

2004


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Recommended Citation

Friedman, Richard D. "Face to Face with the Right of Confrontation." *Law Quad. Notes* 46 no. 3/4, no. 1 (2004): 92-6. (Edited excerpt from the amicus curiae brief filed in *Crawford v. Washington*, heard before the U.S. Supreme Court on November 19, 2003.)

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Face to face with the right of confrontation

The following edited excerpt is from the amicus curiae brief filed in Crawford v. Washington, heard before the U.S. Supreme Court on November 10, 2003. (An elaborated form of the brief appears at 2004 International Journal of Evidence and Proof 1-30.) Law School graduate Jeffrey Fisher, '97, (see stories on page 30 and page 76) argued on behalf of Crawford. The brief was written by Ralph W. Aigler Professor of Law Richard D. Friedman. David A. Moran, '91, Assistant Professor at Wayne State Law School, was of counsel. Among the signatories are Professor of Law Sherman J. Clark and Associate Dean for Clinical Affairs Bridget McCormack, both of the Law School faculty. At deadline time, the Court had not yet announced its decision in the case.

By Richard D. Friedman

Like *Lee v. Illinois*, 476 U.S. 530 (1986), and *Lilly v. Virginia*, 527 U.S. 116 (1999), this case is an example of what might be called station-house testimony. Sylvia Crawford, the petitioner's wife, made a tape-recorded statement to investigating officers at the police station on the night of the alleged crime. Sylvia was unwilling to testify at trial against her husband, and was deemed by all parties to be unavailable as a witness. Over petitioner's objection, Sylvia's statement was introduced, and petitioner was convicted. *Amici* file this brief to address the second Question Presented in the petition for *certiorari*:

"Whether this Court should reevaluate [the] Confrontation Clause framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and hold that the Clause unequivocally prohibits the admission of out-of-court statements insofar as they are contained in 'testimonial' materials, such as tape-recorded custodial statements."

Summary of argument

By granting *certiorari* in this case, the Court has created an opportunity to replace an unsatisfactory conception of the Confrontation Clause with one that is historically well grounded, textually faithful, intuitively appealing, and straightforward in application. This conception confines the Clause to its proper sphere and at the same time makes clear the place of the confrontation right as one of the fundamental cornerstones of our system of criminal justice. Adopting this conception will also make the law far easier than current doctrine for the lower courts to follow, because the Confrontation Clause decisions of this Court will be explained by reference to a robust, easily understood principle with deep roots in the Anglo-American tradition and, indeed, throughout Western jurisprudence. This principle is that the testimony of a witness may not be used against an accused unless it was given under the conditions prescribed for testimony, among which are that it be under oath or affirmation, that it be given in the presence of the accused, and that it be subject to cross-examination.

Implementation of the principle requires recognition that a statement may be testimonial in nature even though it was not made under the conditions prescribed for testimony. Thus, a statement made knowingly to authorities accusing another person of a crime is clearly a testimonial statement — even though it was made without oath or cross-examination and in

Like the right to counsel and the right to a jury trial, the right to confront witnesses is subject to waiver, and it is also subject to forfeiture, for the accused has no ground to complain if his own wrongdoing causes his inability to confront the witness. Like those other rights, the right to confront adverse witnesses can and should be applied unequivocally. That is, if the statement is a testimonial one and the right has not been waived or forfeited, then the right should apply without exceptions. This simple approach is possible because the scope of the right, properly conceived, is quite narrow. It does not reach out-of-court statements in general, but only those that are testimonial in nature.

Under the currently prevailing doctrine, by contrast, the scope of the Clause is extremely broad: Any hearsay statement made by an out-of-court declarant is presumptively excluded by the Clause. A flat exclusionary rule of such breadth would be impractical, and so the doctrine exempts from the presumptive rule many statements that are deemed to be reliable — purportedly so reliable that cross-examination would be of little value. Statements that fit within “firmly rooted” hearsay exceptions are deemed reliable without more. Just which of the many hearsay exceptions — a term used in this brief to cover both exceptions proper to the rule against hearsay and exclusions from the definition of hearsay — are considered to be “firmly rooted” is a question that this Court has only partially resolved. On an *ad hoc* basis, the Court has declared hearsay exceptions, or part of them,

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the presence of no one but the authorities. If a report by the authorities of a statement made in this way may be considered by the trier of fact, then a system has been created that tolerates the giving of testimony behind closed doors. The very point of the Confrontation Clause was to prevent the creation of such a system. That a statement was made absent the conditions required by the system for testimony does not render the statement non-testimonial in nature — rather, if the statement was testimonial in nature, the absence of those conditions renders the testimony intolerable. Put another way, the Confrontation Clause gives the accused more than a right to confront “all those who appear and give evidence at trial.” (*California v. Green*, 399 U.S. 149, 175 [1970] Harlan, J., concurring). Its primary impact is to ensure that prosecution witnesses do give their evidence at trial, or if necessary at a pretrial proceeding at which the accused is able to confront them.

either within that category or not, but the Court has never offered a clear set of criteria for determining what makes an exception “firmly rooted.” If a statement does not fit within a “firmly rooted” exception, it may yet satisfy the reliability requirement, if the statement is deemed to have “individualized guarantees of trustworthiness.” This standard is heavily fact-bound and demands case-by-case review. Even if a statement is deemed reliable, the Confrontation Clause may bar its use if the declarant is available to be a witness. As with reliability, the criteria for the unavailability requirement are unclear. If the statement falls within the exception for former testimony, the declarant must be unavailable or the Clause will preclude its use; if the statement falls within the exceptions for spontaneous declarations, statements made for purposes of medical treatment, and conspirator declarations, unavailability is not required; in other contexts it is not yet known whether the unavailability requirement applies.

This framework is unpredictable and overcomplicated, and so it too frequently yields very bad results in the lower courts. The framework is capable of producing good results; indeed, adopting the approach proposed in this brief would not require the Court to overrule any of its Confrontation Clause decisions. But the existing framework reaches good results consistently only if it is manipulated. In this respect, it resembles the Ptolemeian astronomical system. That system, too, was capable of yielding good results, but only if it was manipulated and made ever more complex to ensure that its results matched empirical observations. Ultimately, the system failed to explain coherently the phenomenon it was trying to describe. Because the system's predictive power was thus limited, it became necessary to adopt a new organizing principle. In the confrontation context, too, a new organizing principle is necessary: Rather than treating the Confrontation Clause as a generalized attempt to exclude unreliable hearsay evidence, the Court should recognize that the Clause is a guarantee that testimony offered against an accused must be given in the manner prescribed for centuries, in the presence of the accused and subject to cross-examination.

Argument

I. The text of the Confrontation Clause supports a testimonial approach to the Clause, and not the *Roberts* framework.

We begin with the text of the Confrontation Clause. It provides in simple terms: In all criminal prosecutions, “the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

Now compare how this language squares respectively with the prevailing framework established by *Roberts* and with the testimonial approach proposed here. The prevailing framework was laid out by *Roberts*, 448 U.S. at 66. As subsequently modified, it has these principal elements:

1. “[W]hen a hearsay declarant is not present for cross-examination at trial,” use of the hearsay declaration is presumptively barred by the Confrontation Clause.

2. Even though it is hearsay, an out-of-court statement may be admitted against an accused (subject to the possible applicability of an unavailability requirement) if it is sufficiently reliable. Under this doctrine, statements are deemed reliable if the evidence either “falls within a firmly rooted hearsay exception” or “contains ‘particularized guarantees of trustworthiness’ such that adversarial testing would be expected to add little, if anything, to the statements’ reliability.” (*Lilly*, 527 U.S. at 124-25, quoting in part *Roberts*, 448 U.S. at 66.)

In short, the *Roberts* framework depends on a set of concepts — hearsay, reliability, and exceptions — none of which is supported by the text of the Confrontation Clause.

In contrast, that text squares very well with the testimonial approach, the core of which may be expressed as follows: Use against an accused of the statement of a witness — that is, a statement that is testimonial in nature — violates a right of the

accused unless the accused has or has had an adequate opportunity to confront the witness. A subsidiary principle is that if the accused has had an adequate opportunity to confront the witness at an earlier time but, without fault of the prosecution, the witness is unavailable to testify at trial, then the witness’ prior statement may be used. . . .

II. The history underlying the Confrontation Clause supports a testimonial approach to the Clause, and not the *Roberts* framework.

If an adjudicative system is rational, then it must rely in large part on the testimony of witnesses and prescribe the conditions under which they may testify. For many systems, one such condition is that testimony must be given under oath. Another common condition, characteristic of the common law system but not limited to it, is that testimony of a prosecution witness must be given in the presence of the accused, subject to questions by him or on his behalf.

Once the irrational methods of medieval adjudication, such as trial by ordeal and by battle, withered away, Western legal systems developed different approaches to testimony. Continental systems tended to take testimony on written questions behind closed doors and out of the presence of the parties for fear that the witnesses would be coached or intimidated. In contrast, beginning in the 15th century and continuing for centuries afterwards, numerous English judges and commentators — John Fortescue, Thomas Smith, Matthew Hale, and William Blackstone among them — praised the open and confrontational style of the English criminal trial.

To be sure, the norm of confrontation was not always respected. First, a set of courts in England followed continental procedures rather than those of the common law. Precisely for that reason, they were politically controversial, and most of them (notably the Court of Star Chamber), being viewed as arms of an unlimited royal power, did not survive the upheavals of the 17th century. . . . Perhaps most significantly, in politically charged cases the Crown, trying to control its adversaries though the criminal law, sometimes used testimony taken out of the presence of the accused. Thus, the battle for confrontation was most clearly fought in the treason cases of Tudor and Stuart England. Even early in the 16th century, treason defendants demanded that witnesses be brought before them; often they used the term “face to face.” Sometimes these demands were heeded, but what is most notable is that they found recurrent legislative supports, acts of Parliament repeatedly requiring that accusing witnesses be brought “face to face” with the accused. By the middle of the 17th century, the battle was won, and courts routinely required that treason witnesses testify before the accused and be subjected to questioning by him.

The confrontation right naturally found its way to America. There, the right to counsel developed far more quickly than in England, and with it an adversarial spirit that made confrontation especially crucial. The right became a particular focus of

American concerns in the 1760s when the Stamp Acts and other Parliamentary regulations of the colonies provided for the examination of witnesses upon interrogatories in certain circumstances. Not surprisingly, the early state constitutions guaranteed the confrontation right. Some used the time-honored “face to face” formula; others, following Hale and Blackstone, adopted language strikingly similar to that later used in the Sixth Amendment’s Confrontation Clause.

This account has not mentioned reliability. Though one of the advantages perceived for confrontation was its contribution to truth-determination, the confrontation right was not considered contingent, inapplicable upon a judicial determination that the particular testimony was unreliable.

Similarly, the law against hearsay has not played a role in this account. Hearsay law, like evidence law more generally, was not well developed at the time the Clause was adopted, much

- Confrontation guarantees openness of procedure, which among other benefits ensures that the witness’ testimony is not the product of torture or of milder forms of coercion or intimidation.
- Confrontation provides a chance for the defendant, personally or through counsel, to dispute and explore the weaknesses in the witness’ testimony.
- Confrontation discourages falsehood as well as assists in its detection. The prospect of testifying under oath, subject to cross-examination, and in the presence of the accused, makes false accusation much more difficult than it would be otherwise.
- If, as is usually the case, the confrontation occurs at trial or in a videotaped proceeding, the trier of fact has an opportunity to assess the demeanor of the witness.
- Confrontation eliminates the need for intermediaries, and along with it any doubt about what the witness’ testimony is.



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less during the previous centuries. In expressing a fundamental procedural principle governing how testimony must be given, the Clause was not meant to constitutionalize the law of hearsay. The *Roberts* framework is a latter-day construct, with no historical roots.

III. The testimonial approach reflects values warranting constitutional protection, and the *Roberts* framework does not.

When the statement is testimonial, the question is not simply an evidentiary one, whether the particular statement should be included in the body of information presented to the trier of fact. Rather, there is now a basic procedural issue, of how testimony against an accused shall be given. And there is no doubt that the constitutional demand is that such testimony be given face to face with the accused, subject to cross-examination. Insisting on such confrontation as the required method for giving testimony serves several important instrumental purposes:

IV. As compared to the *Roberts* framework, the testimonial approach gives better guidance to the lower courts, is more practical to implement, and is less susceptible to manipulation.

The testimonial approach can be articulated in terms of four basic questions.

1. First, was the statement testimonial in nature? The statement falls within the scope of the Confrontation Clause if and only if the answer is affirmative. It is clear that Sylvia Crawford’s statement to the police was testimonial, under any reasonable approach. The statement was electronically recorded by the police in a police station after the incident at issue. The recording was made with considerable ceremony, clearly for use in later proceedings, and Ms. Crawford spoke in response to questioning much as if in a deposition — but without oath or cross-examination. If statements made in such circumstances are allowed as proof at trial, then under any plausible view the declarant is testifying when she

made such a statement, for there is no doubt that a reasonable person in her position would anticipate that her statements would likely be used as evidence in a future criminal proceeding.

Just as in this case, the question of whether a given statement should be considered testimonial can usually be rather easily resolved, as indicated by the following “rules of thumb”:

- A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made directly to the authorities or not.
- If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial.
- A statement made by one participant in a criminal enterprise to another, intended to further the enterprise, is not testimonial.
- And neither is a statement made in the course of going about one’s ordinary business, made before the criminal act has occurred or with no recognition that it relates to criminal activity.

Thus, testimonial statements include not only statements made as testimony at the trial itself, but also testimony given at a prior trial or other judicial proceeding, and statements, like the one in this case, knowingly made to investigating authorities or with the understanding that they will reach and be used by those authorities. Inevitably, some cases remain near the borderline, but that in itself is not troubling.

2. Assuming the statement is testimonial, the second basic question is: Will the accused have had an adequate opportunity to confront the witness? In some settings, this question poses interesting issues, such as whether the witness may testify via an electronic connection to the courtroom, whether an opportunity to cross-examine at a preliminary hearing suffices for purposes of the Confrontation Clause, or whether the witness’ memory loss at the time of cross-examination unduly impairs the accused’s confrontation opportunity. Usually, though, the answer to this question is clear, as it is here; Michael Crawford did not have an opportunity to cross-examine Sylvia.

If the accused will not have had an adequate opportunity to confront the witness, then introduction of the testimonial statement to prove the truth of what it asserts violates the accused’s confrontation right unless the answer to the third question is in the affirmative:

3. Did the accused waive the right to confrontation by failing to object, or forfeit it by misconduct? The accused might forfeit the right, for example, by intimidating the witness, kidnapping her, or murdering her. An accused cannot complain about this inability to confront the witness if it is his own wrongful conduct that created that inability. This principle — rather than the fiction that cross-examination would be practically useless anyway because a declarant would not wish to die with a lie on her lips — best explains the admissibility of certain statements by dying witnesses.

If the testimonial statement was made at an earlier time, and the accused then had an adequate opportunity to confront the witness, a fourth question arises:

4. Has the witness been shown to be unavailable to testify at trial? If the answer is negative, then the statement may not be used, because live testimony is possible and preferred. If the answer is affirmative, however, the Confrontation Clause poses no obstacle to admissibility of the statement, unless the prosecution’s wrongdoing causes the unavailability. Taking the testimony at trial would be ideal, but the ideal is not possible; an opportunity for confrontation is what is essential, and the accused has had it.

Conclusion

Current doctrine relies on hearsay law to do the work that should be performed by the Confrontation Clause, and this has been detrimental to both. It has made hearsay law overly rigid, and it has obscured the meaning of the Clause. Once it is recognized that the scope of the Clause is narrower than that of hearsay law, and that it applies only to those statements that are testimonial in nature, the essence of that right becomes apparent: It protects one of the central procedural aspects of our system of criminal justice, the presentation of testimony in the presence of the accused and subject to cross-examination. That right may be waived or forfeited, but it is not subject to exceptions nor can it be trumped by a judicial determination that the particular statement at issue is reliable.

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the Ralph W. Aigler Professor of Law, earned a B.A. and a J.D. from Harvard, where he was an editor of the Harvard Law Review, and a D.Phil. in modern history from Oxford University. His research focuses principally on evidence and Supreme Court history. He is the general editor of The New Wigmore, a multi-volume treatise on evidence, and has been designated to write the volume on the Hughes Court in the Oliver Wendell Holmes Devise History of the United States Supreme Court. In addition, he has published an evidence textbook, The Elements of Evidence, the third edition of which is now in press, and many law review articles and essays. Friedman clerked for Judge Irving R. Kaufman of the U.S. Court of Appeals for the Second Circuit, and was then an associate for the law firm of Paul, Weiss, Rifkind, Wharton & Garrison in New York City. He came to the Law School faculty in 1988 from Cardozo Law School.

