

THE END OF THE “VIRTUALLY CONSTITUTIONAL”?
THE CONFRONTATION RIGHT AND *CRAWFORD V.*
WASHINGTON AS A PRELUDE TO REVERSAL OF
MARYLAND V. CRAIG

*David M. Wagner**

I. INTRODUCTION

The Confrontation Clause is about the criminal defendant’s right “to be confronted with the witnesses against him.”¹ The Supreme Court reaffirmed as much in *Coy v. Iowa*,² holding: “We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”³ However, like all constitutional rules designed to restrain government, a temptation exists to set it aside when there is a “very good reason.” Officially, the Supreme Court’s term for “very good reason” is “compelling state interest,”⁴ by which the Court, in its view, uses that reason or interest to justify government conduct that otherwise is clearly unconstitutional. On that basis, the Court has allowed, on occasion, exceptions to collateral rights thought to be rooted in the Confrontation Clause.⁵ But when confrontation *itself* has been at issue, the Court has not used this technique, but rather a “totality of the circumstances” approach. This approach differs from “compelling state interest” mainly because it is more difficult to pin down.

A forthright holding that the government may deny a criminal defendant a confrontation with his accuser because a “compelling state interest” is present, in, say, combatting child abuse, would invite obvious and well-founded objections of the “slippery slope” variety. Arguably, the state does have a compelling state interest in combating all violent crimes, child abuse among the rest. Under this test, however, constitutional guarantees of due process in criminal prosecutions would quickly unravel.

* Associate Professor, Regent University School of Law. I would like to acknowledge the help of my research assistant, Vielka Wilkinson.

¹ U.S. CONST. amend. VI.

² 487 U.S. 1012 (1988).

³ *Id.* at 1016 (citing *Kentucky v. Stincer*, 482 U.S. 730, 748–50 (1987) (Marshall, J., dissenting)).

⁴ This test is commonly associated with the Court’s Equal Protection cases. But for an argument that it actually originated in First Amendment cases and then migrated to Equal Protection, see Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, Aug. 2006, <http://ssrn.com/abstract=934795>.

⁵ *Coy*, 487 U.S. at 1020–21 (collecting cases).

Instead of using the compelling state interest test as a “very good reason” to uproot the Confrontation Clause, *Maryland v. Craig*,⁶ which is a significant retreat from *Coy*, used a public policy rationale as a “very good reason” to act unconstitutionally. “We likewise conclude today that a State’s interest in the physical and psychological well-being of child abuse victims may be *sufficiently important* to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.”⁷ The “compelling state interest” test never put in an appearance, and no body of jurisprudence has arisen since *Craig* elaborating the “sufficiently important in some cases” test. But *Craig*’s many citations to the psychological literature showing the ubiquity of child abuse and the emotional fragility of child-witnesses shows that a public policy test was set and met.

To say that this change from the *Coy* approach elicited a strong dissent from Justice Scalia (author of *Coy*) understates the matter considerably. Joined in category-defying fashion by Justices Brennan, Marshall, and Stevens, Justice Scalia began by declaring that “[s]eldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion.”⁸

Fourteen years after *Craig*, the Court analyzed once more the Confrontation Clause, again with Justice Scalia writing for the Court, though in a factual situation not involving child abuse. Despite this difference, *Crawford v. Washington*⁹ contains dicta incompatible with *Maryland v. Craig* and portends that aberrant decision’s downfall.

Part II will review the facts and holdings of *Coy* and *Craig*. Part III will look at *Crawford* with emphasis on those aspects of that decision that undermine crucial elements of the *Craig* reasoning. Finally, Part IV will draw the obvious conclusion.

II. COY AND CRAIG

Both *Coy* and *Craig* involved criminal prosecutions for sexual assault on minors. *Coy* was accused of forcing himself on two thirteen-year-old girls who were having an outdoor sleepover in the neighboring yard.¹⁰ The Iowa Code allowed prosecutors to use either closed-circuit television or a screen to shield the complaining witness from having to see the defendant.¹¹ In *Coy*, pursuant to the Iowa Code, a screen was used.

⁶ 497 U.S. 836 (1990).

⁷ *Id.* at 853 (emphasis added).

⁸ *Id.* at 860 (Scalia, J., dissenting).

⁹ 541 U.S. 36 (2004).

¹⁰ *Coy*, 487 U.S. at 1014.

¹¹ IOWA CODE § 910A.14 (1987).

Many elements of the confrontation right were unassaulted by this procedure. For example, the identity of the witness was not kept secret, and the jury could see them. However, the witness could not see the defendant—indeed, this was the whole point of the screen. Likewise, the defendant could not see the witness. Also, no less importantly, the jury could not see how the witness and the defendant interacted once confronted with each other. In the paradigm case of a violation of the confrontation right, Sir Walter Raleigh, on trial for his life on the basis of a letter written by his alleged co-felon, the absent Lord Cobham, challenged his zealous prosecutor, Lord Coke, by stating: "The Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face"¹²

Besides legal history's vindication of Raleigh's position on the confrontation issue, the *Coy* Court also deployed an apposite quote from Shakespeare's *Richard II*, not because the Bard—or, more precisely, any of his characters, least of all that mercurial and self-absorbed ruler Richard II¹³—is a legal authority, but because Richard's command here concerning the quarrel of Bolingroke and Mowbray—

"Then call them to our presence. Face to face,
And frowning brow to brow, ourselves will hear
The accuser and the accused freely speak"¹⁴—

illustrates the commonly accepted connotations of confrontation during a formative period of the common law.

In *Craig*, both the procedure and the legal defense of it was different than in *Coy*, and the constitutional significance of these differences produced, of course, a difference within the Court. The witness—a six-year-old girl who had attended a preschool run by the defendant—testified from a separate room, with a closed-circuit television feed into the courtroom. The defendant could see her, but, as in *Coy*, she could not see the defendant; so, once again, the finder of fact had no opportunity to observe the accuser's demeanor in the presence of the defendant. Furthermore, the statute that authorized this procedure required a judicial determination that fear of the defendant prevented the child from testifying, which determination had been duly made.

While the requirement of "individualized findings"¹⁵ appealed to those such as former Justice O'Connor, for whom the expression "case-

¹² *The Trial of Sir Walter Raleigh* (1603), in 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1, 15–16 (T.B. Howell ed., London, R. Bagshaw 1809).

¹³ JOHN JULIUS NORWICH, SHAKESPEARE'S KINGS: THE GREAT PLAYS AND THE HISTORY OF ENGLAND IN THE MIDDLE AGES 1337-1485, at 115 (1999).

¹⁴ WILLIAM SHAKESPEARE, RICHARD II act 1, sc. 1.

¹⁵ *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (citing *Coy*, 487 U.S. at 1021) (noting that absence of such findings serves as a makeweight argument in support of its conclusion).

by-case basis” carries strong analytic significance, *Craig*’s reasoning really stemmed from the urgency of the child abuse problem. Hence, the dissent’s pungent reminders that rules constraining government conduct exist precisely for those occasions when the arguments for breaking them appear very, very good.

The legal reasoning deployed in *Craig* shrinks the confrontation right by raising it to a higher level of generality than the one selected by the Framers. The Confrontation Clause, *Craig* teaches, can be reduced to its “central concern,” and that concern is “to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”¹⁶ Any procedure that does this, the Court reasoned, satisfies the Confrontation Clause.¹⁷

III. CRAWFORD

A. Facts and Holding

In *Crawford*, the Confrontation Clause challenge was brought against a statement made by the defendant’s wife to policemen in the course of investigating the crime.¹⁸ Mrs. Crawford was “unavailable” within the meaning of hearsay jurisprudence because of the spousal testimonial privilege.¹⁹ The key factual issue in play was whether the victim, Kenneth Lee, had a weapon in his hand at the moment that Crawford wounded him. If he did not, Crawford was guilty of assault (which he was ultimately convicted of based on the strength of Mrs. Crawford’s out-of-court statement, introduced as evidence), or perhaps even attempted murder (of which, as it happened, the trial court acquitted him). If Lee did have a weapon, then a self-defense claim could stand.

¹⁶ *Id.*

¹⁷ *Id.* at 862 (Scalia, J., dissenting) (“This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was ‘face-to-face’ confrontation.”).

¹⁸ *Crawford v. Washington*, 541 U.S. 36 (2004).

¹⁹ The Court noted, but “expressed no opinion on,” the question of whether a Confrontation Clause objection to hearsay testimony may be raised by a defendant who is himself the cause of the declarant’s unavailability through his invocation of a traditional evidentiary privilege such as the spousal one here. The Washington Supreme Court did not hold back on this issue, holding that it was an unacceptable “Hobson’s choice” to force a defendant to choose between his rights under the Confrontation Clause and an otherwise-available evidentiary privilege. All agree that the confrontation right is forfeited if the defendant causes the declarant’s unavailability by foul play, rather than by standing on a long-established right. *Id.* at 42 n.1 (quoting *State v. Crawford*, 54 P.3d 656, 660 (Wash. 2002)).

Crawford’s own testimony affirmed weakly, with many hedges, that Lee did in fact have a weapon. Mrs. Crawford’s out-of-court statement tended to show that he did not, hence its value to the prosecution.²⁰ Incredibly, the Washington Supreme Court held that Mrs. Crawford’s statement, though made out of court, and without opportunity for Mr. Crawford to cross-examine, nonetheless had “sufficient indicia of reliability” precisely because it was substantially *the same* as Mr. Crawford’s.²¹ It is difficult to reconcile this finding with the state’s zeal to introduce Mrs. Crawford’s statement to *dispute* Mr. Crawford’s testimony, or with the jury’s guilty verdict on the assault charge.

All three state courts that handled this case were trying (“in utmost good faith,”²² grants the U.S. Supreme Court) to implement the high Court’s ruling in *Ohio v. Roberts*,²³ under which testimonial hearsay, without cross-examination, nonetheless survives a Confrontation Clause challenge if it falls within a recognized hearsay exception or bears other indicia of reliability.²⁴ While not disputing the outcome of *Roberts* (“admitt[ing] testimony from a preliminary hearing at which the defendant had examined the witness”²⁵), the *Crawford* Court overrules the *Roberts* holding that even unconfrosted hearsay may be admitted if it “falls under a ‘firmly rooted hearsay exception’ or bears ‘particularized guarantees of trustworthiness.’”²⁶ Having identified exclusion of *ex parte* testimony, such as was used against Sir Walter Raleigh, as the principal historical purpose of the Confrontation Clause, the Court held that the *Roberts* rule “admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.”²⁷ Therefore, Mrs. Crawford’s statement should not have been included, and the state supreme court decision upholding Mr. Crawford’s conviction was reversed.²⁸ We move now to the implications for *Maryland v. Craig*.

B. A Time-Bomb Underneath Craig

There are several holdings in *Crawford* that throw the continuing validity of *Maryland v. Craig* into grave doubt. At a minimum, in a

²⁰ *Id.* at 39–40.

²¹ *Id.* at 41.

²² *Id.* at 67.

²³ 448 U.S. 56 (1980).

²⁴ *Id.* at 66.

²⁵ *Crawford*, 541 U.S. at 58.

²⁶ *Id.* at 60 (quoting *Roberts*, 448 U.S. at 66).

²⁷ *Id.*

²⁸ *Id.* at 69.

properly presented case,²⁹ the Court will have to choose between overruling *Craig* and dismissing as dicta certain explanatory phrases in *Crawford* that either are in fact holdings, or else are nonetheless so closely tied to the holding each explains, that to dismiss them as dicta will be to sail against the wind of the opinion. I will consider these one by one.

“The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts.”³⁰ According to the *Craig* dissent, this was precisely what the *Craig* Court did: it created an open-ended exception to the confrontation right—the exception is open-ended because the public’s sense of urgent public policy,³¹ as well as the Justices’ interpretation of that sense, is inherently unpredictable. A public policy deemed urgent and compelling by the public and the Court may, according to *Craig*, “outweigh, at least in some cases, a defendant’s right to face his or her accuser in court.”³² But “[t]he purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant’s right to face his or her accuser in court.”³³ “For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it.”³⁴ “We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.”³⁵

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.³⁶

Of course counsel for Sandra Craig could cross-examine the child witness. But the text-parsing methodology that the Court here rejects is exactly what it engaged in, and what the dissent criticized, in *Craig*:

The reasoning [of the *Craig* Court] is as follows: The Confrontation Clause guarantees not only what it explicitly provides for—“face-to-face” confrontation—but also implied and collateral rights such as

²⁹ The Court was recently petitioned to issue a writ of certiorari to review the judgment of the Wisconsin Court of Appeals in *State v. Vogelsberg*, 724 N.W.2d 649, 2006 WI App 228, petition for cert. filed, 2007 WL 776725 (U.S. Mar. 14, 2007) (No. 06-1253).

³⁰ *Id.* at 54.

³¹ *Maryland v. Craig*, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting).

³² *Id.* at 853 (majority opinion).

³³ *Id.* at 861 (Scalia, J., dissenting).

³⁴ *Id.* at 870 (Scalia, J., dissenting).

³⁵ *Id.*

³⁶ *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for—“face-to-face” confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right.³⁷

In *Crawford*, as we have seen, the Court specifically rejected the process of raising a specific right to a high enough level of generality that, the general right once secured (supposedly), the specific right can then be ignored.³⁸ *Crawford* affirms what *Craig* evaded: the Sixth Amendment says in effect, “Read my lips: to be CON. FRONT. ED. with the witnesses against him.”

“The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability.”³⁹ Likewise, the *Craig* Court allowed a jury to hear evidence, tested by some elements of the adversary process but not by confrontation, based on a mere judicial determination (authorized by statute) of—not even reliability, but the child-witness’s emotional needs. The Court’s rejection of such doings in *Crawford* suggests a rejection of the doings of *Craig*, not meaningfully distinguishable, in an appropriate future case.

“It is not enough to point out that most of the usual safeguards of the adversary process attend the statement, when the single safeguard missing is the one that the Confrontation Clause demands.”⁴⁰ To this declaration from *Crawford*, compare this one from the *Craig* dissent:

The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional, I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction.⁴¹

Or consider this passage from *Crawford*: “The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising.”⁴² So it is not only a matter of what the Confrontation Clause explicitly requires, but also of the nature of the

³⁷ *Craig*, 497 U.S. at 862 (Scalia, J., dissenting).

³⁸ See *supra* note 36 and accompanying text.

³⁹ *Crawford*, 541 U.S. at 62.

⁴⁰ *Id.* at 65.

⁴¹ *Craig*, 497 U.S. at 870 (Scalia, J., dissenting).

⁴² *Crawford*, 541 U.S. at 67.

Court's authority, if any, to nullify or even evade that meaning. And so the Court now, it seems, agrees.

But *Craig*, according to its dissenters, was to the contrary. From the *Craig* dissent: "In the last analysis, however, this debate [over the value of the confrontation right in the context of child-abuse prosecutions] is not an appropriate one. I have no need to defend the value of confrontation, because the Court has no authority to question it."⁴³ The *Craig* dissent's concern that the majority has exercised a power that "is not within our charge"⁴⁴ is echoed by the *Crawford* majority's concern that "[t]he Framers . . . were loath to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."⁴⁵ And the *Crawford* Court's holding that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation"⁴⁶ was presaged by the *Craig* dissenters' declaration that "the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was 'face-to-face' confrontation."⁴⁷

I submit that these comparisons demonstrate that, where the Confrontation Clause is concerned, the Court's acceptance of the "virtually constitutional" in place of the "actually constitutional" may be drawing to a close.

IV. CONCLUSION

It is becoming difficult to deny that zeal to combat child abuse led to strange and tragic failures of the criminal justice system during the 1980s.⁴⁸ Though this particular problem was not, so far as I have found, within the ken of the drafters of the Sixth Amendment, those drafters were undoubtedly aware of how a particular problem at a particular time could divert all attention to the gravity of the charges and away from the procedures in place that guarantee fairness in criminal trials.⁴⁹

But even to say this is to focus on underlying policy decisions that legislators must make (in keeping with the Constitution, of course),

⁴³ *Craig*, 497 U.S. at 869–70 (Scalia, J., dissenting).

⁴⁴ *Id.* at 870.

⁴⁵ *Crawford*, 541 U.S. at 67–68 (internal citations omitted).

⁴⁶ *Id.* at 68–69.

⁴⁷ *Craig*, 497 U.S. at 862 (Scalia, J., dissenting).

⁴⁸ See DOROTHY RABINOWITZ, *NO CRUELLER TYRANNIES: ACCUSATIONS, FALSE WITNESS, AND OTHER TERRORS OF OUR TIMES* (2003) (showing, *inter alia*, that operators of pre-schools—a category that included Sandra Craig—were especially vulnerable).

⁴⁹ See MARY BETH NORTON, *IN THE DEVIL'S SNARE: THE SALEM WITCHCRAFT CRISIS OF 1692* (2002).

where as we deal here with a policy *made by the Constitution itself*, and thus—in the interests of fair criminal procedure—unrevisable by legislatures *or by courts*, even for “very good reasons” supported by “widespread belief.”⁵⁰ “[T]he Constitution is meant to protect against, rather than conform to, current ‘widespread belief . . .’”⁵¹ *Crawford* bids fair to undo a recent but perennially recurring wrong.

⁵⁰ *Craig*, 497 U.S. at 853.

⁵¹ *Id.* at 861 (Scalia, J., dissenting).