University of Michigan Law School
University of Michigan Law School Scholarship Repository

Articles | Faculty Scholarship

2004

# The Confrontation Clause Re-Rooted and Transformed

Richard D. Friedman
*University of Michigan Law School*, rdfrdman@umich.edu

Follow this and additional works at: http://repository.law.umich.edu/articles

Part of the Constitutional Law Commons, Courts Commons, Criminal Procedure Commons, Evidence Commons, and the Legal History, Theory and Process Commons

Recommended Citation
Friedman, Richard D. "The Confrontation Clause Re-Rooted and Transformed." Cato Sup. Ct. Rev. 2003-2004 (2004): 439-68. (Portions of this article have previously been published in "'Face to Face': Rediscovering the Right to Confront Prosecution Witnesses." Int'l J. Evidence & Proof 8, no. 1 (2004): 1-30 and "Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection." Criminal Justice 19, no. 2 (2004): 4-13.)

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

# The Confrontation Clause Re-Rooted and Transformed

*Richard D. Friedman**

## I. Introduction

For several centuries, prosecution witnesses in criminal cases have given their testimony under oath, face to face with the accused, and subject to cross-examination at trial. The Confrontation Clause of the Sixth Amendment to the U.S. Constitution guarantees the procedure, providing that ''[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him.'' In recent decades, however, judicial protection of the right has been lax, because the U.S. Supreme Court has tolerated admission of out-of-court statements against the accused, without cross-examination, if the statements are deemed ''reliable'' or ''trustworthy.'' This year, in *Crawford v. Washington*,[1] the Supreme Court did a sharp about-face, holding that a testimonial statement cannot be admitted against an accused, no matter how reliable a court may deem it to be, unless the accused has had an adequate opportunity to cross-examine the witness who made the statement.

*Crawford* is not only a vindication of the rights of the accused but a victory for fidelity to constitutional text and intent. And yet the decision leaves many open questions, and all lawyers involved in the criminal justice process will have to adjust to the new regime that it creates.

The transformation achieved by *Crawford* is crystallized by considering the facts of the case itself.[2] Michael Crawford, upset by a report that Kenneth Lee had made advances on his wife Sylvia, went with Sylvia to Lee's apartment. A violent fight followed, during the course

*Portions of this article have been previously published in *Criminal Justice,* a journal published by the American Bar Association, and in the *International Journal of Evidence & Proof.*

[1] 124 S. Ct. 1354 (2004).

[2] See *id*. at 1356–59 (reciting facts of the case).

of which Crawford was cut badly on the hand and stabbed Lee in the stomach, seriously injuring him. That night, Sylvia and Michael Crawford both made tape-recorded statements to the police at the station-house. The statements were similar in many respects, but Sylvia's tended to damage Michael's contention of self-defense. Michael eventually was tried on charges stemming from the incident. Sylvia was unwilling to testify at trial against her husband, and was deemed by all parties to be unavailable as a witness. Accordingly, the prosecution offered Sylvia's station-house statement.

The case therefore fits the mold of what I have called ''station-house testimony''—a statement by a witness of an alleged crime, made knowingly and privately to investigating officers, with the clear anticipation on the part of all that the statement may be used as prosecution evidence at trial. A lay observer as well as a lawyer may have a strong intuitive sense that such a statement ought not be used to help convict an accused. And yet, until this year, prevailing doctrine failed to give a sufficiently clear signal that this was so. Sylvia's statement was admitted into evidence over Michael's objection, he was convicted, and the Washington Supreme Court eventually upheld the conviction, holding that the ''interlock'' of Sylvia's and Michael's statements rendered Sylvia's sufficiently trustworthy for Confrontation Clause purposes.[3]

The U.S. Supreme Court then reviewed the case. What is notable is not that the Court reversed Crawford's conviction, nor even that it did so unanimously. Rather, as I explain more fully below, what makes *Crawford* a landmark is that the Court discarded the flabby doctrine that it had used to apply the Confrontation Clause and instead adopted an approach that better fits the meaning and intent of the Clause.

Part II of this article explores the values underlying the Confrontation Clause and its historical background. Part III shows how the principle driving the Clause became obscured by a hopelessly flawed body of doctrine. Part IV lays out the elements of the testimonial framework adopted by *Crawford*. Part V examines, the areas of criminal procedure left unchanged by *Crawford*, and the open questions that future courts will have to settle in the wake of this watershed decision.

[3] *Id.* at 1358.

## II. Values, History, and Text

A cornerstone of the Anglo-American legal system has long been that a witness may not testify against an accused unless the witness confronts the accused with the testimony. The requirement that prosecution testimony be given this way—rather than, say, in writing or behind closed doors, as have been the methods in some systems—serves a range of purposes:

- *Openness*. Confrontation guarantees openness of procedure, which among other benefits ensures that the witness's testimony is not the product of torture or of milder forms of coercion or intimidation. This is particularly important given the contrast to early Continental systems, in which coercion of witnesses examined privately was very common.
- *Adversarial Procedure*. Confrontation provides a chance for the defendant, personally or through counsel, to dispute and explore the weaknesses in the witness's testimony. In an earlier day, that chance came in the form of a wide-open altercation in court. Today it comes in the form of cross-examination, usually through counsel. The U.S. Supreme Court has repeatedly endorsed John Henry Wigmore's characterization of cross-examination as ''beyond any doubt the greatest legal engine ever invented for the discovery of truth.''[4] Of course, as Wigmore recognized, cross-examination may sometimes lead the trier of fact away from the truth rather than toward it. But the constitutionally required ''beyond a reasonable doubt'' standard of persuasion in a criminal case reflects the extreme disutility of a false conviction.[5] The same consideration demands that

[4]5 John H. Wigmore, Evidence § 1367, at 32 (James Chadbourn rev. 1974) (quoted in part in Lilly v. Virginia, 527 U.S. 116, 123 (1999) (plurality opinion)). See also White v. Illinois, 502 U.S. 346, 356 (1992); Maryland v. Craig, 497 U.S. 836, 844 (1990); Perry v. Leeke, 488 U.S. 272, 283 n.7 (1989); Kentucky v. Stincer, 482 U.S. 730, 736 (1987); California v. Green, 399 U.S. 149, 158 (1970); Ford v. Wainwright, 477 U.S. 399, 415 (1986); Lee v. Illinois, 476 U.S. 530, 540 (1986); Watkins v. Sowders, 449 U.S. 341, 348 n.4 (1981); Roberts v. Ohio, 448 U.S. 56, 63 n.6 (1980); cf. United States v. Salerno, 505 U.S. 317, 328 (1992) (Stevens, J., dissenting) (''Even if one does not completely agree with Wigmore's assertion . . . one must admit that in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate.'').

[5]See In re Winship, 397 U.S. 358, 361–64 (1970).

the accused be able to cross-examine adverse witnesses even if sometimes that requirement prevents the conviction of a guilty person.

- *Discouragement of Falsehood*. Confrontation discourages falsehood as well as assists in its detection. The prospect of testifying under oath, subject to cross-examination, in the presence of the accused makes false accusation much more difficult than it would be otherwise, or so at least is the well-settled belief.[6]
- *Demeanor as Evidence*. If, as is usually the case, the confrontation occurs at trial or (in modern times) in a videotaped proceeding, the trier of fact has an opportunity to assess the demeanor of the witness.[7]
- *Elimination of Intermediaries*. Confrontation eliminates the need for intermediaries, and along with it any doubt about what the witness's testimony is.
- *Symbolic Purposes.* Beyond these instrumental purposes, confrontation of prosecution witnesses serves a ''strong symbolic purpose'' that repeatedly has been recognized by the Supreme Court.[8] Even if confrontation had no impact on the quality of the prosecution's evidence, it would be important to protect because, as the Court said in *Coy v. Iowa*[9] and repeated in *Maryland v. Craig*,[10] ''there is something deep in human nature that regards face-to-face confrontation between accused and accuser

[6]Maryland v. Craig, 497 U.S. 836, 846 (1990); Coy v. Iowa, 487 U.S. 1012, 1019–20 (1988) (''It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'''). See also Richard A. Posner, An Economic Approach to the Law of Evidence, 51 Stan. L. Rev. 1477, 1490 (1999) (''The witness whose credibility would be destroyed by cross-examination will not be called at all or will try to pull the sting of the cross-examiner by acknowledging on direct examination the facts that a cross-examiner could be expected to harp on.''). Of course, the same prospect may deter the giving of truthful testimony. But, again, the tradeoff accords with the fundamental value underlying the ''beyond a reasonable doubt'' standard. See Craig, 497 U.S. at 846–47; Coy, 487 U.S. at 1020.

[7]Craig, 497 U.S. at 844; Mattox v. United States, 156 U.S. 237, 242–43 (1895) (confrontation gives the accused the opportunity ''of compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief'').

[8]Craig, 497 U.S. at 846; Lee v. Illinois, 476 U.S. 530, 540 (1986).

[9]*Supra* note 6.

[10]*Supra* note 6.

as 'essential to a fair trial in a criminal prosecution.'"[11] It is not only fairness to the accused that is at stake, but also the moral responsibility of witnesses and of society at large, for "requiring confrontation is a way of reminding ourselves that we are, or at least want to see ourselves as, the kind of people who decline to countenance or abet what we see as the cowardly and ignoble practice of hidden accusation."[12]

- *The Weight of History.* The symbolic value of confrontation is enhanced by the history of the right, which I will now review.[13] Indeed, the very fact that for many centuries accused persons have had the right to confront the witnesses against them makes it especially important to continue to honor that right.

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 questioning by him or on his behalf. The ancient Hebrews required confrontation,[14] as did the Romans. A Roman governor, Festus, pronounced: "It is not the manner of the Romans to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."[15]

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

[11] Craig, 497 U.S. at 847, quoting Coy, 487 U.S. at 1017, quoting in part Pointer v. Texas, 380 U.S. 400, 404 (1965).

[12] See generally Sherman J. Clark, An Accuser-Obligation Approach to the Confrontation Clause, 81 Neb. L. Rev. 1258 (2003).

[13] A more extensive historical discussion, with fuller citations, may be found in Richard D. Friedman and Bridget McCormack, Dial-In Testimony, 150 U. Pa. L. Rev. 1171, 1202–09 (2002).

[14] Deut. 19:15–18.

[15] Acts 25:16.

would be coached or intimidated. By contrast, beginning in the fifteenth century and continuing for centuries afterward, 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. In a celebrated sixteenth century description, for example, Smith spoke approvingly of an ''altercation'' between accuser and accused. Nearly two centuries later, Sollom Emlyn proclaimed, ''In other Countries, the Witnesses are examin'd in private, and in the Prisoner's Absence; with us, they are produced face to face, and deliver their Evidence in open Court, the Prisoner himself being present, and at liberty to cross-examine them.'' And later in the eighteenth century Blackstone spoke of ''the confronting of adverse witnesses'' as being among the advantages of ''the English way of giving testimony, *ore tenus*''—that is, by word of mouth, or orally.[16]

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. Most of them (notably the Court of Star Chamber) were viewed as arms of an unlimited royal power and did not survive the upheavals of the seventeenth century. Second, from the reign of Queen Mary, justices of the peace were required by statutes to examine felony witnesses, and these examinations were admissible at trial, even though the witness had not been cross-examined, if the examination was taken under oath and the witness was then unavailable. This treatment—which almost certainly numbered among the chief abuses at which the Confrontation Clause was aimed—was a continuing source of controversy, and in 1696, in the celebrated case of *Rex v. Paine*,[17] the court refused to extend it to misdemeanor cases; eventually, the practice was abolished by statutes for felony cases as well. Finally, and perhaps most significant, the Crown, when trying to control its political adversaries through treason prosecutions and other uses of the criminal law, sometimes used testimony taken out of the presence of the accused.

[16] For full citations, see Friedman & McCormack, *supra* note 13, at 1203–04.

[17] 87 Eng. Rep. 584 (K.B. 1696); 90 Eng. Rep. 527 (K.B. 1696); 90 Eng. Rep. 1062 (K.B. 1696); 91 Eng. Rep. 246 (K.B. 1696); 91 Eng. Rep. 1387 (K.B. 1696).

The battle for confrontation was most clearly fought in the treason cases of Tudor and Stuart England. Even early in the sixteenth century, treason defendants demanded that witnesses be brought before them; often they used the term ''face to face.'' The notorious case of Walter Raleigh was one of many in which Crown prosecutors used confessions made by alleged accomplices of the accused, even though the confessions were not made under oath or before the accused. The self-accusing nature of such statements was said to be an adequate substitute for the usual requirements of testimony. But in 1662, the judges of the King's Bench ruled unanimously and definitively in *Tong's Case*[18] that a pretrial confession ''cannot be made use of as evidence against any others'' than the confessor himself.[19]

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; as early as 1776, others, following Hale and Blackstone, adopted language strikingly similar to that later used in the Sixth Amendment's Confrontation Clause.[20]

The Confrontation Clause states simply:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.[21]

Note that nothing in the history of the Clause, or in its text, suggests that the confrontation right was considered contingent, inapplicable upon a judicial determination that the particular testimony was reliable. Rather, the Clause established as a categorical rule a basic procedural norm that a witness may not be heard for the prosecution unless the accused has an opportunity to be confronted by her—

[18] Case of Thomas Tong, 84 Eng. Rep. 1061 (K.B. 1662).

[19] *Id*. at 1062 (cited in Lilly v. Virginia, 527 U.S. 116, 141 (1999) (Breyer, J., concurring)).

[20] Friedman & McCormack, *supra* note 13, at 1207–08.

[21] U.S. Const. amend. VI, cl. 3.

that is, the witness must speak in the presence of the accused, and subject to cross-examination. Like Festus, we can say that it is not our way to allow an accused to be convicted of a crime unless the witnesses against him testify to his face.

## III. *Roberts* and the Obscuring of the Confrontation Principle

I have presented a view of a relatively uncluttered confrontation principle written into the Constitution by the Sixth Amendment. But later the picture got badly muddied. Here is a brief speculative account, which I have developed in greater detail elsewhere.[22]

### *A. The Rise of the* Roberts *Framework*

The law against hearsay has not played a role in the historical account underlying the Confrontation Clause, just as it does not enter into the text of the Clause. Hearsay law, like evidence law more generally, was not well developed at the time the constitutions of the states of the United States, or the U.S. Constitution, articulated the confrontation right, much less during previous centuries. In the eighteenth century, the term hearsay closely conformed to the lay sense of the word: Hearsay was what a witness contended she heard another person say.

Around the beginning of the nineteenth century, the conception of hearsay expanded.[23] The reason for this expansion appears to have been the growing role of criminal defense lawyers, who emphasized, with respect to nontestimonial statements as well as testimonial

[22] Friedman & McCormack, *supra* note 13, at 1209-27

[23] See Thomas Peake, A Compendium of the Law of Evidence 10 (1801). Peake said, in the course of his discussion of hearsay, that certain written memoranda made in the ordinary course of business are admissible as ''not within the exception as to hearsay evidence.'' He used ''exception'' in the same sense that today we would use ''objection.'' The statement, therefore, is that these memoranda are not excluded by the hearsay rule; implicit may be the inchoate idea that other writings would be. About a decade later, S.M. Phillipps made the principle clear: The exclusionary rule ''is applicable to statements in writing, no less than to words spoken,'' the only difference being that there is greater facility of proof in the case of writings than of oral statements. 1 S.M. Phillipps, A Treatise on the Law of Evidence 173 (1st Amer. ed. from the 2d London ed. 1816). The point did not gain instant universality. Francis Buller, An Introduction to the Law Relative to Trials at Nisi Prius 294b n. (Richard Whalley Bridgman ed., 7th ed. 1817), follows Peake's treatment, virtually to the point of plagiarism. 3 Jeremy Bentham, Rationale of Judicial Evidence 447–48 (1827), treats written evidence as distinct from hearsay, but claims that the same rules apply to both.

ones, the lack of an opportunity for cross-examination. This emphasis led to sharper recognition that evidence is not ideal when the value of the evidence depends on the credibility of a person not testifying in court.[24] This recognition in turn led to, or at least was associated with, articulation of the modern definition of hearsay as an out-of-court statement offered to prove the truth of what it asserts.[25]

As the law of hearsay expanded, exceptions to the hearsay rule multiplied. Since the early nineteenth century, the trend has been to expand those exceptions and to admit more statements into evidence. The articulated basis for the law largely has been shaped by Wigmore's emphasis on ''trustworthiness,'' but I suspect the actual bounds of the hearsay doctrine were also shaped by an unarticulated adherence to the confrontation principle. Inevitably, over time, the confrontation principle was diluted and obscured: Treating non-testimonial statements on a par with testimonial ones meant that an opportunity for cross-examination could not be regarded as an absolute precondition for admission, but only as a desirable, and sometimes dispensable, condition.[26]

So long as the Confrontation Clause was a limitation only on the federal judicial system, its bounds, and its relationship to hearsay doctrine, did not matter very much; pretty much any result the Supreme Court would reach by applying the Confrontation Clause it could also reach by applying nonconstitutional doctrine as well.[27]

[24] In a contemplative discussion, Thomas Starkie noted that the exclusionary rule does not apply ''where declarations . . . possess an intrinsic credit beyond the mere naked unauthorized assertions of a stranger.'' 1 Thomas Starkie, A Practical Treatise on the Law of Evidence 46 (1st American ed. 1826).

[25] Note the following passage from 1 S.M. Phillipps, A Treatise on the Law of Evidence 229 (7th ed. 1829), not found in earlier editions (including the 6th edition of 1824): ''Hearsay is not admitted in our courts of justice, as proof of the fact which is stated by a third person.''

[26] Lost was the recognition of a critical difference between statements made ''for the express purpose of being given in evidence'' and ''the natural effusions of a party . . . who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth.'' Phillipps, *supra* note 23, at 175, quoting in part Eldon, L.C., in Whitlocke v. Baker, 13 Ves. Jr. 510, 514 (1807), and citing Berkeley Peerage Case, 4 Camp. 402, 171 E.R. 128 (1811), in which some of the judges drew the distinction.

[27] Note, for example, the celebrated case of Shepard v. United States, 290 U.S. 96, 98 (1933), in which the Court held the statement, ''Dr. Shepard has poisoned me,'' which it characterized as an ''accusation,'' inadmissible on hearsay grounds, without mentioning the Confrontation Clause.

But in 1965 the Court held that the Fourteenth Amendment incorporates the Confrontation Clause against the states.[28] What the Clause prevents then became critical. The trouble was that by this time the Court had nearly lost sight of the purpose behind the Clause. And so in *Ohio v. Roberts*,[29] after fifteen years of deciding cases without an overall theory of the Clause, the Court concocted a doctrine that virtually conformed the meaning of the Clause to ordinary hearsay law.

The essential elements of the *Roberts* doctrine were as follows: First, *Roberts* held that any hearsay statement made by a person who did not testify in court and offered against a criminal defendant posed a confrontation issue. Second, hearsay could be admitted without an opportunity for cross-examination if the statement satisfied certain conditions. The primary condition to be satisfied was that the statement be ''reliable.'' A statement would be deemed reliable if it either fit within a ''firmly rooted hearsay exception'' or was supported by ''particularized guarantees of trustworthiness.'' Third, in some set of circumstances, the scope of which was never clear, another condition for admissibility was that the person had to be unavailable at trial.[30]

All of these elements proved to be troublesome. First, the scope of the *Roberts* doctrine was too broad. The Confrontation Clause says nothing about hearsay, and many statements that fit within the basic definition of hearsay—that is, out-of-court statements offered to prove the truth of what they assert—do not plausibly threaten to violate the right of a defendant ''to be confronted with the witnesses against him.''

Second, reliability is a poor criterion, inappropriate for the Confrontation Clause. Trials are not supposed to be limited to reliable evidence. Much of the evidence that is admitted—including, often, testimony that has been subjected to cross-examination—is highly *un*reliable. The function of the trial is to give the fact-finder an opportunity to make its best assessment of the facts after considering all the evidence properly presented, reliable and unreliable. Moreover, the hearsay exceptions do not all do a good job of sorting out

[28] Pointer v. Texas, 380 U.S. 400 (1965).

[29] 448 U.S. 56 (1980).

[30] See *id*. at 65–66.

reliable from unreliable evidence. A great deal of mundane hearsay raises no strong grounds for doubt, and yet does not fit within an exception. Conversely, much hearsay is plainly of dubious trustworthiness, even though it fits within a well-established exception. For example, there is a long-standing exception for certain ''dying declarations.'' The traditional justification for this exception is that no one about to meet her Maker would do so with a lie upon her lips. In today's world, this idea is nearly laughable—and it is not made less so by the Supreme Court's pious assertion in 1990 that the rationale for the exception is so powerful that cross-examination would be of ''marginal utility.''[31]

If a statement was not deemed to fit within a firmly rooted hearsay exception, it could yet satisfy the reliability requirement of *Roberts* by meeting the ''particularized guarantees of trustworthiness'' test. That test was notoriously amorphous and manipulable. The Court tried to put some order on this case-by-case inquiry by insisting that corroborating evidence could not satisfy it; only ''circumstances . . . that surround the making of the statement and that render the declarant particularly worthy of belief'' could be used.[32] This limitation perplexed the lower courts, which strained mightily against it.

Finally, the unavailability requirement proved equally difficult. The Court never applied the requirement beyond the context in which it was first articulated (i.e., where the statement at issue fit within the hearsay exception for former testimony.) At times, it appeared that this was the only context in which the Court *would* apply the exception, at times it appeared that the Court might apply the requirement to statements fitting within certain other exceptions,

[31] Idaho v. Wright, 497 U.S. 805, 820 (1990). Further, though a statement might appear to fit within a firmly rooted exception, at least in the view of the forum state, admission could yet be intolerable. Consider Lee v. Illinois, 476 U.S. 530 (1986). There, the statement at issue was a confession by one Thomas, according to which both he and Lee played central roles in a gruesome double murder. Thomas was deemed unavailable at Lee's trial, by reason of privilege, and so the state offered the confession, contending reasonably that it was a declaration against interest. The Court's response, that such a categorization defines too large a class for meaningful Confrontation Clause analysis, *id.* at 544 n.5, was buried in a footnote, perhaps because the Court could not easily reconcile that response with its attempt in *Roberts* to make dispositive the broad categorizations of hearsay law.

[32] Wright, 497 U.S. at 819.

but the matter remained unresolved. Even knowledgeable observers expressed confusion.

*B. The Testimonial Framework*

In the end, the *Roberts* framework—clunky, confusing, and manipulable—did not provide meaningful protection against the giving of testimony behind closed doors. In recent years, there were glimmers of hope that the Court might change course. Concurring opinions by Justice Thomas, joined by Justice Scalia, in *White v. Illinois*,[33] and by Justices Breyer and Scalia in *Lilly v. Virginia*,[34] suggested the possibility of a radical transformation. Finally, in *Crawford*, seven justices converted the suggestion to reality, adopting a new organizing principle that treats the Confrontation Clause as 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.

Recall that in *Crawford* the Washington Supreme Court held that Sylvia Crawford's statement, made in the station house to investigating officers, was admissible against Crawford, even though Sylvia was considered unavailable to testify at trial, because the statement was deemed sufficiently reliable to satisfy *Roberts.* The U.S. Supreme Court reversed unanimously. The chief justice and Justice O'Connor would simply have held that Sylvia's statement did not satisfy *Roberts*. The other seven justices, in an opinion by Justice Scalia, agreed that various factors—including the fact that Sylvia said her eyes were closed during part of the incident!—pointed to the unreliability of her statement. But this majority declined to rest the decision on *Roberts*. Rather, the majority pointed to these factors, and the fact that the Washington courts had concluded the statement was admissible, as a stark indication of the failure of *Roberts*. Accepting the proposal made by Crawford, and supported by amici curiae (friends-of-the-court), the Court discarded the *Roberts* doctrine and adopted instead a ''testimonial'' approach to the Confrontation Clause.

The essence of the testimonial approach may be grasped by considering *Crawford*'s treatment of the three elements of the *Roberts* doctrine outlined above.

[33] 502 U.S. 346, 358 (1992) (Thomas, J., concurring).

[34] 527 U.S. 116, 141 (1999) (Breyer, J., concurring); *id.* at 143 (Scalia, J., concurring).

First, *Crawford* makes clear that the principal—and perhaps only—focus of the Confrontation Clause is *testimonial* statements. Justice Scalia, for example, called ''testimonial'' statements the ''principal object'' of the Sixth Amendment.[35] This proposition is in accord with the text of the Confrontation Clause; as noted above, the Clause speaks of ''witnesses,'' the most natural meaning of which is those who give testimony.[36] The historical account given in Part II demonstrates that a focus on testimonial statements is also in accord with the basic idea that motivated adoption of the Clause, one that is still crucial to the Anglo-American system—that, in contrast to the procedures of some systems of medieval Europe, witnesses against an accused should give their testimony in the presence of the accused and subject to oral cross-examination. Just what statements are to be considered testimonial is an important question, one that is discussed below and that undoubtedly will be the subject of many cases in coming years. The Court declined to furnish a comprehensive definition.

Second, the Court ruled that if a statement is ''testimonial'' and is offered to prove the truth of what it asserts, that statement cannot be admitted against an accused unless he has an opportunity to cross-examine the maker of the statement. As Justice Scalia emphasized, ''Where testimonial statements are at issue, the *only* indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.''[37] In other words, reliability cannot substitute for cross-examination.

Third, in contrast to *Roberts*, under which unavailability had an uncertain role that was difficult to defend,[38] the *Crawford* Court emphasized that the testimonial approach makes the role of unavailability quite clear and logical. As Justice Scalia explained, testimonial

[35] Crawford v. Washington, 124 S. Ct. 1354, 1365 (2004).

[36] The Latin for ''witness'' is ''testis.'' That word shares a root with ''testimonium,'' the core meaning of which is ''the testimony of a witness.'' And that, of course, is the source of the English word ''testimony.'' The derivation appears to be through the Old French; thus, in the modern French witness is ''témoin'' and testimony is ''témoinage.'' See, e.g., Adolf Berger, Encyclopedic Dictionary of Roman Law, 43(2) Trans. Am. Phil. Soc. 335, 735 (1953); 17 Oxford English Dictionary 833 (2d ed. 1989).

[37] Crawford, 124 S. Ct. at 1374 (emphasis added).

[38] See, e.g., *id*. at 1369.

statements may be admitted ''only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.''[39] Ordinarily, the opportunity for cross-examination should occur at trial. But if the witness—that is, the maker of the testimonial statement—is unavailable to testify at trial, then cross-examination at an earlier proceeding will be acceptable as a second-best substitute.

## IV. Matters That Remain Unchanged

*Crawford* reflects a paradigm shift in the doctrine of the Confrontation Clause. Nonetheless, Crawford and amici went to some pains to assure the Supreme Court that adoption of the testimonial approach would alter the results in few, if any, of the Court's own precedents. A considerable number of decisions in the lower courts, however, would come out differently under *Crawford*. To set the groundwork for understanding how *Crawford* alters the doctrinal landscape and the important issues that are likely to arise, it will first help to examine several respects in which *Crawford* does *not* change the law.

First, under *Crawford*, as before, a statement does not raise a confrontation issue unless it is offered to prove the truth of a matter that it asserts. This is the rule of *Tennessee v. Street*,[40] which *Crawford* explicitly reaffirms.[41] In *Street* itself, for example, the defendant contended that the police coerced him to make a statement similar to that of an accomplice's confession. The Court ruled unanimously that the prosecution therefore could introduce the accomplice's confession to demonstrate not that it was true but that it was substantially different from the defendant's. That result would be unchanged under *Crawford*. There may be questions as to how far a prosecutor may take this ''not for the truth'' argument. For example, if the prosecutor argues that the statement is being offered as support for the opinion of an expert witness, in some cases that might be considered too thin a veneer. Nonetheless, the basic doctrine remains in place.

Second, many statements that were admissible under *Roberts* will still be admissible under *Crawford*, though the grounds of decision

[39] *Id*.

[40] 471 U.S. 409, 414 (1985).

[41] Crawford, 124 S. Ct. at 1369 n.9.

will be different. The question is not, as some analysts have posed it, whether *Crawford* preserves given hearsay exceptions. The rule against hearsay and the Confrontation Clause are separate sources of law—and *Crawford* stops the tendency to meld them. The question for Confrontation Clause purposes in each case is whether the given statement is testimonial. The fact that a statement fits within a hearsay exception does not alter its status with respect to that question. But one can say that *most* statements that fit within certain hearsay exceptions are not testimonial. For example, under *Roberts*, business records and conspirator statements were deemed reliable because they fell within ''firmly rooted'' hearsay exemptions. Under *Crawford*, almost all such statements will be considered non-testimonial, and therefore the Confrontation Clause will impose little, if any, obstacle to their admissibility.

Third, the rule of *California v. Green*[42] also is preserved. As the *Crawford* Court summarized the rule, ''[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.''[43] In my view, the rule is a dubious one. It fails to take into account the serious impairment of the ability to cross-examine that arises when a witness's prior statement is admitted and the witness does not re-assert its substance, effectively walking away from it.[44] But the Court has shown no inclination to modify the rule. Indeed, it was reinforced by Justice Scalia himself in *United States v. Owens*,[45] a case involving a witness whose severe head injuries destroyed much of his memory—and it now becomes more important than ever for prosecutors. If a witness makes a statement favorable to a prosecutor, but the prosecutor is afraid that the witness will not stand by the statement at trial, the prosecutor should not argue that the statement is ''reliable.'' Rather, the prosecutor should bring the witness to trial, or otherwise ensure that the defendant has had an adequate opportunity for cross. If the witness reaffirms the substance of the prior statement, all is well and good for the prosecutor. If

[42] 399 U.S. 149 (1970).

[43] 124 S. Ct. at 1369 n.9.

[44] See Richard D. Friedman, Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket, 1995 Sup. Ct. Rev. 277.

[45] 484 U.S. 554 (1988).

she testifies at variance from the statement, then the Confrontation Clause does not bar admissibility of the statement.

Fourth, in applying *Roberts*, the Court developed a body of case law concerning what constitutes proof of unavailability (assuming the given statement can be introduced only if the declarant is unavailable), and that case law—including part of *Roberts* itself—is left untouched, for better or worse. At argument in *Crawford*, the chief justice asked what impact the testimonial approach would have on *Mancusi v. Stubbs*,[46] a key case in this line and one in which he wrote the majority opinion.[47] The proper answer is simple: None at all.

Fifth, *Crawford* explicitly preserves the principle that the accused should be deemed to have forfeited the confrontation right if the accused's own misconduct prevented him from having an adequate opportunity to cross-examine the witness.[48] The right may be forfeited, for example, if the accused murdered or intimidated the witness. The forfeiture principle may take on greater importance under *Crawford*, as explained below.

Sixth, the rule of *Maryland v. Craig*[49] is unchanged, at least for now. In that case, the Court held that, upon a particularized showing that a child witness would be traumatized by testifying 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. *Crawford* addresses the question of *when* confrontation is required; *Craig* addresses the question of *what* procedures confrontation requires. The two cases can coexist peacefully, and nothing in *Crawford* suggests that *Craig* is placed in doubt. And yet, Justice Scalia dissented bitterly in *Craig*. The categorical nature of his opinion in *Crawford* squares better with his *Craig* dissent than with Justice O'Connor's looser majority opinion in *Craig*, and presumably he would welcome the opportunity to overrule *Craig*. Whether he would have the votes is an open question.

[46] 408 U.S. 204 (1972).

[47] Transcript of Oral Argument, Crawford v. Washington, 124 S. Ct. 1354 (2004) (No. 02-9410), available at 2003 WL 22705281.

[48] 124 S. Ct. at 1370.

[49] 497 U.S. 836 (1990).

Finally, *Crawford* leaves intact the final succor of prosecutors, the rule that a violation of the confrontation right may be harmless and therefore not require reversal.[50]

## V. Changes and Open Questions

That *Crawford* leaves much of the *status quo ante* unchanged does not gainsay that it changes a great deal, and not just the conceptual framework of the Confrontation Clause. Here I will address respects in which *Crawford does* change the law, questions that it leaves open, and adjustments to existing law that might be adopted in its wake.

### *A. The Basic Change*

Most fundamentally, of course, *Crawford* ends the prosecutorial use of testimonial statements made to police in circumstances where the accused cannot confront his accuser. That means that when a prosecutor attempts to introduce a testimonial statement made by a person who is not a witness at trial, the prosecutor will not be able to argue that the statement should be admitted because it is reliable. Unless the accused either has had the opportunity to cross-examine the declarant, or has forfeited the right to confront her, the statement cannot be admitted.

Thus, to take an obvious example, some courts have been willing to admit grand jury testimony given by a witness who is not available at trial, persuading themselves that various factors—including the fact that the testimony was given under oath—are in the aggregate sufficiently strong ''particularized guarantees of trustworthiness'' to excuse the absence of an opportunity for cross-examination. *Crawford* means that this practice must stop. Similarly, station-house statements, of the type involved in *Crawford* itself, and statements made in plea hearings may not be introduced by the prosecution unless either the witness testifies at trial or she is unavailable and the accused has had an opportunity to cross-examine her.

Courts have already begun to apply cases consistently with these principles. In one Detroit murder case pending on appeal when *Crawford* was decided, the prosecutor has since confessed error, because the conviction depended in part on statements made to a polygraph examiner by a friend of the accused. Consider also *United*

[50] Delaware v. Van Arsdall, 475 U.S. 673 (1986). See also, e.g., Moody v. State, 594 S.E.2d 350 (Ga. 2004).

*States v. Saner*,[51] a post-*Crawford* decision in which the accused, a bookstore manager, objected to admission of a statement by a competitor, made to a Justice Department lawyer and paralegal, that the two managers had fixed prices. The court held, properly, that because the accused had not had a chance to cross-examine the competitor, who asserted the Fifth Amendment privilege at trial, *Crawford* precluded admissibility of the competitor's statement.[52]

*B. The Meaning of ''Testimonial''*

The most significant question that arises, of course, is how far the category of ''testimonial'' statements extends.

*1. Standards*

The *Crawford* Court did not have difficulty in concluding that Sylvia's statement was testimonial: ''Statements taken by police officers in the course of interrogations,'' as Sylvia's was, are ''testimonial under even a narrow standard.''[53] As the Court elaborated:

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.[54]

So much for the core. The boundaries of the category will have to be marked out by future cases. The Court quoted three standards without choosing among them:

- ''*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially'';
- ''extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions''; and

[51] 313 F. Supp. 2d 896 (S.D. Ind. 2004).

[52] *Id.* at 902–03.

[53] Crawford v. Washington, 124 S. Ct. 1354, 1364 (2004).

[54] *Id.* The Court noted that ''[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard.'' *Id.*

- ''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.''[55]

I believe the third of these is the most useful and accurate. It captures the animating idea behind the Confrontation Clause—the prevention of a system in which witnesses can offer their testimony in private without cross-examination. In some cases, under this view, a statement should be considered testimonial even though it was not made to a government official.[56]

It is by no means certain that this standard will ultimately prevail. Some language in *Crawford* emphasizes the role of government officers in creating testimony. For example, having used the term ''interrogation,'' the Court takes care to note that Sylvia's statement, ''knowingly given in response to structured police questioning, qualifies under any conceivable definition'';[57] at another point, it noted that ''[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse.''[58] This emphasis on government involvement might suggest that the Court will stick closely to a minimalist definition of testimonial statements.

That would be a mistake, however. I do not believe that participation by government officials in creation of the statement—either receipt of it as its initial audience or active procurement of it through interrogation—is the essence of what makes a statement testimonial.

[55] *Id.* (citations omitted).

[56] Most obvious, a government investigator may use a private intermediary to procure testimony, (but see People v. Geno, LC No. 01-046631-FC, 2004 WL 893947 (Mich. Ct. App. Apr. 27, 2004)), or a witness might use an intermediary as her agent for transmitting testimony to court. Thus, a declaration by a dying person identifying her killer should be considered testimonial even though the only person who hears it is a private individual; the purpose of the communication is presumably not merely to edify the listener but to pass on to the authorities the victim's identification of the killer, and the understanding of both parties to the communication is that the listener will play his role. Similarly, a complainant should not be able to avoid confrontation by passing on her information to a private intermediary who effectively runs a testimony-transmission operation—''Make this videotape and I'll pass it on to the proper authorities. You don't even have to take an oath, and after the tape is done you can even leave the state if you want.''

[57] 124 S. Ct. at 1365 n.4.

[58] *Id.* at 1367 n.7.

The confrontation right was recognized in older systems in which there was no public prosecutor, and victims or their families prosecuted crimes themselves. The idea behind the confrontation right is that the judicial system cannot try an accused with the aid of testimony by a witness whom the accused has not had a chance to confront. The prosecutor plays no essential role in the violation. Thus, if just before trial a person shoved a written statement under the courthouse door, asserting that the accused did in fact commit the crime, that would plainly be testimonial even though no government official played a role in preparing the statement.[59] One ground for hope in this respect is that *Crawford* itself noted that one of the statements involved in the notorious *Raleigh* case was a letter.[60]

In some cases a problem that nearly is the reverse arises—an investigative official may be seeking to procure evidence, but the declarant may not understand this. I believe that in the usual case the investigator's anticipation should not alter characterization of the statement. If the declarant does not recognize she is creating evidence that may be used in a criminal proceeding, then the nature of what she is doing in making the statement is not testimonial. Thus, a conversation between criminal confederates, with no anticipation of a leak to the authorities, is not ordinarily testimonial, and if in fact the authorities are surreptitiously recording the conversation, that should not change the result.[61] On the other hand, investigators probably should not be allowed to disguise their intent gratuitously—that is, for the purpose of defeating the confrontation right. Accordingly, even apart from a standard like the third one quoted above, perhaps a statement should be considered testimonial in what might be called an ''invited statement'' context in which the statement fits a description such as this:

[59] Indeed, the *prosecutor* cannot violate the confrontation right; there is nothing wrong with a prosecutor interviewing a witness out of the presence of the accused, and it is only when the *court* admits the witness's statement into evidence that the right is violated. It is thus the court's conduct that is state action for constitutional purposes.

[60] 124 S. Ct. at 1360.

[61] See People v. Torres, No. CRF01-84916, 2004 WL 575205 (Cal. Ct. App. Mar. 24, 2004; as modified on denial of rehearing, Apr. 13, 2004) (unpublished op.).

> Before the statement is made, (1) a recipient of the statement anticipates evidentiary use of the statement, but does not inform the declarant of this anticipation, and (2) the prosecution does not demonstrate that disclosure of anticipation of evidentiary use would have substantially diminished the probability that the declarant would have made the statement.

The idea behind the second prong of such a test would be that if disclosing the recipient's investigatory activity would not inhibit the declarant from making the statement, then the disclosure probably ought to be made; on the other hand, if the disclosure would likely prevent the statement from being made, then the investigator has sufficient reason for declining to make a disclosure. This rule seems to me to have some merit, but it may be too complicated to be applied satisfactorily.

*2. Special Cases*

Many cases will arise, in a wide variety of circumstances, in which it is a close question whether a statement should be deemed testimonial. I will address here two of the most important recurring types of cases.

*a. When Are 911 Calls Testimonial?*

Consider first the example of statements made in calls to 911 operators. In recent years, courts have often admitted these statements—most characteristically, by complainants in domestic violence cases—even though the caller has not testified in court. Under *Crawford*, this practice would not be allowed *if* the statement is deemed ''testimonial.'' The extent to which these calls are ''testimonial,'' however, is an open question.

The court in one post-*Crawford* case, in justifying its decision that statements in 911 calls should not be deemed testimonial, declared:

> Typically, a woman who calls 911 for help because she has just been stabbed or shot is not contemplating being a ''witness'' in future legal proceedings; she is usually trying simply to save her own life.[62]

[62] People v. Moscat, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

This generalization fits some cases, but not all. In some cases, the caller does not perceive that she is any longer in immediate danger, and the primary purpose of the call is simply to initiate investigative and prosecutorial machinery. Indeed, often the call occurs a considerable time after the particular episode has closed, and often the caller gives a good deal of information that is not necessary for immediate intervention. In a broader set of cases, the caller's motives are mixed but she is fully aware that what she says has potential evidentiary value.

Consider, for example, *State v. Davis*,[63] now on review in the Washington Supreme Court (the same court from which *Crawford* came). The complainant called 911 and, in response to questions by the operator, disclosed that the defendant had beaten her with his fists and then run out the door, further disclosed that she had a protection order against him, and explained the reasons why he had been in her house. The complainant did not testify at trial, and the 911 tape was played to the jury. In closing argument, the prosecutor said,

> [A]lthough she is not here today to talk to you[,] she left something better. She left you her *testimony* on the day that this happened . . . . [T]his shows that the defendant, Adrian Davis, was at her home and assaulted her.[64]

Then the prosecutor played the 911 tape again.[65] Here, the statement has strong claim to be considered testimonial.

*Davis* and cases like it suggest that the 911-call scenario should not be dismissed by broad generalizations about the ''typical'' case. Rather, a case-by-case assessment is necessary. Indeed, even if a 911 call is nothing but an urgent plea for protection, the court should closely scrutinize it. I will repeat here the analysis that Bridget McCormack and I have given:

> To the extent the call itself is part of the incident being tried, the fact of the call presumably should be admitted so the prosecution can present a coherent story about the incident. But even in that situation, the need to present a coherent

[63] 64 P.3d 661 (Wash. Ct. App. 2003).

[64] State v. Davis, Kings Cty. Super. Ct., King Co. No. 01102794-4 (KNT), Report of Proceedings, May 5, 2001, at 55, conviction affirmed, 64 P.3d 661, review granted, 75 P.3d 969 (Wash. Sept. 5, 2003).

[65] *Id*.

> story does not necessarily justify admitting the contents of the call. And even if the circumstances do warrant allowing the prosecution to prove the contents of the call, those contents generally should not be admitted to prove the *truth* of what they assert . . . . To the extent that the contents of the call are significant only as the caller's report of *what has happened*, such a report usually should be considered testimonial.[66]

*b. When Are Statements by Children ''Testimonial''?*

Another type of case that frequently will test the limits of the term ''testimonial'' involves statements by children, typically alleging some kind of abuse. Suppose, for example, a young child tells a police officer that an adult has physically or sexually abused her. If an adult made such a statement, it would clearly be testimonial. But can a different result occur in the case of a very young child?

At some point, the statement of a very young child may perhaps be considered more like the bark of a bloodhound than like the testimony of an adult human; that is, the child may be reacting to and communicating about what occurred, with no sense of the consequences that her communication may have. Arguably, fidelity to the text and policies of the Confrontation Clause suggests that some degree of understanding of the consequences of the statement is necessary before a declarant may be considered a ''witness.'' *If* that is true, the better rule would probably be that a person is not a witness unless she understands that the statement, if accepted, is likely to lead to adverse consequences for the person accused. Under this view, a child could be a witness even if she had no real understanding of the legal system; it would be enough to know that telling a police officer about a bad thing that a person did would likely cause that person to be punished.

In deciding whether a child is capable of acting as a ''witness,'' the moral as well as cognitive development of the child may well be material. My colleague Sherman Clark has argued that part of what drives the confrontation right is not simply the formal categorization of a person as a ''witness,'' but also the moral sense of the obligation of an accuser to confront the accused.[67] If he is right—

[66] Friedman & McCormack, *supra* note 13, at 1243 (emphasis added).

[67] Clark, *supra* note 12, at 1282.

and I believe there is a good deal of force to the argument—then the important question is not only whether the child understands the punitive consequences of the statement, but also ''the level of obligation and responsibility we are willing to put on the shoulders of children.''[68]

Even assuming a given child is capable of making a testimonial statement, the fact that the declarant is a child can complicate the question of whether the particular statement should be deemed testimonial. As I suggested earlier, when an adult makes a statement accusing a person of a crime, the statement should be considered testimonial, even though the statement is made to a private individual, if the declarant understands that the listener will pass the information on to the authorities. But consider children's statements to intermediaries—for instance, a child's statement to his mother. This situation may be materially different from that of the adult witness, because even a child sufficiently mature to be capable of being considered a witness may have no understanding that the third party will pass the statement on to the authorities.

There are different ways to approach this problem. One view is that the statement is not testimonial if a child in the position of the declarant would not understand that the information would reach the authorities. A second view is that if the child, without understanding the particulars, expects the mother to visit adverse consequences upon the assailant, then the child should be deemed to be testifying within his or her ability to do so. And a third view is that differentiating by maturity is simply inappropriate and unadministrable, so the perspective of a reasonable adult should govern determination of whether a statement is deemed testimonial.[69]

Furthermore, the supplemental standard I have suggested as a possibility in ''invited statement'' contexts may be appropriate in certain cases involving statements by children. Under that standard,

[68] *Id*.

[69] See People v. Sisavath, 118 Cal. App. 4th 1396 (Cal. 2004) (applying to a four-year-old child's statement standard of reasonable expectation of an ''objective observer,'' and rejecting the view that this should be applied by considering ''an objective witness in the same category of persons as the actual witness"); State v. Courtney, Nos. A03-790, A03-791, 2004 WL 1488539 (Minn. Ct. App. July 6, 2004) (six-year-old child's interview with child protective services worker is testimonial; no suggestion that declarant's age is relevant).

the statement should be deemed testimonial (1) if the investigative nature of the conversation is withheld from the child but (2) it does not appear that the nondisclosure was necessary to procure the statement. Again, the idea is that the investigator should not be allowed to withhold the purposes of her inquiries gratuitously in an effort to defeat the confrontation right—but the complexity of this inquiry gives me some qualms whether this standard should be applied.

Plainly, this is an extraordinarily complex and difficult area, and pending further guidance from the Court it will remain very uncertain.[70]

*3. What Constitutes an ''Opportunity for Cross-Examination''?*

Under *Crawford*, the confrontation right presumptively is violated if a statement is considered ''testimonial'' but the witness does not testify at trial. By contrast, the confrontation right is not violated where the witness is unavailable and the accused has had a prior opportunity for cross-examination. In the wake of *Crawford*, a wise prosecutor, aware of the possibility that a key witness may be unavailable, will often take the witness's deposition early in the investigation. *Crawford* therefore raises an important question about what constitutes an adequate ''prior opportunity for cross-examination.''

For example, suppose a laboratory report is a critical piece of evidence. In most circumstances, the lab report should be considered testimonial, because the report is prepared in anticipation of its introduction at trial. Therefore, the lab technician who made the report should testify at trial if she is available to do so. If she becomes unavailable through no fault of the accused (by accidental death, for example), and the accused has not had an opportunity to cross-examine her, then the report should not be considered admissible. But if the prosecution takes her deposition—that is, a pretrial examination, subject to oath and cross-examination—and the technician later becomes unavailable, the prosecutor may use the deposition *if* the deposition presented an adequate opportunity for cross-examination.

[70]Compare, e.g., People v. Geno, LC No. 01-046631-FC, 2004 WL 893947 (Mich. Ct. App. Apr. 27, 2004), with Snowden v. State, 846 A.2d 36 (Md. Ct. Spec. App. 2004).

Because *Crawford* increases the prosecutor's incentive to take a deposition, we can expect pressure to amend the rules of criminal procedure in jurisdictions, including at the federal level, in which depositions are not now readily available, and perhaps even to allow depositions before charges have been brought. If a deposition is taken very early, obviously there will often be a question whether it gave the accused an adequate opportunity to cross-examine. Did counsel have enough time to prepare? Did counsel know what issues to press, and have the information at hand that would enable her to do so effectively? The better approach would *not* be to assume that early opportunities are inadequate per se; in many cases, counsel will have little difficulty, even with limited preparation and even before matters have proceeded very far, determining what questions to ask. Rather, if the defendant had an opportunity to cross-examine the witness at deposition but the witness is unavailable at trial, the confrontation right should not require exclusion unless the defense shows some particular reason to believe the opportunity was inadequate.

One more change in prosecutorial practice may well follow from *Crawford*. Suppose a prosecutor announces an intention to use a witness's statement and invites the defense to demand a deposition of the witness if it wants to be assured of cross-examining the witness. If the defendant does not make the demand, the witness is unavailable at trial, and the prosecution offers the statement, would this procedure suffice to protect adequately the ''opportunity for confrontation''? Perhaps, by not making the demand though being warned of the possible consequences, the defendant would be deemed to have waived the confrontation right. Or perhaps the procedure would be considered a violation of the accused's passive right to do nothing and ''be confronted with'' the witnesses against him. We may never know for sure unless the procedure is tried.

*4. What Constitutes ''Forfeiture''?*

The idea that the accused cannot claim the confrontation right if the accused's own misconduct prevents the witness from testifying at trial is a very old one. *Crawford* explicitly reaffirms it,[71] and justifiably so.

[71] Crawford v. Washington, 124 S. Ct. 1354, 1370 (2004).

Forfeiture often raises difficult issues. If a witness is murdered shortly before she was scheduled to testify against the accused, what showing of the accused's involvement does the prosecution have to make? Is it enough that the accused acquiesced in the wrongdoing? And how is participation or acquiescence to be determined; is the mere fact that the accused benefited from the murder enough to raise a presumption that the accused acquiesced in it?

One issue on which *Crawford* gives little or no guidance may be expected to become particularly pressing now. Suppose the wrongful act that allegedly rendered the witness unavailable is the *same* act with which he is charged. May the act nevertheless cause a forfeiture of the confrontation right? For example, suppose the accusation is of child sexual abuse and the prosecution argues that the abuse itself has intimidated the child from testifying in court (though she previously made a statement describing it). Or suppose the accusation is of murder, the prosecution contending that the accused struck a fatal blow and that the victim made a statement identifying the accused and then died?

The first reaction of many observers is that in such situations forfeiture would be bizarre. And yet, for reasons I will summarize briefly, I believe that in some circumstances it is appropriate.[72] In post-*Crawford* cases, two state supreme courts have agreed.[73]

The objection most frequently made to applying forfeiture doctrine in situations of this sort is that it is bootstrapping: The accused is held to have forfeited the confrontation right on the ground that he or she committed the very act on which the trial centers—an act that he or she is accused of committing, but denies committing and is presumed not to have committed. On closer analysis, I do not believe the objection carries weight. The situation is analogous to the one that often arises when a defendant is accused of conspiracy and the prosecution argues that the hearsay rule poses no bar to admission of a statement made by a conspirator in support of the conspiracy. In each of these cases, the same factual issue—the defendant's participation in the conspiracy in the one case, and his commission of the wrongful act that rendered the witness unavailable

[72] See Richard D. Friedman, Confrontation and the Definition of Chutzpa, 31 Isr. L. Rev. 506 (1997).

[73] People v. Moore, No. 01CA1760, 2004 WL 1690247 (Col. July 29, 2004); State v. Meeks, 88 P.3d 789 (Kan. 2004).

in the other—may arise as a threshold matter for evidentiary purposes and when determining guilt, but so what? The issue will likely be decided for the two different purposes by different fact-finders—the judge deciding threshold evidentiary matters and the jury determining guilt—and on different factual bases.[74]

Another objection is that presumably the crime was not committed *for the purpose* of rendering the witness unavailable. But again I respond with a shrug. The point of forfeiture doctrine is that the accused has acted wrongfully in a way that is incompatible with maintenance of the right. Suppose that an informer makes a statement to the police describing a drug kingpin's illegal activities. But the informer stays undercover and, before the kingpin knows anything about the statement, the two get into a fight over a card game. The kingpin goes to a closet, pulls out a gun, and murders the informer. If the kingpin is tried on drug charges and the prosecution wants to introduce the informer's statement, the kingpin should not succeed in arguing, ''But I haven't had a chance to cross-examine him.'' The appropriate response is, ''And whose fault is that? You murdered him.''

As interpreted in this way, forfeiture doctrine can solve one of the puzzles of the confrontation right. The *Crawford* Court accurately noted that the ''dying declaration'' exception is the only exception commonly applicable to testimonial statements that had been well-established at the time of the Sixth Amendment's adoption in 1791.[75] The Court then said, with apparently studied ambiguity, ''If this exception must be accepted on historical grounds, it is sui generis.''[76] It seems highly unlikely that the Court would generally exclude statements that fit within the dying declaration exception, thus achieving a remarkably unappealing evidentiary result that courts have avoided for several hundred years.

On the other hand, admitting these statements on the ground suggested by the Court raises problems of its own. It obscures the clarity of the principle adopted by *Crawford*, that if a statement is testimonial it cannot be introduced against the accused unless he had an opportunity to cross-examine the witness. And it does so on

[74] See generally Bourjaily v. United States, 483 U.S. 171 (1987); Fed. R. Evid. 104(a).

[75] Crawford v. Washington, 124 S. Ct. 1354, 1367 n.6 (2004).

[76] *Id*.

very weak grounds, for (as noted above) the rationale generally cited for the dying declaration exception is absurd. A far better resolution would be to recognize that, however the admissibility of dying declarations usually has been defended, it really is best understood as a reflection of the principle that a defendant who renders a witness unavailable by wrongful means cannot complain about her absence at trial. That principle also explains, incidentally, why (1) the hearsay exception for dying declarations is limited to those that describe the *cause* of death, and (2) the declaration will not be admitted unless death appeared *imminent* at the time the declaration was made.

**C.** Crawford's *Impact on Non-Testimonial Statements*

If a statement is deemed not to be testimonial, what is the impact of the Confrontation Clause? *Crawford* does not resolve the matter. The theory of the opinion suggests, and the Court explicitly preserves the possibility of, ''an approach that exempted such statements from Confrontation Clause scrutiny altogether.''[77] But, in an apparent compromise, the Court also indicated that *Roberts*, or some standard even more flexible, might also be applied in this context.[78]

Numerous post-*Crawford* courts, having determined the statements at issue were not testimonial, have gone through the *Roberts* analysis and—not surprisingly—determined that the statements were admissible.[79] It is easy enough to see why a court disposed to admit a statement would follow this approach: If instead the court held that the Confrontation Clause did not apply at all to non-testimonial statements, it might leave itself vulnerable to reversal if a higher court held that *Roberts* continues to apply to such a statement. So it is prudent to run through the *Roberts* analysis, which a court can always find is satisfied if it wants to (that being one of the problems with *Roberts*.) No terrible harm is done, perhaps, but the process is wasteful, because courts will continue to run through it with predictable results.[80] Until a prosecutor is brave enough to press the

[77] *Id.* at 1374.

[78] *Id.*

[79] See, e.g., State v. Rivera, 844 A.2d 191 (Conn. 2004); People v. Coker, Nos. 238738, 238739, 2004 WL 626855 (Mich. Ct. App. Mar. 30, 2004).

[80] In State v. Blackstock, No. COA03-732, 2004 WL 1485849 (N.C. Ct. App. July 6, 2004), the court, having determined that certain statements were not testimonial, appears to have concluded they were not admissible under *Roberts*—but it also clearly concluded that the state statements were rendered inadmissible by the hearsay rule. Thus, *Roberts* had no effect on the outcome. I know of no post-*Crawford* case in which

point, it is doubtful that there will be a clear test in the Supreme Court on the proposition that outside the context of testimonial statements, the Confrontation Clause has no force.

## VI. Conclusion

Plainly, *Crawford* leaves open many very important questions. In particular, the impact of the opinion may be very different depending on whether the Supreme Court adopts a broad or narrow understanding of the term ''testimonial.'' But what is most important is that the jurisprudence of the Confrontation Clause, after a long detour, has been set on the proper course. This means that the discourse can be rational and candid. Rather than manipulating unanswerable questions as to whether a given statement is sufficiently ''reliable'' to warrant admission, the courts will be asking whether admission violates the time-honored and constitutionally protected right of a criminal defendant to insist witnesses against him testify subject to cross-examination.

Even in the pages of this journal, I am willing to confess that I am not a strict originalist in constitutional interpretation. I believe that there are some questions of constitutional law that cannot be answered most usefully by asking what the public meaning was of the constitutional text at the time it was adopted, or what the intention of the Framers was. But in this context, all indications are in alignment. The historical background shows that the meaning of the text and the intention of the Framers are quite clear, and the unequivocal procedural rule on which they insisted continues to resonate today as one of the central aspects of our system of criminal procedure. The *Crawford* Court properly said, ''By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.''[81] The Constitution does not always speak in terms of categorical guarantees, but when it does, as in the case of the Confrontation Clause, it should be heeded. Give credit to the Court for disenthralling itself from a doctrine that had grown familiar but had no basis in the Constitution and was utterly unsatisfactory, and for recognizing the essence of the confrontation right.

---

a court has decided that a statement was (1) not excluded by the hearsay rule, (2) not testimonial for purposes of the Confrontation Clause, and yet (3) rendered inadmissible by *Roberts*.

[81] Crawford v. Washington, 124 S. Ct. 1354, 1373 (2004).