



BROOKLYN LAW SCHOOL 250 JORALEMON STREET | BROOKLYN, NEW YORK | 11201

**Crawford**  
Exploring  
the Future of the  
Confrontation Clause  
in Light of  
Its Past  
**&Beyond**

February 18, 2005

**BROOKLYN LAW SCHOOL**  
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# Crawford & Beyond

Last term, the United States Supreme Court, in *Crawford v. Washington*, abandoned the “indicia of reliability” approach of *Ohio v. Roberts* that it had used for nearly twenty-five years in ruling on Confrontation Clause challenges to the admissibility of hearsay statements. Justice Scalia’s opinion for the seven-justice majority concluded that a reliability standard was too “subjective” and “unpredictable.” Most importantly, it possessed the “unpardonable vice” of leading lower courts to admit hearsay statements that the Confrontation Clause was designed to exclude. According to *Crawford*, confrontation requires cross-examination of the declarant, not a judicial inquiry into the reliability of a hearsay statement.

Justice Scalia posits that the evil that the Confrontation Clause drafters sought to eliminate was the admission of the statements of non-testifying witnesses obtained through *ex parte* examinations (some considerably less benign than others). These examinations were conducted under the “civil-law mode of criminal procedure” practiced by justices of the peace, magistrates, and other officers of the crown in 16th and 17th century England.

Given this history, *Crawford* concludes that a defendant’s right to confrontation is violated by admission in evidence of present day “testimonial” statements obtained by practices with “closest kinship to the abuses at which the Confrontation Clause was directed.” In the testimonial category, *Crawford* includes, at a minimum, prior testimony at a preliminary hearing, before a grand jury, or at a former trial and statements made during police interrogation. These statements would be admissible only if defendant had the opportunity to cross-examine the declarant at the time the statement was made or during trial.

*Crawford* leaves numerous questions for another day, including:

- What constitutes police interrogation?
- Should “testimonial” be comprehensively defined and, if so, what should that definition be?
- Which other statements come within the testimonial category?
- Are there testimonial statements that, even if admitted in evidence, would not violate the Confrontation Clause?
- Is the role of governmental action in producing the statement significant?
- Does the admission of non-testimonial statements implicate the Confrontation Clause at all? If not, do other constitutional safeguards such as due process apply?
- What is the scope of forfeiture by wrongdoing?

As seen from the above open issues, the thirty-three page, nine footnote, discursive *Crawford* majority opinion raises many more questions than it answers. This program, to be held just two weeks before the one-year anniversary of *Crawford*, will explore these questions and others, with a view toward future development of confrontation principles.

**RSVP** [www.brooklaw.edu/rsvp](http://www.brooklaw.edu/rsvp) by Friday, February 11, 2005

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**Friday, February 18, 2005**

**9:00 AM** **INTRODUCTION**  
**Dean Joan G. Wexler**

**OPENING REMARKS**  
**Robert M. Pitler** | Brooklyn Law School

**9:15 – 10:45 AM** **Can History Define the Structure of Confrontation Doctrine?**

**PRESENTER**  
**Roger W. Kirst** | University of Nebraska

**MODERATOR**  
**Jason Mazzone** | Brooklyn Law School

**COMMENTATORS**  
**Richard D. Friedman** | University of Michigan  
**Randolph N. Jonakait** | New York Law School  
**Myrna S. Raeder** | Southwestern University  
**Peter Tillers** | Cardozo School of Law

**10:45 – 11:00 AM** **Coffee Break**

**11:00 AM – 12:30 PM** **Testimonial Statements**

**PRESENTER**  
**Richard D. Friedman** | University of Michigan

**MODERATOR**  
**Margaret A. Berger** | Brooklyn Law School

**COMMENTATORS**  
**Mark Dwyer** | New York County District Attorney’s Office  
**Brooks R. Holland** | New York County Defenders  
**Roger W. Kirst** | Nebraska Law School  
**Roger C. Park** | University of California, Hastings

**12:30 – 1:30 PM** **Lunch**

**1:30 – 2:45 PM** **Statements of Domestic Violence and Child Abuse Victims**

**PRESENTER**  
**Myrna S. Raeder** | Southwestern University

**MODERATOR**  
**Edward K. Cheng** | Brooklyn Law School

**COMMENTATORS**  
**Lawrence Busching** | New York City Law Department  
**Daniel J. Capra** | Fordham University  
**Michele Maxian** | New York City Legal Aid Society  
**Roger C. Park** | University of California, Hastings

**2:45 – 4:00 PM** **Real Hypotheticals**

**PRESENTER**  
**Robert M. Pitler** | Brooklyn Law School

**COMMENTATORS**  
**Richard T. Farrell** | Brooklyn Law School  
**Richard D. Friedman** | University of Michigan  
**Paul L. Shechtman** | Stillman & Friedman

**Barbara Underwood** | United States Attorney’s Office, Eastern District of New York

**4:00 PM** **CLOSING REMARKS**  
**Professors Margaret A. Berger**  
and **Robert M. Pitler** | Brooklyn Law School