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Taking Confrontation Seriously Does Crawford Mean That Confessions Must Be CrossExamined

Mark A. Summers

TAKING CONFRONTATION SERIOUSLY: DOES *CRAWFORD* MEAN THAT CONFESSIONS MUST BE CROSS-EXAMINED?

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ABSTRACT

This article focuses on the applicability of the Supreme Court's decision in *Crawford v. Washington* to one subcategory of party admissions—defendants' confessions "taken by police officers in the course of interrogations." Such statements fall within *Crawford*'s core class of testimonial statements, which must be subjected to cross-examination either at the time they are made or at trial in order to satisfy the Confrontation Clause. In some post-*Crawford* cases, defendants have argued that the failure to comply with *Crawford* should bar the prosecution from using their confessions. The lower courts have uniformly held that *Crawford* does not apply to a defendant's own confession because such statements are defined by the Federal Rules of Evidence as "not hearsay," and *Crawford* applies only to "testimonial hearsay." In this article, I argue that, as a definitional matter, *Crawford* does apply to confessions, but that they should be exempted from *Crawford*'s cross-examination requirement on "historical grounds."

I. INTRODUCTION

The "*Crawford*"[1] revolution of 2004 radically changed how courts were to determine whether admitting hearsay violated a criminal defendant's Sixth Amendment confrontation rights by switching the focus from the reliability of the statement itself to the cross-examination of the person who made the statement.[2] As a result,

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[1] Crawford v. Washington, 541 U.S. 36 (2004).

[2] *Id.* at 68–69 ("In this case, the State admitted Sylvia's testimonial statement against

the focus of the Confrontation Clause[3] became whether or not hearsay statements that the *Crawford* Court called "testimonial" had been subjected to cross-examination.[4] Since 2004, a new "*Crawford*" case has reached the Supreme Court almost every term,[5] some of them grappling with the question *Crawford* intentionally left unanswered:[6] what does "testimonial" mean?[7]

One potential "*Crawford*" issue has yet to make it to the High Court: *Crawford*'s effect on the hearsay "exemptions" found in Federal Rule of Evidence 801(d)(2), collectively labeled as "An Opposing Party's Statement."[8] At first blush, this makes sense because party statements are deemed "not hearsay" by the Federal Rules of Evidence[9] and according to the *Crawford* Court, the "primary object" of the Sixth Amendment's Confrontation Clause is "testimonial hearsay."[10] Nonetheless, there is an argument that party statements should not be exempted from *Crawford* on those grounds because prior to the Federal Rules, party statements were treated as hearsay admitted subject to an exception.[11] Thus, their current non-hearsay status is largely a matter of labeling[12] and

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petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

[3] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

[4] *Crawford*, 541 U.S. at 51–52, 68 (holding that testimonial statements include, but are not limited to, affidavits, custodial examinations, prior testimony that was not cross-examined, or pre-trial statements that would reasonably be expected to be used prosecutorially).

[5] *See, e.g.*, Williams v. Illinois, 132 S. Ct. 2221 (2012); Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011); Michigan v. Bryant, 131 S. Ct. 1143 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Giles v. California, 554 U.S. 353 (2008); Whorton v. Bockting, 549 U.S. 406 (2007); Davis v. Washington, 547 U.S. 813 (2006).

[6] *Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" (footnote omitted)).

[7] *Bryant*, 131 S. Ct. at 1155 (finding a murder victim's statement to police non-testimonial where primary purpose of the interrogation was not "creating an out-of-court substitute for trial testimony"); *Melendez-Diaz*, 557 U.S. at 310 (determining that a drug lab technician's affidavit fell within *Crawford's* "core class" of testimonial statements); *Davis*, 547 U.S. at 828 (holding that statements are not testimonial if the " primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency").

[8] FED. R. EVID. 801(d)(2).

[9] *Id.* at 801(d) ("A statement that meets the following conditions is not hearsay . . . .").

[10] *Crawford*, 541 U.S. at 53.

[11] FED. R. EVID. 801(d) advisory committee's note ("Several types of statements which would otherwise literally fall within the definition [of hearsay] are expressly excluded from it . . . .").

[12] *See, e.g.*, GEORGE FISHER, EVIDENCE 393 (2d ed. 2008) ("Do not struggle to find meaning in this Orwellian labeling. You are best off thinking of all of the above categories [including

should not affect how they are treated for *Crawford* purposes.

Moreover, unlike non-hearsay statements exempted from *Crawford* scrutiny because they are not admitted for their truth,[13] party statements are both admitted for truth and often provide powerful evidence of a defendant's guilt.[14] And statements that are not hearsay because they are not offered for their truth presumably need not be subjected to cross-examination because their reliability is not an issue—that is, it does not matter whether they are true.[15]

This article will focus primarily on the applicability of *Crawford* to one subcategory of party statements: a defendant's confession "taken by police officers in the course of interrogations," which fall within *Crawford*'s "core class of 'testimonial' statements."[16] Confessions also satisfy the definition of hearsay, since they are out-of-court statements admitted for their truth.[17] And, finally, they appear to satisfy *Crawford*'s other requirements: the person who made the statement is unavailable as a witness at trial and was not cross-examined at the time the statement was made.[18] Nevertheless, no post-*Crawford* court has seriously considered whether confessions admitted without cross-examination violate the Confrontation Clause and many have admitted them into evidence simply because they are deemed not hearsay by the Federal Rules of Evidence.[19]

In spite of this simplistic approach, it may be that these courts have reached the correct result. One explanation is that *Crawford*'s inclusion of statements made in response to police interrogation

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Rule 801(d)(2)] as exceptions to the rule." (citing Roger Park, *The Rationale of Personal Admissions*, 21 IND. L. REV. 509, 509 n.3 (1988)).

[13] *Crawford*, 541 U.S. at 59 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)).

[14] *See* Bruton v. United States, 391 U.S. 123, 131–32 (1993).

[15] *See Street*, 471 U.S. at 414.

[16] *Crawford*, 541 U.S. at 51–52. Out-of-court statements made by criminal defendants to those not known to be police are also party admissions but they are not testimonial. *Id.* at 56 (observing that statements made in furtherance of a conspiracy are ordinarily "by their nature . . . not testimonial").

[17] FED. R. EVID. 801(c).

[18] *Crawford*, 541 U.S. at 53–54.

[19] *See, e.g.*, United States v. Townley, 472 F.3d 1267, 1274–75 (10th Cir. 2007) (admitting tape-recorded conversations as party admissions and coconspirator statements made in furtherance of the conspiracy); United States v. Tolliver, 454 F.3d 660, 665 (7th Cir. 2006) (admitting taped statements as party-opponent admissions); Casbar v. Ludwick, Civil No. 2:09 CV 12915, 2010 WL 2105133, at *3 (E.D. Mich. May 25, 2010) (admitting the defendant's statements made to police as party-opponent admissions); United States v. Andrews, No. 1:01-CR-93-TS, 2007 WL 1749221, at *5 (N.D. Ind. June 15, 2007) (finding the defendant's statements on videotape were not hearsay) (citing *Tolliver*, 454 F.3d at 665–66); People v. Thompson, No. 256744, 2005 WL 3304096, at *1 (Mich. Ct. App. Dec. 6, 2005) (admitting the defendant's statements because they fell within party-opponent rule).

within its "core class" of testimonial statements is meant to refer to the statements of others and not to the defendant's own statements.[20] After all, *Crawford* itself dealt with a statement made by the defendant's wife to the police and not the defendant's confession.[21] Another possibility is that there is a pre-Federal Rules justification for the treatment of party statements as "not hearsay" and that therefore their current categorization as such is not just semantics.[22] Finally, it may be that, since a criminal defendant is present at trial when her confession is admitted into evidence, she is not unavailable in the sense that the *Crawford* Court used that term.[23]

This article will consider, in turn, these possible explanations for the outcomes in the post-*Crawford* testimonial confession cases. It will also consider whether *Crawford* should apply to the other categories of party statements covered by Rule 801(d)(2). Finally, it will argue that a plausible reading of *Crawford* could result in the exclusion of confessions that were not cross-examined at the time they were made, and offer a solution that would avoid this unintended outcome.

II. DOES A DEFENDANT'S CONFESSION SATISFY *CRAWFORD*'S THREE PREREQUISITES?

A. Is a Defendant's Confession "Testimonial"?

Crawford applies only to "testimonial" out-of-court statements, the "comprehensive definition" of which the Court intentionally left to be worked out in future cases.[24] Nonetheless, the Court made it clear that a statement made in response to police interrogation falls squarely within its "core class" of testimonial statements.[25] To reach this position, Justice Scalia, writing for the majority in *Crawford*, started with the language of the Confrontation Clause: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[26] Justice Scalia then turned to history to determine whether the founders understood

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[20] *See* United States v. Crowe, 563 F.3d 969, 976 n.12 (9th Cir. 2009).

[21] *Crawford*, 541 U.S. at 38–40.

[22] *See* Freda F. Bein, *Parties' Admissions, Agents' Admissions: Hearsay Wolves in Sheep's Clothing*, 12 HOFSTRA L. REV. 393, 403 (1984).

[23] *See infra* Part II.C.

[24] *Crawford*, 541 U.S. at 68.

[25] *Id.* at 51, 52, 53.

[26] U.S. CONST. amend. VI.

"'witnesses against' a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between."[27] Notwithstanding this indication of a somewhat broader inquiry, Justice Scalia's focus thereafter is almost exclusively upon out-of-court statements that might have been offered in evidence at trial and whether cross-examination of such a statement was a pre-requisite to its admissibility.[28] One source of evidence similar to a modern police interrogation was the "Marian" bail and committal procedure,[29] which "required justices of the peace to examine *suspects* and witnesses in felony cases and to certify the results to the court."[30] And while there was once some doubt whether the cross-examination requirement applied to these interrogations, "by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases."[31]

Those who must be cross-examined (i.e., witnesses) are those who give testimony that is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[32] According to Justice Scalia, it is therefore such "testimonial" statements, when offered into evidence at trial, which must have been cross-examined at the time made if the person who made the statement is unavailable to testify.[33] Since "[s]tatements taken by police officers

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[27] *Crawford*, 541 U.S. at 42–43 (citations omitted).

[28] *Id.* at 43–56 (describing whether statements admitted at trial without cross-examination conformed to the framers' understanding of the Confrontation Clause). Indeed, Justice Scalia flatly rejected "the view that the Confrontation Clause applies of its own force only to in-court testimony." *Id.* at 50.

[29] *Id.* at 52.

[30] *Id.* at 44 (emphasis added).

[31] *Id.* at 46 (citations omitted).

[32] *Id.* at 51 (alteration in original) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (internal quotation marks omitted). It is clear that in the early common law period, criminal defendants were not witnesses, nor was there cross-examination in the way we use those terms today. *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1049 (1994). The defendant participated in the trial as an unsworn witness, unrepresented by counsel. *Id.*; *see also* E. M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 19 (1949) (stating that it was not unusual for the court to argue with a defendant during the course of a trial). The purpose of the trial "was to provide the accused an opportunity to explain away the prosecution case." Langbein, *supra*, at 1049. "The result was that, during the period in question [1554–1637], the examination of the prisoner, which is at present scrupulously, and I think even pedantically, avoided, was the very essence of the trial, and his answers regulated the production of the evidence . . . ." 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 325–26 (1883). Thus, during the common law trial, the defendant's participation was arguably the functional equivalent of testifying.

[33] *Crawford*, 541 U.S. at 53–54 ("The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness

in the course of interrogations are . . . testimonial,"[34] as a definitional matter, a defendant's own confession could be included within this category. Nonetheless, it seems clear that Justice Scalia meant to include only statements made by "[a]n accuser who makes a formal statement to government officers."[35]

Yet, reading a defendant's confession to the police out of *Crawford*'s definition of "testimonial" statements is problematic for several reasons. First, as the analysis above suggests, such an interpretation is contrary to the plain language of *Crawford*. Second, on its face, it leads to an unavoidable contradiction—an accusatory statement made by a third party to the police is "testimonial," while a self-accusatory statement made by a defendant under exactly the same circumstances is not.[36] And, finally, it would put *Crawford*'s understanding of the word "witness" as used in the Confrontation Clause at odds with the Court's interpretation of the same word in the Fifth Amendment.[37]

Well before *Crawford* was decided, Professor Akhil Amar made an argument for a *Crawford*-like reading of the Confrontation Clause that avoids these problems.[38] Professor Amar starts from the proposition that:

> In ordinary language, when witness *A* takes the stand and testifies about what her best friend *B* told her out of court, *A* is the witness, not *B*. Imagine, for example, that *B* were later asked whether she had ever before been a witness in a criminal prosecution. Surely *B* could say no . . . .[39]

Accordingly, "an out-of-court declarant whose utterance is introduced for the truth of the matter of asserted"[40] is only considered to be a witness when it is necessary to prevent violations of the Confrontation Clause by prosecutorial "sneakiness."[41] Thus, witnessing encompasses some kinds of out-of-court statements, such as "videotapes, transcripts, depositions, and affidavits when

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who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.").

[34] *Id.* at 52.

[35] *Id.* at 51.

[36] *See id.* ("[T]he Confrontation Clause . . . applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" (citing WEBSTER, *supra* note 32).

[37] "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

[38] AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 127 (1997).

[39] *Id.*

[40] *Id.* (internal quotation marks omitted).

[41] *See id.* at 128–29.

prepared for court use and introduced as testimony,"[42] including any such substitute testimony given by the defendant "under penalty of contempt."[43] This distinguishes Professor Amar's approach to confrontation from *Crawford*'s by excluding a defendant's confession to the police since there is no threat of contempt when the police interrogate a defendant. The confessing defendant is therefore not a witness and his confession is not "testimonial." The witness whom the defendant has the right to confront is the police officer who took his confession.

Could a post-*Crawford* Court adopt Professor Amar's stance by limiting the types of out-of-court statements that require confrontation to those made by defendants "under penalty of contempt"?[44] Unfortunately, this simple and sensible solution would require the Court to return to its pre-*Miranda v. Arizona*[45] understanding of what being compelled to be a "witness" means in the Fifth Amendment,[46] and that would result in assigning different meanings to the same word when used in different sections of the Constitution. As a matter of constitutional interpretation, this would not be a desirable outcome.

> Of course, sometimes words in a legal document mean something different from the same words in ordinary language. However, in a Constitution ratified by, subject to, and proclaimed in the name of, the people, it would be unfortunate if words generally could not be taken at face value. At any rate, surely a careful ordinary citizen reading the confrontation clause and pondering the word *witness* might look to see how the word is used elsewhere in the Constitution itself.[47]

The Court's pre-*Miranda* regulation of the admissibility of confessions resulting from police interrogations focused on whether they were "voluntary" and thus comported with the Due Process Clause of the Fourteenth Amendment.[48] By contrast, the Fifth

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[42] *Id.* at 129.

[43] *Id.* at 128.

[44] *See id.*

[45] Miranda v. Arizona, 384 U.S. 436 (1966).

[46] *Id.* at 510 (Harlan, J., dissenting) ("Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved . . . .").

[47] AMAR, *supra* note 38, at 127–28 (footnotes omitted).

[48] *See, e.g.*, Hopt v. Utah, 110 U.S. 574, 585 (1884) (holding that a confession that violated the common law voluntariness rule was inadmissible). In *Bram v. United States*, 168 U.S. 532 (1897), the Court used the self-incrimination clause of the Fifth Amendment to preclude a statement compelled by coercive police interrogation tactics. STEPHEN A. SALTZBURG &

Amendment's prohibition against compelling a person to be a "witness against himself" was limited to statements made under some form of judicial compulsion, which was not present during police interrogations.[49] Therefore, a defendant who confessed to the police was not a "witness."

Miranda expanded the concept of "witness" by extending the Fifth Amendment to reach statements made by a defendant during police interrogations[50] where "the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations."[51] *Miranda* clearly recognizes that a defendant is a "witness" during a police interrogation.[52] *Crawford* holds that the statements made during police interrogations are "testimonial" and that the witnesses who make them must be cross-examined.[53] It is thus not possible to limit *Crawford*'s "testimonial" statements to those made "under penalty of contempt"[54] without reaching the conclusion that the word "witness" means something different in the Sixth Amendment than it does in the Fifth.[55]

DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 651–52 (9th ed. 2010) (emphasis added) (citation omitted). *Bram*, "for the first time [made the admissibility of] confession[s] a matter of constitutional significance." Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 327 (1998). "The fact that the interrogation was conducted by a police officer and not a judge or examining magistrate was immaterial; the privilege against self-incrimination demanded the exclusion of confessions obtained by the application of any form of external pressure." *Id.* at 328. "Although it did not overrule *Bram*, for two-thirds of a century, the Court never explicitly and exclusively relied on the privilege against self-incrimination to suppress the use of a confession in another federal case. After *Bram* and until 1964, the Court turned to the Due Process Clause to decide coerced confession cases." SALTZBURG & CAPRA, *supra*, at 652 (citation omitted).

[49] *See* Morgan, *supra* note 31, at 27; *see also* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) ("The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt . . . .").

[50] In his dissenting opinion in *Miranda*, Justice Harlan observed that "[e]ven those who would readily enlarge the privilege [against self-incrimination] must concede some linguistic difficulties since the Fifth Amendment in terms proscribes only compelling any person 'in any criminal case to be a witness against himself.'" *Miranda*, 384 U.S. at 511 (Harlan, J., dissenting) (quoting Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From* Powell *to* Gideon, *from* Escobedo *to* . . ., *in* CRIMINAL JUSTICE IN OUR TIME 1, 26 (A. E. Dick Howard, ed. 1965)).

[51] *Miranda*, 384 U.S. at 461.

[52] Foreshadowing Justice Scalia's argument in *Crawford* that trial-like witnessing occurred during the Marian bail and committal procedures, Professor Morgan argued that the privilege against self-incrimination should apply during police interrogations because "[t]he function which the police have assumed in interrogating an accused is exactly that of the early committing magistrates." Morgan, *supra* note 31, at 27.

[53] Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

[54] *See* AMAR, *supra* note 38, at 128.

[55] This conclusion is not altered by the Court's two most important post-*Crawford*

B. Are Confessions Hearsay?

While there is "general agreement that the prosecution is entitled to introduce confessions, . . . the conceptual basis for this position is somewhat unclear."[56] The Advisory Committee Notes (ACN) to the Federal Rules of Evidence do little to elucidate what that conceptual basis might be. The ACN categorize statements by a party-opponent as not hearsay because their admissibility "is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule."[57] One explanation of the Advisory Committee's position is:

> The exceptions to the hearsay rule apply to admit hearsay when surrounding circumstances provide guarantees of reliability. There are no guarantees of reliability in the case of an admission. Therefore, admissions do not qualify for an exception to the hearsay rule. Nevertheless, admissions have been received into evidence since time immemorial. If they do not qualify as an exception, then they must have been received because they are not hearsay at all.[58]

However, there is circularity in this rationalization that begs the real question. The essence of hearsay, as it is defined in the Federal Rules, is "an out-of-court assertion, offered to prove the truth of the matter asserted."[59] Since a defendant's confession unambiguously meets this definition, how is it somehow mysteriously dubbed "not hearsay" just because it has been received in evidence from "time immemorial"?[60]

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elaborations on the definition of "testimonial," neither of which involved police interrogation of a defendant. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1150 (2011) (holding that statements made by a crime victim were not testimonial); Davis v. Washington, 547 U.S. 813, 828 (2006) (concluding that during an emergency, some of a 911 caller's statements were not testimonial); *see also* AMAR, *supra* note 38, at 128 (exploring the definition of the term witness).

[56] 1 MCCORMICK ON EVIDENCE § 144, at 520 (John W. Strong ed., 5th ed. 1999) [hereinafter MCCORMICK 5th ed.].

[57] FED. R. EVID. 801(d)(2) advisory committee's note. The authorities cited by the ACN in support of the language quoted in the text on balance viewed party statements as hearsay, subject to an exception to the hearsay rule. Bein, *supra* note 22, at 403 n.67.

[58] ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS § 7.07, at 274 (2d ed. 2004); *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.27, at 797 (4th ed. 2009) ("Individual Admissions").

[59] 2 MCCORMICK 5th ed., *supra* note 55, § 246, at 96; *see* FED. R. EVID. 801(c).

[60] Indeed, in another passage the ACN concedes the hearsay status of party admissions. FED. R. EVID. 801(d)(2) advisory committee's note (noting that "statements which would otherwise literally fall within the definition [of hearsay] are expressly excluded from it").

> Commentators have therefore sought to explain the use of party admissions by modern methods of classification. One group holds that party admissions are admissible because

One prominent twentieth century commentator tackled this conundrum head on. After examining and rejecting several theories for the admissibility of party statements for reasons other than as exceptions to the hearsay rule,[61] Professor Edmund M. Morgan concluded:

> Certain it is that extra-judicial admissions are received in evidence. Equally certain is it that they are received for the purpose of proving the truth of the matter admitted. It is likewise certain that they do not fall within that exception to the rule against hearsay which admits declarations against interest. *These are the facts, and from them the conclusion is inevitable that they are received as an exception to the rule against hearsay, and not that they are received on any theory that they are not hearsay.*[62]

According to Professor Morgan, such statements are admitted into evidence as exceptions to the hearsay rule because "[a]ll the substantial reasons for excluding hearsay" do not apply to these statements.[63] The party against whom they are offered cannot complain about the "lack of confrontation," the "lack of opportunity for cross-examination," or the fact that she "was not under oath."[64] Thus, Professor Morgan faced the inescapable fact that confessions fall squarely within the definition of hearsay and that they are admissible in evidence as an exception to that rule. Given the definition of hearsay, the logic of this position is unassailable.[65]

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they are analytically "not hearsay." The other group concedes the hearsay nature of party admissions, but argues that they constitute a desirable exception to the hearsay rule.

Bein, *supra* note 22, at 403 (footnote omitted).

[61] Edmund M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355, 355–59 (1921) (rejecting arguments that extra-judicial party admissions were treated the same as judicial admissions, that they were evidence of the state of mind of the declarant, that they impeached the declarant's position at trial and therefore were not admitted for their truth, or that they fell within the declarations against interest exception to the hearsay rule).

[62] *Id.* at 359–60 (emphasis added). Morgan consistently advanced this position. *See, e.g.*, Edmund M. Morgan, *Admissions*, 12 WASH. L. REV. 181 (1937) (discussing different views on admissions as evidence); Edmund M. Morgan, *Some Suggestions for Defining and Classifying Hearsay*, 86 U. PA. L. REV. 258 (1938) (discussing how to classify hearsay).

[63] Morgan, *supra* note 60, at 361.

[64] *Id.*

[65] Florida treats party admissions, including confessions, as hearsay subject to an exception to the hearsay rule. FLA. STAT. § 90.803(18)(a) (2012). Professor Ehrhardt, the leading commentator on Florida evidence, comparing the federal and Florida approaches, concludes that while "there is a difference in the method of defining whether it is an exception or an exclusion, an admission is admissible in the same circumstances under both the federal and Florida codifications. It is a distinction without a practical difference." 1 CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 803.18, at 965 (2012). *See also* FISHER, *supra* note 12, at 393 ("You are best off thinking of all of the above categories [including 801(d)(2)(A)] as

Confessions, therefore, should be classified as "testimonial hearsay" for *Crawford* purposes.

C. Are Criminal Defendants Unavailable Witnesses?

Despite the categorization of a confession as "testimonial hearsay," *Crawford*'s cross-examination requirement would apply only if the declarant is unavailable as a witness at trial.[66] But what exactly does unavailable mean? Does it mean unavailable entirely, or unavailable to the party seeking to introduce the out-of-court statement? If unavailable means unavailable to the party offering evidence of an out-of-court statement, then a criminal defendant is clearly unavailable as a witness when the prosecution offers her confession in its case-in-chief.[67] The Federal Rules of Evidence define the relevant form of unavailability: "A declarant is considered to be unavailable as a witness if the declarant: (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies . . . ."[68] This test of unavailability clearly applies to a criminal defendant who has a valid claim of privilege that prevents the prosecution from calling her as a witness.[69] So, at least in that sense, a defendant is unavailable as a witness at the time the prosecution offers her confession during its case-in-chief.[70]

On the other hand, a criminal defendant is clearly not unavailable as a witness in any absolute sense. She has the right to testify on her own behalf.[71] Moreover, she has an advantage that other witnesses do not have—the Confrontation Clause guarantees her right to be present in court while the prosecution witnesses testify.[72] Indeed, the fact that the defendant has that advantage, as well as the option to testify, seems to undergird the admissibility of confessions as exceptions to the hearsay rule. Thus, the defendant

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exceptions to the [hearsay] rule.").

[66] Crawford v. Washington, 541 U.S. 36, 59 (2004) ("Testimonial statements of witnesses absent from trial have been admitted only where the declarant is *unavailable*, and only where the defendant has had a prior opportunity to cross-examine." (emphasis added)).

[67] *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.5, at 1136 (4th ed. 2004).

[68] FED. R. EVID. 804(a)(1). A valid claim of marital privilege is why Sylvia Crawford, whose out-of-court statement was offered in evidence by the prosecution, was "unavailable" as a prosecution witness in *Crawford*. *Crawford*, 541 U.S. at 40.

[69] *See* Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

[70] *See* United States v. Lilley, 581 F.2d 182, 187 (8th Cir. 1978) (holding that the defendant's husband was unavailable to prosecution as a witness during its case-in-chief due to defendant's invocation of marital privilege).

[71] Rock v. Arkansas, 483 U.S. 44, 51 (1987).

[72] 1 MCCORMICK 5th ed., *supra* note 55, § 252, at 121.

against whom such evidence is offered "is in no position to object on the score of lack of confrontation or of lack of opportunity for cross-examination,"[73] for, as Professor Morgan observed:

> He [the in-court witness] is confronting the very person whose statements he is reporting, he is subject to cross-examination by counsel who has at his elbow the person who knows all the facts and circumstances of the alleged statements and who is therefore in the best possible position to conduct a searching inquiry, and, finally, the declarant may himself go upon the stand and deny, qualify or explain the alleged admissions.[74]

This may be a plausible rationale for excepting confessions from the hearsay ban, but it does not address whether a defendant who has the *option* to testify at the point when the prosecutor offers the confession in evidence is "available" as a witness, thereby satisfying *Crawford*.

A case that may shed some light on this question is *United States v. Owens*.[75] There, the Supreme Court considered whether a prosecution witness who has suffered a profound memory loss "is subject to cross-examination," a pre-requisite to the admission of his out-of-court identification of the defendant.[76] Justice Scalia wrote for the Court that "a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions."[77] *Owens* means that in order for the prosecutor to introduce an out-of-court identification, she must call the witness who made the identification so that she may be cross-examined.[78]

By analogy, *Crawford*'s cross-examination requirement must also mean that the prosecutor must call the witness who made the out-of-court statement. This criterion is not met when the prosecutor offers the confession of a criminal defendant, even though the defendant is physically present in court at the time.

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[73] Morgan, *supra* note 60, at 361.

[74] *Id.* This view is consistent with Professor Amar's interpretation of the confrontation right, which would apply to the witness who reports the hearsay statement in court and not to the out-of-court hearsay declarant. AMAR, *supra* note 38, at 127.

[75] United States v. Owens, 484 U.S. 554 (1988).

[76] *Id.* at 555, 561; FED. R. EVID. 801(d)(1)(C).

[77] *Owens*, 484 U.S. at 561.

[78] *Id.* at 558.

III. *CRAWFORD*'S APPLICABILITY TO OTHER PARTY STATEMENTS

Confessions are not the only party statements that some lower courts have exempted from *Crawford* simply because they are deemed "not hearsay."[79] Subsections (B)–(E) of Rule 801(d)(2) apply to statements made by others that are attributed to the defendant.[80] With the exception of adopted statements,[81] which must be made in the defendant's presence,[82] the argument is even stronger that *Crawford*'s cross-examination requirement should apply to these statements,[83] despite their designation as "not hearsay," because the Federal Rules do not require that the defendant be present when such statements are made or even that she be aware of their contents.[84] Thus, the defendant may not be able to provide her counsel with ammunition to cross-examine the witness who appears in court.[85] Nor does the defendant have the option to testify that the statement was not what she said.[86] Finally, and perhaps most obviously, since the declarant is someone other than the defendant, cross-examination is possible.[87]

Cross-examination of a declarant who makes a statement that is attributed to a defendant is also particularly important because, unlike statements admitted as hearsay exceptions, party statements need not be predicated on personal knowledge and are free from the restrictions placed upon opinion evidence.[88] This point is well illustrated by the leading post-Federal Rules case on the admissibility of an agent's statements.[89] In that case, the agent's

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[79] *See* United States v. Hargrove, 508 F.3d 445, 449 (7th Cir. 2007) (exempting co-conspirator statements); United States v. Yi, 460 F.3d 623, 634 (5th Cir. 2006) (exempting agent's statements); United States v. Jenkins, 419 F.3d 614, 618 (7th Cir. 2005) (exempting co-conspirator statements).

[80] *See* FED. R. EVID. 801(d)(2)(B)–(E).

[81] *Id.* at 801(d)(2)(B).

[82] *See* Jenkins v. Anderson, 447 U.S. 231, 248–49 (1980) (Marshall, J., dissenting) ("[S]ilence was traditionally considered a tacit admission if a statement made in the party's presence was heard and understood by the party, who was at liberty to respond, in circumstances naturally calling for a response, and the party failed to respond.").

[83] These statements are authorized by the defendant (Rule 801(d)(2)(C)), made by the defendant's agent (Rule 801(d)(2)(D)), or made by the defendant's co-conspirators (Rule 801(d)(2)(E)). FED. R. EVID. 801(d)(2)(C)–(E).

[84] The Federal Rules of Evidence recognize this distinction between statements made by a defendant or in his presence and those made by others and attributed to him by allowing impeachment of the latter but not the former. FED. R. EVID. 806.

[85] *See supra* text accompanying notes 71–74.

[86] *See supra* text accompanying notes 71–74.

[87] *See* FED. R. EVID. 801(d)(2)(C)–(E).

[88] *Id.* at 801(d)(2) advisory committee's note; *see* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL: STUDENT EDITION § 15.02[2] (7th ed. 2005).

[89] *See* Mahlandt v. Wild Canid Survival & Research Ctr., Inc., 588 F.2d 626, 630–31 (8th

statements, which were not based on personal knowledge, were admissible despite the fact that they contained misleading, even false, information.[90] Fortunately, these statements were used in a civil case and the agent was available to be called as a witness.[91] Imagine the consequences if these statements (assuming they were "testimonial") had been admitted in a criminal case as the statements of an un-cross-examined, unavailable agent. In such circumstances, *Crawford* should certainly bar the evidence if there was no cross-examination of the declarant.[92]

At least one post-*Crawford* court has taken this approach to party statements not made by the defendant herself. In *United States v. Baines*,[93] the court encountered the rare case of a testimonial co-conspirator declaration.[94] Finding that the statement was admissible hearsay, the court nonetheless concluded that:

> An examination of *Crawford* shows that the Supreme Court did not intend for its decision with respect to testimonial statements to be abrogated by a rule of evidence. While the Court cited co-conspirator statements as an example of non-testimonial evidence, its decision did not issue a mandate that *all* co-conspirator statements are to be considered non-testimonial. . . . What the Court did make clear is that testimonial statements are subject to the Confrontation Clause, whether or not such statements may also fall within a hearsay exception.[95]

Cir. 1978).

[90] *Id*; *see also* Bein, *supra* note 22, at 401 ("[The] utterances [in *Mahlandt*] were only the latest example of a class of evidence that must be ranked among the least trustworthy of all proof admissible at trial.").

[91] *See* FISHER, *supra* note 12, at 402–03.

[92] The logic of this conclusion is supported by Rule 806 of the Federal Rules of Evidence, which allows the credibility of an out-of-court declarant whose statements are admitted into evidence under Rules 801(d)(2)(C), (D), or (E) to be attacked or supported as "if the declarant had testified as a *witness*." FED. R. EVID. 806 (emphasis added). If these declarants are deemed witnesses, shouldn't *Crawford* require that they be cross-examined?

[93] United States v. Baines, 486 F. Supp. 2d 1288 (D.N.M. 2007), *aff'd*, 573 F.3d 979 (10th Cir. 2009).

[94] *Id.* at 1299. In *Baines*, the co-conspirator statements were made in response to police interrogation before the conspiracy was foiled by the discovery of drugs in the cars they were driving. *Id.* at 1296, 1297.

[95] *Id.* at 1299–1300 (citations omitted); *see also* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'").

IV. CONCLUSIONS

Some may dismiss this essay as sophistry. They might argue it is apparent that the Confrontation Clause guarantees a defendant's right to cross-examination and since it is impossible for a defendant to cross-examine himself, the confrontation right simply does not apply to the defendant's own confession.[96] But the point has been to suggest that a literal reading of *Crawford* could lead to unintended results. *Crawford* says that un-cross-examined "testimonial hearsay" statements of unavailable witnesses are inadmissible, period.[97] Whether they might be otherwise reliable hearsay is simply beside the point.[98] Thus, however unlikely it might be, it is possible to read *Crawford* to mean that the prosecution may not offer into evidence a defendant's out-of-court confession unless the defendant is on the witness stand. This outcome, of course, would be extremely costly in confession cases because prosecutors would be foreclosed in their cases-in-chief from using valuable evidence that is highly relevant to the determination of guilt. But, if *Crawford*'s interpretation of the Confrontation Clause is correct, that price is one exacted by our Constitution.[99]

It is a fair question whether there is a principled way the Court could avoid coming to that conclusion, aside from saying that the Confrontation Clause is simply inapplicable when the evidence is the defendant's confession. That route, as I argued above, would require the Court to face the question of whether "witness" in the Sixth Amendment has a different meaning than it has in the

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[96] *See* United States v. Lafferty, 387 F. Supp. 2d 500, 511 (W.D. Pa. 2005) ("Inherent in Justice Scalia's analysis in the *Crawford* opinion was the idea that the right of confrontation exists as to accusations of third parties implicating a criminal defendant, not a criminal defendant implicating herself.").

[97] *Crawford*, 541 U.S. at 68–69.

[98] *See* Whorton v. Bockting, 549 U.S. 406, 420 (2007) ("But whatever improvement in reliability *Crawford* produced in this respect must be considered together with *Crawford*'s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.").

[99] *Cf.* United States v. Leon, 468 U.S. 897, 941 (1984) (Brennan, J., dissenting) ("It is the loss of that evidence that is the 'price' our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment. Thus, some criminals will go free *not*, in Justice (then Judge) Cardozo's misleading epigram, 'because the constable has blundered,' but rather because official compliance with Fourth Amendment requirements makes it more difficult to catch criminals." (quoting People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)).

Fifth.[100] Needless to say, that is a question the Court might prefer to duck. There is, however, a hint in *Crawford* that suggests another path the Court might take.

In a footnote, Justice Scalia alluded to dying declarations and opined that they might be a *sui generis* exception to *Crawford*'s cross-examination mandate on "historical grounds," given the undisputed practice of admitting them as exceptions to the hearsay rule.[101] Though Justice Scalia does not say so, the need for this *sui generis* exception for dying declarations may be due to a characteristic they share with a defendant's confession to police: the impossibility of cross-examining the declarant at either the time the statement is made or at trial. What Justice Scalia proposed as a solution would work equally well for confessions since the "historical grounds" for the use of confessions as evidence are even more compelling than are those for dying declarations.[102] Ironically, however, this solution is premised on the reliability of statements that have long been admitted as exceptions to the hearsay rule,[103] an approach that is more in line with *Roberts*'s approach to confrontation analysis,[104] than it is with *Crawford*'s.

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[100] *See supra* text accompanying note 55.

[101] *Crawford*, 541 U.S. at 55 n.6.

[102] For example, the cases approving the admission of a defendant's voluntary confession are even older than the one cited by Justice Scalia in support of an "historical" exception for dying declarations. *Compare* Hopt v. Utah, 110 U.S. 574, 585 (1884) (acknowledging the admissibility of a voluntary confession), *with* Mattox v. United States, 156 U.S. 237, 249, 250 (1895) (acknowledging the admissibility of a dying declaration). *See also Crawford*, 541 U.S. at 47–49 (citing authorities indicating that at least by the eighteenth century, confessions were regularly admitted in evidence against criminal defendants).

[103] Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. 36 ("The Court has applied this 'indicia of reliability' requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" (quoting *Mattox*, 156 U.S. at 244)).

[104] There is some indication that, at least in some situations, the Court may be returning to reliability as the keystone to satisfying confrontation concerns. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011) ("But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. *In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.* Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause." (second emphasis added)). Justice Scalia dissented in *Bryant*, characterizing the Court's decision as "a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned." *Id.* at 1174 (Scalia, J., dissenting).