontation clause means what it says.”<sup>47</sup> Another law professor predicted “the question of what constitutes testimonial statements would plague lower courts and the attorneys in them on a case by case basis for years to come.”<sup>48</sup>

One New York criminal defense attorney called the consequences of *Crawford* “awesome, [although] how it took so long to get a decision like this is beyond belief.”<sup>49</sup> A Bronx public defender observed: “Mercifully the U.S. Supreme Court . . . just made life in the domestic violence courts a lot more pleasant for both defendants and public defenders.”<sup>50</sup>

In contrast, a New York prosecutor mourned that *Crawford* “may be the most significant criminal law decision from the Supreme Court in years . . . . [The Court has] thrown out 30 years of analysis.”<sup>51</sup> A second prosecutor observed that in light of *Crawford*, “some prosecutors are slashing their wrists because of the concern that statements are now going to

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these rules do not become a straitjacket for the federal courts in terrorism trials that already present a profound challenge.” *Id.*

<sup>45</sup> Charles Lane, *Justices Rule Against Statements Made Out of Court*, WASH. POST, Mar. 9, 2004, at A8 (quoting Jeffrey L. Fisher).

<sup>46</sup> Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, CRIM. JUST., Summer 2004, at 4, 5. In a side bar to this article, a member of the *Criminal Justice* editorial board calls *Crawford* a “one-eighty” . . . a tornado cutting a swath of uncertainty in the criminal justice community.” *Id.* at 5.

<sup>47</sup> Linda Greenhouse, *Court Alters Rule on Statements of Unavailable Witnesses*, N.Y. TIMES, Mar. 9, 2004, at A21 (quoting Richard Friedman).

<sup>48</sup> David Ziemer, *U.S. Supreme Court Term Left Many Unanswered Questions*, DAILY RECORD, Oct. 18, 2004 (quoting the remarks of Charles Whitebread at the Annual Public Defenders Conference in Milwaukee).

<sup>49</sup> Tom Perrotta, *The Struggle to Define ‘Testimony’ After ‘Crawford’*, N.Y.L.J., June 21, 2004, at 1 (quoting Mark R. Baker).

<sup>50</sup> David Feige, *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecutions*, SLATE, Mar. 12, 2004, <http://www.slate.com/id/2097041> (“So from now on, when the complainant in a domestic violence case insists she’s not coming to court and just wants to drop the charges, I’ll just smile as the judge . . . says ‘case dismissed.’”).

<sup>51</sup> *Id.* (quoting Assistant District Attorney Anthony Girese, Counsel to the Bronx District Attorney).

be excluded when in fact they . . . are now admissible under statutes without any impediments imposed by the Sixth Amendment.”<sup>52</sup> A third, somewhat more sanguine, federal prosecutor described *Crawford* as a “major restructuring of the way the Confrontation Clause is interpreted . . . [a]nd . . . a minor win for defendants.”<sup>53</sup>

Almost overnight, *Crawford* spawned an entire cottage industry, including several hundred reported cases, well over 100 articles, an on-line blog, an on-line outline, an untold number of casebooks and text supplements, conferences, CLE lectures and presentations at prosecutorial and criminal defense training sessions.

#### THE CONFERENCE AND THIS SYMPOSIUM

“*Crawford* and Beyond,” the first major academic conference to address *Crawford*, sought to explore the thirty-one page discursive, sprawling and heavily footnoted, dicta-laden *Crawford* majority opinion, which raises substantially more questions than it answers.<sup>54</sup> The program was divided

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<sup>52</sup> Leonard Post, *Prosecutors Feel Broad Wake of ‘Crawford’; Child Abuse Cases, 911 Calls Affected*, NAT’L L.J., Dec. 13, 2004, at 1 (quoting Richard Wintory, Deputy County Attorney, Pima, Arizona and Vice-President for Deputy Prosecutors of The National District Attorney’s Association).

<sup>53</sup> See Perrotta, *supra* note 49, at 1 (quoting Daniel R. Alonso, Chief of the Criminal Division, United States Attorney’s Office for the Eastern District of New York).

<sup>54</sup> Some thirty-eight years before *Crawford*, an equally discursive, sprawling, heavily footnoted, dicta-laden Supreme Court opinion, raising as many, if not more questions than it answered, also dealing with everyday issues in criminal prosecutions, demanded the attention of academics as well as police prosecutors, defense counsel and trial and appellate judges. See *Miranda v. Arizona*, 384 U.S. 436 (1996). *Miranda* and the Fifth Amendment and *Crawford* and the Sixth Amendment have much more in common than a similar opinion style. To mention but a few, they share a common law history involving governmental *ex parte* examinations by interrogators of the same ilk. The minority view in each case concluded that the majority misconstrued and rewrote history. See *Miranda*, 384 U.S. at 526 (White, J., dissenting; joined by Harlan & Stewart, J.J.); *Crawford*, 541 U.S. at 69 (Rehnquist, J., concurring; joined by O’Connor, J.). The text of each amendment contains the word “witness,” which, in large part, determines the scope of protection afforded by each. U.S. CONST. amend. V; U.S. CONST. amend. VI. Both *Miranda* and *Crawford* rejected a twenty-five or more year-old standard as too malleable, and as having had the unpardonable vice of leading lower courts to admit the very evidence sought to be excluded by the respective amendments. The minority view in each case viewed the existing framework as more than adequate to address the admissibility of the statements at issue. See *Miranda*, 384 U.S. at 508 (Harlan, J., dissenting; joined by Stewart & White, J.J.); *Crawford*, 541 U.S. at 71 (Rehnquist, J., concurring). Each case involves police interrogation and the statements derived from it.

To Justice Scalia, *Miranda* is the antithesis of sound constitutional decision-making, in large part because it leads to exclusion of statements that have not been compelled, and thus do not violate the Fifth Amendment’s privilege against self-

into four sessions. This Symposium issue of the *Brooklyn Law Review* is devoted to the papers presented at three of those sessions – history, testimonial statements, and statements in domestic violence and child abuse prosecutions – and essays by a number of the commentators at each session.<sup>55</sup>

### *Historical Background*

In the article that opens this symposium, “Does *Crawford* Provide a Stable Foundation for Confrontation Doctrine?” University of Nebraska Professor Roger Kirst begins with a thorough review of the evolution of confrontation doctrine in Supreme Court decisions.<sup>56</sup> He next examines the opinions in *Crawford*, with special focus on historical sources, especially the constitutional debates at state ratifying conventions.<sup>57</sup> Importantly, with respect to the ratification history, he explains why that record demonstrates that no specific rules of confrontation were intended by the drafters.<sup>58</sup> Rather, he concludes that history indicates an intent to leave confrontation procedure to judicial development.<sup>59</sup> Professor Kirst also offers support for his view that the Confrontation Clause is not an incorporation of, or even an implicit reference to, the English evidentiary common law of hearsay.<sup>60</sup>

Based on his analysis, Professor Kirst concludes that Justice Scalia was certainly correct that the Confrontation Clause was designed to provide criminal defendants with a right to cross-examine some hearsay declarants in order to provide the trier of fact with an adequate basis to evaluate the

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incrimination. See *Dickerson v. United States*, 530 U.S. 428, 447-50 (2000) (Scalia, J., dissenting). It remains to be seen whether subsequent Supreme Court decisions defining testimonial statements will continue to be limited to those derived from modern day practices most closely akin to the civil law mode of *ex parte* examination procedures at which the Confrontation Clause is directed.

<sup>55</sup> The fourth session centered around a robust discussion of an extensive hypothetical, raising many of the open issues. Included in the hypothetical was a simulated, life-like recording of a telephone call to 911. Editing the transcript of the panel discussion raised insurmountable problems. Consequently, it was decided not to publish the hypothetical or the discussion. The simulated 911 call and a transcript of it can be found at [www.brooklaw.edu/news/homepage\\_news/crawford2005.php#video](http://www.brooklaw.edu/news/homepage_news/crawford2005.php#video) (follow “Part IV: Real Hypotheticals” hyperlink).

<sup>56</sup> Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 40-64 (2005).

<sup>57</sup> See *id.* at 64-71, 77-83.

<sup>58</sup> See *id.* at 77-83.

<sup>59</sup> See *id.* at 82-83.

<sup>60</sup> See *id.* at 83-84.



truth and accuracy of the out-of-court statement.<sup>61</sup> On the other hand, Professor Kirst doubts that the purpose of the Confrontation Clause was to exclude certain kinds of hearsay,<sup>62</sup> and he argues that it was surely not designed to draw a distinction between testimonial and nontestimonial statements.<sup>63</sup>

Professor Kirst then gives reasons and lays a foundation for fine-tuning the testimonial framework.<sup>64</sup> Specifically, when the Court addresses with more particularity the distinction between testimonial and nontestimonial statements, Professor Kirst recommends that the concept of testimonial should focus on whether admitting the particular hearsay statement, absent cross-examination of the declarant, is consistent with the purposes of confrontation – that is, to provide the defendant with an ability to contest the statement, and thereby to provide the fact-finder with a sufficient basis for evaluating the accuracy and truthfulness of the statement.<sup>65</sup>

At the February 2005 “*Crawford* and Beyond” Conference, University of Tennessee Law School Professor Tom Davies provided only the introduction to his prospective article. That introduction promised a thorough exploration of English common law, of the early American experience, and of the difficulty of evaluating today’s world of evidentiary hearsay and constitutional confrontation principles by exclusive reference to and guidance by 400 years of history and doctrine.

That promise is more than fulfilled in his lead article, “What Did the Framers Know, and When Did They Know It? Fictional Originalism in *Crawford v. Washington*.”<sup>66</sup> Professor Davies argues persuasively that the testimonial/nontestimonial dichotomy drawn in *Crawford* was neither part of the original meaning of the Confrontation Clause, nor the English common law, nor even pre-ratification American law.<sup>67</sup>

Moreover, as analyzed by Professor Davies, the English common law cases and authorities relied upon by Justice Scalia to support a common law right of confrontation and cross-

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<sup>61</sup> See *id.* at 99-100.

<sup>62</sup> See *id.*

<sup>63</sup> See *id.* at 86-87.

<sup>64</sup> See *id.* at 88-91.

<sup>65</sup> See *id.* at 99-100.

<sup>66</sup> Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005).

<sup>67</sup> See *id.* at 107, 119.

examination simply fail to do so. Indeed, given the publication date of at least three of those cases, Professor Davies argues that they were irrelevant to the original American understanding of the Confrontation Clause.<sup>68</sup> He also explains why the authorities relied on by the *Crawford* majority fail to establish that a rigid rule of cross-examination regarding hearsay statements was part of the American understanding of the common law confrontation right before or during ratification of the Bill of Rights.<sup>69</sup> In this regard, Professor Davies' use of Justice of the Peace manuals and treatises available in the colonies is particularly illuminating.<sup>70</sup>

More fundamentally, Professor Davies explains why he thinks that judicial-chambers historical research is an inherently flawed process that usually leads to inaccurate history.<sup>71</sup> He points out that it is only natural to examine history to support a conclusion already reached, instead of examining history and then, if possible, reaching a conclusion of how the modern doctrine can most accurately reflect the past.<sup>72</sup> Perhaps more importantly, even if one could correctly divine history, Professor Davies argues that framing-era doctrine is usually so far removed in time, place and context from the modern era that it cannot be applied to legal concepts as they are presently understood, or for that matter to contemporary practices.<sup>73</sup> As a result, reasoning relying only

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<sup>68</sup> See *id.* at 116-18.

<sup>69</sup> See *id.* at 118-19.

<sup>70</sup> See *id.* at 118.

<sup>71</sup> See *id.* at 119-20. *But cf.* Jack N. Rakove, *Fidelity Through History (Or To It)*, 65 *FORDHAM L. REV.* 1587, 1588 (1997) ("Skepticism about the limits of judicial reasoning does not require a blanket dismissal of the possibility that historically grounded approaches to originalism might indeed yield fruitful results.").

<sup>72</sup> See Davies, *supra* note 66, at 120 n.43. *But see* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 45-46 (Princeton Univ. Press 1997) ("[T]he difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution *changes* . . . . The originalist, if he does not have all the answers, has many of them. The Confrontation Clause for example, requires confrontation.") (emphasis in original).

<sup>73</sup> Davies, *supra* note 66, at 119-20. *But see* JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 6-7 (A. A. Knopf 1996) ("[W]hat is most remarkable about our knowledge of the adoption of the Constitution is not how little we understand but how much . . . . However indeterminate some of our findings may be, however much more evidence we could always use, the origins of the Constitution are not 'buried in silence or veiled in fable.'" There are many sources that document the daily deliberations at the Constitutional Convention as well as the subsequent ratification debates, all of which reveal the meanings first attached to the Constitution. Additionally, the "larger intellectual world" within which the Constitution is often located is not completely foreign to most

upon framing-era doctrine and history cannot provide a definitive answer to a contemporary question.<sup>74</sup>

In his essay, “The Too-Easy Historical Assumptions of *Crawford v. Washington*,” New York Law School Professor Randolph Jonakait explores what he sees as a fatal flaw in *Crawford*’s conclusion that the Sixth Amendment Confrontation Clause constitutionalized English common law.<sup>75</sup> To demonstrate the point, Professor Jonakait highlights other clauses of that very same Amendment, namely the rights of defendant to the assistance of counsel, to notice of the charges, and to compulsory process, that were undoubtedly in derogation of the English common law.<sup>76</sup> Given that these other Sixth Amendment rights do not constitutionalize the common law, to Professor Jonakait it is incongruous to conclude, especially without any support in the text or in the record of ratification, that the Framers sought to codify an English common law of confrontation. Indeed, Professor Jonakait, as has Professor Kirst,<sup>77</sup> points to the text of the Seventh Amendment to illustrate that when the drafters sought to continue adherence to the common law, they did so expressly.<sup>78</sup>

To be sure, as Professor Jonakait acknowledges, the Sixth Amendment jury trial provision is adopted from English law.<sup>79</sup> Still, and with considerable force, Professor Jonakait argues that the methods for conducting those trials were not derived from the English common law, but instead were essentially American in character.<sup>80</sup> Additionally, Professor

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scholars.); Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation*, 65 FORDHAM L. REV. 1435, 1447 (1997) (“Our Constitution is written in English and was ratified by people who read Aristotle and Plato; Shakespeare and Milton; Aquinas and Augustine; Hobbes and Hume; Locke and Montesquieu; Voltaire and Rousseau; Jefferson and Madison; the Old and New Testaments of the Bible; Dante and Homer. Americans think the 200 years from the Republic of Slavery to the Democracy of today is an eon . . . . The American legal tradition is just not that old nor can the Constitution be fairly compared to some ancient manuscript written in Greek or Sanskrit.”).

<sup>74</sup> Davies, *supra* note 66, at 121-22.

<sup>75</sup> Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219 (2005).

<sup>76</sup> *See id.* at 220-24.

<sup>77</sup> Kirst, *supra* note 56, at 84.

<sup>78</sup> Jonakait, *supra* note 75, at 231.

<sup>79</sup> *See id.* at 225-26.

<sup>80</sup> *See id.* at 226; *see also* 30 WRIGHT & GRAHAM, *supra* note 7, at 347 (“The American history [of confrontation] is not a continuation of the story in England but a separate story that has significant overlap and interconnection with events in England.”).

Jonakait argues that by assuming a common law basis for the confrontation right, the reasoning of *Crawford* serves only to cast doubt on other longstanding Sixth Amendment principles – for example, an indigent criminal defendant’s right to assigned counsel.<sup>81</sup>

Finally, with respect to history, Cardozo Law School Professor Peter Tillers provides a brief, amusing, thoughtful essay, “Legal History for a Dummy: A Comment on the Role of History in Judicial Interpretation of the Confrontation Clause.”<sup>82</sup> A self-confessed non-historian, Professor Tillers finds both Professors Kirt and Davies persuasive regarding the inaccurate history in *Crawford* that they argue misinformed the *Crawford* decision.<sup>83</sup> He concludes that the historical mistakes and distortions in *Crawford* occurred because the Court knows neither how to conduct an effective historical inquiry, nor how to use the facts disclosed by such an inquiry.<sup>84</sup> Still, he warns that *Crawford*’s mistakes about legal history do not necessarily mean that *Crawford* is an unwelcome decision. That, he says, depends on how the text of *Crawford* is read and its implications are interpreted.<sup>85</sup>

When addressing the meaning of testimonial statements,<sup>86</sup> Mark Dwyer, who has been the Chief of Appeals in the New York County District Attorney’s Office for the past twenty years, cautions that despite the fascinating nature of the debate over history, practicing attorneys must rely on controlling precedent. Mr. Dwyer advises that prosecutors and defense counsel cannot simply walk into the courtroom and tell the judge, “Sure there is *Crawford v. Washington*, but Justice Scalia got the history wrong, and so here is how you should let me try my case.”<sup>87</sup> Mr. Dwyer observes that when the Court decides a major case like *Crawford*, “everything past is essentially irrelevant” and analysis has to start with

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<sup>81</sup> Jonakait, *supra* note 75, at 232-34.

<sup>82</sup> Peter Tillers, *Legal History for a Dummy: A Comment on the Role of History in Judicial Interpretation of the Confrontation Clause*, 71 BROOK. L. REV. 235 (2005).

<sup>83</sup> *See id.* at 237.

<sup>84</sup> *See id.* at 238.

<sup>85</sup> *See id.* at 237 n.12.

<sup>86</sup> *See* Mark Dwyer, *Crawford’s “Testimonial Hearsay” Category: A Plain Limit on the Protections of the Confrontation Clause*, 71 BROOK. L. REV. 275 (2005), discussed more fully at text accompanying note 108, *infra*.

<sup>87</sup> *Id.* at 275.

*Crawford*.<sup>88</sup> Nonetheless, history should continue to play a role in determining the kinds of statements that are at the testimonial core of *Crawford* and its view of confrontation.

### *The Meaning of Testimonial*

University of Michigan Law Professor Richard Friedman explores the category of testimonial statements in his lead article, “Grappling with the Meaning of ‘Testimonial.’”<sup>89</sup> After a careful and thoughtful analysis, he favors an objective approach, focusing on whether a reasonable declarant would have understood at the time he or she made the statement that there was a significant probability that the statement would be used by the prosecution.<sup>90</sup> In his view, whether a statement is testimonial depends on whether it performs the function of testimony, not whether the statement fits within a predetermined list of characteristics.<sup>91</sup> Consequently, the formal nature of the statement, the participation of a governmental agent or government abuse in securing it, the presence of interrogation, and the presence of excitement surrounding the statement are not essential to finding a statement testimonial.<sup>92</sup> Rather, by way of emphasis, not repetition, the controlling issue is whether the hearsay statement performs the function of testimony.

It could well be argued that any out-of-court statement offered to prove the truth of a fact asserted in that statement always performs the function of testimony. But to Professor Friedman, an out-of-court declarant is a witness who “bears testimony,” within the meaning of the Confrontation Clause, when he or she makes a statement reasonably believing that it will be used in a criminal proceeding.<sup>93</sup> In his analysis, Professor Friedman attempts to demonstrate the practical implications of this approach.

Finally, Professor Friedman notes briefly how the objective testimonial approach would address statements of children. He “tend[s] to believe” that, because of their

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<sup>88</sup> *Id.*

<sup>89</sup> Richard D. Friedman, *Grappling With the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241 (2005).

<sup>90</sup> *See id.* at 252-54.

<sup>91</sup> *See id.* at 249.

<sup>92</sup> *See id.* at 243.

<sup>93</sup> *Id.* at 267 (quoting *Crawford*, 541 U.S. 36, 51 (2004)).

undeveloped understanding, very young children who make out-of-court statements should not be treated as witnesses within the meaning of the Confrontation Clause.<sup>94</sup> Assuming a child is capable of being a “witness,” the question then becomes whether his or her hearsay statement should be considered testimonial. Since Professor Friedman favors an objective standard for determining whether a declarant reasonably believed that a statement would be used prosecutorially, he concludes that a child’s age and immaturity would be irrelevant.<sup>95</sup> Yet, Professor Friedman acknowledges “something a little odd about asking, with respect to a statement by a young child, what the anticipation of a reasonable adult would be.”<sup>96</sup>

In his essay “Testimonial Statements under *Crawford*: What Makes Testimony . . . Testimonial,”<sup>97</sup> Brooks Holland, a criminal defense attorney with eleven years of practice experience in New York City and presently a Visiting Professor of Law at Gonzaga University Law School, finds a testimonial out-of-court statement to be one in which the surrounding circumstances made its adjudicative use foreseeable to the declarant.<sup>98</sup> To Professor Holland, objective expectation is the key to the meaning of testimonial, not artificial notions of

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<sup>94</sup> *Id.* at 272. Presumably, since very young children are not “witnesses,” their statements are not testimonial, and thus not within the categorical ban of *Crawford*. See Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 L. & CONTEMP. PROB. 243, 250 (2002).

<sup>95</sup> Friedman, *supra* note 89, at 272-73. If a subjective test is used, Professor Friedman views the proper focus to be whether “the child understood that she [or he] was reporting wrongdoing and that some adverse consequences – including that Mommy [presumably Daddy too] would get mad – would be visited on the wrongdoer.” *Id.* at 273.

<sup>96</sup> *Id.* at 273. Compare *Yarborough v. Alvarado*, 541 U.S. 652, 667-68 (2004) (Kennedy, J.; joined by Rehnquist, C.J., Scalia, J., and Thomas, J.) (indicating that the objective reasonable person standard to determine whether a suspect is in custody for purposes of *Miranda* is designed to give clear guidance to the police, and that clarity could be diminished if consideration of the suspect’s individual characteristics – including his age – are required), *with id.* at 669 (O’Connor, J., concurring) (“[T]here may be cases in which a suspect’s age will be relevant to the ‘custody’ inquiry under *Miranda* . . . however, [in this case] Alvarado was almost 18 at the time of this interview.”), and *id.* at 673-75 (age is an objective, widely shared characteristic that does not complicate, but is relevant to, the custody inquiry; the “reasonable person” standard does not require a court to pretend that Alvarado was a 35-year-old with aging parents whose middle-aged children do what their parent ask only out of respect”). Cf. *Dir. of Pub. Prosecutions v. Camplin*, 2 All Eng. Rep. 168, 2 W.L.R. 678, 685 (House of Lords 1978) (provocation defense *inter alia* focuses on the degree of self control to be expected of a reasonable person of the same age as defendant).

<sup>97</sup> Brooks Holland, *Testimonial Statements under Crawford: What Makes Testimony . . . Testimonial?*, 71 BROOK L. REV. 281 (2005).

<sup>98</sup> See *id.* at 287-88.

formality, statement context, witness cognition, interrogation structure, status of the questioner, or governmental abuse.<sup>99</sup>

In his essay, “Purpose as a Guide to the Interpretation of the Confrontation Clause,”<sup>100</sup> University of California-Hastings Professor Roger Park agrees with most of the substance in Professor Friedman’s article. Nonetheless, he finds it problematic, if not overly simplistic, to describe the purpose of the confrontation guarantee as providing a criminal defendant with the opportunity to cross-examine testimonial hearsay defendants who must testify in the defendant’s presence.<sup>101</sup>

Professor Park believes it necessary to delve deeper into why the Framers thought a right of confrontation to be constitutionally necessary. Citing a 1992 article by the moderator of the program’s testimonial session,<sup>102</sup> Professor Park views the “primary purpose of the Confrontation Clause is to prevent injustice caused by abuse of state power.”<sup>103</sup> He then proceeds to explain his view of how the inability to confront nontestifying hearsay declarants facilitates abuse of power by the government.

Professor Park also views the *Crawford* opinion as open to, if not embrative of, a functional approach, focusing on whether a statement was secured by governmental overreaching to define the scope of the confrontation right, especially the meaning of testimonial.<sup>104</sup> Professor Park gives the example of a child abuse case where he would focus on whether a child hearsay declarant was subject to a suggestive governmental interview, rather than focusing on the daunting, sometimes impossible task of determining whether the child was old enough to know that his or her statement might be used in a criminal prosecution. Professor Park also suggests that the government-abuse approach could provide a principled

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<sup>99</sup> See generally Holland, *supra* note 97.

<sup>100</sup> Roger C. Park, *Purpose as a Guide to the Interpretation of the Confrontation Clause*, 71 BROOK. L. REV. 297 (2005).

<sup>101</sup> See *id.* at 297-98.

<sup>102</sup> Berger, *Prosecutorial Restraint*, *supra* note 11, at 557, 558-61.

<sup>103</sup> Park, *supra* note 100, at 298.

<sup>104</sup> See *id.* at 301-02; see *Crawford v. Washington*, 541 U.S. at 56 n.7 (“Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar.”).

basis by which to conclude that casual hearsay to a private individual passes constitutional-confrontation muster.<sup>105</sup>

Professor Park emphasizes that particular results are not the focus of his concern.<sup>106</sup> Nevertheless, simply because the *Roberts* indicia of reliability framework proved unsatisfactory to Professor Park, it does not follow that the same fate awaits a confrontation inquiry focusing on governmental abuse or overreaching.<sup>107</sup>

Playing the game by the rules enunciated in *Crawford*, the aforementioned Mark Dwyer<sup>108</sup> reads testimonial to include only those modern day statements that truly resemble the class of formal statements disfavored at common law. Those statements include affidavits, depositions and statements of witnesses and accomplices taken by magistrates, justices of the peace, and other officers of the crown.<sup>109</sup>

According to Mr. Dwyer, broadening the testimonial category to include hearsay statements not of this ilk is simply not within the holding of *Crawford*.<sup>110</sup> He is also critical of the attempt to redefine testimonial to include statements of a declarant who believes that such statements will have a law enforcement “use,” because belief about “use” is simply not enough to make an out-of-court declarant a witness bearing testimony.<sup>111</sup> Rather, he says, the focus of testimonial should be a declarant’s expectation that his or her statement will serve as the equivalent of in-court testimony.<sup>112</sup>

Finally, Mr. Dwyer emphasizes that nontestimonial statements may be inadmissible hearsay, but that does not, per se, render such statements excludible under the Confrontation Clause.<sup>113</sup> Indeed, to Mr. Dwyer, arguments seeking to broaden the scope of testimonial well beyond the statements obtained under the civil law *ex parte* mode of examination are nothing more than a desire to recast the Confrontation Clause into a super rule against hearsay. Mr. Dwyer expresses profound skepticism that *Crawford* supports such a result.<sup>114</sup>

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<sup>105</sup> Park, *supra* note 100, at 298-99.

<sup>106</sup> *See id.* at 303.

<sup>107</sup> *See id.* at 305.

<sup>108</sup> *See* Dwyer, *supra* note 86.

<sup>109</sup> *See id.* at 277.

<sup>110</sup> *See id.* at 277-78.

<sup>111</sup> *Id.* at 279.

<sup>112</sup> *See id.*

<sup>113</sup> *See id.* at 278.

<sup>114</sup> *See id.*



In his essay, Paul Shechtman, a leading New York criminal defense attorney and former New York County and federal prosecutor, who teaches evidence at Columbia University Law School, bemoans the demise of the *Roberts* indicia of reliability framework.<sup>115</sup> He does so because he believes that *Roberts* asked the correct question: “was the out-of-court statement sufficiently reliable that it could be admitted at criminal trial untested by cross-examination?”<sup>116</sup> Mr. Shechtman observes that the new *Crawford* standard fosters unpredictability<sup>117</sup> and he expresses concern that *Crawford* will weaken Confrontation Clause protections for defendants by permitting the introduction of testimony of dubious reliability.<sup>118</sup>

Mr. Shechtman also describes an untoward consequence of *Crawford* involving the possible unconstitutionality of Federal Rule of Evidence Rule 803(6).<sup>119</sup> That rule, in part, authorizes a business record custodian, in lieu of testifying, to submit an affidavit certifying that a record complies with Rule 902(11), Rule 902(12) or other statutes permitting certification. Given that an affidavit of certification is made for the very purpose of being introduced in evidence, it is, the argument goes, testimonial and hence inadmissible in a criminal case, absent the affiant’s testimony.<sup>120</sup> Yet, this kind of affidavit hardly resembles the civil-law *ex parte* deposition at which the right of confrontation is directed.<sup>121</sup> Mr. Shechtman’s concern in this regard implicitly recognizes that requiring the certifying affiant to testify defeats the very practical purpose of the certification process, which is to permit record custodians to

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<sup>115</sup> Paul L. Shechtman, *From “Reliability” to Uncertainty: Difficulties Inherent in Interpreting and Applying the New Crawford Standard*, 71 BROOK L. REV. 305, 307 (2005).

<sup>116</sup> *Id.* at 306.

<sup>117</sup> *See id.* at 308.

<sup>118</sup> *See id.* at 309.

<sup>119</sup> Mr. Shechtman points to a pre-*Crawford* federal district court case decided under the indicia of reliability framework that had upheld against a confrontation challenge the admissibility of a certification of foreign business records pursuant to 18 U.S.C. § 3505. *See Shechtman, supra* note 115, at 308-09 (citing *United States v. Chan*, 680 F. Supp. 521, 522 (E.D.N.Y. 1988) (Weinstein, J.)).

<sup>120</sup> *See United States v. Wittig*, No. 03-40142JAR, 2005 WL 1227790 (D. Kan. May 23, 2005) (Federal Rule of Evidence certification of business record excluded as testimonial).

<sup>121</sup> *See State v. Cook*, No. WD-04-029, 2005 WL 736671, at \*3 (Ohio Ct. App. Mar. 31, 2005) (affidavit by custodian of documents that they are made and kept in the ordinary course of business is not the kind of testimonial evidence about which *Crawford* is concerned).

perform the job for which they have been employed, rather than having to become professional witnesses.<sup>122</sup>

*Testimonial Statements in Domestic Violence and Child Abuse Prosecutions*

Throughout her article, “Remember the Ladies and the Children Too: *Crawford’s* Impact on Domestic Violence and Sexual Abuse Cases,”<sup>123</sup> Southwestern Law School Professor Myrna Raeder is intellectually forthright in presenting her viewpoint and the conflicting concerns and policies that have engendered it. On the one side is her belief in the need and desirability to assure that the voices of women and children are heard, both to protect them and to lower the incidence of domestic violence and sexual abuse.<sup>124</sup> On the other side is her fear of eviscerating defendants’ rights to confront live witnesses with first-hand knowledge, as opposed to second-hand reporters of hearsay, and her corresponding view that the category “testimonial hearsay” should be interpreted broadly.<sup>125</sup>

Professor Raeder seems both amazed and dismayed that the right of confrontation in 2004 is to be defined by focusing on the world of 1791, a “world that typically treated [women and children] as chattel” and in which domestic violence and sexual abuse prosecutions were virtually unknown.<sup>126</sup> A world, as Professor Raeder describes it, without organized police departments, medical or forensic protocols in criminal cases, mandatory reporting requirements for medical personnel who have knowledge of domestic violence or child abuse, videotape, audiotape, closed-circuit television, telephones, computers, e-mail, typewriters, emergency 911 operators, mandatory arrest and no-drop prosecution policies in domestic violence or child sex abuse cases, protective orders, and expansive hearsay exceptions.<sup>127</sup>

With the 2004/1791 dichotomy as a backdrop, Professor Raeder examines domestic violence and its criminalization, as

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<sup>122</sup> See *Napier v. State*, 827 N.E.2d 565, 569 (Ind. Ct. App. 2005) (“unreasonable to have a toxicologist in every court on a daily basis offering testimony about his [or her] inspection of a breathalyzer machine and the certification of the operator as a proper administrator of the breath test”) (citation omitted).

<sup>123</sup> Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Sexual Abuse Cases*, 71 BROOK. L. REV. 311 (2005).

<sup>124</sup> See *id.* at 314.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See *id.* at 311-12, 324.

well as the realities of domestic violence prosecutions.<sup>128</sup> She also discusses current trends affecting domestic violence and child abuse litigation.

She critiques the testimonial approach of *Crawford* and presents her view on the appropriate definition of testimonial statements, in particular excited utterances, “the workhorse of domestic violence cases.”<sup>129</sup> She considers other hearsay exceptions frequently used in such prosecutions, *i.e.* statements for purposes of medical diagnosis and treatment, dying declarations, prior inconsistent statements of testifying victims, ad hoc exceptions, as well as forfeiture.<sup>130</sup> Professor Raeder then discusses some of these issues as they arise in child abuse prosecutions.<sup>131</sup>

She also explores waiver by a defendant “opening the door”<sup>132</sup> to testimonial statements, the expansion of admissible hearsay for declarants who testify, and embraces “evidentiary creativity”<sup>133</sup> with respect to new post-*Crawford* hearsay exceptions in domestic violence cases, and expert testimony to provide needed background information about domestic battery and child abuse.<sup>134</sup>

Finally, and “more globally,” Professor Raeder proposes restructuring domestic violence prosecutions into three distinct tracks in order to allocate the scarce judicial resources to the prosecution of the most dangerous offenders.<sup>135</sup>

In his essay, “*Crawford’s* Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases,”<sup>136</sup> Duke University Law Professor Robert Mosteller acknowledges that, regardless of the ultimate definitional breadth of “testimonial,” *Crawford* will substantially limit the admissibility of hearsay in domestic violence cases and have a somewhat lesser, but nonetheless significant, impact on the admissibility of hearsay in child abuse cases.<sup>137</sup> The breadth of testimonial notwithstanding, Professor Mosteller explores

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<sup>128</sup> See *id.* at 326-32.

<sup>129</sup> Raeder *supra* note 123, at 332.

<sup>130</sup> See *id.* at 348-66.

<sup>131</sup> See *id.* at 374-89.

<sup>132</sup> *Id.* at 359.

<sup>133</sup> *Id.* at 315.

<sup>134</sup> See *id.* at 366-67, 370-371.

<sup>135</sup> *Id.* at 315, 367.

<sup>136</sup> Robert P. Mosteller, *Crawford’s Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411 (2005).

<sup>137</sup> *Id.* at 411-12.

available tools, or tools that could be made available, that will assist the successful prosecution of domestic violence and child abuse cases.<sup>138</sup>

He also suggests that in child sexual abuse cases better, harder, and more creative work by prosecutors in preparing a child witness to testify will well-serve successful prosecutions.<sup>139</sup> Given that the *Crawford* majority leaves no doubt that if the declarant testifies, then there is no confrontation bar to the introduction of his or her prior hearsay statements,<sup>140</sup> Professor Mosteller points approvingly to an Oregon statute that provides for the admissibility of all prior statements by a child sexual abuse victim in a sex crime prosecution, provided the child testifies and is subject to cross-examination.<sup>141</sup> Of course, absent such a statute, he recognizes that the traditional rule against hearsay will prove troublesome for the introduction of many of the statements that would be admissible only under an Oregon-type provision.<sup>142</sup>

Professor Mosteller advocates that domestic violence victims testify at an early adversary proceeding hearing such as a preliminary hearing, a conditional examination to preserve testimony, or other deposition, provided that the defendant has an opportunity and real motive to cross-examine the victim, as well as other restrictions.<sup>143</sup> Additionally, he also provides sound reasoning to support the conclusion that the confrontation right is not satisfied simply by producing the declarant either at a pretrial hearing or at trial to be called by the defendant.<sup>144</sup>

Professor Mosteller agrees that if the restrictions he suggests are adhered to, then, regardless of whether the victim is subsequently unavailable to testify or is called by the prosecution to testify, the introduction of the prior hearing

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<sup>138</sup> See *id.* at 412-13.

<sup>139</sup> *Id.* at 414-15.

<sup>140</sup> *Id.* at 414.

<sup>141</sup> *Id.* at 415 (citing OR. R. EVID. 803(18a)(b) (OR. REV. STAT. § 40.460(18a)(b) (2005))). More problematic is another Oregon law, OR. REV. STAT. § 40.460(26a) (2005), Rule 803(26a). That statute provides for the admissibility of any domestic violence accusation made within 24 hours of the event and either recorded electronically or in writing, or made to a peace officer, other corrections officer, youth corrections officer, parole officer, probation officer, emergency medical technician, or firefighter. See *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2004); see also *supra* note 25.

<sup>142</sup> Mosteller, *supra* note 136, at 420-21.

<sup>143</sup> See *id.* at 415-16.

<sup>144</sup> See *id.* at 416-17.

testimony would not violate the confrontation right. This is so even if, as Professor Mosteller postulates, the victim at trial exonerates the defendant, refuses to implicate the defendant, or denies making or the truth of the prior statement.<sup>145</sup>

Finally, Professor Mosteller voices concern that once prior confronted testimony of a victim has been secured, the prosecution may have less of an incentive to procure the trial testimony of the victim.<sup>146</sup> He believes, however, that this concern can be addressed by judicial vigilance to ensure that the witness is indeed unavailable, and that the prosecution worked “roughly as hard to find and produce the witness as it does in cases where the witness is needed to prove the prosecution’s case.”<sup>147</sup>

In his essay, “Yes, Virginia, There Is a Confrontation Clause,”<sup>148</sup> Professor Tom Lininger of the University of Oregon School of Law does not share Professor Raeder’s uneasiness over a historical testimonial approach to the Confrontation Clause.<sup>149</sup> Rather, Professor Lininger concludes that the “testimonial approach is more faithful to the Framers’ intent [and] concerns”<sup>150</sup> about confrontation than the vague *Roberts* indicia of reliability framework.

As for excited utterances that often mark domestic violence cases, Professor Lininger agrees with Professor Raeder that a categorical approach is too drastic.<sup>151</sup> This is true regardless of whether excited hearsay utterances are routinely treated as testimonial or nontestimonial.<sup>152</sup> In particular, with respect to automatic nontestimonial status for excited utterances, Professor Lininger directs attention to a footnote in *Crawford*, in which the Court strongly implies an inclination to include within the police-interrogation testimonial subcategory some modern day noncustodial spontaneous (excited) utterances of child sex abuse victims.<sup>153</sup>

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<sup>145</sup> See *id.* at 417-19.

<sup>146</sup> See *id.* at 425-26.

<sup>147</sup> *Id.* at 426 (citing *Ohio v. Roberts*, 448 U.S. 56, 79-80 (1980) (Marshall, J., dissenting)).

<sup>148</sup> Tom Lininger, *Yes, Virginia, There Is a Confrontation Clause*, 71 BROOK. L. REV. 401 (2005).

<sup>149</sup> *Id.* at 402.

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

<sup>151</sup> See *id.* at 404.

<sup>152</sup> See *id.* at 403-04.

<sup>153</sup> See *id.* at 404 n.15 (citing 541 U.S. 36, 58 n.8 (2004)); see also *supra* note

Instead of a per se approach, Professor Lininger acknowledges that excited utterances could be subject to a case-by-case consideration of factors that serve to distinguish testimonial from nontestimonial statements. He fears, however, the unpredictable and easily manipulable nature of such an ad hoc approach, which he finds far too reminiscent of the *Roberts* indicia of reliability standard repudiated by *Crawford*.<sup>154</sup>

Professor Lininger offers another approach, which would treat all statements to police officers as presumptively testimonial, provided that the declarant believes that she or he was speaking to the police.<sup>155</sup> Under Professor Lininger's view, the prosecution could rebut the presumption with a "strong

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<sup>154</sup> See Lininger, *supra* note 148, at 405.

<sup>155</sup> *Id.* Compare, e.g., *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 552 (Mass. 2005) ("[S]tatements made in response to questioning by law enforcement agents, e.g. concerning physical abuse by boyfriend, are per se testimonial except when the questioning is meant to secure a volatile scene or to establish the need for or provide medical care."), and *United States v. Arnold*, 410 F.3d 895, 901, 903-04 (6th Cir. 2005) (Even though a statement of a woman who had been menaced by a man with a gun was within the excited utterance exception to the hearsay rule it was excluded because a "statement made knowingly to the authorities that describes criminal activity is almost always testimonial" and "the decisive inquiry should be 'whether a reasonable person in the declarant's position would anticipate his [or her] statement being used against the accused in investigating or prosecuting the crime,'" (quoting *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir. 2004))), and *State v. Moody*, 594 S.E.2d 350, 353 n.6 (Ga. 2004) (holding testimonial a murder victim's statements to police officers conducting field investigation shortly after defendant had fired his shotgun into her bedroom), with *Hammon v. State*, 829 N.E.2d 444, 456-58 (Ind. 2005) (Excited utterance responses, e.g. of an abused spouse, to initial inquiries at a crime scene are typically not testimonial; the standard for testimonial focuses on the subjective intent, i.e. motivation, of the declarant and the questioner "more than that of the declarant"; and when a statement is taken pursuant to established procedures the subjective motivation of the questioner or the objectively-evaluated purpose of the procedure controls. An affidavit signed at the scene by the victim-wife is, however testimonial.), *cert. granted*, No. 05-5705 (U.S. Oct. 31, 2005), available at <http://www.supremecourtus.gov/orders/courtorders/103105pzor.pdf> at 3. See also *State v. Greene*, 874 A.2d 750, 775 (Conn. 2005) ("where a [shooting] victim contacts a police officer immediately following a criminal incident to report a possible injury and the officer receives information or asks questions to ensure that the victim receives proper medical attention and the crime scene is properly secured, the victim's statements describing the crime are not testimonial," but part and parcel of the crime itself. In these situations, "an objective witness reasonably would not believe that the statements would be available for use at a later trial." (citation omitted)). Statements made during 911 emergency calls have been addressed on a case-by-case basis, focusing on whether the call is a truly spontaneous, excited plea for help, contemporaneous with or immediately after the danger has presented itself, or simply a narrative of past events. See, e.g., *Arnold*, 410 F.3d at 900-01; *United States v. Hinton*, 423 F.3d 355, 361-62 (3d Cir. 2005); *State v. Wright*, 701 N.W.2d 802, 811 (Minn. 2005); *People v. Coleman*, 791 N.Y.S.2d 112, 114 (App. Div. 2005); *State v. Davis*, 111 P.3d 844 (Wash. 2005), *cert. granted*, No. 05-5225 (U.S. Oct. 31, 2005), available at <http://www.supremecourtus.gov/orders/courtorders/103105pzor.pdf> at 3.

showing” that the nontestimonial characteristics outweigh the testimonial characteristics.<sup>156</sup>

Professor Lininger shares Professor Raeder’s belief that one of *Crawford’s* “greatest shortcomings” is its failure to address specifically whether confrontation or due process requirements limit the admissibility of nontestimonial statements of declarants who do not testify.<sup>157</sup> A number of courts have used the *Crawford*-savaged *Roberts* reliability framework with respect to nontestimonial statements that are not at the core of the Confrontation Clause.<sup>158</sup> As an alternative, Professor Lininger finds attractive the Oregon Supreme Court’s state constitutional approach to the *Roberts* indicia of reliability framework, requiring the prosecution to establish the unavailability of the declarant or to produce the declarant as a prerequisite to the admissibility of a hearsay statement.<sup>159</sup> This Oregon approach is virtually identical to language in *Roberts*, which ironically, was also subsequently rejected by the pre-*Crawford* Supreme Court, that time because the unavailability approach was overly protective of the confrontation right.<sup>160</sup>

In conclusion, Professor Lininger advocates, as does Professor Mosteller,<sup>161</sup> that prosecutors direct their attention to

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<sup>156</sup> Lininger, *supra* note 148, at 405.

<sup>157</sup> *Id.* at 405; Raeder, *supra* note 123, at 316-17.

<sup>158</sup> Courts use the indicia of reliability framework because that portion of *Roberts* has not yet been set aside with respect to nontestimonial hearsay statements. *See supra* notes 36-38 and accompanying text. Given that firmly-rooted hearsay exceptions are conclusively deemed reliable under the indicia of reliability framework of *Ohio v. Roberts*, 448 U.S. 56, 66, 74 (1980), most nontestimonial statements will be admissible except those that do not fit within a firmly-rooted hearsay exception and do not have particularized guarantees of trustworthiness. *Compare, e.g.,* United States v. Saget, 377 F.3d 223, 230-31 (2d Cir. 2004) (nontestimonial, non-custodial declaration against penal interest of a co-conspirator to a private party bore particularized guarantees of trustworthiness), *Horton v. Allen*, 370 F.3d 75, 84-85 (1st Cir. 2004) (accomplice statements within the “firmly rooted” hearsay exception for state of mind declaration are clothed by indicia of reliability), *and State v. Manuel*, 697 N.W.2d 811, 814-28 (Wis. 2005) (declarant’s private conversation with his girlfriend describing a shooting, as well as the defendant’s participation in it, shortly after the incident took place, is not testimonial, even though the statement came within a state hearsay exception for statements of recent perception, that exception is not firmly rooted; nonetheless, the statement bears sufficient particularized guarantees of trustworthiness to satisfy the *Roberts* indicia of reliability requirement), *with Miller v. State*, 98 P.3d 738, 744-48 (Okla. Crim. App. 2004) (accomplice’s confession to a private person is nontestimonial but there are no particularized guarantees of trustworthiness).

<sup>159</sup> Lininger, *supra* note 148, at 406; *see State v. Moore*, 49 P.3d 785, 788-91 (Or. 2002); *accord State v. McGriff*, 871 P.2d 782, 790 (Haw. 1994).

<sup>160</sup> *See supra* note 3.

<sup>161</sup> Mosteller, *supra* note 136, at 411, 414-16.

facilitating the confrontation required by *Crawford*, rather than disputing the need for it.<sup>162</sup>

Our last essayist, Laurence Busching, was the attorney-in-charge of domestic violence and child abuse prosecutions brought by the New York County District Attorney's Office for four years.<sup>163</sup> He opens by discussing the reasons for the practical and evidentiary strategies employed by the Manhattan District Attorney's Office in its pre-*Crawford* efforts to prosecute successfully extremely difficult domestic abuse and child abuse cases.<sup>164</sup>

According to Mr. Busching, the post-*Crawford* predictions of serious and disastrous difficulties in so-called "evidence-based"<sup>165</sup> prosecutions, *i.e.*, without the victim's in-court testimony, have not yet come to pass in New York.<sup>166</sup> These difficulties have not occurred because New York courts have often characterized hearsay statements in domestic violence and child abuse cases as excited utterances, present sense impressions, and statements to medical doctors for purposes of diagnosis and treatment. Because declarants usually make such statements informally and without awareness of prosecutorial use, these statements are not testimonial.<sup>167</sup> However, Mr. Busching acknowledges that some convictions have been rendered more difficult because other kinds of victim hearsay statements have been held to be testimonial.<sup>168</sup>

In the aftermath of *Crawford*, Mr. Busching notes that prosecutorial self-examination has prompted the contemplation of new strategies, including increased attention to the recovery of physical evidence and to the memorialization of the injuries suffered by the victim.<sup>169</sup> Statements from the suspect-abusers

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<sup>162</sup> Lininger, *supra* note 148, at 408-09.

<sup>163</sup> See Laurence Busching, *Rethinking Strategies for Prosecution of Domestic Violence in the Wake of Crawford*, 71 BROOK. L. REV. 391 (2005).

<sup>164</sup> See *id.* at 393-95.

<sup>165</sup> Some prosecutors are unhappy with this characterization because all prosecutions are evidence-based, regardless of who does or does not testify. See Andrew Seewald, *Evidence-Based Prosecution of Domestic Violence Cases After Crawford v. Washington: A Greatly Exaggerated Death*, EMPIRE STATE PROSECUTOR, Spring 2005, at 28.

<sup>166</sup> Busching, *supra* note 163, at 396; accord Seewald, *supra* note 165, at 29. But see Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 820 app. 1 (2005) (California, Oregon and Washington reported a post-*Crawford* increase in dismissals of domestic violence cases).

<sup>167</sup> Busching, *supra* note 163, at 397.

<sup>168</sup> See *id.*

<sup>169</sup> See *id.*



themselves, obtained after full Miranda warnings, are another important source of evidence; such statements were not always sought from defendants in the pre-*Crawford* era.<sup>170</sup> Also, prosecutors had started to use imaginatively the forfeiture doctrine even before *Crawford*. That might now be especially important in domestic violence cases, when the unavailability of the declarant is the direct result of conduct by or attributable to the defendant.<sup>171</sup>

Mr. Busching also thinks that *Crawford* may prompt prosecutors to reconsider whether to compel domestic violence victims to testify. He further believes that, in order to protect against the risk of recantations on the stand by understandably frightened victims, it may be necessary to explore amending New York's strict statutory evidentiary limitation on the kinds of statements that a party (usually the prosecution) may use to impeach its own witness.<sup>172</sup>

Finally, given *Crawford's* holding that there is no bar to the testimonial hearsay of a declarant who testifies at trial, Mr. Busching ruminates about whether it would be confrontationally sufficient simply to produce the declarant or otherwise make him or her available to be called for cross-examination by the defendant.<sup>173</sup>

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<sup>170</sup> See *id.* at 397-98.

<sup>171</sup> See *id.* at 398. See, e.g., *People v. Santiago*, No. 2725-02, 2003 N.Y. Misc. LEXIS 829, \*1-2, \*51-52 (N.Y. Sup. Ct. 2003) (defendant's pattern of abusing his wife over a period of many years had clearly, convincingly and intentionally assured her unavailability, even before the charged crimes of contempt and violations of orders of protection had been committed).

<sup>172</sup> See N.Y. CRIM. PROC. LAW § 60.35 (A witness called by a party in a criminal case, who elicits from that witness testimony upon a material issue, tending to disprove the calling party's position, may be impeached by the calling party through the introduction of a prior written statement signed by the witness, or by the witness's oral statement under oath contradicting the witness's trial testimony. The statute expressly provides that the prior statements are not admissible for substantive proof. When the witness's testimony does not tend to disprove the calling and eliciting party's case, the prior statements are not admissible but can be used to refresh the witness's recollection, provided that the contents of the statement are not disclosed to the jury.).

<sup>173</sup> Busching, *supra* note 163, at 400; see *Crawford v. Washington*, 541 U.S. 36, 60 n.9 (2004) ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements . . . . The Clause does not bar admission of a statement as long as the declarant is present at trial to defend or explain it."). In his symposium essay, Professor Mosteller offers a reasoned conclusion that the confrontation right is not satisfied by the prosecutor simply producing or otherwise making the victim available to be called by defendants. See Mosteller, *supra* note 136, at 416-17; see also *State v. Snowden*, 867 A.2d 314, 332-33 (Md. 2005).

## FINAL THOUGHTS

Before *Crawford*, the Supreme Court last addressed a Confrontation Clause hearsay issue in the 1999 case *Lilly v. Virginia*.<sup>174</sup> There, the Court unanimously reversed a Virginia Supreme Court that had rejected a confrontation challenge to the admission of a nontestifying accomplice's custodial confession to the police. The rationale for reversal was supported only by a plurality opinion,<sup>175</sup> which was accompanied by four other separate concurring opinions.<sup>176</sup>

Remarkably, only five years later, a seven justice majority in *Crawford* spoke with one voice, that of Justice Scalia. By examining the text of the Confrontation Clause, particularly the word witnesses, English history and common law (perhaps too much), pre-ratification American history (perhaps not enough), the practices that most concerned the Framers, the articulation of that concern during the ratification process and the modern day equivalent of those practices, Justice Scalia paints a simple but persuasive portrait of the majority's vision of the confrontation right and its relationship to hearsay. That vision is well-captured and persuasive regardless of the name given to the interpretative approach followed.

Though hardly necessary to its holding, the *Crawford* majority at times seems to play a little too fast and loose with English common law to tell a story that comports fully with its view of the limitations placed on the introduction of hearsay by the Confrontation Clause. Nevertheless, much to its credit, the *Crawford* majority focuses on statements secured by law enforcement interrogation of individuals who respond with testimony-bearing statements. The introduction of such statements at trial and the defendant's inability to cross-examine the absent declarant are a core concern of the Confrontation Clause. Thus, centering analysis on practices

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<sup>174</sup> *Lilly v. Virginia*, 527 U.S. 116 (1999).

<sup>175</sup> *See id.* at 120, 134, 137-38 (Stevens, J., for plurality; joined by Souter, Ginsburg & Breyer, J.J.) (custodial statements of a nontestifying accomplice that petitioner committed the charged murder were neither within a firmly rooted hearsay exception, nor possessed of particularized guarantees of trustworthiness).

<sup>176</sup> *Id.* at 140 (Breyer, J. concurring); *id.* at 143 (Scalia, J. concurring in part and in the judgment); *id.* at 143; (Thomas, J., concurring in part and in the judgment); *id.* at 144 (Rehnquist, C.J., concurring in the judgment; joined by O'Connor & Kennedy, J.J.).

that are modern-day counterparts to the abuses targeted by the Clause is particularly appropriate.

The wisdom of the testimonial approach notwithstanding, every question or group of questions does not necessarily constitute an interrogation, nor is every answer to a question necessarily a testimonial statement. This caveat aside, the categorical exclusion of testimonial statements absent cross-examination of the declarant surely should prove a more principled, and less subjective approach than, and without the “unpardonable vice” of, the *Roberts* indicia of reliability framework.

The twenty months since *Crawford* have seen untold numbers of reported and unreported state and federal cases struggling over the meaning of “testimonial.” Indeed, some observers may have started to wonder whether “testimonial” will turn out to be as vague and malleable as the *Roberts* “reliability” framework. The difficulty with the testimonial concept had been presaged at oral argument in *Crawford*. While exploring the definitional scope of “testimonial” with *Crawford*’s counsel, Justice O’Connor rhetorically remarked, “[W]hy buy a pig in a poke.”<sup>177</sup> Whatever the Court has bought or wrought will be on display as it considers and decides two state *Crawford* cases in which certiorari was granted on October 31, 2005.<sup>178</sup>

The articles and essays that follow are scholarly, enlightening, thoughtful, thought-provoking, and even amusing. They provide a well-rounded read by which to explore the meaning and scope of the many issues presented by *Crawford*, and a perfect introduction to whatever comes next.

After the “*Crawford* and Beyond” Conference, this wonderful Symposium Issue of the *Law Review*, and the two cases in which a decision can be expected by the end of the 2005 term, we can look forward to “*Crawford* and Beyond: Revisited.”

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<sup>177</sup> Transcript of Oral Argument, 2003 WL 22705281, at \*14, *Crawford*, 541 U.S. 36 (No. 02-9410).

<sup>178</sup> See *State v. Davis*, 111 P.3d 844 (Wash. 2005) (a hysterical, crying declarant’s description of how and by whom she had just been assaulted given to a 911 operator is not testimonial), *cert. granted*, No. 05-5224 (U.S. Oct. 31, 2005), available at <http://www.supremecourtus.gov/orders/courtorders/103105pzor.pdf> at 3; *Hammon v. State*, 829 N.E. 2d 444 (Ind. 2005) (a “somewhat frightened” woman’s description of physical abuse by her husband made to police officers responding to a reported domestic disturbance is not testimonial), *cert. granted*, No. 05-5705 (U.S. Oct. 31, 2005), available at <http://www.supremecourtus.gov/orders/courtorders/103105pzor.pdf> at 3.