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# Yes, Virginia, There Is a Confrontation Clause

Tom Lininger<sup>†</sup>

I appreciate the opportunity to comment on Myrna Raeder's excellent scholarship<sup>1</sup> concerning the Supreme Court's ruling in *Crawford v. Washington*.<sup>2</sup> It is fitting to discuss the *Crawford* decision in New York, where much of the important litigation interpreting *Crawford* has taken place.

One of my favorite New Yorkers was Francis Pharcellus Church. We all remember Mr. Church's famous editorial for the New York Sun newspaper in 1897. Mr. Church wrote the piece in response to a letter from young Virginia O'Hanlon, whose friends told her that Santa Claus was just a myth. Mr. Church emphatically rebuked the doubters: "Virginia, your little friends are wrong. They have been affected by the scepticism of a sceptical age . . . . *Yes, Virginia, there is a Santa Claus.*"<sup>3</sup>

The Supreme Court's ruling in *Crawford*, like Mr. Church's editorial, seemed primarily concerned with rebutting the skeptics. The majority opinion in *Crawford* sharply criticized prior decisions – most notably *Ohio v. Roberts*<sup>4</sup> – that cast doubt on the primacy of the Confrontation Clause. Just like Mr. Church's editorial, the *Crawford* majority exposed the skeptics' errors by arguing *reductio ad absurdum*: if *Roberts*' teleology were acceptable, judges could dispense with jury

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<sup>1</sup> Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311 (2005). Professor Raeder is arguably the nation's foremost authority on evidentiary issues in prosecutions of violence against women, and her guidance has helped me tremendously with my own scholarship on this issue.

<sup>2</sup> 541 U.S. 36 (2004).

<sup>3</sup> Francis P. Church, Editorial, *Is There a Santa Claus?*, N.Y. SUN, Sept. 21, 1897, available at <http://www.stormfax.com/virginia.htm>. Church's reply to Virginia is "without question, the best-known newspaper editorial in American history." Clyde Haberman, *In This House, A Little Girl Had a Question*, N.Y. TIMES, Dec. 23, 2003, at B1.

<sup>4</sup> 448 U.S. 56 (1980).

trials when they were confident of defendants' guilt.<sup>5</sup> The *Crawford* majority insisted that the Confrontation Clause is alive and well, and is not just a figment of defendants' imaginations.

Unfortunately, the *Crawford* ruling was short on details. The *Crawford* majority spent more time disabusing critics of their misconceptions about the Confrontation Clause than announcing a clear test to replace *Roberts*. The lack of concrete guidance in *Crawford* has led to inconsistent rulings by the lower courts. Some courts have persisted in the practices decried by *Crawford*.<sup>6</sup> Prosecutors are dismissing or losing a high number of domestic violence cases, in large part because no one is certain what *Crawford* really means.<sup>7</sup>

In the 2005-06 term – one hundred years after the death of Francis Pharcellus Church – it is time for the Supreme Court to finish the task of vindicating the Confrontation Clause. In particular, the Court should clarify the extent of confrontation rights in three contexts: 1) the prosecution's use of verbal statements by alleged victims to responding officers; 2) the prosecution's use of nontestimonial hearsay; and 3) the prosecution's introduction of hearsay under the doctrine of forfeiture by wrongdoing. Each of these topics will be discussed in turn below.

## I. STATEMENTS TO RESPONDING OFFICERS

Professor Raeder is generally wary of the testimonial approach to confrontation, arguing that modern courts should not be bound by the common law in 1791.<sup>8</sup> Her arguments are cogent, but I believe that in many respects the testimonial approach is preferable to the *Roberts* framework. The testimonial approach is more faithful to the Framers' intent, and in particular to their concerns about the trial of Sir Walter Raleigh.<sup>9</sup> The testimonial approach strengthens defendants'

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<sup>5</sup> *Crawford*, 541 U.S. at 62 (“Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”); Church, *supra* note 3 (“Not believe in Santa Claus! You might as well not believe in fairies!”).

<sup>6</sup> See Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 766-67 (2005).

<sup>7</sup> *Id.* at 750, 820 app. 1 (setting forth results of survey involving sixty prosecutors' offices in California, Oregon and Washington; 76% of respondents reported a higher number of dismissals after *Crawford*).

<sup>8</sup> Raeder, *supra* note 1, at 315-16.

<sup>9</sup> *Crawford*, 541 U.S. at 44-50.

confrontation rights in the settings where the need for confrontation is most urgent. Further, at least in theory, the testimonial approach makes confrontation analysis more predictable than under the vague *Roberts* test examining “indicia of reliability.”<sup>10</sup>

The parameters of “testimonial hearsay” are clear in some contexts, but they are less clear in others. Currently the most problematic issue seems to be the application of the term “testimonial” to alleged victims’ statements to police who have just arrived at the scene. For example, when police respond to an emergency call at a residence where domestic violence seems to have occurred, and the apparent victim makes a brief statement to the police within a few minutes after their arrival, is this statement “testimonial” for purposes of *Crawford*?

One possible approach would label the statement nontestimonial because the officers are securing the scene rather than “interrogating” the declarant.<sup>11</sup> Such a classification may appear advantageous in that it offers a bright-line temporal rule (*i.e.* statements are admissible if given within a few minutes after the officers’ arrival). But I believe this approach is unduly formalistic. Accusers who speak to police shortly after their arrival should foresee the prosecutorial use of their statements. Moreover, if police were able to circumvent the *Crawford* test merely by asking questions immediately after their arrival, then police might simply commence an informal interrogation the moment they meet the apparent victim, and ask all the crucial questions in the first few minutes. The stopwatch has no place in confrontation analysis.

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<sup>10</sup> *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

<sup>11</sup> *People v. Ford*, No. A104115, 2004 WL 2538477, at \*8 (Cal. Ct. App. Nov. 10, 2004) (determining that victim’s statements in response to officers’ preliminary questions at scene of domestic violence were nontestimonial because officers were “eliciting basic facts about the nature and cause of her injuries”); *People v. Magdeleno*, No. B169360, 2004 WL 2181412, at \*9 (Cal. Ct. App. Sept. 29, 2004) (holding that a statement by domestic violence victim when she first encountered police was not testimonial because no “structured police questioning” had occurred); *People v. Mackey*, 785 N.Y.S.2d 870, 873-74 (Crim. Ct. 2004) (finding that a statement by domestic violence victim in response to preliminary questioning by police during field investigation was nontestimonial); *Gonzalez v. State*, 155 S.W.3d 603, 609-610 n.4 (Tex. App. 2004) (stating that investigatory questioning immediately after commission of a crime does not constitute “interrogation” so *Crawford* is inapplicable). *See Mungo v. Duncan*, 393 F.3d 327, 336 n.9 (2d Cir. 2004) (suggesting, in dictum, that assault victim’s “answers to the early questions, delivered in emergency circumstances to help the police nab [victim’s] assailant,” were not testimonial).

Another possible approach would be to treat all excited utterances as necessarily nontestimonial. According to this view, a battered woman who speaks to a police officer shortly after the battery is so overwhelmed by the trauma of the event that she does not contemplate the later use of her statements in a criminal prosecution. The categorical approach to excited utterances has attracted a number of adherents.<sup>12</sup> I agree with Professor Raeder that such a rule is too drastic.<sup>13</sup> The *Crawford* majority's criticism of *White v. Illinois*<sup>14</sup> suggests that the Court does not favor such liberal admission of excited utterances.<sup>15</sup> In addition, a statement does not lose its testimonial character merely because the declarant was excited at the time of the statement.<sup>16</sup> Excited declarants can foresee that prosecutors will use their statements. Indeed, confrontation of an excited declarant may be more important than confrontation of a dispassionate declarant because the former is more likely to fabricate or exaggerate details out of spite toward the assailant.

A third possible approach would consider, on a case-by-case basis, a range of factors that distinguish testimonial from nontestimonial statements. These factors might include the following: 1) the formality of the setting; 2) whether the communication was recorded; and 3) whether the officers

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<sup>12</sup> *United States v. Brown*, 322 F. Supp. 2d 101, 105 n.4 (D. Mass. 2004) (expressing doubt that "*Crawford* would apply to spontaneous utterances"); *State v. Barnes*, 854 A.2d 208, 209-11 (Me. 2004) (describing how defendant's mother drove to police station and, while "sobbing and crying," gave a statement about defendant's assault on her earlier that day; the court found that the statement qualified as an excited utterance and was nontestimonial under *Crawford* analysis); *State v. Wright*, 686 N.W.2d 295, 305 (Minn. Ct. App. 2004) (holding that declarants' "demonstrated emotional distress – the very quality that justified the admission of their statements as excited utterances – is inconsistent with a determination that they were made with a belief that such statements 'would be available for use at a later trial'" (quoting *Crawford*, 541 U.S. at 52)); *State v. Forrest*, 596 S.E.2d 22, 27 (N.C. Ct. App. 2004) (statements were nontestimonial when victim spoke spontaneously and she was "nervous, shaking, and crying"), *aff'd*, 607 S.E.2d 653 (N.C. 2005); *State v. Banks*, No. 03AP-1286, 2004 WL 2809070, at \*3 (Ohio Ct. App. Dec. 7, 2004) (*Crawford* does not apply to excited utterances), *appeal denied*, 825 N.E.2d 624, and 830 N.E.2d 348 (Ohio 2005); *Rivera v. State*, No. 04-03-00830-CR, 2004 WL 3015165, at \*1-2 (Tex. App. Dec. 30, 2004) (mem.) (excited utterance to responding officers was not testimonial).

<sup>13</sup> Raeder, *supra* note 1, at 335.

<sup>14</sup> 502 U.S. 346 (1992).

<sup>15</sup> *Crawford*, 541 U.S. at 58 n.8.

<sup>16</sup> *Lopez v. State*, 888 So. 2d 693, 699-700 (Fla. Dist. Ct. App. 2004) ("In our view, the findings necessary to support a conclusion that a statement was an excited utterance do not conflict with those that are necessary to support a conclusion that it was testimonial . . . . [T]he statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made.").

announced they had a particular suspect in mind.<sup>17</sup> Professor Raeder seems to advocate a case-by-case approach, and I agree with her that the multifactor approach is preferable to the two categorical approaches discussed above.<sup>18</sup> On the other hand, the multifactor standard is unpredictable, and results could vary from court to court. Two courts faced with identical facts might ascribe different significance to the same fact, as in the *Roberts* era.<sup>19</sup>

Perhaps a fourth approach deserves consideration. Statements to police officers could be treated as presumptively testimonial, so long as the declarant knew she was speaking with a police officer. The presumption could be rebutted if the prosecution could make a strong showing that the characteristics of nontestimonial statements predominated over the characteristics of testimonial statements. This approach might combine the advantages of a multifactor test with the greater predictability of a categorical rule. Critics might complain that the presumption would result in the loss of many victims' statements, but exclusion need not necessarily result. The classification of evidence as testimonial would simply require that the prosecution afford the accused an opportunity for confrontation, possibly at a pretrial hearing or deposition.

## II. NONTESTIMONIAL HEARSAY

I agree with Professor Raeder that one of *Crawford's* greatest shortcomings is its failure to specify confrontation requirements for nontestimonial hearsay.<sup>20</sup> Many lower courts have avoided the *Crawford* test by classifying the hearsay at issue as nontestimonial. Indeed, in the nine months between the date of the *Crawford* ruling and the end of 2004, lower courts issued hundreds of rulings interpreting *Crawford*, and approximately one-third of the rulings that reached the merits determined that the evidence at issue was nontestimonial.<sup>21</sup> Those courts deeming hearsay to be nontestimonial have generally applied *Roberts* and its progeny – a great irony given

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<sup>17</sup> See, e.g., *People v. Cage*, 15 Cal. Rptr. 3d 846, 856-57 (Ct. App. 2004) (stressing formality and setting, among other factors), *review granted*, 99 P.3d 2 (Cal. 2004).

<sup>18</sup> Raeder, *supra* note 1, at 331.

<sup>19</sup> *Crawford*, 541 U.S. at 63.

<sup>20</sup> Raeder, *supra* note 1, at 316-17.

<sup>21</sup> Lininger, *supra* note 6, at 766-67.

the *Crawford* majority's vehement criticism of *Roberts*. Because the opinions following *Roberts*, especially *Inadi* and *White*,<sup>22</sup> have rendered the confrontation analysis perfunctory for firmly-rooted hearsay exceptions, the application of the *Roberts* test is tantamount to applying no confrontation test at all.

What would be a better test for nontestimonial hearsay? One attractive alternative is the approach taken by Oregon courts. Even before *Crawford*, the Oregon Supreme Court recognized the danger in dispensing with confrontation analysis for hearsay fitting within a firmly-rooted exception. In *Oregon v. Moore*,<sup>23</sup> the court declined to follow *Inadi*, *White*, and the other progeny of *Roberts* that rendered confrontational analysis co-extensive with statutory hearsay law. The Oregon Supreme Court required the prosecution to demonstrate the unavailability of the declarant or to produce the declarant for cross-examination, whether or not the prosecution invoked a firmly-rooted hearsay exception.<sup>24</sup> This requirement helps to avoid the gamesmanship of the pre-*Crawford* era, when prosecutors called police to recount victims' hearsay statements even when the victims were available to testify.<sup>25</sup>

If *Roberts* continues to supply the confrontation test for nontestimonial hearsay, police will likely modify their practices so that they elicit statements in settings that do not trigger the strictures of *Crawford*. The efficacy of defendants' confrontation will then depend on officers' skill in avoiding the label "testimonial."<sup>26</sup> The protection of the Sixth Amendment should not be vulnerable to such manipulation. It is time for the Supreme Court to close the gap between confrontation rights for testimonial and nontestimonial hearsay.

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<sup>22</sup> *United States v. Inadi*, 475 U.S. 387, 395 (1986) (finding that government may offer co-conspirator's statement without showing unavailability of declarant); *White v. Illinois*, 502 U.S. 346 (1992) (holding that Confrontation Clause does not require proof of unavailability when government offers hearsay under exceptions for excited spontaneous declarations and for statements made to obtain medical treatment).

<sup>23</sup> 49 P.3d 785 (Or. 2002).

<sup>24</sup> *Id.* at 792.

<sup>25</sup> *See, e.g., Beach v. State*, 816 N.E.2d 57, 60 (Ind. Ct. App. 2004) (noting that the pre-*Crawford* trial court had allowed the prosecution to offer hearsay statements against the accused even though the declarant was available to testify), *abrogated by Hammon v. State*, 829 N.E.2d 444 (Ind. 2005).

<sup>26</sup> *See In re T.T.*, 815 N.E.2d 789, 802 (Ill. App. Ct. 2004) (expressing concern that officers will be able to manipulate factors that distinguish testimonial from nontestimonial hearsay).

### III. FORFEITURE BY WRONGDOING

In the wake of *Crawford*, some prosecutors are attempting to avoid confrontation requirements entirely by invoking the doctrine of forfeiture by wrongdoing. This doctrine extinguishes the confrontation rights of a party who has wrongfully procured the absence of the hearsay declarant.<sup>27</sup> Dicta in *Crawford* expressly approved the forfeiture doctrine.<sup>28</sup> Adam Krischer of the American Prosecutors Research Institute has gone so far as to argue that “domestic violence almost always involves forfeiture.”<sup>29</sup>

I support the forfeiture doctrine as a general matter, but I worry that it will become too expansive after *Crawford*. Professor Raeder has suggested some reasonable boundaries for the doctrine: it should only apply when the opponent actually intended to procure the declarant’s unavailability, or when the opponent killed the declarant.<sup>30</sup> Mr. Krischer, however, would transform the forfeiture doctrine into a silver bullet that would slay *Crawford* in virtually any domestic violence prosecution. Domestic violence is coercive, to be sure, but not every assault carries with it the threat of reprisals if the victim cooperates with law enforcement. If courts were to presume such tampering in every domestic violence case, the forfeiture exception would swallow the rule of confrontation.

As prosecutors rely increasingly on the forfeiture doctrine in the aftermath of *Crawford*, important questions remain to be answered. What standard of proof should apply?<sup>31</sup> Should all categories of statements by the victim be admissible against the wrongdoer, or only those that relate to the

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<sup>27</sup> See FED. R. EVID. 804(b)(6).

<sup>28</sup> *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

<sup>29</sup> Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid*, PROSECUTOR, Nov.-Dec. 2004, at 14, available at 38-DEC PROSC 14 (Westlaw).

<sup>30</sup> Raeder, *supra* note 1, at 355.

<sup>31</sup> Most courts have applied the preponderance of the evidence standard when judging whether the proponent has made the predicate showing to invoke the doctrine of forfeiture of wrongdoing. See, e.g., *United States v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002); *United States v. Zlatogur*, 271 F.3d 1025, 1028 (11th Cir. 2001); *United States v. Ochoa*, 229 F.3d 631, 639 (7th Cir. 2000); *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996); *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982); *Steele v. Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1980); *People v. Baca*, No. E032929, 2004 WL 2750083, at \*11 (Cal. Ct. App. Dec. 2, 2004); *State v. Henry*, 820 A.2d 1076, 1087 (Conn. App. Ct. 2003); *State v. Meeks*, 88 P.3d 789, 794 (Kan. 2004); *United States v. Melendez*, No. CRIM. 96-0023, 1998 WL 737994, at \*3 (D.P.R. Oct. 15, 1998); *United States v. Rivera*, 292 F. Supp. 2d 827, 831 (E.D. Va. 2003).



wrongdoing? What does it mean for a party to “acquiesce” in wrongdoing as provided in Federal Rule of Evidence 804(b)(6)? The lower courts are beginning to hear a number of forfeiture arguments after *Crawford*, but guidance from the Supreme Court would be helpful to avoid a patchwork of conflicting opinions.<sup>32</sup> Prosecutors and courts should resist the temptation to treat the forfeiture doctrine as a panacea for all the difficulties created by *Crawford*.

#### IV. CONCLUSION: LESS CANT, MORE KANT

Francis Pharcellus Church lived by a simple motto: “Endeavor to clear your mind of cant.”<sup>33</sup> The lower courts interpreting *Crawford* would do well to follow this adage. While courts have generally acknowledged that *Crawford* requires greater respect for confrontation rights, some courts still cling to the teleological conception of confrontation. Notwithstanding their lip service to *Crawford*, these courts seem to believe that confrontation is merely a means to the end of ensuring the reliability of evidence, and that confrontation rights must occasionally give way to considerations of expediency.

A Kantian perspective would be more appropriate. Confrontation is not a means to an end, but an end in itself. The government must respect the defendant’s autonomy in determining whether to confront accusers, even when the utility of such confrontation may appear negligible in a particular case.

The Supreme Court should clarify that when it said confrontation, it meant confrontation. In a follow-up ruling to *Crawford*, the Supreme Court should spell out what the Confrontation Clause requires in the settings where lower courts have ruled inconsistently. Prosecutors should focus

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<sup>32</sup> Compare *State v. Ivy*, No. W2003-00786-CCA-R3-DD, 2004 WL 3021146, at \*14 (Tenn. Crim. App. Dec. 30, 2004) (murder of declarant did not justify finding of forfeiture by wrongdoing where prosecutor could not show intent to prevent victim from testifying), with *People v. Giles*, 19 Cal. Rptr. 3d 843, 847-48 (Ct. App. 2004), review granted, 102 P.3d 930 (Cal. 2004) (holding that the defendant forfeited confrontation rights by murdering declarant, even where government could not show intent to prevent declarant from testifying).

<sup>33</sup> THE PEOPLE’S ALMANAC 1358 (David Wallechinsky & Irving Wallace eds., 1975). Webster’s offers this definition for the term “cant”: “The use of religious phraseology without understanding or sincerity; empty, solemn speech, implying what is not felt; hypocrisy.” Webster Dictionary, <http://www.webster-dictionary.net/d.aspx?w=cant> (last visited Oct. 12, 2005).

their attention on facilitating the confrontation that *Crawford* demands, rather than disputing the need for confrontation.<sup>34</sup>

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<sup>34</sup> For strategies to allow more confrontation of hearsay declarants, see Lininger, *supra* note 6, at 783-813. See also Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 591-614 (2005) (suggesting various strategies to facilitate confrontation required by *Crawford*, including pretrial confrontation of hearsay declarants).