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# From “Reliability” to Uncertainty

## DIFFICULTIES INHERENT IN INTERPRETING AND APPLYING THE NEW *CRAWFORD* STANDARD

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My family once lived across the street from a nut wholesaler in lower Manhattan. Late one night, I saw a man crawling out of a broken window in the building, dragging behind him bags of nuts. I immediately reached for the telephone, dialed 911, and described what I was seeing. The operator interrupted my report with a few questions to establish the building’s location and the details of the man’s clothing. As we spoke, the thief hurried up the street with his prize.

Suffice it to say the burglar was not caught. What if he had been? Was my 911 call “testimonial” as that term is used in *Crawford v. Washington*?<sup>1</sup> Would it matter if the 911 operator had been trained by the Police Department’s detective bureau? Does it matter that I am familiar with the hearsay rule? What if I had shouted the description to my wife, and not the 911 operator?

As my real-life example suggests (and the hypotheticals propounded by Professor Robert Pitler at the Brooklyn Law School symposium confirm), *Crawford* is a law professor’s dream and a trial judge’s nightmare. The familiar framework of *Ohio v. Roberts*<sup>2</sup> is gone and in its place is a mode of analysis that is exceedingly difficult to apply, at least until the Supreme Court provides further guidance. For now, the best that I can offer are a few observations about the changes that *Crawford* has brought and the uncertainty that has followed in its wake.

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

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

## I. BEFORE *CRAWFORD*: THE *ROBERTS* “RELIABILITY” STANDARD

Undoubtedly, there was something intellectually unsatisfying about *Ohio v. Roberts*<sup>3</sup>, a case which one court aptly described as the “Sistine Chapel’ of *obiter dicta*.”<sup>4</sup> *Roberts* taught that hearsay was constitutionally admissible in a criminal trial if it fell within a “firmly rooted hearsay exception” or bore “particularized guarantees of trustworthiness.”<sup>5</sup> The result was a near congruence between the Confrontation Clause and the Federal Rules of Evidence. If an extrajudicial statement was admissible under the Rules, it was almost certainly admissible under the Confrontation Clause. And if it was inadmissible under the Rules, it was almost certainly constitutionally inadmissible as well. It was as if the Framers had been prescient enough to write the Federal Rules of Evidence into the Sixth Amendment.

## II. *CRAWFORD* AND THE MEANING OF “TESTIMONIAL”

For all its intellectual shortcomings, *Roberts*, I believe, asked the right question: was the out-of-court statement sufficiently reliable that it could be admitted in a criminal trial untested by cross-examination? *Crawford*, of course, tells us that reliability is *not* the touchstone – that “[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right to confrontation . . . [which] commands . . . that reliability be assessed . . . by testing in the crucible of cross-examination.”<sup>6</sup> That language might be read to mean that all hearsay is constitutionally inadmissible in a criminal trial. *Crawford*’s holding, however, is not so sweeping. Rather, the case holds that the Confrontation Clause excludes testimonial statements of witnesses who are absent from trial, except (i) where the declarant is unavailable and the defendant has had a prior opportunity to cross-examine him,<sup>7</sup> (ii) the

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<sup>3</sup> *Id.*

<sup>4</sup> *People v. White*, 555 N.E.2d 1241, 1252 (Ill. App. Ct. 1990), *aff’d sub nom.* *White v. Illinois*, 502 U.S. 346 (1992).

<sup>5</sup> *Roberts*, 448 U.S. at 66.

<sup>6</sup> *Crawford*, 541 U.S. at 61.

<sup>7</sup> *Id.* at 59.

defendant has forfeited his right to confront the witness<sup>8</sup> or (iii) perhaps if the statement is a testimonial dying declaration.<sup>9</sup>

Once reliability is abandoned as the focus of Confrontation Clause analysis, we are adrift. *Crawford* offers three potential definitions of testimonial: (i) "statements that declarants would reasonably expect to be used prosecutorially";<sup>10</sup> (ii) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"<sup>11</sup>; or (iii) "statements . . . made under circumstances which would lead an objective witness . . . to believe the statement would be available for use at a later trial."<sup>12</sup> Although Justice Scalia posits that these formulations "share a common nucleus,"<sup>13</sup> they differ greatly. Consider my excited utterance to the 911 operator. Under the second formulation (that advanced by Justice Thomas in *White v. Illinois*),<sup>14</sup> the statement is constitutionally admissible, since it is not "formalized testimonial material."<sup>15</sup> The first and third formulations are more difficult to apply. I suppose that I reasonably expected that my utterance would be used "prosecutorially," if that phrase means "used to arrest the perpetrator." But would an objective observer reasonably believe that the statement would be available for use at a later trial? As I shouted into the telephone, I never considered a later trial. And whether an observer hearing my statement would anticipate its use at trial would seem to depend on what the observer knew about criminal trial practice.

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<sup>8</sup> *Id.* at 62.

<sup>9</sup> *Id.* at 56 n.6.

<sup>10</sup> *Id.* at 51 (quoting Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02-9410)).

<sup>11</sup> *Id.* at 51-52 (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)) (alteration in original).

<sup>12</sup> *Crawford*, 541 U.S. at 52 (quoting Brief for the National Association of Criminal Defense Lawyers et. al. in Support of Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02-9410)).

<sup>13</sup> *Id.*

<sup>14</sup> *White*, 502 U.S. 346, 362-63, 365 (1992) (Thomas, J., concurring) ("As a matter of plain language . . . it is difficult to see how or why the [Confrontation] Clause should apply to hearsay evidence as a general proposition.")

<sup>15</sup> *Id.* at 365.

### III. THE NEW *CRAWFORD* STANDARD: SHAKY FOUNDATION, UNCLEAR CONSEQUENCES

The questions raised by *Crawford* are obvious: Is the standard objective or subjective? If the declarant is a child, does one ask whether a reasonable child would expect later trial use? Is the test prosecutorial use or trial use? For me, it is impossible to answer these questions unless one knows the reason for asking them. Is our goal to make criminal trials in the 21st century mimic those in 1787? Is it to prevent Sir Walter Raleigh's case from repeating itself on our shores? Is it to develop a formal definition that best captures those instances in which the declarant sees himself (or perhaps others see him) as "bearing witness"? Or is it to ensure that defendants are not convicted on the basis of untrustworthy hearsay? As Professor Park said at the symposium, it is difficult to develop a coherent confrontation clause jurisprudence – *i.e.*, a definition of testimonial – unless "we know what we are trying to accomplish."

Much of Justice Scalia's opinion is devoted to demonstrating that *Roberts* was amorphous and unpredictable. What he actually shows is that prosecutors and lower courts were remarkably adept at finding ways to admit accomplice confessions, despite the plurality's admonition in *Lilly v. Virginia* that it was "highly unlikely" that any such statement could survive Confrontation Clause scrutiny.<sup>16</sup> If the *Crawford* Court had held that accomplice confessions were *per se* unreliable, much of the unpredictability of *Roberts* would have disappeared, and none of the new unpredictability would exist.

One of the untoward consequences of *Crawford* is that it seems to have rendered nugatory in criminal cases the December 2000 amendment to Rule 803(6).<sup>17</sup> That reform was designed to allow a business record custodian to submit an affidavit in lieu of in-court testimony.<sup>18</sup> Most federal prosecutors' offices now believe that such affidavits are "testimonial" and have therefore returned to calling custodians to testify. Is it conceivable that such a sensible evidentiary

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<sup>16</sup> *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion).

<sup>17</sup> FED. R. EVID. 803(6).

<sup>18</sup> See FED. R. EVID. 803 advisory committee's note (2000 amendments) ("The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify.").

reform is unconstitutional? As Professor Capra pointed out at the symposium, Judge Weinstein authored a lucid opinion, prior to *Crawford*, upholding the constitutionality of such a business record certification.<sup>19</sup> As we say in Brooklyn, if it is good enough for Judge Weinstein, it is good enough for me. Yet one can read *Crawford* to undermine Judge Weinstein's sensible conclusion.

#### IV. LOOKING FORWARD

Where are we headed? It seems certain that Justice Scalia eschewed a more precise definition of "testimonial" so as not to fracture his majority. Pre-*Crawford*, Justice Thomas and Justice Breyer inveighed against *Roberts*,<sup>20</sup> but their definitions of "testimonial" may well be different. The federal circuit courts seem to be moving toward a relatively narrow definition that limits the term to declarations given in response to investigatory questioning.<sup>21</sup> A betting person might wager that defendants will end up with less constitutional protection than if *Roberts* had been retained and *Lilly* strengthened. If so, Michael Crawford's win will be other defendants' loss.

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<sup>19</sup> *United States v. Chan*, 680 F. Supp. 521, 522 (E.D.N.Y. 1988) (foreign certification procedure did not violate defendant's rights).

<sup>20</sup> *See Lilly*, 527 U.S. at 142 (Breyer, J., concurring) (citing *White*, 502 U.S. at 363 (Thomas, J., concurring)) ("At the same time, the current hearsay-based Confrontation Clause test is arguably too broad . . . [I]t is debatable whether the Sixth Amendment principally protects 'trustworthiness,' rather than 'confrontation.'"); *White*, 502 U.S. at 365 (Thomas, J., concurring) ("[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.").

<sup>21</sup> *See, e.g., United States v. Hendricks*, 395 F.3d 173, 181 (3d Cir. 2005), *mandamus denied sub nom. In re Robinson*, 132 Fed. Appx. 418 (3d Cir. 2005); *Leavitt v. Arave*, 371 F.3d 663, 683 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2540 (2005); *Mungo v. Duncan*, 393 F.3d 327, 331-32 (2d Cir. 2004), *cert. denied sub nom. Mungo v. Greene*, 125 S. Ct. 1936 (2005).