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Testimonial Statements under *Crawford*

WHAT MAKES TESTIMONY . . . TESTIMONIAL?

Brooks Holland[†]

I. INTRODUCTION

In *Crawford v. Washington*,¹ the United States Supreme Court discarded the reliability framework that had governed the admissibility of hearsay statements under the Confrontation Clause for more than twenty years.² In its stead, the Court adopted an unforgiving procedural guarantee: testimonial hearsay statements by non-testifying declarants may not be admitted at trial unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.³ The majority in *Crawford*, however, left the precise meaning of “testimonial” statements “for another day,”⁴ casting a shadow of uncertainty over a major component of criminal practice.⁵

This essay attempts to detangle the concept of testimonial statements. As Mark Dwyer of the New York County District Attorney’s Office noted during our conference at Brooklyn Law School, my proposed definition may amount to mere “wishful thinking.”⁶ But, it is a definition that makes sense to me. And not just theoretically, but also practically, after more than a decade of trying criminal cases.

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¹ 541 U.S. 36 (2004). In an effort to maintain brevity, this essay presumes the reader’s basic familiarity with *Crawford*.

² See *Ohio v. Roberts*, 448 U.S. 56 (1980).

³ See *Crawford*, 541 U.S. at 53-58, 59, 61, 68.

⁴ *Id.* at 68.

⁵ See *id.* at 75 (Rehnquist, C.J., concurring).

⁶ Mark Dwyer, *Crawford’s “Testimonial Hearsay” Category: A Plain Limit on the Protections of the Confrontation Clause*, 71 BROOK. L. REV. 277, 279 (2005).

II. DEFINING TESTIMONY

Crawford offers a lot of cryptic clues about what “testimonial” may mean – historical clues, terminological clues, governmental “abuse” clues, and three oft-cited definitional clues.⁷ Yet, as the diversity of judicial decisions interpreting *Crawford* demonstrates,⁸ *Crawford* fails to identify a clear commonality to “testimonial” that accurately defines when a statement is “testimonial” instead of something else that is produced when a person speaks about facts or opinions. History may play an important role in revealing this commonality, as a panel at our conference discussed in detail. I will suggest a couple of additional questions that perhaps should weigh upon this historical analysis. My main goal here, however, will be to define testimony from my practical perspective of having spent the last eleven years as a criminal defense attorney observing, producing and cross-examining witness testimony. The hope is not to argue the testimonial status of every common type of hearsay statement, but rather to identify a core ingredient of testimony that may serve as a broad guide to resolving these questions.

A. *Looking to History to Define Testimony*

The discussion of history’s role in shaping confrontation doctrine raises two questions for me. The first relates to the “not enough like *Raleigh*” approach to testimonial statements. *Crawford*, of course, treated us to a detailed historical backdrop to the adoption of the Confrontation Clause. This backdrop focused on several high-profile political trials during 16th, 17th and 18th century England and colonial times,⁹ especially the treason trial of Sir Walter Raleigh, which the Court characterized as “a paradigmatic confrontation violation.”¹⁰ Raleigh’s alleged accomplice, Lord Cobham, did not testify at Raleigh’s trial and thus could not be cross-examined, as Raleigh demanded. Instead, Cobham’s statements were taken *ex parte* by an investigating “Privy Council” prior to trial, and his accusations were presented at trial in hearsay form. The

⁷ See generally *State v. Davis*, 613 S.E.2d 760, 766-68 (S.C. Ct. App. 2005).

⁸ See *id.* at 768-79 (cataloguing decisions); see also Jeffrey L. Fisher, *Crawford v. Washington: Reframing the Right to Confrontation*, <http://www.dwt.com/lawdir/publications/CrawfordOutline.pdf> (last visited Oct. 10, 2005).

⁹ See *Crawford*, 541 U.S. at 42-50.

¹⁰ *Id.* at 52.

Court in *Crawford* identified this “civil-law mode of criminal procedure” as the “principal evil at which the Confrontation Clause was directed.”¹¹ And since *Crawford*, some courts have seized upon the *Raleigh* paradigm to find hearsay statements nontestimonial because they did not sufficiently mirror the formality of Cobham’s pre-trial examination or the other historical illustrations of civil-law mode pre-trial examinations.¹²

In today’s era, it is a serious mistake to define the prevailing model of criminal practice by the generally unrepresentative events of celebrity trials. And, I gather that the *Raleigh* case was very much the celebrity prosecution of its day, as were the other political trials discussed in *Crawford*. So, maybe the question should be asked, were run-of-the-mill *ex parte* witness examinations in the *Raleigh* era really that formal? I do not know the answer. The comments of some of our conference panelists, however, suggest that they may not have been. So if, for example, the typical historical *ex parte* witness examination more routinely involved a citizen-initiated complaint,¹³ brought to the local farmer-by-day-justice-of-the-peace-by-night, under relatively informal circumstances, post-*Crawford* courts may have been basing confrontation decisions on a flawed expectation of formality generated by a historical version of the O.J. trial. Either way, none of the courts decreeing “not enough like *Raleigh*” has explored whether the formal nature of Cobham’s examination in *Raleigh* accurately depicts the prevailing day-to-day criminal practice of the time, and if not, whether this fact alters the historical analysis.

My second question concerns what this prevailing historical practice should tell us about modern criminal practice. Some courts have determined that the historical practice targeted by the Confrontation Clause informs us of the degree of formality we should expect from a modern criminal

¹¹ *Id.* at 50.

¹² *See, e.g.,* People v. Jimenez, No. B164534, 2004 WL 1832719, at *11-12 (Cal. Ct. App. Aug. 17, 2004) (unpublished), *cert. denied*, 125 S. Ct. 1713 (2005); People v. Cage, 15 Cal. Rptr. 3d 846, 856-57 (Ct. App. 2004) (concluding that “[w]e cannot believe that the framers would have seen a ‘striking resemblance’ between Deputy Mullin’s interview with John at the hospital and a justice of the peace’s pretrial examination”), *rev. granted and op. superseded by*, 99 P.3d 2 (Cal. 2004).

¹³ *Cf.* Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 458 (2004) (noting that “in older systems . . . there was no public prosecutor, and victims or their families prosecuted crimes themselves”).

investigation before it will produce a testimonial statement.¹⁴ But, this view focuses on the circumstances surrounding an out-of-court statement instead of the *trial* at which it is offered, which for confrontation purposes may be asking the wrong question. Rather, the more germane question may be whether the shift away from the civil-law mode of procedure to the confrontation model reflected in the Sixth Amendment effectively ended the historical practice of admitting out-of-court statements at trial by non-testifying declarants. Or, did a robust practice of admitting such statements still persist except for the very formalized types of pre-trial statements illustrated by the *Raleigh* case? If the latter is true, then the many post-*Crawford* decisions admitting substantial hearsay as “not enough like *Raleigh*” may be on the right track.

But, from the comments of our panelists who study this history, I suspect that the former is more likely. If so, modern courts may be ignoring the proper historical emphasis: by constitutionally eliminating the “principle evil” illustrated by the *Raleigh* case, the Framers established an historical practice model that resulted in few, if any, out-of-court statements by non-testifying declarants being admitted at trial.¹⁵ If history is indeed to guide us, a broad modern hearsay exception should not unseat this constitutionally enshrined practice model, “even if that exception might be justifiable in other circumstances.”¹⁶ Instead, in defining “testimonial,” and thereby setting the primary if not exclusive scope of confrontation rights, we should view our modern criminal practices through the lens of this historical practice model that permitted few if any out-of-court statements by non-testifying declarants at trial. Otherwise, despite our asserted fidelity to history, we risk establishing a modern criminal practice model

¹⁴ See, e.g., authorities cited *supra* note 12.

¹⁵ Cf. *Crawford*, 541 U.S. at 43 (explaining that “[t]he common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers”); *id.* at 56 n.6, 58 n.8 (noting that few, if any, modern hearsay exceptions were recognized in 1791, with the exception of the dying declaration exception and perhaps a very circumscribed version of the spontaneous declaration exception). Cf. also, e.g., *Stancil v. United States*, 866 A.2d 799, 808 (D.C. 2005) (discussing modern expansion of excited utterance hearsay exception), *vacated, reh’g en banc granted*, 878 A.2d 1186 (D.C. 2005); Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1209-24 (2002) (surveying historical development of excited utterance exception). *But cf.* *People v. Rincon*, 28 Cal. Rptr. 3d 844, 858 (Ct. App. 2005) (claiming that elements of California’s spontaneous statement exception “are largely identical to the common law hearsay exception for spontaneous declarations as described in *Crawford*”).

¹⁶ *Crawford*, 541 U.S. at 56 n.7.

that at the stage where confrontation matters – *trial* – looks nothing like what the Framers created for themselves.

B. Testimony: Part of a Process

In *Crawford*, the Supreme Court told us that testimony typically means “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.”¹⁷ This definition, however, raises more questions than it answers. Even with the three oft-cited formulations of testimony outlined in *Crawford*,¹⁸ not only did the Court mysteriously decline to adopt any of them, it also failed to articulate the “common nucleus” that they all supposedly share.¹⁹ The Court’s practical illustrations also failed to clarify the meaning of testimony, as the Court offered only the obvious extremes of the testimonial spectrum: traditional courtroom testimony and custodial police interrogations on the one hand, and a casual or off-hand remark to an acquaintance on the other.²⁰

The Court simply did not tell us what feature, other than our ingrained assumptions, makes the former statements testimonial but the latter nontestimonial, so that we can know what to do with the statements in between. Is the determinative factor the formal judicial or quasi-judicial circumstances surrounding the statement when made? The nature or degree of any interrogation by the questioner? The involvement of a government actor in producing the statement? The questioner’s purpose in interrogating the declarant? The declarant’s subjective awareness of any or all of these facts?

My experience tells me that while these factors all can bear on the ultimate question of whether a statement constitutes testimony, none is a *necessary* ingredient to it. Rather, the common ingredient to testimony that I consistently have observed is notice, or foreseeability, to a declarant that his or her statement will contribute to a formal decision-making process. Factors like formality, interrogation, and questioner or declarant intent all matter, but only because they may demonstrate this foreseeability, not because any one factor or combination of factors necessarily defines testimony. An exploration of these factors should illustrate.

¹⁷ *Id.* at 51 (internal citations omitted).

¹⁸ *See id.* at 51-52.

¹⁹ *See id.* at 52.

²⁰ *See id.* at 51-52, 68.

1. Formality & Foreseeability

Emphasizing *Crawford's* admonition that “[a]n accuser who makes a *formal* statement . . . bears testimony,”²¹ several courts have placed heavy emphasis on whether an out-of-court statement was given under particularly formal circumstances in determining whether it proves to be testimonial.²² Many of these formality lines drawn by lower courts, however, strike me as arbitrary and disconnected from any meaningful conception of testimony – such as the line that makes narrative, accusatory statements to police officers at a precinct sufficiently formal, but the very same statements to the very same officers on the street or at a hospital, or through 911, insufficiently so.²³

Perhaps the mistake rests in focusing on the formality of the circumstances surrounding an out-of-court statement when it is uttered instead of the *formal purpose to which the statement will be put*. “Testimony” cannot conceptually be divorced from the broader purpose that it serves and that distinguishes it from mere words. Testimony at its core contributes to formal fact resolution, and consequently, to a formal decision-making *process*.²⁴ This process frequently is fluid and multi-layered, running in a criminal case, for instance, from the decision to arrest and charge, to a preliminary hearing and grand jury proceedings, to pre-trial hearings and the trial itself, and sometimes even to post-conviction proceedings. Witness statements guide these very formal decisions throughout the adjudicative process. To freeze

²¹ *Id.* at 51 (emphasis added).

²² *See, e.g.*, *People v. Ferrell*, No. B172129, 2005 WL 977609, at *12 (Cal. Ct. App. Apr. 28, 2005) (unpublished); *People v. Corella*, 18 Cal. Rptr. 3d 770, 775-77 (Ct. App. 2004); *People v. Jimenez*, No. B164534, 2004 WL 1832719, at *11-12 (Cal. Ct. App. Aug. 17, 2004); *Hammon v. State*, 809 N.E.2d 945, 951-52 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 444 (Ind. 2005); *Fowler v. State*, 809 N.E.2d 960, 963-64 (Ind. Ct. App. 2004), *aff'd*, 829 N.E.2d 459 (Ind. 2005); *State v. Wright*, 686 N.W.2d 295, 305 (Minn. Ct. App. 2004), *aff'd*, 701 N.W.2d 802 (Minn. 2005).

²³ *See, e.g.*, *Jimenez*, 2004 WL 1832719, at *11-12 (street); *People v. Lennon*, No. B169775, 2005 WL 957751, at *11-13 (Cal. Ct. App. Apr. 27, 2005) (unpublished) (hospital); *People v. Coleman*, 791 N.Y.S.2d 112, 114 (App. Div. 2005) (911 call). *Cf.* *State v. Davis*, 111 P.3d 844, 855 (Wash. 2005) (Sanders, J., dissenting) (noting lack of coherence to majority’s theory of testimony that holds the complainant’s most incriminating statements during a 911 call to be nontestimonial, while identifying other portions of the same call as testimonial).

²⁴ Although confrontation interests are invoked by testimony, the purpose of testimony must be considered discretely from the purposes of confrontation. Confrontation refines the presentation of testimony; it does not itself define testimony. *See Friedman, supra* note 13, at 441-43 (discussing purposes behind confrontation).

an out-of-court statement in its static surrounding environment, therefore, when considering whether it is testimonial in character artificially removes the statement from the broader process of fact adjudication that gives testimony its defining character.²⁵ The question of formality instead needs to be more forward-looking so as to account for this ongoing decision-making process.

Of course, the formality of the surrounding environment often will alert a declarant to the formal decision-making purpose reserved for his or her statement, and thus, these factors remain relevant. A person making statements to a grand jury, for example, has notice from that environment alone that this judicial body will use the statements for a formal adjudicative purpose. But even in a traditional testimonial setting like the grand jury, testimony does not derive its character from the contemporaneous externalities that surround it, but rather from its role in this process of formal fact adjudication – such as the grand jury’s decision whether to indict, a formal decision that certainly does not happen contemporaneously with the giving of testimony.

The absence of terribly formal circumstances surrounding a statement, therefore, should not become a superficial talisman for nontestimonial hearsay rulings. The determinative question instead should be whether the surrounding circumstances notified the declarant of the formal adjudicative *process* to which the statement will contribute, for a statement’s contribution to that process sits at the heart of its character as testimony – and of the need for confrontation if it is offered at trial. This question asks more than just a long-winded version of the third formulation of testimony suggested in *Crawford*: “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.”²⁶ It recognizes that testimony contributes to a broader and more fluid process than just the end-game of trial where confrontation is implicated, and that the concept of testimony therefore cannot be restricted solely to consideration of its use

²⁵ Cf. *Crawford*, 541 U.S. at 51 (2004) (defining testimony broadly as a statement “made for the purpose of establishing or proving some fact”).

²⁶ *Id.* at 52.

at the adversarial stage of the adjudicative process requiring confrontation.²⁷

This view of testimony, moreover, means a declarant need not necessarily anticipate or have an interest in advancing the adjudicative process.²⁸ In my experience, traditional witnesses testify with a wide range of awareness, expectations and interests, varying from fully engaged to totally out of it. The exact rate and degree of these subjective considerations is really irrelevant, because we do not test courtroom witnesses on them before they are asked to give testimony.²⁹ Instead, it is the *notice* on which traditional witnesses are placed of the formal decision-making purpose reserved for their statements that makes them “witnesses” who “testify.” This notice fairly creates the *external* expectation that a witness, for better or worse, will appreciate this formal purpose and that his or her statements thus will be subject to adversarial testing.³⁰ The standard should prove no different with out-of-court testimony.

²⁷ Indeed, nothing about the concept of testimony indicates that it should be restricted to statements made in furtherance of a *criminal prosecution*, and I have seen no meaningful definitional distinction between civil and criminal “testimony.” *Cf.* *United States v. Holmes*, 406 F.3d 337, 348-49 (5th Cir. 2005) (noting that whether the witness’ sworn civil deposition “is ‘testimonial’ as *Crawford* used that term is uncertain”); *United States v. Moffie*, No. 1:04 CR 567, 2005 U.S. Dist. LEXIS 9462, at *22-23 (N.D. Ohio May 11, 2005). *Cf. also* Richard D. Friedman et al., *Listening to Crawford* 1 (Feb. 15, 2005) (unpublished article, *available at* <http://confrontationright.blogspot.com/2005/02/case-of-censorship.html>) (arguing that a person testifies when he or she “states information to a person of authority or otherwise makes a statement that a reasonable person would understand will likely be used for *evidentiary* purposes” (emphasis added)); *but cf.* Richard D. Friedman, *Grappling with the Meaning of Testimonial* 8 (Feb. 16, 2005) (draft, *available at* <http://confrontationright.blogspot.com/2005/02/grappling-with-meaning-of-testimonial.html>) (noting that “anticipation of use in *prosecution* is the key question in determining whether a statement is testimonial” (emphasis added)).

²⁸ *Cf., e.g., United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004) (reasoning that “*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant’s awareness or expectation that his or her statements may later be used at a trial”); *State v. Hembertt*, 696 N.W.2d 473, 482 (Neb. 2005) (holding that “[t]he inquiry is whether . . . the declarant intended to bear testimony against the accused,” and thus, “[t]he determinative factor in determining whether a declarant bears testimony is the declarant’s awareness or expectation that his or her statements may later be used at a trial”).

²⁹ *Cf. State v. Krasky*, 696 N.W.2d 816, 827 (Minn. Ct. App. 2005) (Crippen, J., dissenting) (explaining that “the notion of an inquiry on the sophistication of the declarant might reasonably be abandoned due [to] its inevitable absurdity”); *In re Rolandis G.*, 817 N.E.2d 183, 189 (Ill. App. Ct. 2004).

³⁰ In most traditional testimonial settings, this notice is established first and foremost by administration of an oath. Once a witness has sworn or affirmed to tell the truth, what the witness actually expects or desires about the role of his or her statements becomes irrelevant, as the oath creates our *external* expectation that the

Therefore, I would suggest that *Crawford*'s "formality" analysis properly should be an objective, forward-looking one: Did the circumstances surrounding the out-of-court statement make its formal, adjudicative use *foreseeable* to the declarant?³¹ If so, the out-of-court witness as much as the in-court witness speaks with the external expectation that his or her statements will affect this process, and thus must be treated accordingly – as testimony, and not simply mere words.

This foreseeability should not be obviated by an out-of-court witness' excitement or stress, contrary to the view of several post-*Crawford* courts.³² Witnesses testify in courtrooms every day while experiencing tremendous stress, excitement, anxiety and every other form of emotion that might still their capacity for reflection and contrivance. Yet, we do not declare adversarial testing of their statements unnecessary, because these witnesses nevertheless remain on notice of the formal use intended for their statements sufficient to prompt our external expectation that these statements will be weighed and tested as testimony. A witness' demeanor and emotional state simply become factors to be considered when his or her testimony is weighed in the decision-making process. No different analysis should apply to out-of-court statements that happen to qualify as excited utterances, except perhaps for truly spontaneous, exclamatory statements that fall closer to the narrow spontaneous declaration exception that may have existed in

witness will testify accordingly. As *Crawford* suggests, however, while administration of an oath certainly bespeaks of testimony, it is not a precondition to testimony if other circumstances fairly create the same testimonial expectations. See *Crawford*, 541 U.S. at 52 n.3.

³¹ Cf. *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 558 (Mass. 2005) (adopting "a formulation that would find testimonial *all* statements the declarant knew or *should have known might be used* to investigate or prosecute an accused" (second emphasis added)).

³² See, e.g., *United States v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005) (concluding that "the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to assault would be emotional and spontaneous rather than deliberate and calculated. We hold that [the declarant's] 911 call was an excited utterance, and under these circumstances, nontestimonial" (citation omitted)); *United States v. Luciano*, 414 F.3d 174, 179 n.3 (1st Cir. 2005) (reasoning that "the excited utterance of fourteen-year-old Camacho as he flagged down Officer Thornton immediately following the incident clearly does not fall within the meaning of testimonial hearsay as it is used *Crawford*"); *State v. Banks*, No. 03AP-1286, 2004 WL 2809070, at *3 (Ohio Ct. App. Dec. 7, 2004) (holding that "*Crawford* only applies to statements that . . . are not subject to common-law exceptions to the hearsay rule, such as excited utterance"). See generally *Anderson v. State*, 111 P.3d 350, 354 n.26 (Alaska Ct. App. 2005) (cataloguing additional authorities).

1791.³³ These latter statements remain so interconnected to the factual incident being referenced that future use of the statements simply no longer proves foreseeable.³⁴

2. Interrogation & Questioner Intent

This forward-looking view of “formality” also means that “interrogation” of one form or another should not dictate whether a statement is testimonial. At trial, direct examination tends to involve open-ended questions like “what happened,” while cross-examination involves leading questions. Answers to both are surely witness testimony. Indeed, some of the most effective examinations of trial witnesses I have seen are when a lawyer asks very few open-ended questions, with the witness so well prepared and aware of his or her role that “structured” interrogation becomes unnecessary for effective testimony. Why should a different standard apply to out-of-court witnesses, requiring “structured” interrogation as a precondition to testimony?³⁵ To testify, of course, a witness

³³ See *Crawford v. Washington*, 541 U.S. 36, 58 n.8 (2004). Cf. *Bockting v. Bayer*, 399 F.3d 1010, 1022-23 (9th Cir. 2005) (Noonan, J., concurring) (criticizing admission of declarant’s statement under *Crawford* even though “[i]t may have been an excited or spontaneous utterance”); *Stancil v. United States*, 866 A.2d 799, 807-15 (D.C. 2005) (noting broad modern expansion of historical spontaneous declaration hearsay exception and concluding that “the findings necessary to support a conclusion that a statement was an excited utterance do not conflict with those that are necessary to support a conclusion that it was testimonial . . . under *Crawford*, reliability has no bearing on the question of whether a statement was testimonial”), *vacated, reh’g en banc granted*, 878 A.2d 1186 (D.C. 2005); *Lopez v. State*, 888 So. 2d 693, 699-700 (Fla. Dist. Ct. App. 2004) (concluding that “we do not think that excited utterances can be automatically excluded from the class of testimonial statements”); *Gonsalves*, 833 N.E.2d at 559 (concluding that “a statement can be both testimonial in nature and a spontaneous utterance . . . Nothing in *Crawford* indicates the two are mutually exclusive. In fact, quite the contrary. In dicta in a footnote, the Court suggested such utterances can be testimonial, depending on the applicable State’s hearsay law”); *State v. Powers*, 99 P.3d 1262, 1263-66 (Wash. Ct. App. 2004) (noting that while “[t]he trial judge characterized [the 911] call as an excited utterance . . . based on indicia of reliability and trustworthiness, *Crawford* clearly rejects the admission of testimonial statements based on ‘the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability’”). Cf. generally *State v. Branch*, 865 A.2d 673 (N.J. 2005) (severely restricting scope of New Jersey’s excited utterance hearsay exception to conform to its narrow historical form and justification); *State v. Cotto*, 865 A.2d 660 (N.J. 2005) (same).

³⁴ For an example of an arguably nontestimonial excited utterance, albeit under a different analysis, see *People v. Conyers*, 777 N.Y.S.2d 274 (Sup. Ct. 2004).

³⁵ See, e.g., *People v. Bradley*, 799 N.Y.S.2d 472, 476-77 (App. Div. 2005) (evaluating responding police officer’s question of “what happened” and concluding that “[e]ven assuming that the circumstances under which the statement was obtained can be considered an ‘interrogation,’ they are hardly comparable to the ‘structured interrogation’ found to be subject to the Confrontation Clause in *Crawford*,” which the court characterized as “detailed, particularized and memorialized questioning”); *State*

must be doing something more than just yelling into the wind, and the manner of an interrogation may signal to the declarant what he or she should expect when responding. But, whether a questioner uses open-ended or leading questions, or otherwise “interrogates” the declarant in a particularly “structured” manner, again seems ancillary to the real question: whether the declarant spoke on notice that his or her statements would contribute to a formal adjudicative process.³⁶

This proper focus on the role of interrogation in shaping testimony demonstrates why, contrary to some courts’ view, “the objective of the person posing the question” does not dictate whether the declarant’s response is testimonial.³⁷ For instance, in *People v. Bradley*,³⁸ the court focused on the non-investigative objectives of a police officer asking a domestic violence victim “what happened” in finding her response that her boyfriend had thrown her through a glass door nontestimonial.³⁹ True, “what happened” is a pretty innocuous question that in a complete vacuum may not signal any particularly formal adjudicative role for the response. But, this question was not asked in a vacuum in *Bradley*. Rather, it was asked by a uniformed police officer responding to a 911 call who met an injured and bleeding domestic violence victim who already had an order of protection against the defendant and who accused him of further crimes.⁴⁰

Of course, the officer in *Bradley* did not know all of these facts surrounding his question until he asked it and received an accusatory response.⁴¹ But, the victim did. And these known circumstances should have notified the victim

v. Barnes, 854 A.2d 208, 211 (Me. 2004) (finding complainant’s statements nontestimonial because “she was not responding to tactically structured police questioning as in *Crawford*”); Hammon v. State, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004) (opining that “[w]e also believe that ‘interrogation’ carries with it a connotation of an at least slightly adversarial setting”), *aff’d*, 829 N.E.2d 444 (Ind. 2005).

³⁶ Cf. *Gonsalves*, 833 N.E.2d at 555-57 (rejecting formulaic approach to “interrogation,” applying instead “everyday, common understandings of the term, both in the general public and the legal community,” and thus viewing answers to police questions unrelated to the police “community caretaking function and the need to secure a volatile scene” as *per se* testimonial).

³⁷ *Bradley*, 799 N.Y.S.2d at 480. A definition of testimony that hinges on the questioner’s intent also raises concerns about law enforcement’s ability to construct questions that strategically ensure that the response is deemed nontestimonial. See Friedman, *supra* note 13, at 458.

³⁸ 799 N.Y.S.2d 472 (App. Div. 2005).

³⁹ See *id.* at 474, 477-80.

⁴⁰ See *id.* at 474-75.

⁴¹ See *id.* at 480.

that her response would contribute to a formal decision-making process, a decisional process that would begin with the officer's response to her accusation. Indeed, that the officer in *Bradley* may not have drawn any firm conclusions prior to asking "what happened" illustrates the testimonial nature of the victim's response, for it informed his formal decision-making just as it would have informed a jury's decision-making if the victim instead had given her statement from the witness chair in response to a prosecutor asking "what happened." The court in *Bradley* improperly ignored this context surrounding the victim's response and its role in the decision-making process, and instead isolated the officer's purpose in asking the question to define the response.⁴² This artificial divorce of question from answer does not reflect any real conception of testimony.⁴³

3. Governmental "Abuse"

The Court in *Crawford* referred to concerns over governmental abuse,⁴⁴ and government actors took the disputed statement in *Crawford*. Several courts have seemingly read these portions of *Crawford* as a cue to look for governmental action in the taking of any challenged statement as a condition to it being testimonial.

Nothing in *Crawford*, however, indicates that the governmental abuse it seeks to prevent, occurs, or only occurs, during the taking of statements.⁴⁵ Indeed, to focus on governmental abuse during the *taking* of a statement rather than at its introduction at trial misses the point of confrontation.⁴⁶ Consider a practical illustration. A colleague at my office recently tried a domestic violence case where the complainant gave an initial accusatory narrative statement to

⁴² See, e.g., *id.* at 480 (explaining that "[r]ather than attempting to assess the expectation of the declarant regarding the probable use of any statement that might be forthcoming, the better approach is to evaluate the objective of the person posing the question Thus, [a] response [that] is not the product of a structured police interrogation . . . should not be regarded as testimonial").

⁴³ Perhaps this necessary relationship between question and answer to a broader understanding of testimony underscores the traditional refrain that trial judges offer to juries: a question alone never constitutes testimony; only an answer joined with a question creates testimony.

⁴⁴ See, e.g., *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004) (expressing concern that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse").

⁴⁵ Cf. *id.* at 51 (referring generally to "the civil-law abuses the Confrontation Clause targeted").

⁴⁶ Cf. Friedman, *supra* note 13, at 457-58.

responding police officers, but later recanted and did not appear at trial. The prosecution introduced the complainant's initial accusation to the police, which the trial court deemed an excited utterance. No serious effort was made to subpoena the complainant for trial, nor did the prosecution allege that the defendant improperly procured her recantation, so nothing indicated that she in fact was "unavailable" to testify.

A definition of testimony that focuses on governmental "abuse" prior to trial will find none in this case. The police engaged in no abuse by taking the complainant's *ex parte* statement prior to trial – such interviews are a routine and entirely proper part of police investigative work. Nor did the government engage in any abuse by not producing her for cross-examination prior to trial – the defendant had no free-standing constitutional right to pre-trial confrontation. No abuse occurred if the prosecution unilaterally concluded that the complainant's initial accusation provided the most reliable account of the defendant's conduct – prosecutors are charged with making exactly this sort of decision as part of the adjudicative process.

Rather, the abuse in this case – and with all similar confrontation violations – occurred when the prosecution usurped the fact-finding process at trial, and ensured that the trial retained an investigative rather than adversarial character, by presenting an unchallengeable narrative that already had shaped and guided the fact-finding process leading to trial, and certainly would at trial as well. To suggest that this role of the complainant's statements was not foreseeable constructs a definition of testimony that simply does not exist elsewhere – one that limits consideration of its procedural use only to trial and requires the witness to subjectively appreciate this narrow role for it. Any conception of confrontation that expresses concern for governmental abuse must focus on exactly this type of prosecutorial strategy to sanitize the fact-finding process at trial.⁴⁷

This observation returns me to the concept of testimony as contributing to a formal, decision-making process. Under this concept, the governmental status of the interrogator should bear on whether a statement proves testimonial only to

⁴⁷ Cf. *Bockting v. Bayer*, 399 F.3d 1010, 1022-24 (9th Cir. 2005) (Noonan, J., concurring); Brooks Holland, *Using Excited Utterances to Prosecute Domestic Violence in New York: The Door Opens Wide, or Just a Crack?*, 8 CARDOZO WOMEN'S L.J. 171, 199 (2002).

the extent that the interrogator's status makes the statement's injection into this process foreseeable. To paraphrase *Crawford* itself, a statement to a police officer possesses a foreseeable significance to it in this way that a statement to a friend usually does not,⁴⁸ because to most people, the police and similar authority figures acting in an investigative capacity communicate a clear message: what you say will be included in a formal decision-making process.⁴⁹ For children, however, parents and guardians may assume this role as much or even more than law enforcement, as perhaps no one is more empowered to resolve formal disputes in a child's mind than his or her parent.⁵⁰ Even a private party such as a medical professional may take a testimonial statement, if the circumstances demonstrate that this person foreseeably will inject the statement into a formal adjudicative process.⁵¹ By contrast, people speaking in furtherance of a conspiracy or completing business records,⁵² or speaking to an acquaintance in private,⁵³ generally have no reason to foresee that their statements will contribute to anything beyond their non-adjudicative function.

III. CONCLUSION

The only true commonality that I have observed of all "testimony" is the foreseeability of that statement's contribution to a formal, adjudicative process. In the end, therefore, that process is the key to unlocking the meaning of testimony, and not artificial notions of formality, statement content, witness cognition, interrogation structure or

⁴⁸ Cf. *Crawford*, 541 U.S. at 51.

⁴⁹ Cf. *United States v. Arnold*, 410 F.3d 895, 903-04 (6th Cir. 2005); *United States v. Cromer*, 389 F.3d 662, 674-75 (6th Cir. 2005); *United States v. Summers*, 414 F.3d 1287, 1302-03, (10th Cir. 2005); *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 557-59 (Mass. 2005); cf. also *United States v. Hinton*, No. 03-3803, 2005 WL 2218919, at *3-5 (3rd Cir. 2005). For an interesting example of how witness statements quickly may transform from nontestimonial to testimonial in the course of a hectic police investigation, see *People v. Watson*, 798 N.Y.S.2d 712 (Sup. Ct. 2004) (unpublished).

⁵⁰ Cf. *In re E.H.*, 823 N.E.2d 1029, 1034-37 (Ill. App. Ct. 2005), *appeal granted*, 833 N.E.2d 2 (Ill. 2005); cf. also *People v. R.F.*, 825 N.E.2d 287, 296-99 (Ill. App. Ct. 2005) (Neville, J., dissenting).

⁵¹ Cf., e.g., *In re T.T.*, 815 N.E.2d 789, 803 (Ill. App. Ct. 2004) (finding statements by complainant to physician during medical evaluation generally nontestimonial, except for her identification of defendant as her abuser).

⁵² See *Crawford*, 541 U.S. at 56.

⁵³ Cf. *People v. Compan*, 100 P.3d 533, 535-38 (Colo. Ct. App. 2004), *cert. granted*, No. 04SC422, 2004 WL 2376474 (Colo. Oct. 25, 2004).

interrogator status. A definition of testimony that emphasizes this “common nucleus”⁵⁴ will ensure that the proper range of hearsay statements by non-testifying declarants is excluded in criminal trials, unless such statements satisfy *Crawford*’s properly unforgiving procedural guarantee.⁵⁵

⁵⁴ *Crawford*, 541 U.S. at 52.

⁵⁵ Or, unless the prosecution can establish that the defendant has forfeited any claim to confrontation, a subject beyond the scope of this essay. For an interesting debate on confrontation forfeiture, check out Richard D. Friedman’s blog at <http://confrontationright.blogspot.com> (last visited October 10, 2005). See also *State v. Wright*, 701 N.W.2d 802 (Minn. 2005) (noting the “special concerns” that domestic violence cases raise for potential forfeiture by wrongdoing).