Grappling with the Meaning of "Testimonial"

by Richard D. Friedman*

Crawford v. Washington[1] has adopted a testimonial approach to the Confrontation Clause, holding categorically that a testimonial statement may not be introduced against an accused unless he has had an opportunity to cross-examine the person who made the statement. Those of us who previously advocated the testimonial approach therefore find ourselves in a position somewhat like that of an opposition politician who suddenly wins election and has to deal with the realities of government. It is relatively easy to car from the outside about what is wrong with the old regime, to present an alternative approach in general terms, and to offer a few illustrations of how that approach may work in real situations. It may be harder actually to resolve the daily flood of issues as they arise. Before *Crawford*, it was possible, without going into too much detail as to what "testimonial" means, to argue that a testimonial approach should replace the unsatisfactory rule of *Ohio v. Roberts*.[2] But now that *Crawford* has adopted the testimonial approach, cases must be decided under it, actual cases and many of them. Pretty quickly, we are going to have to get to a full understanding of the meaning of "testimonial."

Of course, the analogy cannot be pushed too far. *Crawford*, unlike many elections, did not put anybody into power who was not already. Academics, commenting from the sidelines, have neither the opportunity nor the responsibility to decide cases. But I believe the transformation achieved by *Crawford* was correct, and I want it to succeed. I am therefore happy to take this opportunity to reflect at some length on the question of what statements should be deemed testimonial for Confrontation Clause purposes. Of course, I cannot offer here a resolution for every possible situation posing an issue of whether a statement should be deemed to be testimonial. But I hope to present an overview of how these issues should be resolved.

Much of what I have to say can be summarized this way. Many courts and commentators have attempted to define testimonial by starting at a core of statements that includes trial testimony and working outwards. But this is not a good approach, because the whole point of the confrontation right is to bring testimony to trial, or some other formal proceeding.

Here is a more extensive summary:

1. The purpose of the Confrontation Clause is to assure that prosecution testimony be given under prescribed conditions, most notably that it be in the presence of the accused and subject to cross-examination.

---

* Ralph W. Aigler Professor of Law, University of Michigan Law School; rdfrdman@umich.edu. I comment further on questions related to the topic of this paper on the Confrontation Blog, www.confrontationright.blogspot.com.

[1] 541 U.S. 36 (2004).

[2] 448 U.S. 56 (1980).

2. Whether a statement is deemed to be testimonial should not be determined by whether it bears a set of characteristics resembling trial testimony. Rather, the question depends on whether the statement fulfills the function of prosecution testimony. That function, in rough terms, is the transmittal of information for use in prosecution.

3. Whether a statement is testimonial must be determined from the perspective of the time when it was made. The appropriate test is not the purpose for which the statement was given or taken, but the anticipation at the time – that is whether at that time it appeared reasonably probable that the statement would be used in prosecution.

4. It is a matter of secondary – though still substantial – importance whether the test is objective or subjective.

5. Whether a statement is testimonial must be determined from the perspective of the person who made it – the witness.

6. Several considerations may be significant factors indicating that a statement is testimonial, but the absence of any one or more of these does not mean that the statement is not testimonial. Thus, a statement can be testimonial even if it is

(a) not made to a government agent;

(b) made at the initiative of the witness, rather than in response to interrogation; or

(c) made in an informal setting.

7. A statement can be testimonial even if it is made in great excitement shortly after the event in question.

8. Some very young children should perhaps be considered too undeveloped to be capable of being witnesses. In the case of children who are capable of being witnesses, how to determine whether the given statement is testimonial may often depend on whether a subjective or objective approach is used.

I. The Conditions of Testimony

If a system of adjudication is to depend in large part on the testimony of witnesses – which any rational system ultimately does – then almost by definition it must determine the conditions under which testimony may be given. That is, an adjudicative would hardly warrant that designation if it provided, "Anybody who wishes to testify against a criminal defendant may do so however she wishes. She may, for example, do so in open court, but if she does not wish to she may make a statement to the police, or submit a written statement or a videotape directly to the court, or she may make a statement to a friend with the understanding that the friend will

relay it to court."

One *can* imagine, because it has happened, different rules for giving testimony. For example, many systems, but not all, have insisted that testimony be given under oath. A system might provide, as the later Athenians did, that testimony be written and placed into a sealed container, thus allowing the parties to know before trial what the body of evidence would be. Or it might provide, as many Continental courts have done, that testimony must be recorded out of the presence of the parties, to prevent intimidation. But the English took another course, one that the Hebrews, the earlier Athenians, and the Romans had followed: They insisted that witnesses give their testimony "face to face" with the adverse party. This practice was not universally followed, especially in politically charged cases, but by the middle of the seventeenth century it was firmly established even in that context. By then also it was clear that the defendant could question the witness. And even before then, and for long after, English commentators proudly proclaimed this method of giving testimony as one of the chief superiorities of the English system of criminal justice over its Continental counterparts. The practice took on even greater significance in America, where the importance of defense counsel, and so too of cross-examination, became established sooner. Shortly after declaring independence, the American states made the practice a right protected by their constitutions, and in 1791, in the Sixth Amendment, so did the United States.

II. A Functional Rather Than Descriptive Approach

Part I has shown that there are many ways in which prosecution testimony could be given, but that the Confrontation Clause insists on one, face-to-face with the accused and subject to cross-examination. It therefore makes no sense to determine whether a statement is testimonial by asking whether the statement shares key characteristics with trial testimony. The very point of the Clause is to ensure that testimony will be given at trial, or at some other proceeding that maintains the essential attributes of trial testimony. To say that a statement is beyond the reach of the Confrontation Clause because the circumstances in which it was given do not resemble a trial therefore turns logic on its head. It means that the more that a statement fails to satisfy the conditions for testimony prescribed by the Confrontation Clause, the less likely the Clause will address the problem.

Thus, a characteristic-based approach to the question of what is testimonial lacks logic and historical foundation. A critical practical factor also weighs decisively against it. If certain characteristics are deemed crucial for treating a statement as testimonial, then repeat players involved in the creation or receipt of prosecution evidence will have a strong incentive, and often ready means, to escape that treatment, simply by avoiding those characteristics. We have seen this already. Some police have been led to believe that even if a statements made knowingly to them accuses a person of a crime it is not testimonial unless th product of a formal interrogation begun after the police have determined that a crime has been committed. And so we have seen that police and prosecutors have done their best to secure accusatory statements without beginning what would necessarily be deemed a formal interrogation.

These difficulties are all solved if instead of relying on a pre-determined checklist of

characteristics we make the determination of whether a statement is testimonial depend on whether it performs the function of testimony. That approach allows the Confrontation Clause to perform its historically-supported function, assuring that however testimony has been given it will be proscribed unless it satisfies the demands of the Clause. And it deprives repeat players of the ability or incentive to manipulate, because they cannot change the status of a statement under the Clause by shaping the circumstances in which the statement is given unless they defeat their own purposes by depriving the statement of testimonial value.

This approach does, of course, require the articulation of what the testimonial function is, and then implementation of that standard. Here I will concentrate on the first step. A useful articulation, I believe, is that a statement is testimonial if it transmits information for use in litigation. In the context of importance to the Confrontation Clause, this usually means that the statement transmits information for use in a criminal prosecution.[3] (I am using "for" as a shorthand; as explained below, I do not believe the statement needs to have been made *for the*

[3] That is not inevitable, though. At the argument of *Crawford*, Justice Kennedy posed this interesting hypothetical: Criminal charges are brought arising from a serious auto accident, and the prosecution offers a statement made shortly after the accident by an observer to an insurance investigator. The statement would clearly be testimonial with respect to civil litigation. Should it be considered testimonial for purposes of the Confrontation Clause? I believe it should, even without requiring proof that the declarant anticipated a criminal prosecution.

purpose of aiding a criminal prosecution to be deemed testimonial.[4])

Note that "use in a . . . prosecution" is a somewhat looser wording than, say, "use as evidence at trial" (which is, or resembles, a wording I have used in the past). Two reasons justify this choice. First, I think it is probably better as a matter of principle. A great deal of criminal procedure occurs before trial – the vast majority of cases never go to trial – and evidence provided to the authorities can be useful to them, and help them secure a conviction, long before trial. The trial is when the confrontation right can be invoked – in fact, this is a great deal of what makes a trial – but the information may have performed its inculpatory function well beforehand.

Second, this approach has the practical advantage of helping us avoid a bothersome Catch-22. Suppose the governing doctrine makes admissibility at trial the critical factor determining whether a statement is testimonial. Suppose also that the jurisdiction assiduously protects the confrontation right. This means that it will exclude testimonial statements (unless that accused has had an opportunity to cross-examine and the declarant is unavailable). But then a statement that otherwise would be testimonial will not be under the hypothetically governing law – for the very reason that it is inadmissible at trial and so cannot be testimonial under that

[4] Also, I will not explore beyond this footnote the question of *what* prosecution will satisfy this definition. Does the defendant have to be identified at the time of the statement? Not necessarily, I don't think. What if the statement is made with one crime in mind and is later introduced at a trial for a later-committed crime? If there is a substantial link between the two, that should probably be enough; I have in mind the cases in which a statement is made in the context of an incident of domestic violence, and the complainant is later murdered. Forfeiture doctrine would often nullify the confrontation right in this context, though. *E.g.*, *People v. Giles*, 19 Cal. Rptr.3d 843, *review granted*, 102 P.3d 930 (2004). Does any crime have to have been committed yet? Not necessarily; her I have in mind the cases in which an eventual murder victim, fearing her assailant, tells a confidante information to be used in the event that she does in fact assault her and render her unable to testify. *See* State v. Cunningham, 99 P.3d 271 (Or. 2004). Again, forfeiture is probable in this situation.

law. One could construct a complicated contingent question to try to avoid this infinite regress. It is far simpler, though, to avoid the whole problem simply by speaking in terms of use of the information in prosecution generally rather than specifically at trial.

III. Anticipated Use

I have contended that, in rough terms, testimony is the transmittal of information for use in prosecution. Necessarily, then, the determination of whether a statement is testimonial examines the situation as of the time the statement is made. A standard that labeled a statement as testimonial *because* it was used in prosecution would make no sense; it would mean that any out-of-court statement offered by the prosecution at trial to prove the truth of what it asserts – that is, any hearsay – is testimonial.

To determine whether a statement is testimonial, therefore, we must figuratively stand at the time of the statement and look forward in time towards the prosecutorial process. Now, let us assume for the sake of argument a point that I will try to demonstrate in Part V, that in doing so we should take the perspective of the declarant, the purported witness. And for the moment I will assume also that in taking that perspective it is the actual state of mind of the witness that matters. The question I will address here is what state of mind is necessary for the statement to be deemed testimonial.

It may be tempting to conclude, as some courts have concluded, that the statement is testimonial only if it was made *for the purpose* of transmitting information to be used in prosecution. But of course people often make statements for multiple purposes, and so this test would immediately raise the question of how important that purpose must be for the statement to be deemed testimonial: The *dominant* purpose? *A* purpose? Something in between, such as a *decisive, but-for* purpose, absent which the statement would not have been made? I think none of these should be the test. Instead, the question is whether the declarant *understood* that there was a significant probability that the statement would be used in prosecution. In other words, the test is one of anticipation; one might speak of it as an intent test, in the soft sense that a person is deemed to have intended the natural consequences of her actions.

I believe this anticipation test is preferable to a purpose test for several reasons. First, as a matter of principle, it better describes the testimonial function. Suppose a witness gives a statement to the police describing the commission of a crime, in circumstances like those of *Crawford*: The statement is made in the station-house, in response to formal and structured questioning by the police. I believe the statement is clearly testimonial, because the witness must have understood (as did the police) that the statement was transmitting information for use in prosecution. And this conclusion would remain the same even if we found out that the witness only gave the statement under pressure, because she thought doing so would help her own status with the authorities; or that, feeling personal sympathy with the defendant, she hoped even while making the statement that it would never be used; or that she made the statement primarily for the purpose of personal catharsis, or expiation, or to secure her immediate personal safety, and that in each case this other purpose would have been sufficient to explain her conduct

even if use of the statement in prosecution were not a possibility. In short, understanding of the probable evidentiary use, rather than desire for that use, is what makes the statement testimonial.

Second, as a practical matter, the inquiry into anticipation is much easier than an inquiry into motivation. Anticipation depends on, and can be proven by, external circumstances; motivation demands a more searching psychological inquiry.

Third, a test worded framed in terms of anticipation can be applied on an objective basis – that is, in terms of the reasonable anticipation of a person in the witness's position, rather than in terms of the witness's own actual anticipation, if that is deemed preferable. I do not believe it would be coherent to apply a motive test except subjectively, on the basis of the witness's actual motivations. I will now address the question of whether the test should be subjective or objective.

IV. Subjective or Objective?

Again, I will assume for now that the perspective of the witness is the crucial one. In Part III, I have argued that anticipation of use in prosecution is the crucial question. But in answering this question, should we take a subjective or objective view? That is, should we ask whether this particular declarant anticipated use in prosecution, or should we ask whether a reasonable person in the position of the declarant would anticipate such use?

In most cases, I do not think the choice makes very much difference. Assuming the test is a subjective one, a court would still perforce often determine what the declarant's anticipation was by relying largely on surrounding circumstances. In other words, the court would infer that the declarant did (or did not) anticipate use in prosecution from its perception that a reasonable person in the declarant's position would (or would not) anticipate such use.

The subjective approach has the advantage of theoretical simplicity – it does not entail the issues of what characteristics to assume a reasonable person has in this context or what it means to be in the declarant's position. It is also more intellectually coherent: It is easier to explain why a statement should be deemed testimonial given that the person who actually made it anticipated prosecutorial use than to explain why it should be deemed testimonial given that a mythical person who might be quite different from the actual declarant would have anticipated.

On the other hand, the objective approach is more likely to yield some categorical rules, and to the extent that reasonable rules could be crafted that would be a welcome development. Not all situations lend themselves to categorical rules – 911 calls reporting an assault while the assailant is still nearby provide a good example. But some situations do. For example, I believe that a statement describing an assault made after the assailant has left to a police officer responding at the scene should, if an objective test is used, be deemed testimonial as a categorical matter.

The chief consequence of the choice between an objective and subjective approach may

well be in the context of child witnesses. As I shall show in Part __, a subjective approach would more easily support the conclusion that a given statement by the child is not testimonial.

V. The Perspective of the Witness

I have argued in Part III that anticipation of use in prosecution is the key question in determining whether a statement is testimonial. But whose anticipation? The declarant's? Governmental authorities'?[5] Both – so that a statement is not deemed testimonial unless both the declarant and governmental authorities anticipate use in prosecution? Either – so that a statement is deemed testimonial if either the declarant or governmental authorities anticipate use in prosecution? I will contend here that it is the perspective of the declarant – the witness – that matters. (For simplicity, I will speak here as if is the actual anticipation of the declarant that is material – that is, that a subjective test is used – though as discussed in Part IV the test could be objective or subjective.) In this Part, I will contend that governmental authorities are gathering evidence for use in prosecution does not make a statement testimonial if the declarant does not understand that this is happening. In Part VI, I will argue that if the declarant does anticipate that the statement will be used in prosecution, that is sufficient – even if the statement was not made to a governmental agent.

[5] With respect to governmental authorities, it would not much matter whether we spoke of purpose or anticipation; it would be a rare situation in which a government agent would take a statement anticipating use in prosecution but not for that purpose.

This is a contentious area. I will approach it first by showing that making the intentions or anticipation of government agents *the* dispositive consideration would lead to some unappealing results – and unappealing in particular to one arguing from a pro-prosecution perspective. A statement by a conspirator of the defendant, made for the purpose of furthering the conspiracy but to an undercover police agent was clearly admissible under pre-*Crawford* law. The justices' questions at argument of *Crawford* suggested they would be loath to adopt any theory that would entail a change in this result. But if the intention of a government agent to gather evidence for use in prosecution is the critical consideration, then such a statement is clearly testimonial, for that is precisely what the agent is trying to do. So what makes the statement non-testimonial? Clearly it is that the *declarant* did not anticipate a prosecutorial use of the statement. Similarly, consider the cases in which police intercept calls to a drug or gambling house, either by answering the telephone and playing the role of an order-taker or by monitoring an answering machine; the callers, unaware that they are speaking to the police, place their orders or make statements otherwise indicating their awareness of the business performed att he house. The American cases were in consensus before *Crawford* that these statements are admissible, and that is the proper result. But any attempt to contend that the police are not gathering evidence for use in prosecution is utterly unconvincing.[6] Again, the reason these statements are not testimonial is that the *declarant* did not anticipate prosecutorial use.

These examples suggest that an intention on the part of a government agent to gather evidence does not in itself make a statement testimonial. And as a theoretical matter I believe this is right.

Police gather evidence from many different sources – blood, maggots, bloodhounds, skidmarks, and so forth. There is, of course, no Confrontation Clause problem with the introduction at trial of such evidence. It may appear that this is obviously because one cannot usefully attempt to cross-examine a maggot or a bloodhound, to say nothing of a vial of blood or a skidmark. But I do not believe that is actually the right answer. For one thing, there is more to confrontation than cross-examination; there is also the longer-standing idea of having the witness testify in the presence of the accused. That the accused was not present when the maggots were generating their evidence will not create a Confrontation Clause issue, however.

Moreover, that cross-examination was never possible does not relieve a Confrontation Clause problem if the statement is testimonial. Corpses cannot be cross-examined, either. Suppose that the prosecution takes the deposition of a witness – clearly a testimonial statement – and just before cross-examination is about to start the witness dies of a heart attack, through nobody's fault. If the prosecution offers the deposition transcript at trial, and the accused objects on confrontation grounds, the prosecution could not validly contend, "Cross-examination is not possible now and it never was possible. It is therefore silly to exclude this evidence on the basis that the accused has not had an opportunity for cross-examination and that in some imaginable state of the world he might have had such an opportunity." The court would rule in effect,

[6] People v. Morgan, 2005 WL 56947 (Cal. App. Jan. 12, 2005).

"Sorry. This evidence doesn't satisfy the conditions for testimony. I understand that it was impossible to satisfy those conditions. But that's your tough luck." Courts *could* say something like that when the prosecution wants to prove the reaction of a bloodhound: "Sorry. Cross-examination is not possible. I know there's nothing you can do or could have done to make it possible, but given that it isn't this evidence just doesn't satisfy the conditions for testimony." But of course courts do not do that; though in exposing the bloodhound to a bloody shirt the police were trying to secure evidence for use in prosecution, what the bloodhound did by barking is not testifying within the meaning of the Confrontation Clause.

And why not? It appears that the essence of testifying is *knowing* provision of information for use in prosecution. The bloodhound lacks the understanding to make his bark testimonial – and so does the conspirator or the unwitting drug customer. Without such understanding on the part of the declarant, all we can say is that a phenomenon occurred, one that was observed or perhaps even generated by government agents, but that doesn't make the statement testimonial. With such understanding, we can say that the witness was playing a conscious, knowing role in the criminal justice system, providing information for use in prosecution – and that certainly sounds a lot like testifying. Furthermore, without such understanding on the part of the declarant, the situation lacks the moral component in which the judicial system can say in effect, "You have provided information with the knowledge that it may help convict a person. If that is to happen, our system imposes upon you the obligation of taking an oath, saying what you have to say in the presence of the accused, and answering questions put to you in his behalf."[7]

My point is that simply because evidence is created through the participation of a government agent does not make it testimonial. The conduct of the purported witness must be testimonial in nature. A conspirator going about his routine conspiratorial business is not performing a testimonial act, nor is a drug or gambling customer placing an order. To be testimonial, it must appear from the perspective of the witness that the statement is transmitting information that will, to a substantial probability, be used in prosecution.

VI. Statements Not Made to Governmental Agents

Part V has shown that government involvement is not sufficient to make a statement testimonial. But is it necessary? I believe the answer is negative. That a statement is made to a government agent is often a factor supporting a conclusion that the statement is testimonial. But there is no requirement that it be made to such an agent. If the declarant anticipates that the statement, or the information asserted in it, will be conveyed to the authorities and used in prosecution, then it is testimonial, whether it is made directly to the authorities or not.

---

[7] *See* Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 Neb. L. Rev. 1258 (2003).

Once again I will argue both from consequences and from theory. A rule providing that a statement is not testimonial unless it is made directly to government agents would have some consequences that I believe are intolerable. A witness who did not want to undergo the rigors of cross-examination could simply send a statement to the court, in writing or other recorded form: "Here's what I have to say. Please read it at trial; I don't want to come in person." If that statement were considered testimonial – on a theory that the court is a government agent, and all that is necessary is that such an agent receive the statement directly, not that the agent play a role in procuring the statement – the reluctant witness would still have an easy alternative. She could simply make a statement to a friend and ask the friend, as her agent, to pass the statement on to the authorities or directly to court; even if the friend had to testify subject to cross-examination, that would probably not be a hardship, because she would only be testifying that the witness made the statement. And in many cases the witness would not even have to take the initiative. I think it is not only plausible but virtually inevitable that, if a government agent standard is established by the courts, private victims' rights organizations will provide a comfortable way for may complainants to create evidence for use in prosecution without having to confront the accused: "Make a videotape, and then go on vacation. We'll bring the tape to court and present the testimony necessary to get the tape shown to the jury. Don't worry, you never have to look the accused in the eye, you never have to answer questions by his attorney, and you don't even have to take an oath." How can the making of that videotape not be considered testimonial? And if a dying murder victim says to a private person nearby, "Jack shot me!" I do not believe the statement is made for the edification or amusement of the listener; clearly it is made to help bring the assailant to justice, and that makes it testimonial.[8]

These examples suggest that government involvement in the creation is not necessary to make a statement testimonial. History lends further support to the point. The confrontation right predates the existence of government prosecutors or police. As I mentioned in Part I, the Hebrews, the early Athenians, and the Romans all protected the right of the accused to confront the witnesses against him. In England, state prosecutors did not become the norm for ordinary crime until well into the eighteenth century, but the right to confront was established long before; indeed, two centuries earlier Thomas Smith described the criminal trial as an "altercation" between accuser and accused. If today a jurisdiction were to eliminate state prosecutors, returning to a system in which crime was privately prosecuted, I do not believe we would say that the confrontation right virtually disappeared, allowing a private prosecutor or his agent to gather statements from observers and report them all in court.

Conceptually also, it makes no sense to say that a statement must be made to a government agent for it to be deemed testimonial. Granted, there is language in *Crawford* emphasizing prosecutorial abuse. But it must be remembered that it is not prosecutorial

[8] The statement may nevertheless be admissible, preferably on the basis that the accused forfeited the confrontation right, but that is another matter.

authorities who violate the Confrontation Clause. Certainly the authorities not violate the Clause when they take a statement behind closed doors from a witness. We *expect* the police to take confidential statements. The violation of the Clause occurs when a testimonial statement is *admitted at trial* against an accused without his having had an opportunity to confront the witness. The prosecutor may be said to be complicit in the violation, because presumably it was the prosecutor who sought admissibility. But it is the *court* that commits the violation by deciding to admit the statement notwithstanding the lack of confrontation.[9] Once again, if we imagine a world without prosecutors, this time a world in which the court gathers evidence against the accused, that should not mean the destruction of the confrontation right; Alice should not be allowed to testify, "Barbara chose not to come here today, but she asked me to relay to you her rendition of what she saw at the crime scene."

I am only arguing that there is no *per se* rule that a statement cannot be testimonial unless it is made to a government agent; the bottom line question is what the anticipation of the witness was. In some cases, as suggested by the examples I have given above, the anticipation of prosecutorial use is clear even though the statement is made to a private person. In other cases, there will be no good basis for inferring such an anticipation. And clearly, when the statement is made to a prosecutorial agent, that will often be a strong basis for drawing an inference that the declarant anticipated that the statement would be used in prosecution. Sometimes, indeed, the agent will announce this intention. But even if she does not, in some contexts the likely use is obvious from the nature of the statement and the open presence of a government officer. "Our neighbor parked his car strangely yesterday" said to one's spouse will probably appear to be a "casual remark to an acquaintance."[10] But now suppose that what prompted the statement was this question by a police officer: "We're investigating a murder in the neighborhood. Did you notice anything strange yesterday?" Then the statement seems plainly testimonial

A rule refusing to deem a statement as testimonial unless it was made to a government agent might be mitigated by stretching of the term government agent. Suppose a calm, collected statement to a privately employed 911 operator describing a crime that occurred several hours before. Perhaps the 911 operator may be considered a government agent because the company that employs her is under contract with government agencies. Or consider an emergency room doctor, who regularly receives, and passes on to the authorities, statements made by victims of crimes describing what occurred. Perhaps she, too, can be considered a government agent, even if she is not a public employee, because she is under a legal obligation to report the statement. But it would be better to avoid such manipulations, which cannot address all situations in any event, and acknowledge frankly that in some circumstances a statement may be testimonial even though it is not made directly to a government agent.

---

[9] The court is a state actor, and so the decision to admit the statement constitutes state action, a necessary element under the Fourteenth Amendment, which makes the Confrontation clause applicable to the states.

[10] *Crawford*, 124 S.Ct. At 1364.

VII. Interrogation[11]

[11] I have taken this Part from an entry called “The Interrogation Bugaboo” that I posted on the Confrontation Blog.

Since *Crawford*, some courts have said that a statement is not testimonial unless it is made in response to governmental interrogation.[12] And indeed, some have gone further, refusing to characterize a statement as testimonial unless it meets a restrictive definition of interrogation as "structured police questioning."[13] This idea has begun to distort police practices, as police ry to act in such a way that prosecutors can later argue that statements made to the police were not in response to interrogation.

I believe that the whole supposed interrogation requirement is entirely mistaken. Interrogation – like the participation of a government agent in the making of a statement – is a factor that in some contexts supports an inference that the statement is testimonial, but the statement may be testimonial even though it is not in response to interrogation.

Those who contend that interrogation is necessary for a statement to be deemed testimonial have language they can point to in *Crawford*, though it is quickly apparent that the language does not really support them. Sylvia Crawford's statements were made in response to police interrogation, and the Court held that, whatever else the category of testimonial statements might include, statements made in response to police interrogation certainly fall within it. Here are the passages in question, with emphasis added in each case:

> The Clause's primary object is testimonial hearsay, and interrogations by law enforcement officers *fall squarely within that class*.
>
> Statements taken by police officers in the course of interrogations are also testimonial *under even a narrow standard*. Police interrogations bear a striking resemblance to examinations by justices of the peace in England.
>
> In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers *fall squarely within that class*.

---

[12] E.g., People v. Bryant, 2004 WL 1882661 (Mich. App. 2004); United States v. Webb, 2004 WL 2726100 (D.C. Super. Dec. 22, 2004).

[13] State v. Barnes, 2004 WL 1773301 (Me. 2004); Fowler v. State, 809 N.E.2d 960 (Ind. App. 2004), transfer granted (Ind. Dec. 10, 2004); People v. Newland, 775 N.Y.S.2d 308 (N.Y. App.), leave to appeal denied, 3 N.Y.3d 679 (2004).

> *Whatever else the term covers*, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with to the abuses at which the Confrontation Clause was directed.

There is no indication, then, that statements not made during formal testimonial events -- a preliminary hearing, grand jury or a former trial -- must be in response to police interrogation to be considered testimonial. The Court is very clear that it is merely listing a core class of testimonial statements, a class that plainly includes the statements at issue in the case, and is deciding no more than that these statements are testimonial. Left for another day is the question of what additional statements, if any, shall be considered testimonial. It is true that the Court left open the possibility that it will not consider any statements beyond this core class to be testimonial. Indeed, the fact that the Court took the care, in footnote 4, to offer some elaboration on the meaning of "interrogation" -- saying that it was using the term in a colloquial sense, that it did not have to choose among definitions, and that "Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition" -- confirms that the Court preserved the possibility that the term would in some circumstances be decisive. But that is as far as the Court went in this direction. It offered no intimation that a statement not made in response to interrogation would not be considered testimonial. And it certainly did not suggest that if a statement was not "knowingly given in response to structured police questioning" it would not be testimonial; it merely said that a statement meeting that standard "qualifies under any conceivable definition."

So *Crawford* does not tell us that a statement must be in response to interrogation to be characterized as testimonial. And common sense tells us that there is no such requirement. Suppose that at trial a prosecutor gives an observer an opportunity to come to the front of the courtroom and then says, "Ms. Observer, I invite you to tell us what you know about this incident." After the witness does so, the prosecutor says, "Thank you. You may go." Of course, defense counsel objects because of a lack of confrontation. "But," says the prosecutor, "this was no witness. I did not subject her to any interrogation." The prosecutor is right that there was no interrogation, but of course we would expect the legal argument to be rejected sneeringly. What Observer was doing was testifying. It does not matter that her statement was not given in response to questions; nor would it matter whether she or the prosecutor took the initiative in arranging for her to give the testimony.

So now suppose the invitation comes not at trial but at the police station.: "Ms. Observer, if you care to make a statement, please feel free to do so. I will videotape it, and when we this perpetrator stands trial I will give the prosecutor the tape so that she can play it in front of the jury." I think it is equally obvious that a statement made in response to this invitation is testimonial. And now suppose an observer walks into the police station and says, "You don't know about a crime that has been committed, but I am now going to tell you, and I expect that you will then want to prosecute. Please record what I am about to say, because I expect you will want to use it at trial -- I do not like the idea of being under oath and having to answer questions by some aggressive defense lawyer." I cannot see a plausible basis on which this statement

should not be deemed testimonial. Or suppose the observer walks in to the police station with an affidavit completed, describing the crime. Does anyone seriously contend that this is not testimonial?

Now, of course, the statements in these hypotheticals are less formal than in the usual case, in which a witness makes a statement to a police officer in the field, perhaps before the officer is confident that a crime has been committed. But, for reasons that I will analyze in Part VIII, formality is not required to render a statement testimonial. If the declarant in that field situation understands full well that, once the officer receives the statement, it is likely to be used for prosecutorial purposes, it is testimonial. The declarant is creating evidence, and this critical reality is unaffected by the facts that the police officer was not confident until the moment that the statement was made that a crime had been committed, and that structured questioning by the officer was not necessary to secure the statement.

The bottom line is that if the declarant is making the statement with the reasonable anticipation of prosecutorial use, it is testimonial, even if it is made without questioning by government authorities or entirely on the witness's own initiative. Interrogation may, however, be a significant factor in indicating that the declarant did have this anticipation, because if the authorities are interrogating that is a factor that would often convey to the declarant the likelihood of prosecutorial use. But when the declarant is reporting a crime this factor is not necessary to characterize the statement as testimonial; she knows that she is conveying to the authorities information about a crime, and presumably she understands that they will use that information to invoke the machinery of criminal justice. To hold that such a statement is not testimonial is merely to try to avoid *Crawford* because it makes prosecutions more difficult.

VIII. Formality[14]

Some cases have indicated that a statement cannot be considered testimonial for purposes of the *Crawford* inquiry unless it was made formally.[15] Once again, I believe this view represents a misunderstanding of *Crawford*, and of the basic approach to the confrontation right that *Crawford* reflects.

Once again, courts this rule can find some language in *Crawford* to cite in their support, though ultimately, once again, the attempt is unavailing. First, drawing on a definition given by Noah Webster, Justice Scalia wrote that testimony "is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Second, Justice Scalia then offered this contrast: "An accuser who makes a formal statement to government officers

[14] I have taken this Part from an entry called "The Formality Bugaboo" that I posted on the Confrontation Blog.

[15] E.g., People v. Jimenez, 2004 WL 1832719 (Cal. App. 2d Dist. Aug. 17,2004); Mungo v. Duncan, 2004 WL 2988301 (2d Cir. Dec. 28, 2004) (dictum).

bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Third, one of the three formulations of the class of testimonial statements presented by Justice Scalia is the one adopted by Justice Thomas (with Justice Scalia himself joining) in his separate opinion in *White v. Illinois*:[16] "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."

Even on their face, none of these three passages adopts a formality rule. The Court did not say that testimony must be a solemn declaration; it said that testimony typically *is* such a declaration. The two polar categories, "a formal statement to government officers" and "a casual remark to an acquaintance," plainly do not exhaust all possibilities, and so presenting these two does not indicate where the boundary between testimonial and non-testimonial lies. As for the Thomas formulation, it is only one of three alternatives presented by the Court, and the only one that includes a formality rule. Moreover, it is not clear whether Justice Thomas regards confessions as being a subset of "formalized testimonial materials"; if so, it is not clear why, because confessions can be very informal, and if not, it is not clear why the two sets, "formalized testimonial materials" and "confessions," should be deemed to constitute the overall class of testimonial statements.

[16] 502 U.S. 346, 365 (1992)

In short, nothing in *Crawford* compels the conclusion that only formal statements can be deemed to be testimonial. And courts should not adopt such a rule, most importantly because it makes no sense. Consider this exchange:[17]:

> Police Officer: Please have a cup of coffee and make yourself comfortable. If that chair is too hard, please let me know and I'll get you a cushion.
>
> Witness: Thanks so much. The chair is fine, but I'd love some milk if you have it.
>
> Officer: Sure. Here you go. You know, I'm collecting evidence for the trial of Suspect on robbery charges. I know you'll find it inconvenient and unpleasant to testify in court, so why don't you tell me everything you remember, and then I'll tell the jury everything you've told me. We can do this very informally. In fact, I'm not even going to take notes. So just start talking whenever you're ready.
>
> Witness: OK. Well, I was just walking down Main Street, minding my own business . . . .

It seems to me clear that this statement is testimonial. Clearly, Witness is making a statement for use at trial and (if it mattered, which of course I do not think it should) Officer understands that as well. But just as clearly, the statement seems informal – or, put another way, it cannot be considered formal without robbing that term of all meaning. Finally, it seems obvious that this type of statement should not be admitted against accused if he never has an opportunity to cross-examine Witness. And -- here is the crucial part -- it is inadmissible not despite the lack of formality but, one may say, in large part because of it.

[17] I could make the same point by using the actual statements made by the informant in the decision of the Sixth Circuit in *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004), which rejected a formality requirement.

What formalities is this statement missing? The presence of the accused and the opportunity for him to cross-examine, most notably. Those, of course, are the essence of the confrontation right. Clearly, the logic could not be that because of their absence the statement is informal and therefore the confrontation right does not apply, because that is a Catch-22 that would prevent the right from ever applying. Apart from those two, the most obvious formality is the oath. But we already know from *Crawford* itself that the absence of the oath will not make the statement be considered non-testimonial; the majority opinion was quite explicit on this point,[18] and the statement at issue in the case was not given under oath. There are other formalities as well that usually accompany testimony -- the question-and-answer format and the general ceremonial nature of the courtroom -- but these are of lesser importance; I have already explained in Part VII why I do not believe interrogation is necessary to make a statement testimonial.

The bottom line is this: The absence of formalities does not render a statement non-testimonial. Rather, the absence of the most important formalities may make unacceptable as evidence a statement that is testimonial in nature. This casts a helpful light on dictionary definitions , like the one quoted by *Crawford*, that include formality as a component of testimony: Formality is an ideal, an aspect of testimony given in the optimal way, at trial in open court. The purpose of the Confrontation Clause, indeed, is to ensure that testimony be given in an acceptably formal way, in th presence of the accused and subject to cross-examination. To say that the absence of formality takes a statement that would otherwise be deemed testimonial outside the purview of the Clause would be to treat a defect of the statement into a virtue.

It would also give investigating officers precisely the wrong incentive. Whatever procedure is deemed to be a critical aspect of formality they would tend to avoid, so that statements given to them in full anticipation of evidentiary use would then be deemed non-testimonial and outside the rule of *Crawford*.

Once again, simply because this factor – formality – is not required to make a statement testimonial does not mean that it is irrelevant in determining whether the statement is testimonial – that is, that it was made in anticipation of prosecutorial use. For example, in *Crawford* the statement was videotaped, with an introduction by the investigating officer that could leave no doubt about why the statement was being taped. But when a witness to a completed crime knowingly makes a statement to the police or other authorities describing the crime, the statement should be deemed testimonial, no matter how informally it was taken, because the likely evidentiary use is so clear. The presence of formalities can reinforce that determination,

---

[18] *See Crawford*, 124 S.Ct. at 1365 n.3 ("We find it implausible that a provision which concededly condemned trial by sworn ex parte affidavit thought trial by unsworn ex parte affidavit perfectly OK.").

but they are not necessary to it.

IX. Excited Testimony

Before *Crawford*, the decision in *White v. Illinois*,[19] treating the hearsay exception for spontaneous declarations as a "firmly rooted" one for purposes of applying the reliability test of *Roberts*, gave a green light to prosecutors and courts to try cases by introducing statements made in 911 calls and to responding officers, even if the declarant did not testify. This is a practice that Bridget McCormack and I have called "dial-in testimony."[20]

Allowing this kind of evidence made it possible to try domestic violence cases by using the complainant's description of the incident, even without the complainant having testified in front of the accused. Many courts and prosecutors engaged in domestic violence cases give this practice a euphemistic name – "evidence-based prosecutions" – that is extraordinarily ironic, like the use of language in *1984*: These prosecutions are most notable for the critical evidence that they *lack*, testimony given by the complainant subject to cross-examination. Since *Crawford*, many courts have continued operating essentially as they did before. Indeed, I believe that some courts and prosecutors who are actively engaged in domestic violence cases, determined to maintain the practice, have adopted a "draw the wagons" approach. For example, consider what happened when the National Council of Juvenile and Family Court Judges published in its journal *Juvenile Justice Today* an article by two Florida judges saying that courts could essentially ignore *Crawford* by invoking the excited utterance exception to the rule against hearsay. Bridget McCormack, Jeff Fisher, and I, believing this article reflected a misleading ruling of *Crawford* that would eventually lead to many reversed convictions, wrote a response. The Council has refused to publish this article; it has said that its tone would be insulting to the judges, who are valued members of the organization. We have expressed mystification about this contention, and have offered to adjust the tone to whatever extent necessary, but the Council has declined to change its decision.[21] It is hard for me to perceive this decision as anything but censorship of views the Council finds unacceptable.

I believe a sensible view recognizes that just because a declarant is excited does not mean that the statement was not testimonial in nature. *Crawford* supports this view. In footnote 8, the Court said that "to the extent the hearsay exception for spontaneous declarations existed at all [at the time the Sixth Amendment was adopted], it required that the statements be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive

---

[19] 512 U.S. 346 (1992).

[20] Richard D. Friedman & Bridget McCormack, *dial-In Testimony*, 150 U.PA. L. REV. 1171 (2002).

[21] A link to our essay is posted on the Confrontation Blog, under the title, *A Case of Censorhip?*

any thing for her own advantage." *Thompson* v. *Trevanion,* Skin. 402, 90 Eng. Rep. 179 (K.B.1694)." In other words, it may be that there was no exception at all for spontaneous declarations; it may be that statements made contemporaneously with the events at issue may have been admitted only on non-hearsay grounds, as part of the events being litigated – as part of th *res gestae*, in the phrase usually now considered discredited. Certainly, nothing like the latter-day exception for excited utterances existed – and the reason presumably was recognition that narrative statements by victims of completed crimes almost certainly are made with anticipation of prosecutorial use, even though they may be made for other purposes as well.

I believe 911 calls provide some very close decisions; statements to responding officers are almost universally testimonial. I will adhere to the summary that Bridget McCormack and I have previously provided:

> . . . The more the statement narrates events, rather than merely asking for help, the more likely it is to be considered testimonial.
>
> Thus, if any significant time has passed since the events it describes, the statement is probably testimonial. When, as is often the case, the 911 call consists largely of a series of questions by the operator, and responses by the caller, concerning not only the current incident but the history of the relationship, the caller's statements should be considered testimonial. When O.J. Simpson called 911 to report an assault by his girlfriend, his call was testimonial, not a plea for urgent protection.
>
> Often, of course, a 911 call is such a plea. Even in this type of situation, a court should closely scrutinize the call. To the extent the call itself is part of the incident being tried, the fact of the call presumably should be admitted so the prosecution can present a coherent story about the incident. But even in that situation, the need to present a coherent story does not necessarily justify admitting the contents of the call. And even if the circumstances do warrant allowing the prosecution to prove the contents of the call, those contents generally should not be admitted to prove the truth of what they assert. If the contents of the call are probative on some ground other than to prove the truth of the caller's report of what has happened, then admissibility should be limited to such other ground. To the extent that the contents of the call are significant only as the caller's report of what has happened, such a report usually should be considered testimonial.[22]

X. Children

Children presented some of the most difficult issues under the *Roberts* regime, and they will continue to do so under *Crawford*.[23]

---

[22] *Dial-In Testimony*, 150 U.PA.L. REV. at 1243-44.

[23] I have addressed many of the issues involved here in *The Conundrum of Children, Confrontation, and Hearsay,* 65 LAW AND CONTEMPORARY PROBLEMS 243 (2002).

I tend to believe that some very young children should be considered incapable of being witnesses for Confrontation Clause purposes. Their understanding is so undeveloped that their words ought to be considered more like the bark of a bloodhound than like the testimony of an adult witness. And perhaps, in accordance with Sherman Clark's theory, we should consider that morally they are so undeveloped that we do not want to impose on them the responsibility of being witnesses.[24]

Even assuming a child is considered capable of being a witness, there remains the question of whether the particular statement should be considered testimonial. Here, the question of whether to take an objective or subjective view in determining whether a statement is testimonial becomes important. If the matter is viewed objectively, it probably does not make much sense to apply a "reasonable child" standard, and most courts that have confronted the issue have declined to do so. That is, an objective standard puts aside the particular incapacities of the given declarant, and it is not clear why youth and immaturity should be treated differently form other incapacities. On the other hand, there is something a little odd about asking, with respect to a statement by a young child, what the anticipation of a reasonable adult would be. If a subjective test is used, I do not believe the proper question for children should be whether the child anticipated prosecutorial use, in the sense of the formal procedures of the criminal justice system. It should be enough if the child understood that she was reporting wrongdoing and that some adverse consequences – including that Mommy would get mad – would be visited on the wrongdoer.

At least if a subjective test is used, it might also be worthwhile to embellish it with an estoppel rule: an investigator should not be able to withhold information about the likely use of the statement gratuitously, for the purpose of being able to contend that the statement was made without testimonial understanding. That rule seems to me to be correct as a matter of principle; whether it would be sensibly applied is another matter.

Conclusion

The question of whether a statement should be deemed to be testimonial will provide many interesting and perplexing issues over the next several years – fodder for Evidence exams! – and it will continue to provide at least many close factual issues long after that. But the existence of all these open questions, and the possibility of treating them in a wide range of ways, should not lead us to believe that *Crawford* is anywhere near as manipulable as *Roberts* was, or that it did not represent a great and beneficial development. *Roberts* did not articulate a doctrine worthy of respect, and so manipulation was inevitable. *Crawford* comes at least close to articulating the fundamental principle underlying the Confrontation Clause, a principle at the heart of our criminal justice system – that if a witness testifies against an accused she must do so face to face ,subject to oath and cross-examination. *Crawford* instantly made easy some cases – like that of Michael Crawford himself – that hade divided the lower courts. And if the Supreme

[24] *See* Clark, *An Accuser-Obligation Approach, supra*.

Court continues to hold the line, lower courts will have to listen. They will realize that there is a wide range of conceivable ways in which witness can testify – some formal, others not; some to government officers, others not; some in response to questioning, others not; some after calm reflection, others not. The Confrontation Clause has a simple but strong demand: Prosecution testimony must be given face to face with the accused, subject to cross-examination.