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Rescued from the Grave and Then Covered with Mud: Justice Scalia and the Unfinished Restoration of the Confrontation Right

Richard D. Friedman[†]

Some years before his death, when asked which was his favorite among his opinions, Antonin Scalia named *Crawford v. Washington*.¹ It was a good choice. Justice Scalia's opinion in *Crawford* reclaimed the Confrontation Clause of the Sixth Amendment to the Constitution and restored it to its rightful place as one of the central protections of our criminal justice system. He must have found it particularly satisfying that the opinion achieved this result by focusing on the historical meaning of the text, and that it gained the concurrence of all but two members of the Court, from all ideological positions.

I. THE OLD REGIME

The Confrontation Clause expresses in simple terms a basic principle that has been essential to common-law jurisprudence for centuries, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”² In other words, a witness against an accused must testify face-to-face with the accused—not, say, by speaking to the police in the stationhouse. And yet, for most of American history articulating the nature of the confrontation right was of relatively little importance, because pretty much any result that the Supreme Court could achieve by relying on

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1. 541 U.S. 36 (2004); *see also* JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 369 (2007) (noting that when asked to identify “the favorite of his opinions,” Justice Scalia “came up with an esoteric case interpreting the Confrontation Clause of the Sixth Amendment.” What counts as esoteric evidently is a matter of context).

2. U.S. CONST. amend. VI.

the Clause it could also achieve by construing the infinitely malleable doctrine of hearsay. That changed in 1965, when the Court held that the Confrontation Clause expresses a fundamental right incorporated against the states by the Fourteenth Amendment.³ Now it really mattered what the Clause meant, because the Clause binds the states but federal conceptions of hearsay law do not. Not until 1980 did the Court attempt to articulate a comprehensive conception of the Clause. And when it did, in *Ohio v. Roberts*,⁴ the result was a failure. The *Roberts* doctrine, especially as it was developed by subsequent cases, virtually constitutionalized contemporary conceptions of the law of hearsay. First, the scope of the Clause, like that of hearsay doctrine, extended to any out-of-court statement offered to prove the truth of what it asserted.⁵ Second, the Clause usually permitted such a statement to be admitted if it fit within a “firmly rooted hearsay exception,”⁶ and even if no such exception applied, admissibility might still be supported “by a showing of particularized guarantees of trustworthiness”⁷—a doctrine that closely resembled the residual exception to the hearsay rule, now set forth in Federal Rule of Evidence 807. The Clause barred admission of some out-of-court statements if the declarant was available but did not testify at trial—but it appeared that the Court would apply the unavailability requirement only in settings in which ordinary hearsay doctrine did as well.⁸

The most significant problem with the *Roberts* doctrine was that it did not articulate any principle worthy of respect. The Court declared that the doctrine was meant to weed out unreliable evidence.⁹ But that would be an odd goal—that evidence is unreliable cannot preclude admissibility, because even live eyewitness testimony is notoriously unreliable. The very point of a trial is to assess a complete body of evidence, some parts of which will usually point in opposite directions, which necessarily means that some are unreliable. Moreover, if reliability appears to be all that is at stake, the trial court’s

3. *Pointer v. Texas*, 380 U.S. 400 (1965).

4. 448 U.S. 56 (1980).

5. *See id.* at 66 (indicating that the Clause operates “when a hearsay declarant is not present for cross-examination at trial”).

6. *Id.*

7. *Id.*

8. *See United States v. Inadi*, 475 U.S. 387 (1986).

9. *See, e.g., Roberts*, 448 U.S. at 65.

inclination will usually be to admit the evidence, because it will usually appear that truth determination will be advanced by letting the jurors hear the evidence rather than shutting their eyes and ears to it.

And so the *Roberts* doctrine generated a great deal of dissatisfaction, from academics and others, including Supreme Court Justices. There were glimmerings that some Justices would favor a different view of the Confrontation Clause. In two settings involving the question of what trial procedures constitute satisfactory confrontation under the Clause—as opposed to the issue covered by *Roberts*, when the Clause tolerates admissibility of a prior statement—Justice Scalia wrote in support of a bright-line understanding of the Clause. In *Maryland v. Craig*, writing in dissent for the Court’s three most liberal members and himself, he objected to an all-circumstances-considered approach, articulated for the majority by Justice O’Connor, to the question of whether a child can sometimes testify against a criminal defendant by a remote electronic connection, without the ability to see the accused; the Court’s decision, he said, conspicuously violated “a categorical guarantee of the Constitution.”¹⁰ And in 2002, he issued a statement when seven members of the Court voted not to transmit to Congress a proposed amendment to Federal Rule of Criminal Procedure 26 that would have more generally allowed witnesses who could not come to court to testify by remote electronic means. Making clear that their opposition was based on the Confrontation Clause, he thundered, “[v]irtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.”¹¹

And meanwhile, in two cases some Justices directly questioned the *Roberts* doctrine. In *White v. Illinois* in 1992, Justice Thomas wrote a concurrence, joined by Justice Scalia, indicating sympathy for the view put forth by the United States (in an amicus brief written in large part by Samuel Alito) that the Clause “should apply only to those persons who provide in-court testimony or the functional equivalent, such as affidavits, depositions, or confessions that are made in contemplation of legal proceedings.”¹² And in *Lilly v. Virginia* in 1999, drawing

10. 497 U.S. 836, 860 (1990) (Scalia, J., dissenting).

11. Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.).

12. *White v. Illinois*, 506 U.S. 346, 364 (1992) (Thomas, J., concurring).

on an amicus brief submitted by the American Civil Liberties Union,¹³ Justice Breyer wrote a concurrence suggesting that the prevailing view of the Clause was arguably too broad in that “[i]t would make a constitutional issue out of the admission of *any* relevant hearsay statement” and too narrow to the extent it would allow “out-of-court statements prepared as testimony for a trial when such statements happen to fall within some well-recognized hearsay rule exception.”¹⁴ Justice Thomas wrote a brief opinion adhering to his *White* concurrence, and Justice Scalia wrote an even briefer opinion that contained this pointed and arresting passage:

During a custodial interrogation, Mark Lilly told police officers that petitioner [his brother Ben] committed the charged murder. The prosecution introduced a tape recording of these statements at trial without making Mark available for cross-examination. In my view, that is a paradigmatic Confrontation Clause violation.¹⁵

How refreshing! Justice Scalia asked us to look at the circumstances in which Mark Lilly implicated Ben and the fact that Ben never had a chance to cross-examine Mark. That was all we needed to know, in his view, to recognize that use of Mark’s statement against Ben had violated Ben’s confrontation right.

Before *Crawford*, then, at least three Justices, Justice Scalia among them, had indicated a willingness to replace *Roberts* by a categorical approach that applied only to certain types of out-of-court statements but that did not depend on an assessment of reliability for determining a Confrontation Clause violation. The *Roberts* doctrine still stood, however; no decision had undercut or chipped away at its foundations. And then, with stunning suddenness, *Crawford* swept the entire edifice aside and replaced it with another.

II. THE *CRAWFORD* TRANSFORMATION

The basic conception of *Crawford* is simple. The Confrontation Clause does not speak in terms of hearsay, or reasonableness, or reliability. Rather, it says in straightforward terms that the accused has a right to be confronted with the witnesses against him. Witnesses, Justice Scalia wrote, are

13. I was one of the principal authors of the brief, along with the late Margaret Berger.

14. *Lilly v. Virginia*, 527 U.S. 116, 141–42 (1999).

15. *Id.* at 143 (Scalia, J., concurring).

those who “bear testimony.”¹⁶ Drawing on historical practice, he reached the conclusion that “[t]estimonial statements of witnesses absent from trial” are allowed by the Confrontation Clause “only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”¹⁷ Wisely, he did not attempt to define the bounds of the key term “testimonial”; that would have been too much to bite off in one case. But he asserted bluntly that the statement involved there—description of a criminal incident made to the police several hours later, in the stationhouse, under considerable formality, and in response to “structured police questioning”—was testimonial “under any conceivable definition.”¹⁸

The scope and power of *Crawford* should not be underestimated. The opinion simply discarded the mush of *Roberts* and established in its place a conception of the confrontation right that was textually and historically sound and that expressed a simple, straightforward principle that most members of our society recognize as a core part of our criminal justice system: a witness against an accused must testify face-to-face with the accused, under oath and subject to cross-examination, if reasonably possible at trial, and not in any other way, such as by speaking to the police in the stationhouse.

To be sure, the opinion was far from perfect. It went out of its way to “reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements”¹⁹—thus entrenching a doctrine, which Justice Scalia had helped to develop,²⁰ that failed to recognize how the confrontation right is impaired if by the time of cross-examination the witness is no longer standing by an assertion previously made. Parts of the opinion seem to me to put too much emphasis on the state of the law “at the time of the

16. *Crawford v. Washington*, 541 U.S. 36, 51 (2004). Justice Scalia’s use of *Webster’s Dictionary* for this definition has been derided. But it is an oddity of the English language that we use words with different roots for testimony and for those who give it. Had Justice Scalia said that witnesses are those who make “witnessy” statements, the reasoning would have been clear, but the inelegance would have been hard to tolerate.

17. *Id.* at 59.

18. *Id.* at 53 n.4.

19. *Id.* at 58 n.9.

20. *See United States v. Owens*, 484 U.S. 554 (1988).

framing,”²¹ as if the Confrontation Clause froze in time a snapshot of the law of 1791, rather than expressing (what most of the opinion addresses) the broad conceptions that the Framers understood to be expressed by the right. And I believe the emphasis throughout much of the opinion on governmental abuse is mistaken; a witness can make a testimonial statement, the use of which at trial would violate the confrontation right, without any involvement of government officials at all. These are not small matters, but they do not minimize how remarkable the achievement of *Crawford* was.

III. FORENSIC LAB REPORTS

The subsequent history has not been so happy, but I will begin with one very bright spot: Justice Scalia’s opinion for a bare majority of the Court in *Melendez-Diaz v. Massachusetts*.²² In accordance with state law, the prosecution had proven that substances in question were cocaine by introducing certificates from forensic lab analysts, without presenting the analysts for confrontation. Justice Scalia’s opinion properly declared this practice a straightforward violation of *Crawford*. And one-by-one, he gave a deserving back-of-the-hand to each of the contentions made by the state or the four dissenters: the witnesses weren’t “accusatory”,²³ they weren’t “conventional’ (or “typical’ or ‘ordinary’)” witnesses;²⁴ they weren’t reporting historical events but rather the results of “neutral, scientific testing”;²⁵ the certificates should be deemed exempt from the Confrontation Clause because they were official or business records;²⁶ the accused had the right to subpoena the analysts if he wanted to;²⁷ requiring the analysts to testify live would create an intolerable burden on the trial process.²⁸ With respect to each, Justice Scalia’s response was, in effect, “doesn’t matter, even if it were true.” The sole problem with this magnificent opinion, in my view, is that it gained the votes of only five members of the Court.

21. *Crawford*, 541 U.S. at 54 n.5.

22. 557 U.S. 305 (2009).

23. *Id.* at 313.

24. *Id.* at 315.

25. *Id.* at 317.

26. *Id.* at 321–22.

27. *Id.* at 324–25.

28. *Id.* at 325.

The remaining four—Chief Justice Roberts and Justices Kennedy, Breyer, and Alito—have not given in. Indeed, it appears that they hoped that Justice Sotomayor’s accession to the Court would help them quickly undo part of *Melendez-Diaz*, but if so they were unsuccessful.²⁹ In *Bullcoming v. New Mexico*,³⁰ they again dissented, believing that although the author of the forensic lab certificate in question again did not testify at trial it should have sufficed that *another* analyst from the lab, who did not observe any of the testing, did so.³¹ Finally, in *Williams v. Illinois*,³² the foursome achieved a limited victory. In that case, swabs taken from a rape victim and sent to a commercial lab led to generation of a male DNA profile that presumably belonged to the perpetrator, and search of a DNA database led to identification of the accused. At his trial, an analyst testified to the match but nobody from the commercial lab testified. The foursome would have held on various grounds—including that the lab had made no statements making an accusation of a “targeted” individual—that there was no confrontation violation. The other five Justices disagreed with virtually every aspect of their reasoning. But Justice Thomas agreed with them that the report was not testimonial, on the idiosyncratic ground—“one Justice’s one-justice view,” as Justice Kagan pungently put it³³—that the report was not sufficiently formal.³⁴

29. Four days after the decision in *Melendez-Diaz*, the Court granted certiorari in *Briscoe v. Virginia* (in which I represented the petitioners). 559 U.S. 32 (2010). The grant was puzzling, because the question presented by the *Briscoe* petition appeared to have been decided in *Melendez-Diaz*. There was widespread speculation that the foursome hoped that the replacement of Justice Souter by Justice Sotomayor, whose nomination had been announced, would lead to a different result. And Justice Scalia lent force to the speculation at argument, when he asked, “Why is this case here except as an opportunity to upset *Melendez-Diaz*?” and then added, “I’m not criticizing Virginia; I’m criticizing us for taking the case.” Transcript of Oral Argument at 58–59, *Briscoe v. Virginia*, 559 U.S. 32 (2010) (No. 07-11191). It quickly became apparent at argument that Justice Sotomayor was not going to upset a seven-month-old precedent, and two weeks later the Court did what it probably should have done from the start: remanded *Briscoe* for reconsideration in light of *Melendez-Diaz*.

30. 564 U.S. 647 (2011).

31. See *id.* at 674 (Kennedy, J., dissenting).

32. 132 S. Ct. 2221 (2012).

33. *Id.* at 2277 (Kagan, J., dissenting).

34. I posted the report on my blog, saying, “it seems to me that simply looking at the report demonstrates whatever degree of formality any [J]ustice is likely to require for a statement to be considered testimonial.” Richard D.

Melendez-Diaz and *Bullcoming* are still the law, and there is no majority opinion in *Williams*. Lower courts have expressed confusion about the law governing forensic lab reports, but so far the Court has shown no inclination to clear matters up. Perhaps when, ultimately, Justice Scalia's seat is filled, the Court will step back in. But, given that a new Justice would have no more votes than Justice Scalia did, and could not cast them any more soundly in this realm than he did, I do not anticipate any favorable developments in the near term.

IV. FRESH ACCUSATIONS

I am even less happy about the state of the law in the other area that has generated considerable post-*Crawford* development: fresh accusations of a crime, typically made by the alleged victim.

The trouble began with *Davis v. Washington*.³⁵ Under that caption, in an opinion by Justice Scalia, the Court decided its first two substantive Confrontation Clause cases after *Crawford*, both involving oral statements made to law enforcement officials by alleged victims describing acts of domestic violence. One of the two, *Hammon v. Indiana*,³⁶ did not prove difficult. There, the speaker made the statement at home, a considerable time after the incident, to a police officer who had responded to a 911 call, while another police officer held the alleged assailant, her husband, at bay. But the wife did not testify at trial, which was held before *Crawford*, and the prosecution was allowed to introduce both her oral statement and an affidavit that she completed immediately after. After *Crawford*, the state supreme court recognized that admission of the affidavit was improper (though harmless, it held), but insisted that the oral statement was not testimonial. I represented the husband before the Supreme Court, and I was confident that the judgment would be reversed; if this evidence were permissible, then a witness could testify against an accused by speaking to the police in her living room. Justice Scalia also regarded the case as an easy one, as apparently did

Friedman, *The Cellmark Report, and What It Shows*, THE CONFRONTATION BLOG (Dec. 15, 2011, 12:43 AM), <http://confrontationright.blogspot.com/2011/12/cellmark-report-and-what-it-shows.html>. I was so wrong.

35. 547 U.S. 813 (2006).

36. 546 U.S. 976 (2005). *Hammon* was ultimately argued in tandem with *Davis*. See *id.*

seven other members of the Court;³⁷ only Justice Thomas dissented, as in *Williams*, asserting alone that the statement was not sufficiently formal to be testimonial.

I would have preferred nine votes, but eight was not bad. The other part of the tandem, *Davis* itself, was another matter. There, the alleged victim, Michelle McCottry, made her statements as part of a 911 call, in obvious distress and apparently beginning while her assailant was still in the house; he was, in any event, at large throughout the conversation.³⁸ Based on his questioning at argument, I had guessed that Justice Scalia would conclude that the statements were testimonial; I had hoped that he, if not the Court, would adopt the principle that any statement to a known police officer accusing another person of a crime is per se testimonial. But instead, the Court unanimously held that the first part of the conversation—enough to support Davis’s conviction—was not testimonial.³⁹ This decision came during Chief Justice Roberts’s first term on the Court, and I believe the unanimity may have reflected his attempt to generate more consensus among the Justices. In any event, given the result, it would have been better had it been based on the assertion (whether accurate or not is another matter) that, in the heat of the moment, a person in McCottry’s position would not be focused on the probable evidentiary use of her statements. Instead, Justice Scalia articulated an amorphous standard under which, if the statement was made for the “primary purpose” of resolving “an ongoing emergency,” it is not deemed testimonial.⁴⁰ Justice Thomas properly pointed out in his separate opinion that this standard was vague and manipulable; a speaker will often have multiple purposes, and a court will have a free range of choice in identifying the “primary” one.⁴¹

Just how manipulable the standard can be is exemplified by *Michigan v. Bryant*,⁴² the first Confrontation Clause case in which Justice Scalia dissented. Covington, a shooting victim, made statements to police officers identifying Bryant, his drug dealer, as the assailant. The interactions occurred at least half an hour after the shooting and several miles away. Neither

37. *Davis*, 547 U.S. at 829.

38. *Id.* at 817.

39. *See id.* at 819.

40. *See id.* at 822.

41. *See id.* at 834 (Thomas, J., dissenting).

42. 562 U.S. 344 (2011).

Covington nor the police acted with any urgency in finding Bryant; the shooting apparently resulted from a drug deal gone bad, and there was no suggestion that a potential serial killer was on the loose. And yet the majority, in an opinion by Justice Sotomayor, held that the primary purpose of Covington's statements was to resolve an ongoing emergency.⁴³ The theory of the opinion was befuddling, especially because it attempted to determine an overall purpose of the conversations—even though questioner and declarant might obviously have very different understandings of the situation. Justice Scalia wrote a pained dissent, in which he argued, quite properly in my view, that the declarant's perspective should govern in determining whether the statement was testimonial.⁴⁴

I believe Covington's statements should have been deemed testimonial—they were clearly made for the purpose of identifying and bringing to justice the person who had shot him. But holding that the Confrontation Clause barred their admissibility would have been a most unappealing result, because Covington died of his wounds several hours later. Note how different the case would have looked had he survived and been readily available to testify at a trial of Bryant on attempted murder charges but either he or the prosecution decided that he would stay away. Nevertheless, the holding of *Bryant* would mean that even then the Confrontation Clause would impose no constraints on use of his out-of-court statements.

Thus, Covington's statements should have been deemed testimonial, but the Confrontation Clause should not have required their exclusion. How could that be? Even assuming, as *Crawford* suggested, that there might be a dying-declaration exception to the confrontation right, supported by history as a *sui generis* matter,⁴⁵ it would not have applied, because there was no indication that at the time Covington made his statements he knew that his life was in imminent danger. But *Bryant* should have been an ideal case for application of a doctrine of forfeiture, which was a possibility also recognized by *Crawford*. That is, the trial court should have been able to make a threshold finding that the reason that Covington was unavailable at the time of trial was that Bryant had engaged in

43. *Id.* at 349.

44. *Id.* at 379 (Scalia, J., dissenting).

45. *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004).

serious intentional misconduct—shooting Covington—that had the foreseeable effect of rendering Covington unavailable at trial, and that Bryant had therefore forfeited the confrontation right.

That *should* have been a possibility—but it was foreclosed by Justice Scalia’s opinion for the Court in *Giles v. California*.⁴⁶ Giles, accused of murdering his former girlfriend, Brenda Avie, acknowledged the killing but claimed self-defense. The prosecution sought to introduce a statement Avie had made to a responding police officer about three weeks earlier, accusing Giles of an act of domestic violence. Before the Supreme Court, the state did not dispute that Avie’s statement was testimonial, but it contended that Giles had forfeited the confrontation right by killing her.⁴⁷ The Court held, however, that an accused does not forfeit the right unless the conduct that rendered the witness unavailable to testify at trial was “designed” to achieve that end.⁴⁸ I have offered elsewhere reasons why I believe this decision was a mistake, not required by equity, common sense, or history.⁴⁹ I will not repeat my vituperations here, other than to say that it was predictable—and predicted—at the time of *Giles* that its unduly narrow interpretation of forfeiture doctrine would lead to unduly narrow constructions of the term “testimonial,” and that this is precisely what happened in *Bryant*. If I am right, it is sadly ironic that such a devastating blow to the doctrine of the Confrontation Clause resulted, albeit indirectly, from an opinion by Justice Scalia that was overly protective of the Clause.

In any event, before his death, Justice Scalia certainly had a strong sense that the Court was bent on cutting back further on the *Crawford* doctrine. *Ohio v. Clark*,⁵⁰ the last Confrontation Clause case decided by the Court during his lifetime, was the first since *Crawford* to deal with statements by a young child. The outcome was not much in doubt; the

46. 554 U.S. 353 (2008).

47. Such a holding would require a threshold determination by the trial court that Giles killed Avie without justification, which is of course was the question before the jury on the merits of the case. But this should not have been a problem. See, e.g., Richard D. Friedman, *Giles v. California: A Personal Reflection*, 13 LEWIS & CLARK L. REV. 733, 736 (2009).

48. *Giles*, 554 U.S. at 368.

49. See, e.g., Friedman, *supra* note 47, at 742–45; Richard D. Friedman, *Come Back to the Boat, Justice Breyer!*, 113 MICH. L. REV. FIRST IMPRESSIONS 1 (2014).

50. 135 S. Ct. 2173 (2015).

Court was unanimous that the statements, made to preschool staff members by a boy not yet three-and-a-half years old, were not testimonial.⁵¹ But Justice Alito's opinion for the majority seemed to Justice Scalia so determined to let the emergency doctrine of *Davis* swallow the basic regime of *Crawford* that he wrote a particularly anguished concurrence "to protest the Court's shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford*"⁵²

CONCLUSION

The predictions of doom in Justice Scalia's dissents had a way of becoming self-fulfilling.⁵³ I hope that this will not prove to be true in the context of the Confrontation Clause. In the short term, I am not optimistic. Most of the developments since *Crawford* have been unfortunate, and some of the Justices have made clear their desire to limit *Crawford* to the extent they can. The most we can hope in this realm from a new appointment to the Court is that it will not make the situation worse than it has been.

And yet, over the long run, I am optimistic because I believe that once a great conceptual threshold is crossed, courts will ultimately winnow out doctrine that does not work and embrace doctrine that does. I am hopeful that over time the Court will recognize that a more robust doctrine of forfeiture than the one created by *Giles* is appropriate, that when it does it will also adopt an ungrudging definition of the term "testimonial," and that it will give full force to *Melendez-Diaz*. Perhaps I am being unduly optimistic, though I have the *very* long run in mind. In any event, the attempt to develop a sound conception of the Confrontation Clause is likely to persist for decades at least, and it will always be remembered that the Court took the first and most decisive step under the leadership of Justice Scalia, establishing that the Clause means what it says and that it expresses a principle that has been central to

51. *Id.* at 2177.

52. *Id.* at 2184 (Scalia, J., concurring).

53. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting) (saying, despite the majority's insistence that the case did not require the Court to decide whether the government had to recognize formally any homosexual relationship, that the reasoning of the majority "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples").

our system for centuries: that an accused has a right to demand that witnesses against him testify face-to-face.