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## The Crawford Transformation

Richard D. Friedman

*University of Michigan Law School, [rdfrdman@umich.edu](mailto:rdfrdman@umich.edu)*

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First, *Crawford* makes clear that the principal and perhaps only focus of the Confrontation Clause is testimonial statements. In contrast, under *Roberts* any hearsay statement by an out-of-court declarant posed a potential confrontation issue though often the issue was resolved in favor of the prosecution. *Crawford*'s focus on testimonial statements is in accord with the text of the Confrontation Clause, which provides that A[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. The most natural meaning of A witnesses is those who give testimony. A focus on testimonial statements is also in accord with the basic idea that motivated the clause, one that is still crucial to the Anglo-American system: that, in contrast to the procedures of some systems of medieval Europe, prosecution witnesses should give their testimony in the presence of the accused and be subject to oral cross-examination.

Second, if a statement is testimonial and offered against an accused to prove the truth of what it asserts, it cannot be admitted unless the accused has an opportunity to cross-examine the maker of the statement. Under *Roberts*, hearsay could usually be admitted against an accused if it was deemed reliable, and reliability could be found if the statement fit within a firmly rooted hearsay exception or if it was deemed to have particularized guarantees of trustworthiness. The reliability test was extraordinarily malleable, and now it is no more; if a statement is testimonial, *Crawford* establishes a firm requirement of cross-examination.

Third, though the opportunity for cross-examination ordinarily should occur at trial, if the witness—that is, the maker of the testimonial statement—is unavailable to testify at trial, then *Crawford* treats cross-

## Thoughts on *Crawford*

### The *Crawford* Transformation

by Richard D. Friedman  
Michigan Law School

*Crawford v. Washington*, 124 S. Ct. 1354 (2004), is one of the most dramatic Evidence cases in recent history, radically transforming the doctrine governing the Confrontation Clause of the Sixth Amendment to the U.S. Constitution. *Crawford* is a very positive development, but leaves many open questions and forces Evidence teachers to rethink how they teach hearsay and confrontation.

### The Doctrinal Transformation

The doctrinal transformation wrought by *Crawford* may be grasped by contrasting it in three respects with the previously prevailing framework, which was laid out in *Ohio v. Roberts*, 448 U.S. 56 (1980), and modified by later cases.

examination taken at an earlier proceeding as an acceptable second-best substitute. Under *Roberts*, unavailability had an uncertain role that was difficult to defend.

### Unchanged Matters

There are numerous aspects of confrontation law that remain unchanged by *Crawford*. It is still true that a matter does not raise a confrontation issue unless it is offered to prove the truth of what it asserts; that if a witness is subjected to cross-examination at trial, introduction of her prior statements will not be deemed to create a confrontation problem, even if the prior statements contain substance not included in the current testimony; that if the accused's own wrongdoing caused the witness's unavailability the accused will be deemed to have forfeited the confrontation right; and that in some circumstances a violation of the Confrontation Clause may be deemed harmless and therefore not require reversal. The doctrine governing when a witness should be deemed unavailable is probably untouched by *Crawford*. So too, at least for the moment, is the rule of *Maryland v. Craig*, 497 U.S. 836 (1990), providing that if a child witness would be traumatized by having to testify in the presence of the accused, the child may testify in another room with the judge and counsel present but the jury and the accused connected electronically. Beyond all this, the results in many cases will remain the same even if the rationale changes substantially: Many statements that were deemed reliable under *Roberts* will be called non-testimonial under *Crawford*, and so will avoid searching Confrontation Clause scrutiny.

### The Meaning of A Testimonial

Much will change, however. The most critical question is: What statements shall be deemed testimonial? *Crawford*

declined to offer a comprehensive definition of the term. It did say that the term Applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. 124 S. Ct. at 1374. The Court took care to note that it used the term Ainterrogation in Aits colloquial, rather than any technical legal, sense, and that the statement at issue in the case, Aknowingly given in response to structured police questioning, qualifies under any conceivable definition, *id.* at 1365 n.4; at another point, it noted that A[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse. *Id.* at 1367 n.7. This emphasis on government involvement might suggest that the Court will stick closely to its minimalist enumeration of types of testimonial statements. Even if it does so, *Crawford* will create a significant protection against some of the more blatant violations of the confrontation right that lower courts tolerated during the *Roberts* era.

The minimalist enumeration, however, is too narrow. A witness can create testimony against an accused without any prosecutorial involvement at all; indeed, the right to confront witnesses first emerged in systems in which there was no prosecutor at all. See Acts 25:16. *Crawford* noted that one of the statements involved in the notorious *Raleigh* case was a letter. *Id.* at 1360. And one of three formulations of the term Atestimonial that the Court quoted B the best of the three, in my view B operates from the perspective of the witness (Astatements 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 1364). Certainly a statement made to a private person who is

used as an intermediary for transmission to the authorities should be regarded as testimonial; otherwise, a gaping opportunity for avoiding *Crawford* will be created.

One context in which uncertainty over the term Atestimonial@ is being played out is that of what Bridget McCormack and I have called Adial-in testimony,@ statements made in 911 calls and to responding officers. The attempt in *People v. Moscat*, 2004 WL 615113, 2004 N.Y. Slip 24090 (Crim. Ct. Bronx Co. 2004), to categorize virtually all 911 calls as non-testimonial is vastly overbroad, I believe. *Davis v. State*, now pending in the Washington Supreme Court, and to be argued by Jeffrey Fisher, who this year also won both *Crawford* and *Blakely v. Washington*, 2004 S. Ct. 1402697, may be a significant case in this area.

Another area of great uncertainty is that of child declarants. Are some children too immature, cognitively or morally or both, to be considered witnesses at all? If a witness perspective is adopted in determining whether a statement is testimonial, should its application take into account the developmental stage of the child?

### Other Issues

*Crawford* raises or intensifies several significant questions apart from the bounds of the term Atestimonial@:

! Are dying declarations admissible notwithstanding a lack of opportunity for cross-examination, and if so, on what basis? An essential aspect of *Crawford* is that the Avagaries of the rules of evidence@ do not affect the status of a testimonial statement under the Confrontation Clause, *id.* at 1370, but it suggested that a *sui generis* exception on historical grounds may be made for dying declarations. *Id.* at 1367 n.6. But *State v. Meeks*, 2004 WL 867738 (Kans. 2004), declined this invitation, and instead held

such a statement admissible on the preferable basis that the accused had forfeited the right of cross-examination.

! Because the Court continues (wrongly, I believe) to adhere to the view that if a witness testifies subject to cross at trial the Confrontation Clause poses no obstacle to admissions of her prior statement, even if the witness no longer asserts the substance of the statement, there may well be increased pressure to make the rule against hearsay inapplicable to all prior statements of a witness.

! The Court left suspended the question whether *Roberts* continues to apply to non-testimonial statements. If it does, it is unlikely to have much impact; if a statement is not excluded by the hearsay rule, a court that holds it to be non-testimonial is unlikely to hold it insufficiently reliable for *Roberts*. The theory of *Crawford* makes the Clause inapplicable to non-testimonial statements, and perhaps in time the Court will give the coup de grâce to *Roberts*.

! In what circumstances should a prior opportunity for cross-examination be deemed sufficient, so that if the witness is unavailable to testify at trial an earlier testimonial statement may be admitted?

### Pedagogy

Finally, how does *Crawford* affect the way Evidence should be taught? Some Evidence teachers have spent a great deal of time on hearsay, and then discussed confrontation briefly, if at all. If this approach was ever viable, it is not after *Crawford*. In my view, we should focus on confrontation before we teach hearsay. There is an historical basis for doing so: The confrontation right developed long before the hearsay rule. After *Crawford*, one does not need to understand the hearsay rule to understand the confrontation right.

Quite the reverse, in fact. If one first understands the basic nature of the confrontation right (and, except as they bear on the question of unavailability, there is not much need to discuss most of the cases from the *Roberts* era), then it becomes possible to examine all the complexities of hearsay law with questions such as these in mind: To what extent does the doctrine reflect the confrontation right, which is now independently protected, or a more general and softer principle applicable to civil cases as well, that statements made with litigation use in mind ought to be made under the conditions prescribed for testimony, including the oath and opportunity for cross-examination? To the extent that the doctrine does *not* reflect confrontation principles, does it advance the search for truth, or is it in large part a relic that should be shed? *Crawford*, in other words, can be the occasion for rethinking not only the confrontation right and how we teach it, nor even merely how we teach hearsay, but how the law of hearsay should be reconstructed.