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# *Crawford*'s "Testimonial Hearsay" Category

## A PLAIN LIMIT ON THE PROTECTIONS OF THE CONFRONTATION CLAUSE

*Mark Dwyer*<sup>†</sup>

For those of us who are practitioners, this debate about the history of the Confrontation Clause might be fascinating. And it might be fascinating, as well, for us to hear speculation about where the law might or should go in the future. But we have to worry primarily about the law now. We practitioners cannot walk into a courtroom and tell the judge, "Sure there is *Crawford v. Washington*, but Justice Scalia got the history wrong, and so here is how you should let me try my case." That does not work. So I start by recognizing the primacy of *Crawford v. Washington*.<sup>1</sup> Any time that the Supreme Court makes that big of a statement, everything past is essentially irrelevant, and analysis must be based on the new case.

However, while *Crawford* is important, its impact is not yet clear. As a practitioner, I do not yet know where the courts will go in applying *Crawford*. But I am not persuaded at all that *Crawford* applies to the same universe of statements that was covered by the old *Ohio v. Roberts*<sup>2</sup> standard. It is important to look at the language of *Crawford*, evaluating it in light of the now-discarded *Roberts* rule and common law precedent, to see where *Crawford* is taking us. In my view, Justice Scalia's *Crawford* opinion actually narrows the scope of the Confrontation Clause, given its emphasis on the category of "testimonial" hearsay.

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<sup>1</sup> 541 U.S. 36 (2004).

<sup>2</sup> 448 U.S. 56 (1980).

Under the rules of evidence, some out-of-court statements are admissible.<sup>3</sup> *Roberts* harmonized the admissibility of some of those statements with the Confrontation Clause. In doing so, *Roberts* threw a thin protective blanket over all hearsay declarations, but the blanket was permeable. Under *Roberts*, hearsay could pass through the blanket and be admitted in court against a defendant if considered reliable.<sup>4</sup>

Those who tend to favor excluding out-of-court statements – and that is a very honorable group of people – were not happy about how much hearsay was admitted under the *Roberts* rule.<sup>5</sup> Their examination of history led them to argue for a new look at the purpose and reach of the Confrontation Clause. Their approach was in effect endorsed in *Crawford v. Washington*. No longer is the protection provided by the Confrontation Clause a permeable blanket; now it is a thick lead shield. No hearsay statement gets by the Confrontation Clause and into court, even if it appears reliable, unless its maker is subject to cross-examination,<sup>6</sup> with an exception only when the defendant has made the witness unavailable for cross-examination.<sup>7</sup>

But the triumph of the historically-based argument underlying *Crawford* amounts to a devil's bargain. In order to get that thick shield against the introduction of hearsay statements by declarants who have not been cross-examined, the proponents based their argument on a history in which the Confrontation Clause did not extend to cover *all* hearsay declarations. In that history, the Confrontation Clause is a shield only against "testimonial hearsay" – a subset of the whole.<sup>8</sup>

Naturally, the people who advocated for the new rule – those who tend to favor excluding out-of-court statements – are pleased to see the thick lead shield now in place. And being human, they want to have their cake and eat it too. So they

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<sup>3</sup> See, e.g., FED. R. EVID. 803 (enumerating twenty-three exceptions to the hearsay rule).

<sup>4</sup> *Id.* at 66.

<sup>5</sup> See, e.g., Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171 (2002); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L. J. 1011 (1998).

<sup>6</sup> *Crawford*, 541 U.S. at 69.

<sup>7</sup> *Id.* at 61 ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds.").

<sup>8</sup> *Id.* at 51.

have proposed that the new, thick shield should extend about as broadly as the old *Roberts* blanket, over virtually all out-of-court declarations. Unfortunately for them, the theories they now press toward that end are not grounded in *Crawford v. Washington* or its historically-based rationale that only "testimonial" hearsay is covered by the Confrontation Clause. These theories are instead based on wishful thinking about what the reach of the Clause ought to be.

I submit that nothing in *Crawford* justifies this hope that virtually all hearsay statements are still within the reach of the Confrontation Clause. Some might now argue that the whole point of the Clause is to draw witnesses into court. But in *Crawford*, Justice Scalia said that the point of the Clause was merely to exclude testimonial hearsay.<sup>9</sup> Some might also contend that the Confrontation Clause would, if things were nice, be interpreted to exclude anything that is "accusatory." But Justice Scalia said nothing like that in his opinion. Noble, too, might be the goals of excluding hearsay that contains "prosecution" information, or of preventing abuses of state power. But you cannot get there, as a way to interpret the Confrontation Clause, from the opinion in *Crawford v. Washington*.

I am not saying that I am the only one who knows how to read a case; but as I read *Crawford*, the Supreme Court has defined "testimonial" hearsay so as to include only statements resembling a narrow class of formal statements disfavored by the common law by 1791 – statements that might have been tolerated under a civil law system of a similar vintage.<sup>10</sup> Justice Scalia had in mind to exclude affidavits and prior testimony.<sup>11</sup> The Court will also now consider admissions to the police by co-defendants to be testimonial statements, but that seems to be related to the fact, as per Justice Scalia, that in Marian times magistrates interrogated suspects.<sup>12</sup> Thus, station house interrogation that yields a statement is much like a Marian magistrate's inquiry, and the statement must be considered court-like and "testimonial."

That is about all that *Crawford* says is "testimonial." Excluded from Justice Scalia's "testimonial" category, and thus from Confrontation Clause protection, are statements

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 50-51.

<sup>11</sup> *Id.* at 51.

<sup>12</sup> *Crawford*, 541 U.S. at 44.

unrelated to the civil law “abuses” that the Justice is talking about. Placing other types of statements within this “testimonial” category, to me, is simply wishful thinking. There is nothing wrong with wishful thinking, and I am not saying that any of these wishes are objectively bad. But these wishes are not based on *Crawford*. Let me comment on just a couple of the arguments that have been made for this wishfully expansive view of “testimonial” hearsay.

One tactic is to say that a certain statement plainly should not be let in at a trial, and to conclude without much reasoning that the Confrontation Clause cannot be interpreted to let it in. For example, civilian *A*, in order to get out of testifying, might give a statement to civilian *B*, expecting *B* to go to court and repeat it. And it would be horrible should *B*’s hearsay testimony be admitted. As this theory goes, such informal statements made without government involvement must be included in the category of prohibited “testimonial” statements. Thus, in defining “testimonial” statements, there cannot be any rule that they be “formal” statements, or that the government be involved in their production.

But I submit the conclusion does not follow. We all agree that *A*’s statement to *B* should not come in at trial. But to exclude the statement, it does not follow that we must call the statement “testimonial,” despite its informality and the lack of government involvement. At least in New York, I predict, a “residue” of protection of the old *Roberts* blanket “reliability” sort will remain, so that even non-testimonial statements may be excluded under a state constitutional rule. But on top of that, simple evidentiary hearsay rules will keep *B* from testifying. His testimony would be hearsay anywhere.

If that is not right, still *A*’s statement to *B* is not “testimonial” under the *Crawford* examples. Wishful thinking will not change that. The devil’s bargain has been made. A statement is not “testimonial,” and thus excludable under the Confrontation Clause, simply because those in a pre-*Crawford* mindset might not have thought that the Constitution should tolerate its admission. The Confrontation Clause now excludes only a limited category of formal hearsay statements disapproved of in 1791, and not “non-testimonial” hearsay. Other sources of protection must be sought, under state law for example, if non-testimonial hearsay is to be deemed inadmissible.

A second tactic to interpret *Crawford* expansively is to take a “functional” approach. Rather than analogize to the

several types of statements that the Supreme Court has said are testimonial, this approach says that testimonial hearsay is any statement made by a declarant who knows it will have a law enforcement use. I submit that this approach is far too broad. Perhaps one might define "testimonial" hearsay as anything said to a law enforcement official that the declarant thinks will be repeated *at trial*. But that is not to say that the expectation by the declarant that a statement will serve *any* law enforcement use is enough to make the statement testimonial. If a robbery victim sees a cop coming and says, "Officer, that man robbed me," he has no thought except that the criminal may be tackled and arrested. The victim has no expectation whatsoever that his statement might be introduced in a grand jury or at a trial. As I read *Crawford*, such a statement is not testimonial unless given under the expectation that it will serve as the equivalent of formal, in-court testimony. There may still be an evidentiary hearsay problem if the statement is offered at trial. But such a statement does not look "testimonial" to me.

Relatedly, in New York, and I suspect elsewhere, the hottest topic these days involves how to classify 911 statements.<sup>13</sup> Some 911 statements seem to be pure cries for help; someone is bleeding and says, "Send an ambulance; he just hit me." As I see it, these statements bear no resemblance to the "testimonial" statements that Justice Scalia is concerned about in *Crawford*. They do not seem at all like the formal statements admissible under civil law but not allowed into common law criminal proceedings in 1791. You may say that those statements should not come in because of traditional hearsay rules. But that does not make them "testimonial" under *Crawford*.

Finally, it also seems to me that there is almost an equation to be made between declarations that are proper excited utterances and statements that are not testimonial. Perhaps the scope of the excited utterance hearsay exception should be narrower than current cases say it is. But if a statement is truly "excited" because it is made before the opportunity to reflect – for example, to reflect on the chance

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<sup>13</sup> See, e.g., *People v. Corella*, 18 Cal. Rptr. 3d 770 (Ct. App. 2004); *People v. Caudillo*, 19 Cal. Rptr. 3d 574 (Ct. App. 2004); *Pitts v. State*, 612 S.E.2d 1 (Ga. Ct. App. 2005); *People v. West*, 823 N.E.2d 82 (Ill. App. Ct. 2005); *People v. Moscat*, 781 N.Y.S.2d 401 (Crim. Ct. 2004); *People v. Cortes*, 777 N.Y.S.2d 875 (Crim. Ct. 2004); *State v. Powers*, 99 P.3d 1262 (Wash. Ct. App. 2004).

that the statement will be admitted at a trial someday – then by definition you cannot call the statement “testimonial.” If hearsay rules do not exclude such a statement, after *Crawford*, there is no reason why the Confrontation Clause should.