Crawford & Beyond
Exploring the Future of the Confrontation Clause in Light of Its Past
February 18, 2005
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.

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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