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CRAWFORD AND *DAVIS*: A PERSONAL REFLECTION

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Thanks so much for the greeting. Thank you, Jim,[1] for that very gracious introduction. I have long admired Professor Duane's work, and I am delighted to be here in a conference under his auspices. I thank also the members of the Law Review for having organized this event. It is a wonderful conference, and I am very happy to be here.

The evening after I argued *Hammon v. Indiana*,[2] after we got home, I complained to my wife. I said, "I am never going to have a moment like this one." Even if I do get to argue another case in front of the Supreme Court—which could happen, but who knows—it won't be my first, but more significantly, it probably won't be as important. And it almost certainly won't just fall out of my scholarship as much as my arguments in *Hammon* were able to do. So I said, "It's as if this is my mid-life crisis point," at which my 13-year-old daughter perked up and said, "Does that mean we get a new car?" We still have the same beat-up cars that we had. But it was a fun and exciting experience to argue before the Supreme Court. If you ever have the opportunity, I suggest you seize it.

I have to say that when I stood up to argue *Hammon* I felt the wind at my back. I was basically a lawyer with an easy case, and there wasn't anything particularly unpredictable at the argument of *Hammon*. Now it got a little bit interesting, as I will explain later, because to a certain extent I was trying to argue the other case as well. But *Hammon* itself was sort of ordinary, normal law.

There was nothing really quite as awesome as the experience that I had a couple years ago sitting at counsel table as second chair at the *Crawford* argument, where I wasn't able to say a word, but sitting there

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* Ralph W. Aigler Professor of Law, University of Michigan Law School. This address was delivered on October 13, 2006, as a part of "*Crawford, Davis* & the Right of Confrontation: Where Do We Go from Here?," a symposium hosted by Regent University Law Review.

1 Addressing Professor James Duane of Regent University School of Law.

2 *Hammon* was the companion case to *Davis v. Washington*, 126 S. Ct. 2266 (2006).

and listening as the Supreme Court actually for the first time considered whether to adopt the testimonial approach to confrontation, which would, if adopted—and of course in the end it was adopted—cause such a radical transformation of the law. That, to me, was just astonishing and breathtaking to see happen before my eyes. And then, of course, when the decision came down,[3] it created, effectively, a whole new world in this realm. It means a great deal has to be written anew, which I think is very exciting. It is a wonderful time to be thinking about many issues afresh, and these issues aren't limited just to the Confrontation Clause, although many of them do concern the Confrontation Clause itself. One thing let me say right off: I don't think it is a concern. I do hear it expressed sometimes: "Oh well, the new law of the Confrontation Clause is very uncertain; it may be open to manipulation and all of that." It is awfully early. It is awfully early. The Court is just beginning this. I am hoping that within a generation or so there is going to be a good, robust understanding of not only what the Confrontation Clause is all about, but how it applies in most situations.

Let me start by talking a little bit about this testimonial approach. *Testimonial* is not just an academic choice of a term. The Confrontation Clause says, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[4] People say this language seems to keep hearsay out, but it can't keep all hearsay out because that would be impractical. So the question becomes, Which hearsay is covered by the Confrontation Clause? And I think that is the wrong way of thinking about this.

Hearsay, for those of you who have studied evidence or remember an evidence course, is a massive concept—it is very, very broad. But hearsay is not a creature of the Confrontation Clause altogether. The confrontation right long predates hearsay law as we know it. The Clause is an expression of an ancient right, a right that has been fundamental to the Anglo-American system of criminal jurisprudence, and that in fact predates that system by centuries.[5] It is a fundamental right as to *how* witnesses testify. That is what it is about.

One could imagine many different types of systems by which witnesses could testify. For instance, the ancient Athenians had witnesses write their testimonies and put them in a sealed pot, which would then be opened at trial. Continental European courts had written depositions taken before a judicial officer and later presented at trial. These are plausible methods by which witnesses could testify.

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

4 U.S. CONST. amend. VI.

5 *See* Charles Nesson, *Solomon's Sword: The Loser Gets Process*, 19 REGENT U. L. REV. 479, 479 (2006-2007).

One could imagine saying, "If you want to testify, what you do is call a special number (911 or some other number), or here is an address (an e-mail address or a website) to which you send your written testimony." Those are plausible ways in which a system could allow testimony or require testimony to be given. But since the sixteenth century, the norm in a common law court has been that testimony is given in one way. That one way, in a criminal case particularly, is in front of the accused, face to face. It is a time-honored expression that testimony be given "under oath, subject to confrontation," and as the right to counsel developed, "subject to cross-examination." That is the way witnesses give testimony. The Confrontation Clause is a rule about testimony.

I am not particularly a textualist. I am not particularly an originalist who gives preeminence to what the language of a clause of the Constitution meant at the time that it was adopted. I think that many clauses of the Constitution have to be interpreted and construed by taking other considerations into account. But in this particular case, I think the text of the Confrontation Clause does a pretty good job of expressing what this fundamental right is all about.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." It doesn't say anything about hearsay. It doesn't say anything about exceptions. It doesn't say anything about reliability. It states a fundamental procedural rule that has been central to our system: witnesses must testify in front of the adverse party. If we are talking about a criminal case, the prosecution's witnesses must testify in front of the accused.

So hearsay doesn't enter in. What we are talking about is testimony because testimony is what witnesses do. In English we have two separate words. We have *witness*, which is a person, and we have *testimony*, which is what the person gives. In many languages they are the same word, or at least the same root. For example, in French, a witness is *un témoin*, and testimony is *témoinage*. And it is a nice party game to ask someone to pick a foreign language, one that you have no knowledge of, and almost certainly the word for testimony and the word for witness have the same root. So if you don't like *testimonial* as a definition, use the word *witnessy* or *witnessish*. That is what the Confrontation Clause is all about.

Now, I have said that it may well be that there are other constitutional constraints. And maybe in some cases those constraints ought to be constitutional in nature—that is, in some cases it might be that even if the Confrontation Clause does not keep a statement out some other part of the Constitution should. But if a statement is not testimonial in nature, then whatever reasons there may be to exclude the statement, they are not what the Confrontation Clause is about. What the Confrontation Clause is about, what the confrontation right is

about, is a right to have witnesses testify in front of you, subject to oath and subject to cross-examination. Any system that doesn't allow that, that doesn't provide for that, is violative of the right.

Now, I want to emphasize the concept of *system*, to which I've just referred. I think that the confrontation right is meant to ensure a *system* of testimony providing an opportunity for confrontation. In looking at a particular case, we should not ask, "Does this look like testimony as we know it?" That is putting the emphasis in the wrong place. It is more a question of, "If this is allowed, would we be creating an alternative system, a different type of system, that allowed testimony without confrontation?"

In other words, it doesn't make sense to say, "Well, the way that statement was made, it doesn't look at all like testimony. There is no oath. There is no formality. There is none of that. So it is not covered by the Confrontation Clause." It wouldn't make sense, in other words, to say, "If a person wants to create evidence for use at trial, all that person has to do is call up a government agent, a government prosecutorial agent, and say, 'Here is my testimony,' or, 'Here is the information that I want you to relay at trial. I am going on vacation.'"

That may not look like testimony as we know it in the sense that it is very informal. There are none of the protections that we are used to thinking of, but those are all parts of the problem. If that is allowed, then we have created a system in which this is how people can testify. They can create evidence for use at trial by calling up the cops and giving the information. I think we have to think in a functional sense about what testimony is, functional in the sense of its role in the procedure of adjudication. Testimony is basically creating evidence, creating information, and transmitting information with the intention, or the anticipation—that is another debate—that it will be used as part of the prosecutorial process.

Looking at it that way, I think the *Hammon* case really was an easy case. In *Hammon*, there was a domestic disturbance report. The police went to the Hammon home. Amy Hammon, the wife, came to the door. The police asked her what happened. She said nothing happened. They asked, "Can we come in?" "Yes." They found the husband. There were clear signs that there had been something going on, some sort of altercation. The husband said, "We had an argument. It never became physical." One cop stayed with the husband. One cop went with the wife in a separate room and asked her again what happened. This time she made an accusation. The officer said, "Will you give us an affidavit?" She agreed. The case was tried before *Crawford*, so of course the state court said, "Excited utterance, present sense impression, whatever—it all

comes in." And Hershel Hammon was convicted.[6] The trial lawyer did a good job of preserving the record. Now that, to me, seems to be a very easy case under *Crawford*.

Before *Crawford*, though, it was an easy case for the prosecution. All you had to do was somehow persuade the court that the statement was reliable, and that was a snap. All you had to do was bring it within a hearsay exception. The excited utterance exception was very broad. The present sense exception was very broad. The courts were very willing to allow it all in. But once you have that transformation in *Crawford*, saying that the Confrontation Clause is about testimony, then what I think you have to realize is that the system we have created, if this statement is admissible, is one that permits an accuser to make an accusation to the police by talking to them in her living room. She never has to take an oath; she never has to come to court; she never has to face adverse questions. To me it is hard to see anything that is much more in the teeth of the confrontation right than *Hammon*.

Davis was a hard case. There is no doubt that *Davis* was a hard case. Frankly, I had qualms about it from the beginning simply because I was afraid that if the Court took both cases there would be a tendency, a temptation, to split the baby; and I think that is probably what they did. I'll talk more about that in a minute. In *Davis*, there was a 911 call and the caller, the complainant, Michelle McCottry, was in evident distress. She told the operator she had just been beaten up. Actually, she began by speaking in the present tense, saying, "He's here jumpin' on me again." It does appear, though, that by the time she made the call, the attack had ended. He had actually left at least the room, and very soon he was out of the house.[7]

Davis was harder than *Hammon*. There is no doubt about it. Because in this case, the event, if it wasn't going on at the time the accusation was made, had just happened. When she is calling, she is not in the presence of the police or of anybody else who could protect her. The accused is not accompanied by the police; he is at large. All of this makes it a much tougher case, and it is much harder to say that her intention was to create evidence for use at trial.

Nevertheless, I thought that Davis should have won. One fact that is striking to me is what the 911 operator said: "[The police are] gonna check the area for him first, and then they're gonna come talk to you."[8] That may not be actually what they did, but that was the nature of the conversation. She wasn't saying, "Oh, no, no, no! They have to come here and protect me." She never gave any indication that she was worried

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6 *Davis*, 126 S. Ct. at 2272–73.

7 *Id.* at 2270–72.

8 *Id.* at 2271.

about her own safety within the next few minutes. Obviously, she wanted Davis stopped, but it seems to me that she was looking for some kind of intervention by the criminal justice system, such as enforcement of the restraining order that was outstanding. It seems to me that if she were worried that he was going to hit her again imminently, that the thing that she would have asked for—the thing that the 911 operator would have offered—was for the police to come to the house right away, not go on a wild-goose chase looking around the streets of the city for him.

The other reason why I think that Davis should have won, apart from the facts and the sense that the information was being transmitted, in part, for intervention of the legal system, was that I felt that both cases could be resolved by the adoption of a simple rule—a simple rule that I advocated while arguing *Hammon* but that would have worked with *Davis* also. (I was hoping very hard that Davis would win.) The simple rule, one that has a great deal of intuitive appeal, is that an accusation made to a police officer or a law enforcement officer is testimonial and is, therefore, within the core of the Confrontation Clause. That is a principle, frankly, that my eight-year-old son is able to understand quite well, and I am working on my seven-year-old daughter as well. The basic idea is that you can't just tell the cops that somebody did something bad and make it stick. You have to come to court.

I am speaking cheekily, of course, by referring to my kids. On the other hand, it kind of bothers me that I have given so much of my professional life to something I can't even make complicated. It is something that a kid can understand. I do really believe that there is something very satisfying about a constitutional right that can be expressed in language that a young kid can understand. I think it has a robust quality to it. When I explained the cases before the arguments to people, they said, "The Supreme Court has to decide *that*? That is not clear?"

I was hoping that the Court would adopt that simple principle, but they didn't. And I think it reminded me of the "bends," the disease that deep-sea divers get if they come up too fast. I think, in a way, that *Davis* was creating a "bends" problem for the Supreme Court. It was just too radical a transformation over too short a time from the pre-*Crawford* regime. All of a sudden 911 calls, even the very first frantic statements in 911 calls, wouldn't be admissible. I think it was just too much to adopt. I confess that at an earlier time in my own scholarship I would have been more hesitant to reach that result, but I do think it was justifiable as a matter of principle and would have yielded a cleaner result. But that is not the way they came out.

Interestingly, the Court was nine to nothing against Davis, and eight to one in favor of Hammon with only Justice Thomas dissenting.

The opinion by Justice Scalia bears lots of marks of compromise. I think that, in the future, this will be regarded as one of those opinions from the first year of the Roberts Court in which the Court was trying hard to get consensus. After the argument, if one had shown me the opinion that was ultimately issued under Justice Scalia's name, I would have been astonished because some of what the opinion contained was so contrary to points he had made at argument. That was startling, but I think that this was an attempt to get the Court to speak together.

I will say that I was very pleased to get Justice Ginsburg's vote for two reasons. One was that I would have been unhappy, given that these were both domestic violence cases, if one of the votes against us in *Hammon* was that of the only woman on the Court and a woman who is an icon of the women's movement. The other reason was that, the night before the decision came down, I said to my wife, "I think I might get Ginsburg's vote." I thought she might go my way in *Hammon* because that would make her look more reasonable in *Davis*, where she was sure to come out the other way. My wife said, "The fact that you even think of that as a possibility shows that you just don't understand women." So that was very—

Professor Christopher Mueller: What is she saying now?

Professor Friedman: She still doesn't think I understand women, but she will give me that anyway, you know. I would have rather had five votes in *Davis* but that was easily worth losing Justice Thomas's vote. I will say that.

I won't get into the particulars of the opinion very far, though I will be happy to answer questions. I mean, from my perspective, there is some good, some bad in it. One of the good things is that they clearly say, with regard to *Hammon*, that it is an easier case. For those who thought that maybe they were just going to limit *Crawford* to very formal statements, it didn't happen—though they do seem to be flirting with an idea of some kind of formality requirement.[9] We will see what happens with that.

There are other aspects that I don't like at all. One of them is that in regard to statements of identity—as in *Davis*, where she named her assailant—the Court said in effect, "Well, this is important so that the police can resolve this ongoing emergency," which is the standard they are adopting because the police need to know the identity of the person

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[9] *Davis*, 126 S. Ct. at 2278 n.5 ("We do not dispute that formality is indeed essential to testimonial utterance."); *see also* Robert P. Mosteller, *Softening the Formality and Formalism of the "Testimonial" Statement Concept*, 19 REGENT U. L. REV. 429 (2006-2007); Roger C. Park, *Is Confrontation the Bottom Line?*, 19 REGENT U. L. REV. 459, 459–62 (2006-2007).

to know whether they are dealing with a violent felon.[10] I must confess, I scratched my head at that. I said, "Well, wait a minute. Let me understand. When the police respond to a domestic disturbance report, unless they hear that this person has a prior charge against him, they say, 'Oh, no problem, la-di-da, we don't have to take much precaution.' But if they hear he has a prior charge, then they say, 'Oh, now we better be careful.'" That, I think, is one of those aspects that is just a matter of compromising. There was a good deal of trading back and forth. The opinion is also murky as to whose perspective controls the question of whether a statement is testimonial.[11] We can talk about that a little bit over the course of the next day.

It is important, I think, to resolve many issues that arise in the *Davis*-types of cases, that is, cases involving "fresh accusations," which is the way I think of accusations made shortly after the event. But in this context we have two poles. We know *Davis* now is not going to be considered testimonial. *Hammon* is. Somewhere in the middle there is a line, and I think we are going to have the usual process of the Court plotting out where this line is. We have got some sense of what is going to happen there. But there are many other unresolved issues not involving fresh accusations. Some of these issues are more open-ended and, in that way, more interesting. So let me list a whole bunch of them.

First, if I were a prosecutor, which I am not, it seems to me that one thing I would be pushing hard for would be to change regular hearsay law to make all prior statements by a witness who actually testifies in court admissible, as they are in some states, but not under the Federal Rules of Evidence. I think it would be a bad change of law, but I keep waiting for prosecutors to push very hard on this issue because under the case of *California v. Green*,[12] reaffirmed by *Crawford*, if the person who made the statement is now a witness in court, it doesn't matter what his or her memory is. It doesn't matter whether he is now testifying in contradiction to the prior statement. As long as you have a live body on the stand who happens to be the same body who uttered that statement, the Confrontation Clause is satisfied. Bad law, I think, but I would think prosecutors would want to take advantage of it.

A second change that I think would be much better would be to make depositions more readily available in criminal cases. Under Rule 15 of the Federal Rules of Criminal Procedure, a criminal deposition is still an extraordinary event. Some states make depositions much more routine. I would think that prosecutors would and should want to take depositions much more frequently to preserve testimony. Chris Mueller

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[10] 126 S. Ct. at 2276.

[11] *See* Park, *supra* note 9, at 462–64.

[12] 399 U.S. 149 (1970).

is going to be speaking about early cross-examination tomorrow.[13] And early depositions will raise a slew of issues as to whether it was too early. Did this deposition, at this time, give the defendant an adequate opportunity to cross-examine given further information that the defendant obtained later, etc., etc.? One issue that is going to be ripe for resolution very quickly is this: Is a deposition that was held for discovery purposes adequate to satisfy the confrontation right?

Those are some legal changes—statutory rules—that one might contemplate. Other issues that courts are going to have to resolve, and ultimately the Supreme Court, are governmental reports, autopsies, lab reports, and so forth. The courts are split on these right now, and I think the Supreme Court is going to have to enter the area rather quickly. Seems to me that these are clearly testimonial. They are made in contemplation of use in prosecution. Whether the lab technician is a member of the police force or not seems to me to be utterly irrelevant. If that is the line, then we know what will happen: all of this work is going to get farmed out to a private lab. Sometimes courts say, "Well, this is routine." Well, so what? All that means is that you are routinely violating the defendant's rights if you don't provide for confrontation.

There are going to be some tough issues, such as notice for example, notice of deportation. If somebody is being prosecuted for attempting to re-enter the country after previously being deported, and then the notice of deportation is introduced from several years before, is that testimonial? I think not, even though, I suppose, a fair number of people who are deported do try to re-enter later. I think there you can say, "Well, there hasn't been a crime committed, and probably a crime won't be committed, because the vast majority of people who are deported do not attempt to re-enter." So I think the notice of deportation probably should not be considered testimonial, though I admit some doubt—for why is this record kept *except* for the possibility that the person will attempt to re-enter at some point? But an autopsy report? I mean, it seems to me to be a clear case of a testimonial statement.

Next, burden-shifting statutes. Here again is an issue I think the Court is going to have to resolve rather quickly. Some of these statutes, particularly in the context of government reports, say the report comes in, but the defendant can subpoena the officer who made the report. The idea is that because you can subpoena the officer, you have confrontation. I don't think confrontation is satisfied by giving the defendant the ability to subpoena the officer. Frankly, that doesn't do anything more than the Compulsory Process Clause. To secure witnesses in your favor is a constitutional right. If the defendant wants to bring in

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[13] *See* Christopher B. Mueller, *Cross-Examination Earlier or Later: When Is It Enough to Satisfy* Crawford?, 19 REGENT U. L. REV. 319 (2006-2007).

the declarant, the defendant can try to do that. But if that satisfies confrontation, then the government can try its entire case by affidavit if they just say, "Here are our affidavits of everything that we want to put in. If you want to call witnesses, you call the witnesses."

I really hope the Supreme Court slaps that down. My concern is more than just prissiness of procedure. The opportunity to call a witness as your own is just not the equivalent of the ability to stand up and ask questions during cross-examination. If you want proof of that, I think the demonstration is this: How often does it happen that the prosecution puts a live witness on the stand who gives devastating testimony, and the defense counsel, at the end of direct, stands up and asks some questions during cross-examination? Answer: virtually all the time. Now, how often does it happen that some kind of hearsay statement is offered against the defendant and the defendant says, "Oh well, I'll just bring in the declarant and make him my own witness and then ask questions"? Virtually never. The reason is that it is foolhardy to bring that person in and put him on the stand. The jury will say, "Whoa, the defense lawyer must really have something up her sleeve to be doing that. This is going to be good." Then what happens if the witness doesn't budge from the prior statement? The defense lawyer has egg in her face. Most of the time, defense lawyers are unwilling to take that chance. So the opportunity to call the witness just isn't the same as the chance for cross-examination, and I hope the Supreme Court will be persuaded of that.

Next, capital sentencing. This is a very interesting issue: To what extent does the confrontation right apply at the sentencing phase in a capital case?[14] Just focus on that. Some courts draw a distinction between the eligibility phase—that is, the part of the sentencing phase at which it is determined that the defendant can have a death penalty imposed on him—and the selection phase—that is, the part in which the jury decides the penalty that will be imposed. These courts apply the confrontation right in the eligibility phase but not in the selection phase. Perhaps that is justified, given the discretionary nature of the selection phase. On the other hand, it seems to me that if the Confrontation Clause itself doesn't apply throughout, some confrontation principle probably should.

Here is what I mean: Let's say you have some kind of proceeding as part of a criminal prosecution that is not the trial itself. So you say, "Well, the Confrontation Clause doesn't apply at this hearing." The

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[14] *See* Penny J. White, *"He Said," "She Said," and Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387 (2006-2007) (arguing that the confrontation right "be given full effect" in all capital sentencing proceedings).

prosecution puts a witness on the stand and, at the end of the witness's direct testimony from the witness stand, the judge says, "Thank you very much, Ms. Witness, that was extremely reliable evidence and very helpful to the Court. You're excused. There is really no need to hear any questions from the defendant because your testimony was so reliable." I don't think anybody would say that comports with due process. The witness is there; the defense has to be able to ask questions.

Well, if you take the view that what the Confrontation Clause is about is protecting the conditions of testimony, and that therefore statements can be considered testimonial even though they weren't made from the witness stand, then it seems that the confrontation principle still applies in those other proceedings, even if the Confrontation Clause itself is deemed not to. That is to say, Ms. Witness's statements really are testimonial, and her testimony has to be presented in a way that gives the defendant an ability to ask questions. The interesting thing is, then, does this theory—that it is improper to use a testimonial statement, even one made out of court, against a criminal defendant absent a chance for cross-examination—apply to other sentencing besides capital sentencing? Does it apply as well there?

Next—children. Golly. It is such a complicated subject. It gives me a bad stomach because the cases are always so horrible, and I think the issues are very, very difficult. One issue, which I know David Wagner is going to address tomorrow,[15] is the question of whether *Maryland v. Craig*,[16] which allows for child testimony from a remote location by electronic means, will still stand. I think it is clear that Justice Scalia would rather it not, but he has been delicate in his approach to this issue. In *Crawford*, and in *Hammon* and *Davis*, we were delicate, too. That is another fight for another day.

How do you deal with children? Will the courts tend to take the perspective of the interrogator? For reasons I have suggested, and I can go into more, I don't think that is the proper perspective. However, I do concede that using the interrogator's perspective would avoid some of the problems associated with focusing on the child's. If you say the proper perspective is that of a reasonable declarant, do we say the reasonable child? Well, I have three children, and I have come to the conclusion that the term *reasonable child* is an oxymoron. A child of ordinary understanding, fine. But is that the question? Or do we say that when we use the term *reasonable* we are really talking about some objective view where we wash out the intelligence and perceptions of the

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[15] *See* David M. Wagner, *The End of the "Virtually Constitutional"? The Confrontation Right and* Crawford v. Washington *as a Prelude to Reversal of* Maryland v. Craig, 19 REGENT U. L. REV. 469 (2006-2007).

[16] 497 U.S. 836 (1990).

particular person and just sort of take the standard issue person, one size fits all? If so, is that the way we should deal with it even though it concerns a child?

I have flirted with the idea that very, very young children are not capable of being witnesses. I think that would be limited to very, very young children. But I think that it is worth thinking about. My colleague Sherman Clark has raised the question of whether children below a certain level lack the moral as well as the cognitive development to have the burden of witnessing imposed on them.[17] I am not sure about that, but I think it is worth thinking about. Finally, in the case of children, the question of forfeiture is particularly pressing: Has the defendant given up the right of confrontation by the conduct that might have prevented the child from testifying?

That brings me to forfeiture. The basic idea of forfeiture is that the defendant has lost the right. The *Davis* opinion in dicta talked about this some. I have always taken the view that there has to be a robust principle of forfeiture with respect to confrontation doctrine, and that the defendant's rights ultimately are going to be better protected if there is a robust principle of forfeiture. The courts will be more willing to have a broad confrontation right if they recognize that it can be forfeited.

There are a slew of difficult issues. What kind of conduct can be forfeiting conduct? Does it have to be conduct motivated by the intention of preventing the person from testifying? Or are there circumstances, as I believe, in which the conduct is so bad that even if preventing testimony wasn't the intent or purpose, it is still enough to forfeit the confrontation right? How is the forfeiting conduct proven? In particular, can it be proven with the use of the challenged statement itself? What is the standard of proof? Is it more than just a preponderance? I think it should be.

Whatever the rules are governing the standard of proof and the bounds of forfeiting conduct, I don't think it is going to provide much protection to defendants. I think the key issue in this area is going to be to what extent is the Court willing to say that the prosecution has a responsibility of mitigating the problem. So, for instance, if—and I will talk about this more tomorrow, I don't want to step too much on my own toes[18]—you have a murder case, and the witness makes a dying declaration, to what extent does the prosecution have the burden of trying to arrange for a deposition from this lingering victim? If there is

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[17] Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1280–85 (2003).

[18] *See* Richard D. Friedman, *Forfeiture of the Confrontation Right After* Crawford *and* Davis, 19 REGENT U. L. REV. 487 (2006-2007).

intimidation, to what extent does the prosecution have the burden of trying to get the witness to testify, notwithstanding the intimidation?

Part of the conference title is, "Where Do We Go from Here?" I want to suggest that I am hoping that we are on the threshold of a broad reform of the law of hearsay not limited to just confrontation. It is a pleasure to speak about this here, on the eve of my thirtieth law school reunion, with my former Evidence professor, Charles Nesson, and my fellow Nesson alum, James Duane, right here. We both took Evidence with him, and we studied hearsay law.

Hearsay law has been around for the last couple of centuries or so, maybe a little bit more. I am hoping that now that *Crawford* has enunciated a confrontation right that is independent of the law of hearsay, the law of hearsay as we know it will wither away over a generation or so—within the professional lifetime of most of us in this room. I am hoping for this change because I think the law of hearsay, as we know it, does more harm than good.

I think that most often when hearsay should be kept out, it is either because of the confrontation principle in criminal cases or for some similar, softer principle in civil cases. But what about beyond that? Once you enunciate a confrontation principle that is independent of hearsay law, then it is possible to say, "Well, let's see, what other hearsay do we need to keep out and why?" I think we would never in a million years come up with a very complicated structure of hearsay law, with a very difficult definition and with umpteen exceptions, which plague law students and lawyers and judges alike. We would never do that.

The structure I envision is one where you have a firm confrontation right in criminal cases, a somewhat softer confrontation principle in civil cases, and you get to insist that witnesses testify under proper conditions. And then, there is a very soft rule, a discretionary rule, as to other hearsay, except in maybe some extreme cases where it is kept out on other constitutional grounds.

Now let me say this: Many evidence professors have, over the last few decades at least, barely taught the confrontation right. It is sort of an afterthought in dealing with hearsay, and sort of shoved into a chapter on the future of confrontation or hearsay law or something like that. That is not as intellectually aggressive as it might be, but I can understand it from a practical standpoint because the old confrontation law basically seemed to say that if a statement was okay under hearsay law, it was okay under the Confrontation Clause. So why bother? After *Crawford*, however, that mindset is irresponsible. And after *Davis*, I take the view that the Confrontation Clause ought to come first. It ought to come first because it is what drives what is worthwhile about hearsay law. And that is the way we ought to be thinking about it.

Here are some preliminary thoughts about how confrontation and hearsay law might be taught. We ought to first ask what is the nature of the confrontation right. *Crawford* may not be a bad place to begin. It says that you get to confront testimony given against you; in other words, the whole basic idea is that we have a system of giving testimony in which adversaries get to demand that the testimony be given openly, in their presence, subject to oath and cross-examination. Then raise questions such as, "What about a particular statement determines whether or not it is testimonial?" *Davis* raises that. One can then talk about business records and maybe things like autopsies—whatever.

Then ask: Should the Confrontation Clause be limited to those testimonial statements offered for their truth? There are a few significant cases, including the recent one of *People v. Goldstein* in the Court of Appeals of New York,[19] where the state said, "Oh, no, no! We are not introducing the statement for its truth. We are just introducing it because it supports the expert's opinion that the guy had sufficient malice before committing the murder." And the Court of Appeals of New York scratched its head and said, "That sounds like it is being offered for its truth to us."

Then comes a question made salient by *Crawford*: In what circumstances is the witness unavailable? The law there sounds very much like it did before *Crawford*.

Next, was there an adequate opportunity for cross-examination? Again, the question was made significant by *Crawford*. We can ask, in what circumstances is an early deposition adequate? In what circumstances does the forgetfulness of the witness at trial, or the failure to speak consistently with prior statements, impair the opportunity for cross?

Finally, we can address the possibility of forfeiting the confrontation right. I think, within that, we bring in all of the dying declaration cases.

Now after studying all that, you have got a pretty good sense of what the confrontation right is all about. Notice how organizing the discussion around the framework of the confrontation right gives obvious opportunities to discuss a lot of hearsay law. You can then look at the whole area and say, "Now what else do we have to keep out, and on what basis should we keep it out?" And maybe we spend a lot less time, even in the interim, dealing with the exceptions than we do now.

I know people have said, "Well, you are dreaming." Yeah, I am. On the other hand, I was dreaming before *Crawford*, too, and the rest of the common law world has pretty much done away with hearsay law as we know it in the civil context. They have kept it in the criminal context, I think, because they haven't articulated what the confrontation right is

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[19] 843 N.E.2d 727 (N.Y. 2005).

all about. When they do that, I am hoping maybe some other common law systems will follow *Crawford*. If they do, they may say, "You know what, the way we have done away with hearsay law in the civil context, now that we have an independent protection of the confrontation right, we should probably do away with ordinary hearsay law in the criminal context as well."

I believe that in this country, over the long run, now that we have protected the confrontation right, we also can start dismantling ordinary hearsay law. So, that is a long way from "where do we go from here," but I hope it comes to pass within the professional life of all of us. That is hoping that we live a long time, and reform happens quickly.

Thank you very much, and I will be happy to answer any questions I can if there are questions.

Professor James Duane: You said there were some parts in the *Davis* opinion that surprised you a little bit in light of what Justice Scalia had said in the oral argument.

Professor Friedman: Yes.

Professor Duane: I gather you thought there were parts of the opinion that maybe he really didn't have his heart in.

Professor Friedman: Oh, I think there really were.

Professor Duane: Can you give us some examples of the parts in particular that he really didn't have his heart in?

Professor Friedman: Well, there are two that stick out most. One is, in response to Justice Thomas, he said, "We do not dispute that formality is indeed essential to testimonial utterance."[20] Now he doesn't quite say we hold that formality *is* essential, but rather we don't deny that formality is essential. In other parts of the opinion, he seems to be knocking down the formality requirement, but he does have that passage. And at argument, he was so good in saying things like, "Well okay, forget about an affidavit. How about a letter? What if somebody just writes a letter? I can give him my brief. Somebody just sends a letter to the court, and you are going to allow that to prove a case?" He understood that. He understood that it makes no sense whatsoever to have a formality requirement. It is making a virtue of a deficit. That was one of them.

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[20] Davis v. Washington, 126 S. Ct. 2266, 2278 n.5 (2006).

The other one that really amazed me was where he said that even a statement of identity was really primarily for the purpose of resolving the ongoing emergency, and therefore didn't make the statement testimonial.[21] It just went so contrary to the whole tenor of the argument. So after the argument, I said to somebody, as I have said tonight, that I had felt the wind behind my back while arguing the case. He said, "You didn't just have the wind behind your back, you had Scalia behind your back pushing." At one point during the argument, I felt like I could just sit down because he was taking the case so fully. That is not the way the opinions came out. Very much a mixed blessing.

Thank you very much. I look forward to a full day tomorrow.

[21] *Id.* at 2276.

CROSS-EXAMINATION EARLIER OR LATER: WHEN IS IT ENOUGH TO SATISFY *CRAWFORD*?

*Christopher B. Mueller**

The revolution in confrontation jurisprudence brought by the decision in *Crawford v. Washington*[1] changed many things, but it did not change one important part of the law, namely the doctrine that cross-examination can make everything right, as far as the Confrontation Clause is concerned. Simplifying for a moment, *Crawford* affirms the old rule that the Confrontation Clause is satisfied by both prior and deferred cross-examination.

That is to say, a statement may be admitted if the speaker testified before trial, typically in a preliminary hearing but sometimes in a deposition, and was cross-examined then (or could have been), which is what is meant by prior cross-examination. And a statement may be admitted if the witness testifies at trial and can be cross-examined then, which is what is meant by deferred cross-examination.

In either case, the cross-examination is not quite what lawyers usually have in mind when they think about cross-examination and what it can do. The reason is that in both cases the actual statement being admitted against the accused was made "off stage" so to speak, and not in court where a defense lawyer can press the witness by putting the questions that cross-examination allows.

In the case of prior cross-examination, there is always the question about motivation: Did the defense lawyer really have the same incentive back then to pursue the witness?

In the case of deferred cross-examination, there is always the question whether the testing process can be fully effective, since it goes forward long after the statement was made, and since the witness almost always retreats into evasions and claims of lack of memory now. The witness often never quite concedes that the earlier statement was mistaken or false, so it is possible that the deferred chance to challenge the witness is not really good enough. If it wasn't good enough, then a

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* Henry S. Lindsley Professor of Law, University of Colorado School of Law. The author wishes to thank the staff of Regent University Law Review, and particularly Editor in Chief Kerry Hodges, Symposium Director Amber Dina, and my own host at the conference, Jeremy Pryor, as well as our gracious faculty host, James Duane, for their work in putting together the symposium of which this article is a part. I also wish to thank my longtime friend and co-author Laird Kirkpatrick who was a symposium participant, for his helpful comments on the subject addressed in this article, and I wish to thank Professor Duane for comments he made in many conversations that led to this piece. Final responsibility for the positions taken in this article rest, of course, with me.

1 541 U.S. 36 (2004).

statement that ought never to have counted in the case survives and may well count after all.

There are three reasons to revisit this subject now. First, *Crawford* requires exclusion of some statements that courts admitted before, which means that prosecutors have new incentives to try to avoid the barrier of *Crawford*-based objections by taking advantage of the old rule that prior or deferred cross-examination suffices. Included in this category are statements to police that fit the excited utterance or against-interest exception, testimony before grand juries that was sometimes admitted under the catchall exception, and statements in plea proceedings that were sometimes admitted under the against-interest exception. Second, the old rule was never fully fleshed out, and the Court has been, to put it mildly, casual in explaining why prior or deferred cross-examination removes objections under the Confrontation Clause. Third, the old rule is manipulable, and courts face real issues as to what it actually means to provide an opportunity for prior or deferred cross-examination.

It merits mention that the task at hand is not to attack *Crawford*. The good work done by the Court in that case deserves our respect, even admiration, and this article does not seek to derail the project that *Crawford* set out for courts.[2] *Crawford* was right to shift the focus of the Confrontation Clause away from reliability and to look instead at the nature of statements offered against the accused, and especially at the intent or expectations of witnesses who make them and the role of police who gather or generate them. Under the older *Roberts* approach,[3] the Confrontation Clause was a kind of "super standard" of reliability that turned for the most part on the same factors that already count in applying hearsay exceptions. The dominant theme of *Roberts* was that essentially all hearsay that satisfied traditional ("firmly rooted") exceptions had a free pass. In that doctrinal environment, the Confrontation Clause almost disappeared, and there was something profoundly unsatisfactory about looking at hearsay doctrine as imposing one set of reliability criteria and the Confrontation Clause as imposing substantially the same standard, only different.

As conceived in *Crawford*, the Confrontation Clause is an independent check on the conduct of police and prosecutors in preparing and trying cases. To be sure, *Crawford* does not operate in the same

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[2] The author, along with other participants in this symposium, was invited to join an amicus brief submitted in *Crawford*, and did so gladly. The leading role on the brief was played by Professor Richard Friedman of the University of Michigan Law School (he also appeared in oral argument). *See* Brief for Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park as Amicus Curiae Supporting Petitioner, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754958.

[3] Ohio v. Roberts, 448 U.S. 56 (1980).

manner as other quasi-evidentiary doctrines associated with the decisions in *Mapp*, *Miranda*, and *Massiah*, which apply the Fourth, Fifth and Sixth Amendments, respectively.[4] These doctrines criticize or condemn certain police tactics as violating various protected rights—as invading aspects of personal privacy and security that are protected by the Fourth Amendment, failing to respect the will and dignity of suspects that are protected by the Fifth Amendment, and undermining the right to counsel that is protected by the Sixth Amendment.

In contrast to *Mapp*, *Miranda*, and *Massiah*, the *Crawford* doctrine does not criticize or condemn any police tactic. *Crawford* does, however, make the Confrontation Clause into a regulating principle that governs the manner of preparing for trial and the manner of conducting the trial itself, and in this way *Crawford* serves a regulatory or prophylactic purpose that is of a piece with the other doctrines. *Crawford* insures that prosecutors will not merely gather and offer pretrial hearsay statements, but will also take care to bring those witnesses to appear and actually to testify.

The work begun in *Crawford*, however, remains unfinished. What is needed is more nuanced doctrines relating to the real meaning of cross-examination, which can apply in situations in which the speaker was subject to prior or deferred cross-examination. The task of this article is to further the discussion of this subject.

I. PURPOSES OF CROSS-EXAMINATION

A. The Academic and Judicial Model: Cross as Testing

Courts and commentators are as one in calling cross-examination a "testing mechanism." In Wigmore's much-quoted phrase, cross-examination is "the greatest legal engine ever invented for the discovery of truth,"[5] and the Supreme Court has said very much the same thing, stressing the role of cross-examination in the truth-finding enterprise,

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[4] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that evidence seized illegally under Fourth Amendment must be excluded). Well before *Mapp*, the Court adopted a similar rule for evidence illegally seized by federal officers in violation of the Fourth Amendment and offered in federal courts. Weeks v. United States, 232 U.S. 383, 398 (1914). *See also* Miranda v. Arizona, 384 U.S. 436, 498–99 (1966) (stating that police must read a suspect his rights before custodial questioning, otherwise what he says in response to questioning is inadmissible under the Fifth Amendment); Massiah v. United States, 377 U.S. 201, 207 (1964) (holding that certain post-indictment statements are excludable under Sixth Amendment right to counsel).

[5] 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (James H. Chadbourn ed., rev. ed. 1974).

and holding that protecting the right to cross-examine is central to the purpose of the Confrontation Clause.[6]

In the testing model, the cross-examiner delves into word meaning, truthfulness, memory, and perception.[7] These "hearsay risks," as we call them in explaining the reason for the famous evidence doctrine that excludes at least those out-of-court statements that do not fit some exception, are controlled and substantially reduced by the testing process that cross-examination advances.

It is worth considering these points in more detail:

In connection with word meaning, the cross-examiner can help get at what the witness is really trying to convey in the words that the witness chooses. Does "blue" in her account really mean blue, or could it mean silver? Does "fast" mean 40 MPH, or does it mean 75 MPH? When she says the defendant had a knife, does she mean he had the knife in his hand, ready to use, or does she mean that it was resting in a scabbard? In talking about reasons to mistrust hearsay, we speak of these issues in terms of ambiguity, or narrative ambiguity, and cross-examining a percipient witness can reduce and perhaps minimize these risks.

In connection with truthfulness, the cross-examiner can get at specific motivational factors that affect what the witness says. Has he reached an understanding with the prosecutor in connection with possible charges against him, or the disposition of pending charges, or the conditions of incarceration? Does he have something to gain or lose if the case comes out one way or another? Does he have a relationship with one of the parties that will naturally incline him to testify favorably for one or unfavorably to another? Of course the cross-examiner can also get at points that reflect more generally on truthfulness, such as prior instances of misrepresentation, as happens if someone inflates a resume by inventing experiences or educational credentials. And the cross-

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[6] *See* Douglas v. Alabama, 380 U.S. 415, 418 (1965) (stating that the "primary interest" secured by the Confrontation Clause is "the right of cross-examination," and "an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation").

[7] Kentucky v. Stincer, 482 U.S. 730, 737 (1987) ("[Cross] is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial."); Davis v. Alaska, 415 U.S. 308, 316 (1974) (stating that cross is "the principal means by which the believability of a witness and the truth of his testimony are tested"); Mattox v. United States, 156 U.S. 237, 242–43 (1895) (stating that cross gives the defense "an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief").

examiner can, of course, go into prior convictions, a practice much criticized by commentators, including the author of this piece.[8]

It would be saying too much to claim that points such as these can identify a witness who simply enjoys lying—indeed, how many such people have any of us ever met? A more plausible idea is that a witness who gives in to the temptation to lie when it will do him some good may lie in his testimony, even though more conventional attacks for bias have not uncovered a particular motivation, or perhaps when they *have* uncovered a motivation, in which case the witness who is easily tempted into falsehood on other occasions is for that reason even more likely to be tempted in that direction now. Whether or not everyone has a "price," the very pragmatic underlying idea is that some people can, in fact, be bought, and indeed some can be bought more cheaply than others. We speak, in this context, of exploring "character for truth and veracity."[9]

In connection with memory, the cross-examiner can get at the question whether the witness really remembers the acts, events, or conditions that he describes. Since almost every witness has spoken to others about his proposed testimony, and especially to the lawyer who will ask him questions on direct, there is always the possibility that what the witness remembers is "what he has said before" rather than the underlying acts, events, or conditions. And of course there is the possibility that he remembers saliently some major points but has forgotten others, or maybe he never knew them, and is just "filling them in" by a process of ordinary inference that might even be unconscious. In connection with hearsay, we speak of the risk of failed or faulty memory.

The cross-examiner also tests perception. Can the witness see or hear well? Was he in a good position to see or hear what he describes? Was he distracted by other sights or sounds, or by his thoughts or engagements? In connection with hearsay, we speak of the risk of misperception.

The testing model is afflicted with one great difficulty. This difficulty stems from the fact that cross-examination cannot, and certainly should not, succeed in shaking every witness or undermining confidence in what she has said. The model must accommodate the possibility that the witness gets it right the first time, that she is both honest and painstaking in what she says. It is not too much to hope that in most cases the witness will take care, and will spend time organizing her thoughts and searching her memory. Hence the possibility is real

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[8] *See generally* Christopher Mueller, *Of Misshapen Stones and Compromises:* Michelson *and the Modern Law of Character Evidence, in* EVIDENCE STORIES 75 (Richard Lempert ed., 2006).

[9] *See, e.g.*, FED. R. EVID. 608(b) (authorizing cross-examination on specific instances of misconduct); FED. R. EVID. 609(a) (authorizing the use of convictions to impeach); FED. R. EVID. 611 (speaking generally about cross-examination).

that the adverse party will see that there is nothing to be gained by an attack and will not cross-examine at all. Or he will sense, after a few probes, that defeat is coming and give up the game after cursory questions that can be passed off as constructive efforts to clarify, rather than a failed attack. Or perhaps the cross-examiner will be forced—because lawyers have a very different model of cross-examination on their mind, taken up below—to pursue diversionary tactics, finding fault or making the witness look bad on some minor or peripheral point. What is of course the worst possible outcome is an attack that fails utterly.

For these reasons, appraising cross-examination may involve looking at something that did not happen at all, in which case one can only ask whether the *opportunity* to cross-examine was adequate, or whether the lawyer's choice not to pursue it reflects incompetence or dereliction of duty. Appraising cross-examination may involve looking at questioning that appears timid, or seems to have gone off on a tangent, or seems to have failed. We can try to dig out from this difficulty by saying that what we promise is process: The parties—and in the setting of the constitutional guarantee of confrontation we are concerned with defendants in criminal cases—are entitled to have a go at the witness. "You can cross-examine every witness," we say, but we don't promise success. "You aren't entitled to dislodge every story or discredit every witness," we say. But this kind of statement is window dressing: To know whether there was an opportunity that means something, we must pay attention to what happened. If we won't look, or if we blame lawyers when the procedural opportunity does not yield any progress, then we are simply hoping that only true stories survive and that only credible witnesses are believed.

Appraising cross-examination that did not achieve full success (or an opportunity that was not seriously pursued) is perhaps made a little bit easier by the fact that not many witnesses will be as perfect as the one imagined above. We can expect that most witnesses will not find exactly the right words, and indeed the very idea of perfect verbal expression may be incoherent, given the complexity of language, the imprecision of meaning, and the vagaries of communicating by word of mouth. Hence almost any cross-examiner can make at least some progress in uncovering a misimpression or misspoken phrase, or can at least succeed in limiting or expanding the implications of some thought ventured on direct, or in uncovering some hesitation or uncertainty on some point, or at the very least in pointing out that a witness who is sure of everything has assumed an attitude that is itself suspicious.

It is for these reasons that the Supreme Court has said, in a phrase that has become almost as familiar to modern litigants as Wigmore's description of cross-examination is familiar to virtually everyone in the profession, that defendants in criminal cases are entitled only to "an

opportunity" for cross-examination. They are emphatically not entitled to cross-examination that is "effective in whatever way, and to whatever extent" that they "might wish."[10]

B. The Lawyers' Model: Cross as Drama

Practitioners seem to live on a different planet from courts and academic commentators. Not surprisingly, practitioners tell us that cross-examination is about winning, and not about testing as such, and certainly not about truth as such. Lawyers speak to one another in terms of drama, theatre, and rhetoric. In terms of drama and theatre, practitioners use cross-examination to show that the witness is actually bad, not to prove as a matter of logic that he is incorrect. To put it another way, cross-examination involves persuading juries to reject testimony, which requires not simply a logical appeal, but an emotional appeal as well. In terms of rhetoric, cross-examination resembles a political contest, in which the point is not merely to prove some error in the position taken by the other side, but to find words that encapsulate for an audience the proposition that the other side is morally flawed, even corrupt. And speaking of drama, theatre, and rhetoric, the cross-examiner who attacks the witness must also show that she herself is good, and by extension that her client is good, and by further extension that the cause of her client is good. It is not enough merely to prove that her client and her cause are right or correct.

In the practitioner's vision of cross-examination, focusing now on the situation to which the Confrontation Clause is addressed, the defendant questions witnesses called by the prosecutor. It is of course the prosecutor who would prove a proposition that the defendant denies, and the prosecutor is the sponsoring party, the one who transparently chooses to advance his side of the case by means of the witness. While the Rules take the view that sponsoring (or calling) a witness does not involve "vouching" for her testimony,[11] it is nevertheless the case that neither the prosecutor nor the defendant can be seen to sponsor (or call) a witness with whom it can make no headway, whose testimony—meaning virtually every word of it—is favorable to the other side.

A defendant may be able to afford to cross-examine a witness called by the other side even if the cross-examination does not prove very much, because merely modifying or clarifying what the witness says can be viewed as contributing to the task at hand, and amounts to a kind of lesser drama or demonstration, and there are few witnesses whose testimony cannot be at least challenged in terms of the degree of certainty in which it is expressed, or thrown into doubt by suggestive

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[10] Delaware v. Fensterer, 474 U.S. 15, 20 (1985).

[11] *See* FED. R. EVID. 607 (providing that any party may impeach a witness).

questions about interest or viewpoint or problems in perception or word choice.

To get what is needed from cross-examination, practitioners argue that the critical point is *controlling* the witness. Even in common usage, the term cross-examination conveys this idea. To cross-examine someone is to subject him to the third degree, to interrogate or engage in relentless verbal pursuit. Practitioners say that the cross-examiner must control the witness without *appearing to do so* because jurors identify more with witnesses than with lawyers, more with people than with causes, and jurors are prepared to believe that trial lawyers do anything to win. Practitioners say "never take your eyes off the witness" and "never let her get away with an evasive answer," and always "intimidate the witness to bring him under your control." In his famous *Ten Commands of Cross-Examination*, Irving Younger said that lawyers should ask only leading questions, should never let the witness repeat his direct testimony, and should never let him explain an answer.[12] In the context of cross-examining even expert witnesses, where one might think that the testing function would be paramount and that a lawyer would go into the factors made familiar by the *Daubert* case,[13] such as the risk of error or false positives, or the perils of mishandling samples, or the limits of statistical inference, we are told that what really happens is much different. Even here, the lawyer's job on cross is not to test, but to make the expert look like a liar. Jurors, we are told, don't care about things like error rates.[14]

The film version of *Anatomy of a Murder* presents more than one vivid illustration of cross-examination as drama in the setting that concerns us here, which is defense cross-examination of prosecution witnesses.[15] A justice of the Michigan Supreme Court wrote the novel on

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[12] Henry W. Asbil, *The Ten Commandments of Cross-Examination Revisited*, CRIM. JUST., Winter 1994, at 2.

[13] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); *see also infra* note 49 and accompanying text.

[14] James M. Shellow, *The Limits of Cross-Examination*, 34 SETON HALL L. REV. 317, 319 (2003) (discussing how the cross-examiner must make the expert look "morally deficient," and how the combination of judge unable or unwilling to assess reliability and jury with no understanding of scientific method leads to cross-examination that is "more style than substance").

[15] The popular black-and-white film ANATOMY OF A MURDER (Carlyle Prods., Inc. 1959) was directed by Otto Preminger. James Stewart starred as the defense counsel Paul Biegler, and George C. Scott starred as the prosecutor Claude Dancer. Lee Remick played Laura Manion (wife of the defendant). Ben Gazzara played Lieutenant Frederick Manion, who was accused of murdering Barney Quill because he made a pass at his wife. Eve Arden played Maida Rutledge, secretary to Paul Biegler, and Arthur O'Connell played an older beaten-down friend and helpmate of Biegler's, named Parnell Emmett McCarthy. Don Ross played the jailed surprise witness Duane ("Duke") Miller. Joseph N. Welch played the patient and world-weary presiding officer, Judge Weaver. Welch was by this time famous—

which the film was based,[16] so perhaps it is not surprising that the courtroom scenes are so vivid and so convincing, and the screen performances by James Stewart (who played defense counsel Paul Biegler) and George C. Scott (who played prosecutor Claude Dancer) are star quality, by any measure. To take just one example, Biegler cross-examines a jailed prisoner named Duane Miller, whose cell is beside that of the defendant (Lieutenant Manion).[17] Led by the prosecutor Dancer (Scott), Miller tells the jury that the defendant said things in his cell that would be destined to offend the jury and convince any doubter of his guilt in murdering his wife's apparent lover. According to Miller, Manion said the following: "I got it made, Buster. I fooled my lawyer and I fooled that head shrinker and I'm going to fool that bunch of corn cobbers on the jury!" And Miller finished with the coup de grace: "He said when he got out the first thing he was going to do was kick that bitch from here to kingdom come." "To whom was he referring?" asks prosecutor Dancer. "To his wife," Miller replied. "Your witness," says Dancer.

Now what kind of cross-examination could hope to test a witness who has said such things? Certainly not questions probing memory or perception or word meaning, or even questioning probing bias: Who else would a defendant on trial for murder talk to during a trial? Another jailed person, of course, so regardless how "tainted" such a witness might be on account of self-interest, one can understand that the prosecutor must call him if the jury is to hear what the defendant "really" thinks. So what does Paul Biegler (Stewart) do in this disastrous situation? He makes the choice that many lawyers make in such circumstances, and many politicians fearing for their political future—he engages in a blatant *ad hominem* attack. In the movie, the defendant Manion expresses outrage in court over Miller's testimony, and here is what Biegler says: "I apologize for my client, Your Honor. Yet, his outburst is almost excusable since the prosecution has seen fit to put a felon on the stand to testify against an officer in the United States Army."

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in real life he was the lawyer who represented the Army in the televised Army-McCarthy hearings in 1954. It was Welch who asked the dramatic question that put an end to Joseph McCarthy's "witch hunt" for Communists in the Army. Defending Fred Fisher (a young lawyer in his office), Welch asked the following devastating rhetorical question: "Have you left no sense of decency sir, at long last? Have you left no sense of decency?" The famous exchange can be viewed in POINT OF ORDER! (Point Films 1964), Emile de Antonio's famous documentary of the hearings.

[16] ROBERT TRAVER, ANATOMY OF A MURDER (St. Martin's Press 1958). Traver was the pen name used by John D. Voelker, who served on the Michigan Supreme Court from 1957–1959.

[17] The quoted passages in the ensuing paragraphs are taken from Wendell Mayes, *Screenplay for Anatomy of a Murder*, from the novel by Robert Traver, at 181–85 (Feb. 25, 1959), which can be viewed on the Internet at http://www.dailyscript.com/scripts/anatomy_of_a_murder.pdf.

And what comes next? Biegler asks Miller, "What are you in jail for?" and "How many other offenses have you committed?" which produces the answer "I was in reform school when I was a kid." Then Biegler, looking at the record of the witness, essentially testifies for him:

> Mr. Miller, this record shows you've been in prison six times in three different states. You've been in three times for arson, twice for assault with a deadly weapon, once for larceny. It also shows you've done short stretches in four city jails for the charges of indecent exposure, window peeping, perjury, and committing a public nuisance. Is this your true record?

"Well, them things never are right," replies Miller. Biegler follows up, asking, "How did you get the ear of the prosecution?" and learns that the prosecutor Dancer had gone to the jail, where he spoke separately with the inmates. "Were you promised a lighter sentence," asks Biegler, "if you would go on the witness stand?" Miller denies the suggestion. "Perhaps you just thought it might help your own troubles if you dreamed up a story that would please the D.A.?" says Biegler, and here the screenplay finishes with a question mark, although Biegler's line reads more like a naked assertion. Miller denies dreaming up anything, and Biegler asks whether he's "sure that's what Lieutenant Manion said." "Yep, I'm sure." "Just as sure as you were about your criminal record?" "Well, I kind of flubbed that I guess." Biegler makes his exit: "I don't feel I can dignify this creature with any more questions."

Put most starkly, the difference between courts and academic commentators on the one hand, and practitioners on the other hand, including the fictitious Paul Biegler in *Anatomy of a Murder*, involves almost a contradiction. A trial, one might argue, is not all what we usually say about it—it "is not, in fact, a search for truth," one academic commentator writes in sympathy with practitioners, and the trial lawyer is not an investigator seeking the truth, but "first and foremost a seller of a story."[18] In this account, it is almost hard to avoid the conclusion that the trial lawyer is a salesman, a politician, a talk show host. His job is to "sell" a line, to sell himself as the good guy and the opposition as a bad guy, which includes using cross to draw from every witness "any concession" that can be parlayed into winning support for the lawyer's version of the case. In short, practitioners are from Mars and cross is warfare, while judges and academics are from—well, not Venus, perhaps, but at least Mercury, who was not only the messenger god, but also the god of knowledge.

Of course this realpolitik vision of the role of trial lawyers can be discounted for three reasons. To begin with, part of it is simply bravado. Trial lawyers experience risks, gains and losses, wins and defeats, in a

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[18] Richard H. Underwood, *The Limits of Cross-Examination*, 21 AM. J. TRIAL ADVOC. 113, 121 (1997).

more vivid way than courts and commentators, and more vividly than lawyers in other branches of the profession ("transactional lawyers"). To venture into a trial arena takes a special kind of personality, a kind of ego strength that manifests itself in hyperbole. It is no accident that real practitioners like Gerry Spence write books with titles like *Gunning for Justice*, or that fictional trial lawyers like Rumpole remember their past successes (*The Penge Bungalo Murders*) in inflated and dramatic terms.[19]

Perhaps equally importantly, cross-examination goes forward under the constraint of Evidence Rules and the unspoken conventions of human discourse that the presence of the jury and the judge require lawyers to bear in mind. The Rules are designed to check adversarial excesses, and to enable courts to check them, and thus for example the Rules (if administered right) block trial lawyers from asking groundless questions simply aiming to imply something horrendous but false about the witness.[20]

Finally, most trial lawyers are in some respects ordinary mortals, which is to say that they are people of conscience and scruples, and they do not in fact "do anything to win." Rather, they fear the wrath of juries and judges if they are perceived to be doing that, so the system is not quite as much "dog eat dog" as the more exaggerated accounts suggest.

C. A Standard Emerges: The Decision in Green

In its decision in the *Green* case almost forty years ago,[21] the Supreme Court spoke definitively to the question whether prior cross-examination satisfies the Confrontation Clause, and also to the question whether deferred cross-examination satisfies the Clause, answering both questions in the affirmative.

In *Green*, we should recall that Melvin Porter was the main witness, and the theory was that the defendant recruited this sixteen-year-old boy to sell marijuana. Porter made a stationhouse affidavit and testified fulsomely at the preliminary hearing. At trial, however, he waffled. There he would only say that Green called and asked him "to sell some unidentified 'stuff,'" and that after this conversation Porter got twenty-nine plastic baggies of marijuana and sold some. But Porter said he had

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[19] *See, e.g.*, GERRY SPENCE, GUNNING FOR JUSTICE (1982) (describing career of its famous author and commenting on the Silkwood trial and others); GERRY SPENCE, THE SMOKING GUN (2003); JOHN MORTIMER, RUMPOLE AND THE PENGE BUNGALO MURDERS (2004).

[20] *See* 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 6:54 (forthcoming 3d ed. 2007) (stating that under FED. R. EVID. 608, cross-examiner cannot properly ask witness about prior bad acts suggesting untruthfulness without having a reasonable basis for the question).

[21] California v. Green, 399 U.S. 149 (1970).

taken LSD before Green phoned, and said that he couldn't remember how he got the marijuana, and said as well that he couldn't tell fact from fantasy. The prosecutor used Porter's earlier statements to refresh memory, and Porter then "guessed" he got the marijuana from Green's house, and paid Green the money that Porter collected when he sold it.

The Court approved use of both the preliminary hearing testimony and the stationhouse affidavit.

Porter's preliminary hearing testimony, said the Court, was given in "circumstances closely approximating" those of trial because Porter was under oath, a judge presided, and a verbatim record was kept. Also defendant had a lawyer, and most importantly the lawyer "had every opportunity" to cross-examine Porter. Hence what Porter had to say would have been admissible at trial even if Porter had been "actually unavailable" to testify at trial.[22] In short, prior cross-examination satisfies the Confrontation Clause. Indeed, the position of the Court in *Green* was that a mere prior opportunity to cross-examine satisfies the Confrontation Clause, regardless whether the defense pursued that opportunity. It was not until the *Roberts* case was decided in 1980 (ten years after *Green*) that the Court considered the possibility that an "opportunity" to cross-examine might not be enough, inasmuch as refraining from doing so might be a reasonable decision that could not be construed as waiver.[23] In *Green*, that thought did not occur, and *Green* says that an opportunity suffices.

Similarly the stationhouse affidavit could be used at trial because deferred cross-examination at the time of trial also satisfies the Confrontation Clause. After all, said the Court in *Green*, the fact that the witness now tells a "different, inconsistent story" that is "favorable to the defendant" does as much as "successful" cross might accomplish earlier. The witness has not become "hardened" by the delay between the statement and the opportunity to question him at trial, and indeed the statement has "softened to the point where he now repudiates it." Of course the atmosphere at trial is not quite what we normally experience. The witness in the case under consideration has become "favorable to the defendant" and is now "more than willing" to explain the inaccuracy of what he said before, which might stem from "faulty perception or undue haste."

Green set the standard for measuring the adequacy of cross-examination. The question, said the Court in *Green*, is not whether contemporaneous cross would be better. Rather, the question is whether delayed cross affords the trier "a satisfactory basis" to appraise the prior

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[22] *Id.* at 165 (likening the preliminary hearing to a prior trial).

[23] Ohio v. Roberts, 448 U.S. 56, 70 (1980); *see also infra* notes 91–94 and accompanying text.

statement. The absence of contemporaneous cross-examination does not matter if the defendant can engage in "full and effective cross-examination" at trial—"full and effective" is the standard, although "full and effective" does not mean contemporaneous cross-examination.

In reaching this conclusion, the Court had to do three things in *Green*:

First, it played *up* the extent to which Porter had become the friend of the defendant John Green. Porter was, after all, still damaging to the defense. He did not, in any realistic account, turn from being the main witness against John Green to being his main defender—Porter still said that Green was his supplier. The only difference was that Porter had become less certain at the time of the trial, and vaguer in details, which is surely a difference in degree but not kind. In short, Porter remained the principal witness against the defendant.

Second, the Court in *Green* played *down* the extent to which cross was impeded in testing what Porter had said. A witness who keeps saying he doesn't remember the acts, events, or conditions reported in his prior statement can't very well be asked whether his words were accurate, or whether his perceptions were accurate. Perhaps he can be asked whether his memory was better at the time—the memory that he says he does not now have—but the answer to that question is of little use. In the analogous case in which the proponent invokes the exception for past recollection recorded, the witness must affirm that his memory on the prior occasion was good and that he spoke while the matter was fresh in his mind, and the witness on that occasion usually (although not always) participates in actually creating the prior statement by writing it down.[24] But in the present setting, there is no such involvement, nor any such assurance that prior memory was right or that the statement was accurate, and indeed the stance of a witness like Porter is that the statement was not accurate. These points the Court all but ignored.

Third, the Court in *Green* ignored the practitioner's view of cross—the extent to which it was impeded as drama. Instead, *Green* adopted the usual judicial and academic view of the purposes and virtue of cross-examination as a testing mechanism. The opinion does comment that the task of the cross-examiner is "no longer identical to the task he would have faced if [the witness] had not changed his story" because the cross-examiner is not facing a "hostile" witness. But the Court was simply making the point that cross-examination involves testing, and it said that the difference brought about by the change in the story "may actually enhance" defendant's ability "to attack" the prior statement

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[24] *See* 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:76 (discussing FED. R. EVID. 803(5)).

because the witness is "more than willing" to explain it as the product of "faulty perception" or "undue haste."

There is, however, little or no drama, little or no theatre, little or no rhetoric, hence little or no appeal to the emotions, in attacking a witness who is trying to help without becoming a perjurer.

II. ADEQUACY OF LATER CROSS

A. Rules Requiring Deferred Cross-Examination

In three places, the Federal Rules of Evidence (FRE) require that the speaker be cross-examinable about what he said before, but they set a low standard: They only require that she be cross-examinable about the statement itself, not about the acts, events, or conditions reported in her statement.

First, FRE 801(d)(1)(A) provides that a prior inconsistent statement is admissible as substantive evidence if it was made under oath in proceedings and if the witness is cross-examinable "concerning the statement" being offered. From looking elsewhere in the Rules, we learn that the framers could easily have required that the speaker answer about the acts, events, or conditions described in the statement. In the definition of unavailability in FRE 804(a), the framers include language defining a person as "unavailable as a witness" if she does not remember "the subject matter" of her statement. That phrase obviously refers to the acts, events, or conditions described in it, and the same language could also have been used in FRE 801(d)(1). The Court concluded in the *Owens* case that the language actually used in FRE 801(d)(1) means what it seems to mean—that the witness must be cross-examinable about the statement, not that he must be cross-examinable about the acts, events, or conditions reflected or reported in the statement.[25]

Second, the Rules contain a similar provision dealing with prior consistent statements. Under FRE 801(d)(1)(B), these are admissible as substantive evidence if offered to rebut a claim of influence or motive and if (once again) the speaker is cross-examinable "concerning the statement." Again both the language and the decision in *Owens* suggest that cross-examinability about the acts, events, or conditions reported in the statement is unimportant. In cases where the live testimony essentially tracks what he said before, so the prior statement adds no new information to the testimony, it is hard to imagine a witness who doesn't remember the acts, events, or conditions reported in both narratives. To testify at all, a witness must have personal knowledge, and testimony that represents guesswork or simply reports what

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[25] United States, v. Owens, 484 U.S. 554, 561–62 (1988).

another has said to the witness would be excludable on those grounds alone.

We learn from cases like *Tome*, however, that prior consistent statements may say far more than the witness says at trial. In *Tome*, a girl aged six testified about acts that occurred when she was four, mostly saying yes or no to leading questions put by the prosecutor, and saying nothing at all on cross. If a prior statement in such circumstances is "consistent" with trial testimony, it fits this description in much the same way that the definition of justice offered in the early going of Plato's Republic (giving "every man his due") was consistent with what Socrates develops over the whole dialogue, describing in detail the upbringing and education of children, and the operation of a government run by philosophers.[26] Perhaps a broad generality is consistent with a detailed account, but the detail is critical and a witness who cannot be cross-examined on details in an earlier statement that is offered as "consistent" with later testimony is escaping altogether any realistic testing of what he has said.[27]

Third, a statement of identification of a person is admissible as substantive evidence under FRE 801(d)(1)(C) if (once again) the witness is cross-examinable concerning the statement. Again the language of the Rule, and also the holding in the *Owens* case, tell us that cross-examinability about the facts doesn't matter. In *Owens* itself, a prison guard beaten by an inmate—a man who may never have seen his assailant—was found to be adequately cross-examinable about a hospital statement identifying the defendant in a conversation that the speaker barely remembered. It should be noted that *Owens* did not resolve constitutional issues, limiting its discussion to the question whether the Rule was satisfied.

Of course there are other places where the Rules allow a prior statement by a testifying witness. The exception for past recollection recorded in FRE 803(5) is an obvious example. Here it is assumed that the witness cannot be cross-examined in the usual way, and we make do with a substitute: He must testify that he once had knowledge, that the statement accurately reflects that knowledge, and that it was made when the matter was fresh in his mind. More importantly, many common hearsay exceptions, such as those for personal admissions by co-offenders or excited utterances, could be invoked in cases where the speaker testifies, and often are invoked in this setting. When such

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[26] *See generally* PLATO, THE REPUBLIC 327a–354c, at 3–43 (Robin Waterford ed. & trans., Oxford Univ. Press 1993).

[27] Tome v. United States, 513 U.S. 150, 153 (1995) (stating that the child described sexual assault in "one- and two-word answers to a series of leading questions," and on cross was "reluctant at many points to answer," leading to "lapses of as much as 40–55 seconds between some questions and the answers").

statements are testimonial under *Crawford*, as is often true when such statements are made to police or law enforcement, the fact that the speaker testifies could remove objections under *Crawford* and under the *Bruton* doctrine.[28]

B. "Full and Effective" Cross-Examination: What Should It Mean?

Recall that the standard set in *Green* is that the defense must have an opportunity for "full and effective" cross-examination. Of course opportunity really is the right word in this setting. We could not require actual cross-examination as part of the standard, which is to say that we cannot very well take the position that later cross satisfies *Crawford* only if the defendant actually cross-examines. If we did, defendants could require exclusion of prior statements, at least those that amount to testimonial statements under *Crawford*, by refusing to cross-examine. At least when the prosecutor has done what is developed more fully in the next paragraphs, it seems fair to view a defense decision not to cross-examine as waiver.[29]

Let us consider for a moment what "full and effective" cross-examination means in a setting in which it cannot mean quite what it means in the usual setting in which the questioner confronts the witness about the testimony he has just given—the kind of confrontation that occurs whenever the lawyer for the "other side" cross-examines a percipient witness. It cannot quite mean that, because time has passed and the prior statement is a matter of history, and because the Court in *Green* must have meant that this fact by itself is not enough to mean that the Confrontation Clause is not satisfied. Let us, however, imagine the conditions in which cross-examination is as full as we can imagine it to be without the element of being contemporaneous with the statement itself.

First, it seems that "full and effective" cross-examination should mean that the prosecutor has called the witness whose statement is to be offered, and has presented his testimony about some or all of the acts, events, or conditions that count in the case. Second, it seems that "full and effective" cross-examination should mean that the prosecutor has raised the prior statement in questioning the witness, putting its

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[28] Bruton v. United States, 391 U.S. 123, 126 (1968) (holding that the Confrontation Clause blocks use in evidence of statement by one defendant incriminating another by name, even if court instructs jury not to use statement against the latter, unless declarant testifies).

[29] Commonwealth v. Almonte, 829 N.E.2d 1094, 1102–03 (Mass. 2005) (admitting R's pretrial identification of defendant; R testified and identified defendant at trial, and neither defense nor prosecutor questioned R about his pretrial statement identifying defendant; since R testified at trial and was "available for cross-examination," admitting his pretrial statement did not offend *Crawford*).

substance into evidence by asking the witness about it or by offering some other form of evidence that proves the statement, such as testimony by another witness or a transcript of the statement, or a recording or writing that embodies the statement. Third, it seems that "full and effective" cross-examination should mean that the witness has answered questions about both the acts, events, or conditions reported in the prior statement and about the statement itself.

Is it important, if cross-examination is to be "full and effective," that the prosecutor call the witness who has made the prior statement? Is it also important that the prosecutor adduce the testimony by the witness about the acts, events, or conditions that count in the case, and about the statement? The answer is yes under the practitioners' model of cross-examination as drama because it is these elements that set up a situation in which the defense can challenge the witness. Calling the witness makes her the prosecutor's witness, and for that reason the defense is not responsible for her testimony. If the prosecutor does not call the witness, the defense would take a significant risk in calling her—one that defendants mostly cannot afford to take because the defense cannot seem to sponsor her. It seems important as well that the prosecutor adduce testimony about acts, events, or conditions that count, or at the very least that the prosecutor adduce the statement itself. Otherwise the defense has nothing that it can attack, and cross-examination again becomes a high-risk undertaking because the defense cannot be seen to engage in an attack that has no point of importance to refute, or one that fails, which means for the most part that defendants cannot afford to cross-examine at all.

Is it also important that the witness answer questions on cross about the acts, events, or conditions, and also about the statement? Viewing cross as logical testing, answering questions about the acts, events, or conditions is important as a means of testing memory, perception, and candor of the witness now as she testifies. Answering questions about the statement itself can test these qualities and can also test the meaning of the statement, by exploring any ambiguities and by getting at what the witness (and speaker) actually meant in the words that she used. Under the model of cross-examination as drama, answering questions on these points may be critical as well. It is only when the witness answers such questions that the cross-examiner might be able to show that the witness is mistaken or false in what she says now or what she said before. A witness who answers questions about the events can be forced to face up to any disparity between what she now says about them and what she said before. A witness who answers questions about the statement itself can be required to explain what she really meant.

In fact, some modern cases exemplify this description, and decisions approving the use of testimonial hearsay under *Crawford* are on firm ground in this setting because cross-examination really can be "full and effective."[30] Something slightly less than ideal may suffice, as may occur if the witness is mostly responsive to questions and only occasionally retreats into claims of lack of memory.[31] By only slight extension, it is arguable that the opportunity to cross-examine may sometimes be adequate even if the prosecutor calls the witness and adduces his testimony about acts, events, or conditions without asking about the prior statement itself.[32]

In an unusual scenario, witnesses who have made out-of-court statements that incriminate defendants actually give trial testimony that exonerates them. In the *O'Neil* case, which came down a few years after *Green*, the Court found that cross could be full and effective in this setting too. In *O'Neil*, defendant Runnels made a statement that incriminated both himself and codefendant O'Neil in car theft and kidnapping. At trial, the prosecutor called only three witnesses, namely the victim and two police officers. During the defense case, Runnels took the stand and testified favorably for himself and O'Neil, telling a story depicting innocent possession of the car as a loan from a friend and denying the kidnapping, which was consistent with what defendant

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[30] United States. v. Garcia, 447 F.3d 1327, 1335–36 (11th Cir. 2006) (explaining that expert C testified on use of coded language by drug traffickers, including fact that "shirts" means cocaine or meth, by quoting drug operative M, who testified to same statement; *Crawford* was satisfied because defendant had "ample opportunity" to confront and cross-examine M and because his statement was offered to explain basis of C's expert opinion); Miller v. State, 893 A.2d 937, 953 (Del. 2006) (in trial for sexual abuse of minor, admitting her written statement; she testified and "her direct examination touched on the written statements themselves," and defense cross-examined about statements) (no *Crawford* violation).

[31] State v. McKinney, 699 N.W.2d 471, 479–80 (S.D. 2005) (in abuse trial, holding that child victim was adequately cross-examinable despite answering that she "did not know" or "could not remember" in response to twenty questions; of these, one question was withdrawn, and another was irrelevant; eight were rephrased and answered later, and six involved recollections of prior statements; only four related to the abuse; on this point jury had her prior statements; victim did "affirmatively" answer 403 questions, including 122 questions on cross and recross).

[32] *See* United States v. Price, 458 F.3d 202, 209 n.2 (3d Cir. 2006) (holding that B's statements to investigators were admissible because he "testified at trial and was available for cross-examination"); People v. Argomaniz-Ramirez, 102 P.3d 1015, 1019 (Colo. 2004) (holding that it was error to exclude videotaped deposition of child victims; prosecutor represented that they would testify; based on fact that they would appear and be subject to cross, deposition was admissible); Flonnory v. State, 893 A.2d 507, 521–22 (Del. 2006) (holding that statements by witness who actually testified and was "present and subject to cross-examination" could be admitted as defense had "opportunity to cross-examine" about statements); State v. Corbett, 130 P.3d 1179, 1189 (Kan. 2006) (admitting deposition witnesses who testified at trial and could have been cross-examined; this opportunity satisfied *Crawford*).

O'Neil himself said. Although Runnels denied making the prior statement, O'Neil's cross-examination could be full and effective. The Court said that O'Neil would have been "in far worse straits" if Runnels had owned up to the statement because then O'Neil would have had to show that Runnels "confessed to a crime he had not committed" or "fabricated" the part implicating O'Neil.[33]

In the setting of *O'Neil*, it would still be helpful to cross-examine the statement, but perhaps it is less important. The reason is that Runnels's testimony was positively helpful, and codefendant O'Neil needed not be seen as the sponsor of Runnels. Not surprisingly, such a case is most likely to arise where a codefendant testifies, as in *O'Neil* (or at least a co-offender). At least one post-*Crawford* case comes out the same way where the speaker claimed at trial that what he had said before was false.[34]

C. Suboptimal Cross: The Sandbagging Prosecutor

Suppose now a different situation. In most of the cases considered so far, the witness testifies and the prosecutor examines, adducing or trying to adduce testimony about acts, events, or conditions that count, and examines the witness about his statement. Suppose, however, that the prosecutor offers other proof of a statement, such as a transcript or signed writing or testimony by another witness, and at some point calls the person who made the statement, but without putting questions to him about the acts, events, or conditions described in the statement, and without questioning him about the statement either. The prosecutor tenders the person who made the statement, who is now at least nominally a testifying witness, to the defense: Is the opportunity thus presented for cross-examination sufficient, assuming that the witness can answer questions on these subjects?

The answer should be no. The most important reason is that defendants are usually not in a position to cross-examine if they must shoulder the risk of opening the subject because usually they cannot afford to make an effort that fails, and the risk of failure is huge. Taking

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[33] Nelson v. O'Neil, 402 U.S. 622, 628–30 (1971) (rejecting claim that cross was constitutionally inadequate where declarant denied making a prior statement incriminating the defendant; result of taking this position was "more favorable to [O] than any cross-examination by counsel" could produce).

[34] *See* Commonwealth v. Clements, 763 N.E.2d 55, 57 (Mass. 2002) (admitting prior grand jury testimony by witness who recanted at trial, saying "he had been drunk at the time of the shooting," and that "it was dark and he really had not seen the shooter's face," and that he was "repeating what he had heard from others" and was "pressured to identify the defendant by the victim's family" and had not been "thinking straight" when he identified the defendant or "appreciated the seriousness of his accusations") (rejecting defense claim that there was no opportunity for cross because statement was offered after cross was completed; no discussion of effectiveness of cross).

seriously the model of cross-examination as drama, defendants usually cannot be seen as trying to discredit a witness or a statement and failing completely at the task. Somewhat obliquely, standard legal doctrine supports this point: The burden of persuasion is of course on the prosecutor to prove the elements of the crime, and this burden includes the burden of calling witnesses whose evidence is being offered. Shifting this burden to the defense is not allowed, and such a shift occurs when the prosecutor leaves it to the defendant to call a witness or to broach with a witness the subject of a statement that he has made that the prosecutor has offered as evidence.

In its 2006 decision in the *Vaska* case, the Alaska Supreme Court reversed a conviction for child sexual abuse largely for such reasons. In *Vaska*, the prosecutor offered the child's testimonial statement describing abuse. Later the prosecutor called the child as a witness, but asked her only the most basic identifying information, and then tendered her to the defense. The reviewing court concluded that the opportunity for cross was not sufficient. The court relied on Alaska Rules 613 and 801(d)(1)(A). Now the latter differs from its federal counterpart in two important ways. To begin with, it allows the substantive use of all prior statements if the speaker is cross-examinable, which was of course the proposal advanced by the Federal Rules Advisory Committee in 1975, which Congress was ultimately to reject in favor of the present provision allowing only the substantive use of statements given "in proceedings under oath." The language of the Alaska Rule also requires that the witness be "examined about his statement while testifying," so as to permit the witness "to explain or to deny" his prior statement. The decision in *Vaska* holds that the Alaska State Rules require the proponent to offer the statement though the speaker herself, and these foundational requirements must be met before defense is given the "burden" of cross-examining.[35]

Although FRE 801(d)(1)(A) contains no similar language requiring that the witness be examined about his statement while on the stand, pretty clearly that model was the one that the framers of the federal

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[35] Vaska v. State, 135 P.3d 1011, 1016 (Alaska 2006) (holding that it was error to admit statements by young victim of sexual abuse, age three at time of abuse and ten at time of trial, who testified only about her experiences in fourth grade, her age and birthday, and her parents, and not at all about her prior statement or the abuse; Alaska's Rule 801(d)(1)(A) allows substantive use of a prior inconsistent statement regardless whether sworn or given in proceedings, but requires as well that the witness be "so examined while testifying" as to have a chance "to explain or deny" the statement before she is "excused" from the case; these foundational requirements should be met before statement is admitted, and "full foundation" must be laid before witness is dismissed; to shift to defendant the foundational burden would leave defendant with "an untenable choice," forcing him to choose between cross-examining the speaker and relying on state's burden of proof).

language had in mind,[36] and other decisions reach results similar to that reached in *Vaska* in insisting that prosecutors call declarants and adduce their testimony about both statements and events.[37]

Suppose the prosecutor does not even call the declarant to the witness stand, offering proof of out-of-court statements by means of written documents or transcripts or testimony and never calling the speaker as a witness. Of course sometimes this tactic is improper: The provisions in FRE 801(d)(1), for example, clearly require that the declarant be called as a witness at some point, for they cover only statements by a witness who is "subject to cross-examination" at trial "concerning" prior statements. Also one of the subdivisions of that Rule relates to impeachment (covering "inconsistent" statements) and another relates to repair (covering "consistent" statements), and these provisions are even more clearly tied to the fact that the speaker testifies. In this setting, should it suffice that the prosecutor calls the witness at some point? The answer surely is no, at least in most cases, and the reason is that this tactic does not provide an adequate opportunity for defense cross-examination. As a matter of doctrine, the burden of presenting a case includes the burden of calling witnesses to support the case.[38]

D. Suboptimal Cross: Faulty Memory or Refusal to Testify About Events

Often a witness who has made a statement about the acts, events, or conditions in play in a criminal trial either cannot testify about them or refuses to testify, and often it is not clear whether *cannot* or *will not* is the more accurate description. *Green* exemplifies this phenomenon, as Melvin Porter looks very much like a witness who claimed not to remember, even though he actually did.[39] Often in such cases, it looks very much as though the witness has waffled because of personal regret

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[36] *See* 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:37.

[37] State v. Rohrich, 939 P.2d 697, 700–01 (Wash. 1997) (in abuse trial, holding that child did not testify as required by statute where she was not asked about the events in issue or her prior statement; "opportunity to cross examine means more than affording the defendant the opportunity to hail the witness to court . . . [and] requires the State to elicit the damaging testimony . . . so the defendant may cross examine," and declarant must be cross-examinable generally and about the prior statement specifically; "State's failure to adequately draw out testimony from the child witness before admitting [her] hearsay puts the defendant in 'a constitutionally impermissible Catch-22' of calling the child for direct or waiving" confrontation) (reversing).

[38] Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 604 (1978) (arguing that "[w]hat distinguishes a witness 'against' the accused from a witness 'in his favor' is not the content of the witness' testimony but the identity of the party relying on his evidence," and that one "is a witness 'against' the accused if he is one whose statements the prosecution relies upon in court in its effort to convict the accused," in which case the prosecutor "must take the initiative in identifying and producing him at trial" (emphasis omitted)).

[39] *See* California v. Green, 399 U.S. 149, 152, 168–70 (1970).

over being the instrument of another person's destruction, or out of fear because the witness cannot be sure at the time when he testifies that the other will go to jail. In addition, there is always a risk that an unsuccessful prosecution will lead to revenge, and of course the witness may be afraid of other things too, if the defendant has friends who might cause trouble or if "snitching" can itself lead to retribution in the community to which the witness must return. Sometimes in such cases the witness has simply over-promised what he can deliver, bargaining with the prosecutor in exchange for leniency and going further in his pretrial conversations than he is willing to go in the bright light of day when the defendant and the defense lawyer are there looking at him.

Somewhat less commonly, it appears that the witness has genuinely forgotten critical acts, events, or conditions, as occurred in the *Owens* case in which a prison guard, apparently assaulted by an inmate, seemed to have suffered from amnesia as a result of the blows he suffered in the criminal attack.[40]

Should it suffice, for the purpose of confrontation, that the witness is available for cross-examination, in the sense of being there and being a little bit cooperative, if he cannot or will not shed any more light on the acts, events, or conditions described in the crucial statement? Parenthetically, it is worth noting that the event recounted in a prior statement by a testifying witness may itself be a statement of some kind, and very often it is something that the defendant has said (his admission). Here, of course, remembering the event recounted in a prior statement entails merely remembering the fact that the defendant spoke and the substance of what he said.[41]

Here cross-examination cannot seriously be considered to be "full," in the usual sense of that term, although cross might still be "effective." The problem is that such a witness cannot be tested on the memory or perception behind his prior statement, or on the ambiguities or meaning of the statement. These are not minor drawbacks, but major stumbling

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[40] United States v. Owens, 484 U.S. 554, 556 (1988); *see also infra* notes 50–51 and accompanying text.

[41] *See* State v. Pierre, 890 A.2d 474, 498, 501 (Conn. 2006) (in murder trial, admitting statement by witness describing conversation involving defendant that included grisly and detailed account of murder; declarant was cross-examinable, even though he "claimed that he could not remember ever having heard any of the information recounted in the written statement, that he never had substantively reviewed" and signed "only to stop the police from harassing him," because he "answered all questions posed by defense," including several about "motives and interest" in talking to police, and fact that "he had charges pending against him in an unrelated matter" that were resolved when he agreed to testify; he said "he had signed the written statement despite the fact that it was not accurate . . . to get [police] to stop bothering him"; he "confirmed several other pieces of information" in the statement, even though he claimed no memory) (no *Crawford* violation).

blocks, regardless whether we view cross-examination as testing or as drama. It is true enough that such lack of memory might not completely stifle cross: One who will not or cannot answer questions about acts, events, or conditions might still answer enough questions about his life and circumstances to shed light on the prior statement. And the answers to such questions can also shed light on general truthfulness, on bias, and on the pressures that may have been working on him on account of potential charges or other influences. Also the witness might still answer questions about the statement itself, so the cross-examiner can get at the specific circumstances in which the witness found himself at the time, which might uncover or include proving that the witness was himself under suspicion and facing charges.

In such settings, post-*Crawford* cases unfortunately continue to approve the use of statements by a witness despite these impediments, and these decisions seem to follow pre-*Crawford* authorities that are examined more fully and critically below.[42]

E. Suboptimal Cross: Faulty Memory or Refusal to Testify About Statement

Often the witness has forgotten the statement and cannot testify about it, or he simply refuses to, and again it is often not clear whether "cannot" or "will not" is the better term. The witness who waffles in this way is likely once again to be acting out of regret or fear, and again the possibility arises that he has over-promised in exchange for leniency. Should it suffice, for purposes of confrontation, that he is available for cross-examination but cannot or will not shed any more light on the critical statement?

Here once again it is hard to take seriously the idea that there is a "full" opportunity for cross, although here too cross might be "effective." Here is the problem: If a witness cannot or will not testify about the statement itself, it is hard to get at the pressures or influences that affected him at the time when he spoke, and once again it is hard or impossible to test the meaning and ambiguities in the statement itself.

If the witness is fully responsive when asked about the acts, events, or conditions described in his prior statement, the cross-examiner can at least cover some of the ground covered in the statement. If, for example, the prior statement says that the defendant entered the store and returned with the proceeds, but the witness does not remember (or he denies) making the statement, he might still answer questions about

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[42] *See id.* at 501; Commonwealth v. Le, 828 N.E.2d 501, 506–07 (Mass. 2005) (admitting victim's statement identifying defendant as perpetrator of assault; "memory loss about prior events would not impermissibly undermine the opportunity to cross-examine"; "substantive content" of answers on cross does not constitute deprivation of right to cross-examine).

what the defendant did. These questions at least test the perceptions that are also found in the statement, and it might seem that little can be lost in the fact that the statement itself remains hidden in mystery. But if the defense has succeeded in showing that the witness is himself subject to serious charges and that he is testifying under an agreement that would reduce those charges or the likely punishment, then not being able to get at the reasons for the statement may be critical, particularly if the statement was made in some other setting that might falsely appear to avoid the doubts created by the fact of pending charges.

In such settings, post-*Crawford* cases unfortunately continue to approve the use of statements despite these impediments, again following pre-*Crawford* authorities that are examined critically below.[43]

F. Egregious Inadequacy: Not Remembering or Refusing to Testify About Everything

In perhaps the most egregious case, the witness turns aside questions about both the acts, events, or conditions reported in a prior statement and about the statement itself.

Post-*Crawford* cases approve use of prior statements and say the opportunity for cross at trial was adequate, despite evasion or lack of memory about both the statement and the event recounted, and a few decisions come close to saying that the witness is adequately cross-examinable even if she claims to be completely unable to remember anything relevant to the case, including her prior statement.[44]

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[43] Johnson v. State, 878 A.2d 422, 427–28 (Del. 2005) (in murder trial, admitting W's statement recounting conversation between two defendants, under state exception for statements by testifying witness regardless whether consistent or inconsistent with testimony, despite fact that the W repeatedly said she could not recall the statement) (*Crawford* satisfied).

[44] *See* Mercer v. United States, 864 A.2d 110, 113–14 (D.C. Cir. 2004) (admitting testimony from first trial by witness who later suffered head injuries and strokes and could not "remember the case at all," as well as grand jury testimony; since she testified that "she had no memory of what happened the night of the murder," but before the grand jury she said defendant shot the victim, inconsistency requirement was met, and witness was cross-examined on prior knowledge; she gave affirmative answer "when asked whether she recalled testifying at the first trial that she had not seen Mercer shoot the gun," which contradicted grand jury testimony; "it is possible, and in fact not uncommon, for a witness . . . at trial to be . . . unavailable for some purpose," but subject to cross) (*Crawford* was satisfied); State v. Gorman, 854 A.2d 1164, 1177 (Me. 2004) (admitting grand jury testimony in murder trial by defendant's mother recounting his confession, even though she claimed no memory of confessing and no memory of testifying to grand jury; mother had selective memory loss, recalling conversations with defendant both before and after the one in which he confessed, but agreed that if she had testified before grand jury under oath, she was truthful; rejecting claim that mother was incompetent because at time of grand jury appearance she was "under the influence of psychiatric medications and had a history of delusional thought that demonstrated an inability to separate fact from fantasy"); State v. Jaiman, 850 A.2d 984, 985–86, 988–90 (R.I. 2004) (in second murder

Here it is hard to say that cross could be either "full" or "effective," and the "opportunity" in this setting is simply not good enough.[45]

G. Egregious Inadequacy: Other Cases

One can of course imagine circumstances in which cross-examination is even more egregiously constrained. If, for example, the witness claims a lack of memory about both the prior statement and the acts, events, or conditions reported in it, or refuses to answer questions in these areas, then all that is left for the cross-examiner is a frontal assault on the character or motivations of the witness. Here cross-examination is clearly not "full," and it is hard to imagine it could be called "effective," although there may be cases in which the witness is thoroughly discredited as a disreputable person with such a checkered past that nobody would believe anything he says on a serious matter.

It should go almost without saying that if a statement is offered after the witness has left the stand, then cross-examination that went forward before that time is likely to be inadequate. Once again it is imaginable that a witness has been so thoroughly discredited that this fact pales in importance, but obviously a defendant cannot be faulted for not asking questions about a statement that has not yet been offered, and it is hard to see any justification for expecting otherwise. For reasons examined below, it should not be up to the defendant to call a witness whose statement has been offered by the prosecutor, and if the

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trial, admitting statement to police by alleged co-offender M who engaged in "testimonial double-cross of the state" after pleading to charges, signing seven-page statement and agreeing to testify against defendant; in second trial, M claimed he had to testify only once, which he had already done, and M then "suffered a convenient failure of memory," declaring that he could not remember the events because "of the passage of time and the stress of his incarceration"; state rule does not require prior inconsistency to be in proceedings under oath, and M "did testify and was, in fact, cross-examined," and prosecutor can resort to statement by witness who reneges on cooperation agreement; decision in *Green* raised this issue, but California court approved use of testimony on basis that jury "could disbelieve the witness's alleged lack of memory based on his apparent reluctance to testify," and Confrontation Clause is satisfied here; there is no requirement "that the witness possess perfect recall concerning the basis of his or her prior statement or current testimony, nor does it entitle the cross-examiner to an effective examination") (not reaching constitutional issues); State v. Price, 146 P.3d 1183, 1192 (Wash. 2006) (stating that the purposes of confrontation are satisfied, even when witness is "unable to recall" so if she is asked questions about events and prior statements, but cannot remember either, defendant has "sufficient opportunity for cross-examination," and "inability to remember does not implicate *Crawford* [or] foreclose [use] of pretrial statements").

[45] *See* United States v. DiCaro, 772 F.2d 1314, 1323 (7th Cir. 1985) (stating that the requirement that witness be cross-examinable at trial should not be made "effectively meaningless," as would be the case if witness suffers "total memory lapse concerning both the prior statement and its contents"; but here witness suffering amnesia answered questions about his situation and life in crime, which was adequate cross).

statement is "testimonial" in nature, the Confrontation Clause should not permit this tactic.[46]

H. Court's Lenient or Relaxed Standard

Recall that "full and effective" is the standard that grew out of the decision in *Green*. Both there and in later decisions, the Supreme Court has said that this standard is in fact far more lenient or relaxed than one might assume. In *Crawford*, the Court underscored the point by saying that the Confrontation Clause "places no constraints at all" on the use of testimonial hearsay in cases where the declarant "appears for cross-examination at trial" (the words of *Crawford*), as if to say that this fact alone suffices, regardless what cross might yield.[47]

Fensterer is the source of the statement previously quoted, along with the comment that the statement is almost as famous as Wigmore's observation about cross-examination. Here it is again: A defendant, said the Court in *Fensterer*, is not entitled to cross-examination that is "effective in whatever way, and to whatever extent" the defendant "might wish." But *Fensterer* was a special case, and a peculiar case at that, and *Fensterer* did not involve hearsay. Hence it is strange that *Fensterer* has become the iconic statement in cases explaining why problems with cross-examination do not block the use of hearsay.

In *Fensterer*, an expert apparently forgot which of four possible bases underlay his conclusion about a hair having been forcibly torn from the head of a victim, and the Court said cross could still be adequate. Now it is surprising and troublesome enough that an expert on such a technical subject as the forensic examination of a hair sample should give important testimony in a case without being able to defend or even provide the basis for his conclusion.[48] It is open to question whether such a witness should be allowed to give a conclusion of this sort under the modern *Daubert* standard and amended Rule 702.

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[46] United States v. Nunez, 432 F.3d 573, 581 (4th Cir. 2005) (stating that it was error to admit investigative report summarizing statement by defendant J implicating defendant C, where preparer of report had testified and submitted to cross-examination at a point in time when court had ruled the report inadmissible; it was later admitted, but earlier appearance of preparer did not provide opportunity to cross-examine).

[47] Crawford v. Washington, 541 U.S. 36, 60 n.9 (2004) (adding, however, that the Clause does not bar a statement "so long as the declarant is present at trial to defend or explain it," which is arguably a little more than simply being present and subject to cross).

[48] *See* Delaware v. Fensterer, 474 U.S. 15, 16–17, 20 (1985) (stating that assurances of reliability are present "notwithstanding the witness' inability to recall the basis for his opinion [because] the factfinder can observe the witness' demeanor under cross-examination," and witness testifies under oath in presence of accused; here, cross showed that the agent "could not even recall the theory on which his opinion was based," and the defense expert suggested that the agent "relied on a theory which the defense expert considered baseless"; expert who testified that hair was forcibly removed from the victim could not recall which of three possible reasons underlay that conclusion).

Paraphrasing, the latter requires courts to appraise the basis underlying expert testimony, and to admit such testimony only if it rests on sufficient facts or data and on reliable principles and methods that have been reliably applied, and an expert who cannot remember the basis for his conclusion cannot satisfy such a standard.[49]

In two ways, *Fensterer* is too thin a reed to support the weight that it is asked to carry in modern opinions. In the first place, defendants have lots of room to complain seriously that the opportunity for cross was inadequate without having to claim that they are entitled to what amounts to egg in their beer: Defendants are entitled to "full and effective" cross, and asking for that is not the same thing as asking for cross that yields all they might wish for. The comment in *Fensterer* is rhetorical overkill that cannot be taken seriously as a way of describing some rational limit on the plea that an adequate opportunity for cross-examination must be afforded. In the second place, *Fensterer* did not involve a fact witness whose statement was used to prove what the defendant had done, but an expert shedding meaning on physical evidence that had been offered in the case. As noted above, his lapse was appalling enough in the case as we have it, but he did proffer four possible bases for his conclusion, which is a far cry from the situation of a fact witness who cannot or will not answer questions about acts, events, or conditions described in a statement, or about the statement itself.

Perhaps the second most prominent decision is *Owens*, where a prison guard was apparently victimized in a vicious attack by an inmate. At trial, he could not recall what happened to him, and he may not even have seen his assailant (he remembered being struck and seeing his own blood on the floor). Still, the Court said he was cross-examinable. He did recall making the statement at the hospital, although he was hazy about that as well. The only explanation that the Court offered for its conclusion was that the Confrontation Clause does not guarantee that a witness will not forget, evade, or become confused, and it quoted from an earlier opinion that the adverse party "is not without ammunition" in attacking the speaker because the jury will learn that his memory has failed, and may well conclude that his testimony is unreliable too.[50] It is hard to know what to make of the comment about the Confrontation Clause: Taken literally, it is just silly. Taken as a description of a limit—the Confrontation Clause does not protect the accused against an unremembering witness—the comment makes one wonder. If witnesses

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[49] *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590–91, 595 (1993) (stressing reliability and setting out standards to assess this point; also stressing "fit" and authority to exclude under FRE 403).

[50] United States v. Owens, 484 U.S. 554, 558 (1988).

can testify when they don't remember enough to be tested, how serious are we about testing?

Easily the most enthusiastic opinion is *Green*, where the Court assumed that the witness would answer the most fulsome and searching questions. Taking a cue from comments made by the Court in *Green* and *Owens*,[51] modern opinions have gone so far as to make a virtue out of the circumstance of the unremembering witness. The suggestion is that if the witness does not remember, then the cross-examiner has accomplished just what he has set out to do. It may well be right that almost any witness, including any of us, if examined about a trip we have taken and what we saw or a movie that we have seen, will quickly run out of memory on many points of interesting detail. Hence a cross-examiner cannot plausibly argue that a witness who doesn't remember points of detail that are unimportant to the main issues in the case has evaded or frustrated the purposes of cross-examination, whether we stress the testing model or the model of cross as drama. It is another matter altogether if the witness cannot remember points that are central to the case, or if the witness has forgotten so much that one begins to wonder whether he could have seen what he does remember.[52]

I. Faint Words of Warning: Sometimes Cross is Inadequate

Three times the Court has said that the forgetfulness on the part of a witness might stifle cross to the point that it becomes inadequate, but the remarkable point is that these suggestions have never borne fruit.

In *Green*, the Court acknowledged a "narrow question" lurking in the case, which was whether Porter's lack of memory rendered cross inadequate.[53] On remand, however, the California Supreme Court thought that Porter's behavior on the stand did not prevent effective cross-examination. The case had been tried to a judge without a jury, and the California Supreme Court carefully analyzed Porter's behavior and answers on the stand, quoting them at length. What emerged was a

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[51] *See id.* at 559 (stating that defense was free to cross-examine on "bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination) the very fact that he has a bad memory" (citation omitted)).

[52] Bugh v. Mitchell, 329 F.3d 496, 505, 508 (6th Cir. 2003) (admitting child victim hearsay by witness who "was not willing to testify about the statements at trial and did not remember" even making them; while cross "may not have yielded the desired answers," and child may not have remembered "circumstances surrounding her previous statements," still defense "had the opportunity to expose such infirmities" by stressing youthfulness of witness and lack of memory, and jury could see her demeanor and "draw its own conclusions" on her credibility).

[53] California v. Green, 399 U.S. 149, 168–70, 170 n.19 (1970) (noting "narrow question" whether "apparent lapse of memory" on events made critical difference; issue is "not insubstantial" because conviction rested heavily on this testimony; vacating to allow California court to consider the matter).

picture of a reluctant youngster, and the trial judge had enough to go on: Acting as factfinder, the trial court could "disbelieve Porter's claim that he no longer remembered" how he got the marijuana. In his hesitant replies to questions, Porter "unmasked his apparent motive" by commenting that he had "a conscience" and implying that he didn't want to send his friend to jail ("I don't want to . . . ."). He took the course of not "flatly denying" critical points, instead "evading" questions with "equivocations" ("I'm not positive."). In the end, then, the court could conclude from his behavior on the stand that he really did remember and that his claimed memory lapse was false.

Here is the heart of the California court's analysis, on remand in *Green*:

> The [Supreme Court in this very case] pointed out that the three-fold purpose of confrontation is (1) to insure reliability by means of the oath, (2) to expose the witness to the probe of cross-examination, and (3) to permit the trier of fact to weigh his demeanor. As to the first of these functions, the court observed that "If the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness. Thus, as far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury . . . ." Here Porter was recalled for further cross-examination after Officer Wade had testified to his extrajudicial statement. When asked, under oath, if he gave a statement to the officer on the subject of acquiring and selling marijuana, Porter replied, "Yes, I did." Counsel then inquired as to the contents of the statement, and Porter admitted that "it had to do with buying it from John [i.e., defendant], yes, sir." Although he hastily added—reverting to his technique of deliberate equivocation—that "I mean, I couldn't say exactly what went on or not," he nevertheless grudgingly conceded making the two principal factual assertions reported in the statement. . . . [T]he danger of faulty reproduction was therefore negligible and the trier of fact could be confident that it had before it conflicting statements of the same witness.
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> Turning to the second function of confrontation in this context—cross-examination of the declarant—we observe that defense counsel asked Porter only one question on the topic: "Now, at the time that you made this statement to the officer, did you believe that you were telling the truth?" Porter replied, "Yes, sir," and counsel accepted the answer. It is true that in the common situation envisaged by the [Court in *Green*] the witness takes the occasion to repudiate or qualify his prior inconsistent statement, whereas here Porter reaffirmed it. But in either event it is the cross-examiner's task to "rehabilitate" the now-friendly witness by providing him with "the usual suggested explanations for the inaccuracy of his prior statement, such as faulty perception or undue haste in recounting the event." In the present

> case, however, defense counsel made no attempt to explore the inconsistency thus laid bare. Yet Porter was on the stand and under oath, and had just admitted making the statement in question. Defendant thus had the opportunity to cross-examine him, but in effect declined to do so. Whether or not a witness is actually cross-examined, the fact the defendant has an adequate opportunity to carry out such an inquiry satisfies the confrontation clause. Moreover, as the United States Supreme Court explains, "The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant."
>
> Finally, the function of confrontation in subjecting the witness' demeanor to the scrutiny of the trier of fact was undoubtedly served in the case at bar. Porter's manner of testifying on the subject of his prior statement to Officer Wade was, we have seen, no different from his behavior on the stand throughout the trial; and as noted above, that performance was closely observed and carefully weighed by the trial court.[54]

In *Fensterer*, the Supreme Court again noted that lapse of memory might "so frustrate" cross-examination that the opportunity would be inadequate for purposes of the Confrontation Clause.[55] Finally, in *Owens* the Court acknowledged that court-imposed "limitations on the scope of examination" or "assertions of privilege" might "undermine the process to such a degree that meaningful cross-examination" no longer occurs.[56]

J. Waiving Confrontation Right, and Stretching the Waiver Concept

As noted above, tactical decisions to forgo cross-examination clearly amount to waiving the right secured by the Confrontation Clause. It seems fair to expect even more of defendants. If refraining from questioning a witness amounts to waiver, half-hearted attempts to question witnesses should also be seen as waiving the rights that could be exercised in a bolder and more determined pursuit. Hence it seems fair, in cases where the defense puts questions that the witness fobs off with refusals to answer or unresponsive answers, to infer a waiver of confrontation rights if the defense fails to seek the aid of the court in compelling answers or demanding fuller responses from the witness.[57]

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[54] People v. Green, 479 P.2d 998, 1003–04, 1004 n.9 (Cal. 1971) (first alteration in original) (citations omitted) (emphasis omitted) (footnote omitted).

[55] Delaware v. Fensterer, 474 U.S. 15, 19–20 (1985) (stating that the Court "need not decide" whether lapse of memory might "so frustrate" cross as to make it inadequate under Confrontation Clause; expert witness who "cannot recall" basis for opinion invites jury to find that "his opinion is as unreliable as his memory").

[56] *Owens*, 484 U.S. at 561–62.

[57] *See* Fowler v. State, 829 N.E.2d 459, 470 (Ind. 2005) (in domestic battery case, finding that defense waived *Crawford* objection to use of her prior statements; she

Prosecutors, and sometimes courts, have faulted defendants for failing to cross-examine in circumstances in which any notion of fault or shortcoming is far more attenuated. In effect, the waiver concept is sometimes stretched far beyond its ordinary meaning, and indeed far beyond any defensible construction. Suppose, for example, that the declarant is in some sense "available" as a witness and could be called to testify, but that the prosecutor does not call the declarant and offers his statement instead. In this setting, can it be said that the defendant waives any right to cross-examine by failing to call the witness? It takes a Humpty Dumpty definition of waiver to answer this question by saying yes,[58] but some courts have indeed said yes.[59] One opinion, which was obviously very much affected by the fact that the defendant did not raise appropriate objection at trial, went even further by saying that the defendant had to show that the government would not have called the speaker to testify if an objection had been made.[60] Fortunately, the greater number of decisions have concluded that defendant does not waive objection under the Confrontation Clause by failing to call the witness.[61]

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appeared and refused to answer questions, making no claim of privilege; defense did not seek court order; defendant has choice of seeking such order or forfeiting *Crawford* objections).

[58] *See* LEWIS CARROLL, THROUGH THE LOOKING GLASS 60 (Philip M. Parker ed., ICON Classics 2005) (1872) ("'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'" (emphasis omitted)).

[59] People v. Cookson, 830 N.E.2d 484, 490 (Ill. 2005) (admitting statements by child describing sexual assault; statutory requirement that child "be available to testify at the proceeding" satisfies *Crawford*); Peak v. Commonwealth, 197 S.W.3d 536, 543–44 (Ky. 2006) (codefendant M waived Fifth Amendment rights, demanded that prosecutor use unredacted tape of his statement naming codefendant P; judge ruled that P could call M and ask leading questions, but P did not; using M's statement did not violate P's confrontation rights, which he waived by declining to call M and cross-examining him).

[60] *See* United States v. Hadley, 431 F.3d 484, 508 (6th Cir. 2005) (stating that if defense had raised objection under Confrontation Clause, government "might well have elected to respond" by calling speaker as a witness, and jury would still have heard that defendant had a gun on occasion of crime; to prevail in showing effect on substantive rights, defense must show why this outcome would not likely have occurred).

[61] *See* State v. Cox, 876 So. 2d 932, 938 (La. Ct. App. 2004) (rejecting claim that confrontation rights were satisfied where court offered defense "right to subpoena Sykes as a witness," which "begs the issue" because calling her "would hardly render the statement admissible" and defendant "should not be required to call" her "simply to facilitate the State's introduction of evidence"; there might be "a whole host of reasons" why defendant would not want to call her; if state wanted to introduce statement, it could call her); State v. Blue, 717 N.W.2d 558, 566 (N.D. 2006) (rejecting argument that "opportunity to cross-examine" is assured by "mere presence at a preliminary hearing," which "is not an adequate opportunity" as required by Confrontation Clause; videotaped child victim hearsay is not admissible, but might be if child testifies at trial); Bratton v. State, 156

So what's wrong with burdening the defense with calling a declarant when the prosecutor has offered proof of his testimonial statement? By now the answer should be clear: As a matter of litigation strategy, best captured in the idea of cross-examination as drama, defendants simply cannot afford to call a witness in the hope that they can mount a successful cross-examination that will in some way succeed in discrediting a person whom the other side has not even called. As a matter of doctrine, there is something profoundly wrong, in the nature of a sleight of hand, to say that prosecutors bear the burden of persuasion on points relating to guilt, but that defendants bear the burden of calling the witnesses on whom the prosecutor chooses to rely in offering testimonial hearsay.[62]

But wait a moment. We should at least acknowledge here that sometimes defendants are blameworthy. They may claim the right to confront witnesses when their real aim is simply to exclude their evidence altogether. In the setting of child victim hearsay, for example, the last thing a defendant may actually want to see is a child on the witness stand describing what happened to her. Claiming the right to confront in this circumstance can resemble a game of "chicken" in which the question is whether the prosecutor will, to mix the metaphor, call the bluff, or will simply give up the best source of proof and enter a bargain with the defendant for a plea of guilty on lesser charges. In such cases, a court may be sorely tempted to give the defense what it says it wants. Still, this course is the proper one, and admitting the testimonial hearsay over objection on the theory that the defense does not actually want what it claims to want is one trick too many.

It is worth noting in this setting that there are substitutes for calling child abuse victims and expecting them to testify in the courtroom setting. Under the *Craig* doctrine, which was not altered by *Crawford*, a child victim who would suffer serious trauma from the ordeal of giving public testimony may instead testify from a remote setting, aided by video monitor, which assures something pretty close to "face-to-face" confrontation with the accused.[63]

S.W.3d 689, 694 (Tex. Crim. App. 2005) (holding that prosecutor must call witness or prove that he was previously subject to cross-examination; defense failure to call witness does not waive confrontation claims).

[62] *See* Westen, *supra* note 38, at 604.

[63] Maryland v. Craig, 497 U.S. 836, 858 (1990) (authorizing use of two-way video monitors for child testifying from remote location); *see also* United States v. Bordeaux, 400 F.3d 548, 552 (8th Cir. 2005) (holding that *Craig* requires finding that child fears defendant, not a finding that she fears testifying in court; statute is unconstitutional to the extent it requires lesser finding) (reversing).

III. PARTICULAR RECURRENT SITUATIONS

A. Forensic Lab Reports

In most states, statutes pave the way to admit reports by forensic laboratories on a wide range of topics, from DNA to blood alcohol content, to ballistics tests to fingerprints, and, of course, analyses of bags of white powder to determine whether they contain cocaine or methamphetamine, and many other similar matters. The reason is not far to seek: Much that a laboratory can do is routine and non-controversial. Even in the case of routine tests, however, the mechanics and the theory may be complicated and hard to explain to a lay jury, and delivering lectures on these matters would be needlessly time-consuming and expensive.

Yet it is also the case that these materials can be crucial in a case, and it is not always true that they are noncontroversial. Mistakes in such materials can lead to unjust convictions, and sometimes defendants have more than theoretical grounds for challenging the findings of such reports—they have real indications that some kind of misconduct occurred, or real indications that errors are commonplace or likely on the particular facts of the case. Hence it can be critical for defendants to be able to cross-examine laboratory technicians who are informed not only about the substance and theory of the tests, but about the actual conduct of the test that produces the results being offered in the case.[64]

In the states, mostly this matter is governed by special statutes, of which there are two kinds in common usage. One is what we might call a "notice statute," which places the burden on the prosecutor to call the laboratory technician if the defense raises an objection to the use of a laboratory report or asks the prosecutor to call the technician.[65] The other is what we might call a "shortcut statute," which eases the burden on the prosecutor by requiring the defendant to call the technician, but in these cases the prosecutor is obligated to have the technician available to the defense, and presumably the laboratory report is excludable if the prosecutor does not do at least this much.[66]

In federal courts, the Rules leave the status of forensic laboratory reports uncertain. There is no statute covering this matter, and the public records exception to the hearsay doctrine, codified in FRE 803(8), seems to apply. In this exception, clause (B) authorizes use of public

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[64] *See generally* Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671 (1988) (discussing comprehensively hearsay and confrontation issues).

[65] *See, e.g.*, COLO. REV. STAT. § 16-3-309(5) (2006) (stating that crime lab reports "shall be received in evidence," provided that any party may request preparer to "testify in person" by giving ten days notice).

[66] *See, e.g.*, LA. REV. STAT. ANN. §§ 15:499–:501 (2005 & Supp. 2007).

reports to prove "matters observed," which could reach lab reports, but there are two problems. One is that these words are not very appropriate as terms describing write-ups of tests performed in a laboratory. They are far more at home as descriptions of entries describing simpler everyday observations, such as tag numbers of cars crossing the border between California and Mexico or temperature or wind speed.[67] The second problem is that clause (B) excludes reports by "police officers and other law enforcement personnel." The landmark federal decision in *Oates* concluded that government crime lab reports are embraced by this restriction because technicians in such labs are part of the prosecution team and should be treated like police.[68] The other two clauses in the public records exception obviously cannot be stretched to cover laboratory reports offered against the accused.[69]

The business records exception in FRE 803(6) might apply to reports prepared by both private labs and public or official labs. Some courts do apply this exception, but the result seems wrong.[70] The reason is that taking this approach sidesteps the language of limitation in FRE 803(8). Forensic laboratory reports should be viewed as reports prepared by police or law enforcement officers because the laboratories that prepare such reports, and in all likelihood the technicians actually involved in their preparation, are very likely to know roughly what is at stake in any given test that finds its way into a report, and are likely to "identify with" the cause of the prosecution, which is invested in developing or proving a case in much the same way that police and other law enforcement officers are invested in the cause. When forensic laboratories are publicly owned and operated, as is often the case, their

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[67] United States v. Orozco, 590 F.2d 789, 793–94, (9th Cir. 1979) (tag numbers recorded by customs inspector at border). See also the following pre-Rules decisions applying the common law antecedent of FRE 803(8): Evanston v. Gunn, 99 U.S. 660, 666–67 (1878) (meteorological observations of Signal Service); Minnehaha County v. Kelley, 150 F.2d 356, 361 (8th Cir. 1945) (records of Weather Bureau with data on rainfall in Sioux Falls).

[68] United States v. Oates, 560 F.2d 45, 84 (2d Cir. 1977) (prolix but thorough and insightful opinion by Judge Waterman).

[69] FRE 803(8)(A) embraces public records reflecting the activities of a public office or agency, and of course lab reports do reflect such activities, and indeed virtually every public record reflects such activities in some way. Obviously, however, the intent of this provision is to pave the way for using such records to prove the activities of the public office or agency, and that is not the purpose of laboratory reports offered in criminal cases. Finally, FRE 803(8)(C) embraces fact findings made on the basis of an investigation, but in criminal cases it can be used only "against the Government." *See generally* 4 MUELLER & KIRKPATRICK, *supra* note 20, §§ 8:87, 8:89 (discussing FRE 803(8)(C)).

[70] United States v. Ellis, 460 F.3d 920, 925–26 (7th Cir. 2006) (admitting hospital blood work-up showing that defendant had methamphetamine in his system; report prepared at police request, but fit business records exception and was nontestimonial under *Crawford*).

records and reports are obviously public records within the meaning of FRE 803(8). When police or prosecutors commission private laboratories to prepare such reports, such laboratories should be treated as public offices under ordinary notions of agency law because their "principal" is the public office that retains their services and their interests are to perform well, which means that they are aligned on the side of police or law enforcement officials in much the same way as public laboratories. The limiting language in clauses (B) and (C) of FRE 803(8) was intended to exclude police reports, not simply to act as a limit on the exception, and the same principle ought to apply to forensic laboratory reports prepared on behalf of police or prosecutors.[71]

Given the various approaches taken by the states, and the situation in federal courts, it is worthwhile to pause here to consider where we should end up. Certainly laboratory reports should ordinarily be admissible if they can be trusted, and surely it is often the case that they can be. The information contained in such reports is often technical, and no one is likely to carry around in his head all the details that underlie the conclusions reached in any given test, so insisting on live testimony by a percipient witness is likely to be unproductive and costly. It also seems, however, that a technician should be available if there is any real fight or disagreement on the conclusion expressed in the report. Defendants may want to explore (a) the limits of the technique used in preparing the report, such as how many false positives or false negatives there are;[72] (b) the meaning of the conclusions, such as what twelve concordances mean in a fingerprint comparison,[73] and what a match of five factors means in a DNA test, and what databases were used in generating what are always astronomical numbers indicating a very high probative value of "matches";[74] (c) the opportunities and risks of

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[71] *Compare Oates*, 560 F.2d at 83–84, *with* State v. Forte, 629 S.E.2d 137, 144 (N.C. 2006) (admitting state crime lab report on DNA, which was nontestimonial and fit public records exception despite restrictive language because Congress did not change the practice in this area).

[72] *See generally* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (mentioning error rates as a factor bearing on reliability). *See also* DAVID L. FAIGMAN, DAVID H. KAYE, MICHAEL J. SAKS & JOSEPH SANDERS, SCIENCE IN THE LAW § 1-3.4.2 (2002) (discussing methods of analyzing error rates).

[73] *See generally* United States v. Mitchell, 365 F.3d 215 (3d Cir. 2004) (approving fingerprint evidence as satisfying *Daubert* standard but upholding right of defendants to call experts to testify about the limitations of fingerprint evidence). *See also* Tara Marie La Morte, *Sleeping Gatekeepers:* United States v. Llera Plaza *and the Unreliability of Forensic Fingerprinting Evidence Under* Daubert, 14 ALB. L.J. SCI. & TECH. 171 (2003).

[74] *See* D.H. Kaye, *Behavioral Genetics Research and Criminal DNA Databases*, LAW & CONTEMP. PROBS., Winter/Spring 2006, at 259; D.H. Kaye, *The Relevance of "Matching" DNA: Is the Window Half Open or Half Shut?*, 85 J. CRIM. L. & CRIMINOLOGY 676 (1995).

error that come with doing the tests that produce the result;[75] and (d) the proficiency of the lab or the technician or tests that were used.[76]

In federal courts, one way to get to a sound result in the treatment of forensic laboratory reports would involve limiting prosecutors to the exception for past recollection recorded, found in FRE 803(5). Taking this approach would reach something approximating what happens under state notice statutes, except that prosecutors would always be burdened with calling the technician who prepares such reports, and would be required to lay the standard foundation for invoking this exception, which includes showing that the technician does not recall the specific test and the result reached, but that he took care in preparing the report to get it right. Some decisions do allow resort to this exception for public records that would otherwise be excludable under the language of limitation found in FRE 803(8)(B) and (C).[77] This approach is distinctly "second best," however, as it should not be necessary to call technicians in cases where the defense does not plan to challenge the test results, and also because the real point is not so much to call an unremembering witness, but rather to insure that the defense has ready access to the right person for purposes of confronting and cross-examining her.

In the states, it seems that the shortcut statutes described above, that simply allow defendants to call the technician, should not be viewed as adequate for reasons already considered. First, defendants cannot afford to call witnesses where they have little or no chance of making progress in impeaching or cross-examining them. Second, putting this burden on defendants involves shifting to them the burden that belongs on the prosecutor: The report is part of the prosecutor's case, and the prosecutor should bear the risk that the technician might be unavailable, that the report was badly prepared, or that the tests were inconclusive or botched.[78]

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[75] *See generally* Simon A. Cole, *The Prevalence and Potential Causes of Wrongful Conviction by Fingerprint Evidence*, 37 GOLDEN GATE U. L. REV. 39 (2006); Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985 (2005); Robert Epstein, *Fingerprints Meet* Daubert*: The Myth of Fingerprint "Science" is Revealed*, 75 S. CAL. L. REV. 605 (2002).

[76] *See* William C. Thompson, *Tarnish on the 'Gold Standard': Understanding Recent Problems in Forensic DNA Testing*, THE CHAMPION, Jan.-Feb. 2006, at 10.

[77] United States v. Marshall, 532 F.2d 1279, 1285–86 (9th Cir. 1976) (admitting police chemist's analysis of heroin as past recollection recorded).

[78] Wigglesworth v. Oregon, 49 F.3d 578, 581 (9th Cir. 1995) (stating that to satisfy confrontation rights, a statute must require the state to subpoena the technician; allowing the defense to do this puts the defendant in a "'Catch-22' situation [in which the choice is to] call the criminalist who prepared the report during the defendant's own case and possibly bolster the [state's] case, or forego [sic] examination of the criminalist and perhaps lose an opportunity to expose a defect"); State v. Hancock, 854 P.2d 926, 929 (Or. 1993) (construing OR. REV. STAT. § 475.235(4)–(5) (2005) to mean that prosecutor must subpoena preparer on defense's request in connection with lab reports on controlled substances). *But*

Far better are the state notice statutes, and it would be reasonable to augment these with a requirement that defendants must carry at least some burden before prosecutors should have to call the technician. It seems fair, for example, to require defendants to make some preliminary showing that the test was improperly run, or that it carries a risk of error that is substantial, or that the laboratory that performed the test has had proficiency problems or has not been subjected to any kind of proficiency standard.[79]

Where the defense raises any kind of substantial objection, the burden should then be cast on the prosecutor to call a knowledgeable witness. A common question is whether it suffices to produce an expert who works in the lab but did not actually prepare the report. In *Oates*, the prosecutor called a chemist who was an associate of the person who prepared an analysis of cocaine, and the reviewing court was plainly not satisfied. In the 2006 decision by the Maryland Supreme Court in the *Rollins* case, the prosecutor called an associate in the state medical examiner's office because the doctor who prepared the autopsy report no longer worked there, and the reviewing court was satisfied. Pretty clearly the fact that a laboratory technician who prepares a test has died or become unavailable should not by itself be enough to require exclusion of a report, but on the other hand the defense should be entitled, upon raising suitable objection, to cross-examine a witness who can reply knowledgeably on the science and techniques of testing, and on the protocols followed in the particular laboratory. (The decision in *Oates* concluded that the report could not be admitted under any hearsay exception. In *Rollins*, the court concluded that the report was nontestimonial for purposes of the *Crawford* doctrine, and it did fit a statutory exception.[80])

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see State v. Cunningham, 903 So. 2d 1110, 1121–22 (La. 2005) (approving lab report proving that substance was marijuana, where statute entitled defense to request subpoena of technician, which complied with *Crawford*); State v. Campbell, 719 N.W.2d 374, 378 (N.D. 2006) (approving use of state crime lab report on drug and alcohol content; defendant waived *Crawford* objection by failing to call technician); State v. Craig, 853 N.E.2d 621, 640 (Ohio 2006) (approving coroner's report to prove cause of death where medical examiner other than one who prepared report testified and could be cross-examined).

[79] *See* City of Las Vegas v. Walsh, 124 P.3d 203, 208 (Nev. 2005) (approving statutory scheme in DUI trial, which enabled defense to object to use of affidavit to prove blood alcohol level, and required the affiant to appear for cross-examination if defendant raises a "substantial and bona fide dispute" on substance of affidavit; this scheme comports with *Crawford*); *see also* LA. REV. STAT. ANN. § 15:501 (2005 & Supp. 2007) (stating that when defense subpoenas lab technician, defense shall certify that it "intends in good faith to conduct the cross-examination").

[80] Rollins v. State, 897 A.2d 821, 839 (Md. 2006) (admitting state medical examiner's autopsy report to show cause of death in murder trial); *see also* Schoenwetter v. State, 931 So. 2d 857, 870–71 (Fla. 2006) (admitting testimony in murder trial by medical

One thing that we do not want is a system that allows prosecutors to offer laboratory reports without any realistic way of cross-examining the preparer. Another thing we do not want is a system in which the defendant could require prosecutors always to bring in the laboratory technician, even in cases where the report is completely uncontroversial and there is no intent on the part of the defense to challenge the report in any way.

Somewhat astonishingly, some modern decisions hold that lab reports are not testimonial.[81] Fortunately, however, at least some modern opinions reach the more plausible conclusion that such reports are testimonial for purposes of *Crawford*.[82]

Many modern opinions approve the use of certificates to prove ministerial points, such as the qualifications of the technician or the calibration of the machine used in testing. It seems that these somewhat pedestrian matters should be provable in this way, without calling a live witness, at least in the absence of any significant objection by the defense.[83] Arguably, more generalized lab reports should be admissible as well, where they bear more generally on the case in providing context

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examiner as to cause of death, based on report prepared by another examiner who was unavailable; no violation of confrontation rights under *Crawford*).

[81] *See* United States v. Feliz, 467 F.3d 227, 234–35 (2d Cir. 2006) (holding that medical examiner's autopsy report was nontestimonial business record); United States v. Ellis, 460 F.3d 920, 927 (7th Cir. 2006) (finding that hospital blood test reporting use of methamphetamine, made at behest of police, was business record and nontestimonial); State v. Musser, 721 N.W.2d 734, 750–51 (Iowa 2006) (admitting state lab test reporting that defendant was positive for HIV); Rollins v. State, 897 A.2d 821, 839 (Md. 2006) (admitting state medical examiner's autopsy report to show cause of death in murder trial); Commonwealth v. Verde, 827 N.E.2d 701, 705 (Mass. 2005) (allowing public lab test on cocaine, which was not "discretionary nor based on opinion," but describes "well-recognized scientific test"); State v. Dedman, 102 P.3d 628, 636 (N.M. 2004) (admitting lab report of blood alcohol); State v. Craig, 853 N.E.2d 621, 639 (Ohio 2006) (holding that medical examiner's autopsy report was a nontestimonial business record).

[82] *See* State v. Caulfield, 722 N.W.2d 304, 310 (Minn. 2006) (holding that state lab test reports are testimonial); People v. Rogers, 780 N.Y.S.2d 393, 396 (App. Div. 2004) (in a rape trial, holding that it was error to admit report on victim's blood, which was testimonial; although prepared by private lab, it was at police request, so not a business record); State v. Crager, 844 N.E.2d 390, 397 (Ohio Ct. App. 2005) (holding that state crime lab report on DNA was testimonial); *see also* State v. Clark, 964 P.2d 766, 772–73 (Mont. 1998) (admitting state lab report in DUI case as public record, without producing technician, violated defense right under state constitution to confront accuser).

[83] *See* Bohsancurt v. Eisenberg, 129 P.3d 471, 475 (Ariz. Ct. App. 2006) (holding that maintenance and calibration records for breath-testing machine were not testimonial under *Crawford*); State v. Carter, 114 P.3d 1001, 1006 (Mont. 2005) (in DUI case, admitting certificates indicating that Intoxilizer was working properly, which was nontestimonial foundational evidence under *Crawford*).

and background, as opposed to direct support for elements in a charge or defense.[84]

B. Child Victim Hearsay

One might read *Crawford* as ending the use of child victim hearsay to prove abuse, but in fact the cases point toward the opposite conclusion. Child victim hearsay is still admitted routinely under the exceptions for excited utterances, statements to physicians, and under state catchalls and rifle-shot child victim hearsay provisions.

Should we tolerate a situation in which it is up to the defense to call children as witnesses? Arguably the answer should be no, and for much the same reasons outlined above—defendants usually cannot afford to call child victims in hopes of discrediting them, and prosecutors should bear this burden.

Sometimes defendants do not want child victims to testify because they are sympathetic witnesses and the case against the defendant is pretty strong. Instead, defendants hope that by insisting on confrontation they can achieve a bargaining advantage. Perhaps for this reason, courts sometimes invoke the waiver notion, saying defendants who do not themselves call child victims have waived confrontation rights.[85] The Maryland Supreme Court's 2005 decision in the *Snowden* case seems right, however, in rejecting this approach.[86]

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[84] *See* United States v. Scholle, 553 F.2d 1109, 1124–25 (8th Cir. 1977) (printouts on drugs seized across country, including lab analyses).

[85] *In re* Pamela A.G., 134 P.3d 746, 751 (N.M. 2006) (in proceedings related to four-year-old adoptive child, admitting her statements describing abuse and identifying abuser under child victim hearsay provision, and rejecting claim of *Crawford* violation; the court noted that "[n]either parent called [the c]hild . . . nor . . . ask[ed] permission of the court to allow them to question" her and instead "simply sought to exclude [her] statements"; they "did not indicate . . . what questions they might ask," making it hard to decide "what value . . . cross-examination . . . would have offered").

[86] State v. Snowden, 867 A.2d 314, 331–33 (Md. 2005) (holding that it was error to admit child victim's interview with investigator and rejecting claim that defense failed to raise *Crawford* issue by failing specifically to object "to the State's failure to place the children in the witness box," which "ignores the fundamental principle" that the state bears the "threshold burden to produce a prima facie case" of guilt; also rejecting argument that Confrontation Clause is satisfied if defendant had "opportunity to call" the declarant, which approach has "significant constitutional shortcomings" with respect to the burden of production that rests on the state "to produce affirmatively the witnesses needed for its prima facie showing" of guilt; state must "place the defendant's accusers on the stand so that the defendant both may hear the accusations against him or her stated in open court and have the opportunity to cross-examine," and burden is on the state to prove its case through production of witnesses and evidence; "[i]mplicit" in defendant's objection to hearsay was "the demand that the withheld declarants testify"); Lowery v. Collins, 996 F.2d 770, 771 (5th Cir. 1993) ("Forcing a defendant to call a child [victim] . . . unfairly requires a defendant to choose between his right to cross-examine a complaining witness and his right to rely on the State's burden of proof in a criminal case.").

Courts routinely admit child victim statements describing abuse where the child testifies and can be cross-examined at trial, without further discussion.[87] And they approve the use of their statements even if they are unresponsive on cross in cases where they do testify.[88]

Testifying from a remote setting by means of a two-way video monitor, with defense cross-examination conducted from the courtroom in a situation in which neither the defendant nor defense counsel actually confronts the child physically, is permissible when the *Craig* standard is satisfied, meaning that the trial court finds specifically that fear of the defendant prevents the child from testifying. More generalized findings, however, based on fear of the courtroom or testifying in public, do not justify this approach because it cuts off the usual mechanism of face-to-face cross-examination and confrontation.[89]

IV. PRIOR CROSS-EXAMINATION

In connection with prior cross-examination, there is one big issue and a second issue that has gone unnoticed. Here is the big issue: If the defense had a prior opportunity to cross-examine but did not take advantage of it, when if ever does this tactic waive an objection based on the Confrontation Clause? Here is the unnoticed issue: Does the prior cross pave the way not only for the prior testimony that was given at the earlier time, but also for statements that were made even earlier?

A. Big Issue: The Opportunity Untaken

One might think that an opportunity to cross-examine at an earlier time suffices, even if the defense did not take advantage of the opportunity. Just as later cross really means later opportunity to question the declarant, prior cross might mean prior opportunity to question the declarant. But different considerations apply when we speak of the earlier opportunity for cross, and it is not at all clear that a mere prior opportunity should suffice.

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[87] Gaxiola v. State, 119 P.3d 1225, 1231 (Nev. 2005) (admitting child's statements describing abuse to mother, uncle, detective, and member of sexual abuse investigative team; child testified and was cross-examinable, removing *Crawford* objection).

[88] United States v. Kappell, 418 F.3d 550, 554–55 (6th Cir. 2005) (in child abuse trial, admitting statements by children aged three and six, given to psychotherapist and pediatricians, under medical statements exception; children testified and were cross-examined; defense agreed to let them testify by closed circuit television; they were sometimes "unresponsive or inarticulate," but cross satisfied *Crawford*).

[89] *See* Maryland v. Craig, 497 U.S. 836, 860 (1990); United States v. Bordeaux, 400 F.3d 548, 552 (8th Cir. 2005) (holding that it was error to let child testify by two-way video monitor on basis of finding that she was frightened of defendant and testifying before jury; *Craig* requires finding of fear of defendant, not fear of courtroom, and statute is unconstitutional to extent that it requires lesser finding) (reversing).

1. Preliminary Hearings and Depositions

In a common scenario, a witness testifies at a preliminary hearing (or less often in a deposition), but becomes unavailable at trial. Should the prior testimony be admissible against the defendant? Does it matter whether the defendant took advantage of the chance to cross-examine, or purposefully declined to do so, or engaged only in brief cross?

Notably, the former testimony exception in FRE 804(b)(1) would allow the use at trial of testimony given in a preliminary hearing if the declarant is unavailable at trial and if the defendant had "opportunity and similar motive" to cross-examine at the preliminary hearing. It is also notable that the Supreme Court has twice approved use of the exception to admit preliminary hearing testimony at trial, and in *Crawford* the Court seemed to take pains to indicate that its new approach would not change anything in this area. In *Green*, the Court gave its approval in a case in which the witness also testified at trial, but pointedly added that it would have approved this use of the preliminary hearing testimony even if the declarant had not been cross-examinable at trial.[90] In *Roberts*, the Court said the defense had engaged in "the equivalent of" cross-examination in the preliminary hearing, and approved use of testimony given in that setting where the witness was unavailable to testify at trial.[91] And in *Crawford*, the Court cited *Roberts* and *Green* in suggesting that preliminary hearing testimony remains admissible at trial, provided that the declarant is unavailable to testify.[92]

Influenced by *Roberts* and *Green*, many states approve the use of preliminary hearing testimony against the accused, under the former testimony exception,[93] and similar logic extends to depositions.[94] Even

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[90] California v. Green, 399 U.S. 149, 165 (1970) (approving use of preliminary hearing testimony given in equivalent setting of trial; defense had "every opportunity" to cross-examine).

[91] Ohio v. Roberts, 448 U.S. 56, 70 (1980) (approving use of preliminary hearing testimony by unavailable witness; defense engaged in functional equivalent of cross).

[92] Crawford v. Washington, 541 U.S. 36, 58–59 (2004) (citing *Roberts* as one among the "recent cases" whose "outcome[]" is consistent with the "traditional line" to which the Court now returns, and noting that testimonial statements by absent witnesses have been admitted "only where the declarant is unavailable" and defense "had a prior opportunity" for cross-examination).

[93] People v. Jurado, 131 P.3d 400, 428 (Cal. 2006) (in conditional examination in murder case, holding that defense could cross-examine co-offender, even though defense did not know about statements he later made indicating that he knew of and agreed with defendant's plan to commit murder); People v. Carter, 117 P.3d 476, 516 (Cal. 2005) (approving use of preliminary hearing testimony by unavailable declarant; motive to cross-examine in preliminary hearing is not identical because purpose is only to determine probable cause, but motive was "closely similar" because defense sought to discredit the state's theory by showing that the witness saw defendant with the victim "several hours prior to the time" that other witnesses put them together, which was "sufficiently similar" to satisfy former testimony exception and the federal constitutional standard); State v.

when later events bear on questions that the defense might put, arguably indicating that the prior opportunity for cross was inadequate, courts have rejected challenges to the use of such testimony.[95]

Of course testimony given in a preliminary hearing is quintessentially "testimonial" under *Crawford*. That is to say, such testimony satisfies most of the criteria mentioned in *Crawford* for distinguishing testimonial from nontestimonial statements: The speaker intends (and certainly expects) his statements to be used in investigating and prosecuting crimes; the state is very much involved in the production of these statements; such statements possess all the formal indicia of testimony—because that is exactly what they are.[96]

Nevertheless, decisions approving use of the former testimony exception seem wrong as a matter of hearsay law. There is only one issue in preliminary hearings: Is there probable cause to think a crime was committed and that the defendant is the perpetrator? In this setting, there is little or no hope of knocking out a facially adequate case, and defendants know it. Even the most aggressive cross-examination ordinarily leaves room for a jury to believe the witness, and judges in preliminary hearings almost always turn these cases over for trial rather than dismiss. Hence lawyers for the accused usually conclude that there is no point in cross-examining, except to the extent that it might be necessary to clarify testimony in order to be informed about the worst thing that could happen at trial. Most defense lawyers think it is better to hold back, and to save the most searching questions for cross-examination at trial. In short, perhaps there is an opportunity for cross at the preliminary hearing, but the opportunity is not inviting—there is

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Skakel, 888 A.2d 985, 1040 (Conn. 2006) (approving use of testimony from probable cause hearing where speaker had died, and the defense had questioned him "extensively" in the hearing, pointing out his "drug addiction, his prior acts of misconduct, his prior inconsistent statements about the subject matter of his testimony, his lack of recollection due to the passage of time and ongoing drug abuse, and his failure to report the defendant's alleged confession" to authorities).

[94] Rice v. State, 635 S.E.2d 707, 709 (Ga. 2006) (admitting deposition by deceased witness who was dying at the time; defense knew witness was in ill health and he died during the course of the deposition; defense did not cross-examine; right was waived); Howard v. State, 853 N.E.2d 461, 469 (Ind. 2006) (admitting child victim's deposition, where defense conducted "vigorous and lengthy examination" and had adequate opportunity).

[95] *See* State v. Estrella, 893 A.2d 348, 360 (Conn. 2006) (admitting R's preliminary hearing testimony even though defense did not then know of later letter by R retracting that testimony; defendant knew whether R was lying about defendant's conduct and "readily could have challenged [R's] credibility even without the letter").

[96] *Crawford*, 541 U.S. at 51 (mentioning "*ex parte* in-court testimony or its functional equivalent," such as affidavits, custodial examinations, and prior testimony that "defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," and also mentioning "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions").

no motive to take advantage of the opportunity. To say that a defendant has an opportunity to do what most defense lawyers would choose not to do because the odds overwhelmingly favor the proposition that "saving the ammunition until trial" presents the best chance to defend the client is to engage in a kind of fiction. Waiver becomes a "crap shoot" in which the lawyer's understandable decision comes back to hurt his client. Influenced by these realities, a few states wisely exclude preliminary hearing testimony, even when the speaker is unavailable at trial.[97]

What about the constitutional standard? *Crawford* contemplates a continuation of tradition and stresses that the declarant must be unavailable at trial and that there must have been an opportunity for cross-examination on the prior occasion. There is, however, at least some reason to doubt that preliminary hearing testimony should be admitted as a constitutional matter. There is one principle that underlies modern confrontation jurisprudence that predates both *Roberts* and *Crawford*: That principle holds that cross-examination is a trial right, which suggests that it should be up to the defendant whether to cross-examine prior to trial, and that a decision not to do so cannot waive the right to cross-examine at trial.[98] *Roberts* seemed attentive to this point in suggesting that it is very hard to decide whether not cross-examining at a preliminary hearing can be viewed as a waiver.[99]

2. Prior Trials

Testimony given at prior trials on the same or related offenses differs considerably from testimony given in preliminary hearings and depositions. To begin with, the difference in what is at stake—establishing probable cause as against establishing guilt or innocence—profoundly affects the incentive to cross-examine. A defendant who would be foolish to cross-examine at a preliminary hearing or deposition cannot afford to hold back at trial, and must do his best to attack the

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[97] *See* People v. Fry, 92 P.3d 970, 979–80 (Colo. 2004) (holding that it was error to admit testimony from preliminary hearing; defendant does not enjoy adequate motive and opportunity); State v. Elisondo, 757 P.2d 675, 677 (Idaho 1988) (stating that defense has little reason to cross-examine at preliminary hearing; most consider it a "tactical error"); State v. Stuart, 695 N.W.2d 259, 265–66 (Wis. 2005) (in homicide trial, holding that it was error to admit preliminary hearing testimony by unavailable witness; cross at preliminary hearings tests "plausibility, not credibility" so opportunity at that time does not satisfy *Crawford*) (reversing).

[98] Barber v. Page, 390 U.S. 719, 725 (1968) (holding that confrontation is "basically a trial right" that includes the right to cross-examine and the opportunity to let the jury consider the demeanor of the witness); *see also* Pennsylvania v. Ritchie, 480 U.S. 39, 52–53 (1987); Mancusi v. Stubbs, 408 U.S. 204, 211 (1972) (quoting *Barber* on this point).

[99] Ohio v. Roberts, 448 U.S. 56, 70 (1980) (stating that the question whether defense waives right to cross-examine at trial by not cross-examining at preliminary hearing is "truly difficult to resolve under conventional theories" (quoting Peter Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1211 (1979))).

witness and his testimony if it counts in some serious way in the case. More importantly, there is no room for strategic guessing about later opportunities and holding back one's best shots at trial. A defendant cannot anticipate a second trial and must assume that the first trial is the last one. The defense must do all that can be done, within the constraints of the Rules and the obligations of professional responsibility, to raise a reasonable doubt or prove some defense.

Hence it is not surprising that the Supreme Court has approved the use of statements that constituted testimony given in a prior trial of the same offense,[100] and it is not surprising that post-*Crawford* cases are in accord.[101] Of course the government can invoke the former testimony exception to admit testimony from a prior trial, but as always this exception can be used only if the witness is unavailable, as *Crawford* itself observed.[102] Although the government cannot invoke the exception if it "procures" the unavailability of the witness,[103] it seems that deporting an illegal alien does not constitute procurement, and the government can first deport and then invoke the former testimony exception.[104] Prior testimony, given in other trials in which the defendant against whom the testimony is offered did not have a chance to cross-examine, is not admissible. The former testimony exception does not reach such testimony (because the current defendant did not have a chance to cross-examine), and such testimony is "testimonial" for purposes of the *Crawford* doctrine.[105]

Changes in the evidence presented, as between the first and second trials, may implicate the nature of cross-examination that the defense

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[100] *Mancusi*, 408 U.S. at 216 (admitting testimony given in prior trial on same charges); Mattox v. United States, 156 U.S. 237, 244 (1895) (admitting testimony given at defendant's first trial by witness who died by time of second trial).

[101] *See* Epperson v. Commonwealth, 197 S.W.3d 46, 55 (Ky. 2006) (approving use of prior trial testimony by witness who claimed lack of memory at second trial, thus becoming unavailable; witness appeared for cross-examination at prior trial, so *Crawford* did not stand in the way); Farmer v. State, 124 P.3d 699, 705 (Wyo. 2005) (approving use of prior trial testimony despite defense claim that counsel in first trial asked "relatively few questions" and was generally inadequate).

[102] Crawford v. Washington, 541 U.S. 36, 59 (2004) (summing up with the observation that testimonial hearsay has been admitted "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine").

[103] *See* FED. R. EVID. 804(a) (stating that one is not unavailable if the proponent has procured his absence).

[104] *See* Williams v. United States, 881 A.2d 557, 565 (D.C. Cir. 2005) (in a second murder trial, admitting testimony from first trial by witness whom government had deported as illegal alien before second trial; witness satisfied unavailability requirement).

[105] *See* Willingham v. State, 622 S.E.2d 343, 345–46 (Ga. 2005) (holding that it was error to admit testimony by since-deceased witness in trial of co-offender, which was testimonial under *Crawford*, and current defendant had no opportunity to cross-examine) (reversing).

pursues or would want to pursue, and potentially such changes could mean that even testimony given in prior trials of the defendant cannot be admitted in later trials. So far, however, this fact has not led to the conclusion that prior cross-examination was inadequate to satisfy the Confrontation Clause.[106]

B. The Unnoticed Issue: Statements Other than Testimony

Prior cross (or maybe the opportunity) might pave the way to admit testimonial hearsay other than the testimony given when the prior cross (or opportunity) occurred.

Suppose *X* says "I was struck on the head and robbed on the street by a fellow in jeans and a Seahawks hat" in an excited statement to a police officer in July. In August, *X* appears in a preliminary hearing on charges that *Y* committed the robbery. *X* testifies that *Y* is the assailant/robber. The prosecutor either does or does not offer *X*'s prior statement. Defense counsel representing *Y* either does or does not cross-examine at the preliminary hearing. The question is: Can the prior statement can be admitted?

If *X* never testifies at trial, the prosecutor might argue that the prior statement to the police officer, even if testimonial, should be admissible as an excited utterance. The prosecutor might also add that no *Crawford* problem exists because, in the preliminary hearing, the defendant could have cross-examined *X* about his earlier statement.

To start with, it is not clear whether the cases envision prior cross-examination as a basis to admit something other than the previously cross-examined testimony itself. As noted in the foregoing discussion, the first problem is to determine whether the opportunity to cross-examine at the preliminary hearing, if it was not actually pursued by the defense, justifies admitting even the preliminary hearing testimony itself. If the defense did not cross-examine, and the opportunity is viewed as inadequate as to the testimony itself, then seemingly the "opportunity" is inadequate as to the prior statement as well.

Assuming that the opportunity, not taken by the defense, is adequate as to the testimony itself, it still should not be viewed as

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[106] *See* State v. Hannon, 703 N.W.2d 498, 507–08 (Minn. 2005) (admitting testimony given by since-deceased witness at defendant's first trial and rejecting claim that prior opportunity to cross-examine was inadequate; defense argued that his confession was excluded from the second trial, so the cross-examination in the first trial rested on a "completely different theory" than would animate cross-examination in the second trial, but it was not clear that cross in the second trial would address "any 'new material line of questioning'" inasmuch as the state's theory was "the same at both trials" and the evidence was "largely the same," even though second trial "featured more emphasis on the testimony of informants"; *Crawford* requires "a prior opportunity to cross-examine," and "[t]he opportunity need not actually be seized"; but it is possible to imagine a prior opportunity that is not adequate "due to substantial circumstantial differences" (emphasis omitted)).

adequate for a statement that the prosecutor never mentioned. For reasons that apply more generally when prosecutors use prior statements as evidence, it seems that the prosecutor should at least present the statement in order to make an adequate opportunity for defense cross-examination.

Assuming that the defense does cross-examine at the preliminary hearing, and goes into detail on acts, events, or conditions reported in the testimony and in the prior statement, arguably the cross-examination requirement is satisfied. This position is plausible even if the prosecutor does not mention the statement, although obviously the case to admit the statement over an objection under the Confrontation Clause is better if the statement was raised by the prosecutor.

V. CONCLUSION

It is high time to revisit the meaning of the constitutional standard, established in the jurisprudence of the Confrontation Clause, that assures the accused an adequate opportunity for "full and effective" cross-examination. One reason is that the coming of *Crawford* means that some statements that courts admitted under the old *Roberts* doctrine as reliable hearsay are no longer admissible unless the right of cross-examination is provided for. Another reason—and the more important one—is that the doctrine of "full and effective" cross-examination has not been adequately developed. In the common setting of a witness at trial who retreats into claims of memory loss, *Green* was overly sanguine in appraising the effectiveness of delayed cross-examination. The memorable comment in *Fensterer* suggesting that defendants cannot expect to get everything they want in cross-examination cannot function as a useful standard when defendants are convicted after cross-examination has been stymied.

At the very least, "full and effective" cross-examination that is delayed until trial can occur only if prosecutors actually call witnesses whose statements are offered, and examine them both about the acts, events, and conditions reported in their statements and about the statements themselves. Even when these conditions are satisfied, "full and effective" cross-examination envisions a witness who actually replies in some substantive way to questions put by the defense about those acts, events, and conditions, and about the statements being offered.

At the very least, "full and effective" cross-examination that occurred prior to trial means that the witness was once again called by the prosecutor, and that the defendant had not only an opportunity but an incentive to cross-examine.

Dealing constructively with these issues requires courts to appreciate not only the customary view that cross-examination is a testing mechanism, but also the view that cross-examination is drama,

theatre, and rhetoric. Pretending that cross-examination is only the former amounts to ignoring the realities that confront trial lawyers and to deciding cases on an unrealistic basis.

NONTESTIMONIAL HEARSAY AFTER *CRAWFORD*, *DAVIS* AND *BOCKTING*

*Laird C. Kirkpatrick**

The 2004 decision of the United States Supreme Court in *Crawford v. Washington*[1] ushered in a new era of confrontation jurisprudence. The ruling greatly strengthened a defendant's Sixth Amendment protection against testimonial hearsay by requiring that it be subject to cross-examination either before or at trial in order to be admitted. What was not made clear was whether criminal defendants have constitutional protection against hearsay offered by the prosecution that is found to be nontestimonial.

Before *Crawford*, the Supreme Court viewed all hearsay offered against a criminal defendant as being subject to the Confrontation Clause. Whether the hearsay was admissible depended on whether it satisfied the two-pronged test of *Ohio v. Roberts*.[2] *Roberts* required a finding that the hearsay was reliable and a showing that the declarant was unavailable. *Roberts* held that reliability could be inferred without further inquiry if the statement fit a "firmly rooted" hearsay exception. As for unavailability, later decisions limited this requirement primarily to former testimony and to hearsay offered under exceptions that were not "firmly rooted."

Crawford clearly overruled *Roberts* with respect to testimonial hearsay, holding that such hearsay must be subject to cross-examination regardless of whether a finding of reliability and unavailability has been made. Thus, testimonial hearsay previously admitted under *Roberts* will now be excluded if the cross-examination requirement is not satisfied. However, *Crawford* did not overrule *Roberts* with respect to nontestimonial hearsay, although it hinted that *Roberts*'s days might be numbered. The Court stated: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as

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1 541 U.S. 36 (2004).

2 448 U.S. 56 (1980).

would an approach that exempted such statements from Confrontation Clause scrutiny altogether."[3]

And so the law stood for two years after *Crawford*—testimonial hearsay was governed by *Crawford* and nontestimonial hearsay was governed by *Roberts*.[4] Then came the Supreme Court's decision in *Davis v. Washington*[5] in 2006. In *Davis*, Justice Scalia, writing for the Court, reached out to address an issue that was not before the Court—the applicability of the Confrontation Clause to nontestimonial hearsay. This issue was not briefed or argued in either *Davis* or the companion case of *Hammon v. Indiana*,[6] nor was it a question the Court had accepted for review. Furthermore, neither Davis nor Hammon had argued in the courts below that if the hearsay in question was found to be nontestimonial its admission would violate the Confrontation Clause,[7] thus no claim of error on this point was preserved. Nonetheless, Justice Scalia, in language so cryptic that it escaped the attention of many readers of the opinion, including the preparer of the headnotes,[8] signaled his view that nontestimonial hearsay was no longer subject to the Sixth Amendment. After reaffirming that the primary focus of the Confrontation Clause is on testimonial hearsay, he stated that "[a] limitation so clearly reflected in the text of the constitutional provision

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[3] 541 U.S. at 68.

[4] *See, e.g.*, Summers v. Dretke, 431 F.3d 861, 877 (5th Cir. 2005) ("With respect to the statements at issue here—nontestimonial out-of-court statements in furtherance of a conspiracy—it is clear that [*Roberts*] continues to control."); United States v. Hinton, 423 F.3d 355, 358 n.1 (3d Cir. 2005) ("[T]he admission of non-testimonial hearsay is still governed by *Roberts*."); United States v. Brun, 416 F.3d 703, 707 (8th Cir. 2005) (applying *Roberts*'s standard to excited utterance); United States v. Gibson, 409 F.3d 325, 338 (6th Cir. 2005) ("*Crawford* dealt only with testimonial statements and did not disturb the rule that nontestimonial statements are constitutionally admissible if they bear independent guarantees of trustworthiness."); United States v. Saget, 377 F.3d 223, 227 (2d Cir. 2004) ("*Crawford* leaves the *Roberts* approach untouched with respect to nontestimonial statements."); State v. Rivera, 844 A.2d 191, 202 (Conn. 2004) ("[B]ecause this statement was nontestimonial in nature, application of the *Roberts* test remains appropriate.").

[5] 126 S. Ct. 2266 (2006).

[6] Hammon's brief does not address the issue. Brief of Petitioner Hershel Hammon, Hammon v. Indiana, 126 S. Ct. 2266 (2006) (No. 05-5705), 2005 WL 3597706. Nor does Davis's. Brief for Petitioner, Davis v. Washington, 126 S. Ct. 2266 (2006) (No. 05-5224), 2005 WL 3598182.

[7] Neither the Washington Supreme Court nor the Indiana Supreme Court addressed the issue. *See* State v. Davis, 111 P.3d 844, 850–52 (Wash. 2005); Hammon v. State, 829 N.E.2d 444, 452 (Ind. 2005) ("[W]hether some nontestimonial statements may be subject to Sixth Amendment limitations is not before us today.").

[8] James J. Duane, *The Cryptographic Coroner's Report on* Ohio v. Roberts, CRIM. JUST., Fall 2006, at 37, 38 ("The official syllabus to the *Davis* case prepared by the Reporter of Decisions and the West headnotes to the opinion make no mention of *Roberts* at all, much less any mention that *Roberts* was finally overruled in that case. And the lower courts have thus far been almost completely unable to accurately decipher what *Davis* said on that point.").

must fairly be said to mark out not merely its 'core,' but its perimeter."[9] Earlier in the opinion he stated that "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."[10]

Some lower courts viewed this dictum in *Davis* that appeared to signal the death of *Roberts* as nonbinding,[11] just as other dicta in *Crawford* and *Davis* had been regarded as overly broad.[12] However, eight months later in *Whorton v. Bockting*,[13] a unanimous Supreme Court, again addressing an issue that had not been briefed or argued by the parties,[14] stated that there is no constitutional protection against nontestimonial hearsay. In an opinion by Justice Alito, the Court said:

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[9] 126 S. Ct. at 2274. The phrasing in *Crawford* was that testimonial statements were the "primary object" of the Confrontation Clause. In *Davis* Justice Scalia wrote a broader statement that "only" a testimonial statement can "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Id.* at 2273.

[10] *Id.*

[11] See the following post-*Davis* cases: Albrecht v. Horn, 471 F.3d 435, 468 (3d Cir. 2006) ("Unless and until the Supreme Court holds otherwise, *Roberts* still controls nontestimonial statements."); Scott v. Jarog, No 03-73737, 2006 WL 2811270, at *9 (E.D. Mich. Sept. 28, 2006) ("With respect to non-testimonial hearsay statements, *Roberts* and its progeny remain the controlling precedents."). *Cf.* United States v. Feliz, 467 F.3d 227, 232 (2d Cir. 2006) (in the context of autopsy reports admitted as public records, stating that regardless of "[w]hether the admissibility of nontestimonial evidence also turns on an analysis of its reliability based on requirements rooted outside the rules of evidence, the particular guarantees of trustworthiness attendant to autopsy reports . . . make it unnecessary to resolve that question in this case").

On the question when lower courts should view a Supreme Court decision as overruled based on dictum, see Agostini v. Felton, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). On the appropriate criteria for identifying dicta, see generally Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005).

[12] For example, the *Crawford* opinion listed business records as an example of hearsay that is nontestimonial. 541 U.S. 36, 56 (2004) ("Most of the hearsay exceptions [in the Framers' era] covered statements that by their nature were not testimonial—for example business records or statements in furtherance of a conspiracy."). However, some records of regularly conducted activity fitting Federal Rule of Evidence 803(6) would clearly be testimonial, such as investigative police reports or a store detective's report of shoplifting offered against a defendant in a shoplifting prosecution. *See, e.g.*, State v. Crager, 844 N.E.2d 390, 398–99 (Ohio Ct. App. 2005) (refusing to adopt a per se exclusion of all business records from scrutiny under *Crawford*); People v. Mitchell, 32 Cal. Rptr. 3d 613, 621 (Ct. App. 2005) (stating that the *Crawford* Court did not intend that "all documentary evidence which could broadly qualify in some context as a business record . . . automatically be considered non-testimonial").

[13] 127 S. Ct. 1173 (2007).

[14] The issue before the Court was the retroactivity of the *Crawford* decision, and the Court held that it was not retroactive. The hearsay statements in question had already been held to satisfy *Roberts*.

> But whatever improvement in reliability *Crawford* produced . . . 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.[15]

The manner in which the Supreme Court has approached the question whether criminal defendants have any constitutional protection against nontestimonial hearsay is troubling. The answer to this question has broad ramifications for how criminal cases are tried and affects a large number of cases. According to a recent survey, nearly one-third of the confrontation challenges before the appellate courts have been held to involve nontestimonial hearsay.[16] Yet there has been no briefing or argument on the question whether there should be at least a minimal level of Sixth Amendment scrutiny for some forms of nontestimonial hearsay. The Court has staked out its position on the question, which is apparently to exclude nontestimonial hearsay entirely from the protection of the Sixth Amendment, without hearing argument from any of the litigants who might actually be affected by such a ruling.

It was premature for the Court to resolve the constitutional status of nontestimonial hearsay at a time when the definition of testimonial hearsay is still so unsettled. The term *testimonial* hearsay has not yet been clearly defined by the Court, hence the scope of what is *nontestimonial* hearsay also remains significantly undefined.[17] Since *Crawford*, lower courts have held that the following types of hearsay statements are nontestimonial: a child's statements alleging sexual abuse made to family members, such as parents or foster parents,[18] as

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[15] *Bockting*, 127 S. Ct. at 1183. The Court is in error in this statement. *Crawford* did not hold that the Confrontation Clause has no applicability to nontestimonial hearsay. *See supra* notes 4–5 and accompanying text.

[16] *See* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 767 (2005) (noting that among approximately 500 published federal and state court opinions applying *Crawford* between March 8 and December 31, 2004, nearly one-third of the courts reaching the merits distinguished *Crawford* on the ground that the statements at issue were nontestimonial).

[17] The Supreme Court has expressly declined to provide a comprehensive definition of the term "testimonial." Davis v. Washington, 126 S. Ct. 2266, 2273 (2006); *Crawford*, 541 U.S. at 68.

[18] People v. Virgil, 104 P.3d 258, 265 (Colo. Ct. App. 2005) (finding that statements to father and father's friend were nontestimonial); Herrera-Vega v. State, 888 So. 2d 66, 69 (Fla. Dist. Ct. App. 2004) (admitting child's statements to mother and father reporting sodomy because statements were nontestimonial); People v. R.F., 825 N.E.2d 287, 295 (Ill. App. Ct. 2005) (holding as nontestimonial statements made to mother and grandmother); *In re* Rolandis G., 817 N.E.2d 186, 189 (Ill. App. Ct. 2004) (finding that statements made to

well as to medical personnel, such as nurses[19] or doctors;[20] an accomplice's statement describing a murder-for-hire scheme to an acquaintance;[21] recorded jailhouse conversations between a defendant's boyfriend and his visitors;[22] private conversations with a friend;[23] statements by a shooting victim to her family at the hospital;[24] domestic business records;[25] foreign business records;[26] autopsy reports;[27] odometer statements by sellers of used cars;[28] a wide range of certifications, such as certifications of the authenticity of public records,[29] certifications of the nonexistence of a public record,[30] certifications attesting to the authenticity of a business record,[31] and certifications of testing devices;[32] and laboratory reports identifying illegal substances or measuring drug or alcohol content in defendant's

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mother were nontestimonial); State v. Bobadilla, 690 N.W.2d 345, 350 (Minn. Ct. App. 2004) (finding that statements made to mother were nontestimonial); Pantano v. State, 138 P.3d 477, 479 (Nev. 2006) (admitting child's statement to father concerning sexual abuse by another); State v. Brigman, 615 S.E.2d 21, 24–25 (N.C. Ct. App. 2005) (admitting child's statement to foster mother because it was nontestimonial); State v. Walker, 118 P.3d 935, 942 (Wash. Ct. App. 2005) (finding that statements to mother were nontestimonial).

19 State v. Scacchetti, 711 N.W.2d 508, 514–15 (Minn. 2006); State v. Krasky, 696 N.W.2d 816, 819–20 (Minn. Ct. App. 2005) (holding that seven-year-old's statements to nurse practitioner about her father's alleged abuse were nontestimonial).

20 United States v. Peneaux, 432 F.3d 882, 896 (8th Cir. 2005); People v. Cage, 15 Cal. Rptr. 3d 846, 854–55 (Ct. App. 2004); State v. Slater, 908 A.2d 1097, 1107 (Conn. App. Ct. 2006); Commonwealth v. DeOliveira, 849 N.E.2d 218, 224 (Mass. 2006); Foley v. State, 914 So. 2d 677, 685 (Miss. 2005); State v. Vaught, 682 N.W.2d 284, 287–91 (Neb. 2004); State v. Lee, No. 22262, 2005 WL 544837 (Ohio Ct. App. 2005).

21 Ramirez v. Dretke, 398 F.3d 691, 695 n.3 (5th Cir. 2005).

22 People v. Shepard, 689 N.W.2d 721, 729 (Mich. Ct. App. 2004).

23 Horton v. Allen, 370 F.3d 75, 83–84 (1st Cir. 2004); State v. Manuel, 697 N.W.2d 811, 823–25 (Wis. 2005) (collecting cases).

24 State v. Blackstock, 598 S.E.2d 412, 420 (N.C. Ct. App. 2004).

25 United States v. Ellis, 460 F.3d 920, 927 (7th Cir. 2006).

26 United States v. Hagege, 437 F.3d 943, 958 (9th Cir. 2006).

27 United States v. Feliz, 467 F.3d 227, 233–34 (2d Cir. 2006); State v. Lackey, 120 P.3d 332, 348–52 (Kan. 2005); Rollins v. State, 866 A.2d 926, 953 (Md. Ct. Spec. App. 2005); Moreno-Denoso v. State, 156 S.W.3d 166, 180–82 (Tex. Crim. App. 2005).

28 United States v. Gilbertson, 435 F.3d 790, 796 (7th Cir. 2006).

29 United States v. Weiland, 420 F.3d 1062, 1077 (9th Cir. 2005).

30 United States v. Rueda-Rivera, 396 F.3d 678, 680 (5th Cir. 2005); United States v. Cervantes-Flores, 421 F.3d 825, 830–34 (9th Cir. 2004); State v. N.M.K., 118 P.3d 368, 371–72 (Wash. Ct. App. 2005) (holding that certification that defendant lacks a driver's license was nontestimonial).

31 United States v. Ellis, 460 F.3d 920, 927 (7th Cir. 2006).

32 Rackoff v. State, 621 S.E.2d 841, 845 (Ga. Ct. App. 2005) (finding that certification regarding breathalyzer was not testimonial because not prepared for any particular case).

blood made for use in criminal prosecutions,[33] whether made by public or private laboratories.[34]

It is possible that the Supreme Court may ultimately adopt a definition of *testimonial* that will cover the hearsay in some of these cases. But in the meantime, the constitutional questions raised by these cases are too important and involve too many factual variations to have been properly resolved without careful consideration based upon full briefing and argument by the parties affected.

I. CHILD SEXUAL ABUSE PROSECUTIONS

A full briefing and argument on the constitutional status of nontestimonial hearsay would have allowed the Court to consider a number of important questions. The first is whether eliminating nontestimonial hearsay from the scope of the Confrontation Clause will remove a constitutional safeguard that has played a vital role in assuring fairness and balance in child sexual abuse prosecutions. If *Roberts* is overruled in its entirety, this will have a particularly significant impact on child sexual abuse prosecutions for three reasons. First, many statements made by children offered in such prosecutions have been found to be nontestimonial. Although a child's statements to a law enforcement officer, or an agent of law enforcement, are generally considered to be testimonial under *Crawford*,[35] many statements by children alleging sexual abuse are usually made first in private settings to caretakers, family members, friends, teachers, doctors, or nurses. A large number of lower courts have held that such statements made in private settings are nontestimonial.[36]

A second reason why overruling *Roberts* will have a particularly large impact on child sexual abuse prosecutions is that child hearsay is often offered under hearsay exceptions that are not "firmly rooted," such as the residual exception or new statutory exceptions designed specifically for child hearsay. While *Roberts* accorded a presumption of

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[33] Napier v. State, 827 N.E.2d 565, 569 (Ind. Ct. App. 2005) (demonstrating that a toxicologist certificate was nontestimonial); Commonwealth v. Verde, 827 N.E.2d 701, 706 (Mass. 2005) (holding that toxicologist's report on drug type was nontestimonial); State v. Campbell, 719 N.W.2d 374, 376–77 (N.D. 2006) (identifying evidence seized as marijuana).

[34] *Ellis*, 460 F.3d 920 (lab test from private hospital); People v. Meekins, 828 N.Y.S.2d 83 (App. Div. 2006) (private DNA lab).

[35] *See, e.g.*, People v. Warner, 14 Cal. Rptr. 3d 419, 429 (Ct. App. 2004) (holding that statements to police officer and child interview specialist were testimonial); People v. Virgil, 104 P.3d 258, 262 (Colo. Ct. App. 2005) (demonstrating that statements to a police officer and physician member of child protection team were testimonial); Blanton v. State, 880 So. 2d 798, 800–01 (Fla. Dist. Ct. App. 2004) (requiring Sixth Amendment protection for statements made to a police investigator); Flores v. State, 120 P.3d 1170, 1178–79 (Nev. 2005) (finding that statements to police and child abuse investigator were testimonial).

[36] *See* cases cited *supra* notes 18–20.

reliability for hearsay that fits a firmly rooted exception, it generally required a showing of reliability for hearsay that does not fit a firmly rooted exception. Thus, child sexual abuse prosecutions are an area where the reliability requirement of *Roberts* had its greatest force.

Reports by children that are the product of suggestive questioning can be unreliable, as has been demonstrated in a number of nationally publicized cases.[37] With the help of social science research, the legal

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[37] In 1983 and 1984, more than 350 children claimed to have suffered sexual abuse at McMartin's preschool in Manhattan Beach, California. After allegations by one parent prompted the investigation, most of the other allegations came after questioning by parents who received a letter from the police advising them that their children might have been abused or by questioning by the Children's Institute International (CII), a Los Angeles abuse therapy clinic. Some of the allegations made in the case were of a bizarre nature involving Satanic rituals, hot air balloon rides, giraffes, and tunnels. After what is purported to be the longest and most expensive criminal prosecution in United States history, Peggy McMartin Buckey was found not guilty in 1990, and her son was acquitted of a number of charges, the remaining of which were dropped after a hung jury on retrial. For an account of this case, see EDGAR W. BUTLER ET AL., ANATOMY OF THE MCMARTIN CHILD MOLESTATION CASE (2001); ELAINE SHOWALTER, HYSTORIES: HYSTERICAL EPIDEMICS AND MODERN MEDIA (1997); Dorothy Rabinowitz, *From the Mouths of Babes to a Jail Cell: Child Abuse and the Abuse of Justice: A Case Study*, HARPER'S MAGAZINE, May 1990, at 52; Buckey v. County of Los Angeles, 968 F.2d 791 (9th Cir.), *cert. denied*, 506 U.S. 999 (1992) (Peggy McMartin Buckey's post-acquittal 42 U.S.C. § 1983 claim against the county, county district attorney, child abuse investigation institute, and child abuse investigator).

In East Wenatchee, Washington, based on evidence gathered from unrecorded questioning of sixty children who signed statements after extended periods of interrogation, 27,726 child sexual abuse charges were brought against forty-three adults in 1994. Most of the charges were ultimately dismissed; many of the convictions were overturned on appeal; and other defendants were freed after plea bargaining. Timothy Egan, *Pastor and Wife Are Acquitted on All Charges in Sex-Abuse Case*, N.Y. TIMES, Dec. 12, 1995, at A24; John K. Wiley, *Two Wenatchee Sex Abuse Defendants Released*, SEATTLE POST-INTELLIGENCER, June 8, 2000, http://seattlepi.nwsource.com/local/wenaww.shtml; *The Accused: Over Two Years, 43 People Were Charged with 27,726 Counts of Child Sex Abuse. 17 Were Convicted and Remain in Prison. 4 Were Acquitted*, SEATTLE POST-INTELLIGENCER, Feb. 25, 1998, at A6. Dr. Phillip Esplin, a forensic psychologist for the National Institutes of Health's Child Witness Project and expert witness in two of the Wenatchee trials, commented that "Wenatchee may be the worst example ever of mental health services being abused by a state . . . to control and manage children who have been frightened and coerced into falsely accusing their parents and neighbors of the most heinous of crimes." Andrew Schneider, *Wenatchee Abuses Attacked Nationally*, SEATTLE POST-INTELLIGENCER, May 28, 1998, at B1; *see also* Mike Barber, *Wenatchee Must Pay Up, Court Rules $718,000 in Sanctions Over Abuse Case is Confirmed by State Appeals Panel*, SEATTLE POST-INTELLIGENCER, Aug. 4, 2004, at B1; Debbie Nathan, *Justice in Wenatchee*, N.Y. TIMES, Dec. 19, 1995, at A25.

See also Maryland v. Craig, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting) (explaining that "[s]ome studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality"); State v. Michaels, 642 A.2d 1372, 1384–85 (N.J. 1994) (reversing conviction of female nursery school teacher on 115 counts of sexual abuse of children in her care on ground that convictions were based almost entirely on statements by young children who had been subjected to sustained leading interrogation); Stephen J. Ceci & Maggie Bruck,

system has gained an increased understanding of the factors, particularly the susceptibility of children to suggestive questioning, that bear on the reliability of statements by young children.[38] A leading case applying the *Roberts* reliability requirement is *Idaho v. Wright*,[39] which arose out of a prosecution for child sexual abuse. In *Wright*, the Supreme Court affirmed the Idaho Supreme Court which held that a young child's statements to a doctor alleging sexual abuse of both herself and her sister lacked sufficient indicia of reliability to justify admission under the Confrontation Clause. The Idaho Supreme Court found that the statements lacked trustworthiness because the interviewing physician used "blatantly leading questions," had a "preconceived idea of what [the child] should be disclosing," and the interview lacked procedural safeguards.[40] The physician had apparently drawn a picture during his questioning of the child that was no longer available for inspection, and the Idaho court found that "the circumstances surrounding this interview demonstrate dangers of unreliability which, because the interview was not [audio or video] recorded, can never be fully assessed."[41]

The Supreme Court agreed that the child's statements lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause. Writing for the Court, Justice O'Connor stated:

> We think the Supreme Court of Idaho properly focused on the presumptive unreliability of the out-of-court statements and on the suggestive manner in which Dr. Jambura conducted the interview. Viewing the totality of the circumstances surrounding the younger daughter's responses to Dr. Jambura's questions, we find no special

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Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 PSYCHOL. BULL. 403 (1993) (examining interviewing practices that can produce false memory in children).

[38] *See, e.g.*, Maggie Bruck & Stephen J. Ceci, *The Suggestibility of Children's Memory*, 50 ANN. REV. PSYCHOL. 419 (1999); Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33 (2000); Jodi A. Quas et al., *Individual Differences in Children's and Adults' Suggestibility and False Event Memory*, 9 LEARNING & INDIVIDUAL DIFFERENCES 359 (1997); Anne M. Ridley et al., *The Effects of State Anxiety on the Suggestibility and Accuracy of Child Eyewitnesses*, 16 APPLIED COGNITIVE PSYCHOL. 547 (2002); Daniel L. Schacter et al., *True and False Memories in Children and Adults: A Cognitive Neuroscience Perspective*, 1 PSYCHOL. PUB. POL'Y & L. 411 (1995); Amye R. Warren & Dorothy F. Marsil, *Why Children's Suggestibility Remains a Serious Concern*, 65 LAW & CONTEMP. PROBS. 127 (2002); Amye Warren et al., *Inducing Resistance to Suggestibility in Children*, 15 LAW & HUM. BEHAV. 3 (1991).

[39] 497 U.S. 805 (1990).

[40] State v. Wright, 775 P.2d 1224, 1227 (Idaho 1980).

[41] *Id.* at 1230.

> reason for supposing that the incriminating statements were particularly trustworthy.[42]

Lower courts have generally read *Wright* as establishing that the following four factors, along with other surrounding circumstances, are appropriate to consider in determining the reliability of a child's statement alleging sexual abuse: (1) whether the child had a motive to "make up a story of this nature"; (2) whether, given the child's age, the statements are of a type "that one would expect a child to fabricate"; (3) whether the interview of the child was conducted in a suggestive manner; and (4) the degree to which the child's statement was spontaneous, although noting that "[i]f there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness."[43]

The Court rejected the "apparently dispositive weight" placed by the Idaho Supreme Court on the lack of procedural safeguards at the interview. While acknowledging that videotaping the child's interview and avoiding leading questions "may well enhance the reliability of out-of-court statements of children regarding sexual abuse," the Court declined "to read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant."[44]

Nonetheless, the message was not lost on prosecutor's offices and child advocacy centers throughout the country—children's out-of-court statements are much more likely to be admitted under *Wright* if they are videotaped and if the persons involved in interviewing children who may be victims of child abuse are trained to avoid overly leading, repetitious, or suggestive questioning. *Wright* has not only had a significant impact in changing the techniques used in cases of suspected child sexual abuse,[45] it has also provided a constitutional safeguard against untrustworthy statements in the thousands of child sexual abuse prosecutions that have been brought since *Wright* was decided.[46]

It is difficult to determine how many times trial judges have excluded hearsay statements as untrustworthy by applying the

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[42] *Wright*, 497 U.S. at 826.

[43] *Id.*; *see also, e.g.*, Webb v. Lewis, 44 F.3d 1387, 1391 (9th Cir. 1994); Virgin Islands v. Joseph, 964 F.2d 1380, 1388 (3d Cir. 1992).

[44] *Wright*, 497 U.S. at 826.

[45] *See* Thomas D. Lyon, *Applying Suggestibility Research to the Real World: The Case of Repeated Questions*, 65 LAW & CONTEMP. PROBS. 97, 126 (2002); Dorothy F. Marsil et al., *Child Witness Policy: Law Interfacing with Social Science*, 65 LAW & CONTEMP. PROBS. 209, 241 (2002).

[46] *See generally* Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, 65 LAW & CONTEMP. PROBS. 47 (2002) (citing cases).

Wright/Roberts standard. Because prosecutors generally cannot appeal, the case reports, for the most part, only reflect cases where the statements were admitted and the defendant challenged that ruling on appeal, not those cases where the hearsay statements were excluded. The case reports also do not reflect how many times prosecutors have refrained from offering hearsay statements of questionable reliability out of concern for violating the *Wright/Roberts* constitutional standard. But there can be little doubt that *Wright* and *Roberts* have played a major role in child sexual abuse prosecutions throughout the United States and have been key precedents regularly taken into account by trial lawyers and judges handling such cases.[47] Yet if *Roberts* is overruled in its entirety, *Wright* is also overruled *sub silentio*.

A third reason why *Roberts* has played a significant role in child sexual abuse prosecutions is that a general consensus exists that it is important to have the child testify when possible, given the nature of the crime and the severity of the penalties. The *Roberts* requirement that the declarant testify when available has generally been interpreted to apply to hearsay offered under the catchall exception as well as under the special child hearsay exceptions.[48]

Over the past several decades, evidence law has changed in many ways that makes it easier for children to testify. Age-based competency restrictions have largely been eliminated.[49] States have adopted statutes that authorize the appointment of a special advocate to support the child

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[47] *See generally* Ronald J. Allen, *The Expert as Educator: Enhancing the Rationality of Verdicts in Child Sex Abuse Prosecutions*, 1 PSYCHOL. PUB. POL'Y & L. 323 (1995); Allison C. Goodman, *Two Critical Evidentiary Issues in Child Sexual Abuse Cases: Closed-Circuit Testimony by Child Victims and Exceptions to the Hearsay Rule*, 32 AM. CRIM. L. REV. 855 (1995); John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 56–58 (1996).

[48] *See, e.g.*, United States v. Earles, 113 F.3d 796, 801 (8th Cir. 1997) (holding that when a hearsay declarant is not present for cross-examination at trial, "the Confrontation Clause normally requires a showing that he is unavailable"); United States v. Lang, 904 F.2d 618, 625 (11th Cir. 1990) (citing *Roberts* as requiring unavailability as a prerequisite to admission of hearsay under catchall exception); United States v. Dorian, 803 F.2d 1439, 1447 (8th Cir. 1986) (citing *Roberts* as requiring a five-year-old victim's unavailability, which was shown due to her young age and fright, as a prerequisite to admission under catchall hearsay exception in prosecution for child sexual abuse); Vaska v. State, 135 P.3d 1011, 1014 n.6 (Alaska 2006) (applying unavailability requirement under state residual hearsay exception in child sexual abuse case); State v. Allen, 755 P.2d 1153, 1159 (Ariz. 1988) (same); State v. Robinson, 699 N.W.2d 790, 798 (Minn. Ct. App. 2005) (same); Betzle v. State, 847 P.2d 1010, 1019 (Wyo. 1993) (same); *cf.* CAL. EVID. CODE § 1360(a) (West 2004) (providing that "statement[s] made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another" is admissible where statement is reliable and child is unavailable to testify).

[49] *See* FED. R. EVID. 601; UNIF. R. EVID. 601; *see also* Nora A. Uehlein, Annotation, *Witnesses: Child Competency Statutes*, 60 A.L.R.4TH 369 (1988).

during the legal process and that sometimes even allow the advocate to sit with the child while his or her testimony is given.[50] In order to assist children with verbal inhibitions, anatomically correct dolls are used to help children describe genitalia or sexual activity.[51] Many states, as well as the federal government, authorize the presentation of a child's testimony by closed-circuit television or a videotaped deposition in situations where testifying in court would be too traumatic or damaging to the child.[52]

The constitutionality of presenting a child's testimony by closed-circuit television, at least in cases where the child would be unduly traumatized by taking the stand, was upheld in *Maryland v. Craig*[53] over a vigorous dissent by Justice Scalia. In his dissent, he stated:

> Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?" Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.[54]

However, if a child's statement in a private setting is considered nontestimonial, a prosecutor could now apparently present the child's accusatory statement through a third party without calling the child for cross-examination at all, let alone by means of closed-circuit television. Ironically Justice Scalia's concern about the need for confrontation in

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[50] MICH. COMP. LAWS § 600.2163a(4) (2004) (allowing victim of child abuse "to have a support person sit with, accompany, or be in close proximity to the witness during . . . testimony"); MINN. STAT. § 631.046 (2003) (allowing "parent, guardian, or other supportive person" to accompany child abuse victim at trial); WYO. STAT. ANN. § 7-11-408(b) (2005) (allowing advocate to accompany child sex-crime victim during videotaped deposition).

[51] *See* Monique K. Cirelli, *Expert Testimony in Child Sexual Abuse Cases: Helpful or Prejudicial?* People v. Beckley, 8 T.M. COOLEY L. REV. 425, 426 n.18 (1991) (collecting cases).

[52] In the federal context, 18 U.S.C. § 3509 (2000) permits the use of closed-circuit or videotaped testimony in child sexual abuse cases, codifying the holding of *Maryland v. Craig*, 497 U.S. 836, 857–58 (1990). For state authorities, see *Craig*, 497 U.S. at 853–54 n.3 (collecting state statutes permitting child victim testimony via closed-circuit in sexual abuse cases).

[53] *Id.* at 857–58.

[54] *Id.* at 861 (Scalia, J., dissenting).

Craig can be completely circumvented under a regime that simply eliminates the requirement of in-court testimony by an available child when the child's out-of-court statement is found to be nontestimonial.

There is another point to consider. Almost all the statutory child hearsay exceptions adopted by various states have been drafted with the assumption that *Roberts* set forth the controlling constitutional standard. Therefore they contain reliability and unavailability requirements.[55] If *Roberts* is dead, states would presumably be free to modify these statutes and eliminate the reliability and unavailability requirements from these hearsay exceptions or, for that matter, to repeal the hearsay rule entirely with respect to nontestimonial hearsay.

II. NEED FOR CROSS-EXAMINATION

A hearing focused on the constitutional status of nontestimonial hearsay would also have allowed the Court to consider the fact that in some cases defendants have a strong need to cross-examine nontestimonial hearsay. Certainly the need to test, and refute if possible, a hearsay statement is generally greater where the statement is testimonial. But this is not always the case. The importance of testing and refutation is not necessarily a function of the distinction adopted in *Crawford*, but turns rather on the content of the statement and its importance and role in the case as evidence. A nontestimonial statement can sometimes be as vital in convicting a defendant as a testimonial statement. Two examples illustrate the point.

The notorious trial of Sir Walter Raleigh in 1603 is an important part of the background of the Confrontation Clause, and was cited repeatedly by Justice Scalia in *Crawford* as well as in *Davis*.[56] Raleigh was convicted of treason and sentenced to death based on the out-of-court statements of an alleged accomplice, Lord Cobham, accusing Raleigh of plotting to overthrow James I. At trial Raleigh pleaded for the court to "let Cobham be here, let him speak it. Call my accuser before my face." But his request was denied, and Raleigh was convicted and

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[55] *See, e.g.*, ALA. CODE § 15-25-2 (1995) (permitting introduction of hearsay statements made by child sexual abuse victims, with unavailability and reliability requirements); CAL. EVID. CODE § 1360(a) (West Supp. 2007) (providing that a "statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another" is admissible where the statement is reliable and the child is unavailable to testify); OR. REV. STAT. § 40.460(18a)(d) (2005) (allowing a special hearsay exception for children and persons with developmental disabilities who allege sexual abuse, containing reliability and unavailability requirements). The model for many state statutes is UNIF. R. EVID. 807, which establishes a hearsay exception admitting the inherently trustworthy declaration of an unavailable child victim of neglect or physical or sexual abuse.

[56] Davis v. Washington, 126 S. Ct. 2266, 2277 (2006); Crawford v. Washington, 541 U.S. 36, 44 (2004).

ultimately executed.[57] His trial is frequently cited as a powerful example of the criminal defendant's need to confront his accuser, and the perceived unfairness of his trial is generally thought to be one of the reasons for the adoption of the Confrontation Clause.[58]

But what if instead of speaking to an examining magistrate, Cobham had spoken to a friend, described a plot that Raleigh had allegedly devised to overthrow the Crown, and stated his intention to "cast his lot with Raleigh." In such a case, a prosecutor operating in a post-*Crawford* world would likely be able to offer Cobham's statement through his friend's testimony as a declaration against penal interest. The statement would presumably not be testimonial, because it was made in a private setting without any intent that it be used as a basis for criminal investigation or prosecution. Yet if such a hearsay statement accusing Raleigh of being the instigator of a treasonous plot had been admitted, it is hard to imagine that Raleigh would not still have made the same demand to "call my accuser before my face." Raleigh's need to confront and cross-examine his accuser would be as essential in the hypothetical trial as the actual trial. If Raleigh had been convicted and executed on the basis of such unsworn, out-of-court, uncross-examined evidence, it seems doubtful that his trial would have been perceived as significantly more fair than his actual trial. Yet under the position taken by the Court in *Davis* and *Bockting*, the admission of such hearsay would not be considered even to raise a confrontation issue.[59]

A second example where a defendant's need to cross-examine nontestimonial hearsay could be as great as the need to cross-examine testimonial hearsay can be developed from the facts of *Indiana v. Hammon*, the companion case to *Davis*. Police were called to the Hammon's home after Amy Hammon placed a 911 call requesting

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[57] *The Trial of Sir Walter Raleigh* (1603), *in* 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1, 1–60 (T.B. Howell ed., London, R. Bagshaw 1809).

[58] One of the judge's at Raleigh's trial later commented that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." 1 D. JARDINE, CRIMINAL TRIALS 520 (London, C. Knight 1832).

[59] Under *Roberts*, nontestimonial declarations against penal interest are subject to constitutional scrutiny and have sometimes been excluded where found to be unreliable. *See, e.g.*, Sanders v. Moore, 156 F. Supp. 2d 1301, 1318–19 (M.D. Fla. 2001) (granting petition for writ of habeas corpus because of erroneous admission of husband's out-of-court statement to his wife that defendant had asked him to join a conspiracy to murder defendant's mother; such statement violated defendant's right of confrontation; it failed to fit within a "firmly rooted" hearsay exception and was not supported by particularized guarantees of trustworthiness); *see also* Miller v. State, 98 P.3d 738, 745–46 (Okla. Crim. App. 2004) (applying *Roberts* to exclude nontestimonial hearsay offered as a declaration against penal interest); *cf.* People v. Ewell, 98 P.3d 738, 745–47 (Cal. Ct. App. 2004) (upholding lower court in excluding nontestimonial statement on the grounds that the statement was not sufficiently against speaker's own penal interest, and in any case it lacked guarantees of trustworthiness under *Roberts*).

assistance. After police arrived, her husband Hershel Hammon was placed in a separate room while the police interrogated Amy. She gave a statement to the police that said in essence: "Hershel punched me and shoved me down causing my head to hit the heater." Hershel was arrested and prosecuted for domestic violence. At the time of trial, Amy could not be located, refused to appear, and did not testify. Instead her out-of-court statement made to the police was introduced as an excited utterance through testimony by police officers, and it served as the only direct evidence establishing that Hershel had committed a crime.[60] The Supreme Court reversed Hammon's conviction, holding that his right of confrontation had been violated. The Court held that Amy's statement was "testimonial" because it was made for the primary purpose of assisting a law enforcement investigation or prosecution since the immediate emergency had passed by the time it was made. The Court concluded that his wife was a "witness against" him within the meaning of the Sixth Amendment, and that Hammon was constitutionally entitled to cross-examine her about her accusatory statement.[61]

But what if just before the police arrived Amy Hammon had made an identical statement to her next-door neighbor, and that on a retrial of the case the prosecutor offered the statement made to the neighbor rather than the statement made to the police, again as an excited utterance? Presumably Hammon's attorney would argue that he had every bit as much need to cross-examine Amy Hammon at the second trial as he had at the first trial (perhaps to suggest that she slipped to the floor rather than being shoved). The fact that the wife's statement is now offered through a neighbor rather than through the police would make no difference in terms of its accusatory impact and would be entirely sufficient to convict Hammon at the second trial. Yet if Hammon were to appeal his second conviction, Hammon's right to confront and cross-examine his accuser, which the Court viewed as having such crucial importance in the first trial, would apparently have no constitutional significance whatsoever in the second trial, assuming that the wife's statement to the neighbor were found to be nontestimonial.[62]

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[60] *Davis*, 126 S. Ct. at 2272–73.

[61] *Id.* at 2278–79.

[62] *See id.* at 2274 n.2 (noting that, because victim's statement was made to an agent working in a law enforcement capacity, the Court was not called upon to "consider whether and when statements made to someone other than law enforcement personnel are 'testimonial,'" thus, for the time being, leaving the scope of the confrontation right limited to police interrogation); *id.* at 2278 n.5 (explaining that "formality is indeed essential to testimonial utterance"); *Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). *But see* Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1042–43 (1998) ("A statement made by

As Justice Scalia explained in *Davis*, declarants who provide nontestimonial hearsay are not considered "witnesses against" a defendant within the meaning of the Sixth Amendment.[63] Therefore, the defense attorney would have the somewhat awkward task of explaining to Hammon why his wife was a "witness against" him in the first trial, and hence he was constitutionally entitled to cross-examine her, but that in the second trial she was not a "witness against" him and he had no right to cross-examine her, even though her accusatory words were identical and served as the basis for his conviction in both trials.

It should be noted that in both of these examples and in any other case where nontestimonial hearsay is offered against a criminal defendant, the prosecutor now will apparently have the tactical option, at least as far as the Confrontation Clause is concerned, of introducing the hearsay statement without calling the declarant to testify, even if the declarant is available and willing to take the stand.[64]

III. CONCEPTUAL FRAMEWORK OF *CRAWORD*

Finally, a hearing focused on the constitutional status of the nontestimonial hearsay issue would have allowed the court to consider whether the conceptual framework adopted in *Crawford* necessarily requires excluding nontestimonial hearsay from any level of constitutional scrutiny. In building the new framework that focuses on testimonial hearsay, the Court relied in part on an 1828 dictionary

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a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to the authorities or not.").

[63] 126 S. Ct. at 2273 (holding that only a testimonial statement can "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause").

[64] Of course apart from *Crawford* and *Davis*, the Supreme Court has already cut back on the unavailability requirement of *Roberts* by holding it inapplicable to hearsay offered under a firmly rooted exception, such as the excited utterance exception. *See* White v. Illinois, 502 U.S. 346 (1992). But this is a decision that could be revisited. Some states reject *White* and continue to impose an unavailability requirement as a matter of state constitutional law. *See, e.g.*, State v. McGriff, 871 P.2d 782, 790 (Haw. 1994); State v. Lopez, 926 P.2d 784, 789 (N.M. Ct. App. 1996); State v. Moore, 49 P.3d 785, 792 (Or. 2002). Even where there is no federal or state constitutional unavailability requirement, courts have sometimes been critical of prosecutors who use hearsay statements for tactical advantage in preference to the available testimony of the declarant. *See, e.g.*, Beach v. State, 816 N.E.2d 57, 60 (Ind. Ct. App. 2004) (showing that the court gave warning when prosecutor offered nontestimonial hearsay statement of domestic violence victim even though she was available to testify when it stated that "the State would be well-advised to avoid the tactic of introducing hearsay statements without calling the declarant to testify in cases where the declarant is in fact available"). For suggested standards for when the unavailability requirement should apply under *Roberts*, see Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Unavailability Requirement*, 70 MINN. L. REV. 665 (1986) (arguing that whether to require unavailability should turn on the centrality of the statement, its reliability, the likelihood that cross-examination could realistically test it, and the adequacy of alternative means of challenge).

defining *witness*, and on the limited historical record pertaining to the drafting and adoption of the Confrontation Clause. Arguably both sources were used somewhat selectively.

For example, in *Crawford* the Court stated: "The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' 2 N. Webster, An American Dictionary of the English Language (1828)."[65] However, the definition quoted by the Court is for when *witness* is used as a verb, and in the Confrontation Clause, *witnesses* is used as a noun. As a noun, Webster's dictionary sets forth the following definitions of *witness*:

> 1. Testimony; attestation of a fact or event. 2. That which furnishes evidence or proof. 3. A person who knows or sees any thing; one personally present; as, he was *witness*; he was an *eye-witness*. 4. One who sees the execution of an instrument, and subscribes it for the purpose of confirming its authenticity by his testimony. 5. One who gives testimony; as, the *witnesses* in court agreed in all essential facts.[66]

A limitation of *witness* to those who give testimony at trial is too narrow and has been consistently rejected by the Court, including in *Crawford* and *Davis*. Justice Scalia gives no explanation as to why the Framers of the Confrontation Clause would not have intended the second or third definitions set forth in Webster's—i.e., a person who "furnishes evidence or proof," or a person "who knows or sees anything." These are common and widely accepted definitions that would encompass both testimonial and nontestimonial hearsay when out-of-court statements by such "witnesses" are offered against a criminal defendant. Moreover, these broader definitions are more consistent with how the term *witness* has been construed under other constitutional provisions, such as the Compulsory Process Clause.[67]

With respect to the historical record, Justice Scalia's opinion in *Crawford* is a model of originalist interpretation of a constitutional provision. It focuses on the likely intent of the Framers of the Confrontation Clause based on the experiences, practices, and laws of their time, as well as their apparent conception of fairness in court procedures. However, one danger of originalism as a theory of constitutional interpretation is that it may cause a Court to focus too much on the specific issues facing the Framers at the expense of their more general underlying concerns. Certainly in 1791, the primary focus

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[65] 541 U.S. at 51.

[66] 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 114 (New York, S. Converse 1828).

[67] *See* Randolph N. Jonakait, *"Witness" in the Confrontation Clause:* Crawford v. Washington, *Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155 (2006).

of the Framers was on ex parte examination of witnesses, because that was a practice of the era that had generated controversy. But the most difficult confrontation issues facing courts today were not before the courts in 1791, so it is difficult to know what the common law judges who developed the right of confrontation or the Framers of the Sixth Amendment would have thought of them. There were no special hearsay exceptions for child hearsay or statements by domestic violence victims, statements to diagnosing doctors, present sense impressions, declarations against penal interest, and certainly no "catchall exception."[68] There were no 911 calls, rape crisis centers, or child advocates employed to take statements from suspected child abuse victims.

Surprisingly little material actually exists in the historical record indicating the intent of the Framers themselves with respect to the right of confrontation. Justice Scalia himself acknowledged as much when he joined an opinion twelve years before *Crawford* that stated "[t]here is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean."[69] His exhaustive historical research in the *Crawford* opinion focused almost entirely on chronicling the evolving practices of English and American courts with respect to *ex parte* examination of witnesses and exploring how the right of cross-examination came to be recognized for such testimonial statements. It contains only two quotes pertinent to the actual adoption of the Confrontation Clause, neither of which shed any light on its possible application to nontestimonial hearsay.[70] Thus while the historical record supports the conclusion that the Framers had a heightened concern about testimonial hearsay, it does not support a conclusion that the Framers neither had nor would have had concerns about other forms of hearsay.[71] Even if it could be shown that nontestimonial hearsay was

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[68] *See* Thomas Y. Davies, *Not "the Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the* Crawford-Davis *"Testimonial" Formulation of the Scope of the Original Confrontation Right*, 15 J.L. & POL'Y (forthcoming 2007) ("However, how could one logically infer that the Framers would not have applied the Confrontation Clause to "nontestimonial hearsay" if framing-era law did not yet recognize any exceptions under which informal, unsworn hearsay could arguably have constituted admissible evidence in criminal trials in any event?"); Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105 (2005). *But see* Thomas D. Lyon & Raymond Lamagna, *Hearsay from Unavailable Child Witnesses: From Old Bailey to Post-*Davis, 82 IND. L.J. (forthcoming 2007) (asserting that child hearsay was sometimes received in English criminal prosecutions during that era).

[69] *White*, 502 U.S. at 359 (Thomas, J., concurring).

[70] 541 U.S. at 49–50.

[71] *Cf. id.* at 71 (Rehnquist, C.J., concurring) ("As far as I can tell, unsworn testimonial statements were treated no differently at common law than were nontestimonial statements.").

beyond the contemplation of the Framers, the judicial construction of other provisions of the Bill of Rights has not been limited only to matters contemplated by the Framers at the time of ratification.[72]

Ironically, in *Davis* where Justice Scalia reached out to declare nontestimonial hearsay a matter beyond the historical concern of the Framers, he made the following comment in rejecting Justice Thomas's narrow interpretation of testimonial hearsay: "Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction."[73] This comment is similarly pertinent in assessing the constitutional status of nontestimonial hearsay.

IV. CONCLUSION

In *Crawford*, the Court held that the *primary* concern of the Confrontation Clause is testimonial hearsay.[74] In *Davis* and *Bockting*, the Court reformulated this holding to say that the *sole* concern of the Confrontation Clause is testimonial hearsay.[75] Such a reformulation has significant policy implications for future criminal prosecutions, because as the Court acknowledged in *Bockting*, it permits the admission of unreliable hearsay in criminal cases and makes it "unclear whether *Crawford*, on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials."[76] This reformulation suggests that the Court assumed a constitutional trade-off was required by the reasoning of *Crawford*—enhanced protection against testimonial hearsay and abandonment of any degree of Sixth Amendment protection against nontestimonial hearsay. It is unfortunate that before adopting this view the Court never entertained briefing or argument on whether such a conclusive trade-off is actually *compelled* by

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[72] See, for example, cases construing the protections afforded under the Cruel and Unusual Punishment Clause of the Eighth Amendment, such as *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) ("[T]he Eighth Amendment's proscriptions are not limited to those practices condemned by the common law in 1789. . . . Not bound by the sparing humanitarian concessions of our forebears, the Amendment also recognizes 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))), and *Weems v. United States*, 217 U.S. 349, 373 (1910) ("Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.").

[73] Davis v. Washington, 126 S. Ct. 2266, 2278 n.5 (2006).

[74] 541 U.S. at 53 ("In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object . . . .").

[75] *See supra* notes 9–15 and accompanying text.

[76] Whorton v. Bockting, 127 S. Ct. 1173, 1183 (2007).

either history, policy, or traditional conventions of constitutional interpretation.[77]

In adopting the new testimonial approach to confrontation jurisprudence, the Court in *Crawford* made the point that the new theory was largely consistent with the holdings, as distinguished from the reasoning, of its prior confrontation decisions.[78] Whether that is true will depend on how broadly *testimonial* is ultimately defined and particularly on whether statements made in private settings can ever be testimonial.[79] If the Court adopts a narrow definition of *testimonial*, and if *Ohio v. Roberts* and *Idaho v. Wright* are both indeed overruled, there will be a significant gap in confrontation jurisprudence demanding further consideration by both courts and commentators.

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[77] The *Davis* case in particular seems a sharp departure from the stated philosophy of Chief Justice Roberts, which has guided the Court in other areas, that "[i]f it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more." *Shrinking Supremes*, THE ECONOMIST, Dec. 16–22, 2006, at 34 (quoting Chief Justice John Roberts).

[78] 541 U.S. at 57 (stating that Supreme Court case law "has been largely consistent" with the testimonial theory adopted in *Crawford*).

[79] *See supra* note 62 and accompanying text.

"HE SAID," "SHE SAID," AND ISSUES OF LIFE AND DEATH: THE RIGHT TO CONFRONTATION AT CAPITAL SENTENCING PROCEEDINGS

Penny J. White[*]

> The elders said, "As we were walking in the garden alone, this woman came in with two maids, shut the garden doors, and dismissed the maids. Then a young man, who had been hidden, came to her and lay with her. We were in a corner of the garden, and when we saw this wickedness we ran to them.
>
> We saw them embracing, but we could not hold the man, for he was too strong for us, and he opened the doors and dashed out. So we seized this woman and asked her who the young man was, but she would not tell us. These things we testify." The assembly believed them, because they were elders of the people and judges; and they condemned her to death.
>
> . . . .
>
> And as she was being led away to be put to death, God aroused the holy spirit of a young lad named Daniel . . . . Taking his stand in the midst of them, he said, "Are you such fools, you sons of Israel? Have you condemned a daughter of Israel without examination and without learning the facts? Return to the place of judgment. For these men have borne false witness against her." Then all the people returned in haste. And the elders said to him, "Come, sit among us and inform us, for God has given you that right." And Daniel said to them, "Separate them far from each other, and I will examine them." When they were separated from each other, he summoned one of them and said to him, ". . . Now then, if you really saw her, tell me this: Under what tree did you see them being intimate with each other?" He answered, "Under a mastic tree."
>
> Then he put him aside, and commanded them to bring the other. And he said to him, ". . . Now then, tell me: Under what tree did you catch them being intimate with each other?" He answered, "Under an evergreen oak." And Daniel said to him, "Very well! You also have lied

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> against your own head, for the angel of God is waiting with his sword to saw you in two, that he may destroy you both." . . . And they rose against the two elders, for out of their own mouths Daniel had convicted them of bearing false witness.[1]

INTRODUCTION

The Bible's story of how Daniel spared the virtuous Susanna, wrongly condemned to death, with the simple tools of sequestration, confrontation, and cross-examination, provides a fitting genesis for this article, which explores the right of confrontation at a capital sentencing hearing. Since the United States Supreme Court revisited the issue of the right to confrontation in *Crawford v. Washington*[2] in 2004 and in *Davis v. Washington*[3] in 2006, volumes[4] have been written about the right to confront witnesses during the guilt-innocence phase of a criminal trial. But little has been written about whether the cases, or related constitutional developments, require the right to confrontation at a capital sentencing hearing. That is the purpose of this article.

Capital defendants are frequently sentenced to death based upon unchallenged hearsay—evidence of no greater quality, and arguably a significantly lesser quality, than that offered by the scheming, spurned elders who argued for Susanna's death. In many states,[5] statutes permit the introduction of "[a]ny evidence which has probative value and is relevant . . . regardless of its admissibility under the . . . rules of evidence"[6] at a capital sentencing hearing.[7] Many states construe

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1 *Susanna* 36–61 (Revised Standard Version with the Apocrypha).

2 541 U.S. 36 (2004).

3 126 S. Ct. 2266 (2006). The companion case to *Davis*, *Hammon v. Indiana*, was also decided by the Court in 2006. *Id.*

4 Articles by seven evidence experts appear in this symposium issue alone; other law schools, notably Brooklyn, have produced similar symposia editions on the *Crawford* issue.

5 There are notable exceptions to the text's inference that most states do not provide for confrontation at sentencing. For example, in *Proffitt v. Wainwright*, 685 F.2d 1227, 1255 (1982), the Eleventh Circuit held that the Sixth Amendment guarantees the right to cross-examination at a capital sentencing proceeding. Rather than asserting that the U.S. Supreme Court had foreclosed the issue in *Williams v. New York*, *see infra* text accompanying notes 70–97, the Eleventh Circuit considered it "an issue of first impression" not yet decided by the Supreme Court. *Proffitt*, 685 F.2d at 1253. Focusing on the importance of reliability in capital sentencing proceedings and the Court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981) (upholding the Fifth Circuit decision *Smith v. Estelle*, 602 F.2d 696, 701 (5th Cir. 1979)), which recognized that a psychiatrist's testimony that was not cross-examined by the defendant "carrie[d] no assurance of reliability whatsoever," the Eleventh Circuit upheld the right to cross-examine adverse witnesses at capital sentencing proceedings when necessary to ensure the reliability of the testimony. *Proffitt*, 685 F.2d at 1255.

6 ALA. CODE § 13A-5-45(d) (2006); *see also* ARIZ. REV. STAT. ANN. § 13-703.01(G) (Supp. 2006); FLA. STAT. § 921.141 (Supp. 2006).

similarly broad capital sentencing statutes to allow the introduction of reliable hearsay.[8] In others, silent death penalty statutes invite judges to apply reasoning tethered to a half-century old U.S. Supreme Court decision that has limited, if any, viability today.[9]

A death sentence under federal law[10] may likewise be based upon unchallenged evidence because the Federal Death Penalty Act provides that "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury."[11]

Thus, for example, death sentences have recently been sought or imposed based upon the following evidence: prison investigative reports that included anonymous claims by inmates that the defendants committed assaults and attempted to introduce cyanide into the U.S. penitentiary;[12] a jailhouse informant's testimony that alleged the

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[7] In this article, I use the phrase "capital sentencing hearing" to include any proceeding which follows a jury determination that the defendant is guilty of an offense for which death is an available punishment. In many jurisdictions, after a jury finds a defendant guilty of a capital offense, the jury is required to consider the existence of aggravating circumstances. If the jury finds the existence of one aggravating circumstance beyond a reasonable doubt, it then considers all mitigating circumstances. Ultimately, the jury considers the aggravating and mitigating circumstances in determining or recommending a sentence of life or death. Although some jurisdictions bifurcate this process, the phrase "capital sentencing hearing" in this article is used to refer to the entire proceeding that follows the jury's determination that the defendant is guilty of a capital offense.

[8] *See, e.g.*, GA. CODE ANN. § 17-10-2 (2004); TENN. CODE ANN. § 40-35-209 (2003).

[9] *See infra* text accompanying notes 70–97 for discussion of *Williams v. New York*, 337 U.S. 241 (1949), and how emerging jurisprudence has undercut its application.

[10] The Federal Death Penalty Act is codified at 18 U.S.C. §§ 3591–3599 (2000).

[11] 18 U.S.C. § 3593(c) (2000).

[12] United States v. Mills, 446 F. Supp. 2d. 1115 (C.D. Cal. 2006). The defendants were found guilty of murder in violation of the Violent Crime in Aid of Racketeering Act. In seeking a death sentence, the government sought to rely upon "several hundred pages of documents." *Id.* at 1119. Some of the documents were earlier presentence and postsentence reports. *Id.* at 1135. Within those reports were references to other crimes, including investigative reports and detailed statements of witnesses. Other documents were prison disciplinary reports, so-called IDC reports, which recited various incidents of misconduct attributed to the defendants. *Id.* at 1137. The court described the level of misconduct set forth in the documents as ranging from "delaying a bed count or flooding one's cell to never-prosecuted acts of murder." *Id.* at 1119. One particular report alleged that defendant Mills "attempted to introduce cyanide into USP Marion on several occasions in 1987 and 1988. These reports [included] statements by Federal Bureau of Investigation officials . . . ." *Id.* at 1137. Another report consisted of internal prison memoranda based on interviews with unidentified inmates and officers who claimed that defendant Mills stabbed and murdered a fellow inmate. *Id.* at 1138. Yet another document that the Government sought to introduce was the Grand Jury testimony of a witness who later testified at trial in direct contradiction to the statement sworn before the Grand Jury. *Id.*

defendant's unadjudicated violent acts by repeating statements of another inmate who asserted his right to remain silent;[13] a report from a deceased psychiatrist, based on interviews conducted thirteen years earlier, which asserted that the defendant constituted a future danger to society;[14] third-party testimony, repeating statements by a deceased codefendant, that the defendant committed various criminal acts;[15] testimony by a police officer quoting witnesses who claimed to have been victimized by the defendant;[16] and testimony by a witness who appeared

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[13] United States v. Johnson, 378 F. Supp. 2d 1051 (N.D. Iowa 2005). Defendant Johnson was convicted of ten counts of capital murder arising out of the murder of witnesses to her former boyfriend's drug-trafficking activities. *Id.* Her former boyfriend, Honken, was convicted in a prior proceeding. *Id.* at 1054. The government sought to introduce the testimony of Vest, a jailhouse informant, who claimed that Honken discussed Johnson's role in the murders with him while the two were incarcerated together. *Id.* at 1056. The court agreed to the introduction of the evidence, reasoning that the right to confrontation did not apply in sentencing proceedings, and in particular, did not apply in this case wherein the court had decided to trifurcate the proceedings, thereby entitling the defendant to confrontation through the eligibility phase of the case. *Id.* at 1062.

[14] Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990). The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's denial of habeas corpus in a capital case in which the defendant claimed ineffective assistance of counsel and a violation of his rights under *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Id.* At the defendant's sentencing hearing, the government introduced a psychological report prepared thirteen years earlier while the defendant was imprisoned on an unrelated, robbery charge. *Id.* at 938. The evaluation was prepared by a prison psychologist who had died in the interim. On habeas, the defendant challenged the use of the report not based on confrontation grounds, but based on the government's failure to provide him with an expert to assist in rebutting the content of the report. *Id.* The Fourth Circuit held that "in a capital sentencing procedure, when the state presents psychiatric evidence of the defendant's future dangerousness, due process requires that the defendant have access to psychiatric testimony, a psychiatric examination, and assistance in preparing for the sentencing stage." *Id.* However, the *Ake* decision was handed down five years after Bassette's capital sentencing hearing. *Id.* Because the Court of Appeals construed *Ake* to be a new rule of constitutional criminal procedure, it did not apply retroactively in a habeas proceeding. *Id.* at 938–39.

[15] United States v. Fell, 217 F. Supp. 2d 469 (D. Vt. 2002), *rev'd on other grounds*, 360 F.3d 135 (2d Cir. 2004). Fell was charged with carjacking and kidnapping resulting in death along with two other crimes. The carjacking and kidnapping charges were capital crimes. *Id.* at 473. The government asserted that it intended to offer a statement allegedly made by Fell's deceased co-defendant, Lee, to establish Fell's death eligibility. *Id.* at 485. The intended use of this and other evidence led the district court to conclude, among other things, that a capital sentencing hearing's use of a "relaxed evidentiary standard" violated the defendant's rights to due process and confrontation. *Id.* The Second Circuit Court of Appeals reversed the district court ruling.

[16] State v. Bell, 603 S.E.2d 93 (N.C. 2004). Bell was convicted of kidnapping an elderly woman, assaulting her, and then killing her by setting a car on fire with her in it. *Id.* at 100–01. During the capital sentencing proceeding, the State relied upon the aggravating circumstance of committing a prior crime of violence in order to seek the death penalty. *Id.* at 121. To prove this aggravating circumstance, the State called a police officer to testify about a statement he had taken from a victim who had been robbed by the defendant. *Id.* at 115. The prosecutor told the judge that the victim "'was a Hispanic and has left, we tracked, pulled the record, he's left the State and possibly the country.'" *Id.*

as a surrogate for the victim's family and delivered a message from the family and its therapist.[17]

Over objection, the trial court allowed the officer to testify to the contents of a statement given to the officer by the victim. *Id.*

The North Carolina Supreme Court first considered the State's claims that the witness was unavailable. Based on North Carolina authority, the court noted that the State had not established unavailability of the witness as required by the Confrontation Clause. *Id.* at 116. "[O]nce the [S]tate decides to present testimony of a witness to a capital sentencing jury, the Confrontation Clause requires the [S]tate to undertake good-faith efforts to secure the 'better evidence' of live testimony before resorting to the 'weaker substitute' of former testimony." *Id.* at 116 (quoting State v. Nobles, 584 S.E.2d 765, 771 (N.C. 2003) (quoting United States v. Inadi, 475 U.S. 387, 394–95 (1986))). Here, the State's efforts were insufficient to establish good faith. *Id.*

Because the State had not established that the witness was unavailable, the officer's recitation was admissible only if the witness's statement was nontestimonial. *See infra* notes 191–200 and accompanying text for discussion of testimonial statements. The North Carolina Supreme Court noted that the statement

> was in response to structured police questioning . . . regarding the details of the robbery committed by the defendant. There can be no doubt that the statement was made to further [the] investigation of the crime. . . . Therefore [the witness's statement] is testimonial in nature, triggering the requirement of cross-examination set forth by *Crawford*.

Id. at 116.

The court's analysis had little effect on the ultimate disposition. Because the defendant had been convicted of robbing the victim and because in North Carolina the common-law crime of robbery required an element of "taking . . . by means of violence or fear," the introduction of the witness's statement, through the officer, was cumulative, and therefore harmless. *Id.* at 117.

[17] United States v. Brown, 441 F.3d 1330 (11th Cir. 2006). Meier Jason Brown was found guilty of stabbing the victim, a part-time postmistress, to death while he was robbing the U.S. Post Office in Fleming, Georgia. *Id.* Her sister presented classic victim impact testimony, detailing how the victim's death had affected her family. She then further testified as follows:

> [One of the victim's sons] "felt under his emotional state of mind that he could not [go to college] at this time. He could not concentrate to go onto college." . . . "I just spoke with [the victim's husband] just a few minutes ago. He could not appear. His emotional state, he is going through therapy. . . . And he knew that under the advise [sic] of his therapist, and a counseling group that he had gone to with other family members that have lost closed [sic] loved ones, that he could not, he could not manage to go through this court hearing."

Id. at 1360.

Since counsel failed to object, the appellate court reviewed the error under the plain error standard. *Id.* The U.S. Court of Appeals for the Eleventh Circuit concluded: (1) none of the statements were hearsay; (2) if they were hearsay, the Federal Rules of Evidence did not apply to the penalty phase of a capital trial; and (3) if the Confrontation Clause applied at a capital sentencing hearing, the statements were not testimonial under the *Crawford* definition. *Id.* at 1360–61.

In an implausible opinion, the Eleventh Circuit reasoned that the statements were not hearsay because they "did not include statements," but were merely the witness's impressions. *Id.* at 1360. The statements were not testimonial because "[t]hey were made by one grieving family member to another. They were not made in the context of an examination, were not recorded in a formal document, and were not made under circumstances that would lead a reasonable person to believe they would later be used at

In these and many other cases, the decision to sentence a defendant to die is based upon evidence that is neither challenged nor confronted, and upon statements of witnesses who neither appear nor are cross-examined. This article discusses whether the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"[18] is violated by the introduction of such evidence in capital sentencing proceedings.

Because the right to confrontation flows from the text of the Constitution, the discussion begins with a short consideration of the relevant text of the Sixth Amendment in Part I.[19] Next, the article briefly reviews the historical background of sentencing in Part II[20] and capital sentencing in Part III.[21] Part IV of the article considers the current viability of *Williams v. New York*,[22] the Supreme Court precedent most often relied upon by courts holding that the right of confrontation does not apply at sentencing.[23] This section of the article suggests that several constitutional developments not only have eviscerated that precedent, but in the aggregate now mandate the right to confrontation in capital sentencing proceedings. One of those constitutional developments, the right to have a jury determine all facts of constitutional significance, is discussed in detail in Part V.[24] The final section of the article, Part VI, examines briefly the Supreme Court decisions in *Crawford v. Washington*[25] and *Davis v. Washington*[26] and discusses why the right to confrontation as delineated in those decisions is instrumental to a fair capital sentencing proceeding.[27]

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trial." *Id.* at 1361. The court also found that defense counsel "could have called any of [the family members] as witnesses" for the purpose of cross-examining them, thereby exercising the defendant's right to confrontation. *Id.*

18 U.S. CONST. amend. VI.

19 *See infra* text accompanying notes 28–41. For a more thorough review of the history surrounding the adoption of the Sixth Amendment, which is beyond the scope of this article, see FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT (1951).

20 *See infra* text accompanying notes 42–50. An exhaustive review of the history of sentencing in the United States is beyond the scope of this article. Many good books and articles have tackled that topic. *See, e.g.*, JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2005); Becky Gregory & Traci Kenner, *A New Era in Federal Sentencing*, 68 TEX. B.J. 798 (2005).

21 *See infra* text accompanying notes 51–69.

22 337 U.S. 241 (1949).

23 *See infra* text accompanying notes 70–148.

24 *See infra* text accompanying notes 149–83.

25 541 U.S. 36 (2004).

26 126 S. Ct. 2266 (2006).

27 *See infra* text accompanying notes 184–218.

I. CONFRONTATION AT CAPITAL SENTENCING BASED ON CONSTITUTIONAL TEXT

A simple reading of the relevant constitutional text supports the argument that the right to confrontation applies at a capital sentencing hearing. The Sixth Amendment applies to "criminal prosecutions."[28] Thus, the Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[29]

The Sixth Amendment is not the only amendment in the Bill of Rights[30] that provides guarantees applicable to the criminal process. While the Fourth, Fifth, and Eighth Amendments all clearly apply to aspects of the criminal process, only the Fifth and the Sixth Amendment utilize phrases which limit the scope of the protections they provide.

The scope of the Sixth Amendment is limited by the use of the phrase "in all criminal prosecutions," while parts of the Fifth Amendment protections are limited by use of the phrase "in any criminal case."[31] This distinction has been characterized as a deliberate choice, which narrows the application of the Sixth Amendment in comparison to the Fifth Amendment.[32]

Thus, unlike the rights enumerated in the Fifth Amendment, the Sixth Amendment rights[33] are applicable only to the accused "in criminal prosecutions." The use of the term "accused" in conjunction with the phrase "in all criminal prosecutions" infers that the Amendment protects

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[28] The Sixth Amendment provides, in its entirety:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence.

U.S. CONST. amend. VI.

[29] *Id.*

[30] The Constitution also references the criminal process, using slightly different language, in Article III, Section 2. There the phrase used is "trial of all crimes." This section establishes the right to trial by jury (except for impeachment) and the right to be tried in the venue where the crime occurred.

[31] U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."). For a thorough discussion of how the Supreme Court has failed to effectuate the Framers' intent in its Fifth Amendment jurisprudence, see Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 TENN. L. REV. 987, 1009–18 (2003).

[32] *See infra* note 35 and accompanying text for a discussion of *Counselman v. Hitchcock*.

[33] *See supra* note 28.

those who have been charged with a crime. For the most part, that construction is borne out by the nature of the rights included in the Amendment. For example, the Amendment guarantees a speedy and public trial, at a precise location, and with precise protections. While some of the enumerated rights by definition apply only during the proceeding at which the guilt and sentence are determined, commonly referred to as the "trial," the very nature of other rights, for example the right to "have compulsory process for obtaining witnesses," lends credence to the interpretation that the Sixth Amendment applies from the time of arrest until the time of judgment.[34]

As early as 1892, the Supreme Court characterized the guarantees of the Sixth Amendment as being applicable to those accused and tried for the commission of a crime.

> [The phrase "in all criminal prosecutions" in the Sixth Amendment] distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury. A criminal prosecution under article 6 of the amendments is much narrower than a "criminal case," . . . under article 5 of the amendments.[35]

But the Court broadened its interpretation more recently, focusing specifically on some of the additional rights guaranteed by the Sixth Amendment. Thus, for example, the right to counsel has been interpreted to apply after the commencement of adversary criminal

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[34] The Supreme Court has frequently used the phrase "trial rights" in reference to the rights enumerated in the Sixth Amendment. The use of the term "trial" is unfortunate, in light of its inaccuracy and ramifications. *Cf. infra* text accompanying note 203 for Webster's definition of "prosecution" at common law. For example, in *Barber v. Page*, 390 U.S. 719, 725 (1968)—decided the same day as *Pointer v. Texas*, 380 U.S. 400 (1968)—in which the Court held the right applicable to the states, the Court focused on the "trial" nature of the right to confrontation. *Barber*, 390 U.S. at 725. "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Id.* As is discussed, the expansive holding in *Williams v. New York*, *see infra* text accompanying notes 70–97, and the repeated reference to confrontation as a "trial right" would replace any meaningful analysis by the Supreme Court of what actually constituted a trial. In time, "trial" became synonymous with the guilt phase of a criminal proceeding.

[35] Counselman v. Hitchcock, 142 U.S. 547, 563 (1892). In *Counselman*, the government attempted to limit the application of the Fifth Amendment's right to be free from self-incrimination to cases in which an accused had been charged. *Id.* While testifying before a Grand Jury as a witness, the petitioner declined to respond to some of the questions asked of him, stating "[t]hat I decline to answer, . . . on the ground that it might tend to criminate me." *Id.* at 548. He was held in contempt of court for refusing to answer and incarcerated on the contempt charge. His argument on appeal was that he had a right under the Fifth Amendment to refuse to answer. The government urged the Court to restrict the application of the Fifth Amendment to cases in which defendants had pending charges. On appeal, the U.S. Supreme Court upheld the petitioner's right to refuse to answer and reversed the courts below which had denied him habeas corpus relief on the contempt incarceration. *Id.*

proceedings,[36] to apply not only at trial, but also at all "critical stages" of the prosecution,[37] and to apply in certain proceedings that occur after trial.[38] This recognition that rights seemingly connected with a criminal trial may also apply *before* and *after* a trial returns the emphasis to where it belongs—on the actual phrase used in the Amendment, "in all criminal prosecutions."

The very nature of a criminal prosecution requires the interpretation that Sixth Amendment rights do not begin and end with the in-court proceeding commonly known as a trial. Many of the tenets of our criminal justice system—the presumption of innocence, the right to remain silent, the right to have fair notice of the accusations against the accused—would be meaningless were the Sixth Amendment read to apply only at trial.

Historians of the Sixth Amendment have defined the phrase broadly, in such a manner as to include all steps, beginning with the criminal charge and concluding with the imposition of punishment. Francis Heller, writing about the Sixth Amendment in the late 1950s, concluded: "The 'criminal prosecution' begins with the arraignment of the accused and ends when sentence has been pronounced on the convicted or a verdict of '[n]ot guilty' has cleared the defendant of the charge."[39]

This historical interpretation reinforces the accepted meaning and common usage of the term "prosecution." Webster's *An American Dictionary of the English Language* defined "prosecution" as the

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[36] In *Massiah v. United States*, 377 U.S. 201 (1964), the U.S. Supreme Court found a violation of the Sixth Amendment right to counsel "when there was used against [Massiah] at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206. In 1977, the Court applied the right to state prosecutions. Brewer v. Williams, 430 U.S. 387 (1977).

[37] Coleman v. Alabama, 399 U.S. 1, 7 (1970); *see also* United States v. Ash, 413 U.S. 300, 321 (1973) (Stewart, J., concurring). In addition to its application at trial, the Court has held that the right to counsel applies at a pretrial lineup, United States v. Wade, 388 U.S. 218 (1967); a preliminary hearing, *Coleman*, 399 U.S. 1; at certain arraignments, Hamilton v. Alabama, 368 U.S. 52 (1961); and at sentencing, Mempa v. Rhay, 389 U.S. 128 (1967).

[38] The Sixth Amendment by its terms does not address its application to appeals. While this may be as a result of the absence of routine criminal appeals in 1789, the U.S. Supreme Court has held that the Fourteenth Amendment Due Process Clause requires that counsel be appointed for indigent defendants on appeal by states that provide for an appeal as of right. Douglas v. California, 372 U.S. 353 (1963). Similarly, the Court utilized the Due Process Clause to require certain protections, set forth in the Sixth Amendment, for those facing a parole revocation, but specifically declined to decide whether counsel was also required. Morrissey v. Brewer, 408 U.S. 471, 499 (1972). *See infra* text accompanying notes 139–48 for a discussion of *Morrissey*'s impact on the right to confrontation at sentencing.

[39] HELLER, *supra* note 19, at 54; *see also* LANGBEIN, *supra* note 20.

"institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment."[40] Similarly, dictionaries in everyday use define "prosecution" as "the institution and carrying on of legal proceedings against a person" and "following up on something undertaken or begun, usually to its completion."[41] These definitions clarify that the term is properly recognized to include all aspects of the criminal proceeding, from charge to incarceration or acquittal; they do not support a conclusion that "prosecution" refers solely to the guilt phase of a criminal case. Thus, the relevant constitutional text of the Sixth Amendment suggests that the right to confrontation applies at capital sentencing proceedings.

II. CONFRONTATION AT CAPITAL SENTENCING BASED ON HISTORY OF CRIMINAL SENTENCING

The nature of the criminal proceeding at the time the Sixth Amendment was adopted similarly illuminates the issue of whether the right to confrontation applies at sentencing. The criminal process in the early days of America differed significantly from modern criminal proceedings. Modern criminal proceedings involve a finding of guilt or innocence by a jury and the subsequent determination of punishment, most frequently by a judge. This bifurcated process, in which different rules and procedures often govern the two stages, each requiring distinct roles for the jury and judge, has been altered significantly from the procedure followed in the seventeenth and eighteenth centuries and at the time of the writing and adoption of the Sixth Amendment. When the Sixth Amendment was adopted, the time of critical importance to the analysis in *Crawford*,[42] the sentencing decision was "collaps[ed] . . . into the proceeding for determining guilt."[43] Even as late as the introduction

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[40] 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 45 (New York, S. Converse 1828). This is the same dictionary from which Justice Scalia drew his definition for "witness" and "testimony" in *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

[41] RANDOM HOUSE UNABRIDGED DICTIONARY 1552 (2d ed. 1993).

[42] Crawford v. Washington, 541 U.S. 36, 44 (2004).

[43] 4 WILLIAM BLACKSTONE, COMMENTARIES *298, *368 ("The next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. . . . [T]he next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemeanors, . . . is that of *judgment*."); *see also* LANGBEIN, *supra* note 20, at 48. Juries would routinely manipulate their verdicts in order to lessen the sentence because the conviction of a specific offense mandated a particular punishment. This practice was referred to as "downvaluing" in the case of stolen goods, LANGBEIN, *supra* note 20, at 58, and, by Blackstone, as "pious perjury" in cases in which the jury decided either to acquit or to find the defendant guilty of a lesser crime in order to save the defendant from execution. *Id.* (citing 4 BLACKSTONE, *supra*, at *239).

of the Sixth Amendment in 1789, a criminal trial was treated as a whole, with the jury deciding both the guilt and, as a result, the sentence of the defendant.[44]

In 1789, a "criminal prosecution" began with the return of an indictment that contained sufficient facts to notify the defendant of the charge.[45] The jury in the case then heard the evidence and determined both the guilt and the punishment of the defendant. This finding of guilt and setting of punishment were accomplished in one proceeding, the "criminal prosecution," to which the Framers referred when they drafted the Sixth Amendment.[46]

As the Supreme Court would note in reference to criminal proceedings in the late eighteenth century, "[t]he substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense."[47] It was not until the nineteenth century, with the invention of the penitentiary,[48] that statutes began to provide judges

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[44] LANGBEIN, *supra* note 20, at 36–37.

[45] 4 BLACKSTONE, *supra* note 43, at *298, *368; *see also* JOHN F. ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 16 (1st ed. 1822) (stating that an indictment must contain "all the facts and circumstances, which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly . . . and that there may be no doubt as to the judgment which should be given, if the defendant be convicted").

[46] The language ultimately used in the Sixth Amendment was in large part derived from state constitutions, already in place and in practice at the time of the writing of the Bill of Rights. The Virginia Bill of Rights of 1776 provided in Section 8 that in "all capital or criminal prosecutions a man hath a right . . . to be confronted with the accusers and witnesses." 7 AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 1492–1908, at 3813 (Francis Newton Thorpe ed., 1909). (The June 29, 1776 Constitution of Virginia is part of the Avalon Project at the Yale Law School and can be viewed at http://www.yale.edu/lawweb/avalon/states/va05.htm.) Seven more states drafted constitutions between 1776 and 1791, the date of the Bill of Rights, and each included provisions similar to Virginia's.

Those who authored the state constitutions and experienced their impact for more than a decade were among the attendees at the Constitutional Convention of 1789, at which the Bill of Rights was introduced. HELLER, *supra* note 19, at 23–34. James Madison introduced the Sixth Amendment on June 8, 1789, using substantially the same language as that used in the Virginia Constitution, with the notable addition of the right to counsel, and drawing on the language used in the New York Constitution. Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105, 185 n.255 (2005). After some addition and revision, the Amendment, and the others included in the Bill of Rights, were adopted on December 15, 1791. HELLER, *supra* note 19, at 23–34.

[47] Apprendi v. New Jersey, 530 U.S. 466, 479 (2000) (citing John Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution, in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900, at 13, 36–37 (Antonio Padoa Schioppa ed., 1987)).

[48] 2 DOUGLAS HAY, CRIME AND JUSTICE IN EIGHTEENTH- AND NINETEENTH-CENTURY ENGLAND 54–55 (1980).

discretion in sentencing, and prosecutions began to be divided into separate guilt and sentencing phases.[49] It was on this slate—with joined guilt and sentencing phases—that the Framers chose the words "in all criminal prosecutions" and provided that "the accused shall enjoy the right . . . to be confronted with the witnesses against him."[50]

III. CONFRONTATION AT CAPITAL SENTENCING BASED ON HISTORY OF CAPITAL SENTENCING

Unlike the history of the criminal process in America, which supports the argument that confrontation rights apply at sentencing, the history of capital trials in America is less instructive on the topic. The American colonists brought with them the English fervor for capital punishment. In England, in the 1600s and 1700s, numerous crimes carried a mandatory sentence of death.[51] When the colonists came to America, they tracked this heritage by making many offenses punishable by a mandatory sentence of death.[52] Once a jury found a defendant guilty of the crime, the defendant was automatically sentenced to death.

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[49] This historical reality was recognized by the Court in *Williams v. New York*, 337 U.S. 241 (1949), and chosen as one of the primary reasons for upholding a judge's use of evidence not subject to confrontation or challenge to sentence a defendant to death. *Id.* at 246. In another case, the Court noted the same history and relied upon a 1942 law review article as support. *Apprendi*, 530 U.S. at 481 (citing Note, *The Admissibility of Character Evidence in Determining Sentence*, 9 U. CHI. L. REV. 715 (1942)). For those applying originalism in interpreting the Constitution, the consolidation of guilt and punishment at the time of the framing supports the conclusion that confrontation rights were intended to apply throughout the entirety of the criminal prosecution.

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

[51] Herbert S. Hadley offers this description of the criminal justice process in England:

> It is difficult to realize the unfairness, the brutality, the almost savage satisfaction in conviction and execution that characterized criminal prosecutions in England up to well along in the nineteenth century. You may recall the denunciation of the English judges . . . . "For two hundred years . . . the Judges in England sat on the bench condemning to the penalty of death, every man, woman and child who stole property to the value of five shillings and during that time not one Judge remonstrated against the law."

Herbert S. Hadley, *The Reform of Criminal Procedure*, 10 PROC. ACAD. POL. SCI. 90, 92 (1923) (quoting HENRY ADAMS, THE EDUCATION OF HENRY ADAMS 191 (Random House 1931) (1918)); *see also* 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 457–92 (London, Macmillan 1883).

[52] In STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002), the author reports that

> English colonists of the seventeenth and eighteenth centuries came from a country in which death was the penalty for a list of crimes that seems shockingly long today. Treason, murder, manslaughter, rape, robbery, burglary, arson, counterfeiting, theft—all were capital crimes in England. All became capital crimes in the American colonies as well.

Id. at 5.

This history of capital trials in America fails to instruct on the issue of the right of confrontation at a capital sentencing for a number of reasons,[53] the most prominent of which is the Supreme Court's rejection of mandatory death sentences.[54] Following the Court's determination in 1972 in *Furman v. Georgia*[55] that the death penalty as administered violated the Eighth Amendment's prohibition on cruel and unusual punishment, states undertook to revise their death penalty statutes to meet the Court's concerns.[56]

In complete contrast to capital prosecutions at the time of the Sixth Amendment's framing, most states chose to bifurcate the capital proceedings, separating the guilt-innocence phase from the penalty phase.[57] Some states, however, chose instead to revise their criminal statutes to impose a mandatory death penalty for some crimes.[58] Those statutes requiring mandatory death sentences, mimicking the laws in place in the early colonies, were declared unconstitutional.[59] In ruling on the mandatory death penalty statutes of North Carolina and Louisiana,

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The U.S. Supreme Court has described the history of capital punishment in the United States in its opinion in *Woodson v. North Carolina*, 428 U.S. 280 (1976):

> At the time the Eighth Amendment was adopted in 1791, the States uniformly followed the common-law practice of making death the exclusive and mandatory sentence for certain specified offenses. Although the range of capital offenses in the American Colonies was quite limited in comparison to the more than 200 offenses then punishable by death in England, the Colonies at the time of the Revolution imposed death sentences on all persons convicted of any of a considerable number of crimes, typically including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and sodomy. As at common law, all homicides that were not involuntary, provoked, justified, or excused constituted murder and were automatically punished by death. Almost from the outset jurors reacted unfavorably to the harshness of mandatory death sentences. The States initially responded to this expression of public dissatisfaction with mandatory statutes by limiting the classes of capital offenses. This reform, however, left unresolved the problem posed by the not infrequent refusal of juries to convict murderers rather than subject them to automatic death sentences.

Id. at 289–90 (citations omitted).

53 *See infra* text accompanying notes 55–69.

54 *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion). The Court applied the Eighth Amendment's prohibition of cruel and unusual punishment to the states in *Robinson v. California*, 370 U.S. 660, 666 (1962).

55 408 U.S. 238 (1972).

56 The effect of *Furman* was to eliminate death penalty statutes that did not discourage arbitrariness. In response to *Furman*, and in an effort to redraft statutes that would not run afoul of the Constitution, states devised different methods to address the issue of arbitrariness.

57 *See* Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

58 *See, e.g.*, *Woodson*, 428 U.S. at 286; *Roberts*, 428 U.S. at 328.

59 *Woodson*, 428 U.S. at 305; *Roberts*, 428 U.S. at 336.

the Supreme Court outlined three aspects of the statutes that it characterized as "shortcomings":

> [O]ne of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense. [This] mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish "be exercised within the limits of civilized standards."
>
> A separate deficiency of [this] mandatory death sentence statute is its failure to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences. Central to the limited holding in Furman was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments. [These mandatory statutes] . . . have simply papered over the problem of unguided and unchecked jury discretion.
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> . . . .
>
> A third constitutional shortcoming of the . . . statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.[60]

The Supreme Court's outright rejection of mandatory death sentences in *Furman* diminishes or perhaps eliminates any consideration of the procedures used in framing-era capital trials to analyze the right to confrontation at modern capital sentencing proceedings. But while the procedure in those framing-era cases has been rendered irrelevant to the analysis, the reasoning for the rejection of mandatory death sentences is not. Implicit in every aspect of the Court's rationale was the need for reliable information on which to base the life or death decision.

First, the Court noted the function that societal standards play in the decision to implement and impose capital punishment. Society has determined that a death sentence should not be imposed on every person who commits a particular crime.[61] Thus, society's demand for reliable information upon which to differentiate between offenders obligates the courts to assure that those charged with the task of determining which offenders should live and which should die are provided sufficient, reliable information upon which to base that decision.

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[60] *Id.* at 301–03 (citations omitted).

[61] In Justice Brennan's words, "The progressive decline in and the current rarity of the infliction of death demonstrate that our society seriously questions the appropriateness of the punishment today." Furman v. Georgia, 408 U.S. 238, 299 (1972) (Brennan, J., concurring).

Few tasks are more demanding than determining whether another citizen should live or die. The responsibility placed upon jurors in capital cases[62] has been described as "truly awesome,"[63] and the Court has disallowed procedures or instructions that diminish that responsibility.[64] In order to exercise that responsibility conscientiously, those asked to impose this ultimate sentence must be provided with reliable evidence. They should not be expected to decide whether a defendant should be sentenced to life or death based on evidence that has not been subjected to challenge or confrontation.

Additionally, the Court reiterated a point that had been made earlier in *Furman* and which became the capstone of the Court's capital punishment jurisprudence.

> [M]embers of this Court acknowledge what cannot fairly be denied that death is a punishment different from all other sanctions in kind rather than degree. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[65]

The recognition that "death is different" has led the Court to conclude that death sentences demand "unique safeguards,"[66] specifically

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[62] Most states place the responsibility for determining the sentence on the jury, although some states still require that the jury recommend a sentence, but that the judge actually select the sentence. *See* Ring v. Arizona, 536 U.S. 584, 608 n.6 (2002).

> Of the 38 states with capital punishment [at the time of the decision in *Ring*], 29 generally commit sentencing decisions to juries. Other than Arizona, only four States commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges. Four States have hybrid systems, in which the jury renders an advisory verdict but the judges makes the ultimate sentencing determinations.

Id. (citations omitted).

[63] McGautha v. California, 402 U.S. 183, 208 (1971). In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Court expressed confidence that jurors take their capital sentencing responsibilities very seriously:

> Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed th[e] Court to view sentencer discretion as consistent with and indispensable to the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case."

Id. at 331 (quoting *Woodson*, 428 U.S. at 305).

[64] *Caldwell*, 472 U.S. at 328–29 ("[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who had been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.").

[65] *Woodson*, 428 U.S. at 304–05 (citations omitted).

[66] Spaziano v. Florida, 468 U.S. 447, 468 (1984). *See generally* Margaret Jane Radin, *Cruel Punishment and the Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980). Professor Radin is credited with coining the phrase "super due process" in capital cases.

a heightened standard of fairness in the proceeding and a heightened standard of reliability in the determination that death is the appropriate punishment: "because a deprivation of liberty is qualitatively different from a deprivation of property, heightened procedural safeguards are a hallmark of Anglo-American criminal jurisprudence. But that jurisprudence has also unequivocally established that a State's deprivation of a person's life is also qualitatively different from any lesser intrusion on liberty."[67]

These heightened standards of fairness and reliability apply not only to the determination that the defendant committed an offense punishable by death, but also, perhaps even more, to the determination that the defendant deserves a sentence of death.[68] Thus, the Supreme Court has specifically recognized the importance of reliability at a capital sentencing proceeding: "[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision."[69]

IV. CONFRONTATION AT CAPITAL SENTENCING BASED ON SUPREME COURT PRECEDENT

Courts almost uniformly hold that the right to confrontation does not apply at sentencing. The authority relied upon most frequently by state and federal courts to reject the application of the right to confrontation at capital sentencing proceedings is the Supreme Court's 1949 decision in *Williams v. New York*.[70] However, subsequent cases[71] and other constitutional developments have significantly undermined the Court's reasoning in *Williams*, leaving it, at best, diluted.

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[67] *Spaziano*, 468 U.S. at 468 (Stevens, J., dissenting). This concept of qualitative difference had been recognized by the Court even before *Furman*. In *Reid v. Covert*, 354 U.S. 1 (1957), for example, the Court said, "It is in capital cases especially that the balancing of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." *Id.* at 46.

[68] Capital proceedings are generally bifurcated, even though bifurcation is not constitutionally required. First, the factfinder determines whether the defendant committed a capital offense. If so, the factfinder determines the appropriate sentence. Some states require juries to weigh aggravating and mitigating circumstances, while others require that the jury answer specific questions regarding the defendant's likely future behavior. Still others require "consideration" of all the factors. The different state configurations do not alter the premise of this article: the right to confrontation applies at a capital sentencing hearing. If a state were to attempt to return to a unified procedure, then the issue of confrontation would be simplified, since there is no logical basis for altering constitutional requirements within a single procedure.

[69] Gregg v. Georgia, 428 U.S. 153, 190 (1986).

[70] 337 U.S. 241 (1949).

[71] *See infra* text accompanying notes 98–183.

A. Williams v. New York

Williams was decided more than a decade before the Supreme Court held that the Eighth Amendment's prohibition against cruel and unusual punishment was incorporated into the Due Process Clause of the Fourteenth Amendment.[72] Additionally, the *Williams* decision predated each of the series of cases significant to the resolution of the issue raised in this article. As discussed above, *Williams* was decided before the Court's nine separate opinions in *Furman v. Georgia*,[73] which prompted the wholesale revision of state capital punishment laws[74] and resulted in the adoption of standards of heightened due process, fairness, and reliability for both the guilt and sentencing determinations.[75] As a result, the decision predated the recognition by a majority of the Court that "death is different" and, thus, demands heightened accuracy.[76] *Williams* was decided in advance of cases delineating due process guarantees in various proceedings.[77] Similarly, it was decided more than five decades before the quintet of cases, beginning in 2000, which retooled the jury's role as factfinder in criminal cases.[78] And, finally, *Williams* was decided before the Court undertook to redefine the meaning of the Sixth Amendment Confrontation Clause in *Crawford* and *Davis*.[79]

The New York procedure in place at the time of Samuel Tito Williams's trial for murder in the first degree required the jury to determine the guilt or innocence of the defendant and, upon finding guilt, to recommend the sentence.[80] Williams was found guilty of first-degree murder, a crime that was punishable by "death, unless the jury

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72 Robinson v. California, 370 U.S. 660, 666 (1962).

73 408 U.S. 238 (1972).

74 *See generally* Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982).

75 *See supra* text accompanying notes 55–69.

76 Justice Stevens noted in *Gardner v. Florida* that "five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." 430 U.S. 349, 357 (1977) (citing Gregg v. Georgia, 428 U.S. 153, 181–88 (1976)).

Counsel for Williams urged the Court to adopt a "death is different" stance in the case. The Court noted that it was urged to "draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed." *Williams*, 337 U.S. at 251. But the Court declined. "We cannot say that the due process clause renders a sentence void merely because the judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence." *Id.*

77 *See infra* text accompanying notes 98–148.

78 *See infra* text accompanying notes 150–83.

79 *See infra* text accompanying notes 184–218.

80 *Williams*, 337 U.S. at 243 n.2.

recommends life imprisonment."[81] Williams's jury recommended that he receive a life sentence, but the trial judge imposed the death sentence, relying upon sentencing information provided to the court in accordance with New York law.[82] The sentencing information employed to overrule the jury recommendation included allegations detailed in a presentence investigation report.[83] Counsel argued that the judge's use of the untested sentencing information had violated Williams's right to due process of law.[84]

The Supreme Court's opinion upholding the trial judge's actions repeatedly emphasized that Williams did not "challenge" the report, nor ask for an opportunity "to refute or discredit [it] . . . by cross-examination or otherwise."[85] Despite the carefully framed constitutional argument raised,[86] the U.S. Supreme Court described the issue as

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[81] *Id.* (quoting N.Y. PENAL LAW § 1045). A subsequent section provided:

> A jury finding a person guilty of murder in the first degree . . . may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life.

Id. (quoting N.Y. PENAL LAW § 1045-a). It was this provision that gave the judge the discretion to sentence a defendant to death, despite the jury recommendation.

[82] The New York law required that "[b]efore rendering judgment or pronouncing sentence the court shall cause the defendant's criminal record to be submitted to it . . . and may seek any information that will aid the court in determining the proper treatment of such defendant." *Id.* at 243 (quoting N.Y. CRIM. CODE § 482).

[83] Included in the information the judge recited as the basis for the jury override was Williams's involvement in "thirty other burglaries," none of which Williams had been convicted of committing, and Williams's "morbid sexuality." *Id.* at 244.

[84] Counsel based the argument upon the Due Process Clause because *Williams* was decided before the Court's determination that the right to confrontation, under the Sixth Amendment, was applicable in state criminal trials. The Supreme Court held that the right to confrontation applied in state courts in *Pointer v. Texas*, 380 U.S. 400 (1965). The opinion exalts the importance of the right:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one . . . would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.

Id. at 404 (citations omitted).

[85] At the time of the *Williams* decision, the significance of the Court's repeated reference to this "quasi-waiver" argument was at best unclear. The Court did not base the decision on waiver, but emphasized waiver throughout the decision. Almost thirty years later, in *Gardner v. Florida*, 430 U.S. 349 (1977), the Court latched upon these facts as a crucial basis for distinguishing a factually similar case. *See infra* text accompanying notes 98–119.

[86] The New York Court of Appeals describes Williams's argument as follows:

relating "to the rules of evidence applicable to the manner in which a judge may obtain information to guide him in the imposition of sentence upon an already convicted defendant."[87]

Relying upon what the Court characterized as a historical basis,[88] as well as "sound practical reasons,"[89] the Court affirmed Williams's death sentence. In the most often quoted language from the *Williams* decision, the Court emphasized the demanding task of trial judges:

> To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentence would be unavailable if the information were restricted to that given in open court by witnesses subject to cross-examination.[90]

The majority's rationale in *Williams* is that the judge needs more, not less, information in order to impose an individually appropriate sentence.[91] Trial judges need the fullest amount of information possible about a defendant's background and personality in order to individualize the punishment. Despite the fact that the judge in *Williams* used the unconfronted and unconfirmed information to override the jury's

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> [T]he conviction and sentence . . . are in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States "in that the sentence of death was based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal . . . ."

Williams, 337 U.S. at 244 (quoting People v. Williams, 83 N.E.2d 698, 699 (N.Y. 1949)).

87 *Id.*

88 The Court noted that

> both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Id. at 246. This statement ignores the fact that capital sentences were originally mandated based on the nature of the conviction. This was true not only in capital cases, but in all criminal cases. 4 BLACKSTONE, *supra* note 43, at *37; *see* BANNER, *supra* note 52. *But see Williams*, 337 U.S. at 247–48 ("This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial." (citing 4 BLACKSTONE, *supra* note 43, at *375, *376–77)).

89 *Williams*, 337 U.S. at 246.

90 *Id.* at 250.

91 It is ironic that the Court emphasizes that modern penological policy, which is described as promoting and providing for individualized sentences, has

> not resulted in making the lot of offenders harder. On the contrary a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship.

Id. at 249. This rationale obviously has no application to the case before the Court in which Williams's life sentence was replaced with a sentence of death.

recommendation of a life sentence and impose a death sentence, the Court reasoned that modern changes in the treatment of offenders (so-called penological procedural policy) required sufficient information in order to assist in rehabilitation.

The Court's decision in *Williams* has become synonymous with an absolute rule of law; it is cited definitively—and frequently[92]—as a well-established holding that the right to confrontation does not apply at sentencing.[93] But this standardization of and reliance on the *Williams*

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[92] At last look, the case had been cited over 1700 times in reported decisions. The frequency of citations to *Williams*, however, does not mean that courts are properly characterizing the case. *Cf.* Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 CUMB. L. REV. 961 (1996) (arguing that the *Miller* case has been routinely mischaracterized by the courts).

[93] Some courts also cite to a second *Williams* case: *Williams v. Oklahoma*, 358 U.S. 576 (1959). In that case, the defendant pleaded guilty to kidnapping after having been sentenced to life imprisonment for murder in another Oklahoma court for events arising out of the same criminal incident. When he entered his guilty plea to the kidnapping charge, the judge warned him that he faced a death sentence. Before imposing the sentence, the judge allowed the prosecutor to make a statement in which the prosecutor recounted the details of the kidnapping and murder and also detailed the defendant's prior criminal record. The judge sentenced the defendant to death. *Id.* at 580–81.

On appeal, the defendant claimed that the death sentence violated due process because the court had not pursued a formal procedure for receiving sentencing information as outlined in the Oklahoma statutes. *Id.* at 582. Because the use of the statutory procedure was discretionary and because the defendant did not request a hearing or an opportunity to put on evidence in mitigation, the Supreme Court affirmed the death sentence. *Id.* at 583. In a succinct opinion with little analysis, the Court stated summarily:

> Nor did the State's Attorney's statement of the details of the crime and of petitioner's criminal record deprive petitioner of fundamental fairness or of any right of confrontation or cross-examination. . . . [In addition to failing to request a hearing,] petitioner, upon interrogation by the court, stated that the recitals of the [prosecutor's] statement were true. This alone should be a complete answer to the contention. But we go on to consider this Court's opinion in *Williams v. New York* . . . .
>
> These considerations make it clear that the State's Attorney's statement of the details of the crime and of petitioner's criminal record—all admitted by petitioner to be true—did not deprive petitioner of fundamental fairness or of any right of confrontation or cross-examination.

Id. at 583–84.

The case has numerous unique circumstances, which limit its effect on the issue of confrontation at a capital sentencing proceeding. The information provided by the prosecutor was limited to the defendant's prior criminal record and the details of an offense to which the defendant had pleaded guilty and had been sentenced to life imprisonment. The defendant admitted the truth of the details and of his record. In addition, the Oklahoma statute, which provided for a more formal presentation, allowed either party to "suggest[] . . . there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment." *Id.* at 582 (quoting OKLA. STAT. tit. 22, § 973 (1951)). Counsel for the defendant had not requested a hearing or an opportunity to put on evidence. Counsel similarly had not challenged the prosecutor's right to make a statement to the court and had not, until appeal, claimed a violation of due process or confrontation.

holding fails to consider the Court's capital punishment,[94] due process,[95] constitutionally significant factfinding,[96] and confrontation[97] jurisprudence.

B. Reconsidering Williams *After the Court's Due Process Jurisprudence:* Gardner v. Florida, Specht v. Patterson, *and* Morrissey v. Brewer

1. *Gardner v. Florida*

Almost thirty years after *Williams* was decided, the Supreme Court revisited the issue of confrontation, albeit in due process clothing, at a capital sentencing in another judicial override case.[98] As with the statute at issue in New York, Florida's capital punishment statute in effect in 1973 provided for a jury recommendation of sentence, but allowed a judge to override a recommendation of a life sentence with a death sentence.[99] The Citrus County Circuit Court judge overrode a jury's recommendation of a life sentence in *Gardner v. Florida*, basing his decision to sentence Gardner to death upon evidence at trial and sentencing, and upon "factual information contained in [a] presentence investigation [report]."[100] Unlike in *Williams*, however, part of the report was not disclosed to Gardner or his counsel.[101]

The focal point of the State's argument in *Gardner* was that the Court had resolved the issue in *Williams* and needed to neither revisit nor revise its decision. The Court, however, distinguished *Williams* on several grounds,[102] and ultimately concluded that Gardner "was denied

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These distinctions make the case very fragile authority for the proposition that the Confrontation Clause does not apply to sentencing proceedings.

94 *See supra* text accompanying notes 55–69.

95 *See infra* text accompanying notes 98–148.

96 *See infra* text accompanying notes 150–83.

97 *See infra* text accompanying notes 184–218.

98 Gardner v. Florida, 430 U.S. 349 (1977).

99 FLA. STAT. § 921.141 (Supp. 1976), *cited in Gardner*, 430 U.S. at 351 n.1.

100 430 U.S. at 353.

101 As was true in *Williams*, the Court legitimately could have decided the issue strictly on waiver grounds, avoiding the due process issue altogether. The Supreme Court noted in the *Gardner* opinion that the trial judge had found that counsel and Gardner had been given copies of the "portion [of the report] to which they are entitled," and that "counsel made no request to examine the full report or to be apprised of the contents of the confidential portion." *Id.* at 353 (alteration in original).

Interestingly, the report was not included as an exhibit to the appellate record at any level of the state court proceedings. *See* Gardner v. State, 313 So. 2d 675, 678 (Fla. 1978) (Ervin & Boyd, JJ., dissenting). The Supreme Court noted that the State of Florida placed "a copy of the confidential portion of the presentence report" in the appendix to its brief. 430 U.S. at 354 n.5. For obvious reasons, the Court declined to consider the contents of the report.

102 *See infra* text accompanying notes 108–10 for a discussion of the distinctions that the Court drew.

due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."[103]

The State relied upon the underpinnings of *Williams* as a basis for upholding the death sentence in *Gardner*.[104] Adding to the argument that the trial judge needs "more, not less" information to do the best job possible in sentencing, the State contended that since much of the information relevant to sentencing is sensitive, the state needed to give "assurance[s] of confidentiality" in order to acquire the information.[105] The Court disagreed with the State's argument, noting that "the interest in reliability plainly outweighs" the State's claimed justification.[106]

Similarly, drawing upon the rationale in *Williams*, the State argued that confidentiality was necessary to foster a defendant's rehabilitation.[107] The irony of the argument—that the potential for rehabilitation was in any way relevant to a sentence of death—did not escape the Court this time and the Court dismissed the argument outright:

> [W]hatever force that argument may have in noncapital cases, it has absolutely no merit in a case in which a judge has decided to sentence the defendant to death. Indeed, the extinction of all possibility of rehabilitation is one of the aspects of the death sentence that makes it different in kind from any other sentence a State may legitimately impose.[108]

Among the distinctions the Supreme Court found between the case before it and *Williams* were counsel's failure in *Williams* to challenge or refute the information relied upon by the judge and the judge's narration of the information into the record in open court in the presence of the defendant and counsel.[109] Perhaps the most important difference relied upon by the Court to justify reaching a different result in *Gardner*, however, was the passage of time's effect on capital sentencing.

Justice Stevens explained the significance of the intervening three decades by noting that Justice Black, the author of *Williams*, had himself recognized the need to reevaluate capital sentencing

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[103] *Gardner*, 430 U.S. at 362. Perhaps the choice of these two verbs—"deny" and "explain"—leads to the narrow reading of *Gardner* by many courts today.

[104] The State also argued that full disclosure of the information to the defense would cause delay. *Id.* at 355. The Court discounted this argument because the importance of ascertaining the validity of the information easily outweighs any asserted state interest in efficiency. *Id.* at 357–58.

[105] *Id.* at 358.

[106] *Id.* at 359.

[107] *Id.*

[108] *Id.* at 360.

[109] *Id.* at 356.

procedures.[110] Since *Williams*, "two constitutional developments . . . require[d] [the Court] to scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949."[111] Those two constitutional developments were the recognition by a majority of the Court that "death is . . . different,"[112] and the recognition that sentencing is a "critical stage of the criminal proceeding."[113]

Gardner, unlike *Williams*, came after the U.S. Supreme Court's decision in *Furman v. Georgia*.[114] Despite the differences in the reasoning of the five Justices in the *Furman* majority, the pervasive theme in the opinions[115] was a theme of fairness. As one example, in recognizing the importance of this development since *Williams*, Justice Stevens specifically noted in *Gardner* that death sentences must be determined based on "reason."[116] Throughout the Court's discussion of the State's proferred justifications, the Court emphasized the need for reliability in the capital sentencing proceeding.[117]

Today, courts faced with the issue of the right of confrontation at sentencing often straddle the *Williams/Gardner* tightrope, if acknowledging *Gardner* at all. The courts cite *Williams* for the overly-broad proposition that a judge, or jury, may consider inadmissible and unchallenged evidence in determining a sentence and confine *Gardner* to circumstances in which a sentence is based on secretive, nondisclosed information.[118] Therefore, as long as the court discloses all of the sentencing information upon which it relied to a defendant, the second-hand, unconfirmed, and unchallenged nature of the information was of no constitutional consequence.

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[110] *Id.* at 356–57 (quoting Williams v. New York, 337 U.S. 241, 247–48 (1949)).

[111] *Id.* at 357.

[112] *Id.* at 357–58; *see supra* text accompanying notes 65–69.

[113] *Id.* at 358.

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

Id.

[114] 408 U.S. 238 (1972).

[115] In *Furman v. Georgia*, the Court issued a single paragraph per curiam opinion, but each Justice wrote separately. *Id.* at 239.

[116] 430 U.S. at 358.

[117] *Id.* at 359.

[118] *See, e.g.*, Ex parte Smith, 557 So. 2d 13 (Ala. 1988); Nukapiqak v. State, 576 P.2d 982 (Alaska 1978); People v. Arbuckle, 587 P.2d 220 (Cal. 1978); People v. Lowery, 642 P.2d 515 (Colo. 1982); State v. Fuller, 744 A.2d 931 (Conn. 2000); State v. Harmon, 157 A.2d 594 (Conn. 1960); Mayes v. State, 604 A.2d 839 (Del. 1992); Thompson v. Yuen, 623 P.2d 881 (Haw. 1982); State v. Pizutto, 810 P.2d 680 (Idaho 1991); People v. Williams, 599 N.E.2d 913 (Ill. 1992); Moore v. State, 479 N.E.2d 1264 (Ind. 1985).

This broadening of *Williams* and narrowing of *Gardner* ignores three essential distinctions in the two cases. First, Williams's counsel did not raise the issue at trial, thereby technically waiving the issue on appeal.[119] Second, since *Williams* the Court has demanded heightened reliability and accuracy in death penalty cases. The third distinction was the other "constitutional development" that the Court said required more scrutiny than had been necessary at the time of the *Williams* decision. That development was the Court's recognition that sentencing was a critical stage in the criminal justice process that required due process.

2. *Specht v. Patterson*

This second constitutional development—applying the fundamental aspects of due process, including the right to counsel, not only to trials but also to all "critical stages" in the criminal proceeding[120]—was far from mature at the time of *Williams*.[121] Just seven years before *Williams*, the Supreme Court had declined to find that the right to counsel was a "fundamental right, essential to a fair trial."[122] But both the right to counsel[123] and an understanding of the requirements of due process[124]

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[119] Because the issue is the admission of evidence, the rules of evidence with regard to preservation of error apply. The federal rules from which most state rules are drawn, for example, requires a timely objection or a timely motion to strike. FED. R. EVID. 103(a)(1).

[120] Coleman v. Alabama, 399 U.S. 1, 7 (1970).

> This Court has held that a person accused of crime "requires the guiding hand of counsel at every step in the proceedings against him," and that that constitutional principle is not limited to the presence of counsel at trial. "It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."

Id. at 7 (citation omitted).

[121] In 1949, the year of the *Williams* decision, the Court was still viewing the right to counsel provided by the Sixth Amendment as a limited right. HELLER, *supra* note 19, at 120–28; *see* Penny J. White, *A Noble Ideal Whose Time Has Come*, 19 MEMPHIS ST. L. REV. 223 (1988).

[122] Betts v. Brady, 316 U.S. 455, 471 (1942).

> [I]n the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence, we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.

Id. at 471–72.

[123] *See Coleman*, 399 U.S. 1; Gideon v. Wainwright, 372 U.S. 335 (1963). In *Mempa v. Rhay*, for example, decided a decade before *Gardner* but relied upon by the Court in *Gardner*, the Court recognized:

had matured by the time *Gardner* was decided. Ten years before *Gardner*, in *Specht v. Patterson*,[125] the Court merged the two concepts.

Defendant Specht was convicted in a Colorado court for the crime of indecent liberties, which carried a maximum punishment of ten years.[126] Following his conviction, the court sentenced Specht to an indeterminate sentence of "from one day to life" based upon a procedure set out in the Colorado Sex Offenders Act.[127] The statutory procedure that Specht challenged allowed a defendant who was found guilty of a specified offense to receive a significantly increased sentence based upon the judge's finding of an additional fact. The additional fact was "not an ingredient of the offense charged,"[128] but rather a new fact, found after conviction. As the Supreme Court would later explain, Specht "was examined as required and a psychiatric report prepared and given to the trial judge . . . . But there was no hearing in the normal sense, no right of confrontation and so on."[129]

Specht argued that the additional factfinding of the judge in Colorado's sentencing procedure violated due process because it allowed a "critical finding to be made . . . without a hearing at which the person so convicted may confront and cross-examine adverse witnesses . . . and on the basis of hearsay evidence to which the person involved is not allowed access."[130] As in *Gardner*, the State relied upon *Williams* to support its contention that the sentencing procedure was satisfactory.[131]

On certiorari, the U.S. Supreme Court distinguished the case before it from *Williams*, but unfortunately described the decision in *Williams*

> There was no occasion in *Gideon* to enumerate the various stages in a criminal proceeding at which counsel was required, but *Townsend*, *Moore*, and *Hamilton*, when the *Betts* requirement of special circumstances is stripped away by *Gideon*, clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.

389 U.S. 128, 134 (1967). The Court specifically credited *Townsend* with "illustrat[ing] the critical nature of sentencing in a criminal case" and noted that it "might well be considered to support by itself a holding that the right to counsel applies at sentencing." *Id.* (citing Townsend v. Burke, 334 U.S. 736 (1948)).

[124] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); *Mempa*, 389 U.S. 128.

[125] 386 U.S. 605 (1967).

[126] *Id.* at 607.

[127] *Id.* The Sex Offenders Act could be used by a trial court who was "'of the opinion that any . . . person [convicted of specified sex offenses], if at large, constitute[d] a threat of bodily harm to members of the public, or is an habitual offender and mentally ill.'" *Id.* (quoting Sex Offenders Act, COLO. REV. STAT. §§ 39-19-1–10 (1963)).

[128] *Id.*

[129] *Id.* at 608.

[130] *Id.*

[131] *Id.*

broadly as holding that due process "did not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when [the judge] came to determine the sentence to be imposed."[132] Despite this obvious overstatement of the *Williams* holding, to which the Court said it "adhere[d]," the Court described the State's argument in *Specht* as extending the *Williams* rationale to a "radically different situation."[133]

The Court analogized the Colorado statute to habitual criminal and recidivist statutes, which implicate the procedural protections of the Due Process Clause.[134] The Court concluded that

> [d]ue process, in other words, requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.[135]

Because the Colorado statute lacked all of these protections, it was "deficient in due process,"[136] and violated the Fourteenth Amendment.

The holding and rationale in *Specht v. Patterson*[137] clearly supported the Court's decision in *Gardner*, but the Court's reliance on *Specht* would also foreshadow another relevant constitutional development. *Specht* was the Court's first foray into what has come to be known as "constitutionally significant factfinding," but its significance in that area would not be realized for thirty years.[138] Importantly, when the holdings in *Gardner* and *Specht* are considered together, they lead inescapably to the conclusion that due process at sentencing includes not only the right

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[132] *Id.* at 606. After this unfortunate, and incorrect, statement, the Court recited *Williams*'s precise language and clarified the context in which the issue in that case arose. *Id.* at 606–07 (quoting *Williams*, 337 U.S. at 249–50).

[133] *Id.* at 608.

[134] *Id.* at 610. The Court also cited, and quoted, from a Third Circuit case, interpreting a similar Pennsylvania statute:

> It is a separate criminal proceeding . . . [at which] [p]etitioner . . . was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him.

Id. at 609–10 (quoting United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)).

[135] *Id.* at 610.

[136] *Id.* at 611.

[137] *Id.* at 610–11.

[138] *See infra* text accompanying notes 150–83.

to counsel, but also the right to confront and cross-examine the government's witnesses.

3. *Morrissey v. Brewer*

The Supreme Court has recognized the importance of confrontation, as an element of due process, in contexts other than sentencing. The holding of one such case, that applies the right to confrontation at a parole revocation hearing, bolsters the proposition that mature due process includes the right to confrontation at capital sentencing proceedings.

In *Morrissey v. Brewer*,[139] two defendants[140] challenged the procedures by which their parole was revoked resulting in their return to prison. In both cases, the revocation was based upon a written report, filed by a parole officer, which recited various violations of the conditions of parole. In neither case did the defendant receive a hearing.[141]

The appellate court approved the parole revocation procedures relying on the traditional view that parole was a privilege rather than a right and that prison authorities need broad discretion to further the objectives of penological policy.[142] The Supreme Court reversed, holding that due process requires, at a minimum, written notice of the alleged violations, disclosure to the defendant of the evidence against him or her, an opportunity to be heard and to present witnesses and evidence before a neutral and detached hearing body, "the right to confront and cross-examine adverse witnesses," and a written decision outlining the reasons for the decision.[143]

The Court invoked a traditional due process analysis, characterizing the parolee's liberty interest as conditional and "indeterminate," but concluding that "[b]y whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its

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[139] 408 U.S. 471 (1972).

[140] Morrissey was paroled from the Iowa State Penitentiary on a charge of uttering bad checks. Seven months after his release he was arrested and jailed locally. One week later, the Iowa Board of Parole revoked his parole and returned him to the state penitentiary, based upon the officer's written report. Co-petitioner Booher was paroled after service of two years of a ten year sentence. Eight months after his release, he was arrested and placed in the county jail. Some weeks later, the Iowa Board of Parole revoked his parole and returned him to the penitentiary based on the parole officer's written report. Neither inmate received a hearing prior to their arrest or their revocation. *Id.* at 472–74.

[141] *Id.* at 474.

[142] *Id.* at 474–75. The deference given to prison officials in the appellate decision is similar to the deference the Court gave to judges in *Williams*. Both are based on an unwillingness to interfere with corrections policy. *See supra* text accompanying notes 84–97.

[143] *Id.* at 489.

termination calls for some orderly process, however informal."[144] Notwithstanding the "overwhelming"[145] state interests at issue, the Court concluded that the State has no interest "in revoking parole without some informal procedural guarantees."[146]

Thus, even after conviction and incarceration, when there is no question as to guilt or sentence, but only a question as to the manner of service of the sentence, and when the state's interests are strong, due process demands that an accused parolee have the right to confront and cross-examine witnesses before parole is revoked. That due process would require less when the issue is whether a defendant should be sentenced to life or death is inconceivable.

The extent of procedural protections required by due process depends upon "the extent to which an individual will be 'condemned to suffer grievous loss.'"[147] The loss that a parolee might suffer upon revocation is not remotely comparable to that which a capital defendant faces. At a capital sentencing proceeding, the defendant's interest in life and liberty are ultimate; no greater "core value" than life exists.[148] The government, too, has an interest in the sanctity of life and in assuring that it only seeks to execute those who are clearly deserving of the most severe penalty. Any government interest in efficiency is trivial by comparison to the interest both parties share in assuring reliability in the sentencing process.

V. RECONSIDERING *WILLIAMS* AFTER THE COURT'S CONSTITUTIONALLY SIGNIFICANT FACTFINDING JURISPRUDENCE: *APPRENDI V. NEW JERSEY*, *RING V. ARIZONA*, FEDERAL AND STATE SENTENCING GUIDELINES CASES

Specht v. Patterson is a focal point for a crucial analytical element of confrontation rights at capital sentencing. After *Specht*, it is clear that only factual findings derived from a proceeding at which certain due process protections are honored may be relied upon to enhance a criminal sentence. *Specht* requires specifically that the accused have the right to counsel, the right to be heard, the right to offer evidence, and, most importantly, the right to confrontation and to cross-examination.[149]

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[144] *Id.* at 482.

[145] *Id.* at 483.

[146] *Id.* at 484.

[147] *Id.* at 481 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1950) (Frankfurter, J., concurring)).

[148] *Id.* at 482. In determining whether a parolee had a liberty interest protected by due process, the Court analyzed whether the parolee's interests included "the core values of unqualified liberty" and whether termination of parole would inflict a "'grievous loss'" on the parolee. *Id.*

[149] *See supra* text accompanying note 135.

The question which *Specht* did not address was *who* must make the "new factual finding" necessary to enhance the sentence. This question was resolved in *Apprendi v. New Jersey*,[150] in the first of five cases in which the Court delineated the right to have a jury determine constitutionally significant facts.[151]

In *Apprendi*, a state criminal case, the trial judge enhanced a convicted defendant's sentence after finding that the defendant committed the crime "'with a purpose to intimidate an individual or group of individuals . . . because of race.'"[152] The court based the enhancement upon a New Jersey statute which gave the court discretion, upon request by the state, to extend the prison sentence based upon a finding by a preponderance of the evidence that the crime had been committed with the "'purpose to intimidate'" because "'the crime was motivated by racial bias.'"[153]

Although the issue had not been analyzed in state criminal cases, a year earlier, the Court had faced a similar issue in two federal cases. In the earlier of the two, *Almendarez-Torres v. United States*,[154] the trial court enhanced the defendant's sentence for violation of a deportation statute based upon the defendant's admission that his prior deportation had been as a result of prior convictions.[155] The Court upheld the sentence, concluding that the statute under which the judge had sentenced the defendant was a "penalty provision."[156] Because that statute did not create a separate crime, the government was not required to include the fact of the prior convictions in the indictment as the defendant argued.[157]

In the second case, *Jones v. United States*,[158] a judge enhanced a defendant's sentence for carjacking based upon provisions of a federal statute that allowed enhancement when the carjacking caused serious bodily injury or death.[159] Like the defendant in *Almendarez-Torres*, Jones argued that the fact of serious bodily injury or death was an element of

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150 530 U.S. 466 (2000).

151 *See infra* text accompanying notes 152–83.

152 530 U.S. at 468 (citing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999–2000)).

153 *Id.* at 471.

154 523 U.S. 224 (1998).

155 *Id.* at 226–27. *Almendarez-Torres* was a case in which, following a guilty plea to a violation of the deportation statute, an offense with a two year maximum sentence, the trial court sentenced the defendant to eighty-five months based on his admission that his prior deportation had been as a result of prior convictions. *Id.*

156 *Id.* at 226.

157 *Id.*

158 526 U.S. 227 (1999).

159 *Id.* at 230–31.

the offense, and had to be pleaded in the indictment and proven beyond a reasonable doubt to the jury.[160]

The Supreme Court saw the two cases as distinguishable, based upon the nature of the facts necessary to allow enhancement. In *Almendarez-Torres*, the enhancement was based on prior convictions which had "been established through procedures satisfying [due process]."[161] In *Jones*, however, the facts used to enhance the sentence were "new" and in addition to the elements necessary to constitute the offense. The federal statute at issue allowed enhancement upon the finding of additional facts—either serious bodily injury or death—and those facts must be found by a jury based upon proof beyond a reasonable doubt.[162]

The state case, on the Court's docket a year later, could not support a different result. Thus, the Court held in *Apprendi* that the Fourteenth Amendment provided the same due process protections in a state criminal case: "'[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'"[163]

The decision in *Apprendi* is significant for several reasons. The trial judge in *Apprendi*, unlike the trial judge in *Specht*, conducted an "evidentiary hearing" before determining whether to enhance punishment.[164] This distinguished the case from the one before the Court in *Specht*. Additionally, the New Jersey statute at issue in *Apprendi* required the trial judge to find the facts by a preponderance of the evidence standard. This forced the Court to decide the narrow issue, which it described as "starkly presented,"[165] of whether a "factual determination authorizing an increase in the maximum prison sentence .

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[160] *Id.* at 231.

[161] *Id.* at 249. Unlike other factors used to enhance sentences, the fact of a prior conviction "must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.*

[162] *Id.* at 230–32.

[163] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (alteration in original) (quoting *Jones*, 526 U.S. at 252–53 (Stevens, J., concurring)).

[164] *Id.* at 470. It does not appear that the statute at issue actually required a hearing. The statute specifically provided that the "'court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime, . . . to an extended term if it finds, by a preponderance of the evidence, the [requisite] grounds.'" *Id.* (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999–2000)). Because Apprendi entered a guilty plea, the evidentiary hearing which the court conducted was the only opportunity for the court to hear evidence concerning the alleged "'purpose to intimidate . . . because of race.'" *Id.* at 469–70.

[165] *Id.* at 476.

. . [must] be made by a jury on the basis of proof beyond a reasonable doubt."[166]

Crucially, *Apprendi* also involved a noncapital crime. The Court had struggled previously to draw lines between elements of an offense, which must be determined beyond a reasonable doubt by a jury, and "sentencing factors," which could be utilized by a judge in determining a sentence.[167] *Apprendi* provided the Court with an opportunity to reconcile the conflicting cases outside the politically charged climate of a capital case.

The Court's holding, reiterated from its two prior cases,[168] was that "any fact [other than a prior conviction[169]] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[170] The Court attempted to dilute any effect that its decision would have on capital sentencing proceedings, citing Justice Scalia's dissenting opinion in *Almendarez-Torres*,[171] a holding that it had already clearly distinguished: "[f]or reasons we have explained, the capital cases are not controlling."[172] The

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[166] *Id.* at 469.

[167] The Court had recognized in *Jones* that "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones*, 526 U.S. at 232.

[168] *See id.*; Almendarez-Torres v. United States, 523 U.S. 224 (1998). The Court took pains to avoid overruling *Almendarez-Torres* in *Apprendi*, although the majority was obviously troubled by the potential lack of consistency:

> Even though it is arguable that *Almendarez-Torres* was incorrectly decided, . . . Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

530 U.S. at 489–90.

[169] In *Jones* the Court distinguished *Almendarez-Torres*: "The Court's repeated emphasis on the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing." 526 U.S. at 249. The reason for the distinction was obvious. Unlike other factors used to enhance sentences, the fact of a prior conviction "must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot, then, be read to resolve the due process and Sixth Amendment questions implicated by reading the carjacking statute as the Government urges." *Id.* at 249.

[170] 530 U.S. at 490.

[171] *See* 523 U.S. at 257 n.2 (Scalia, J., dissenting).

[172] *Apprendi*, 530 U.S. at 496 (citing Walton v. Arizona, 497 U.S. 639, 647–49 (1990), *overruled in part by* Ring v. Arizona, 536 U.S. 584 (2002)). Justice O'Connor, a former Arizona state judge, and a dissenter in *Apprendi*'s predecessor, *see Jones*, 526 U.S. at 254 (O'Connor, J., dissenting), knew better. "The distinction of [the Court's decisions in the

attempted distinction was not readily accepted by those vigilant about fairness in capital punishment schemes. Within months of the ruling in *Apprendi*, the Court was squarely faced[173] with the issue of whether its *Apprendi* logic did not apply with full force to many capital punishment schemes.[174]

As the dissenting Justices in *Apprendi* had predicted, the majority's holding could not be tailored to fit only noncapital cases. Thus, in *Ring v. Arizona*, the Court announced that "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[175] Thus, if a defendant found guilty of a capital crime could only be sentenced to life imprisonment absent some aggravating circumstance, the facts necessary to prove the aggravating circumstance, and thereby elevate the life sentence to death, must be found by a jury beyond a reasonable doubt. In *Ring*, the Court overruled prior authority to the "extent that it allows a sentencing judge, sitting without a jury, to

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capital cases] offered by the Court today is baffling, to say the least." *Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting).

Walton v. Arizona, which the Court cited in *Apprendi*, was an Arizona capital case in which the Court upheld Arizona's capital sentencing scheme. 497 U.S. at 647. The Arizona statute required a separate sentencing hearing at which the judge would "'impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated [in the statute] and that there are no mitigating circumstances sufficiently substantial to call for leniency.'" *Id.* at 644 (quoting ARIZ. REV. STAT. ANN. § 13-703(E) (1989)). In *Walton*, the Court relied upon prior authority in which it had concluded that "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" *Id.* at 648 (quoting Hildwin v. Florida, 490 U.S. 638, 640–41 (1989) (per curiam)). As Justice O'Connor explained in her dissent:

> [U]sing the terminology that the Court itself employs to describe the constitutional fault in the New Jersey sentencing scheme . . . under Arizona law, the judge's finding that a statutory aggravating circumstance exists "exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."

Apprendi, 530 U.S. at 537 (O'Connor, J., dissenting) (quoting *id.* at 482 (majority opinion)).

[173] *See Ring*, 536 U.S. 584.

[174] Thirty-eight states had authorized capital punishment at the time of the decision in *Ring*. *Id.* at 608 n.6. Unlike Arizona, the vast majority assigned the sentencing decision to a jury. Five states, including Arizona, required the judge to both find the facts essential to a death sentence and ultimately determine sentence. *Id.* The remaining four states utilized a system in which the jury reached an advisory verdict, but the ultimate sentencing authority was left to the judge. *Id.*

[175] *Id.* at 589. In a demonstration of the power of the Supremacy Clause, the Arizona State Supreme Court noted its agreement with Justice O'Connor's dissent in *Apprendi*, *see supra* note 172, and the persuasion of Ring's argument on appeal, but upheld the death sentence based on *Walton*, which the majority in *Apprendi* had specifically endorsed. State v. Ring, 25 P.3d 1139,1151–52 (Ariz. 2001).

find an aggravating circumstance necessary for imposition of the death penalty."[176]

But the Court's journey through the land of "factual findings requiring a unanimous jury determination," so-called "constitutionally significant facts," did not end with its overruling of prior capital cases in *Ring*. Instead, three other cases allowed the Court to refine its decisions. These cases, though not involving capital proceedings, bolster the proposition that the right of confrontation must apply at a capital sentencing.

In 2004 and 2005, and most recently in 2007, the Court reviewed federal and state noncapital sentencing schemes in light of the *Apprendi* rationale. In *Blakely v. Washington*,[177] *United States v. Booker*,[178] and

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[176] 536 U.S. at 609.

[177] 542 U.S. 296 (2004). The Washington criminal punishment scheme was at issue in *Blakely*. In the Washington criminal statutes, offenses were punished by broad indeterminate sentences, but the appropriate sentence for a particular offender was narrowed to a lesser indeterminate sentence of months within the broader sentence range based on stated criteria. Upon a finding of "'substantial and compelling reasons justifying an exceptional sentence,'" a judge could sentence above the offender's set range. *Id.* at 299 (quoting WASH. REV. CODE § 9.94A.123(2) (2000)). An "'exceptional sentence'" could only be imposed if the judge found the existence of factors other than those used in computing the initial sentence range. *Id.* at 298. Blakely was charged with an offense which carried a maximum sentence of ten years; his maximum exposure, however, was forty-nine to fifty-three months. *Id.* at 299. After Blakely pleaded guilty, the judge found that he had acted with "'deliberate cruelty,'" which was a statutorily listed ground allowing departure from a range sentence, and sentenced Blakely to ninety months. *Id.* at 300.

[178] 543 U.S. 220 (2005). The defendants in *Booker* and the companion case of *United States v. Fanfan* were sentenced pursuant to the United States Federal Sentencing Guidelines. Both defendants were subject to an increased sentence after the respective judges found, by a preponderance of the evidence, the existence of factors that authorized an increase. *Id.* at 227–29. The Supreme Court held that the analysis in *Blakely* applied:

> [T]here is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case. This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges.
>
> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.
>
> The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges.

Id. at 233–34. (citations omitted). A different majority, led by Justice Breyer, delivered the remainder of the opinion in *Booker*, severing the provisions of the Guidelines that made them mandatory and turning a determinate sentencing scheme into an indeterminate one. *Id.* at 245.

Cunningham v. California,[179] the Court struck down sentencing schemes that permitted the judge to impose a higher sentence based upon a judicial finding of certain enumerated aggravating factors.[180] The Court reiterated that any fact that is not an element of the crime and that is necessary to increase a sentence beyond the statutory range is of constitutional significance and must be found beyond a reasonable doubt by a jury.[181]

If the Sixth Amendment requires that a jury find, beyond a reasonable doubt, the factors necessary to impose a sentence outside the statutory range, then the majority of death penalty statutes in the United States require a jury determination of the sentence of death.[182] When a statute authorizes either a life or death sentence, but imposes a life sentence absent the finding of certain aggravating circumstances, the facts constituting the aggravating circumstance are facts of constitutional significance and must be found by a jury.

When a jury is required to find facts beyond a reasonable doubt, the decision in *Specht* requires the presence of other important aspects of due process, including the right to counsel, the right to cross-examine, and the right to confrontation.[183] The extent to which those aspects of due process apply in a capital sentencing proceeding depends upon which facts in the proceeding are of constitutional significance. If a fact is of constitutional significance, then the accused has a right to have that fact found beyond a reasonable doubt by a jury in a hearing at which the accused has the benefit of counsel and the opportunity to confront and challenge the evidence presented.

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[179] 127 S. Ct. 856 (2007). In *Cunningham*, California's determinate sentencing law was at issue. The Determinate Sentencing Law, called the DSL, was described as "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence." *Id.* at 860. This sentencing scheme, to no one's surprise, was found to violate the Sixth and Fourteenth Amendments of the United States Constitution. *Id.*

California argued that the scheme withstood *Blakely* and *Booker* analysis because, in most cases, it reduced sentences, and because the statutory enhancement factors were required to be charged in the indictment. *Id.* at 865–66. Disagreeing, the Supreme Court enumerated California's options. Either the state could preserve the determinate sentencing scheme by allowing juries to find the facts necessary to the imposition of an elevated sentence or judges could continue to sentence but only within the statutory range. *Id.* at 871.

[180] The specific aggravating factors in both the federal and California sentencing schemes were enumerated in various statutes. *Id.* at 862.

[181] *Id.* at 868.

[182] All of the states that require the jury to determine the ultimate punishment, based upon finding and weighing the aggravating and mitigating circumstances, would fit in this category. The Court has not held, however, that judges may not be responsible for determining the ultimate sentence, based upon facts found by a jury.

[183] *See supra* notes 120–36.

VI. EFFECT OF *CRAWFORD* AND *DAVIS* ON APPLICATION OF CONFRONTATION RIGHTS TO CAPITAL SENTENCINGS

A. Background

In *Crawford v. Washington*[184] and *Davis v. Washington*[185] the U.S. Supreme Court dramatically altered the parameters of the Sixth Amendment Confrontation Clause. In *Crawford*, the Court held that testimonial statements[186] may not be introduced against a defendant unless the witness is unavailable[187] and the defendant has had a prior opportunity to cross-examine.[188] After a discussion of the history leading to the Sixth Amendment,[189] the Court reached its conclusion by focusing

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[184] 541 U.S. 36 (2004).

[185] 126 S. Ct. 2266 (2006).

[186] Justice Scalia, who authored the majority opinion in both cases, reached the conclusion that the Confrontation Clause applied only to testimonial statements in this way:

> [N]ot all hearsay implicates the Sixth Amendment's core concerns. . . .
>
> The text of the Confrontation Clause reflects [that it] applies to "witnesses" against the accused—in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." . . . The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Id. at 51 (citations omitted).

In the next sentence, Justice Scalia began to use the phrase "testimonial" statements, *id.*, which he sprinkled throughout the remainder of the opinion, concluding his opinion with this statement: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68–69.

[187] While the Court has spoken on occasion about the requirements of unavailability, *see* Barber v. Page, 390 U.S. 719 (1968), the issue of what the Constitution requires to establish unavailability, as compared to what the rules of evidence require, *see* FED. R. EVID. 804(a), has never been resolved, and remains the topic of debate. In both *Crawford* and *Davis*, however, the Court suggested that the need to establish unavailability could be avoided by emphasizing that the right to confrontation is waived by "one who obtains the absence of a witness by wrongdoing." *Davis*, 126 S. Ct. at 2280 (citing *Crawford*, 541 U.S. at 62).

[188] The Court provided no discussion of what would constitute a "prior opportunity to cross-examine." Although the Court previously discussed what was meant by a prior opportunity to cross-examine in *Ohio v. Roberts*, 448 U.S. 56, 69–73 (1980), that discussion was in the context of the now-discarded confrontation test, leaving the appropriate standard unclear. *See* Christopher B. Mueller, *Cross-Examination Earlier or Later: When Is It Enough to Satisfy* Crawford*?*, 19 REGENT U. L. REV. 319 (2006-2007).

[189] 541 U.S. at 43–50. At least one of the country's premier constitutional historians has questioned the validity of some of the historical underpinnings of the opinion:

> If one consults the framing-era evidence authorities to assess the scope of the Confrontation right in 1789—which Justice Scalia did not do in either *Crawford* or *Davis*—one finds that framing-era evidence doctrine imposed a total ban against unsworn hearsay evidence to prove a criminal defendant's guilt. In other words, by the date of the framing judges had not yet invented

first on the word "witness" in the Sixth Amendment. Employing a dictionary definition of "witness" as one who "'bear[s] testimony,'"[190] and a second definition of "'testimony" as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,'" the Court concluded that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[191]

Thus, the Court concluded that the Confrontation Clause "reflects an especially acute concern with a specific type of out-of-court statement," pegged "'testimonial' statements."[192] Although the Court admitted that it was not fully defining this term in *Crawford*, it referred to "[v]arious formulations" including

> "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," . . . "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," . . . "statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[193]

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the hearsay "exceptions" that now constitute a prominent feature of criminal evidence law. Rather, nineteenth century judges invented the hearsay exceptions that now apply to criminal trials only after the framing. Hence, it is plain that the Framers did not design the Confrontation Clause so as to accommodate the admission of unsworn hearsay statements.

Rather the framing-era sources indicate that the confrontation right actually was understood to be one of several principles that required the total ban against the use of hearsay statements as evidence of the defendant's guilt. The condemnations of hearsay that appeared in prominent and widely used framing-era authorities typically recognized that the admission of any hearsay statement would deprive the defendant of the opportunity to cross-examine the speaker, and cross-examination was understood to be a salient aspect of the confrontation right. Thus, the framing-era sources actually indicate that the Framers would not have approved of the hearsay exceptions that were later invented because the Framers would have perceived such exceptions as violations of a defendant's confrontation rights.

Hence, *Crawford's* testimonial formulation of the scope of the confrontation right does not reflect "the Framer's design." Rather, *Crawford's* permissive allowance of unsworn hearsay is inconsistent with the premises that shaped the Framer's understanding of the right.

Thomas Y. Davies, *Not "the Framers' Design": How The Framing-Era Ban Against Hearsay Evidence Refutes the* Crawford-Davis *"Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y (forthcoming 2007).

190 *Crawford*, 541 U.S. at 51 (quoting 2 WEBSTER, *supra* note 40, at 114).

191 *Id.* (quoting 2 WEBSTER, *supra* note 40, at 91).

192 *Id.*

193 *Id.* at 51–52 (citations omitted).

To that laundry list the Court added "[s]tatements taken by police officers in the course of interrogations."[194]

Just as the Court declined to fully define "testimonial statements," it likewise left to another day the definition of "interrogation."[195] The opportunity to refine this new language, at least with regard to testimonial statements and interrogation, came to the Court two years later in *Davis v. Washington* and its companion, *Hammon v. Indiana*.[196] Both cases involved police questioning of victims contacted as a result of calls to 911 emergency operators.

Again, the Court was hesitant to provide broad guidance about what kinds of interrogations produced testimonial statements.[197] Confining its holding to the precise facts in the two cases before it, the Court held that

> [s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[198]

The Court acknowledged that the facts of the cases prompted its focus on statements made in response to interrogation, but added that the focus did not exclude other statements, made without interrogation, from Confrontation Clause analysis.[199]

While ambiguity remains following *Crawford* and *Davis* about the kinds of statements at which the Confrontation Clause is aimed, the Court left no uncertainty about the process required when testimonial statements are at issue. The government may not introduce testimonial statements against the accused unless the witness is unavailable to testify and the accused has had a prior opportunity for cross-examination. In acknowledging this straightforward and absolute

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[194] *Id.* at 52. The Court noted that the use of the term "'interrogation'" was not in its "technical, legal sense," but rather in its "colloquial" sense. *Id.* at 53 n.4.

[195] *Id.* at 53 n.4. Previewing the issue that would arise in *Davis*, the Court commented in *Crawford* that "one can imagine various definitions of 'interrogation,' and we need not select among them in this case." *Id.*

[196] 126 S. Ct. 2266 (2006).

[197] *Id.* at 2273. The Court's caution is reflected in Justice Scalia's statement: "Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows . . . ." *Id.*

[198] *Id.* at 2273–74.

[199] *Id.* at 2274 n.1.

requirement of the Constitution, the Court emphasized the procedural nature of the constitutional right:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. [The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined.[200]

Crawford and *Davis/Hammon* involved statements offered against the accused during the guilt phase of a criminal trial. Thus, the Court had no real occasion to comment on the right to confrontation at sentencing. But the recognition of the absolute procedural demands of the right to confrontation, together with reliance on the nature of criminal proceedings at the time of the framing of the Sixth Amendment, exact the conclusion that the right to confrontation applies equally to testimonial statements offered at a capital sentencing proceeding. At a capital sentencing proceeding, the sentencer must determine whether an eligible defendant should live or die based upon factual information presented as evidence. This factual information is introduced either through the testimony of witnesses or exhibits. The defendant is entitled to challenge the factual information for the purpose of providing the sentencer, be it judge or jury, with a means of assessing the accuracy and reliability of the evidence it has heard. Determining the accuracy and reliability of sentencing information is no less important than determining the accuracy and reliability of information related to guilt. The best mechanism for assessing reliability is confrontation.

B. Implications

If one follows Justice Scalia's practice[201] of beginning with a dictionary definition, as this article has emulated,[202] the Sixth Amendment text guarantees the right to confrontation at a capital sentencing. The Sixth Amendment applies to "all criminal prosecutions." The same dictionary that Justice Scalia used to formulate his definition of "witness," provides that a prosecution is the "institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal,

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[200] *Crawford*, 541 U.S. at 61.

[201] In addition to using *Webster's* to begin his analysis of the constitutional text in *Crawford*, Justice Scalia consulted a dictionary to begin his analysis in *Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) (using WEBSTER'S NEW INTERNATIONAL DICTIONARY 1247 (2d ed. 1950) to determine the meaning of "impartiality").

[202] *See supra* text accompanying notes 28–41.

and pursuing them to final judgment."[203] Common dictionary definitions of "prosecution" include "the institution and carrying on of legal proceedings against a person" and "following up on something undertaken or begun, usually to its completion."[204] A criminal prosecution begins with a charge or arrest and ends, ordinarily,[205] with either an acquittal or punishment. The right to confront the witnesses is guaranteed at every stage in the prosecution by the very terms of the Amendment. Testimonial statements, therefore, may not be admitted at sentencing[206] without the right to confrontation unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness.

An additionally compelling argument for the application of confrontation rights at sentencing flows from the Court's recognition in *Crawford* that the purpose of the Clause, ensuring reliability, is only constitutionally acquired in one way—by cross-examination.[207] The Court made clear that the Confrontation Clause requires not only that evidence be reliable, but that its reliability be tested in a particular way.[208] In essence, reliable evidence is insufficient to satisfy the Confrontation Clause; only evidence that has been subjected to cross-examination and confrontation suffices. This is because cross-examination is *the* criterion for reliability in a criminal prosecution.

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[203] 2 WEBSTER, *supra* note 40, at 45.

[204] RANDOM HOUSE UNABRIDGED DICTIONARY 1552 (2d ed. 1993).

[205] Many criminal prosecutions terminate with a guilty plea or a dismissal, and still others result in a mistrial before verdict.

[206] Although the text and history of the Sixth Amendment would support the conclusion that confrontation applies at *all* sentencings, this article has not discussed the Supreme Court's willingness to draw bold lines of demarcation between capital and noncapital sentencings. For more on this topic, see the discussion in Lockett v. Ohio, 438 U.S. 586, 602–03 (1978).

[207] Although *Crawford* has affected the viability of many of the Court's prior Confrontation Clause cases, the decision in *Crawford* is consistent with much of what the Court has said about the importance of cross-examination to a fair criminal trial. For example, in *Pointer v. Texas*, 380 U.S. 400 (1965), the Court noted that:

> It cannot be seriously doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one . . . would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.

Id. at 404 (citations omitted).

[208] The majority in *Crawford* said that "[t]o 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." 541 U.S. at 61.

"Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because the defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[209]

Reliability is no less important at sentencing—particularly at a capital sentencing—than at trial. The Supreme Court's call for "heightened reliability" in capital proceedings underscores the need for "adversarial testing" to "'beat[] and bolt[] out the [t]ruth'"[210] even more so than in a noncapital case. The recognition by a majority of the Supreme Court that the qualitative difference in the penalty of death demands a "corresponding difference in the need for reliability"[211] only punctuates the point.

The Court's nearly sixty-year old precedent, *Williams v. New York*, which upheld a judge's use of unconfronted evidence to override a jury recommendation of a life sentence, cannot be reconciled with the Eighth Amendment's heightened reliability requirements in modern death penalty jurisprudence, nor with the Sixth Amendment's demand that testimonial statements be tested by cross-examination. The *Williams* decision placed a premium on the quantity of information available to the sentencing authority, but the Eighth Amendment's demand for reliability and the Sixth Amendment's demand for confrontation establish that the focus must shift to the quality, not the quantity, of sentencing information.

In each of the case scenarios outlined in the introduction to this article—and dozens more occurring daily in capital sentencing proceedings—the government sought to introduce testimonial statements at a capital sentencing hearing. Statements of witness-inmates made to prison officials investigating a prior prison disturbance, and then recorded by those officials into a prison investigative report, are equivalent to statements of a witness-citizen given to a responding police officer after the occurrence of a crime.[212] The testimony of a

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[209] *Id.* at 62.

[210] *Id.* at 61–62 (quoting MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 258 (1713)). Justice Scalia also quoted Hale's famous statement about cross-examination, as recorded by Blackstone, in his discussion of the Confrontation Clause's cross-examination requirement: "This open examination of witnesses . . . is much more conducive to the clearing up of truth." *Id.* (quoting 3 BLACKSTONE, *supra* note 43, at *373).

[211] Woodson v. North Carolina, 428 U.S. 280, 305 (1976); *see also Lockett*, 438 U.S. at 604 ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.").

[212] The prison reports in *Mills*, *see supra* note 12, are comparable to the police report and battery affidavit that summed up Amy Hammon's statements in *Hammon*. Both statements were recorded by officials after the passage of an ongoing emergency for the purpose of investigating the past events in order to prove those facts in a later prosecution. *Compare* Davis v. Washington, 126 S. Ct. 2266, 2272–73 (2006) *with* United States v. Mills, 446 F. Supp. 2d. 1115, 1137–38 (C.D. Cal. 2006). The inmates interviewed in *Mills* and

jailhouse informant repeating statements of a witness who has asserted the right to remain silent and who has not been cross-examined, does not differ from the testimony of an officer repeating statements of a witness who has invoked the marital privilege and refused to testify.[213] The investigative report of a psychiatrist containing statements by multiple individuals is indistinguishable from the ex parte examinations condemned in *Crawford*.[214] Similarly, the testimony by a witness, repeating statements by a now-deceased, never cross-examined witness, is the precise kind of extrajudicial statement prohibited by the Court in *Crawford*.[215] A police officer's testimony repeating a victim's statement, given after the event, equates to ex parte in-court testimony, specifically disallowed by both *Crawford*[216] and *Davis*.[217] And absent witnesses' statements repeated by a surrogate who testifies would fit under the most stringent definition of "testimonial."[218]

None of these statements would be admissible had they been offered into evidence at the guilt phase of a criminal prosecution. The

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Amy Hammon bore testimony that they reasonably expected would be used prosecutorially. *Davis*, 126 S. Ct. at 2278; *Mills*, 466 F. Supp. 2d at 1138.

[213] The use of the informant's testimony in *Johnson*, *see supra* note 13, is comparable to the state's use of the tape recorded statement made by Sylvia Crawford. Because the witness whose testimony the informant reported invoked his Fifth Amendment privilege to remain silent, Johnson was denied the right to cross-examine the witness. United States v. Johnson, 378 F. Supp. 2d 1051, 1064–65 (N.D. Iowa 2005). Because Sylvia Crawford invoked Washington's marital privilege, defendant Michael Crawford was denied the right to cross-examine her. *Crawford*, 541 U.S. at 40, 68.

[214] The reports in *Bassette*, *see supra* note 14, bear remarkable resemblance to the eighteenth century practice instituted by the Virginia Governor and contested by its Council of "'privately issu[ing] several commissions to examine witnesses against particular men *ex parte*.'" *Crawford*, 541 U.S. at 47 (citing A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson, *reprinted in* 9 ENGLISH HISTORICAL DOCUMENTS 253, 257 (Merrill Jensen ed., Oxford Univ. Press 1969)).

[215] The facts at issue in *Fell*, *see supra* note 15 and accompanying text, are similar to those in the Court of King's Bench case cited by the Court, *King v. Paine*, 87 Eng. Rep. 584 (K.B. 1696). *Crawford*, 541 U.S. at 45. That case is cited as holding that "even though a witness was dead, his examination was not admissible where 'the defendant not being present when [it was] taken before the mayor . . . had lost the benefit of cross-examination.'" *Id.* (citing *King*, 87 Eng. Rep. at 585).

[216] *Crawford*, 541 U.S. at 69.

[217] The officer's testimony in *Bell*, *see supra* note 16, taken from the victim following the robbery is identical to the officer's report in *Hammon* summarizing the victim's statements after the assault. *Compare* State v. Bell, 603 S.E.2d 93, 116–17 (N.C. 2004), *with Davis*, 126 S. Ct. at 2277–73.

[218] The statements introduced in *Brown*, *see supra* note 17, are comparable to evidence presented by affidavits, with the only difference being the medium. United States v. Brown, 441 F.3d 1330, 1360–61 (11th Cir. 2006). An affidavit delivers facts to the factfinder in writing from a witness who does not appear for cross-examination. The testifying witness in *Brown* delivered facts to the factfinder orally from witnesses who did not appear for cross-examination. *Id.* In *Crawford*, the Court referred to affidavits as "formulation" of the "core class of 'testimonial' statements." 541 U.S. at 51–52.

Confrontation Clause would have barred their admission. Based upon the reasoning in *Crawford* and *Davis*, the Confrontation Clause should also bar the admission of unchallenged hearsay in capital sentencing proceedings.

CONCLUSION

In biblical times in the story of Susanna, Daniel poignantly demonstrated the crucial impact that confrontation had on determining the reliability of the elders' testimony. In modern times in dozens of cases, the sentencing of innocent people to death clearly demonstrates the effects of allowing unconfronted evidence to be considered in capital cases. [219]

Neither the Constitution's text, its history, nor interpretive precedent provide a reasoned basis for denying a person facing death the right to confront the witnesses at a capital sentencing proceeding. On the contrary, the text, the history, and a half-century of constitutional development mandate that the Sixth Amendment right to confrontation be given full effect in the most significant of criminal prosecutions, the capital sentencing proceeding.

[219] One of the major causes of wrongful convictions and death sentences has been found to be the use of jailhouse informants. This problem is exacerbated when the jailhouse informant is allowed to testify to the statements of others. *See* The Innocence Project, Understand the Causes: Informants, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited Mar. 13, 2007) (discussing the causes of wrongful convictions).

SOFTENING THE FORMALITY AND FORMALISM OF THE "TESTIMONIAL" STATEMENT CONCEPT

*Robert P. Mosteller**

I. INTRODUCTION

In *Crawford v. Washington*, the United States Supreme Court ruled that "testimonial" statements are the core, perhaps exclusive, concern of the Confrontation Clause.[1] The Court began a process of defining the testimonial-statement concept but did not develop a comprehensive definition. In *Crawford*, the Court found testimonial a statement that was tape recorded and obtained from a criminal suspect who was in police custody, had been given *Miranda*[2] warnings, and was being interrogated by known governmental agents using what the Court termed "structured" questioning. One of the definitions the Court explicitly presented as a possible model was highly formal and formalistic, and the fact pattern in *Crawford*, as briefly described above, would have fit within such a restrictive and wooden formulation of the concept.

I use the terms "formal" and "formalistic." By "formal," I mean a requirement about the physical form of the statement (written, recorded, etc.), which is at the heart of the definition proposed by Justice Thomas in *White v. Illinois*,[3] or the formality of the proceedings where that statement was secured.[4] "By formalistic, I mean [a relatively] wooden adherence to a set formula rather than a functional approach based on the protective purposes of the Confrontation Clause."[5] These two

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1 541 U.S. 36, 50–52 (2004).

2 Miranda v. Arizona, 384 U.S. 436 (1966).

3 502 U.S. 346, 365 (1992) (Thomas, J., concurring). In *White*, Justice Scalia joined Justice Thomas's opinion, but in *Davis v. Washington*, 126 S. Ct. 2266 (2006), Justice Scalia showed that he did not strictly adhere to that definition, although Justice Thomas continued to do so as his dissent in that case showed.

4 Among the problems with using this type of definition is that the coverage of the Confrontation Clause is subject to easy manipulation by the police to avoid such formality. *See* discussion *infra* pp. 343–44, 349–50.

5 Robert P. Mosteller, Crawford's *Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411, 411 n.2 (2005) [hereinafter Mosteller, Crawford's *Impact*] (stating, initially, a form of dual criticism of the potential inadequacy of "testimonial"); *see also* Robert P. Mosteller, *"Testimonial" and the Formalistic Definition—The Case for an "Accusatorial" Fix*, CRIM. JUST., Summer 2005, at 14 [hereinafter Mosteller, *"Accusatorial" Fix*] (arguing against formalism and instead for a

concepts are related but distinct: in my view, neither excessive formality nor formalism are demanded by *Crawford*, nor are they consistent with its basic intuition about the role of the Clause.

In *Davis v. Washington*, the Court applied the *Crawford* testimonial-statement approach to two additional types of statements, one of which it found to be within the definition and the other outside it.[6] The Court again declined to provide a comprehensive definition of the concept, and it left a large number of questions unanswered about its dimensions. However, it did reject some of the most formal and formalistic elements of what was possible after *Crawford*.

Davis gave us a somewhat softened definition for the testimonial-statement concept. Specifically, its holding and the additional explanatory language of Justice Scalia's opinion for the eight-justice majority, which was often in direct or implicit response to Justice Thomas's dissent advocating adherence to formality, has softened the formality of the definition.[7] *Davis*'s expanded coverage and the modest flexibility it allows in applying the professed definition has also had the effect of softening its formalism. Both developments are quite positive, but unfortunately the opinions leave it entirely unclear whether the Court will continue in this direction.

These changes in the formality and formalism of the testimonial-statement concept and their implications are the subject of this article. My analysis also leads to some further general observations. I question whether the term "testimonial" accurately describes the definition the Court is developing and whether that definition is as faithful to textual and originalist sources as Justice Scalia insists.

II. THE OUTLINES OF THE COURT'S DEVELOPMENT OF THE TESTIMONIAL-STATEMENT DEFINITION

Justice Scalia began with history, which he found reflected a special concern: "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[8] He specifically cited two examples: first, the use of statements taken from accusers by the examining magistrates under the Marian Statutes in the sixteenth century;[9] and second, the accusations of Lord Cobham against

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more functional definition that takes as its most important feature the core concern of whether certain witnesses were making criminal accusations against the defendant).

6 126 S. Ct. at 2276–80.

7 The Court, however, explicitly stated that the formality of a statement is a requirement of a testimonial statement: "We do not dispute that formality is indeed essential to testimonial utterance." *Id.* at 2279 n.5.

8 Crawford v. Washington, 541 U.S. 36, 50 (2004).

9 *Id.* at 44, 50.

Sir Walter Raleigh in his treason trial, who had directly implicated him in both an examination before the Privy Council and in a letter to it.[10]

With respect to the dictionary and its insight into the meaning of the constitutional language used, Justice Scalia wrote:

> The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused—in other words, those who "bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.[11]

Without adopting any specific formulation, the Court quoted three possible definitions for "testimonial" statements:

1. Petitioner's Definition: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[12]
2. Justice Thomas's Definition: "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[13]
3. Amici's Definition: "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[14]

Justice Scalia left for another day a comprehensive definition of such statements.[15] In doing so, he acknowledged the merits of Chief Justice Rehnquist's contention that the majority's "refusal to articulate a comprehensive definition in this case will cause interim uncertainty."[16] Justice Scalia provided only a somewhat generalized version of the necessary implications of the fact pattern covered in *Crawford*, where he seemed to add to the Justice Thomas definition, the most restrictive of the three suggested definitions.

Justice Scalia described the scope of the testimonial concept as follows: "[I]t applies at a minimum to prior testimony at a preliminary

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[10] *Id.* at 44.

[11] *Id.* at 51 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 91 (New York, S. Converse 1828)).

[12] *Id.* (quoting Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02–9410)).

[13] *Id.* at 51–52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

[14] *Id.* at 52 (quoting Brief of Amici Curiae the National Ass'n of Criminal Defense Lawyers et al. in Support of Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02–9410)).

[15] *Id.* at 68.

[16] *Id.* at 68 n.10.

hearing, before a grand jury, or at a former trial; and to police interrogations."[17] This is a list of examples, which are generally physical products and statements in formal, tangible form. Indeed, in the context of the facts of the *Crawford* case, even police interrogation meant a formal, physical product. It exhibits no clear connection to the function of the Clause, nor does the product give indications of what intent or expectation is required by the person who makes or receives the statement.

In *Davis*, another opinion written by Justice Scalia, the Court examined two more fact patterns under the testimonial-statement approach.[18] It found nontestimonial one set of statements that started in an apparent emergency situation. However, it found another set of statements testimonial, even though the statements were made in the field not long after an apparent assault, because the purpose of the police questioners was to establish facts about past events.

Davis, like *Crawford*, declined to provide a comprehensive definition. Although possibly understandable, it should be clear to the Court that the lack of a general definition is causing major problems in criminal cases throughout the United States. Chief Justice Rehnquist criticized this same uncertainty in *Crawford*.[19] What is truly remarkable, however, is that *Davis* did not build positively on any of the three suggested potential definitions set out above in *Crawford*.

Positively, *Davis* only amplified slightly the coverage of testimonial statements:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[20]

This minor clarification, albeit important, appears to go backward rather than forward in terms of developing a comprehensive definition. It is couched generally in the language of *Webster's Dictionary* rather than clarifying the language of any of the three proposed definitions from the *Crawford* opinion. It also does not move toward a general approach that is tailored to categorize the major types of circumstances commonly encountered in criminal prosecutions.

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[17] *Id.* at 68.

[18] 126 S. Ct. 2266, 2276–80 (2006).

[19] 541 U.S. at 70, 75–76 (Rehnquist, C.J., concurring).

[20] 126 S. Ct. at 2273–74.

III. SOFTENING FORMALITY

Davis's most important clarification of a possible general interpretation of "testimonial" as suggested in *Crawford* is negative.[21] It rejects the definition centered on the formality and formalism of the Justice Thomas definition, which was taken from his concurring opinion in *White v. Illinois* (with Justice Scalia concurring) and was the Court's first signal of what was to come in *Crawford*. Moreover, it specifically rejects some of the more extreme amplifications of such a definition.

Justice Thomas would have defined testimonial statements as "'formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'"[22] Justice Scalia unmistakably departed from this signature feature of that proposed definition. Instead, he de-emphasized the importance of the formality of the statement, which is at the core of Justice Thomas's definition and which begins Webster's formulation—"'[a] solemn declaration or affirmation.'"[23]

Concretely, in *Davis*, the testimonial statements were oral statements made in the field to a police officer. Justice Thomas, in dissent, argued that recognizing such a statement as testimonial deviated both from Webster's definition, which the majority itself had endorsed,[24] and from the historical example exemplified by the formality of proceedings before the examining magistrates under the Marian Statutes.

> This requirement of solemnity supports my view that the statements regulated by the Confrontation Clause must include "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." Affidavits, depositions, and prior testimony are, by their very nature, taken through a formalized process. Likewise, confessions, when extracted by police in a formal manner, carry sufficient indicia of solemnity to constitute formalized statements and, accordingly, bear a "striking resemblance," to examinations of the accused and accusers under the Marian Statutes.

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[21] *See* Robert P. Mosteller, Davis v. Washington *and* Hammon v. Indiana*: Beating Expectations*, 105 MICH. L. REV. FIRST IMPRESSIONS 6, 7–9 (2006), http://students.law.umich.edu/mlr/firstimpressions/vol105/mosteller.pdf.

[22] *Crawford*, 541 U.S. at 51–52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

[23] *Id.* at 51 (quoting 2 WEBSTER, *supra* note 11, at 91).

[24] "But the plain terms of the 'testimony' definition we endorsed necessarily require some degree of solemnity before a statement can be deemed 'testimonial.'" *Davis*, 126 S. Ct. at 2282 (Thomas, J., concurring in the judgment in part and dissenting in part). As noted earlier, the majority did not abandon a requirement of formality. Justice Scalia explicitly stated: "We do not dispute that formality is indeed essential to testimonial utterance." *Id.* at 2279 n.5 (majority opinion). However, in Justice Thomas's judgment, the "softening" of the requirement had gone too far.

> . . . Interactions between the police and an accused (or witnesses) resemble Marian proceedings—and ["the early American cases invoking the right to confrontation or the Confrontation Clause itself"]—only when the interactions are somehow rendered "formal." In *Crawford*, for example, the interrogation was custodial, taken after warnings given pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966) . . . . *Miranda* warnings, by their terms, inform a prospective defendant that "'anything he says can be used against him in a court of law.'" This imports a solemnity to the process that is not present in a mere conversation between a witness or suspect and a police officer.[25]

A. Rejecting Strict Formality of Statement Form

Crawford left open the possibility that the form of the statement—whether it was written or recorded—might be given dispositive weight. One unfortunate consequence of this type of definition is that it would invite manipulation by investigative officers in their decision to record a statement or to rely on memory or informal notes.[26] However, in *Davis*, while explicitly acknowledging a formality requirement—"[w]e do not dispute that formality is indeed essential to testimonial utterance"[27]—the Supreme Court clearly eliminated some of the extreme readings of formality and generally softened the requirement.

In apparent response to Justice Thomas's arguments in dissent, the Court acknowledged that most of the early American cases dealing with the Confrontation Clause or its state or common-law counterparts involved formal statements. However, that was not true, it noted, of "the English cases [which] were the progenitors of the Confrontation Clause."[28] The Court generalized its point: "[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a

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[25] *Id.* at 2282–83 (Thomas, J., concurring in the judgment in part and dissenting in part) (citations omitted) (quoting Dickerson v. United States, 530 U.S. 428, 435 (2000).

[26] *See* Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 555 (2005). Some lower courts effectively embraced this distinction and invited future determination of testimonial quality by the decision whether to record. *See, e.g.*, People v. Cage, 15 Cal. Rptr. 3d 846, 856–57 (Ct. App. 2004) (noting that the interview was not recorded and that no evidence existed to show that the police detective "even so much as recorded it later in a police report"), *review granted*, 99 P.3d 2 (Cal. 2004). The majority in *Davis* readily recognized the possibility of police evasion of coverage through "informal" recording of the statement, 126 S. Ct. at 2276, and even Justice Thomas in his dissent would "reach[ ] the use of technically informal statements when used to evade the formalized process." *Id.* at 2283 (Thomas, J., concurring in the judgment in part and dissenting in part).

[27] *Davis*, 126 S. Ct. at 2279 n.5 (majority opinion).

[28] *Id.* at 2276.

deposition."[29] It then extended the point through a broad positive formulation: "The product of [police interrogation to prove or establish past crime], whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial."[30]

The clarification is not theoretically momentous, but it has significant practical import. Without this explanation, the testimonial label might be found to turn on whether the police asked the witness to provide a written and signed statement or received exactly the same information but memorialized it less formally.[31]

B. Rejecting Strict Formality of Proceedings and Limitation to Procedural Situations Resembling Historical Inquisitorial Practices

In his dissenting opinion in *Davis*, Justice Thomas limited his earlier proposed definition of "testimonial" along the lines that a number of lower courts had followed, by limiting the testimonial concept to statements produced in rigorous interrogation proceedings that resembled those under the Marian Statutes. A number of lower courts excluded most statements received by officers in the field because they did not resemble the procedures employed by the examining magistrates under the Marian Statutes. Together, the formality of the form of the statement (written or recorded) and the formality of proceedings would have frequently permitted investigators to obtain accusatory hearsay statements and still avoid Confrontation Clause protection.

Hammon v. Indiana rejected the effort to limit testimonial statements to those produced in procedures resembling the historical situations that concerned the Framers. In doing so, Justice Scalia indicated that he believed original principles should be translated into changed circumstances even if he is not fully accepting of a Constitution that is evolving by stating the following:[32] "Restricting the Confrontation

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[29] *Id.*

[30] *Id.*

[31] *See* Mosteller, *supra* note 26, at 539–40 (describing how the decision of the police not to interview a witness in the field but instead to take the witness to the police station to receive a written statement could determine whether the statement was ruled testimonial under some formulations of the *Crawford* test, and arguing that if formality of that sort were decisive, it would likely lead to manipulation and countermeasures by the police to avoid the testimonial determination).

[32] *See* JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 9–10 (2005) (drawing a distinction between an originalist view that original principles may be modified to fit changed circumstances and the non-originalist view of an evolving or living Constitution).

Clause to the precise forms against which it was originally directed is a recipe for its extinction."[33]

C. Rejecting a Rigorous Interrogation Requirement

The *Crawford* opinion was open to the interpretation that formality required rigorous station-house interrogation because rigorous interrogation occurred in that case. It spoke both of police interrogation and structured questioning. Indeed, Justice Thomas argued that the provision of *Miranda* warnings in the *Crawford* case in the context of custodial interrogation adequately resembled the Marian procedures and thereby provided "sufficient . . . solemnity to constitute formalized statements."[34]

Hammon, the companion case to *Davis*, presented a quite different situation. In *Hammon*, the questioning was in the field rather than in the police station, and the person questioned was an apparent victim and clearly not a criminal suspect. One could hardly imagine a situation where questioning a victim would be nearly as forceful and rigorous as that involved in *Crawford*, where Sylvia Crawford was a suspected co-participant in the aggravated assault. The Court found that none of these differences mattered to its determination that the statements were testimonial. However, Justice Scalia did not remove all sense that special formality was or might be required, leaving the possibility of some future limitations of this type to general inclusion of non-emergency investigative interviews within testimonial statements.

Justice Scalia recognized that the circumstances of the *Crawford* interrogation were more formal than *Hammon*, which he viewed functionally: "[T]hese features certainly strengthened the statements' testimonial aspect—made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events . . . ."[35] He found that none of those formalities—(1) the giving of *Miranda* warnings, (2) the fact they were tape recorded, and (3) the fact they were made at the station house—was required. Comparing the situation in *Hammon* to *Crawford*, he provided the following description:

> Both declarants were actively separated from the defendant . . . . Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for

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[33] *Davis*, 126 S. Ct. at 2279 n.5.

[34] *Id.* at 2282 (Thomas, J., concurring in the judgment in part and dissenting in part).

[35] *Id.* at 2278 (majority opinion).

> live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.[36]

Justice Scalia continued to use the term "interrogation" to describe what occurred in *Hammon*. But, on the other hand, he appears to have eliminated interrogation as a requirement for formality. Furthermore, neither pointed questioning nor even questioning itself is required. He stated: "This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation."[37]

What is left of these various elements of formality, formalism, and interrogation? Justice Scalia's opinion certainly did not remove all limitations. For example, he noted the witnesses' separation from the suspect as an apparently significant common feature of the two testimonial situations found by the Court. Such separation ("let me talk with you alone") is quite different from a casual group conversation that one could imagine a police officer having with a group of people on a street corner. However, beyond imputing that basic message of some seriousness of purpose as opposed to informality of information gathering, it is hard to articulate in general terms the critical threshold in formality he is describing. He did not explain the purpose it served or how that feature might be evaluated across circumstances. More generally, his opinion continued to speak of "interrogation," even when that term appeared no more accurate, and perhaps less so, than the less evocative term "questioning."[38] More significantly, Justice Scalia's opinion kept in place the possibility that testimonial statements might be only those made to persons known to be government investigative agents, or indeed much more restrictively, only statements made to known police officers.

Perhaps in response to Justice Thomas's emphasis on *Miranda* warnings, he articulated a new and potentially very significant limitation. Largely out of the blue, he stated, "It imports sufficient formality . . . that lies to [police] officers are criminal offenses."[39] Even if

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[36] *Id.*

[37] *Id.* at 2274 n.1. As evidence for its conclusion, the Court noted that part of the evidence against Sir Walter Raleigh was a letter written by Lord Cobham "that was plainly *not* the result of sustained questioning." *Id.* (citing *The Trial of Sir Walter Raleigh* (1603), *in* 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1, 1–60 (T.B. Howell ed., London, R. Bagshaw 1809) [hereinafter *The Raleigh Trial*]).

[38] Indeed, in discussing the movement from nontestimonial to testimonial status of statements made in *Davis*, Justice Scalia referred to McCrotty's exchange with the 911 operator as a "conversation," which it clearly seemed to be. *Id.* at 2271–72. Nevertheless, he retained generally the interrogation characterization.

[39] *Id.* at 2279 n.5.

statements to known government officials and indeed to government investigators are the only statements covered, restricting the Confrontation Clause to those agents to whom making false statements is a criminal offense is not a minor matter.[40]

IV. REMAINING POTENTIAL LIMITATIONS

A. The Highly Questionable Potential Requirement that a Statement Must be a Criminal Offense "If It Were" a False Statement

Why the Court in *Davis* focused on the possibility of prosecution for making a false statement as adding sufficient formality is curious, if not inexplicable. In response to Chief Justice Rehnquist's dissenting argument in *Crawford*, Justice Scalia contended that "[e]ven if . . . there were no direct evidence [on] how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been."[41] The answer to his rhetorical question is clear: the Confrontation Clause would have applied. We know because Justice Scalia says it is "implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK."[42] If that explanation is accurate as to sworn statements, why would Justice Scalia now contend that the obviously ridiculous distinction is appropriate when we substitute for sworn statements, statements subject to prosecution if false? Indeed, limiting testimonial statements to those statements that happen to be covered by a statute criminalizing purposefully false statements would be less sensible than limiting them to statements under oath.[43]

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[40] Statements of children to school social workers, school teachers, and doctors who were explicitly eliciting statements for the purpose of establishing or proving a crime (e.g., child sexual abuse) could be excluded from the testimonial definition by the requirement that giving false statements constitutes a criminal offense, even if not already eliminated by a requirement that the statement be received by either a government agent or a government investigative agent.

[41] Crawford v. Washington, 541 U.S. 36, 52 n.3 (2004).

[42] *Id.*

[43] The rationale behind Justice Scalia's posing of the rhetorical question that answers itself is unclear. One possibility is that a statement that performs the same function as testimony at trial—for example, a highly incriminating accusation by an out-of-court declarant—could not possibly be treated differently based on whether it was or was not made under oath. If this is the rationale, Justice Scalia is employing some limited version of a functional analysis, which is suggested by the decision to cover statements to police officers made during an interview in the field in *Hammon*. The second possibility is based on reliability: surely if there is a need to confront and cross-examine a declarant who made a statement under oath, which should have enhanced reliability because it was made under oath, the need would be even greater as to less reliable statements not made under oath. Either rationale makes some sense, but both are fundamentally inconsistent with the formal and formalistic testimonial-statement definition that Justice Scalia supports.

Perhaps Justice Scalia saw the possibility of prosecution for false statements as a substitute for the oath before the examining magistrates under the Marian Statutes, but if so, it is hardly equivalent and would be a bizarre requirement. First, unlike the possibility of a (typically minor) criminal penalty for such a false statement, the ancient oath carried with it not only the possibility of punishment by the authorities, but the far more serious promise of divine punishment combined with the additional obligation to answer on pain of contempt.[44] Also, the publicly administered oath draws the speaker's attention to the obligation, and even today it is recognized to communicate the solemnity of the situation and the seriousness of the enterprise.[45]

Justice Scalia describes his test and examples as follows: "The solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood."[46] By contrast to the formally and publicly administered oath or affirmation, neither 18 U.S.C. § 1001, the federal provision,[47] nor section 946.41 of the

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Indeed, in terms of formality, sworn statements are more like testimony than unsworn statements. So, under a definition based on formality, the distinction that Justice Scalia rhetorically suggests is obviously ridiculous would hardly be so. Under that language, perhaps treating sworn statements different from unsworn ones might make some sense. But Justice Scalia rejects that distinction. Given this position, the distinction between statements subject to prosecution for false statement and those not subject to criminal punishment should not stand because the arguments against the distinction are stronger and those supporting the distinction are weaker than when the oath is involved.

[44] Sanction for false statement is only one element of the "cruel trilemma" that testimony under formal oath carried with it. *See* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) ("The privilege . . . [is founded on] our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt . . . .").

[45] *See* FED. R. EVID. 603. In modern practice this rule is supposed to be implemented with flexibility to deal with the needs of "religious adults, atheists, conscientious objectors, mental defectives, and children." *Id.* advisory committee's note. The rule states that the oath or affirmation is to be "administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to [testify truthfully]." *Id.* This function of the publicly administered oath is an obvious element of its importance throughout history. Punishment for false statement, not announced, would appear qualitatively quite different in terms of its effect on solemnity.

[46] Davis v. Washington, 126 S. Ct. 2266, 2276 (2006); *see, e.g.*, United States v. Stewart, 433 F.3d 273, 288 (2d Cir. 2006) (holding that false statements made to federal investigators violate 18 U.S.C. § 1001); State v. Reed, 695 N.W.2d 315, 323 (Wis. 2005) (holding that it is a state criminal offense to "knowingly giv[e] false information to [an] officer with [the] intent to mislead the officer in the performance of his or her duty").

[47] The statute reads as follows:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

Wisconsin Statutes (which was the statute at issue in *State v. Reed*),[48] require that a violator be warned of the potential criminal consequences of his or her statement if falsely made. Perhaps Justice Scalia is assuming that the same purpose is accomplished without the oath or affirmation because everyone knows of the offense, perhaps because it is so serious. Justice Scalia states the consequences are severe, but the Wisconsin statute ordinarily punishes the crime only as a misdemeanor,[49] which appears typical of state treatment of the offense.[50]

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(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

18 U.S.C.A. § 1001 (West 2000 & Supp. 2006).

[48] The Wisconsin statute criminalizes generally "[w]homever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority." WIS. STAT. § 946.41(1) (2005). It defines "obstructs" as including "without limitation knowingly giving false information to the officer or knowingly placing physical evidence with intent to mislead the officer in the performance of his or her duty." *Id.* § 946.41(2)(a).

Reed, which the United States Supreme Court cites, interprets this statute, which has something of the form of an obstruction of justice statute, as requiring only a materially false statement: "In order to be convicted of this crime, Reed would have to have knowingly given an officer false information and done so with the intent to mislead the officer. As long as the officer was doing an act in an official capacity, and was acting with lawful authority, the statute has been satisfied." *Reed*, 695 N.W.2d at 321.

[49] WIS. STAT. § 946.41(1). The statute treats the offense as a Class A misdemeanor unless two additional requirements are satisfied: (1) the trier of fact considers the evidence at trial and (2) an innocent person is convicted. In that situation, it is a low grade felony (Class H felony). *Id.* § 946.41(2m).

[50] New York grades its offense a Class A misdemeanor. N.Y. PENAL LAW § 240.50 (McKinney Supp. 2007). North Carolina grades its offense as a Class 2 misdemeanor. N.C. GEN. STAT. § 14-225 (2005). Ohio grades the offense a misdemeanor of the "second degree,"

That everyone knows of the offense is also unlikely given the widely variable coverage of the two examples Justice Scalia cites. The federal statute covers, with exceptions, any material false statement made "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States."[51] It has extremely broad scope and is generously interpreted.[52] By contrast, the Wisconsin statute, which appears more typical of state statutes, punishes only false statements to an officer, which is defined as someone allowed to make arrests.[53] Of course, additional statutes may cover false statements made to different types of government officers and in other contexts, but variability would predictably be enormous across the nation. I believe that in the typical case where false unsworn statements made to law enforcement officers are prosecuted in the states, almost never is anyone put on notice that a false statement could be punished. The lack of notice is evidenced by the number of citizen-police interactions that entail some measure of self-protective falsehoods being stated to police officers. Furthermore, offenders are not on notice because the offense is tremendously underenforced and most often not even prosecuted. Finally, even if an offender is prosecuted, publicity is likely miminal and little notoriety is generated because it is only a minor offense.

More significantly, these statutes have no relationship to the concerns of the Confrontation Clause, and a system that uses them as a dividing line for coverage would be absolutely ahistoric[54] and without logical defense.[55] Let us take two examples from the Raleigh case—the

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unless the obstruction "creates a risk of physical harm," in which case it is a felony of the "fifth degree." OHIO REV. CODE ANN. § 2921.31(B) (LexisNexis 2006).

[51] 18 U.S.C.A. § 1001(a).

[52] 1 SARAH N. WELLING, SARA SUN BEALE & PAMELA H. BUCY, FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO § 12.7 (1998).

[53] WIS. STAT. § 946.41(2)(b) (defining "officer" as "a peace officer or other public officer or public employee having the authority by virtue of the officer's or employee's office or employment to take another into custody").

[54] 18 U.S.C.A. § 1001 is not a statute with roots in English common law, colonial history, nor the early years of the new nation. It even has nothing to do with an alternative to the oath. Rather, it has its origin in 1863 as part of the False Claims Act. In its earliest form, the statute covered only frauds against the government by military personnel that cause pecuniary or property loss. In 1872, criminal and civil provisions were separated. In 1918 and 1934, the statute was expanded by Congress to cover frauds not involving military personnel to all those that frustrate government programs even though not causing pecuniary or property loss. 1 WELLING ET AL., *supra* note 52, § 12.7. Under Justice Scalia's suggested distinction, it would appear that statements made to federal law-enforcement officers for the first century after adoption of the Confrontation Clause were not covered by the Clause because Congress had not enacted criminal punishment for false statements made to these officers. That result does not seem sensible to say the least.

[55] It is not reasonable that reports would violate the Confrontation Clause if made in a state, such as Wisconsin, where a false statement is an offense, *see supra* notes 49, but

statements of Lord Cobham and those from a witness named Dyer who told of statements made by a Portugese gentleman that Raleigh and Cobham conspired to have the king killed.[56] Practically, neither would be prosecuted as false statements, a fact that the speaker would likely appreciate. Moreover, the former might not even be a theoretical violation of some state statutes that are based on obstruction of justice concepts,[57] and the second would not be criminal under either the federal or state statutes.

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the identical statement would not be covered by the United States Constitution if made in another state where the statute imposes different requirements, such as New York or North Carolina. *See infra* note 57.

[56] Jardine gives the testimony of Dyer at Raleigh's trial as follows:

> Being at Lisbon, there came to me a Portugal gentleman who asked me how the King of England did, and whether he was crowned? I answered him that I hoped our noble King was well and crowned by this, but the time was not come when I came from the coast for Spain. "Nay," said he, "your King shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned."

1 DAVID JARDINE, CRIMINAL TRIALS 436 (London, Knight 1832).

[57] The North Carolina statute reads as follows:

> Any person who shall willfully make or cause to be made to a law enforcement agency or officer any false, misleading or unfounded report, for the purpose of interfering with the operation of a law enforcement agency, or to hinder or obstruct any law enforcement officer in the performance of his duty, shall be guilty of a Class 2 misdemeanor.

N.C. GEN. STAT. § 14-225 (2005).

The North Carolina statute did not remove the explicit obstruction element or expand the statute's scope to cover any false statement to a police officer. In *State v. Hughes*, the North Carolina Supreme Court, in the process of refusing to find a confidential informant's tip sufficient to justify a traffic stop under the Fourth Amendment, stated:

> The State argues that this was a case of declaration against penal interest because . . . [*inter alia*], since giving a false report to the police is a misdemeanor, the informant risked criminal charges if his information was not truthful. We are not persuaded by this argument, and we conclude that, under the circumstances, the burden of reliability was not met.
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> . . . [M]aking a false statement to the police, standing alone, is not against an individual's penal interest because doing so is not a crime. To be charged with the crime of making a false report to law enforcement agencies or officers, the evidence must show that the person willfully made a false or misleading statement to a law enforcement agency or officer *for the purpose of interfering with the law enforcement agency or hindering or obstructing the officer in the performance of his duties.*

539 S.E.2d 625, 629 (N.C. 2000) (citing N.C. GEN. STAT. § 14-225 (1994)).

The states' treatment of this crime is far from uniform. A New York statute makes it a crime to gratuitously make a false report of an event or offense that did not occur. N.Y. PENAL LAW § 240.50(3) (McKinney Supp. 2007). "Gratuitously" within the meaning of the statute occurs "only where that information is volunteered and is unsolicited." *See* People *ex rel.* Morris v. Skinner, 323 N.Y.S.2d 905, 908 (Sup. Ct. 1971). A false report made during a police investigation in response to questions cannot be punished under the statute. *Id.* at 909.

We are told in *Crawford* that the Framers were most concerned about evidence produced by the government through secret interrogations,[58] which coerced, presumably, false statements incriminating the accused. Justice Scalia's false statement statutes would facially appear to cover those situations, but the crime people are typically punished for is giving false exculpatory statements, not false statements incriminating another.[59] Critically, although the Confrontation Clause is concerned with the latter statements, it is those statements that the statute de facto does not reach.

Indeed, in situations where the confrontation right is needed, the authorities believe the declarant's statements are true, not false. The statements may be false, but that is obviously of no negative consequence to the declarant if the authorities believe them to be true. Alternatively, and in fact inconsistent with the theory under which the Confrontation Clause is important, if the individual were to be prosecuted for making a false statement, or if the threat of that punishment had deterred the falsity, the Confrontation Clause would not have been needed.[60]

Imagine the position of Lord Cobham, but place him, rather than in the Privy Council under formal interrogation which led to a written accusation, "on the street" in conversation with a police officer. The historic exchange might go something like this:

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[58] The Court stated in *Crawford* that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar." 541 U.S. 36, 56 n.7 (2004).

[59] *See, e.g.*, State v. Lazzaro, 667 N.E.2d 384 (Ohio 1996) (prosecuting individual at nursing home for false statement that there were no witnesses to an assault). *Reed*, cited by the Supreme Court, is typical in that the prosecution was for a false denial, but largely atypical in that the person who was in fact the driver, both denied his involvement and named another individual as driver, who was never charged. State v. Reed, 695 N.W.2d 315, 317 (Wis. 2005).

[60] There was a time in the development of the common law when the oath was considered extremely important, indeed, in some instances an alternative protection to confrontation. *See* Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 740–41 (noting the importance of the oath in English common law development and its acceptance in some situations as an alternative to confrontation). Defining a confrontation right that is triggered by a factor that was seen as its substitute or in a later era as a guarantee of trustworthiness is at least somewhat incoherent and perhaps backward. The same can be said with more force, because it lacks any historical pretensions of the false statement offense, which is a basis for the reviled concept of reliability. *See Hughes*, 539 S.E.2d at 629 (describing the prosecution's argument that the false statement statute made the informer's statements more reliable for the purposes of the Fourth Amendment because those statements, if false, would be criminal).

Officer: "Cobham, you know we have the goods on you and your pal Raleigh. You might as well tell us what you know, and by the way, Raleigh has said some awful things about you."
Cobham: "Raleigh has been saying those things? Oh, OK. You're right. Raleigh was in the middle of the plot. Actually, it was all his idea."

No false statement prosecution would occur as a result of this conversation. First, presumably because he is parroting their theory, the prosecution believes that Cobham's presumed lies are true. As a result, he is in no danger of prosecution for his statement whether treated under either federal or state versions of the false statement statute. Unlike the federal statute, the state laws are general applications of an obstruction of justice that requires impeding the officer. As a result, it is unclear that Cobham could be prosecuted for giving a false statement if the authorities came to question that Raleigh was involved under at least some version of the state paradigm. After all, he gave his statement with the intent to aid the officer in achieving the government's proclaimed goal, which is exactly what Cobham was doing under the theory Raleigh espoused and the Framers apparently embraced.

Now let us take another less well-known set of statements in the Raleigh case: the claim through a witness named Dyer that he heard a Portugese gentleman say that Raleigh and Cobham would have the king killed.[61] Lots of possibilities can be imagined, but some commentators have noted that this statement was probably made without any personal knowledge by the speaker of its truth.[62] Let us assume, as may have been the case, that the Portugese gentleman believed it true but had no foundation for the statement. The false statement statutes, both federal and state, require that the declarant make the statement knowing it to be false. Thus, a statement that is in fact false is not criminal if the speaker believes in its truth.

The situation of individuals who believe their false statements are true is often posited in cases involving children who are questioned by leading and suggestive methods. Suggestive questioning, overbearing manner, and preconceived result by the questioner are the dangers that lie behind the determinations of both the Idaho Supreme Court and the United States Supreme Court to exclude the statement in *Idaho v.*

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[61] For a further discussion of this problematic hearsay in the Raleigh trial and its possible implications for historical support for a broader Confrontation Clause protection than *Crawford* and *Davis*, see Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure:* Crawford's *Birth Did not Require that* Roberts *Had to Die*, 15 J. L. & POL'Y (forthcoming 2007).

[62] Roger Park, *A Subject Matter Approach to Hearsay*, 86 MICH. L. REV. 51, 90 (1987).

Wright.[63] These concerns reflect major, real issues for admission of hearsay statements made by children.

Absolutely nothing historically based and almost nothing sensible can be predicated on a distinction that makes coverage of the Confrontation Clause to statements dependent on whether a modern false statement statute criminalizes a false answer. Justice Scalia points to no historical practices he is modeling. More importantly, there is no indication that the Framers meant to restrict the Confrontation Clause only to statements that were known by the speaker to be false when made. Surely, those who were concerned about confrontation, as well as those who theorize about hearsay, understand that a critical reason to have a person who made a statement out of court take the stand for cross-examination is to determine, in addition to whether the person is purposefully lying, what the basis is for that statement.

It should be inconceivable that a highly accusatory statement made about a past crime to a person expected to provide it to the prosecution for use at trial would receive Confrontation Clause protection because that statement, *if it were false*, might be prosecuted under the false statement laws. However, the same statement would escape Confrontation Clause coverage if made to a government official who lacked, for example, arrest power. The distinction would often (perhaps generally) be unknown to the speaker. Moreover, allowing these statements violates our worst historical examples—i.e., those made by Lord Cobham where the speaker would know that he or she will not be prosecuted because that person is doing the government's bidding or, like the Portugese gentleman,[64] where he or she believes the statement to be true, therefore, making the false statement statute inapplicable.

B. The Broad Potential Limitation that Only Statements Made to Known Government Officials or Their Recognized Agents Will be Covered

The Court did nothing to remove the far broader possible limitation that only statements made to known government investigative agents can be considered testimonial. It assumed, without deciding, that if 911 operators are not police officers, they may be agents of law enforcement when they conduct interrogations of 911 callers. After making this

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[63] 497 U.S. 805 (1990).

[64] Similarly, the child in *Wright* was either telling the truth, convinced of the accused's guilt, or coerced into going along with the version of events provided to her by a forceful adult. In any of these situations, the child is not guilty of the crime. Moreover, the doctor in the case would not be covered by the statute.

assumption, the Court noted that as in *Crawford*, it need not decide whether these features were requirements.[65]

Professor Richard Friedman has adeptly pointed out[66] that the Court in *Davis* cited a case that involved a statement made from a child to her mother as an apparent example of an application of the common law principle of confrontation.[67] The case, *King v. Brasier*,[68] suggests that a statement to a known government officer is not required, since this statement was made by the child to her mother. This is indeed an interesting citation and a piece of important supporting evidence for what I believe is the appropriate result, but it cannot possibly constitute a resolution of the far broader question of whether government agents must be involved.[69] Both *Crawford* and *Davis* specifically reserved for later decision the narrower question of whether statements made to anyone other than police officers could be testimonial,[70] and both that narrower issue and the broader one could not be resolved by a single case citation, albeit a truly intriguing one.

V. WEBSTER'S DICTIONARY AS NEW CONSTITUTIONAL TEXT

If one were looking for a text for *Davis*, one would immediately assume that text was the Sixth Amendment to the U.S. Constitution. That is indeed where Justice Scalia nominally begins, with the accused's right "to be confronted with the witnesses against him." However, the true text he is interpreting in *Davis* is the definition of testimony in Noah Webster's 1828 edition of *An American Dictionary of the English*

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[65] The Court stated: "For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police," which as in *Crawford* "makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" Davis v. Washington, 126 S. Ct. 2266, 2274 n.2 (2006).

[66] Richard D. Friedman, *"We Really (For the Most Part) Mean It!,"* 105 MICH. L. REV. FIRST IMPRESSIONS 1, 5 (2006), http://students.law.umich.edu/mlr/firstimpressions/vol105/friedman.pdf.

[67] *Davis*, 126 S. Ct. at 2277. *King v. Brasier* is cited in an argument distinguishing its report shortly after the incident from the situation in the *Davis* facts, which the Court described as an ongoing emergency. The reference is brief and for the purpose of showing that the English cases do not support Davis's position. *Id.* However, as the facts are set out, the Court recognized its applicability by stating that circumstances exist where the case "would be helpful to Davis." *Id.*

[68] 168 Eng. Rep. 202 (K.B. 1779).

[69] As I describe in another article, the lower courts have consistently held that statements made to family members in situations like *Brasier* are nontestimonial. *See* Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. (forthcoming 2007). I have come to the conclusion that predicting with confidence future developments cannot be done, but there will be bases on which this pattern in the lower courts can be continued and *Brasier* ignored. The primary purpose rationale of *Davis* would seem to provide a completely sufficient basis to continue that result. *Id.*

[70] *See supra* notes 15–19 and accompanying text.

Language.[71] "Testimony" is defined there as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[72] Those are the words to which he looks in determining whether the statements of the two different victims should be treated as covered by the protections of the Confrontation Clause.

However, as described above, Justice Scalia departs from the text when he feels it appropriate. He chooses not to emphasize the "solemn declaration or affirmation" aspect of the definition, upon which Justice Thomas focuses. But in Justice Scalia's defense, he is unwilling to jettison the concept entirely. Instead, he focused on "made for the purpose of establishing or proving some fact." That focus becomes the core of the definition of testimonial statements in *Davis*.

Davis articulated the following definition for testimonial: if made under police questioning, a statement is testimonial when "the circumstances objectively indicate that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[73] However, the resulting definition in *Davis* does not match any of the three comprehensive definitions suggested in *Crawford*.

A. Unexplained Variation from the "Text"

Justice Scalia's test makes another somewhat more subtle but potentially very important shift from the "text," which he does not even attempt to explain. In Webster's Dictionary, the key inquiry is the purpose of the declaration or affirmation ("made for the purpose of"). In Justice Scalia's test, the court must analyze the purpose of police questioning ("the primary purpose of interrogation is").

Thus, he shifts the critical intent focus from speaker to questioner. Then without explanation of how to reconcile the different perspectives or even whether he is speaking to exactly the same point, he makes a statement in a footnote on the same page that appears quite inconsistent with the idea of shifted perspective. He states, "And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate."[74] That statement seems to say that the Constitution's

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[71] I leave to one side and do not consider in my treatment of the issue the excellent research and arguments made by Professor Randy Jonakait that even Justice Scalia's choice is selective among the many definitions offered by Webster for the word "testimonial." *See* Randolph N. Jonakait, *"Witnesses" in the Confrontation Clause:* Crawford v. Washington, *Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155 (2006).

[72] 2 WEBSTER, *supra* note 11, at 91.

[73] Davis v. Washington, 126 S. Ct. 2266, 2273–74 (2006).

[74] *Id.* at 2274 n.1.

concern is the product of the interrogation and presumably, if intent matters, with the intent behind that product (the speaker's intent) rather than the intent behind the questioning. However, if that is so, why the testimonial statement definition should distinguish between emergency and non-emergency situations based on "the primary purpose of the interrogation" rather than the purpose, intent, or expectation of the person making the statement is left totally unexplained.[75]

Crawford provided both a historical and a policy-oriented justification for the appropriateness of focusing on the questioners when they are government agents. There the Court stated that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar."[76] That policy concern and that historical experience might warrant particular scrutiny toward the intent of government interrogators.

If a single perspective must be chosen, that of the investigative questioner might be the most appropriate because, in many situations, it may be the most easily determined. Furthermore, potential manipulation by a government agent who is investigating a crime is likely the greater danger to the criminal accused's confrontation rights. Fortunately, whose intent matters is usually insignificant because in the vast majority of cases the intent of both parties is the same. When the objectively discernable purpose of the police is to establish or prove a past fact potentially relevant to criminal prosecution, that purpose will usually be readily observable to the speaker as well as the police.

Much is left to be determined about this shift to the primary purpose of the government officer as questioner. It may reflect not a full determination of when the statement is testimonial, or even a necessary condition, but instead a sufficient condition. A statement may be testimonial if the government officer's primary purpose is to establish past facts potentially relevant to criminal prosecution in a non-emergency situation regardless of the speaker's purpose, intent, or expectation.

Although *Davis* dealt with only two potential purposes—enabling the police to deal with an ongoing emergency and establishing past facts relevant to criminal prosecution—presumably other questioners may have other purposes. Seemingly, however, only one purpose—establishing past facts relevant to criminal prosecution or something very close to that purpose—leads to the determination that the statement is testimonial. All other purposes apparently lead to a

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[75] *Id.* at 2274.

[76] Crawford v. Washington, 541 U.S. 36, 56 n.7 (2004).

nontestimonial determination. Moreover, as to any other purpose, even the establishment of past facts would presumably not render the statement testimonial.[77]

B. The Appropriate Focus in Some Situations is the Intent of the Declarant

A single perspective is not required or even suggested by the right at issue. Although being interested in both the intent of the questioner and the speaker is unusual, it is quite appropriate for the Confrontation Clause. In Confrontation Clause cases, as opposed to *Miranda* cases, for example, the party being protected is not the person (witness-declarant) who is being questioned. It is instead the defendant against whom the statement is being introduced. And the critical constitutional violation occurs at the time of admission by the government against the accused at trial, regardless of whether one focuses on the intent of speaker or questioner at the time that statement was made. In *Davis*, Justice Scalia notes that "it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends [the Confrontation Clause]."[78]

The harm in not being able to cross-examine the witness is the same regardless of whether the police intended to manipulate an answer from the witness, or the witness intended to manipulate the police and the proceeding, or the witness was simply mistaken. And there is reason to assume the Framers also considered the malicious or mistaken witness perspective. *Crawford* implicitly tells us that the Framers were interested in more than just the abuses of government manipulation (which was the subject of the Raleigh case and the Privy Council's interrogation), such as where the crime was against the government and government manipulation and coercion of witnesses would be a prime concern. *Crawford* also tells us that the Confrontation Clause was responsive to the Marian Statutes, which applied to ordinary crimes committed by private citizens where the government's interest (as opposed to a possible private interest) in manipulating the facts would not have been nearly as clear as in a treason prosecution such as Raleigh's.[79] Webster's focus on the intent of the testifier—the person making the out-of-court statement—as opposed to the questioner, adds "textual" support to this historical argument.

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[77] For a more detailed treatment of the primary purpose test, its implications, and its potentially critical impact in cases involving statements by children, see Mosteller, Crawford's *Impact*, *supra* note 5, at 414–15. *See generally* Mosteller, *supra* note 69.

[78] *Davis*, 126 S. Ct. at 2279 n.6.

[79] Mosteller, *supra* note 26, at 571–72.

I suggest that focusing on the declarant's perspective is most critical in situations where police officers are not involved. In that situation, if the statement can be covered by the testimonial concept, which I believe should be possible, and the witness has an intent to establish or prove a fact about a past crime, the statement should be considered testimonial. Such an analysis is needed at least to avert purposeful avoidance of the Confrontation Clause by a knowledgeable witness. Also, pursuant to Webster's "text," considering the declarant's perspective is undeniably proper. Presumably, for the speaker's purpose or intent to render the statement testimonial, that purpose or intent would need to be quite clear. Finding this clear purpose or intent would be a rare situation because speakers do not often relay relevant information for the purpose of a criminal prosecution to a private individual instead of to a government official.

VI. CASE STUDY IN THE "MISAPPLICATION" OF *CRAWFORD* AND THE IMPACT OF *DAVIS*

I present again[80] the fact pattern from a case that should have been treated as "testimonial" and as falling within *Crawford*, but was not when considered by the lower courts. The North Carolina courts gave the Clause a reading that demonstrates the trappings of a specific formalism. While not entirely clear under *Davis*, I believe this fact pattern illustrates well how the Court's second look at the testimonial concept at least softened the edges of the formality and formalism that *Crawford* and Justice Thomas's definition invited.

The fact pattern is from *State v. Forrest*,[81] which the U.S. Supreme Court vacated and remanded after *Davis*,[82] but which was never fully resolved because Forrest was killed shortly after remand.[83]

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[80] In an essay written before *Davis*, I used this fact pattern to illustrate the misuse that may be made of the ambiguity of *Crawford* combined with its formality and formalism. *See* Mosteller, *"Accusatorial" Fix*, *supra* note 5, at 18–19.

[81] 596 S.E.2d 22 (N.C. Ct. App. 2004). After oral argument, the North Carolina Supreme Court affirmed per curiam the decision of the North Carolina Court of Appeals. State v. Forrest, 611 S.E.2d 833 (N.C. 2005).

[82] Forrest v. North Carolina, 126 S. Ct. 2977 (2006) (granting certiorari, vacating the judgment, and remanding for further consideration in light of *Davis*).

[83] State v. Forrest, 636 S.E.2d 565 (N.C. 2006) (vacating original opinion and then dismissing as moot). Forrest was a violent person. In his dissent in *Deck v. Missouri*, a case that concerned the propriety of shackling a criminal defendant, Justice Thomas cited Forrest's conviction for attempted murder in the courtroom of his trial counsel during sentencing. 544 U.S. 622, 653 (2005) (Thomas, J., dissenting) (citing State v. Forrest, 609 S.E.2d 241, 248–49 (N.C. Ct. App. 2005)). This sentencing occurred upon his conviction in the case described in the text.

On July 12, 2006, not long after the Supreme Court's remand, Forrest was moving toward trial in an unrelated death penalty case. While in court, he snatched a revolver from a correction guard's holster and fired it several times, wounding a guard. He was then

The case involved charges that Forrest kidnapped and assaulted with a deadly weapon his aunt, Cynthia Moore. Moore had been served with a subpoena but did not appear at Forrest's trial and did not testify.[84] Forrest was convicted based on Ms. Moore's hearsay statements given to a police detective shortly after the incident, which were admitted as excited utterances.[85]

The events described in Forrest's trial began when, for some undisclosed reason, a police S.W.A.T. team surrounded and observed the house where Forrest was located for about an hour. During that period, Forrest escorted his aunt outside the house on two occasions where escalating violence was suggested. Inside the house, the two used crack cocaine after which Forrest became "paranoid."[86]

After darkness fell, Forrest left the house a third time with his aunt and they started down a nearby sidewalk. The officer in charge of the SWAT team ordered his men to "take down" Forrest. Police officers surrounded Forrest and, to demonstrate how heavily armed they were, illuminated him in the darkness with the lights attached to their "long guns." Two officers put submachine guns to Forrest's forehead. They separated him from Ms. Moore, who was injured with small lacerations on her neck and over an inch-long laceration on her arm. Forrest was taken away in police custody.

Waiting nearby was a police detective, Detective Melanie Blalock. According to her testimony, she was there for the purpose of interviewing Ms. Moore—testimony that was perhaps less circumspect regarding the sole purpose of interviewing the witness than it might have been had *Crawford* and *Davis* already been decided. However, at the time she testified, her intent was largely, if not entirely, irrelevant to the statement's admissibility, which faced only the question of whether it qualified as an excited utterance, and thus satisfied the Confrontation Clause as well.[87]

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fatally shot by a sheriff's deputy who was also in the courtroom. Mandy Locke, *Inmate Killed in Court*, NEWS & OBSERVER (Raleigh, N.C.), July 13, 2006, at A1, *available at* 2006 WLNR 12062660.

I am particularly familiar with the facts of *Forrest*, having filed an amicus brief on Forrest's behalf in the North Carolina Supreme Court both on direct appeal and after remand following the *Davis* decision, and participated in oral argument on both occasions.

[84] *Forrest*, 596 S.E.2d at 23, 30.

[85] *Id.* at 28–29.

[86] Knowledge of most of the events inside the house were provided through the hearsay statements of the victim/aunt who never testified, but instead were given to a police detective with whom she spoke after Forrest's capture.

[87] *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (treating "firmly rooted" hearsay exceptions, which includes excited utterances, as automatically satisfying the reliability requirement of the Confrontation Clause); *see also* White v. Illinois, 502 U.S. 346, 355–56 (1992) (ruling that unavailability need not be shown for excited utterances). At the time

When Detective Blalock moved from her nearby location to the crime scene, Forrest had been taken away. Moore, the victim, was standing in the street with another officer. That officer brought Moore to Blalock. She was crying and her arm was bleeding. Blalock informed Moore that she was calling emergency medical services. At some point, the medics arrived and treated the wounds, but Moore declined to be treated further at a hospital.

Detective Blalock stated that Moore "was nervous, she was shaking, she was crying and she was anxious to tell me that she had been held in the house . . . . [S]he appeared anxious to tell me what happened. And by that I didn't have to ask her what happened to you."[88] Blalock testified that she did not ask any questions initially, and that Moore "just immediately abruptly started talking and telling me."[89]

Moore's statement, according to Detective Blalock, lasted about one minute, during which Moore related that Forrest had come to her house (at least an hour before the statement) and smoked crack cocaine. He then became paranoid and refused to let her leave, taking her from room to room at knife point. She attempted to run but the door was locked; and Forrest cut her.[90] Blalock wrote notes regarding Moore's statements, which she described in her testimony as highly accurate.[91]

The North Carolina Court of Appeals, with one judge dissenting, found the statement nontestimonial under *Crawford*. The Court reasoned as follows:

> Moore's statements concerning her kidnapping and violent assault were made immediately after her rescue by police with no time for reflection or thought on Moore's part. These statements were initiated by the victim . . . . Detective Blalock testified that she did not have to ask Moore questions because she "immediately abruptly started talking." . . . Although Detective Blalock was at the scene specifically to respond to Moore and later asked some questions, Detective Blalock did not question Moore until after she "abruptly started talking." These facts do not warrant the conversation being deemed a "police interrogation" under *Crawford*. . . . She was not providing a formal statement, deposition, or affidavit, was not aware that she was bearing witness, and was not aware that her utterances might impact

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the statement was made to Detective Blalock, *Roberts* and *White* taken together established that statements within the excited utterance hearsay exception automatically satisfied the Confrontation Clause.

[88] Transcript of Proceedings at 94–95, State v. Forrest, No. 02 CRS 87696-98 (N.C. Wake County Super. Ct. Jan. 21, 2003).

[89] *Id.* at 95.

[90] *Id.* at 95–97. In a somewhat later conversation with Detective Blalock, Moore stated that she had also used crack.

[91] Detective Blalock indicated that she took notes regarding what Moore told her, and at one point during her testimony, Blalock stated, "[L]et me refer to my notes as to exactly what she said," which suggests precision in capturing Moore's words. *Id.* at 95–96.

> further legal proceedings . . . . *Crawford* protects defendants from an absent witness's statements introduced after formal police interrogations in which the police are gathering additional information to further the prosecution of a defendant. Crawford does not prohibit spontaneous statements from an unavailable witness like those at bar.[92]

The U.S. Supreme Court, in *Crawford*, seemed to invite such possible results. It described the statements as the result of police interrogation, and used the term "structured . . . questioning."[93] As the lower court found and relied upon, the statement in *Forrest* was not the result of structured questioning.

The principal statement of the test in *Davis* moves the law toward a relatively clear resolution of a case like *Forrest*. That test, which holds statements "testimonial when the circumstance objectively indicates that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution,"[94] renders a significant class of investigative conversations testimonial. Moreover, *Davis's* additional explanatory language eliminates a number of possible ambiguities.

A. Interrogation Not Required

As the *Davis* Court explained:

> Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations—which in some circumstances tend to generate testimonial responses. *This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.* (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning) And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.[95]

B. Formality of Statement Form Not Required

The Court in *Davis* also eliminated any argument of a rigid formality with respect to the physical form of the statement. It held:

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92 State v. Forrest, 596 S.E.2d 22, 27 (N.C. Ct. App. 2004).

93 Crawford v. Washington, 541 U.S. 36, 53 n.4 (2004).

94 Davis v. Washington, 126 S. Ct. 2266, 2273–74 (2006).

95 *Id.* at 2274 n.1 (first emphasis added) (citing *The Raleigh Trial*, *supra* note 37, at 2–60).

"The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial."[96]

C. Emergency Situation is Limited to Physical Safety and Can Change Quickly

In *Davis*, the Court held the initial interrogation in the 911 call was not testimonial because it was "not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance."[97] It, however, noted that even an emergency situation, which does not give rise to testimonial statements, can rather quickly evolve into one where statements made are testimonial: "In this case, for example, . . . the emergency appears to have ended (when Davis drove away from the premises)."[98] Similarly, in *Hammon*, the Court concluded that the statement taken by a police officer in the field in response to an open-ended question was testimonial. Although apparently the officers arrived not long after the violence had ended, "there was no immediate threat to [the declarant's] person," and the officer "was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.'"[99]

The *Forrest* majority relied upon the reasoning set forth in *People v. Moscat*[100] in concluding that the witness's statement to Detective Blalock was nontestimonial. In *Moscat*, the New York court determined that a 911 telephone call requesting emergency assistance was nontestimonial. The situation presented by a 911 call, however, is fundamentally different from the facts of the instant case. As noted by the *Moscat* court, a 911 call "is generated not by the desire of the prosecution or the police to seek evidence against a particular suspect; rather the 911 call has its genesis in the urgent desire of a citizen to be rescued from immediate peril."[101]

Given this more clearly established framework, it is now virtually certain that under the *Forrest* facts, Moore's statements to Blalock were testimonial.[102] At the time the statement was taken, the defendant had

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[96] *Id.* at 2276.

[97] *Id.*

[98] *Id.* at 2277.

[99] *Id.* at 2278.

[100] 777 N.Y.S.2d 875 (Crim. Ct. 2004).

[101] *Id.* at 879.

[102] The description given by Judge Wynn in dissent is rather faithful to *Davis*'s later analysis. Wynn wrote:

> In the instant case, the witness gave a statement to law enforcement officers describing Defendant's actions during the incident . . . . The police officer who interviewed the witness, Detective Blalock, testified it was her

been arrested and removed from the scene. Also, the scene was secure. Moore, the victim, had reached a point of safety, which distinguishes this case from the logic of 911 calls generally, and her statements were not about rescue, or safety, or even medical care. The line that the Court drew in *Davis* when it indicated that the purpose of questioning changed when Davis left the scene is a useful one, and it offers further help in clarifying situations of this type.

Detective Blalock's purpose at the scene of the incident was to obtain the victim's statement for use in prosecution of Forrest. That was shown unmistakably by her direct testimony, and also by circumstantial evidence. Blalock was not the first police officer encountered by the witness at the scene. The witness did not make any statements to the other police officers. Instead, she was held effectively to speak to an officer there for that purpose. Moreover, Moore's statement was about past events.

While the North Carolina courts relied on the fact that no questions were asked, the *Davis* Court, in a part of the opinion not responsive to the facts or issues in the cases at hand (but apparently intended to resolve cases like *Forrest*), stated that questions were not required at all. Thus, volunteered statements like those in *Forrest* are covered.

Finally, the facts in *Forrest* suggested an effort at exact production of the witness's words, albeit written in the officer's notes rather than in a formal statement. Thus, the physical form of the statement probably would not have created a difficulty in treating the statement as testimonial. However, before *Davis*, some debate might have existed. Again, the "gratuitous" explanatory statement given in *Davis* eliminates the issue. Whether the statement is a signed witness statement or the statement is "embedded" in the memory or notes of the officer who received the statement is of no consequence if the statement was made in a non-emergency situation and the purpose of the questioning was to prove or establish a potential past crime.

This examination of the facts of *Forrest* reveals, I believe, how much the *Davis* Court clarified in the "field investigation" context of investigatory witness/victim interviews, and how it has softened some of the most problematic edges of formality in such situations. This is not to deny that *Davis* left much to be resolved. Despite wide areas of uncertainty regarding the dividing line between nontestimonial and

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> "responsibility . . . first to stand by at Mary Phillips school while we waited to determine if the [area] had been secured, meaning that . . . the victim had been removed to safety" and then to "go to the location and get that person and interview that person." After police officers removed Defendant from the scene and the area was secure, Detective Blalock arrived and took the witness' statement, which was later used at trial.

State v. Forrest, 596 S.E.2d 22, 30 (N.C. Ct. App. 2004) (Wynn, J., dissenting).

testimonial statements in 911 calls and other emergency situations, *Davis* resolved, often rather clearly, an important class of cases—non-emergency police investigatory interviews—and it put them within the protection of *Crawford*'s invigorated Confrontation Clause.[103]

VII. SOFTENING FORMALISM—THE IMPRECISION OF THE TESTIMONIAL-STATEMENT LABEL FOR THE ACTUAL COVERAGE OF THE NEW CONFRONTATION CLAUSE

In describing the common features of the statements in *Crawford* and *Davis*, Justice Scalia made the following statement:

> Both statements deliberately recounted, in response to police questioning, how potentially criminal events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.[104]

I question whether the above statement actually describes testimonial statements. Rather, it is a description of statements that would more accurately be covered by different terminology. This is a description of a statement made out of court recounting past events, which was then used in court and had the same effect as testimony. These two individuals were not giving testimony when they talked to the officers. The officers were trying to establish or prove past events. This is a description of non-emergency, official-investigative statements regarding past criminal events.[105] It is not testimony, and calling it testimony does not make it so.

After *Crawford* and *Davis*, the Confrontation Clause covers both testimonial statements as described by Justice Thomas's definition, plus the official investigative statements regarding past events covered by the holdings of those cases and the descriptive language of *Davis*.

Justice Scalia has shown a willingness to reduce substantially the formality requirement of his Webster's dictionary text as he has shifted

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[103] *See also* State v. Lewis, 619 S.E.2d 830, 841–44 (N.C. 2005) (ruling that statement of victim to police officer describing the robbery and her attacker made in non-emergency situation was nontestimonial, the court drawing a distinction between the initial gathering of information and the determination of whether a crime was actually committed, which it considered generally nontestimonial, and "structured questioning," which follows this initial stage and was seen as testimonial). *Lewis* was remanded by the U.S. Supreme Court as well. Lewis v. North Carolina, 126 S. Ct. 2983 (2006) (granting certiorari, vacating the judgment, and remanding for further consideration in light of *Davis*).

[104] *Davis*, 126 S. Ct. at 2278.

[105] When one abstracts the *Davis* holding and its explanatory statements into a descriptive definition, one must wonder what the historical basis is for the developing doctrine that has these specific dimensions. The case is hard to make that the result is compelled by the historical and linguistic sources cited.

from a focus on the intent of the testifying witness to that of the investigative questioner. How this is any longer a definition or description of testimonial statements is far from clear to me. It is certainly not Noah Webster's definition. However, whatever the definition should be labeled, it has become less formalistic than when Justice Thomas first formulated it in *White*, and it has shown some flexibility and some apparent attention to the function of such statements in two quite different historical environments.[106] These are positive developments, which I hope will continue.

VIII. CONCLUSION

Future cases will tell us more about whether this process of softening formality and formalism will continue. In particular, when the statements move from those made to criminal investigative officers to others interested in establishing or proving past criminal events, we will again confront issues of formality and formalism. *Davis* was clearly a positive event in the development of the scope of new Confrontation Clause jurisprudence. It pushed back wooden boundaries to provide coverage suggested by historical sources in a changed environment.

As future cases test these boundaries further, part of what they will reveal is how flexible or rigid they are. Of immediate interest is the possible requirement suggested in *Crawford* that the statement must be made to a known government official, and the suggestion in *Davis* that the statement be made under circumstances where false statements may be criminally punished. We will also see whether categories are added to the current testimonial statements, which include affidavits, prior testimony, etc., as well as non-emergency, official-investigative statements regarding past criminal events (statements in the field of the type made in the *Hammon* case).

If the softening and expansion of the testimonial-statement definition stops at this point, a Confrontation Clause of substantial value will have been created. However, it will be incomplete and inadequate in

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[106] The testimonial concept suggests a formalistic definition, but inherently it need not be so defined. Although Professor Richard Friedman uses the testimonial-statement terminology and argues forcefully for its merits, his conception is far more functional as reflected by the amicus definition in *Crawford*. Indeed, his statement during his introductory remarks at this symposium was expansively functional. He argued that the purpose of the testimonial-statement approach is to preserve the type of trial procedures that give primacy to live testimony given before the jury that is subject to confrontation. That definition does not lead to the embodiment of the testimonial-statement concept in the formality of the statement form or in a formulaic analysis. *See* Richard D. Friedman, Crawford *and* Davis*: A Personal Reflection*, 19 REGENT U. L. REV. 303, 304–05 (2006-2007). When I criticize the testimonial concept I should not be understood to be criticizing this quite different view, but rather the view that I observe in the formulation given the concept by the Court. Obviously, it is the Court's formulation that decides cases.

coverage. We must await the answer given in future opinions because almost nothing in *Crawford* and *Davis*, either when viewed separately or together, compels or even indicates that the positive direction of *Davis* will continue.

IS CONFRONTATION THE BOTTOM LINE?

Roger C. Park[*]

I. THE FORMALITY MYSTERY

Despite general references to the "abuses targeted by the Confrontation Clause,"[1] and the use of Sir Walter Raleigh's trial as an example,[2] the Supreme Court has not given us much guidance about what it thinks the Framers were trying to accomplish. In defining the concept of "testimonial," it has not attempted to state what it is about "testimonial" evidence that makes it dangerous. At times, it seems bent on defining "testimonial" without reference to underlying goals, using as a guide to historical usage Noah Webster's 1828 dictionary definition.[3]

The Supreme Court's treatment of the formality requirement is a prime example. The Court states that "formality is indeed essential to testimonial utterance."[4] One longs for a statement as to why formality is essential—an explanation demonstrating what it is about formal out-of-court statements that makes them more dangerous to the rights of the accused.

Some of the elements that the Court treats as increasing "formality"—and therefore making it more likely that a statement will be excluded as "testimonial"—are counterintuitive. For example, the fact that a statement is recorded reduces the government's ability to manipulate its contents, yet it is counted as one of the things that made the statement in *Crawford*[5] more "formal" than the statement in *Hammon*[6] (though the Court does not believe that this difference in formality is enough to justify a different result). One of the Court's most puzzling statements concerns the relevance of punishment for lying to police officers. The Court stated that "the solemnity of even an oral declaration of a relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood,"[7] and "it imports sufficient formality, in our view,

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1 Davis v. Washington, 126 S. Ct. 2266, 2281 (2006).

2 *Davis*, 126 S. Ct. at 2274 n.1; Crawford v. Washington, 341 U.S. 36, 44 (2004).

3 *Crawford*, 341 U.S. at 51.

4 *Davis*, 126 S. Ct. at 2279 n.5.

5 *Crawford*, 341 U.S. at 44.

6 *Hammon v. Indiana* is the other case decided in the *Davis* opinion. For the *Davis* Court's reference to the greater formality of a recorded statement, see 126 S. Ct. at 2278.

7 *Id.* at 2276.

that lies to such [police] officers are criminal offenses."[8] The point of making lies a crime is presumably to help the police get better evidence, but the Court uses it as a reason to exclude the evidence.

The Court does not tell us why it is important that it is a crime to lie to police officers. Perhaps the Court's implicit reasoning runs something like this:

1. The paradigm example of a "testimonial" statement is testimony under oath before a judicial officer.
2. The more a statement resembles that paradigm, the easier it is to say that it is "testimonial."
3. In the paradigm case, the in-court witness testifies under oath, and hence can be punished for lying.
4. In the case before us, the declarant's statement is analogous to in-court testimony because, like a witness under oath, the declarant could be punished for lying.

Thus the danger of criminal punishment is a feature that the in-court witness and the out-of-court declarant have in common if the declarant's lies can result in a criminal sanction. But similarities that make no functional difference should not matter. If the defendant's case is similar to Sir Walter Raleigh's case because both Sir Walter Raleigh and the defendant have a beard, that similarity should not count against the government. A fortiori, features that reduce the danger of abuse should not count against the government. In the Raleigh case,[9] the defendant was allowed to speak on his own behalf and to make legal arguments to the judges. Obviously, the mere fact that a modern-day defendant is allowed to speak and argue does not make the case more like the Raleigh case in any way that would make the defendant's conviction a better candidate for reversal.

Formalities can make a case better or worse than the Raleigh case. If one thinks of the Confrontation Clause as seeking to prevent adversarial abuses, then certain formalities might cut in favor of letting the evidence in, such as the formality of videotaping a declarant's statement. In a sense, recording makes the statement more like in-court testimony, because in-court testimony is often transcribed. But it also gives the trier a chance to find out more about the declarant's demeanor and the conditions under which the declarant was questioned—perhaps even something about whether unfair pressure had been applied to the

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[8] *Id.* at 2279 n.5.

[9] *The Trial of Sir Walter Raleigh* (1603), *in* 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1, 1–60 (T.B. Howell ed., London, R. Bagshaw 1809), *cited in Crawford*, 541 U.S. at 43. For a partial description of Raleigh's arguments in his own defense, see J.G. PHILLIMORE, HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE 157 (1850), cited and quoted in JOHN R. WALTZ & ROGER C. PARK, CASES AND MATERIALS ON EVIDENCE 97–98 (rev. 10th ed. 2005).

declarant. Not every formality increases the need for confrontation.

Treating "formality" as a negative factor will lead to curious results in cases where the state attempts to provide substitutes for in-court cross-examination. Suppose that a witness is dying of an unrelated affliction and there is an attempt to preserve testimony through deposition. One can imagine a spectrum of attempts to provide a substitute for in-court cross-examination, such as cross-examination by electronic link in the case of vulnerable victims, or cross-examination by an appointed attorney in "John Doe" cases where no suspect is in custody. Under the formality-is-bad approach, every effort to improve the accuracy of recording or to test the declarant's story would only make the evidence more likely to be excluded, until a line is crossed and the formalities become powerful enough to be deemed "confrontation."

It is hard to accept the Court's puzzling notion that the laws against lying to police increase formality, and therefore increase the likelihood that the statement will be excluded on grounds that it violates the Sixth Amendment. Professor Robert Mosteller does an excellent job of arguing that it would not be reasonable to treat statements differently depending upon whether the state has a law against lying to the police, and that the formality requirement is ahistorical and unrelated to the purposes of the Confrontation Clause.[10]

In order to sustain the formality requirement, a justification is needed to explain why formality helps avoid the evils that the Confrontation Clause sought to combat. A possible explanation exists[11]—formality puts the declarant on notice that the statement is likely to be used prosecutorially—but that explanation fits better with an approach that considers formality only as evidence of the declarant's intent, and not as an independent requirement. And under that explanation it would make no sense to make admissibility turn on something that a reasonable declarant would not know (such as whether lying to police is a state offense).

Perhaps the Court took a wrong turn in making the question turn upon whether a statement is "testimonial." That concept has led to a puzzling search for analogues to the formalities that surround in-court testimony. It might have been better to have focused on the words "accused" and "witnesses against" in the Sixth Amendment, and to have ruled that the defendant had the right to face his accusers, that is, those who have made accusatorial statements that are used in court against

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[10] *See* Robert P. Mosteller, *Softening the Formality and Formalism of the "Testimonial" Statement Concept*, 19 REGENT U. L. REV. 313, 323–29 (2006-2007).

[11] The Court suggests this explanation by saying that the formal features of *Crawford* "strengthened the statements' testimonial aspect—made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events." *Davis*, 126 S. Ct. at 2278.

him. If the central concept were whether a statement was "accusatorial" instead of whether it was "testimonial," then the concept would not have come with the baggage of "formality."

II. DECLARANT PERSPECTIVE VS. POLICE PERSPECTIVE

In its central holding distinguishing between testimonial and nontestimonial interrogations, the *Davis* Court also leaves us in the dark about why it chose the particular test that it endorses. The Court held that statements are nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency."[12] Conversely, the Court held that statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[13] These passages raise some unanswered questions, including whether the relevant "objective" purpose is one that would impute to the police officer in light of facts known to the officer, or one that would impute to the declarant in light of facts known to the declarant.[14]

One possible interpretation is that the test shifts the focus from the declarant to the police. Under that view, the question would be what intent the court should impute to a reasonable police officer in light of the facts known to the police at the time of the interrogation. But it is also possible to interpret the Court's language as saying that it is the apparent purpose of police questioning, viewed from the point of view of the declarant, that matters. Under that interpretation, the crucial question would be whether it would appear to a reasonable declarant that the police were trying to give help, or whether it would appear that the police were gathering evidence.

The distinction can make a difference in several situations:

1. An undercover agent, for the primary purpose of gathering information for prosecution, questions a gang member, who has no clue about that purpose. The gang member makes statements that incriminate the defendant. Here, the Court seems to think that the declarant's state of mind governs. The Court suggested that view by citing *Bourjaily v. United States* as an example of a case not involving testimonial evidence because statements were "made unwittingly to a

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[12] *Id.* at 2269.

[13] *Id.* at 2273–74.

[14] I am discarding other possibilities, such as the perspective of an omniscient disembodied observer, as being too hard to conceive or implement.

[government] informant."[15] That reference suggests that if the declarant does not know that the police are gathering evidence for prosecution, a statement is not testimonial, no matter what the police know.

2. A social worker in the special victims unit questions a child victim. Her primary purpose is to gather evidence, but a reasonable child in the victim's position would think that the social worker was trying to help in an emergency (or perhaps the reasonable child would not have a clue about the social worker's aims). One could construe the *Davis* test to mean that the state of mind of the declarant is what matters here, in which case the child's statement would not be testimonial.

3. The declarant secretly knows that she is safe, but the 911 operator reasonably thinks that the declarant is in danger. In *Davis*, the Court notes that "McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (*as far as any reasonable 911 operator could make out*) safe."[16] This passage suggests that if the caller knew she was safe, but the 911 operator did not, the Court's emergency doctrine would still apply and the resulting statement would not be testimonial. Nonetheless, it is plausible to think that the ultimate state of mind that is to be objectively imputed is still the declarant's state of mind. Her objectively indicated state of mind would be one of believing that, because she has given the police information that would make them think that she is in danger, the police are trying to help, not to gather evidence.

The declarant-perspective interpretation is consistent with the Court's later statement that "it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate."[17] It is also consistent with two of the definitions in *Crawford*'s menu: the one that defines testimonial statements as statements that bear a resemblance to ex parte testimony and "'that *declarants would reasonably expect to be used prosecutorially*,'"[18] and the one that defines statements as "testimonial" when they were "'made under circumstances which *would lead an objective witness reasonably to believe that the statement would be available for use at a later trial*.'"[19]

In other words, the "primary purpose" test could be viewed from the

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[15] Crawford v. Washington, 541 U.S. 36, 58 (2004) (citing Bourjaily v. United States, 483 U.S. 171, 181–84 (1987)).

[16] 126 S. Ct. at 2277 (emphasis added).

[17] *Id.* at 2274 n.1.

[18] 541 U.S. at 51 (emphasis added) (quoting Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02–9410)).

[19] *Id.* at 52 (emphasis added) (quoting Brief of Amici Curiae the National Ass'n of Criminal Defense Lawyers et al. in Support of Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02–9410)).

point of view of the declarant. Based on what the declarant knew at the time, would a reasonable declarant believe that the questioner's primary purpose was to give emergency assistance or to gather evidence? Does it look like the police are trying to give help or build a case? The difference between the police point of view and the declarant point of view makes a difference when the police have knowledge that the declarant does not have.

The main difference between the two declarant-expectation definitions in *Crawford*'s menu[20] and the *Davis* definition may not be one of a shift from declarant perspective to questioner perspective. Instead, the difference may consist of redefinition of what the declarant must expect in order for a statement to be deemed "testimonial." It was possible to read *Crawford* to mean that if the declarant could foresee prosecutorial use of the statement, then the statement was testimonial. After *Davis*, a statement can be nontestimonial even if the declarant foresees prosecutorial use—so long as the declarant believes that the "primary purpose" (not necessarily the sole purpose) of the police was to render aid in an emergency.

In deciding whose perspective to use, a discussion of what the Court is seeking to accomplish would have been helpful. There would still be a debatable question whether the declarant perspective or the police perspective should govern. If the dangers against which the Clause protects include coercive or suggestive questioning, then a focus on police intent would be appropriate. If the concern is about conniving declarants who know that their statements will be used prosecutorially, a focus upon the declarant's state of mind would be appropriate. If the Clause is broad enough to protect against both dangers, then it should apply when prosecutorial goals are the primary motive for either the questioner or the declarant.

III. FORFEITURE OF CONFRONTATION RIGHTS

I agree with the result that Professor Richard Friedman would reach, creating a broad forfeiture rule that would allow out-of-court statements to be admitted when the trial judge determines that the defendant's misconduct caused the declarant's unavailability.[21] I believe that the rule would require an expansion of existing doctrine,[22] but that

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[20] *See supra* text accompanying notes 18–19.

[21] The views that I attribute to Professor Friedman in this paper are based on my interpretation of his oral presentation on October 14, 2006, at *Crawford, Davis* & the Right of Confrontation: Where Do We Go from Here?, a symposium hosted by Regent University Law Review. *See generally* Richard D. Friedman, *Forfeiture of the Confrontation Right After* Crawford *and* Davis, 19 REGENT U. L. REV. 487 (2006-2007).

[22] *See* Roger W. Kirst, *Does* Crawford *Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 72–74 (2005). If forfeiture were available

the expansion can be justified on functional grounds.

In arguing for that justification, one can draw an analogy to admissions doctrine. According to the prevailing view, trustworthiness is not the basis for receiving admissions of a party opponent. Instead, their reception into evidence is a function of the adversary system.[23] That does not mean that the trial is a game and the declarant loses because he made the wrong move. The evidence is admissible because the central goal of the hearsay rule, to protect trial evidence from adversarial abuse, is not at risk of being defeated when admissions come in. The hearsay rule aims at encouraging the adversaries to produce the best evidence. It helps prevent angle-shooting maneuvers that would lead to the substitution of hearsay for live testimony. One such angle-shooting maneuver includes manufacturing hearsay evidence and then preventing the declarant from testifying. In the case of statements of a party opponent, there is not much chance that adversarial machinations will deprive the trier of good evidence. To the extent that a statement of a party helps the opponent, it is probably not poisoned by hard-to-penetrate machinations with an eye to litigation. For example, no danger exists that the party offering the statement would have been able to substitute hearsay for live testimony by persuading the opposing party

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under existing doctrine when the defendant has murdered the declarant, then the dying declaration exception would not be needed. And if the declarant had been killed by the defendant, it would not matter whether the declarant was aware of the imminence of death, and statements would not be excluded for lack of that awareness. (For an example of such an exclusion, see Shepard v. United States, 290 U.S. 96 (1933).) Professor Friedman suggested that forfeiture principles help explain why the classic dying declaration exception was limited to homicide cases and to statements about the cause of death. But these limits can be explained with traditional hearsay reasoning. A statement about who murdered the declarant is trustworthy, if the declarant believes he is dying, because the declarant isn't afraid of retaliation and has no motive to incriminate anyone except the guilty party. (I suppose it's possible to imagine a situation in which someone would want to take revenge upon someone other than his killer, but surely that situation must not be very common.) A dying declarant might have a motive to lie in statements about things other than the cause of death, such as debts that would be owed to his estate, or in cases not involving homicide, for example, to protect a loved one who caused an accidental death or even to protect an abortionist whose acts caused death to be imminent. But the declarant is unlikely to want to lie about who murdered her. Moreover, the fact that the exception was often justified on religious grounds—fear of divine punishment for lying—does not preclude the possibility that trustworthiness considerations such as those mentioned above had a role in shaping its contours.

[23] See the Advisory Committee's Note to FED. R. EVID. 801(d)(2) and sources cited in Roger C. Park, *The Rationale of Personal Admissions*, 21 IND. L. REV. 509 (1988). Since writing the article just cited, I have become convinced that adversarial considerations are more important than I then considered them to be. For convincing arguments about the role of the adversarial dynamics in shaping evidence law, see Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477 (1998), and Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 278–97 (1988).

to make the statement and then disappear.

Similar considerations support extending the forfeiture doctrine to cases where the defendant kills the victim for reasons other than preventing testimony. When the government can prove that the defendant killed the declarant,[24] there is less danger that the declarant became unavailable because of some hard-to-penetrate government machination, such as sending the declarant to a secret prison and not telling the lawyers what happened to him. Moreover, judges will be tempted to allow the jury to hear the voice of a murdered victim when confrontation has been made impossible by misconduct of the defendant; letting the evidence in under forfeiture doctrine will make it easier to maintain a firm rule requiring confrontation in other situations.

Admittedly, the case for forfeiture is strongest when the defendant's purpose was to prevent testimony. Forfeiture doctrine is then needed to protect the judicial system against abuse, and to prevent the hearsay rule from encouraging misconduct. But the case for forfeiture is strong enough even when the defendant's misconduct is rooted in some other motive besides the desire to prevent testimony.

IV. THE SPECTER OF *OHIO V. ROBERTS*

The specter of *Ohio v. Roberts*[25] haunts scholarly discussions of *Crawford*. It seems to be commonly accepted that the test articulated in *Ohio v. Roberts*, which incorporated trustworthiness as a criterion, led to evasion of the Confrontation Clause ban, because courts applying the trustworthiness concept on a case-by-case basis were too generous in letting in prosecution evidence. This has led to a fear of justifying confrontation doctrine in terms of trustworthiness, and perhaps to a broader fear of justifying confrontation doctrine in terms of aims beyond that of ensuring confrontation. But saying that the purpose of confrontation is confrontation does not carry us very far when it is time to decide many of the issues that have arisen. The Framers of the Sixth Amendment may have done the basic weighing of values, but they did not answer questions such as whether one should use a declarant perspective or a police perspective in deciding whether a statement is testimonial, whether a primary purpose of rendering aid overrides a secondary purpose of gathering evidence for prosecution, or what the boundaries of forfeiture doctrine should be. In deciding those questions, it is best to talk openly about dangers of abuse of power, adversarial

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[24] In ruling on a claim of forfeiture, the trial judge would determine whether the defendant murdered the victim. *See* FED. R. EVID. 104(a). Of course, that determination would be made only for the purpose of determining whether the evidence was admissible, and the finding would not be communicated to the jury.

[25] *Ohio v. Roberts*, 448 U.S. 56 (1980), is the case that was overruled by *Crawford*.

manipulation, incentives to gather inferior evidence, and even concerns about accuracy.

Using a functional approach does not necessarily mean adopting a balancing test or leaving things to a trial judge's discretion. For example, it is perfectly consistent with a functional approach to the First Amendment to say that prior restraint is per se unconstitutional, or with a functional approach to hearsay doctrine to say that the hearsay rule never prohibits receiving the statement of a party opponent. Rigid rules are justifiable under a functional approach when the harms of uncertainty and misuse of discretion outweigh the harms of overinclusiveness and underinclusiveness. A per se rule is often appropriate when protecting against abuses of state power because judges are likely to be under political pressure. They should be able to say, "I had to do that," rather than, "I decided to do that in the exercise of my discretion."

Under a functional approach, for example, it is perfectly reasonable to have a bright line rule prohibiting vehicles in the park,[26] instead of a rule that states that vehicles are allowed except when benefit outweighs danger. The latter rule would ask enforcers to balance on a case-by-case basis whether the benefit outweighs the danger, taking into account factors such as the size of the vehicle, how much noise it makes, and whether the driver is skilled. But when the question arises whether a World War II tank on a pedestal is a vehicle, the judge is better off thinking about what the rule is trying to accomplish than looking up "vehicle" in the dictionary.

My point is debatable. I cannot demonstrate conclusively that it is better to identify underlying goals than merely to say that "the purpose of confrontation is confrontation."[27] Identifying specific goals can be divisive, even uncivil, when it involves foreseeing abuse of power. Moreover, a danger exists that if underlying goals are made explicit, then judges will evade their responsibilities in hard cases by saying that the policy reasons for confrontation do not apply. But if courts cannot be trusted to reach the right result when they make their policy goals explicit, perhaps they cannot be trusted when they hide their goals, devise fictions, or borrow concepts from dissimilar areas of the law. Stating goals makes the law clearer and easier to critique. Confrontation should not be the bottom line.

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[26] This hypothetical is derived from H.L.A. Hart's famous example of interpreting a rule prohibiting vehicles in a park in H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08 (1958).

[27] I owe Peter Tillers credit for characterizing the idea that I am criticizing as "the idea that the purpose of confrontation is confrontation." Posting of Peter Tillers, Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, peter@tillers.net, to Evid-fac-l@chicagokent.kentlaw.edu (Nov. 10, 2006).

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.

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* 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.

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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 II[13]—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-

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[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.

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[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 unconfronted 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

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[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

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[29] The Court was recently petitioned to issue a writ of certiorari to review the judgment of the Wisonsin 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

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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),

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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).

SOLOMON'S SWORD: THE LOSER GETS PROCESS

*Charles Nesson**

Thank you, James.[1] James really did bring me an apple, that's why I remembered him. I think no other student's ever done that before—I highly recommend it. So, tell me who you are. How many are law students? How many are law faculty types? How many are lawyers? How many are worse?

Alright, so confrontation is the subject, *Crawford* and *Davis*. Confrontation is a word that evidence scholars tend to denude of its emotion. And there are other words like that in Evidence, in fact at the core of Evidence. Words like "guilt" and "privilege." You know, real things that actually affect real people, that somehow get lost in the professionalism of categories and distinctions.

Confrontation is like a crystallized moment. It's a moment that each one of us experiences. We experience it with our father when we first stand up or with our older brother or sister or wife, husband, dean, institution, country. There are moments when we know that we are standing up and representing a truth that we express. So that's the feeling: it's a crystallized moment.

Solomon's sword. The wisdom of Solomon. The theater of trial is rhetorical space. You know the story. Two harlots, each with a child. One of them dies in the night. A dispute as to who was the mother of the living child. They bring it before Solomon. They each speak, and Solomon says bring me the sword. And wham!—at that moment, there's a crystallization of character. The story tells it: one woman says, "Split it, that'd be fair." And the other says, "No, give it to the other." And Solomon makes his judgment, and all of Israel stands in awe because they see the wisdom of God to do judgment is in him.[2] Well that's the moment.

Cross-examination is our trial method of swinging Solomon's sword. It's the device that the American—the Anglo-American—jury system has devised for crystallizing character in a moment. That's the essence of it. In the theater of the courtroom, with the jury looking on, under the aegis of a fair judge conducting a fair procedure, cross-examination produces the moment when truth is on the line and the jury witnesses and decides. That's the core algorithm of the process. That's why it's been

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* William F. Weld Professor of Law, Harvard Law School. This address was delivered on October 14, 2006, as a part of "*Crawford, Davis* & the Right of Confrontation: Where Do We Go from Here?," a symposium hosted by Regent University Law Review.

1 Addressing Professor James J. Duane of Regent University School of Law.

2 1 *Kings* 3:16–28.

such an immense success, such a powerful base for the most powerful legal profession in any country in the world.

So here's the story of confrontation—told to you quickly. It starts with Sir Walter Raleigh, perceived to be an enemy of the state. He is prosecuted by the evil Lord Coke, who locks his friend Cobham up in the Tower of London, exacts a confession from him, puts Raleigh on trial, and offers the confession as the evidence. And Raleigh stands and says, "Will you convict an Englishman on the basis of a piece of paper?" And they falter around a little bit, convict him, and execute.[3] And that injustice rings down through the centuries from 1600 until the time when we adopt our Confrontation Clause as part of the Bill of Rights.

So what's the core idea of the Confrontation Clause? It says the accused shall have the right to confront. Now it says the "witnesses against," but think what it is: it's to confront your accuser. It's to confront Cobham. The "witnesses against" express the accusation against. So, here this right, ensconced in our Constitution, and then not a single case decided on this fundamental right for how long? In 1789 our Constitution gets adopted. The first confrontation case was when? Eighteen ninety-five—106 years later. Why? Were there no issues? This is curious. It has nothing to do with the 14th Amendment. It has to do with the fact that there was no appeal of issues relating to confrontation. There was no appellate court. In the federal system, there was the Supreme Court and then the district courts that rode the circuits. And the only question for the Supreme Court was whether the district judge had jurisdiction to do the job that he was out on the hustings doing. And if Judge Roy Bean had jurisdiction to be sitting in the court he was sitting in, then whatever Judge Roy Bean said in that court was okay. Confrontation was a trial issue. No appeals. No opinions.

Eighteen ninety-five changes it because that's when the intermediate courts of appeal had come into being. And the first case that gets reversed and sent back presents an issue of hearsay when the two key witnesses are missing and the prosecutor wants to introduce the sworn testimony that had been cross-examined in the first trial. And Mattox stands up and says, "Would you convict an American on the basis of a piece of paper?" And that case goes to the Supreme Court.[4]

At this point they have lost it: they don't know what the Confrontation Clause is. They look at it. A big thing has started to intervene. The West system had been adopted in 1880. That meant that scholars could do research and read all the cases. And a guy named Wigmore, with a green eyeshade on, is reading all the hearsay cases and

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[3] *The Trial of Sir Walter Raleigh* (1603), *in* 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1, 1–60 (T.B. Howell ed., London, R. Bagshaw 1809).

[4] *See* Mattox v. United States, 156 U.S. 237 (1895).

sorting them into categories, and he's got categories and categories of hearsay. And so the Supreme Court says: "We don't know exactly what this means. But we can tell you this, this testimony is better than the dying declaration, and nobody ever thought we were going to get rid of that. So if it's more reliable than the dying declaration, that's good enough for us." And that was it for the Confrontation Clause more or less for the next sixty years.

Justice Black embarked on his program to incorporate the Bill of Rights one by one after failing to do it wholesale. He finally gets to the Confrontation Clause in 1965 and holds in a nice, clean, slick opinion that it's a violation of the Confrontation Clause to use an unconfronted preliminary hearing transcript against a defendant.[5] There's a constitutional right to cross-examine and suddenly the world explodes—a defendant wins. Defendants see that every hearsay claim presents a potential Confrontation Clause question and cases start to bubble up. And the Justices of the Supreme Court start saying to themselves: "Whoa, are we going to have to rationalize every hearsay exception? That's going to be really tough." And so they start struggling to try and get away from this thing.

I clerked during this period. I saw Justice Harlan get himself wound up in this. Really, among the judges, the term that floated around was "the ganglion of hearsay." How do you rationalize it? And so in the cases of this period, you can see them trying to escape. And finally *Roberts*[6] does it. Justice Blackmun, he just does it. He just says, straight out, all traditional hearsay is constitutional. That's it—not going to explain. This is a complete corruption of course. The idea that somehow this great principle has been reduced to this ridiculous consequence is a travesty.

Crawford[7]—Solomon's sword in Justice Scalia's hands. He does a beautiful job of killing *Roberts*. He just, *swish*, cuts it. He explains that a principle that is so discretionary is not worth anything. He exhibits an understanding that the way a good judicial process should work is kind of like a software algorithm—you want it to be clean. The more the credibility of the judge is entwined with the outcome of the proceeding, the worse the result. This was very hopeful. But then, *Davis*.[8]

Davis is a mystery to me in this sense: it's hard for me to see how someone I thought was as perceptive as Justice Scalia was in *Crawford* could so badly understand the principle that I thought he had enunciated and demonstrated in *Crawford*. Okay, let's make it simple. These are 911 calls that are up before the Court. *Davis* is a 911 call from

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5 *See* Pointer v. Texas, 380 U.S. 400 (1965).

6 Ohio v. Roberts, 448 U.S. 56 (1980).

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

8 Davis v. Washington, 126 S. Ct. 2266 (2006).

someone who's in difficulty. The question is: Can the transcript come in without violating the Confrontation Clause? Who is Davis's accuser? There were apparently two live witnesses at the trial. They were both police officers who had come after the event and could testify that they saw bruises. But who identified Davis as the assailant? QED. End of case. Who was Davis's accuser? So where did the accuser get lost in this? How can *Davis* be written so far down this path of "testimonial" that in only one step away from its point of origin in *Crawford* it's lost sight of the driving principle?

Davis disempowers. How can that be? *Davis* should require all 911 services to run a little recorded tape that says, "Somebody will be right with you. You're next in line." It should contain a warning. Well, let's just imagine the situation. It's a domestic violence situation. It's between a man and a woman. They have an emotional relationship. Maybe they're married, maybe they're close to marriage, who knows? But we're talking about stuff that we all understand, stuff that goes on between two people of different gender, sometimes the same gender, who feel intensely about each other, and it breaks into violence. And one person, the woman typically, is getting abused physically and calls 911 for help because she can't think of anything else to do. Someone on the other end of the line should say to her (after *Davis*), "Before you speak to the 911 operator, please understand that the testimony you give may be used against the person you love in a prosecution over which you have no control." Why should that warning be given? It should be given because too many people find themselves in the position of having brought in the police because they desperately needed help in a moment, but then finding that they've destroyed the environment that makes up their life—that their opposite member has lost his job or gone to jail, or they've lost their kids. It can be really bad. So, *Davis* disempowers. Somehow the idea took foot in *Davis*—and prevailed—that the way to protect women is to disempower them.

Davis also completely undercuts the key point of brilliance in *Crawford*—understanding the power of neutral procedure—because it puts the judges back into the picture on a factual determination in which the evidence they receive will be offered by prosecutors and consist of the testimony of cops. And judges in the real world have no choice but to believe them. I think of this as the mega-meta-dropsy testimony on searches that you may recall after *Mapp*.[9] Suddenly there was a tremendous spate of people allegedly seen "pulling drugs out of their pockets and dropping them in front of policemen on the street," all approved by the court system. So see that not just as fabrication, but see

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[9] Mapp v. Ohio, 367 U.S. 643 (1961).

it as loss of the credibility of the judge, Solomon. The wisdom of the court lies in a clean algorithm.

Okay, so where did the accuser get lost? Well, first you have to note the word "accuser." That word isn't used in the Confrontation Clause itself. The "accused" is used. We're protecting the accused; we're giving the accused the power to confront the accusation against him as communicated by the witnesses. But it's the accusation that's the core. Where did we get from accusation? This was the crucial move. Justice Scalia says the text of the Confrontation Clause applies to witnesses against the accused—in other words, those who bear testimony.[10] Whoops, done. That's it. Now we're off into the deep weeds of what's "testimony." And we can talk about that even though it's not mentioned anywhere.

Time for questions. Time for reactions. That's my talk.

Question 1: *Davis* and *Hammon* are actually two decisions in one.[11] You speak about *Davis,* but *Hammon* involved similar circumstances and was decided, I think, in favor of your approach to *Crawford* and the Confrontation Clause. My question, though, is why—if excited utterance has been around forever, almost as long as dying declaration—why isn't excited utterance an appropriate exception under the Confrontation Clause and consistent with *Davis* and *Crawford*?

Professor Nesson: Well, I'm going to answer the question that I thought you were going to ask first, and then I'm going to answer yours. You mentioned *Hammon,* and I had the pleasure of sitting with Richy last night and listening to him talk about *Hammon*. And he says *Hammon*'s an easier case than *Davis*. I say it's not. It's only easier if you've already lost yourself in the testimony weeds. If you actually look at what's driving it, *Hammon*'s a case in which not only does the woman make the 911 call, but then she makes a decision in an environment in which she knows very well that she's offering evidence. So if anything, in terms of the empowered woman, I'm more concerned about the *Hammon* case than I am about *Davis*. I'm frankly concerned about both, and I think all this talk about "from whose perspective" is irrelevant. That's where I thought you were going to go on *Hammon*.

On excited utterances, first you start with the dying declaration. The dying declaration is not immune from consideration under a rethought Confrontation Clause. The dying declaration—just so we all understand—is based on the idea that a man will not meet his maker with a lie upon his lips. In modern form, neither man nor woman will

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[10] *Crawford*, 541 U.S. at 51.

[11] *Hammon v. Indiana* was the companion case to *Davis*.

meet his or her maker, yada yada. Alright, it's been around for a long time. It's one of the best pieces of evidence in this rhetorical theater that we're talking about. Wigmore tries to justify these things in terms of reliance, and he comes up with this explanation.

My experience has not been that people at the extremity of life suddenly get truthful. In fact, it seems to me that there's a fair amount of fantasy involved in a lot of what goes on. Plus, they're usually shot full of drugs—it's really bad. And what is the dying declaration that we're worried about? The classic dying declaration is the guy who is wheeled into Bellevue Hospital. He's got bullets in him. He's on his way out we imagine. The scene we imagine is Father O'Brien, with his collar on, saying, "You're about to die, my son. I give you your last rites," and so on and so forth. And the guy says, "Greg did it." But the truth is that it's much more likely that there's a police officer there who is instructed to tell the person that he's dying so that he's aware of it. And the guy says, "Uhhhh, ugggg," and the cop then comes and testifies that he clearly said, "Greg did it." And that's the way it works. And so I don't think the dying declaration should be immune from confrontation analysis. I would be as equally sensitive to a cop testifying to a dying declaration as a cop testifying to anything else. This focus on the police fabricating the testimony goes right back to Cobham. And I would do the same with excited utterances—it's just a different cut.

Question 2: How would you be able to handle an Enron prosecution without the hearsay exception for business records if you had to produce the witness to every transaction, and could not rely on the custodian to lay the foundation for the introduction of a massive quantity of douments?

Professor Nesson: That's an excellent question, and it's exactly the question on which Harlan flubbed up in 1972. They are floundering around; they are all floundering around looking for some rationale for the Confrontation Clause that saves them from the hearsay problem. Well, Wigmore is the source of the problem. He has sorted everything into these twenty-two bins, and now he looks at the Confrontation Clause and says to himself, "Can it be that this Confrontation Clause wipes out all this work I have done? That can't be." And so he authors an interpretation of the Confrontation Clause that includes the famous line that some forms of hearsay are so good and so trustworthy that cross-examination would be an act of "supererogation."[12] Now just pause for a

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12 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1420, at 251 (James H. Chadbourn ed., rev. ed. 1974) ("The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the

moment. This is utter fantasy. There is no defense attorney in the world who would forgo cross-examination of an accusing witness—none. So this thing should have been a laugh, but it was repeated again and again and again—extraordinary.

So Harlan went for one of these things where Wigmore said, "At least the Confrontation Clause should require the production of all available witnesses." And he wrote that.[13] And this is the guy who came up through big time New York law practice where the number one hearsay exception is business records. And the next year, he says, "Oh no," and then actually writes an opinion saying, "I take it back. I got it wrong."[14] But then he didn't know what to do. There was this theory of confrontation that it just meant that you got to cross-examine whatever witness the other side put on. If they offer two police officers, you can stand up and cross-examine them. But that is the extent of the right. And Harlan would fall back on due process as if that was somehow going to be his protection. He had no theory of confrontation.

Well to me, the key here is to focus on the accusation, to recognize that the testimony is the fork in the road that leads you into this ridiculous looking-up-in-the-dictionary form of trying to resolve constitutional structure. At least focus on the right concept. The right concept is the accusation and the communication of the accusation. Now I think that within that framework there would be loads of work to do. And surely you would preserve the forms of hearsay that have served enormously well in many regards. There are some that I think are worth chucking, but business records is not one of them.

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bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.").

[13] California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to produce any available witness whose declarations it seeks to use in a criminal trial. [And] even were this conclusion deemed untenable as a matter of Sixth Amendment law, it is surely agreeable to Fourteenth Amendment 'due process,' which, in my view, is the constitutional framework in which state cases of this kind should be judged.").

[14] Dutton v. Evans, 400 U.S. 74, 95 (1971) (Harlan, J., concurring) ("Nor am I now content with the position I took in concurrence in California v. Green, *supra*, that the Confrontation Clause was designed to establish a preferential rule, requiring the prosecutor to avoid the use of hearsay where it is reasonably possible for him to do so—in other words, to produce available witnesses. Further consideration in the light of facts squarely presenting the issue, as *Green* did not, has led me to conclude that this is not a happy intent to be attributed to the Framers absent compelling linguistic or historical evidence pointing in that direction.").

Question 3: My question has to do with the fact that when you started looking at the empowerment of women, it took you off of the central purpose and theme that you had going on until then. Imagine that in the *Davis* case, the police had talked to the woman and said, "How do you feel about us going ahead with your statement?" And she said, "Fine, go ahead," and then signed something. The police then took it and went to court with it. That doesn't really solve the cross-examination problem. What do you mean by the Confrontation Clause? All that beautiful language? That rhetoric? I think in some ways you are making it easier on yourself. I think this might be a situation where you do have a conflict between the idea of self-empowerment on the one hand and the fact that it might not be good for the victims on the other. I think you have to address that and find ways to resolve this deep problem we have in society.

Professor Nesson: Well, you make an excellent point. In some ways as I thought through what I wanted to say here this morning, it was shaped by my conversation with Richard Friedman last night where I was really trying to understand what the dynamic was that would have led Justice Scalia to write *Davis*. And he was talking about compromise and the influence from the Ginsburg wing of the Court. And I felt that was the real opposition. The tragedy of *Davis* is that it really means that *Crawford* changes very little. It deeply undercuts *Crawford*. After *Crawford*, there was a choice; there was a fork in the road. We could have gone in the direction of expanding the confrontation right and just making it really clear so that people knew what the rules were. And then yes, you would have to come to court if you wanted to succeed in making an accusation. That was the choice. Or, we could try to minimize the impact on the existing ways of doing business as much as possible—change as little as possible by finding every nuance we could in whatever was offered by the Court. It is like Lenny Bruce said: "It's not the Supreme Court that runs the show; it's the lower court judges that sweep up the store. They are the ones that run it."[15] So we needed not only the articulation of the principle of *Crawford*, but then a clarion rearticulation to follow up as well—we needed the Court to say this is

[15] To view the exact quote that Professor Nesson paraphrases, go to http://www.law.umkc.edu/faculty/projects/ftrials/bruce/bruceownwords.html ("The law is a beautiful thing. The people who attack the law don't really understand it. You know what it's like? It's like the Supreme Court, that's the daddy and it runs the store because it knows how. All the state courts; they're the clerks, and the daddy says, 'Now you just sweep the floor and unpack the stock and that's it—I don't want you to place any orders or change the displays, and keep your hands out of the register.' But the minute he turns his back all the clerks think they know how to run it better, and they start changing everything and ordering the wrong things and it's a mess. The Supreme Court, the big daddy, it knows what is, but the little guys keep trying to run the store.").

what we actually meant. Richy actually offered exactly the right line—exactly the right line—when he said that statements made to the cops violate the Confrontation Clause if they are used against the accused. That's it. Nice and clean.

FORFEITURE OF THE CONFRONTATION RIGHT AFTER *CRAWFORD* AND *DAVIS*

*Richard D. Friedman**

Well, thank you, James,[1] and thank you all, and once again it is a delight to be here, and I'm appreciative to James and to the members of the Law Review for organizing this terrific conference.

So my topic this morning is on forfeiture of the confrontation right, which I think plays a central role in confrontation doctrine. And to try to present that, let me state the entirety of confrontation doctrine as briefly as I can. This is, at least, what I think the doctrine is and what it can be: A testimonial statement should not be admissible against an accused to prove the truth of what it asserts unless the accused either has had or will have an opportunity to confront the witness—which should occur at trial unless the witness is then unavailable—or has rendered the confrontation unfeasible.

That's pretty compact. If it is a testimonial statement, it can't be admitted for the truth unless the witness is unavailable, and even then only if the accused either had the opportunity to confront or forfeited the right.

Now, a few complexities lie in there. Notice, I said it is limited to testimonial statements. So one of the questions to Professor Nesson was about business records. Most business records would not be testimonial statements. There has to be an opportunity to confront the witness, and I want to emphasize that confrontation is not limited to cross-examination. Cross-examination is what we've come to think of as the most important aspect of confrontation, but I think the oldest aspect of confrontation was just the idea of being face to face. Notice that there's no room for hearsay exceptions within the doctrine as I've stated it. That is, there is no room for the idea that if a statement falls within a hearsay exception—excited utterance or any other—therefore, it is excepted from the confrontation right. The statement of the confrontation right, as I've given it, is integral; it states the whole doctrine.

Well, how about dying declarations, you might ask. I will get to that. I think that dying declarations are best understood as an instance of forfeiture doctrine. And if forfeiture doctrine is applied properly, it will cover those dying declarations that should be admitted and will do so in

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* Ralph W. Aigler Professor of Law, University of Michigan Law School. This address was delivered on October 14, 2006, as a part of "*Crawford, Davis* & the Right of Confrontation: Where Do We Go from Here?," a symposium hosted by Regent University Law Review.

[1] Addressing Professor James Duane of Regent University School of Law.

a much more sensible way than does the traditional hearsay exception for dying declarations.

What is the basic idea behind forfeiture doctrine? The basic idea, I think, is that if the defendant renders confrontation impossible, at least by wrongdoing, then the defendant cannot complain about the inability to confront. It is not a matter that we don't want someone to profit by his own wrongdoing; it is more precisely that you can't complain about a situation that you created, particularly if it is by your own wrongdoing. Some years ago, I wrote an article called *Confrontation and the Definition of Chutzpa*.[2] *Chutzpa*, as some of you probably know, is the quality illustrated by the person who kills both parents and then begs for mercy as an orphan. And that is the standard definition of chutzpa. What I'm suggesting is that nearly as blatant an illustration of chutzpa is the quality demonstrated by the defendant who, say, murders a witness and then complains about his inability to confront.

Okay, so the core illustration of forfeiture doctrine would be the case in which you have a witness on the way to court to testify against the defendant in, let's say, a robbery case or a drug case, whatever, and the defendant says, "I'm not going to let you testify. I am now going to kill you in order to render that testimony impossible." Bang! Bang! The witness is dead. It turns out that there is ample proof of the murder and the defendant's statements. The prosecution offers the prior statement by the murdered witness—a testimonial statement—and the defendant says, "But that's a testimonial statement. I never had a chance to confront the witness and cross-examine." The prosecution presents this strong proof that the defendant murdered the witness, and the court says, "Let me get this straight: you are complaining about the fact that you didn't get a chance to confront the witness, but you murdered her, didn't you?" "Well, yes I did." "Okay, well, if you murdered her and that's why you didn't get a chance to confront her, you really can't complain about that situation. Therefore, you forfeited the right and the prior statement can come in." That, I say, is the core case. I think that core case has been around for many years. It has been understood for a long time that if by murder, intimidation, or kidnapping, the defendant renders the witness unavailable to testify, forfeiture of confrontation applies.

Well, okay. That's the core case, but let's ask: Must the conduct that renders the witness unavailable to testify subject to confrontation have been motivated in significant part by the desire to achieve that result? And must the conduct have been wrongful? Those are two separate questions, but they are overlapping.

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[2] 31 ISRAEL L. REV. 506 (1997).

What if the conduct wasn't actually motivated by the desire to render the witness unavailable? Let's take this case. Suppose there is a drug conspiracy and an informant in the drug conspiracy reports back to the police, making testimonial statements about the chief of the conspiracy, saying he is a drug kingpin, etc., etc., detailing the chief's role in some depth, but then the informant goes back into his mole role in the conspiracy. The kingpin is none the wiser, but they get into a fight—maybe it is over a card game or something else unrelated. The kingpin has no idea that this person has made the statements. They get into a fight and the kingpin murders the informant—malice aforethought, the whole thing. And then the kingpin is tried for drug crimes, and the prior statement of the informant is offered. The kingpin claims violation of the confrontation right, and the prosecution offers proof that the kingpin murdered the informant. It seems to me that even though there is no proof in that case that the murder was for the purpose of preventing testimony by this person—that, in fact, the kingpin did not know that the informant had testified against him—it nevertheless seems to me that the right should be forfeited. That, in other words, is a circumstance in which we say, the reason that you can't cross-examine this person—can't confront this person—is because you murdered him. And that is sufficiently wrongful conduct that even though you weren't aiming at eliminating this person as a witness, you cannot complain about the situation you've created by that wrongdoing.

Now if I'm right there, a consequence is that, in what I've referred to as the reflexive situation, forfeiture doctrine still applies. That is, it may be that the conduct that leads to forfeiture is the very conduct with which the defendant is charged in the particular case. So here is where we get to dying declarations. The typical sequence would be fatal blow, victim makes a statement identifying the accused, victim dies, prosecution, claim of confrontation right, and the prosecution says—well, what usually happens is that they just say, "Dying declaration!" and the statement gets in.

The theory of the dying declaration exception that is usually received is that nobody would go to heaven to meet his Maker with a lie upon his lips. In order for that to be persuasive, I think we'd have to have faith in the universality of the religious view that, if one does die with unabsolved sin, there is going to be eternal damnation. There may have been virtually unanimous universal acceptance of that view a couple of hundred years ago, but I think that now there isn't. For myself, I've always said that if I were in that situation, I'd look at it as an opportunity to even some old scores without adverse consequences! But, hopefully, I won't be in that situation.

It may be that these statements are more reliable than the run-of-the-mill statements, but what *Crawford* tells us is that reliability is not

what confrontation is all about. I'm not sure that a statement identifying a killer is so clearly reliable, in any event, because the victim is clearly speaking in distress and may not have had a good opportunity to observe the killer. But let's say that instead of going through the analysis required by this old-fashioned hearsay exception—let's say that what we have is a preliminary hearing in which the court determines whether the right was forfeited. Suppose the court says, "If I conclude"—to whatever standard of proof is appropriate—"that the defendant killed the victim, and that that is why the victim is not around to testify"—and you know the difference between a murder case and an assault case, practicing lawyers here today, the difference is one witness!—"if that's why we don't have an ordinary assault case in which the victim is able to testify, because the defendant killed the victim, then"—just as in my murder-over-the-card-game case—"I'm going to find that the defendant forfeited the confrontation right." To me that makes an awful lot more sense than the dying declaration exception.

Now, it tends to raise the problem of—people say you are "bootstrapping," that you are assuming the conclusion. Not at all. Not at all. For one thing, nobody is *assuming* that the defendant committed the killing; that has to be proved. It has to be proved on the basis of evidence, both with respect to forfeiture of the confrontation right and with respect to the underlying charge. The judge has a function, to determine the forfeiture quesiton, and the jury has a function, to determine the facts bearing on the underlying charge. They are separate functions. And the judge decides the matter of forfeiture for purposes of deciding whether the confrontation right still stands. The judge doesn't say, "Ladies and gentlemen of the jury, you may wonder why you've heard the accusation from the dead victim notwithstanding the absence of confrontation. I will tell you why. It is because I have determined that, in fact, the defendant killed the victim, all right, and then forfeited the right. And now you go on and consider. I don't mean to prejudice you on the merits, you go on and consider." No, no, no, no, no! The judge doesn't announce that to the jury at all. The situation really is basically the same as with respect to the conspirator exception to the hearsay rule. (I want you to note that I've said the conspirator exception to the hearsay rule. I did not say the co-conspirator exception to the hearsay rule. The reason is because Professor Duane wrote, I think, about twelve pages of a law review article explaining why it is the conspirator exception, not the co-conspirator exception.[3] I felt that anybody who put that much energy into such a small point must be right!)

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[3] James Joseph Duane, *Some Thoughts on How the Hearsay Exception for Conspirators' Statements Should—And Should Not—Be Amended*, 165 F.R.D. 299 (1996).

If I'm right about all this, notice how dying declarations and excited utterances are entirely different matters. If there is an ordinary excited utterance, so what? That is a hearsay exception and has nothing to do with the confrontation right. The declarant is around. If it was a testimonial statement, it is within the confrontation right and there ought to be confrontation. But dying declarations, I think properly best viewed, are an instantiation of forfeiture doctrine. And that is, I think, probably the underlying reason that motivated the courts that developed the exception, although it wasn't articulated this way at the framing, and I think that is why the doctrine still should stand.

I think the same principle would apply in cases of intimidation. I think it can apply, for instance, in cases of intimidation created by assault. It can also apply in cases like *United States v. Owens*.[4] That is another case in which it is not intimidation, but as you might remember, the victim's head was bashed in. And at some point the victim was able to make a statement identifying the assailant, but by the time of trial he wasn't. But he got on the stand, and the court, in what I think was a bad opinion, said, "Well, okay, it is a good enough opportunity for cross-examination," which is the topic that Chris was addressing,[5] "because he is there. He is on the witness stand able to answer questions." It would have been much more satisfying if the court would have said, "No, Owens didn't have an adequate opportunity to cross-examine, but he forfeited because I find, as a preliminary matter, that he bashed the victim's head in."

On the other hand, suppose you had, say, a negligent homicide—let's say you have a domestic violence case—and between the time of the incident and the time of the trial, the defendant is driving with his wife, who happens to be the accuser, and she dies as a result of negligence. I hesitate to say in that case, even though there was negligence, that the confrontation right ought to be forfeited. I do think that this is a matter of judgment and weighing.

An interesting question, I think, is what if there is no wrongful conduct, but the conduct is aimed at keeping the witness away? Let's say there is somebody who has an ability not to testify, either because she is beyond the reach of the subpoena power or because she has a privilege, and the defendant, not wrongfully, says, "You don't have to testify against me, and I really think it would be a nice loyal thing not to." Is that forfeiture? I don't know. I suppose, at least I think, that if the defendant has a privilege and keeps the witness off the stand by virtue of that privilege, at least there, there should not be a forfeiture because I

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4 484 U.S. 554 (1988).

5 *See* Christopher Mueller, *Cross-Examination Earlier or Later: When Is It Enough to Satisfy* Crawford, 19 REGENT U. L. REV. 319 (2006-2007).

don't think that the defendant should be forced to select between the confrontation right and his privilege.

There are a lot of procedural issues that are important in the forfeiture realm, and these are going to have to be resolved. One is whether the statement itself should be a permissible part of the proof on the basis of which the court decides whether the accused has forfeited the right. In other words, take the murder case in which the victim says that the defendant did it. Can the judge—in deciding that the defendant did this and therefore that there was forfeiture—can the judge take the statement into account? And I think, why not? Under the approach of Rule 104(a) of the Federal Rules of Evidence, the judge can take anything into account, if it is not privileged, in determining a threshold matter. And I'd say that here, too, there is sort of an endless loop. What if it is a testimonial statement, and if I'm concerned about testimonial, about confrontation with respect to threshold issues, do I worry about that? Well, I guess I'd say at the end of the day, either the right was forfeited or not. And if the judge says that he is going to take the statement into account, and in the end the judge concludes the defendant killed the witness, I think there is no harm done. That is, the judge says, "You killed him. You forfeited that right," and so there is nothing wrong with taking the statement into account. And if the judge fails to conclude that the defendant forfeited the right, and so the jury never hears the statement, then there is also no harm done.

What should the standard of persuasion be? I think it should probably be more than "more likely than not." Most courts have gone with "more likely than not." I think it should probably be more elevated. I don't know if that is going to make much of a difference.

Much more significantly, it seems to me, it is essential to impose upon the prosecution a duty to mitigate the problem created by the accused's conduct. So, for instance, take the homicide case and the dying declaration, and the victim makes an accusation after the blow. I think that forfeiture should not apply if the authorities could reasonably have arranged an opportunity to afford confrontation, but failed to do so. That might sound grotesque—the idea of bringing in a lawyer and a stenographer for a deposition with a dying defendant—but, in fact, you go back a couple of hundred years, and there are cases just like that where a confrontation was arranged. And certainly the police and the authorities have no compunction about taking accusatory statements from dying declarants. I think that we probably shouldn't have compunction about arranging for some opportunity for confrontation.

And by the way, this is where I think the idea about imminence comes in. You know the old idea for a dying declaration exception is that the gates of heaven have to be opening for the exception to apply, and I think what that really reflects, in sounder terms, is the idea that if death

is imminent—and I think it should be an objective test rather than a subjective test—but if death is really imminent, then it is probably going to be hard to provide an opportunity for confrontation, hard to provide a deposition.

Another opportunity to mitigate would be in the domestic violence context. If there is a contention of forfeiture, based on intimidation, and also with respect to children, there are many difficult problems, but I think probably it is not enough to say, "She is scared. She doesn't want to testify. All bets are off—no confrontation right." I think that there has to be some burden on the prosecution and on the trial court to do what can be done to protect whatever of the confrontation right can be protected. And if the Supreme Court goes down this line, it will take a while to work out. But, for example, perhaps the accuser should be brought in, at least to testify *in camera*. Perhaps, at least, she should be asked questions about why she won't testify.

This is a rather complicated matter. Maybe what we need to do is disaggregate the confrontation right and think of it in terms of components. You want testimony subject to cross-examination. Ideally, you also want it in the presence of the accused. Maybe we can have cross-examination without the presence. Maybe it is the actual closeness of the defendant that creates the difficulty. Maybe if we pose the question, we realize that the witness is willing to talk as long as the defendant isn't in the room but is instead hooked up electronically. What I'm suggesting is that there has got to be some burden—and working out just how much is going to be a difficult matter—but there has to be some burden on the prosecution and on the court to figure out, given the state of intimidation, what is the best we can do to preserve something of the Confrontation Clause. So that's one more aspect of this whole area that will have to be worked out over a great deal of time. Thanks very much.

Question 1: The question is in regards to wrongful conduct. You say that that is the second prong. To give you a quick hypothetical, say you've got an attorney in the office, you have a Chinese Wall and another attorney, husband and wife come in—it's a domestic violence case. Husband sits down with you. He is currently represented by the public defender's office, and he's shopping for attorneys. And one of the first things he tells you is, "I did it, but my wife doesn't want to testify against me." All right, happens a lot. At that very point, you stop him and say, "Wait," leave the room, and you go to the other attorney who rents from you, and you say to him, "I need you to represent the wife in this case to declare a Fifth Amendment privilege on the stand." Done. Would that rise to the level of wrongful conduct—because it is an ethical problem, perhaps, between the lawyers—but do you charge that to the defendant under your evaluation?

Professor Friedman: That is an interesting question. In other words, as I understand it, the defendant is saying, "My wife doesn't want to testify against me." I don't know of any reason she can avoid doing so. And the lawyer, without perhaps explaining that this is wrongful, is going to make up a Fifth Amendment privilege. Is that what you are saying?

Question 1: The privilege claim is based on the fact that, assuming that she testifies, she is going to testify that it never happened. Therefore, that would be her on the hook for filing a false police report—that is why the Fifth Amendment would apply.

Professor Friedman: Well, all right, so can you tell me more to help me work through this. The wrongful conduct on the part of the attorney, then.

Question 1: I'll tell you, it is a common issue especially up in Northern Virginia.

Professor Friedman: What is? Wrongful is?

Question 1: The point is, what you have is supposed to be a Chinese Wall between these attorneys, and yet, you are going to go in to this attorney and not simply tell him, "I've got a potential client over here that you might want to interview." You are going to go in to specifically say, "Hey, I need you to instruct this individual to plead the Fifth so that my guy can walk," and the question, returning to it, does the wrongful conduct prong in the analysis that you've just presented cover attorneys' actions or is it just restricted to the defendant?

Professor Friedman: That's a tough question—it is obviously a tough question. And I think it is part of a broader question of conduct taken by someone else where the accused is the passive beneficiary. In other words, the simpler case is where somebody else knocks the witness off and the accused said, "Well, I didn't do anything about it." I suppose that that would be my approach there—if the accused came in and did nothing wrong and the attorney just does an attorney-ish thing that benefits the accused, the accused can say, "Hey, what do I know?" It's a tough call.

Question 1: Essentially, I don't see it as something that is a wrong on behalf of a defense attorney or a wrong on behalf of the defendant to say that if this person were already lawyered-up, let's say the victim,

man or woman, they would go to their lawyer and say, "I don't want to testify," and there would be Fifth Amendment, spousal privilege, all those things. Then you have someone who does not have a lawyer, and you try to get them a lawyer so they know their options. Why does that mean wrongdoing?

Professor Friedman: That's what I was wondering. If it is a plausible Fifth Amendment claim, so there is no wrongdoing, then it is a stronger case for no forfeiture.

There was one question that was asked before, the question about why the rest of the world is not paying attention to the Confrontation Clause. I don't think that is actually so. I think that what is a very fascinating development is that under the European Convention on Human Rights there is a whole jurisprudence on confrontation. Even though the Convention does not use the word *confrontation*, the cases have developed this confrontation right, and what is particularly fascinating about it is that they have begun to impose it on the United Kingdom, which is a signatory. So here we have the United Kingdom, which has to learn about confrontation from a court that sits in France! How is that for backwardness, considering that for hundreds of years, the English proclaimed confrontation to be one of the glories of their system.

Professor Laird Kirkpatick: In the O.J. Simpson case, there were all sorts of statements by Nicole Brown that "O.J.'s beat me," "I'm afraid of O.J.," and "I'm afraid he's going to kill me." All sorts of statements were offered in that case, and the trial judge kept out most of them saying that her statements about fear and so forth weren't relevant in a murder prosecution. If the judge had conducted a preliminary hearing and found that, by a preponderance or clear and convincing evidence, O.J. was a killer, would everything that Nicole Simpson said about him be admissible under your theory?

Professor Friedman: It is a very interesting question because these were statements that were made before the crime itself with which he was charged. So the threshold question, of course, is can those statements be considered to be testimonial? And I think yes, they can, because it is anticipated that if there has been one instance of violence in the domestic relationship, that there are going to be others. So I think I would consider those testimonial, and then the judge could decide, nevertheless, that there has been a forfeiture by O.J. Simpson. What becomes particularly interesting, I suppose, is: Should the prosecution be required to mitigate once state authorities know that she is making these statements? Should they anticipate the possibility of wanting to

use those at a time when she wouldn't be available for cross-examination? Should they anticipate murder? And, of course, in the domestic violence community, the answer is yes. When you have a repeated pattern of violence, then murder is anticipatable. But, I don't know, maybe that is pushing it too far. That's answering your question as if I were a student answering a law school exam, spotting issues, and laying it out without coming down one way or another. Is it testimonial? I say yeah. Can the conduct forfeit it? Yeah, I think so. Should there be a requirement of mitigation by the police, saying, "Geez, she is making these statements. We've got to do something"? I don't know.

Thank you.

CRAWFORD, DAVIS & THE RIGHT OF CONFRONTATION: WHERE DO WE GO FROM HERE?

*Morning Panel Discussion**

Participants: Richard D. Friedman,†
Christopher B. Mueller,‡ and Charles Nesson**

Professor Nesson: In my talk,[1] Richy—which you listened to—I left out a step that's a crucial point on the relationship of empowerment and disempowerment to the hearsay issue. In *Davis*,[2] I think you feel that Justice Scalia was, in a sense, up against a sensibility represented by Justice Ginsburg in the direction of admitting the testimony, and that sensibility prevails in effect in *Davis*.

I'm assuming that the reason Justice Ginsburg would advance that position is based on a premise that she thought she was helping the victims of domestic abuse because she was guarding them against the possibility of intimidation that would lead them not to testify. On that basis, she thinks she's protecting them by, by my lights, disempowering them—leaving them with no ability to call 911 for help without, at the same time, bringing along the full force of prosecution. That seems a very odd position to me. It seems like one that has a rhetorical appeal, that somehow the law is coming to the aid of the poor female victim. But it seems based on a very faulty view, both a faulty view of reality and a faulty view of what's important in the Confrontation Clause.

I was wondering: Do you disagree with that? And if you do disagree with that, how do you deal with it?

Professor Friedman: Well, it's a very important question. I guess I'll answer the question you asked.

Professor Nesson: *[To James Duane]* I'm never gonna live that one down! I'll get you back sometime later! *[Laughter]*

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* This panel discussion took place as part of a symposium hosted by Regent University Law Review on October 14, 2006, at Regent University School of Law.

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1 Charles Nesson, *Solomon's Sword: The Loser Gets Process*, 19 REGENT U. L. REV. 479, 482–83 (2006-2007).

2 Davis v. Washington, 126 S. Ct. 2266 (2006).

Professor Friedman: I don't think I disagree with Justice Ginsburg. I think I'm agnostic on it because in that case, as a lawyer trying to represent a client, and more generally an academic trying to figure out what the Confrontation Clause is about, I think it is a type of landmine. But I think I recognize both sides.

The fact is that in *Davis* and *Hammon*[3] there was an amicus brief by, I believe, fifty-eight domestic violence organizations arguing for admissibility of the evidence. These are organizations coming from the point of view of supporting victims of domestic violence. The easy call is the idea that domestic violence is more easily prosecuted if the statements come in and the complainant does not have to confront the accused, is not subject to cross-examination, and doesn't have to show forfeiture or anything like that.

But then there's the other view as well, which you've just articulated very well, which is: Does this view, combined with certain prosecutorial and no-drop policies, take all power away from the victims, who are predominantly women? I think there's force on both sides. It was clear at argument which side was moving Justice Ginsburg.

Professor Nesson: Yeah.

Professor Friedman: And maybe that is short-sighted. I am not a sociologist. I will say that I am confident that in *Hammon*, the reason Amy Hammon didn't testify was not that she was scared of her husband. She actually did not want a restraining order and said she loved her husband. She did not feel threatened by his presence. I suspect that she made the decision—the type that you're saying—that she recognized her life and the lives of her children would be better off if her husband was not prosecuted. If that was her decision, I think she was right because he lost his job and, as a result, things were bad for the family. She may well have been better off had he not been prosecuted.

At the same time, we have to recognize that domestic violence is a recurrent problem in many circumstances, and that in many cases women will follow the path of least resistance, which is to remain in the situation at their peril. I don't think it's unreasonable for prosecutors to say, "I'm going to prosecute whether the woman wants to or not. My rationale stems from paternalistic concerns and because I have a broader social view in mind—that it's important to be tiger-ish about this crime."

I don't know what the best result is. I'm glad it's not my job to figure out what the best is, but I think it's a very difficult issue.

Professor Nesson: Thank you.

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[3] *Hammon v. Indiana* was the companion case to *Davis*.

Professor Mueller: I just want to comment on one thing, which is by way, I suppose, of asking Rich a question as well. I'm very distressed at the notion that killing or making unavailable a witness forfeits a confrontation right regardless of the purpose or intent of the actor. I'm very disturbed at the idea that we will not give a defendant charged with murder what I will call a fair trial because he's committed the crime that he's charged with. I was uncomfortable with Rich alluding to the *Bourjaily* case.[4] All of us who have studied or taught evidence know that the Supreme Court there said you could count the conspirator statement—Jim, I always have called it "co-conspirator," but I guess I've put one too many syllables into it—as a conspirator statement by looking at the statement itself. I never thought that was right to start with. To carry that doctrine over to "we're going to use the statement to prove the crime that the defendant is charged with committing so that we can admit the statement to convict him of that crime" is pulling too many rabbits out of a hat.[5]

I think there ought to be independent proof that he has done something to put the witness off the stand. If we're going to construe this as an equitable doctrine, it seems to me that the purpose of the conduct of the accused has to have something to do with the operation of the courts. If it doesn't have anything to do with the operation of the courts—the accused is just angry, or a murderer, or committing a bank robbery and kills somebody, and therefore that person can't testify—I don't think that's a good reason to deprive him of a fair trial. I think that's a bad way to go, and I very much hope we don't go in that direction.

Professor Friedman: Well, I think it's a good way to go and I very much hope we *do* go in that direction. I don't have a lot to add beyond that I think *Bourjaily* was rightly decided. It's a logical matter. Just because it happens to be an overlap of issues, or even a complete overlap of issues, I don't think we wipe out the general principle that the court decides threshold issues on its own body of evidence, which is generally unrestrained. I think that approach should apply in this context as well. But I guess I'm saying—

Professor Nesson: But Richy, wait a second, wait a second—

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[4] Bourjaily v. United States, 483 U.S. 171 (1987).

[5] *See* Richard D. Friedman, *Forfeiture of the Confrontation Right After* Crawford *and* Davis, 19 REGENT U. L. REV. 487, 492 (2006-2007) (arguing that there is "no harm done" in using the testimonial statement as evidence of forfeiture).

Professor Friedman: Let me just finish one aspect of this. I'm sorry—

Professor Mueller: Listen to your teacher! *[Laughter]*

Professor Friedman: I will! I will! But first I want to respond. You've got to handle dying declarations.

Professor Mueller: I do it the same way Justice Scalia did it. They're just grandfathered in.

Professor Friedman: Oh, that was something that he threw out because they haven't been able to figure it out yet. But that's not a rationale. What is the rationale?

Professor Mueller: Just because you don't believe in originalism doesn't mean that some of the rest of us can't believe in it, a little bit.

Professor Friedman: Well, you can believe in originalism. That's fine. I still think this is what motivated the courts. I don't think it's particularly good hearsay law. You wind up with a very complex doctrine: when all of a sudden this thing comes in from left field, all of a sudden we have an exception. It makes more sense to say, "The reason why I'm allowing the statement is because I conclude that you killed him," not "The reason I'm allowing this in is because I think it's so reliable because the gates of heaven were open and no one would lie in that situation."[6]

Professor Nesson: If you take the principle of *Crawford*,[7] which says we have to get judges out of the role of making discretionary decisions based on presentations of evidence by prosecutors and police that favor the prosecution and police, you couldn't pick a better example than the judge who admits the evidence in a murder case because the judge has made a decision that the defendant is guilty. You just couldn't pick a better example. Why, when you come to dying declarations, aren't you attacking it from "to whom is the statement made"? If we're talking about dying declarations to cops, you're fine with *Crawford*. They go out, and they should go out. If you're not talking about dying declarations to cops, you're first not talking about a very big problem at all. You're in the realm of the *Crawford* problem which is: What do we do with the non-cop hearsay? That's still something to consider, but I can't see that

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6 *See id.* at 489–90.

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

this is the central problem. What I can see is that forfeiture, like the other weeds of testimononial issues, is going to be used by judges and prosecutors who don't want to change—to rationalize the same kind of stuff they've been doing for years that has made a travesty of the Confrontation Clause and, I must say, led by prosecutorial forces that think somehow you're advancing something by lowering the standards by which we convict people.[8]

Professor Friedman: Even before *Crawford*, I felt that the general testimonial approach works best to the advantage of defendants, which is not my goal. I'm not a defense lawyer as such. I'm an academic. But I think we get a better doctrine if it's simpler.[9] I think that the doctrine is more in accordance with the language of the Confrontation Clause, and its history and purpose, if it's simpler. And that is a doctrine that doesn't admit of exceptions. I don't think you need exceptions, just as we don't have exceptions for the right of trial by jury or the right to counsel. We don't say, "Well, in this case he's really guilty so let's not bother." I think the right to confront witnesses is the same thing.

I think that if we're wondering about the long-term health of the Confrontation Clause, we should eliminate the *sui generis* exception and have a simple edifice that says you have a right to confront which you can forfeit—no exceptions.[10] I think that works best to protect the right, and that it will benefit defendants long-term.

Professor Nesson: That's got about as much content to it as the difference between an exclusion and an exception. What difference whether we call it a forfeiture exception or a forfeiture exclusion? The fact is you're going to admit hearsay under certain circumstances, and the circumstances under which you're going to admit them are the circumstances where the judge has decided that the defendant's guilty.

Professor Mueller: But it's actually worse than that, Rich, I think. I'm sorry. I need to say—I'm one of the guys who signed the amicus brief because Rich was willing to let me sign. And I did not work on it

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[8] *See* Nesson, *supra* note 1, at 482–83.

[9] *See* Richard D. Friedman, Crawford *and* Davis*: A Personal Reflection*, 19 REGENT U. L. REV. 303, 308 (2006-2007) ("I do really believe that there is something very satisfying about a constitutional right that can be expressed in language that a young kid can understand. I think it has a robust quality to it.").

[10] *See* Friedman, *supra* note 5, at 487 ("Notice that there's no room for hearsay exceptions within the doctrine as I've stated it. That is, there is no room for the idea that if a statement falls within a hearsay exception—excited utterance or any other—therefore, it is excepted from the confrontation right. The statement of the confrontation right, as I've given it, is integral; it states the whole doctrine.").

whatsoever, except to kibitz with him a little bit. I don't think he took any of my suggestions, and it's probably a better brief because he didn't.

Professor Friedman: You were my house guest at the time, which is I think how I got you to sign the brief. *[Laughter]*

Professor Mueller: Well, that's true.

Professor Friedman: Poor hospitality, I know—I think it was sitting on your bed. *[Laughter]*

Professor Mueller: All I'm trying to say is that I support the testimonial idea. I think it was a wonderful advance, and we owe Richard a debt of gratitude for it. When I have at him from this side just as Charles is having at him from the other side—there are few people I admire more than Rich for what he's accomplished in this case.

I actually think, Rich, that the idea that this is going to be a simple doctrine when you implement forfeiture and then add on to it the prosecutor's duty to mitigate—and we're going to talk about all kinds of nuances there—this is going to be every bit as complicated as reliability analysis. It's just going in a different direction. We're going to be talking about the relative conduct of the parties, the availability of the evidence, who should have called the witness, who made the witness unavailable, and who was really at fault here. That's going to be, in its way, just as complicated as trying to figure out whether the evidence was reliable. It also goes off in kind of a collateral direction. We're talking about the conduct of the parties instead of focusing on whether we're convicting people on stuff that we can actually trust. I don't think this is going to be a simple solution to a complicated problem. It's going to be a complicated solution to a complicated problem.

Professor Friedman: I might have misstated myself. Let me clarify. I agree absolutely that complicated questions can arise. I think the forfeiture doctrine itself is quite complex. What I meant, though, was that I think that under a robust view of forfeiture, one can state the entirety of the Confrontation Clause doctrine rather simply. The principle is that a testimonial statement cannot be offered for its truth against the accused unless the accused has either had or forfeited an adequate opportunity to confront the witness, which must occur at trial unless the witness is not then available. That's it. No exceptions to that—no room for *Roberts*-types of exceptions to that. I'm saying that the forfeiture approach to the confrontation right is a sturdy edifice which will hold up better than saying that exceptions exist to which no one knows what will happen over time.

I agree that forfeiture is very complex. I agree that, one way or the other, the evidence gets in. But in one way you've advanced the centrality and nobility of the confrontation principle. I don't think there's anybody who wants to exclude the classic dying declarations. I wasn't sure, Charlie, whether you were saying you would exclude dying declaration statements made to a cop.

Professor Nesson: Yes, I would exclude it. I would exclude accusatory statements made to police. Yes, absolutely. Nice and clean—just what you argued for.

Professor Friedman: But the forfeiture principle would apply. For hundreds of years, these statements have come in. Let's put it this way. I knew before *Crawford* that we had to be ready to handle dying declarations. If we got that question and took the view that you take—that a dying declaration made to a cop, because it is accusatory, is barred by the Confrontation Clause if the accused had no opportunity to cross-examine the victim—we would not have gotten the result in *Crawford* or *Hammon*. People would say that it's just not a tolerable theory.

I think an accusation of murder made to a private person by a dying victim is also testimonial. I don't think that it's a situation of: "Jack killed me. I am just telling you that for your own amusement and edification." It's a situation of: "Jack killed me. I want you to pass that on." In both cases it's testimonial, but something else kicks in.

Professor Nesson: Could you see *Fensterer*[11] not as a confrontation problem, but as an expert witness problem? Could you look at *Fensterer* and say, "The problem is, here was an expert who was allowed to testify who demonstrated a total lack of respectable methodology?" Therefore, the problem is one of sufficiency and not one of confrontation. On the other side of that, recognize that when you stand up to deal with the witness who has hurt you, if you can demonstrate that the witness doesn't remember anything, didn't keep any notes, and did a really sloppy job, you've done a pretty good job of cross-examination. It doesn't guarantee that the jury isn't going to convict. That's the sufficiency problem. You would need to exclude the expert, and therefore have a lack of evidence to produce the lack of conviction. Why not see *Fensterer* that way rather than seeing confrontation as requiring more than the ability to face your accuser, ask your accuser questions, and generate any kind of response? Such a response under pressure like that would be revealing of character.

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[11] *See* Delaware v. Fensterer, 474 U.S. 15 (1985).

Professor Mueller: I think I agree with absolutely everything that you've said. All I know is that *Fensterer* is always trotted out as an explanation for why cross-examination was sufficient under the Confrontation Clause. It is the go-to place when you're trying the defendant, and even though you couldn't make any headway with the guy, your right to confront him was adequate.[12] In *Fensterer*, I have to say that I don't remember that the expert did what you say he did, which is to demonstrate a complete disrespect for all underlying methodology. I'm a fan, among other things, of *Daubert*[13] as opposed to *Frye*.[14] I think that judges being more actively involved in appraising the adequacy of science—and under the new, revised version of FRE 702, being more actively involved in appraising the methodology, the application of the methodology, and the sufficiency of the basis—I think that's all to the good. If an expert comes in and says, "I have no recollection what type of test I did here. I just have a feeling that what I found is that this hair was jerked out by force, but if you ask me how I got to that, I wouldn't have a clue," I think the judge under 702 could easily exclude it. What judges often do, as I'm sure we all know, is let it in for what it's worth, hope the jury will do the right thing, and then they grant a judgment of acquittal afterwards. I think in the criminal case, unlike the civil case, judges are almost reluctant to grant a directed verdict of acquittal afterwards. Once they give it to the jury, they're almost committed to let the jury convict the guy. Yes, I would love it if judges were to say that this is just not good enough evidence to send a guy to jail.

Professor Nesson: Thank you.

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[12] For a more in-depth discussion of *Fensterer*, see Christopher B. Mueller, *Cross-Examination Earlier or Later: When Is It Enough to Satisfy* Crawford*?*, 19 REGENT U. L. REV. 319, 344–45 (2006-2007).

[13] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (stressing that the proper inquiry in determining the admissibility of expert testimony under Rule 702 is evidentiary reliability).

[14] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (adopting the "general acceptance" standard for admitting expert testimony), *superseded by rule*, FED. R. EVID. 702, *as recognized in Daubert*, 509 U.S. 579.

CRAWFORD, DAVIS & THE RIGHT OF CONFRONTATION: WHERE DO WE GO FROM HERE?

*Afternoon Panel Discussion**

Participants: Richard D. Friedman,† Laird C. Kirkpatrick,‡ Robert P. Mosteller,** Christopher B. Mueller,†† Roger C. Park,‡‡ and Penny J. White***

Moderated by James J. Duane†††

Professor Duane: You have made it all the way through to the end, to the most exciting part of it all. We'll have an opportunity now for some conversation and dialogue among the members of the panel, and we'll answer some of your questions as well. So if you've got some issue that's of burning significance to you, put your questions to the experts in a suitably leading fashion, and if they agree with you, you can cite the *Regent Law Review* in your next court appearance—show it to the judge. Professor Friedman has asked if he could go first—and of course I said yes—to share a few thoughts that he has been collecting as he listened to some of the others.

Professor Friedman: Thank you. I wanted to thank you all for staying for the entire day. I have just a couple comments on Roger's presentation and a few more on Laird's.

I don't think that willingness to lie when making dying declarations is the most important point regarding the unreliability of dying declarations.[1] And, of course, I was jocular before when I was saying I

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* This panel discussion took place as part of a symposium hosted by Regent University Law Review on October 14, 2006, at Regent University School of Law.

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1 *Cf.* Roger C. Park, *Is Confrontation the Bottom Line?*, 19 REGENT U. L. REV. 459, 464 n.22 (2006-2007) ("A statement about who murdered the declarant is trustworthy, if the declarant believes he is dying, because the declarant isn't afraid of retaliation and has no motive to incriminate anyone except the guilty party.").

would use it as an opportunity to even old scores,[2] but I do agree with Roger that if I knew who had murdered me, I would probably have a deeper grudge against him personally than against anybody else. But I think the key question is: Does the dying person necessarily know who delivered the fatal blow? Often that person does not, so I think willingness to lie is only part of what goes into unreliability.

Also, Roger raised a question concerning my statement that the imminence of death is important under forfeiture theory because if death was imminent when the statement was made, then the state couldn't reasonably have provided an opportunity for cross-examination. But he said, "Then why should the victim's knowledge of imminent death be critical?"[3] and I agree. It shouldn't matter. All I said is that the dying declaration exception *closely* reflects forfeiture theory.[4] It doesn't come out exactly the way it would if I were developing it in accordance with my forfeiture theory. But I think the exception reflects, as Roger put it, a "groping" toward that theory, and I think it's pretty close. I think it comes out pretty closely.

In fact, I think forfeiture better reflects the dying declaration than the stated rationale for the exception. The stated rationale is that the gates of Heaven are about to open, and that nobody would die with a lie upon his lips. But this applies to *anything* said on the verge of death—and we don't have an exception of that sort.

One slightly broader comment on what Roger says about a functional approach:[5] I do agree that there is a value to having a functional approach to what is testimonial, but I think, and Justice Scalia has addressed this, we have to be aware of excess functionality. In other words, I think what we really need to avoid is asking case by case, does the function of the Confrontation Clause get advanced by keeping this out or by letting this piece of evidence in. If it's a case-by-case determination, I think we've thrown the whole thing away, and that I think is what happened under *Roberts*.[6]

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[2] Richard D. Friedman, *Forfeiture of the Confrontation Right After* Crawford *and* Davis, 19 REGENT U. L. REV. 487, 489 (2006-2007) ("For myself, I've always said that if I were in that situation, I'd look at it as an opportunity to even some old scores without adverse consequences!").

[3] *See* Park, *supra* note 1, at 465 n.22 (stating that if forfeiture applied "when the defendant has murdered the declarant," then "it would not matter whether the declarant was aware of the imminence of death").

[4] *See* Friedman, *supra* note 2, at 490–91.

[5] Park, *supra* note 1, at 466–67.

[6] Ohio v. Roberts, 448 U.S. 56 (1980).

Some comments on Laird's presentation. Laird is one of several who have said it was kind of sneaky language in *Davis* about *Roberts*.[7] I don't know; to me, it seemed blatant that the Court went out of its way—and it was very surprising to me that they did this—but they went out of their way to say "*Roberts* is dead, and nontestimonial statements are not covered by the confrontation right." I think that's the proper result. I think that, and I suggested this last night, that the Confrontation Clause, the confrontation right, applies to witnesses. So the question is: was this person acting as a witness in some sense? *Testimony*, as I said, is in many languages just another form of the word for *witness*.[8] Testifying is what witnesses do. I think holding the confrontation right inapplicable to nontestimonial statements is the better result. I think the Confrontation Clause comes out better if it is limited to witnesses because we achieve much more moral clarity.

Laird has put together an impressive list of cases in which *Roberts* theoretically could come to the aid of defendants.[9] But I think the fact is, as a rule, in work-a-day practice, it just doesn't; it just didn't. For in the couple of years between *Crawford* and *Davis*, once a court held that the statement was nontestimonial, most of them would say, "Well, now we still have to apply *Roberts*." And then, surprise, surprise, in almost every one, so far as I'm aware, the court said, "Oh well, it's reliable." And they did this because it's such an easy thing to hold that the statement is reliable. Maybe there were some cases in which *Roberts* caused a statement to be excluded, but there weren't a lot; I know of only one, and that one was dubious anyway.

Now Laird says properly that what we're aware of mainly are the appellate cases.[10] Granted. But the trial courts are not of concern here in any event. Let's think about this, putting habeas cases aside for the moment. *Roberts* could have independent impact in causing an out-of-court statement to be excluded in the trial court only if the rule against hearsay didn't already cause the statement to be excluded. But if the

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[7] Laird C. Kirkpatrick, *Nontestimonial Hearsay After* Crawford, Davis *and* Bockting, 19 REGENT U. L. REV. 367, 368 (2006-2007) ("Justice Scalia, in language so cryptic that it escaped the attention of many readers of the opinion, including the preparer of the headnotes, signaled his view that nontestimonial hearsay was no longer subject to the Sixth Amendment." (footnote omitted)); *see also* James J. Duane, *The Cryptographic Coroner's Report on* Ohio v. Roberts, CRIM. JUST., Fall 2006, at 37, 38 ("The official syllabus to the *Davis* case prepared by the Reporter of Decisions and the West headnotes to the opinion make no mention of *Roberts* at all, much less any mention that *Roberts* was finally overruled in that case. And the lower courts have thus far been almost completely unable to accurately decipher what *Davis* said on that point.").

[8] *See* Richard D. Friedman, Crawford *and* Davis*: A Personal Reflection*, 19 REGENT U. L. REV. 303, 305 (2006-2007).

[9] Kirkpatrick, *supra* note 7, at 370–71 nn.18–32.

[10] *Id.* at 376; *see also* discussion *supra* pp. 509–10.

hearsay rule hasn't caused exclusion, then the statement must be within some exception to the rule. If it is within a "firmly rooted" exception, then that is enough to satisfy *Roberts*; if it isn't within such an exception, then it probably falls within the residual exception, which requires a finding of trustworthiness, and *that* would also suffice for *Roberts*. In other words, *Roberts* could cause exclusion by a trial judge only if she said, "The rule against hearsay doesn't keep this evidence out, but I don't think it should come in because it's too unreliable to satisfy the Confrontation Clause." And that just didn't happen. If a trial court wants to keep evidence out, it can keep it out as hearsay; it doesn't need *Roberts* to keep the evidence out. If the trial court is not inclined to keep it out, *Roberts* is not going to push the court to keep it out, because *Roberts* is just so open-ended. And I think really in all these types of cases—child testimony and statements made to private parties and all that—in many of them, yes, as Laird acknowledges, I would like to see the statement called testimonial. If the statement is called testimonial, then we'll have a hard-edged rule. Until such time, I don't believe that any rule is likely going to keep the evidence out.

Habeas cases are the one situation in which a court conceivably could say, "Well, I don't have any control over the domestic state law of hearsay, but I'm going to keep it out on constitutional grounds." But I don't think there are a lot of habeas cases either in which the courts kept evidence out on *Roberts* grounds. With lab reports, it's just remarkable how much the courts' reaction is simply "Oh, that's reliable," and so the evidence just comes on in.

As far as the statutes that Laird has referred to,[11] I don't think *Roberts* has limited the legislature very much at all because it says in effect, "Find that a particular kind of statement is reliable, and then it can come in."

I think that real defense of the confrontation right is much better if we have a clear principle, and that principle is: the confrontation right applies to testimonial statements. I was very glad to hear Laird talk about law reform efforts because if those who agree with us about what the results should be don't have confidence that the Supreme Court and the lower courts are going to come up with a robust definition of testimonial, then I think it's perfectly valid to have evidentiary law, either in the rules or by statutes, to keep out categories of evidence that we think should be kept out. So I think it would be good to get that kind of legislation through the legislature.

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[11] Kirkpatrick, *supra* note 7, at 376–78.

On the history, we debated this in Brooklyn, but I don't find Tom Davies's argument persuasive.[12] At the time of the Confrontation Clause, there really wasn't a lot of hearsay law as such. Courts often said that hearsay is no evidence, but there wasn't even a real definition of what hearsay is until after 1800. And in any event, the understanding of what hearsay was at the time of the framing clearly didn't apply to written statements.

And there is lots of hearsay that did come in despite the articulation of the rule against hearsay. It was really quite unformed. Long before the time of the Confrontation Clause, there was a fundamental principle as to how witnesses testify: face to face, brow to frowning brow. This was established long before the Confrontation Clause wrote it into our Constitution.

Thanks very much.

Professor Park: Thank you. Rich and I agree on so many things that it's sort of like talking about the difference between Methodists and Presbyterians, just a little bit of difference on emphasis. But I would say that the fact that the declarant might be wrong in naming who killed him doesn't mean that the judges didn't take into account the lack of a motive to lie in deciding that the exception was a good idea.

On the sneaky point, I think that both Laird and Rich are right. I think Justice Scalia went out of his way to get rid of *Roberts*, and I think he did it in a sneaky fashion.

Professor Kirkpatrick: I would feel a lot more comfortable if the Supreme Court, in adopting the testimonial approach to confrontation advocated by Rich, had also adopted Rich's definition of which hearsay is "testimonial." If it ultimately does so, some of the concerns I mentioned in my talk will be alleviated. But only time and future cases will answer this question.

We know that the Solicitor General and others will likely be arguing in opposition to Rich that the Confrontation Clause shouldn't apply to hearsay statements made in private settings.

As to whether *Roberts* provides much protection against nontestimonial hearsay, it is true that most reported cases applying *Roberts* have found its requirements to be satisfied. But I think the case law can be misleading as a measure of the impact of *Roberts*, because only a defendant can appeal. Thus the cases we see in the appellate reports are cases where the hearsay was admitted under *Roberts*, the

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[12] *See generally* Thomas Y. Davies, *Not "the Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the* Crawford-Davis *"Testimonial" Formulation of the Scope of the Original Confrontation Right*, 15 J.L. & POL'Y (forthcoming 2007).

defendant appealed, and the appellate court affirmed the trial judge's ruling. What we don't see are cases where the trial court excluded the hearsay as unreliable under *Roberts*, or required a declarant to take the stand rather than admitting the out-of-court statement because of *Roberts*. We also don't see the cases where the prosecutor refrained from offering a hearsay statement of questionable reliability because of *Roberts*. It would take an empirical study, rather than merely a review of the appellate case law, to fairly assess the impact of *Roberts*, particularly in the area of child sexual abuse prosecutions.

Roberts has played an important role in providing a constitutional backstop against unreliable hearsay, even if it fits a hearsay exception. Remember that in *Idaho v. Wright*, the Idaho Supreme Court essentially said: "We think the child's statements are reliable enough to satisfy the catchall exception to the hearsay rule, but we don't think they are reliable enough to satisfy the Confrontation Clause of the Sixth Amendment."[13] And the U.S. Supreme Court agreed that the statements violated the Confrontation Clause, despite being admissible as a matter of state evidence law.[14] So for more than twenty-five years, *Roberts* has played an important role as a constitutional safeguard. But if the dictum in *Davis* becomes law, and *Roberts* is indeed dead, there will be no Sixth Amendment protection at all against nontestimonial hearsay, no matter how unreliable it may be and no matter how much a defendant has a legitimate need to cross-examine the declarant.[15]

Professor Mueller: It seems to me that there are actually three areas in which *Roberts* could continue to play a constructive role. They are the three biggest hearsay exceptions that are not firmly rooted. They are the catchall exception, the special rifle shot exception for child victim hearsay, and also the against-interest exception in a private party setting. And those are three areas in which you could very readily imagine that you would, number one, want some kind of a constitutional standard to apply in connection with state convictions and, number two, you would want some kind of a background constitutional value in case an analysis under those exceptions does not yield an end result you can live with.

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[13] 775 P.2d 1224, 1226–27 (Idaho 1989) ("The hearsay rules and the Confrontation Clause have similar policy objectives. However, they are not coextensive. Some out-of-court declarations which are admissible under hearsay exceptions may violate confrontation rights.").

[14] 497 U.S. 805 (1990).

[15] *See* Whorton v. Bockting, No. 05-595, 2007 WL 597530 (U.S. Feb. 28, 2007) (stating that there is no constitutional protection against nontestimonial hearsay); *see also* Kirkpatrick, *supra* note 7, at 369–70 (discussing the *Bockting* case).

And so, Rich, it seems to me that you have very often said that you think the Confrontation Clause will play a better role if we have something clean and simple, and I guess I'm going to reiterate that I don't think you can have something as clean and simple as you want to make it. And we don't know where we are going to wind up with the coverage of testimonial statements, but we have, whatever it is, two and a half years worth of cases that say, with only one exception that I know of, that the only time statements are testimonial is when they are made to police. You have a huge number of accusatory statements that are made in private settings that so far courts—the only one exception that I can think of is an Illinois case[16]—have said are not testimonial. So if the present trend continues, if there's not a complete reversal of that trend, there is going to be a large body of hearsay that, to use Bob's preferred term, contains accusatory material, and yet is outside the testimonial category.

Professor Friedman: I certainly agree with Laird that it would be better if the Supreme Court agrees with me. I think that would be a good result. But as far as simplicity and cleanness, forfeiture is going to be complicated. I do think that the affirmative command of the Confrontation Clause can be stated pretty crisply, and I have tried to do that today in a relatively simple definition of *testimonial* that the Court could adopt: A testimonial statement may be introduced against an accused only if he has had, or waived, or forfeited an opportunity to confront the witness, which must occur at trial unless the witness is not then available. We are debating an academic point, but if the Court were to say, "Well, testimonial statements and some nontestimonial statements are covered," then I think that makes it more complicated.

So Chris, you say that only one case that you know of treats a statement made in a private setting as testimonial. We discussed this last night. I thought there were more, but I certainly acknowledge that the vast majority of the courts have found the other way. Well, you know, I've got to say, even now most of the courts are still fighting a rear-guard action against *Crawford*. They don't still quite believe it. I think something quite dramatic is changing, and they are regarding their job as trying to figure out ways to say things that will allow them to keep on doing what they were doing before. And that is one of the encouraging things to come out of *Davis* and *Hammon*, that the end result in *Hammon* anyway, really stops some of these lower courts from doing what they have been doing.

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[16] *In re* E.H., 823 N.E.2d 1029 (Ill. App. Ct. 2005), *vacated*, No. 10020, 2006 WL 3741951 (Ill. Dec. 31, 2006).

But you know what, if these lower courts are going to be that constrained or stingy in calling something testimonial, I think that the idea that they are then going to say, "Oh, but those statements are actually unreliable and shouldn't be allowed in," is just unimaginable really. In fact, many of the opinions—let's take lab reports as a prime example—what you see oozing into the opinion is reliability talk. They can't get out of the habit of talking about reliability because they're so used to it. Roger Park, one of the great evidence scholars of our time, can't get out of the habit of talking about reliability in the context of—

Professor Park: Not on a case-by-case basis.

Professor Friedman: I know. Not on a case-by-case basis. You don't do it on a case-by-case basis because you're much more subtle than most of the courts. But most courts, they talk about why lab reports have to come in. And basically, they are saying these reports are highly reliable. Sometimes they goof and say that explicitly, but sometimes you just read between the lines. So the idea that if *Roberts* were there, that all of a sudden these courts would say, "Ah, it's unreliable," when they didn't before *Crawford*—I don't see it.

Professor Mueller: Well, *Roberts* is at least a bit of a less blunt instrument than the testimonial category. It does allow you to distinguish among different statements of similar kinds. And I know you're not in favor of any kind of reliability analysis, but we have been doing that as a judicial system in the Anglo-American tradition for 200 years. I don't blame courts for being a little bit reluctant to say, "We don't know how to do that. We've never done it right. It's been wrong from the beginning." I don't feel that it's been as much a disaster myself as you clearly feel it has been.

We have a series of exceptions. They are not perfect—the dying declaration exception being one of the least perfect. But we have criteria that we have some faith in that have worked for a long time, and one of the things that bothered me some in Scalia's position in *Crawford* is that he was so purposefully destructive of every approach to applying the *Roberts* doctrine that I always thought that he killed more than he should have tried to kill. I am not as persuaded as he is, and perhaps not as persuaded as Rich is, that judicial efforts to assess the reliability of particular statements by reference either to criteria of exceptions or to a more general standard is quite as disastrous as that. I actually—well, I should stop. I want to ask Penny a question because she said something very provocative, but you go ahead.

Professor White: I wanted to say something about judges. My role in *Crawford* for the last three years has been to go to about twelve judicial conferences and try to help these judges who must make these decisions like this *[snapping fingers]*, make them correctly. And I do think that there is a great majority of judges who want to get it right. And I remember what we told them. We took *Crawford* and we took all the non-definitions of testimonial, all the phrases that Justice Scalia put in there: statements that may lead an objective person to think it would be used prosecutorially, *ex parte* affidavits, everything that he said about what might be included in the concept of testimonial statements. There were about twelve different things you could pull out of the opinion, and we said, "Okay, focus on these." The trial judges are in the trenches and they are looking at these guideposts, but most trial judges are very reticent to make law in this age of "let's attack activist judges."

So they are going to go with what's defined and leave it to the appellate courts, in most states their highest court, to make the law if they are going to go beyond the four corners of *Crawford*. So what I saw trial judges trying to do was maybe oversimplify it, to create cubby holes out of *Crawford*, and try to stick the statement into a cubby hole. And if it didn't fit in a cubby hole, as in Tennessee, my state, for example, the court said we are going to continue to apply *Ohio v. Roberts* for everything else.

Well, then along comes *Hammon* and *Davis* and we get this other slice of the definition. And so now I see judges reticent to say "Well, private statements—we don't have any examples here. We got Sylvia Crawford talking to the police, we got Hammon, Davis, these statements are all made to agents." So in the trenches, judges who are trying to do what the law requires them to do, which is to rule based upon precedent and not make new law, are waiting for the higher courts to decide what that is. I think many of them are doing as well as we can expect them to do.

Professor Friedman: I take that point. I don't mean to suggest bad faith on the part of most judges. I just do think that the orientation among many judges—particularly in the domestic violence context—is that they are used to their mode of operation. I guess I don't have anything terribly against judges assessing reliability for some purpose; I just don't think it has anything to do with what the confrontation right is all about. And I guess I disagree with Chris to some extent; I don't think *Roberts* was working. I mean, *Roberts* was what produced the result in the Washington Supreme Court in *Crawford*[17] and the Indiana Supreme

[17] State v. Crawford, 54 P.3d 656 (Wash. 2002).

Court in *Hammon*,[18] and *Roberts* is what produced all these cases in which autopsies can come in and lab reports without witnesses. But it wasn't articulating what the Confrontation Clause was about, and it wasn't articulating a principle anyone could understand except: "Uh, it looks like it's accurate, and so it comes in." The whole right, it just disappeared.

Professor Mueller: I agree with you that *Roberts* was not working very well. I'm a little bit like Laird I suppose on this point: it wasn't a very good instrument, but it's better than no instrument at all. I guess that's where I'm coming out. What I really wanted to ask Penny, because it's so interesting and because it's so beyond my familiarity, is what is the big thing that stops confrontation from playing a huge role in capital sentencing? Is it a concern over cost? Or is it a concern that if you apply confrontation to the prosecutor, then you have a similar high evidentiary standard that applies to the defense, so you'll get less information? What is it that stops the last step from being taken?

Professor White: I don't think it's the latter. Although some folks would like to suggest that applying a high standard will cut back on mitigating evidence, there is a constitutional principle that would prohibit that from happening. I think it's that we still harbor the misbelief that more is better, and that more is quantity, not quality. And I just think that it's easy. There is the *Williams*[19] decision out there, and a judge can just latch on to it and say, "Well, that's the precedent." And *Williams* has never been reinterpreted by the Supreme Court following the *Apprendi* line of cases. So I just think it's the simplest approach. Plus, many judges also have the legislative endorsement of *Williams* by the multitude of statutes, including the Federal Death Penalty, which say that not even the rules of evidence apply in sentencing.

Professor Mosteller: I am going to speak on a different point, and it's about the future. When you look at the purpose language in *Davis*, there is a dichotomy between forward looking, which is not testimonial, and backward looking, which is testimonial: forward looking in the sense of an ongoing emergency, backward looking in the sense of establishing past facts for the purpose of potential use at trial.

In looking at some children's cases I've seen lately, which may be resolved as to confrontation by the private/public division, there are discussions about purposes that are not testimonial that would also be backward looking. There are more than two purposes in the world. When

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[18] Hammon v. State, 809 N.E.2d 945 (Ind. 2004).

[19] Williams v. New York, 337 U.S. 241 (1949).

we're talking about police, it seems like the only purpose the police might be about that's not testimonial is something that is an ongoing emergency. Let's assume that there's a possibility of a statement to a private individual being testimonial.

Consider a medical purpose. A medical statement can be very backward looking and still be taken for the purpose to determine medical care.

If governmental agents are covered in addition to police, it may be possible that social workers who have the job of taking care of the health and welfare of the children may be able to develop statements that are not testimonial in the sense that they are not for the purpose of law enforcement. They may also be very backward looking.

It has appeared to me that, at least in some courts, there's a potential for an avoidance of testimonial statements by the handing off of certain kinds of initial investigations to people who are not in law enforcement and for whom the purpose will be something other than law enforcement. Then if the statement is used later for trial as an incidental purpose, it may not be covered as testimonial.

I don't know if that will occur, but as I was looking through a number of cases, I suddenly realized that in *Davis* there were only two purposes. They were kind of neat: forward looking is good, backward looking is bad. When you think about the other potential purposes that might be out there, it may be that there will be a number of situations that are quite backward looking and also will be quite useful for the prosecution, but were created for a different purpose than prosecution.

Those types of developments are a potential for an impact on the purpose language of *Davis*, which seemed to me as pernicious from my biases. In any case, this is certainly interesting and certainly something to keep your eye on. I hadn't really thought about it until I was looking at all the children's cases.

Purpose also applies to parents. Parents, in addition to being private, are doing something other than purposeful development of testimony. So I saw at least three different purposes used by three different groups—doctors, social workers, and parents—and the courts were starting to say that maybe all of those were not testimonial. So in terms of thinking into the future and possibilities, I wanted to throw out these developments.

Professor Mueller: I think that's exactly what's happening. I mean, I read the cases exactly the same way. You just see case after case in which there is a child talking to a doctor or to a family member and somebody says, "Well, this is testimonial," but the answer is "No, they are concerned with the well-being of the child and trying to treat the child, which is not testimonial." They are looking specifically at the

purpose of the parent and the doctors and the child's medical statements, and they're concluding it's child-victim hearsay or an excited utterance. That's exactly what the cases are doing.

Professor Duane: I agree. It's further evidence of what you, Professor Mosteller, call the "pernicious" implications, possibly, of the Supreme Court's recent focus: in part, on the attitude and perception of the declarant and what she was thinking when she made her remarks. I would be interested in hearing the panel's reaction to this fact pattern. There was a recent case decided by the U.S. Court of Appeals in which the government knowingly procured the assistance of an undercover informant to assist them with an investigation. They gave him a recording device, a wire to wear. They gave him a list of questions to ask, and they told him who to go talk to. And at the government's explicit direction, this informant wearing the wire went and talked to these other people who thought that they were talking to a friend. And when these recorded statements were later offered into evidence against a third individual at his federal criminal trial, he objected on hearsay grounds; he objected on confrontation grounds; and the U.S. Court of Appeals summarily affirmed the trial judge's ruling admitting the evidence, saying, "Well, *Crawford* doesn't apply. This isn't testimonial because the guy who was making the comment didn't know he was talking to a police agent. He thought it was just what *Crawford* called a 'casual remark' overheard by an acquaintance," which is faithful to a couple of lines of *Crawford* taken out of context, but I think it does violence to the other lines of *Crawford* where the Supreme Court spoke so eloquently about the Framers' supposedly resolute concern against allowing the government to knowingly participate in the creation of evidence to be used at trial.

Professor Friedman: That's very interesting. I hadn't known about a case just like that, but I think that—

Professor Duane: Well, you can find a citation to it in a footnote in the next issue of the *Regent Law Review*.[20]

Professor Friedman: I'll look forward to it. I've been expecting cases like that because there clearly is the possibility of abuse, and I think it probably has to be addressed by a doctrine of estoppel, somewhat similar to forfeiture. In fact, at the Brooklyn conference, one speaker there said that we shouldn't be talking about forfeiture, we should be talking about estoppel—estoppel of the defendant—and maybe

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[20] *See* United States v. Johnson, 440 F.3d 832 (6th Cir. 2006).

the prosecution should be estopped too in certain circumstances where there is some sort of manipulation.[21] The difficulty—and I don't mean that it should prevent a doctrine of estoppel of the prosecution from being adopted, it just makes the theory more complicated—is that most people support the doctrine by which statements of conspirators are admissible. (Well, Charlie Nesson is not here, so maybe he wouldn't.) And I think it became quite clear in the argument of *Crawford* that they weren't going to go for any theory under which those didn't come in, and one of the advantages of the declarant orientation is that those statements seem quite easily to be nontestimonial because if a statement is truly in support of a conspiracy, say to an undercover informant, then the speaker doesn't have any testimonial anticipation. But maybe we can distinguish those cases and the type of cases that James mentioned just on the estoppel theory. In other words, it's okay for the government to infiltrate people who are doing bad things and to get them to say things that put the finger on each other but it's not okay for the government to get people who are just going about their business, not doing anything bad, to act as witnesses without their knowledge and perhaps against their will. So that may be the proper approach.

Professor Duane: Very interesting. I apologize for interrupting this freeflowing dialogue, perhaps only temporarily, but we've been promising our guests all day long an opportunity to pose a few questions to our panel of experts, so let's give them that chance now. Any of you have any comments, questions, observations?

Question 1: First I just want to say thank you. It has been a wonderful day, and last night as well. Listening to you all speak has been an amazing opportunity. My question goes a little bit to what you were saying, Mr. Friedman, about the amicus brief in *Hammon*. And also, Professor Wagner approached the issue of how child abuse cases and domestic violence cases are a different kind of criminal case. What is your opinion about whether there should be some accommodation made in these instances other than the fact that they are possibly allowed to testify from a remote video theater or from behind a screen? But also, maybe it goes to the question of what constitutes unavailability of the witness? So I just wanted to hear your thoughts on that. Thank you.

Professor Friedman: Well, I certainly—and thank you for your comments—I certainly don't think there are different standards that

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[21] *See* James Flanagan, *Foreshadowing the Future of Forfeiture/Estoppel by Wrongdoing:* Davis v. Washington *and the Necessity of the Defendant's Intent to Intimidate the Witness*, 15 J.L. & POL'Y (forthcoming 2007).

apply by virtue of the fact that it's, say, a domestic violence case. Justice Scalia made some withering comments to that effect during the argument. I do think that intimidation is a concern in domestic violence cases with particular frequency, and I think that the proper approach is to apply forfeiture to them. So as far as unavailability, forfeiture only applies if the witness is unavailable, and unwillingness to testify is a form of unavailability. If the reason the witness is unavailable is because of the accused's wrongdoing, then forfeiture is possible. I think that forfeiture needs to be proved and not assumed, but I think it's a particularly important issue in the areas of domestic violence and with child witnesses.

Professor Mosteller: With respect to child abuse, I've done a fair amount of research in the area and I've written an article about the Confrontation Clause in that area.[22] One perspective on the Confrontation Clause is that it should be a "get out of jail free" card for the defendant. Another is that it ought to be an incentive to create confrontation. I want to highlight a set of experiences I've seen. Oregon has a hearsay exception that basically admits any statement by a child in a sexual abuse case—any statement—as long as the child testifies.[23] As a result, prosecutors in Oregon spend a lot of time trying to get children able to testify.

It has been my reaction when I've read cases in which it seems advantageous to prosecutors not to get children to testify, that the children tend to be unavailable more than in other situations. I'm not trying to say there are not situations in which children are unable to testify, but I think with a lot of work children can be helped to be able to testify in the courtroom.

One of the things that happened after *Maryland v. Craig*[24] was that there were fewer cases of children testifying by video link than had been expected, and most people in the field believe it was because prosecutors came to the conclusion that remote TV was less effective in getting convictions. So there was a tendency to work to secure direct testimony. I've spent time talking with prosecutors, and many of those who work mostly with children spend a heck of a lot of time empowering the children.

I'm not using empower in an exact sense, but testimony does that. Lots of different things happen when children testify, but for some children, the ability to testify, the ability to go into that courtroom and to

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[22] *See* Robert Mosteller, Crawford's *Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411 (2005).

[23] OR. R. EVID. 803(18a)(b) (OR. REV. STAT. § 40.460(18a)(b) (2005)).

[24] 497 U.S. 836 (1990).

be able to talk about the abuse, is in the end an empowering event. But the effect isn't certain. If the child "wins," it's an empowering event; if the child is thought badly of, it's a harmful event. One of the other things that is the most harmful to the kid is the lack of mom's support. At least some studies have suggested that the mom's support is more important than almost anything else.

So I want us to think about the Confrontation Clause as a way to get confrontation happening as opposed to a way to exclude hearsay. At least one of the advantages in having a more vigorous Confrontation Clause is that more people might testify in court. As a result, defendants might lose more of the time. So confrontation might be bad for defendants, but it's better for our system of justice. If we have a doctrine that is vibrant, and if it creates the right kind of incentives, the result is that people appear in the courtroom. Folks who are making the accusations make them to the face of the individual, the defendant gets to cross-examine, and then the jury decides the case on the basis of the best evidence.

I think there are some ways in which there can be multiple benefits. In a state like Oregon, which has a hearsay rule that admits any statement of a child in a sexual abuse case if the child testifies, there is an actual experiment. Tom Lininger, a law professor from Oregon, has written some articles which reflect something of the perspective that encouraging confrontation can be consistent with effective prosecution.[25] I suspect he has been influenced by what he has seen in that state in children's cases—both goals can be accomplished.

Professor Friedman: Can I just add: I agree absolutely with what Bob said. I mean, it's a very important point and it applies not only to children but to domestic violence victims as well. In fact, in arguing *Hammon*, one of the fun things about preparing that case was the amount of information I could find on the web about police departments and domestic violence organizations and first responders. I just found out all their protocols and a lot of it went into my briefs. One of the *amici* against us was Cook County, Illinois, which had its own brief saying that the world is going to end for domestic violence prosecution if the states

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[25] *See* Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 306–10 (2006) (arguing to maintain unavailability preference for nontestimonial hearsay to encourage confrontation); Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353 (2005) (attempting to modify cross-examination so as to reduce victim's anxiety while maintaining defendant's confrontation rights); Tom Lininger, *Yes, Virginia, There Is a Confrontation Clause*, 71 BROOK. L. REV. 401, 408–09 (2005) (arguing that prosecutors should focus on facilitating confrontation rather than arguing for its elimination); Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 784–97 (2005) (proposing additional ways to allow confrontation before trial through the expansion of preliminary hearings, the creation of new special hearings, and the use of depositions).

lose these cases. Cook County has a program that they're very proud of called "Target Abuser Call," in which they bring victims to court. They say they get eighty percent of them there, a very high percentage of victims testifying, a high conviction rate, and they keep them safe. But it costs money. And I really felt—I tried to make this point—that there was a good chance that domestic violence prosecution in this nation may really have been improved along the lines that Bob was saying if Davis had won. Because the message that would have gone out from the Supreme Court, and then from every prosecutor's office in the country to every legislature, was that the Supreme Court really means business. We've got to put more money into domestic violence prosecutions in terms of persuading women to come and testify and in terms of protecting them. I think it would have been very dramatic if Davis had won.

Question 2: I just had a follow-up question to Professor Mosteller regarding that Oregon law. What would you feel about a federal rule or an addition to the federal rules, that creates sort of a blanket exception for hearsay where, let's say, a child is under five years old, or a child is under seven years old, or whatever psychologists decide is the point at which the cognitive abilities of a child have not fully developed? There's really not a point to having confrontation where there is sexual abuse and the child is under a certain age because it's not hard for a defendant's lawyer to get up and fluster this child and get him to contradict himself and to make it look as though everything that he'd said didn't really happen, because children can at the same time, as I'm sure you know, think that two plus two can equal four and five. So it doesn't seem to me that the right to confront a child that young really serves any purpose. What about just creating a blanket exception for children under a certain age where the right to confrontation is tossed out the window and another hearsay exception is allowed?

Professor Mosteller: I have trouble finding the justification for the blanket exception that admits hearsay for very young children. I know that children aren't supposed to be full-fledged witnesses, at least under some perspectives they aren't supposed to be. However, if you read the cases, a question like "What happened to you?" produces the answer "Stacy hit me right here *[pointing to forehead]*" by a 29-month old. It seems like an accusation. It seems like something significant.

Now my question is, did the child really say that? Or is that a manipulation of the child's words? When the child is there in the courtroom, we can get a view of what is possible and how the statement

squares up. If you look at *Idaho v. Wright*,[26] the statement that the doctor was making that Laird quoted, there is almost nothing in the excluded statement about what the child actually said. It's the doctor's summary. The child in that case is two-and-a-half years old. How much of the statement was what the child said? How much did the doctor pull out of the child? So that's one justification for wanting the child to testify.

Now, what's going to happen in front of the jury? I think cross-examining children is hard as heck. I've seen almost nobody that can do it well. If the defense attorney beats up on the child, it does no good at all. If you can't run circles around a child using age-inappropriate language, then you're pretty poor.

So the ability to cross-examine may not get you very much, and people may argue about it being ineffective cross-examination. They have a point. But I have some trouble saying there is no need to cross-examine if the words come in with a very adult meaning: "Stacy hit me here." I've got "Stacy hit me here" coming in to prove that Stacy is the person who hit me here. The only accusation that Stacy hit the child comes from the child. We should try to help that child come into the courtroom in order to hear what the child would say or not say there. Then we've learned something. I think you should bring in both the hearsay statement and the child's statement.

I've met with some defense attorneys who try to cross-examine children, and they really do say you turn the rules on their head. The best I've personally talked to is a lawyer in Oregon who basically said, "If my whole point is that it was all suggestive and I do a suggestive cross-examination in the courtroom, what have I accomplished? Absolutely nothing." So this person was very gentle. There are a whole bunch of issues about cross-examining children in the courtroom. Can a defense attorney ever do it well? I think that about ninety-five percent will look awful doing it. I think in fact, in most situations, if the child testifies, not much will get accomplished on cross-examination for the defense.

But I have some trouble when the child's statement comes in for the purpose of doing exactly what it is intended to do—that is, to convict a guy on the basis of a very focused accusation—when we let this hearsay in without doing our best to get the surrounding information.

Just one other thing: the possibility of revealing adult manipulation is not a new idea. I was reading something about one of the cases that was cited by the U.S. Supreme Court, the case of *King v. Braiser*.[27] In one of the treatises cited, Lord Hale basically said that we need children to testify even without being under oath because if the mother tells us

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[26] 497 U.S. 805 (1990).

[27] 168 Eng. Rep. 202 (K.B. 1779).

what the child said, we'll only have the word of the mother about what was said. It may be that she is not saying it exactly like what the child said. Being able to compare what the child will say in the courtroom with what the child is supposed to have said outside the courtroom allows the jury to figure it all out. Let the jury figure it all out. Let the statement of the child in—and potentially convict the accused—but we've got a richer mix.

If we can figure out a way to get a richer mix, then I think we've accomplished a little something here. We can't accomplish perfection in the cross-examination of this individual because crossing the child is one of the toughest things that any defense attorney could ever accomplish. But I think a blanket exception takes us in the wrong direction.

Professor White: Let me add a short comment in response to the assertion that the right to confront a child victim does not serve any purpose: the defendant just might be innocent. And many of these child sexual abuse cases have no physical evidence. I have a client serving forty-eight years in the penitentiary for a nonphysical-evidence crime based upon the testimony of a department of social services worker and an ex-wife. The defendant just might be innocent. So I don't think that we can say that there is no purpose or no good gained from having the actual victim there on the stand subject to cross-examination. I mean, it would be a simpler case if there was always physical evidence: if there was a bruise, if in a sexual case there was physical evidence. But given the expansive definition of rape and the expansive definition of sexual battery, there may be no physical evidence. There may only be testimony. And we do have the presumption of innocence and the burden of proof rests upon the state. So that's something I don't think we should lose sight of. There are innocent individuals charged with heinous, heinous offenses.

Professor Friedman: This isn't part of your question, but I wonder if those who have had experience in these cases can help out. It seems to me that probably cross-examining a child in this context tends to be different from cross-examining an adult in this respect. With an adult, what you hope to do is: okay, you say X right, now I'm going to get you to say Y, and then I'm going to show that X and Y are very incompatible, maybe logically incompatible, and at least very unlikely. It seems to me that with children, usually if you try to do anything like that, it's a flop. And the most you can do is reveal the child's cognitive limitations. And maybe the jury has a sense of that ahead of time, maybe not. But it seems to me that with a child, cross-examination has to be gentle, in part because you can't have the rigorous logical testing. It's

more just trying to show in general that this child is not a reliable truth-telling machine.

Professor Mosteller: That's true occasionally. The one person who did what sounded to me to be a wonderful examination, a trial lawyer from Oregon, had the theory that the child was right that abuse happened but that another person was the abuser. She was arguing that there was a reason for the child to place the blame on a certain individual.

Lots of these cases come out of tumultuous family situations; lots of times the abuse is true, but there's also a bias by an adult. The reason the charge of abuse surfaced in this case was that the mother was charged with burglarizing the alleged abuser's apartment. So the whole point of the examination was a single question—the lawyer spent one day getting to the question she wanted to ask. The reason she spent a day getting there was to get the child to talk without clamming up. Interestingly, she said that prosecutors and judges are so interested in defense lawyers not being mean to a child that as long as you are kind to the child, you can ask about lots of things. And her sense was that something awful did happen because every time she led the child to a certain room in the house with her questions, the child would just clam up.

What she ultimately got to was that the first time that the child supposedly told her mother about the abuse was when they were driving away from the house after the mother committed the burglary. The abuse never came out until that point. And this was the first time that she and her mother ever had the conversation about it. The defense attorney's whole theory was generated at that point, and the corroboration of the theory was that the story had never been told to mom before the burglary had taken place. That was something the child was able to tell the cross-examiner. She got one actual answer to an important question.

But a lot of times I think I would agree with your point, Rich. I think it would be a very good point to show what limited kind of information the child can recall; to show what the child can remember; to show how reasonable it was for this to have been the story; and maybe some other logical things that children would likely say.

Question 3: First of all, I am also tremendously honored to have you all here. I just wanted to focus my question specifically to Professor Friedman and those who are opposed to Professor Friedman on forfeiture—

Professor Friedman: That is everybody.

Question 3: So I guess the entire panel in some sense. It seems like everybody up until this point has talked a lot about the mens rea that is associated with forfeiture and less has been said about the actus reus. And I guess one of the reasons why I bring it up is because I feel that if a judge is determining what the actus reus is, then in order to have a forfeiture, I think you run into problems when a judge is trying to summarily determine whether that person has waived it or not.

For example, take a state that refuses to recognize the *Redline* limitation to felony murder.[28] How is a judge to decide the forfeiture question if a robber walks into a bank, holds up the bank teller, a policeman breaks in, and the robber runs out the back door, and the police officer shoots at the robber but instead kills the teller? How does forfeiture apply? I mean, in other words, the actual act of the bank robber was no less wrong, but has he actually forfeited his right to confrontation because the act facilitated the chain of events that led to the lack of confrontation?

Professor Friedman: So, in other words, before the bank teller got shot, she made some kind of testimonial statement?

Question 3: Right. The officer walks in and she says, "Hey, he's the one." And as the bank robber is running out, the police officer draws his weapon and shoots.

Professor Friedman: That's a great exam question. I don't have any strong view on that. That's very interesting because clearly, most people here would say that there can't be forfeiture because the primary intent was not to render the person unavailable as a witness—that wasn't the motivation. For me, it's a closer call because I don't think that motivation that way is essential. On the other hand, there wasn't even the intent to render the person dead. So I guess my inclination would be to say no forfeiture, but that is a very interesting hypothetical which I think is close to the line. I might use that if you don't mind.

Professor Mosteller: I want to respond to a slightly different situation, but to tell you why I'm worried about forfeiture and want to have some restrictions on it. My concern comes from child abuse cases. Is it possible that the reason the child is not testifying is because of the abusive act by the defendant? If you don't have to show an intent to make the witness unavailable by the wrongful act, and you make forfeiture very broad, it will be relatively easy to find.

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[28] *See* Commonwealth v. Redline, 137 A.2d 472 (Pa. 1958).

I'm interested in trying to set up barriers that are difficult for judges to breach when they are deciding forfeiture. Otherwise what we may get is testimony by an expert that the abuse made the child unavailable to testify, and that if she testified, it would be permanently damaging to her. Do you think that evidence might be forthcoming? I suspect it might be if that testimony would facilitate the ability to bring in the hearsay. So I worry about setting up easy barriers for judges to go across. Doing so would run counter to what I said about trying to bring more people in to court to testify.

In a death case, forfeiture is not so flexible. There is no way to manipulate unavailability. But if we are talking about a live witness, who may or may not be available, it's just a step from what has happened before. In the case of *Ohio v. Roberts*,[29] the prosecutors didn't look very hard, it seemed to me, for a witness who had gone out to California and become a hippie. If they hadn't had her preliminary hearing testimony in "the bank," I bet they would have looked about ten times harder. It's just human nature that if you need to get a person to testify, then you're going to work harder at it than if you don't care. I worry about an easy set of decisions that a judge can make based on expert testimony that will establish forfeiture so that the witness is unavailable and as a result the hearsay statements of that person can come in.

In a death case, if you want a broad forfeiture doctrine and can figure out a doctrine to cabin it to death cases, I don't have problems. If someone was shot and is dead, there is little manipulation possible. But a broad forfeiture doctrine doesn't stay put with death cases. It goes into other areas. That's the reason that I worry about tearing down the barrier with respect to the easiest case—the murder case. I thought the best rhetorical device of Justice Scalia in *Crawford* was that we do not deny the right to trial by jury because a judge makes the decision that the defendant is guilty. Similarly, under forfeiture, you shouldn't be able to deny the right to cross-examination and to confrontation, which might have been the essence of the defendant's jury trial, because a judge makes exactly the same kind of decision but just puts a different legal label on it.

So the more amorphous the forfeiture doctrine is, the more I worry. The chief evil of *Roberts* was its unpredictability and its manipulability. If you have a forfeiture doctrine that has those same possibilities, I worry. I know it's a different doctrine, but the practical results are much the same, especially in child abuse and domestic violence cases where the alleged crime itself could be argued as the reason for the person's unavailability. That's why I want to be cautious in liberalizing the

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[29] 448 U.S. 56 (1980).

forfeiture doctrine and to set up as many meaningful barriers as possible.

Professor Friedman: I think it's a very valid concern. That's why I've said I think that the principal restraints against the overuse of the forfeiture doctrine are going to be procedural, if the Court adopts those. And by procedural restraints, I mean at least largely what I have referred to as the mitigation requirement, that is, that the prosecution be required to take steps to limit the damage to the confrontation right. But I do think that to a very large extent, if you say to courts, "Well, this hearsay will come in if you find that the declarant is afraid and that the declarant is afraid because of conduct of the defendant," then it will be found. But I think that if there are procedural steps that the prosecution and the court have to go through, then it's less easy to manipulate.

Professor Mueller: There is actually a case—there may be more than one, but the *Cherry* case is the one that I know about: *United States v. Cherry*.[30] It's a Tenth Circuit case in which the intent is clearly there. One of two co-conspirators realizes that there is a stool pigeon who has been talking to the police, and he decides that he needs to kill this guy. And he drives to the house and kills him. And then the conspirator is charged along with his colleague, and one of the two killed the stool pigeon, the other was simply along for the ride. The question was whether both had forfeited their confrontation rights on account of the act of the one in purposefully killing the stool pigeon in order to keep him from testifying. And the answer given by the court was "yes" if it was within the scope and contemplation of the conspiracy by the time it happened, if it was something that could be foreseen by the colleague by going along or continuing in this conspiracy as it unfolded, but "no" if it was simply something that happened during the conspiracy. So the conspirator along for the ride could not forfeit his confrontation right if the murder wasn't within the contemplation of the conspiracy. In this case, I believe they remanded for the trial judge to think more about this. But the activities of the person in question included apparently obtaining a car to drive to the place where this guy was shot. And so it looks a lot to me as though the trial judge was being invited to say, "Even though she didn't pull the trigger, she was a participant in his murder. She knew about it. It was within the contemplation of what they were doing, and therefore she lost her confrontation right along with the guy who actually pulled the trigger." So one of the other areas in which we are going to have to talk about what forfeiture means is how many people forfeit, particularly if you have a joint criminal enterprise.

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[30] 217 F.3d 811 (10th Cir. 2000).

Question 4: Thank you very much for being here. We have very much enjoyed all of your input. I have often heard that the status of the law is like a pendulum in which you get periods in which the law is very much skewed in favor of the prosecution, and other times in which it is very skewed in favor of the defendant, the accused. Do you think that *Crawford* and *Davis* may have been motivated by a desire on the part of the Court to swing the pendulum back a bit in the direction of the accused?

Professor Friedman: I don't think Justice Scalia was motivated at all to give defendants a break, to push the law more in favor of criminal defendants. I don't think that was it at all. I do think he said, "Gee, there is a constitutional right that is at the center of our system of criminal jurisprudence that is being ignored and misunderstood. And it has got to be articulated and defended with real vigor." That's my sense. Obviously, part of that is his general approach to the Constitution. He's an originalist. And so, I think he found it just plain offensive. I don't think it's a standard "be nice to prosecutors or be nice to defendants" approach.

Professor Mueller: I agree with Rich on that. There's just one other thing—and this is a place where my good friend Laird and I don't always see eye to eye. The Supreme Court tried twice, really without success in my judgment, really more than twice, to deal with against-interest statements by third parties offered against defendants. Now they made a royal mess of it in my opinion in the *Williamson* case.[31] They made another royal mess of it in the *Lilly* case,[32] and there it is for a third time in the *Crawford* case. So one other reason for *Crawford* is to get the Court out of a situation that it could not figure out how to handle. It could not figure out a rational way of dealing with third-party confessions implicating the accused, and since almost all of these are statements to police, statements in guilty plea allocutions, or statements in other clearly testimonial settings, *Crawford* was, as it turns out, a convenient way of cutting a real Gordian knot that the Court had just struggled with and couldn't handle.

Professor Park: When you come to a conference like this you tend to hear about the unsettled areas. But I think *Crawford* really did clear some things up: grand jury testimony, plea allocutions, third party confessions—you can't use them.

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[31] Williamson v. United States, 512 U.S. 594 (1994).

[32] Lilly v. Virginia, 527 U.S. 116 (1999).

Professor Friedman: I think one of the more interesting aspects of the issue is that *Crawford* was 7-2 on the question of whether to adopt the testimonial approach. Everybody but Rehnquist and O'Connor, across the whole spectrum, joined in. And it was 9-0 on the result.

Question 5: I have a question about forfeiture by wrongdoing. Maryland has adopted a state statute that is similar to it, but they've used a clear and convincing standard, and they've said the rules of evidence must be strictly applied at the preliminary hearing. And so it seems to me that they aren't treating this like an ordinary preliminary matter. And I was wondering if you agree with that. Should forfeiture be treated differently depending on the nature of the right being forfeited?

Professor Friedman: I don't. I mean it's an interesting approach. But I think that most threshold issues are dealt with by a court without having to adhere to strict evidentiary rules. That should probably apply here as well. I think that there is a concern over bootstrapping—that is, using the statement the admissibility of which is at issue to prove threshold facts that are essential for the statement to be admitted. My only real concern on this matter is that I think that even on a preliminary matter it may not be appropriate to allow critical proof on the basis of a testimonial statement that the accused has not had a chance to cross-examine. But as I was trying to say this morning—I am not sure I said it very well—at the end of the day, the court is going to say either, "There hasn't been forfeiture, and so the statement doesn't come in," or, "There has been forfeiture, and the defendant forfeits whatever confrontation right he had with respect to this statement at the preliminary hearing as well as at trial." So either way, I don't think the defendant has a complaint about the fact that the court may be relying on the truth of the statement itself to determine whether it should be admitted.[33]

I do think that the forfeiture doctrine has to be constrained, but I think that preventing bootstrapping is being restrictive in the wrong place. I think that other procedural aspects of the forfeiture doctrine are where the courts should be more restrictive, but these are hard to work out. In other words, what procedures, what hoops are you going to make the prosecution jump through before saying the witness is unavailable as a result of the accused's wrongdoing, and so there is forfeiture? It is a lot harder to jimmy with such procedural hoops than with a standard of proof, such as clear and convincing evidence. And even to say that this evidence or that evidence is admissible, I don't think that is going to be a huge difference.

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[33] *See also* Friedman, *supra* note 2, at 489–90.

Professor Mueller: One of the real problems that the forfeiture case presents—I don't want to answer the question you asked because it's too hard, but I'll answer a slightly different question—is a situation where you have a person who is afraid to testify, and that person doesn't even want to come into court and say to the judge, "I'm afraid to testify," because the person's afraid to do that too. So then what you have is his emissary, a lawyer, maybe a prosecutor, who says, "You know the reason we can't call Frank is because he's afraid to death of the defendant, and the reason he's afraid to death of the defendant is that the defendant has threatened him." And so what you have is a presentation in chambers without the defendant present, although the defense counsel *might* be present—although even that is difficult—because you have to tell the defense counsel that he can't reveal everything that is going on to his client.

And so what you have is a decision on a critical preliminary point made on the basis of really presentations by one lawyer, the prosecuting authority, and with the defense counsel, in effect, unable to do anything to test or check this. And you are not even talking to the guy who is afraid because he is afraid. And that's the basis on which the decision is being made—that the defendant has forfeited his right to confront this guy. I mean if the guy is dead, you can understand not bringing him in, and you can understand this situation too. But it isn't just a question of burden of proof, or just a question of bootstrapping, it's a question of deciding it on essentially non-evidence, the most casual kind of evidence you can imagine.

Professor Friedman: Chris, can I ask you then, what would you think of a procedural rule that if the prosecution is claiming forfeiture or intimidation, and the declarant is physically able to come to the court, that the declarant has to be brought, at least in chambers, to explain why she won't testify? I suspect that if that were done, maybe some declarants wouldn't show up, but as Bob says, you know when the prosecution needs it, my goodness, it often happens. And maybe a lot of these cases where they say they're too scared to come, the prosecution figures out a way of providing sufficient protection, at least to bring the person in chambers.

Professor Mueller: It does seem to me—I mean, I haven't thought about it enough to give you a mature reaction. But it seems to me that such a procedural rule would be a little bit better. And then you'd want, it seems to me, to let defense counsel do some cross-examining, or questioning, or what not, but not let the defendant be present. And it seems to me that you couldn't even let the defendant know that this was

happening, but it would seem to me, my initial impression, that it would be a good step.

Professor White: But then consider the jury. I mean, let's not forget about those twelve people sitting out there. What inference are they drawing from the judge making a preliminary finding that this defendant is such a bad egg that he's even threatened the witnesses to keep them from testifying? Maybe my greatest fault is to get us in another direction, but this week the Court heard a case about whether the jury would be drawing impermissible inferences about a defendant when the victim's family came into court with pictures of the victim on their lapels.[34] And to the Court, the question was: Is this like shackling, where the jury is drawing a negative inference about the presumed innocent accused by virtue of their appearance? Forfeiture presents the same situation; it's similar to introducing bad character evidence about the defendant. We've got to somehow make sure that the jury doesn't conclude that the defendant is guilty of the crime charged because he is the type of person who would cause forfeiture of testimony.

Professor Friedman: Well, we certainly don't announce to the jury that there is a forfeiture.

Professor White: Well, if all of those determinations are made behind closed doors, isn't it at least a possible inference the jury is going to draw? As to why that testimony is being presented in a way that is different from the confronted testimony of other witnesses?

Professor Friedman: A knowledgeable jury—well, maybe over time.

Professor Park: Maybe over time, but if they have as much trouble with the hearsay rules as my students do, I don't know if they'll be able to pick out why the hearsay is coming in.

Professor Duane: It appears now that the forfeiture doctrine gives us one more compelling reason to make sure that no lawyer inadvertently slips through the jury selection process. A lawyer in the jury room could be lethal to the defense.

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[34] Carey v. Musladin, 127 S. Ct. 649, 654 (2006) (holding that the decision to allow family members to wear pictures of the victim in the courtroom "was not contrary to or an unreasonable application of clearly established federal law").

Professor Mosteller: It seems to me that moving the standard to clear and convincing evidence would be one change that one could make a good argument for. However, I think it would have to be done by state law. My guess is that when the Supreme Court looks at it, they won't establish that standard. They tend on admissibility issues to stay with preponderance of the evidence. I think the last time they've used clear and convincing with respect to a finding like that was in *Wade* on the issue of an independent source for the in-court identification when the lineup was unconstitutional.[35] That was by clear and convincing evidence.

The argument for the Maryland evidence rule would be to avoid "bootstrapping." At least in terms of the rhetorical argument, to admit the evidence you would have to decide that this individual did the crime to find that he forfeited his right. It seems wrong. I understand that the concern is not technically correct, but you can see where the Maryland rule is coming from. I basically think it's a response to the kind of instinct I have been trying to put forward: be careful to try to set up barriers, make it a little bit harder to find forfeiture. I feel this way since I have trouble figuring out how to implement Friedman's mitigation idea.

If you are asking me what would be the kind of things that might be somewhat helpful to constrain forfeiture, the Maryland approach seems to me something feasible and moves in the right direction, although it might not be technically correct. And with respect to standard of proof, I believe any change will have to be done at the state level if it is going to be done at all.

Question 6: Thank you so much for coming. Some of our professors have expressed that there has been a shift within evidence to go away completely from hearsay across the world, particularly in Europe, where there's a merging of the civil and common law systems. And Professor Friedman, last night you said you would like to see the Confrontation Clause expanded to subsume some of the hearsay exceptions, while dismissing the rest. Do you see that as part of this shift, or as a bolstering of the adversarial system? I tend to be a fan of the adversarial system. I want to know if we should see the testimonial approach as a strengthening of it or as a compromise.

Professor Friedman: The idea is that if the basic concept of the Confrontation Clause were established robustly around the world, would that mean we've more places to travel for conferences? I'm working on

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35 United States v. Wade, 388 U.S. 218 (1967).

India particularly. It's the largest country in the world with an Anglo-American legal system.

I don't think the confrontation right is actually necessarily tied to the adversarial system as we know it, although it obviously finds its most natural home within the Anglo-American system of jurisprudence. As I've suggested, that's where the right really flourished for centuries. It's the great pride of English criminal jurisprudence.

But the European cases are very interesting in this regard because you don't have what we normally think of as an adversarial system—that is, the evidence isn't generated as much by the sides, the parties. The defense lawyer doesn't have as aggressive a role, and yet the European Court has sort of inferred from the European Convention on Human Rights that there is a right to have the testimony given in front of the accused, and to ask questions. So it's sort of a lumping on top of the more European model; it is obviously introducing an aspect of an adversarial system into that process. But I do think it's perfectly compatible with other systems.

The most familiar early mention of a confrontation right occurs in the *Book of Acts*, where the Roman governor says that it is not in the manner of the Romans to put a person to death without the chance to confront the accuser.[36] Some translations use the word "confront," some translations "face to face." There, it doesn't seem like any adversarial system as we know it. It's just a situation where the mob wants this guy convicted and executed, and the government is either going to do it or not.

Here's an even older instance of confrontation, which I find absolutely fascinating. The Bible, in *Deuteronomy*, prohibits the death penalty on the word of a single witness.[37] But the people of the Dead Sea Scrolls asked: What if somebody commits a crime, but only one person sees it, and then later he commits the same crime, so he's a serial criminal? And they concluded that each of those counts as one witness, but you can accumulate them, and you have to record them. And so they say if he commits the crime and only one person sees him, the testimony is recorded for possible future use; we thus have the first known deposition. They bring the person in front of whoever's going to record it, and then that's one strike; this is an old-fashioned rule of two or three strikes and you're out. It's not an adversarial system, but clearly the anticipation is that the defendant and the witness are going to be face to face. So I think the confrontation right is perfectly compatible with systems other than an adversarial system as we know it.

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[36] *Acts* 25:16.

[37] *Deuteronomy* 19:15.

Professor Duane: I regret that it's my unenviable assignment to have to draw a close to this discussion. When you watch the energy and seemingly unflagging patience with which our participants have agreed to engage in this conversation, you will be amazed to know two things. One, they're not being paid by the hour, and I hope that they don't share your surprise with that revelation. And number two, we did not ask them, and they did not agree, to stay past four o'clock, so let's give them our thanks. And thanks to all of you for coming and staying and joining with us. It's been a pleasure.

TELECOMMUTING: A REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT AS TECHNOLOGY ADVANCES

I. INTRODUCTION

There have been substantial technological advancements since Congress enacted the Americans with Disabilities Act (ADA) over fifteen years ago. Developments in technology over the last few decades, including computer enhancements and widespread Internet use, have changed the way society communicates and conducts business. Technological developments continue to infiltrate and better society as a whole, but one group in particular, individuals with disabilities, has been and will continue to be one of the most advantaged recipients of the information age.[1] Countless innovations, such as closed captioning, screen readers, and speech recognition technology, have directly improved the lives of disabled persons. Telecommuting is yet another way persons with disabilities can benefit from this great age of technology.[2] The ability to work from home holds great promise of employment opportunities for persons who would not otherwise be able to access or perform in the traditional workplace environment due to a disability.

Over the last decade, problems have arisen in determining how the provisions of the ADA should be construed in light of technological advancements. Courts have struggled with the role of telecommuting in accommodating disabled employees. When analyzing whether working at home should constitute a reasonable accommodation, the courts have taken different positions. Specifically, decisions have varied from a strong presumption against telecommuting to a fact-specific, case-by-case approach.

This note addresses the role of telecommuting as a reasonable accommodation under the ADA. Part II explains the history and purpose of the ADA. Part III details the protections given under Title I as it relates to telecommuting. Part IV demonstrates the growing trend of people who work from home. Part V outlines the opposing views that courts have taken in determining the availability of telecommuting as a

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[1] U.S. Dep't of Justice, Section 508 of the Rehabilitation Act: Accessibility for People with Disabilities in the Information Age (Results of 2001 Survey) § I.A.1., http://www.usdoj.gov/crt/508/report2/summary.htm (last visited Feb. 22, 2007) ("People with disabilities are among the greatest beneficiaries of this information technology revolution.").

[2] Telecommuting is employment at home while communicating with the workplace generally by phone or the Internet. Dawn R. Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 AM. BUS. L.J. 857, 858 (2001).

reasonable accommodation. Part VI recommends that courts perform fact-specific analysis and interpret the ADA broadly. And finally, Part VII demonstrates various problems associated with telecommuting.

II. THE HISTORY AND PURPOSE OF THE ADA

A. Historical Framework of the ADA

The Civil Rights Act of 1964 brought much needed legislative reform. It addressed discrimination based on race, religion, and national origin.[3] Although this Act did not cover persons with disabilities, it paved the way for the enactment of section 504 of the Rehabilitation Act of 1973.[4] This section, often referred to as the "civil rights bill of the disabled," provided that persons with disabilities who were otherwise qualified should not be denied access to or be subject to discrimination under "any program or activity receiving Federal financial assistance."[5] In the areas where section 504 was applicable, its statutory language was generally applied broadly.[6] Although section 504 was a step in the right direction, it had many deficiencies. The Act did not have a great effect in reducing the difficulties disabled persons faced in employment, transportation, and public accommodations.[7] Section 504 did not apply to private employers, public accommodations in the private sector, or publicly funded programs that were not recipients of federal financial assistance.[8] As one legal scholar noted, section 504 displayed weakness due to its "statutory language, the limited extent of [its] coverage, inadequate enforcement mechanisms, and erratic judicial interpretations."[9] Following the enactment of section 504, activism increased. Legal scholars and activist groups, such as the National Council on the Handicapped, saw the deficiencies in the current law and promoted the ratification of a comprehensive law obligating equal opportunity for disabled persons.[10] Congress recognized the need for action, and the ADA passed both Houses by overwhelming majorities.[11]

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3 ADA & IT Technical Assistance Ctrs., Historical Context of the Americans with Disabilities Act, http://www.adata.org/whatsada-history.aspx (last visited Feb. 22, 2007).

4 *Id.*

5 Ams. Disabled for Accessible Pub. Transp. v. Skinner, 881 F.2d 1184, 1187 (3d Cir. 1988).

6 *See* Janet A. Flaccus, *Discrimination Legislation for the Handicapped: Much Ferment and the Erosion of Coverage*, 55 U. CIN. L. REV. 81 (1986).

7 Helen L. v. DiDario, 46 F.3d 325, 331 (3d Cir. 1995).

8 ADA & IT Technical Assistance Ctrs., *supra* note 3.

9 Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 430–31 (1991).

10 *Id.* at 432–33.

11 ADA & IT Technical Assistance Ctrs., *supra* note 3.

President George H. W. Bush signed the ADA into law on July 26, 1990.[12]

B. Purposes of the ADA

The goal of the ADA is to prevent discrimination against disabled persons through better enforcement of standards, and to incorporate persons with disabilities into the workings of society.[13] The Act provides a "national mandate for the elimination of discrimination against individuals with disabilities."[14] It prohibits discrimination based on disability in the areas of employment, public services, places of public accommodations, telecommunication services, and transportation.[15] The ADA promotes an attitude of acceptance and fairness toward individuals with disabilities. The ADA purports to "extend to people with disabilities civil rights similar to those now available on the basis of race, color, national origin, sex and religion through the Civil Rights Act of 1964."[16]

The ADA serves to empower persons with disabilities and promote equality throughout various facets of society including employment and places of public accommodation. This is accomplished through the legislative enactment of five separate titles within the ADA. Title I addresses discrimination against disabled individuals within the employment context.[17] Title II gives disabled individuals the right to access public services offered by both state and local governments.[18] This title provides that a qualified disabled individual should not be excluded "from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[19] Title III mandates nondiscrimination in the area of public accommodations.[20] Disabled persons are entitled to the full and equal use and enjoyment of services and accommodations of "any place of public accommodation."[21] This includes privately owned public accommodations.[22] For example, private schools are subject to Title III.[23] Title IV addresses telecommunications, which include services for

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12 *Id.*

13 *See* 42 U.S.C. § 12101 (2000).

14 *Id.* § 12101(b)(1).

15 *Id.* § 12101(a)(3).

16 PEO7.com, ADA's Purpose, http://peo7.com/htmFiles/ADAs53.htm (last visited Feb. 22, 2007).

17 42 U.S.C. § 12111.

18 *Id.* § 12132.

19 *Id.*

20 *Id.* § 12182.

21 *Id.* § 12182(a).

22 *Id.*

23 DeBord v. Bd. of Educ., 126 F.3d 1106 (8th Cir. 1997).

hearing-impaired and speech-impaired individuals.[24] Lastly, Title V contains miscellaneous provisions that are applicable to all previous titles.[25]

Since its inception, the ADA has empowered disabled individuals and has effected a societal change with regard to the treatment of persons with disabilities.[26] Although the ADA has been the subject of great praise by some, others have raised questions as to how effective the ADA has actually been.[27] Some scholars feel that it has not lived up to the expectations of its establishers. "The ADA has been less effective than many had hoped in part because it is viewed as a social welfare statute, rather than an antidiscrimination law."[28] Additionally, many feel that its provisions are frequently construed too narrowly, causing a hardship on the disabled individual. This resulting hardship is reflected in specific decisions regarding the use of telecommuting as a reasonable accommodation and will be discussed more fully in subsequent sections.

III. PROTECTIONS AWARDED UNDER TITLE I OF THE ADA

A. Combating Discrimination in the Workforce

Title I, as touched on earlier, is intended to prevent discrimination in the workplace. This title provides as a general rule that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[29] A qualified disabled individual, by definition, is a person who has a disability and can also perform the essential functions of a particular job with or without reasonable accommodation.[30] Under Title I, employers are required to provide qualified disabled persons an equal opportunity to benefit from the employment opportunities available to others.[31] However, Title I does not apply to employers having fewer than fifteen employees.[32] Nearly every aspect of employment is covered under the ADA: working conditions, the

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[24] 47 U.S.C. § 225 (2000).

[25] 42 U.S.C. §§ 12201–12213.

[26] Dep't of Justice, *supra* note 1.

[27] Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 326 (2003).

[28] *Id.*

[29] 42 U.S.C. § 12112(a).

[30] *Id.* § 12111(8).

[31] WorkWorld.org, Americans with Disabilities Act (ADA), http://www.workworld.org/wwwebhelp/americans_with_disabilities_act_ada_.htm (follow the "ADA Title I—Employment" hyperlink) (last visited Feb. 22, 2007).

[32] 42 U.S.C. § 12111.

job application process, hiring, compensation, training, and employee termination.[33] Additionally, the ADA covers non-work facilities, which are related to employment, such as employee lounges and cafeterias.[34]

B. Establishing a Case of Discrimination Under the ADA

In order to establish a discrimination case under Title I of the ADA, an employee must show that he is a qualified disabled individual and that he was discriminated against because of his disability.[35] This requires the employee to show that he is disabled within the meaning of the ADA, that he can perform the essential functions of the job with or without reasonable accommodation, and that his employer terminated or failed to hire him due to the disability.[36] Even if the employee has established a prima facie case, the employer can prevail by showing that the proposed accommodation poses an undue hardship to the employer.[37]

1. Establishing a Qualified Disability

A disabled individual is defined by the ADA as a person "(A) [with] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [with] a record of such an impairment; or (C) being regarded as having such an impairment."[38] Part A specifies that a disabled person includes persons with both physical and mental disabilities. A physical impairment is defined under the Equal Employment Opportunity Commission (EEOC) regulations as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine."[39] A mental impairment is defined as "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[40] Major life activities are those activities that are performed by an average person without difficulty.[41]

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[33] Joe Marrone, *ADA Overview: Title I Employment*, TOOLS FOR INCLUSION (Inst. for Cmty. Inclusion, Boston, Mass.), June 1998, http://www.communityinclusion.org/article.php?article_id=60&staff_id=27.

[34] *Id.*

[35] Cooper v. Neiman Marcus Group, 125 F.3d 786, 790 (9th Cir. 1997).

[36] *Id.*

[37] D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1226 (11th Cir. 2005).

[38] 42 U.S.C. § 12102(2) (2000).

[39] 29 C.F.R. § 1630.2(h)(1) (2006).

[40] *Id.* § 1630.2(h)(2).

[41] DISABILITY AND COMMC'N ACCESS BD., STATE OF HAW., AMERICANS WITH DISABILITIES ACT—TITLE 1: DEFINITION OF AN INDIVIDUAL WITH A DISABILITY 2 (2005),

Courts have been restrictive in interpreting the definition of a major life activity. The United States Supreme Court has held that major life activities are limited to "those activities that are of central importance to daily life."[42] Working is generally considered to be a major life activity.[43]

To qualify as a disabled person, the definition indicates that an individual can have a record of the disability or be regarded as having the disability.[44] Under the explicit text of the ADA, employers must accommodate both those who are defined as actually disabled and those who are merely regarded as disabled.[45] Although on its face it may not seem like a difficult test for an individual to overcome, many individuals have a difficult time establishing a disability under the ADA. Establishing the existence of a disability under the ADA is only the first step in the process of accessing ADA coverage.

2. Ability to Perform Essential Job Functions

For Title I protection, it is not enough for a person to establish a disability; the individual must also be qualified for the position.[46] In other words, an employee must show that he or she can perform the essential functions of the job with or without reasonable accommodation.[47] By definition, the essential functions are the fundamental parts of a job.[48] Such functions are determined by reviewing written job descriptions, which must have been in existence before the discrimination action ensued, and by deferring to the employer's judgment.[49] In the context of telecommuting, disabled workers who request to work from home may be unable to prove that they can perform essential functions of the job if an employer insists that workplace presence is essential. In establishing the parameters of essential job functions, the court can also look to the consequences of the employee's hypothetical inability to perform the function, the work experience of past persons employed in the same position, and the amount of time that would be spent on the particular function.[50] The

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http://www.hawaii.gov/health/dcab/docs/fact_sheets/definition.pdf ("[Major life activities] include walking, speaking, breathing, performing manual tasks, speaking [sic], hearing, learning, caring for one's self, working, sitting, standing, lifting, and reading.").

42 Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

43 D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1227 (11th Cir. 2005).

44 42 U.S.C. § 12102(2) (2000).

45 *D'Angelo*, 422 F.3d at 1236 ("The text of this statute simply offers no basis for differentiating among the three types of disabilities in determining which are entitled to a reasonable accommodation and which are not.").

46 DISABILITY AND COMMC'N ACCESS BD., *supra* note 41, at 2.

47 Cooper v. Neiman Marcus Group, 125 F.3d 786, 790 (9th Cir. 1997).

48 29 C.F.R. § 1630.2(n) (2006).

49 Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1119 (10th Cir. 2004).

50 *Id.*

determination of the essential functions is a fact-specific inquiry performed on a case-by-case basis by the court.[51]

The disabled individual must be able to perform the functions of the position that are deemed essential with or without reasonable accommodation. A reasonable accommodation requires the employer to alter workplace facilities to make them accessible to disabled individuals.[52] Among other things, reasonable accommodations may include obtaining or modifying equipment, job restructuring, and adjusting work schedules.[53] Generally, a reasonable accommodation is a modification "to the way that work is structured that enables the [disabled] employee to perform."[54] Requiring employers to provide a reasonable accommodation is considered to be one of the vaguest provisions within the ADA because the statute does not explicitly define what constitutes a reasonable accommodation.[55] Because of its vagueness, there is much room for differing judicial opinions as to what should constitute a reasonable accommodation. This is reflected in the differing approaches courts have taken with regard to whether working from home constitutes a reasonable accommodation.

3. Undue Hardship

Even after an individual has established a disability and a proposed accommodation that would allow the individual to perform the essential functions of the employment position, an employer may be able to avoid the requested accommodation on the basis of undue hardship.[56] Generally, an accommodation produces an undue hardship if it would cause "significant difficulty or expense" to the employer.[57] Factors that are considered in determining whether a particular accommodation constitutes an undue hardship to the employer include: (1) the nature of the accommodation while considering the tax consequences and outside funding; (2) the financial resources of the facility involved; (3) the overall size of the employer's business, including employees and location; (4) the type and structure of the business; and (5) the impact that the accommodation will have on the entire business, including the other employees.[58] Although employers are required to make a good faith effort

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51 Hernandez v. City of Hartford, 959 F. Supp. 125, 131 (D. Conn. 1997).

52 42 U.S.C. § 12111(9) (2000).

53 *Id.*

54 Travis, *supra* note 27, at 324.

55 Joan T.A. Gabel & Nancy Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 339 (2003).

56 42 U.S.C. § 12112(b)(5)(A).

57 29 C.F.R. § 1630.2(p)(1) (2006).

58 *Id.* § 1630.2(p)(2).

in evaluating the feasibility of a proposed accommodation, they are not obligated to offer accommodations that would eradicate the essential functions of the job position or offer accommodations which do not enable the employee to properly perform the necessary functions of the employment position.[59] For example, an employer would not be required to implement an accommodation that was excessively costly, disruptive, or one that would "fundamentally alter" the nature of the business.[60]

The issue of undue hardship plays a major role in determining the future of telecommuting as a reasonable accommodation for purposes of the ADA. Employers can avoid accommodating a disabled individual's request to work at home on the basis of undue hardship to the company. Further scrutiny of undue hardship as it relates to telecommuting options will be addressed in subsequent sections.

IV. SOCIETAL SHIFT TOWARD WORKING AT HOME

A. Telecommuting: A Growing Trend

Telecommuting occurs when an employee utilizes telecommunications technology in order to work at home instead of at the conventional workplace.[61] The use of telecommuting in the workplace has been steadily increasing over the past few years. Approximately twenty million Americans telecommuted in 2001.[62] A recent study conducted by the Dieringer Research Group for the International Telework Association and Council (ITAC) found that approximately 34 million Americans telecommuted in some capacity in 2006, and approximately 22 million Americans telecommuted at least once per week.[63] The same survey showed a twenty-five percent increase of non-self-employed persons working from home in 2006 compared to the previous year. More and more employers are offering telecommuting as a viable option. Even federal and state agencies have implemented the practice of telecommuting. For example, the federal government has implemented a website, telework.gov, dedicated to telecommuting.[64]

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[59] Swink, *supra* note 2, at 892.

[60] U.S. Equal Employment Opportunity Comm'n, The ADA: Your Reponsibilities as an Employer—When Does a Reasonable Accommodation Become an Undue Hardship?, http://www.eeoc.gov/facts/ada17.html (last visited Feb. 22, 2007) [hereinafter EEOC].

[61] Swink, *supra* note 2, at 858.

[62] *Id.* at 857.

[63] WORLDATWORK, TELEWORK TRENDLINES FOR 2006: 2007 SURVEY BRIEF 3 (2007), http://www.workingfromanywhere.org/news/Trendlines_2006.pdf (presenting results by ITAC based on 2006 data collected by the Dieringer Research Group).

[64] U.S. Office of Pers. Mgmt., Gen. Servs. Admin., Featured Telework Questions—What is Teleworking?, http://www.telework.gov/definition.asp (last visited Feb. 22, 2007).

Both Congress and the Executive Branch have been promoters of telecommuting over the last few years.[65]

Telecommuting can occur either on a full-time basis or may be done on a schedule ranging from a few days per week to as little as one day each month.[66] When teleworking, an employee, even though at home, is still on "official duty" and is expected to "have the resources necessary to do [the] job, and be able to concentrate on that job without interruptions from other family members."[67] Numerous jobs exist where all or the majority of the work can effectively be performed outside the traditional workplace.[68] Some positions, however, due to the nature of the essential job functions, cannot be performed in any capacity from home.[69] Telecommuting is often appropriate for positions involving computer related tasks, such as programming, web design, word processing, and data entry.[70] It is also practical for positions that involve analysis and writing skills, such as research, reviewing cases, writing reports, and data analysis.[71] Telephone-intensive positions are also appropriate.[72] "Writers, salespersons, accountants, programmers, graphic artists, researchers, engineers, architects, public relations professionals—all are prime candidates for telecommuting."[73] The prevalence of telecommuting is likely to flourish because of ever-changing technology and the benefits gained by employers, employees, and society.

B. Employer Telecommuting Benefits

Although an employer may experience some costs from allowing an employee to work from home, the employer will see a savings in other areas of its business.[74] Costs to employers may include equipment for

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65 *Id.*

66 *Id.*

67 *Id.*

68 JUNE LANGHOFF, THE TELECOMMUTER'S ADVISOR: REAL WORLD SOLUTIONS FOR REMOTE WORKERS 19–20 (2000). June Langhoff maintains a website and has published various books and articles promoting telecommuting.

69 U.S. Equal Employment Opportunity Comm'n, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act—Other Reasonable Accomodation Issues § 34, http://www.eeoc.gov/policy/docs/accommodation.html (last visited Feb. 22, 2007) [hereinafter EEOC].

70 U.S. Office of Pers. Mgmt., Gen. Servs. Admin., Featured Telework Questions—Am I a Good Candidate to Be a Teleworker?, http:// www.telework.gov/candidate.asp (last visited Feb. 22, 2007).

71 *Id.*

72 *Id.*

73 Urban Ecology Australia, Telecommuting—FAQs About Telecommuting, http:// www.urbanecology.org.au/topics/telecommuting.html (last visited Feb. 22, 2007).

74 Alvin L. Goldman, *A Comparative Study of the Impact of Electronic Technology on Workplace Disputes*, 24 COMP. LAB. L. & POL'Y J. 1, 9 (2002).

teleworkers as well as expenses associated with the supervision and security of these out-of-office employees. However, working from home allows employers to attract new employees, retain current workers, and increase company loyalty and enthusiasm.[75] Telecommuting has been shown to enhance productivity.[76] For example, the Telecommuting Pilot Program carried out by the State of California found that productivity increased anywhere from ten to thirty percent after implementing the program.[77] Approximately 150 employees from state agencies participated in this telework program.[78] Numerous positions were involved in the project, including analysts and attorneys.[79] The pilot program returned favorable results.[80] Reaching a similar conclusion to the California program, the 1999 Telework America National Telework Survey found that nearly one-half of telecommuters showed increased productivity at home compared to the office.[81] Companies that have implemented telecommuting have also seen a reduction in employee absenteeism rates because of fewer sick leave requests.[82] Also, companies with intact telework programs benefit from business continuity when bad weather or a natural disaster strikes.[83] Reduced office space, resulting in reduced real estate costs, is another valuable benefit.[84] Companies generally see an overall savings in office overhead costs upon implementing telecommuting programs.[85]

C. Employee Benefits from Telecommuting

Employees experience great benefits from being able to work from home. Individuals who telecommute experience higher productivity due to efficient structuring of work time, the reduction in commute time, and decreased absenteeism from sickness or bad weather.[86] Increased

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[75] OFFICE OF TRANSP. & AIR QUALITY, U.S. ENVTL. PROT. AGENCY, TELECOMMUTING/TELEWORK PROGRAMS: IMPLEMENTING COMMUTER BENEFITS UNDER THE COMMUTER CHOICE LEADERSHIP INITIATIVE 2 (2001).

[76] *Id.* at 2–3.

[77] CAL. DEP'T OF GEN. SERVS., THE STATE OF CALIFORNIA TELECOMMUTING PILOT PROJECT FINAL REPORT 75–76 (1990).

[78] *Id.* at 2.

[79] *Id.*

[80] *Id.*

[81] OFFICE OF TRANSP. & AIR QUALITY, *supra* note 75, at 2–3.

[82] Swink, *supra* note 2, at 862.

[83] JuneLanghoff.com, FAQs about Telework, http://www.junelanghoff.com/telework.html (last visited Feb. 22, 2007).

[84] Swink, *supra* note 2, at 862.

[85] *Id.*

[86] William N. Washington, *Telecommuting Program—Is "Flexplace" Suited to Your Organization?*, PROGRAM MANAGER, Jan.-Feb. 2001, at 46, 46, *available at* http://www.dau.mil/pubs/pm/pmpdf01/washj-f.pdf.

productivity can lead to improved performance reviews for the employee, which may ultimately lead to greater compensation. Employees who telecommute often experience non-monetary benefits as well. Less work-related stress is an important benefit of being able to work from home.[87] Employees who telecommute often experience greater job satisfaction and improved balance between work and family life. Additionally, telecommuting allows individuals who would not otherwise be able to work at a traditional workplace to experience the fulfillment of an employment position. This includes mothers with young children who may be capable of working from home as well as individuals with disabilities who cannot easily work outside of the home.

D. Societal Benefits Resulting from Telecommuting

There is a sound public policy reason for the use of telecommuting: the increased use of telecommuting holds benefits for society as a whole. Telecommuting serves to reduce air pollution through the reduction of nitrous oxides, carbon dioxide, and other particles emitted by vehicles.[88] According to one EPA estimate, "If 10% of the nation's workforce telecommuted one day a week, [we] would avoid the frustration of driving 24.4 million miles, breathe air with 12,963 tons less air pollution, and conserve more than 1.2 million gallons of fuel each week."[89] A decreased amount of traffic congestion will also result from the use of telecommuting.[90] The reduction in the amount of commuters on the highways will inevitability improve road conditions and reduce the need for repair and maintenance, which indirectly affects all citizens in reduced taxes.[91] Other expected advantages of telework include reduced crime rates as a result of homes being occupied during the workday and fewer commuting automobile accidents. It is evident that an increase in individuals working from home would have a positive effect on the general public.

E. Legal Issues Arising from Telecommuting

Telecommuting, with its growing popularity, raises legal liability issues in otherwise settled areas of employment law. Telecommuting

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87 Swink, *supra* note 2, at 862.

88 *See* Dennis Henderson & Patricia Mohktarian, *Impacts of Center-Based Telecommuting on Travel and Emissions: Analysis of the Puget Sound Demonstration Project*, 1 TRANSP. RES. PART D: TRANSPORT & ENV'T 29, 29 (1996), *available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1053&context=itsdavis.

89 Fairfaxcounty.gov, Board of Supervisors' 4-Year Transportation Plan—Telework, http://www.fairfaxcounty.gov/chairman/transportation_plan.htm (last visited Feb. 22, 2007).

90 Swink, *supra* note 2, at 862.

91 *Id.*

creates unique questions regarding how it will affect Workers' Compensation, the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Administration (OSHA) standards, and the ADA.[92] "While no legislation specifically addresses the issue, the assumption is that employees working remotely are entitled to workers' compensation benefits so long as the injury arises out of and in the course of employment."[93] Under the FLSA, employers who implement telecommuting programs still need to comply with regulations that require the employer to monitor hours worked and enforce rules limiting such hours.[94] OSHA requires employers to ensure that all employees work in safe conditions regardless of where the work is performed.[95] The ADA is one area of the law "in which there are significant developments respecting the application of U.S. legal standards to the use of electronic technology in the context of at-home work."[96]

V. DIFFERING JUDICIAL APPROACHES TO TELECOMMUTING AS A REASONABLE ACCOMMODATION

Courts have taken conflicting approaches regarding whether telecommuting constitutes a reasonable accommodation. Some courts have set forth a presumption that telecommuting is not a reasonable accommodation,[97] while others have held that a more fact-specific approach is appropriate when determining if telecommuting is a reasonable accommodation.[98] Both approaches will be discussed in detail in the subsequent sections.

A. A Presumption Against Telecommuting

Vande Zande v. Wisconsin Department of Administration is representative of one of the most hostile views regarding whether working at home constitutes a reasonable accommodation. In this case, a paraplegic employee brought a discrimination claim under the ADA against her employer.[99] The employee, who was unable to perform work at the workplace due to pressure ulcers, requested permission to work from home.[100] The ulcers were formed on her skin because she was in the same position too long without proper movement. The employer rejected

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92 *Id.* at 858.

93 Gabel & Mansfield, *supra* note 55, at 343.

94 Swink, *supra* note 2, at 891.

95 *Id.* at 899.

96 Goldman, *supra* note 74, at 6.

97 *See, e.g.*, Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538 (7th Cir. 1995).

98 *See, e.g.*, Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128 (9th Cir. 2001).

99 *Vande Zande*, 44 F.3d at 543.

100 *Id.*

her request.[101] Even though the Seventh Circuit Court of Appeals found that the employer did have a duty to accommodate the employee because the ulcers were a part of her disability, it found that working from home was not a reasonable accommodation.[102] Judge Posner, writing for the majority, recognized that "[t]he concept of reasonable accommodation is at the heart of this case."[103] The court established a presumption against allowing telecommuting as a reasonable accommodation, holding that, in general, "an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home."[104] Although recognizing the possibility of limited exceptions, the court held that it would take an "extraordinary" situation to allow an employee to bring an action based on the employer's failure to permit the employee to work from home.[105] The position of the court in *Vande Zande* against telecommuting as a reasonable accommodation followed what the court referred to as the "majority view."[106] This view stemmed from the ideology of earlier cases that attendance at the workplace was a necessary part of employment.[107]

In *Whillock v. Delta Air Lines, Inc.*,[108] a federal district court in the Northern District of Georgia utilized similar reasoning. The employee worked for Delta as an airline reservation sales agent. She suffered from Multiple Chemical Sensitivity Syndrome, which prevented her from being able to perform at the workplace without experiencing severe allergic reactions. The employee brought suit alleging that the employer had denied her disability benefits, and that the denial of her telecommuting request was a violation of the ADA.[109] The court awarded summary judgment to the employer.[110] The court, using the same reasoning as *Vande Zande*, applied a presumption against telecommuting.[111] The court determined that the employee was not a qualified individual under the ADA because she could not perform the essential functions of her job if the only way she could work was from

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101 *Id.* at 544.

102 *Id.*

103 *Id.* at 543.

104 *Id.* at 544.

105 *Id.* at 545 ("[T]here are exceptions, but it would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home.").

106 *Id.* at 544.

107 *See, e.g.*, Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209, 213 (4th Cir. 1994).

108 926 F. Supp. 1555 (N.D. Ga. 1995).

109 *Id.* at 1560.

110 *Id.* at 1561.

111 *Id.* at 1563.

home.[112] The court further held that even if she could perform the essential functions of her job at home, working from home was unreasonable as a matter of law.[113] In short, the court presumed that workplace presence is an essential element of nearly all job positions.

Courts that have followed a presumption-against-telecommuting approach have often done so under the disingenuous label of a fact-specific approach. Although nominally applying a case-by-case analysis, the courts adhere to the view that working from home is unreasonable in all but extraordinary cases. Furthermore, jurisdictions that follow this approach have failed to identify clear situations where telecommuting would be appropriate as an extraordinary case.

B. A Fact-Specific Approach

At least three federal courts have taken a much less restrictive approach when determining whether telecommuting is a reasonable accommodation.[114] In the federal district court case, *Hernandez v. City of Hartford*, an employee filed suit against her employer under the ADA.[115] She alleged that pre-term labor during her pregnancy was a disability, and that she was discriminated against by her employer's refusal to allow her to work from home.[116] The court rejected *Vande Zande* by holding that "[*Vande Zande*'s] nearly *per se* rule regarding 'at home' work flies in the face of the requirement of a case-by-case, fact-specific inquiry."[117] The court denied the employer's motion to dismiss and found that the employee made a prima facie case showing that a reasonable accommodation existed and raised a fact issue as to whether the request was an undue burden to her employer.[118]

In *Langon v. Department of Health and Human Services*, the D.C. Circuit Court of Appeals took a fact-specific approach in determining the use of telecommuting as a reasonable accommodation. In this case, a former employee of the Department of Health and Human Services filed suit alleging failure to accommodate her disability.[119] The employee's complaint survived summary judgment because her employer had an

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[112] *Id.* at 1565 ("If the only accommodation which would allow Plaintiff to perform the essential functions of her job is allowing her to work at home, Plaintiff is not an 'otherwise qualified individual with a disability' under the terms of the ADA.").

[113] *Id.*

[114] *See* Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128 (9th Cir. 2001); Langon v. Dep't of Health & Human Servs., 959 F.2d 1053 (D.C. Cir. 1992); Hernandez v. City of Hartford, 959 F. Supp. 125 (D. Conn. 1997).

[115] 959 F. Supp. at 128.

[116] *Id.*

[117] *Id.* at 132.

[118] *Id.*

[119] *Langon*, 959 F.2d at 1054.

existing work-at-home policy, and the employee's job description indicated that she did not need to be in the office to adequately perform her duties.[120] Ultimately, the employer failed to offer sufficient evidence that the employee's working from home produced an undue hardship.[121]

In *Humphrey v. Memorial Hospitals Ass'n*, a medical transcriptionist who suffered from obsessive compulsive disorder brought a discrimination suit against her employer under the ADA.[122] The suit alleged that her employer failed to reasonably accommodate her disability by denying her request to work from home.[123] The employer permitted other transcriptionists to work from home, but denied Humphrey's request. The court followed a fact-specific approach and denied the employer's motion for summary judgment. The court held that "working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause an undue hardship for the employer."[124] In taking this approach, the court refused to follow *Vande Zande*, which would only permit telecommuting as a reasonable accommodation in extraordinary circumstances.[125] The *Humphrey*'s court took an approach consistent with the EEOC Enforcement Guidance on Reasonable Accommodation, which indicates that working at home is a reasonable accommodation when the essential job function can be performed at home and no undue hardship would result to the employer.[126] "Undue hardship means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business."[127]

In *Smith v. Bell Atlantic*, a state appellate court affirmed a jury's finding that allowing a disabled employee to perform much of her work at home was a reasonable accommodation.[128] The employee had a paralyzed leg and had to reduce her amount of driving.[129] Telecommuting was deemed a reasonable accommodation because the essential functions of her job did not require her to be present in the office every day.[130]

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120 *Id.* at 1053.

121 *Id.* at 1061.

122 239 F.3d 1128, 1129 (9th Cir. 2001).

123 *See id.* at 1136.

124 *Id.*

125 *Id.* at 1136 n.15 (citing Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544–45 (7th Cir. 1995)).

126 OFFICE OF TRANSP. & AIR QUALITY, *supra* note 75, at 2.

127 EEOC, *supra* note 60.

128 829 N.E.2d 228, 241 (Mass. App. Ct. 2005).

129 *Id.* at 233–34.

130 *Id.* at 241.

In some instances where courts determine that working from home is unreasonable, they still recognize that working from home is an option that should be considered.[131] For example, in the Tenth Circuit Court of Appeals case, *Mason v. Avaya Communications, Inc.*, a terminated employee who suffered from post traumatic stress disorder brought suit against her employer alleging that it failed to accommodate her disability.[132] The employee worked as a service coordinator in an administration center of a "corporation specializing in communications systems, applications, and services."[133] The corporation contended that the nature of the position required onsite interaction with other employees because coordinators assisted one another with their tasks.[134] Additionally, the employer argued that regular training could only be properly provided at the workplace.[135] The court found that working at home would be unreasonable in this situation because it would eliminate an essential function of her job.[136] Although the court determined telecommuting was unreasonable in that situation, the majority opinion noted that

> a request to work at home is unreasonable if it eliminates an essential function of the job; however, summary adjudication may be improper when the employee has presented evidence she could perform the essential functions of her position at home thereby making the at-home accommodation request at least facially reasonable.[137]

VI. THE NEED FOR FACT-SPECIFIC ANALYSIS WITH BROAD INTERPRETATION

A. The Presumption Against Telecommuting Should be Abandoned

The ADA requires a fact-specific approach in determining if a proposed accommodation is a reasonable accommodation.[138] Judicial approaches that create a presumption against telecommuting as a reasonable accommodation rely on the assertion that presence in the workplace is required in practically all employment positions.[139]

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[131] *See, e.g.*, Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1124 (10th Cir. 2004); Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994).

[132] *Mason*, 357 F.3d at 1116.

[133] *Id.* at 1117.

[134] *Id.* at 1121.

[135] *Id.* at 1120.

[136] *Id.* at 1124.

[137] *Id.*

[138] *See* 29 C.F.R. § 1630.2(n) app. (2006) (explaining that "[w]hether a particular function is essential is a factual determination that must be made on a case by case basis").

[139] Kristen M. Ludgate, Note, *Telecommuting and the Americans with Disabilities Act: Is Working at Home a Reasonable Accommodation?*, 81 MINN. L. REV. 1309, 1331 (1997) (noting that the *Vande Zande* and *Whillock* courts relied on excessive absenteeism cases for the presumption that because virtually all jobs require physical presence in the workplace, telecommuting is rarely an appropriate accommodation).

Workplace presence is seen as essential based on the assertion that "[m]ost jobs . . . involve team work under supervision."[140] This dependence on traditional excessive absenteeism cases to assert that telecommuting should be presumed unreasonable is erroneous. Absenteeism cases involve fundamentally different issues than telecommuting cases.[141] The concern with absenteeism cases is whether the employer should be required "to accommodate a disabled employee's repeated, extended, and often unpredictable absences" caused by the disability.[142] The court's focus in these types of cases is not centered on the employee's actual physical presence at the workplace, but rather on the employee's unreliable performance in the employment position.[143] "By importing from the excessive absenteeism cases a presumption that physical presence is per se essential to employment, and that telecommuting is thus by definition an inappropriate accommodation, the presumption cases confuse the need for physical presence at work with the need for predictable job performance."[144] In a traditional absenteeism case, job performance and attendance are related because the employee is not able to perform the essential functions of the position due to the absences. However, in telecommuting cases, an employee is arguing that all the essential functions of the position can be performed outside of the workplace.[145]

An approach that presumes telecommuting is unreasonable in all but exceptional situations should be abandoned altogether because it is inconsistent with the purposes and goals of the ADA. Although some positions require physical presence at the workplace, other positions can feasibly be performed from an offsite location. Workplace presence is a necessity for service-oriented positions where the employee deals directly with customers in person, such as a retail sales representative at a department store or a waiter at a restaurant. The use of telecommuting has been steadily rising over the last few years, and its prevalence will likely only increase in the future. As more employers allow greater numbers of individuals to work from home, a presumption that workplace presence is essential will become more and more irrational.

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[140] Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995).

[141] Ludgate, *supra* note 139, at 1331.

[142] *Id.*

[143] *Id.* at 1332.

[144] *Id.* at 1333.

[145] *Id.* at 1332.

B. The Need for a Broader Approach

1. A Broadly Construed Fact-Specific Analysis Should be the Standard

The only approach that guarantees a fair result is a broadly construed case-by-case approach. The ADA requires the employee to show that he or she is a qualified disabled individual who is able to perform the essential job responsibilities. The employee has the initial burden of proposing reasonable accommodations that would allow the employee to perform the essential job functions. Thus, with a request to work from home, an employee has the initial burden of establishing that he or she can perform all the essential job functions from home and that working from home is reasonable.[146] For example, an attorney requesting to work from home would need to show that the fundamental aspects of his or her position can be performed offsite and that doing so would be reasonable under the circumstances.

Courts should never presume that telecommuting is unreasonable when evaluating an employee's claim. The ADA promotes and requires a fact-specific approach when evaluating reasonable accommodations requests. Courts have the duty to properly and fairly evaluate the reasonableness of the request. In telecommuting cases, courts should look to the nature of the position, the employer's need and ability to supervise the employee from home, and the necessity of the employee to use equipment or resources that are only available at the workplace and cannot be created at home.[147] In circumstances where the essential functions cannot be performed outside the workplace, the request should be deemed unreasonable. But where the employee has shown that the essential functions of the position can be performed outside of the workplace, the accommodation should be allowed unless the employer can establish an undue hardship or present an alternate accommodation that would be effective.[148] The process of determining the reasonableness of a proposed accommodation is highly fact-specific and requires balancing the needs of both the employer and the employee.[149]

The prominence of companies offering telework has increased astonishingly over the past decade.[150] If an employer currently offers a work-at-home option to other employees for the same or an essentially similar employment position, the presumption should always be that

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[146] *See id.* at 1319.

[147] Smith v. Bell Atl., 829 N.E.2d 228, 240 n.5 (Mass. App. Ct. 2005).

[148] *Id.* at 241 n.6.

[149] Rauen v. U.S. Tobacco Mfg., 319 F.3d 891, 896 (7th Cir. 2001).

[150] InnoVisions Canada, U.S. Telework Scene—Stats and Facts, http://www.ivc.ca/studies/us.html (last visited Feb. 22, 2007) (noting that employed telecommuters in the United States have increased from 11.6 million in 1997 to 23.8 million in 2003).

telecommuting will be a reasonable accommodation for a disabled employee.

2. Undue Hardship: Overestimating the Costs of Accommodation and Underestimating the Feasibility of Telecommuting

In cases decided over the last few years, a tendency exists for courts to enunciate a case-by-case analysis, but still reject the request as unreasonable based on undue hardship to the employer. In *Kvorjak v. Maine*, where the majority held that an employee's request to work from home was unreasonable,[151] the dissenting judge responded: "[The court] simply rejected the request for the accommodation without further discussion and it did so without pointing to any facts making the accommodation harmful to its business needs."[152] Unfortunately, this is the critical flaw of many judicial opinions that have addressed this issue. Too often the deciding factor is undue hardship on the employer in situations where the actual hardship has not been fully explored.[153] Oftentimes, the hardship is nothing more than inherent distrust of employees. It has been observed that "the degree to which many companies comply with the accommodations provision of Title I has more to do with their corporate cultures and attitudes than with the actual demands of the law."[154] In telecommuting cases, there are two main reasons why courts erroneously accept an employer's undue hardship defense: (1) they assume the cost of accommodation outweighs the benefits, and (2) they underestimate the feasibility of telecommuting.

First, courts often overestimate the actual costs of accommodation and fail to take into account the benefits of compliance with the requested accommodation. This problem is not unique to telecommuting as evidenced in Title 1 discrimination suits. Some argue that Title I's requirement of reasonable accommodations puts a financial burden on companies that outweighs the benefits.[155] Courts often echo this view in decisions that deny a proposed accommodation based on alleged undue hardship to an employee. In *Vande Zande v. Wisconsin Department of Administration*, this sentiment is reflected in the majority opinion: "If the nation's employers have potentially unlimited financial obligations to 43 million disabled persons, the Americans with Disabilities Act will have imposed an indirect tax potentially greater than the national

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[151] 259 F.3d 48, 58 (1st Cir. 2001).

[152] *Id.* at 59 (Schwarzer, J., dissenting) (quoting Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 648 n.12 (1st Cir. 2000)).

[153] *See, e.g.*, Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538 (7th Cir. 1995).

[154] Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 378 (1997).

[155] *Id.* at 375.

debt."[156] This assumption that costs will outweigh the benefits is often made without reliable data.[157] Studies have shown that companies that effectively follow the law are consistently looking for ways to affordably comply with the provisions of the ADA. These accommodations "have been shown to produce substantial economic benefits to companies, in terms of increased work productivity, injury prevention, reduced workers' compensation costs and workplace effectiveness and efficiency."[158] There have been other studies showing that implementing accommodations for disabled persons have led to both direct and indirect benefits to employers, including increased productivity of employees who do not have disabilities.[159]

Second, courts often underestimate the feasibility of telecommuting. Much emphasis has been placed on the physical presence requirement and the need for supervision and teamwork.[160] Although the need for supervision and teamwork is valid, and in some situations can only be accomplished at a physical workplace, oftentimes supervision and teamwork can still be successfully accomplished in a telecommuting setting. The use of communication tools such as email, teleconferencing, and faxing, can meet the needs of interaction among employees. Employers can supervise via production quotas, computer-assisted work monitoring tools, and by maintaining effective communication. Tools that can be used to effectively manage teleworkers include "project schedules, key milestones, regular status reports, and team reviews."[161]

One example in which the practicability of telecommuting was misjudged is *Kvorjak v. Maine*.[162] In this case, Kvorjak, a claims adjudicator suffering from spinal bifida, had requested to work from home due to complications from his disease.[163] The essential functions of his job included interviewing claimants by telephone; writing and entering decisions related to their claims into a computer; discussing applicable laws and particular claims with the claimants, employers, and others; and assisting claims specialists and employment security aides.[164] The employee contended that he could perform the essential functions by using a telephone and a computer from his home. Instead of

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156 *Vande Zande*, 44 F.3d at 543.

157 Blanck & Marti, *supra* note 154, at 375.

158 *Id.* at 377.

159 *Id.* at 378.

160 *See supra* notes 104, 113 and accompanying text.

161 U.S. Office of Pers. Mgmt., Gen. Servs. Admin., Frequently Asked Questions—How Can the Supervisor Monitor Work Performance When the Employee Is Not Physically Present?, http://www.telework.gov/faqs.asp (last visited Feb. 22, 2007).

162 259 F.3d 48 (1st Cir. 2001).

163 *Id.* at 50–51.

164 *Id.* at 55 nn.13–14.

focusing on the actual tasks of the position,[165] the court based its decision on the presumption that working from home is generally not reasonable due to the lack of "personal contact, interaction, and coordination" needed in most employment positions.[166] The fact that the essential elements of his job could be done offsite was overshadowed by the presumption that an employee needs to be in a workplace with other employees. The director of Kvorjak's division had even stated that "if the law requires it, the [State] could restructure Mr. Kvorjak's job to enable him to work from home."[167]

The *Kvorjak* decision is like many others where the court has "fail[ed] to distinguish between actual job tasks and the default organizational norms regarding when, where, and how the actual tasks get performed."[168] The same line of reasoning was used in the *Vande Zande* decision where the majority opinion stated: "Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance."[169] Courts presume that working from home will result in no supervision and a decrease in the quality of work produced by employees. On the contrary, reports consistently have shown that companies that have implemented telework programs experience increased productivity.[170] There is room for greater leniency in measuring the feasibility of working from home in a number of positions.

VII. PROBLEMS ASSOCIATED WITH TELECOMMUTING

The future of telecommuting holds great promise for numerous individuals with disabilities as well as for the entire workforce. As telecommuting becomes more prevalent, it will open doors to allow qualified disabled individuals to hold fulfilling employment positions that they would otherwise struggle to hold. Along with the abundant opportunities that telecommuting has and will provide, there are issues that arise in connection with the process of working from home.

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[165] *Id.* at 57 ("[C]laims adjudicators [are] key players on a team whose function is to provide information and assistance to the public in utilizing the unemployment insurance system.").

[166] *Id.* (quoting EEOC, *supra* note 69, § 34 n.101).

[167] *Id.* (alteration in original).

[168] Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 39 (2005).

[169] 44 F.3d 538, 544 (7th Cir. 1995).

[170] WORLDATWORK, *supra* note 63, at 3; OFFICE OF TRANSP. & AIR QUALITY, *supra* note 75, at 2.

A. Supervision Issues

Many employers are reluctant to offer telecommuting because of supervision issues. Employers question how to effectively monitor an employee's time and productivity.[171] The need and ease for monitoring will vary with the characterization of the employment position. Some jobs are task-based rather than time-based and can more easily be monitored by observing work product. Employers may have a more difficult time monitoring employment positions that demand certain time commitments. To combat this problem, computer monitoring programs have been implemented where employees "clock" in and out on their computers and will have their work monitored using a computer tracking program.[172] Some companies fear that permitting employees to work from home will allow employees to slack in their work and put in less hours than if they were in the workplace. However, research suggests that individuals who work from home are actually more productive than their colleagues who work in the office.[173] The federal government's website on telecommuting echoes this finding. It states that an employee's work will not suffer without direct supervision because fewer interruptions and distractions occur when working at home and employees have a strong motive to "demonstrate the value of working at home."[174]

B. Security Issues

Security issues associated with telecommuting programs may also concern companies. Because a telecommuter often accesses a company's internal network from home via the Internet, a company's network resources may be more susceptible to computer hackers if proper security measures are not taken.[175] Fortunately, there are security measures companies can take to guard against possible attacks on telecommuter systems. Employers can use encryption protection programs such as Virtual Private Network, so that in the event that the system is hacked, any information stolen is encrypted.[176] Employers can also install firewall software in all computers used by telecommuters.

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171 URSULA HUWS, ET AL., TELEWORK: TOWARDS THE ELUSIVE OFFICE 28–29 (1990).

172 *Id.* at 30–31.

173 Ludgate, *supra* note 139, at 1322 n.82.

174 U.S. Office of Pers. Mgmt., Gen. Servs. Admin., Frequently Asked Questions—Won't the Employee's Work Suffer Without Direct, On-Site Supervision?, http://www.telework.gov/faqs.asp (last visited Feb. 22, 2007).

175 *See* Mark Maier, *Backdoor Liability From Internet Telecommuters*, 6 COMP. L. REV. & TECH J. 27, 39 (2001).

176 *Id.* at 45–46.

Firewall programs increase security and are inexpensive.[177] When appropriate security measures are put into practice, the benefits of telecommuting will outweigh any risk posed by hackers.[178]

C. Social Alienation

Employees that work primarily from home may face social alienation. Personal contact is drastically reduced when an employee telecommutes.[179] Becoming disconnected from society is an important concern for employees that perform a majority of their work from home. "Working from home creates limited interaction with people, places and things, and that might be problematic."[180] Unfortunately, this social alienation is often exemplified when the telecommuter also has a disability. Employers must use care in implementing programs that will prevent social alienation of telecommuting employees.[181] Maintaining strong communication is an important part of preventing social alienation.[182] Social alienation may also play a role in inhibiting an employee's advancement within a company, which will be discussed further in the following section.

D. Promotions

The problem of social alienation may also affect an employee's opportunity for advancement within a company. Workplace promotions are often rooted in social relationships with other employees and management. Working from home may place an otherwise qualified worker at a disadvantage because of the lack of socialization with the workplace-based staff. This issue can be reduced by implementing appropriate communication practices. Recognition is also an important tool employers can use to validate a telecommuter's performance and increase workplace knowledge of a teleworker's contribution to the office.[183] It is also important for management to discuss telework arrangements with the entire staff.[184] Office awareness will aid in decreasing social alienation issues associated with telecommuting.

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[177] *Id.* at 49.

[178] *Id.* at 43.

[179] Ellen Alcorn, Is Working from Home the Answer?, http://diversity.monster.com/wwd/articles/forced (last visited Feb. 22, 2007).

[180] *Id.* (quoting Andrew Houtenville, Ph. D.).

[181] *See id.*

[182] *See* U.S. Office of Pers. Mgmt., Gen. Servs. Admin., Telework: A Management Priority: A Guide for Managers, Supervisors, and Telework Coordinators, http://www.telework.gov/documents/tw_man03/ch4.asp (last visited Feb. 22, 2007).

[183] *Id.* at http://www.telework.gov/documents/tw_man03/ch5.asp.

[184] *Id.* at http://www.telework.gov/documents/tw_man03/ch4.asp.

Additionally, at some point, a disabled employee may be prevented from advancing in a company because it is impossible to perform the advanced job at home. As offices become more computerized and management positions become more easily performed offsite, this issue should present less of a problem. The bottom line is that employers and employees must work together to ensure that teleworking employees are given every opportunity they deserve.

VIII. CONCLUSION

The ADA is valuable in that it reflects the importance of equality and opportunity throughout our society. It has enriched lives and opened doors for many disabled Americans. As technology continues to make workplaces increasingly virtual, the telecommuting trend will continue to increase. As working from home becomes more prevalent in society, it is essential that telecommuting is properly evaluated as a reasonable accommodation under the ADA. Allowing broad statutory interpretations and assessing telecommuting cases on a case-by-case basis are ways in which the court system can ensure the ADA will continue to open doors for Americans with disabilities.

Brianne M. Sullenger

LOST PROFIT OR LOST CHANCE: RECONSIDERING THE MEASURE OF RECOVERY FOR LOST PROFITS IN BREACH OF CONTRACT ACTIONS

"Courts have in the past invented alternative methods of measuring damages. There is nothing to prevent them from adopting some new method" as long as it is "consistent with the generally approved purposes of giving a remedy in damages."[1]

I. INTRODUCTION

Lost profits must be reasonably certain[2]—so concurred the majority of American courts adjudicating breach of contract actions throughout the twentieth century.[3] Over the last few decades several commentators have attacked the results of this standard, sometimes even mentioning the loss of chance remedy as an attractive alternative to the all-or-nothing rule that conventionally applies.[4] Yet none of these periodic critiques has led to a dynamic shift in the determination of contract damage awards; the inertia against change inherent in our legal system has been a formidable opposing force to the extension of this remedy outside of contest and prize scenarios.[5] Because the loss of chance remedy is already applied in those unique types of cases, opening this note with Corbin's quote may be somewhat misleading. The "new method" this note advocates is, in reality, the application of a known and accepted remedy—loss of chance—to a different situation. It is not a radical departure from the conventional understanding and application of the law of contracts, but rather fits squarely within its traditional principles of compensation. For start-up companies and one-time-only event providers—the two plaintiffs who typically suffer from the results of the common all-or-nothing approach—results of this new application would be extraordinary.

Ultimately any argument addressing the issue of damages must justify the calculus it advocates. Therefore an articulation of the

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1 ARTHUR L. CORBIN, 11 CORBIN ON CONTRACTS 232–33 (Joseph M. Perillo ed., rev. ed. 2005).

2 Mo. Retail Hardware Ass'n v. Planters' Operating Co., 294 S.W. 755, 756 (Mo. Ct. App. 1927).

3 *See infra* note 33.

4 Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005, 1056 (1998); Elmer J. Schaefer, *Uncertainty and the Law of Damages*, 19 WM. & MARY L. REV. 719, 738 (1978).

5 The first clear use of the remedy in a breach of contract action is found in *Chaplin v. Hicks*, (1911) 2 K.B. 786. *See* discussion *infra* Part III.A. A different form of the remedy is used for tort claims, particularly in medical and malpractice actions. *See* Polly A. Lord, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479, 1485–94 (1986).

underlying presupposition concerning the purpose of awarding contract damages is demanded. This is a subject of considerable debate.[6] No commentator doubts the occurrence of a legally cognizable wrong; but exactly what that wrong is, and how to calculate it, has been a subject of controversy. This note will assume, just as the majority of opinion does, that in most cases the goal of contract damages is restorative. In other words, the aggrieved party should be placed back in the position he would have been in had the contract not been breached. This restorative goal requires a recovery for the loss of any consequential damages that stem from the breach. It will argue, however, that in cases where the defendant's acts have caused lost profits, the only reasonably certain injury to a start-up company or one-time-only event provider is the loss of an *opportunity*, not the fruits of that opportunity. Thus the calculation of damages should not focus on what the plaintiff would have earned had the contract been performed, but rather on what the contract was worth at the time of breach. This shift is more equitable according to a fairness norm,[7] because it prevents the twin injustices of giving a plaintiff either more than he deserves when he meets the reasonable certainty requirement or less than he deserves when he fails to satisfy the standard.[8]

The remedy of lost chance furthers the restorative goal and, in light of the modern advances made in the field of statistics, would be relatively easy to apply. The lost chance remedy affirms that the harm done to the plaintiff is not the loss of profit or gain that he would have realized had the breaching party performed, but instead is the loss of the opportunity to carry out the contract itself. This chance or opportunity is

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[6] *See* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); CHARLES FRIED, CONTRACT AS PROMISE (1981); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 81 (3d ed. 1986) ("[T]he fundamental function of contract law (and recognized as such at least since Hobbes's day) is to deter people from behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and make costly self-protective measures unnecessary." (footnote omitted)); Peter Benson, *The Unity of Contract Law*, *in* THE THEORY OF CONTRACT LAW: NEW ESSAYS 118 (Peter Benson ed., 2001); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937) (arguing that the goal of contract damages is the stabilization of social relationships); Note, *Damages Contingent Upon Chance*, 18 RUTGERS L. REV. 875 (1964).

[7] By this I simply mean that it awards to each party what is his right. *See* 1 HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE [THE LAWS AND CUSTOMS OF ENGLAND] 13, 15, 17 (Sir Travers Twiss ed., William S. Hein & Co. 1990) (1569), *reprinted in* JEFFREY A. BRAUCH, IS HIGHER LAW COMMON LAW? 33–34 (1999); *see also* RANDY E. BARNETT, PERSPECTIVES ON CONTRACT LAW 3 (3d ed. 2005) ("Fairness to both parties argues against both *over*compensation and *under*compensation.").

[8] *See* CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 119 (1935) (noting that the "all or nothing" rule results in either "overlavishness" or "niggardliness").

what must be restored to the plaintiff, and its value as an asset provides the quantifiable amount of damages to which the plaintiff is entitled.

II. THE HISTORICAL CONTEXT FOR REASONABLE CERTAINTY

A. The Classical Period

At one time the subject of damages for breach of contract was within the distinct province of the jury.[9] The requirement of reasonable certainty developed in the eighteenth century as American judges attempted to control the amount of money awarded by juries in breach of contract actions.[10] Professor McCormick notes that the certainty requirement is a "by-product of the jury system" that springs "from the lack of confidence of American judges in the discretion of juries."[11] Although this requirement served a valid purpose (preventing overcompensation to the plaintiff), its extreme all-or-nothing character also served to create severe problems for parties contracting as or with start-up companies and one-time-only event providers. Because the amount of damages awarded rarely compensated accurately for what was due (in other words, accurately restored to the plaintiff what he lost), the costs of a lawsuit to both plaintiffs and defendants were inefficient—the costs to the plaintiff in bringing the suit typically being much greater than the potential recovery, and the costs to the defendant typically being much less than the cost of performing the contract. These inefficiencies in turn distorted the incentives for investing in and contracting with new ventures.[12]

Economic theory holds that human beings are by nature creatures controlled by incentives.[13] As a fundamental tenet of economics' implicit anthropology, this presupposition has proven quite robust. In modeling aggregate human behavior there are few, if any, considerations that are more useful. Yet over the past two hundred years, courts have practically ignored this empirically validated theory by limiting the award of damages for lost profits in contract actions to cases where the damages are reasonably certain. This failure to account accurately for damages in breach of contract cases creates a perverse incentive for one party to intentionally breach a contract when it is in her interest to do so

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[9] *See id.* at 21–26.

[10] E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1210 (1970).

[11] MCCORMICK, *supra* note 8, at 101.

[12] According to Professor Posner, this problem strikes at the fundamental purpose of contract law. *See* POSNER, *supra* note 6, at 81.

[13] Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 107 (2000); *see* ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 3–7 (5th ed. 2001) (discussing how trade-offs and limits influence human behavior).

(i.e., when she knows that the opposite party will be unable to show with reasonable certainty what her profits might have been).[14] Additionally, it disinclines the other party from entering into a contract when he is at risk for such a breach unless he can afford to insure himself. Though courts have toyed with adopting a different calculation that would force the breaching party to bear some of the injured party's costs,[15] thereby removing the perverse incentive to breach and promoting fairer results when this scenario arises, they have yet to make a substantial change. As things currently stand, the incentive for breach is potentially quite strong for parties who contract with start-up companies and one-time-only event providers.

The reported record of recovery for start-up companies and providers of one-time-only events is bleak. Historically it is more likely for such plaintiffs to become another Google than to recover lost profits from a defendant's breach of contract.[16] The cases that follow provide a representative sample of the same pattern: an entrepreneur signs a contract that it hopes will yield the opportunity for a high return, but that is also subject to a great deal of risk which may lead to no return. The defendant, who is risking comparatively little, willfully breaches the contract. The plaintiff brings suit and puts on the most extensive evidence that the economists of the day can produce in order to show with reasonable certainty what the profits would have been. The court thoughtfully considers the expert's testimony but concludes that ultimately the projected figures are too uncertain to allow the matter to go to the jury. The plaintiff, therefore, recovers none of the profits that it sought to establish.

Chicago Coliseum Club v. Dempsey[17] is perhaps the best known example of the general inability to recover damages for lost profits. Jack Dempsey, the world heavyweight boxing champion, had agreed to fight Harry Wills, an up-and-coming contender.[18] The Chicago Coliseum Club, as the event provider, had agreed to pay Dempsey at least $800,000 for participating in the fight, with the potential for a bonus if the match

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[14] This distortion violates a Kaldor-Hicks theory of efficiency, which holds that a transaction is efficient if those who gain do so to a greater overall degree than those who lose, so that those who gain could in theory compensate those who lose. For a discussion of the Kaldor-Hicks theory of efficiency, see POSNER, *supra* note 6, at 13.

[15] *See* discussion *infra* Part II.B.

[16] *See generally* Todd R. Smyth, Annotation, *Recovery of Anticipated Lost Profits of New Business: Post-1965 Cases*, 55 A.L.R.4TH 507 (2005).

[17] 265 Ill. App. 542 (1932). The story behind the case is quite interesting, especially when understood in the context of the racial tension of the time. *See* RANDY E. BARNETT, CONTRACTS 111–15 (3d ed. 2003).

[18] BARNETT, *supra* note 17, at 111.

were exceptionally lucrative.[19] Dempsey also agreed not to engage in any other boxing matches before the Wills bout.[20] The Club had already secured the promise of Wills, and had decided to hire an experienced marketing expert to promote the fight.[21] Shortly thereafter the Club notified Dempsey of its intention to send insurance representatives to his training facility for a physical examination.[22] His subsequent caustic repudiation was not only a classic example of anticipatory breach, but also led directly to a suit for the recovery of lost profits by the Club.[23]

It is hard to imagine a scenario that could more evoke a court's sympathy to a plaintiff's case than one in which the defendant is an arrogant celebrity who breaches his contract by sending a rude telegram from across the continental divide. Yet the trial court barred the expert testimony the Club sought to introduce with no reservations, and the appellate court had no qualms in sustaining the lower court's determination and awarding only nominal damages. In the words of the court, "[I]t would be impossible to produce evidence of a probative character sufficient to establish any amount which could be reasonably ascertainable by reason of the character of the undertaking. . . . [T]he damages, if any, are purely speculative."[24]

Decided in 1932, *Dempsey* is an example of the jurisprudential understanding of contract damages in the classical period. It clearly affirms the supremacy of the reasonable certainty requirement in limiting contract damage awards, and supports Professor McCormick's assertion that the requirement of reasonable certainty is "probably the most distinctive contribution of the American courts to the common law of damages."[25] For purposes of this note, *Dempsey* clearly exemplifies the two fundamental problems with the current application of the reasonable certainty requirement: the perverse incentive to breach, and the inequity of allowing the perpetrator of a wrong to escape liability. It is time to rethink the approach to contract damages when the law provides no meaningful disincentives for conduct like that of Jack Dempsey.

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19 *Dempsey*, 265 Ill. App. at 545.

20 *Id.*

21 *Id.* at 546.

22 *Id.* at 547.

23 *Id.* Dempsey's repudiation took the form of a telegram, as follows: "President Chicago Coliseum Club Chgo Entirely too busy training for my coming Tunney match to waste time on insurance representatives stop as you have no contract suggest you stop kidding yourself and me also Jack Dempsey." *Id.*

24 *Id.* at 549.

25 MCCORMICK, *supra* note 8, at 124.

Almost as famous as *Dempsey* is the case of *Kenford Co. v. County of Erie*.[26] The fact pattern in *Kenford* is similar to that in *Dempsey* until the parties reach the courthouse. While the trial court in *Dempsey* refused to hear the expert testimony, the *Kenford* trial court not only allowed it in, but ruled in the plaintiff's favor because of it.[27] The Kenford Company (Kenford) and Dome Stadium, Inc. (DSI) entered into a contract with the County of Erie (County) in which the County agreed to construct a new domed stadium while Kenford and DSI agreed to lease the stadium at a price to be determined after the County had obtained a cost estimate.[28] Under the terms of the agreement, the County was to begin construction of the stadium within twelve months of the contract date. When the County failed to begin construction, Kenford and DSI brought suit for lost profits. A jury trial, which was limited to the issue of damages, resulted in a multimillion dollar verdict against the County including damages for loss of future profits. The appellate division, however, reversed that portion of the award attributable to loss of profits on account of its speculative nature.[29] The court of appeals affirmed, even after explicitly noting that Kenford and DSI's

> quantity of proof is massive and, unquestionably, represents business and industry's most advanced and sophisticated method for predicting the probable results of contemplated projects. Indeed, it is difficult to conclude what additional relevant proof could have been submitted by DSI in support of its attempt to establish, with reasonable certainty, loss of prospective profits.[30]

Fifty years separate *Kenford* and *Dempsey*. Despite the court of appeals' failure to ultimately accept the expert's calculations, it recognized the significant gains made in the fields of statistics and probability. The court's attitude of openness towards this testimony is indicative of a shift away from rigid adherence to the reasonable certainty requirement. However, the court of appeals also recognized that any calculation of projected profits, no matter how sophisticated, was not sufficiently certain when based on assumptions not yet realized.[31]

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[26] 493 N.E.2d 234 (N.Y. 1986).

[27] *Id.* at 235.

[28] *Id.* at 234–35.

[29] *Id.*

[30] *Id.* at 236.

[31] *Id.* ("We of course recognize that any projection cannot be absolute, nor is there any such requirement, but it is axiomatic that the degree of certainty is dependent upon known or unknown factors which form the basis of the ultimate conclusion."). Some commentators note that the reasonable certainty requirement is just a proxy for the judge's notion of the business's likelihood of success. *See* Note, *supra* note 6, at 878. Because this standard is subjective, the level of certainty required could range anywhere from 51% to 100%, depending on the judge.

Some have suggested that courts shy away from allowing expected profits for a start-up company or a single-event promoter in order to prevent excessive recoveries, and because of the difficulty inherent in determining what the profits might have been.[32] Unlike situations where the plaintiff is selling fungible goods for which a readily discernible market price exists, there is no market from which to derive the value of a start-up company's goods or services. In other words, the primary risk that start-up companies and one-time-only event providers take is different from that taken by standard goods vendors because it is not known what the public will pay for their product, or even if there will be a paying public. While this risk does diminish the value of contracts involving such parties, it does not mean that they are worth nothing.

B. The Modern Dilemma

The current state of affairs among American courts for the recovery of lost profits could be described as moderately schizophrenic. The vast majority of courts cling to the reasonable certainty requirement despite its unsatisfactory results,[33] while a few have stretched beyond this limitation to award at least some damages when the defendant is directly responsible for the plaintiff's lost profits.[34] In either case, however, the result tends to be inaccurate because it either gives too much or too little to the plaintiff. Thus where the plaintiff is a start-up company or one-time-only event provider, it would seem that the time is ripe for courts to begin to employ the remedy of lost chances in breach of contract actions. However, as *Schonfeld v. Hilliard*[35] demonstrates,

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[32] Schaefer, *supra* note 4, at 739–40; Note, *supra* note 6, at 883–85.

[33] *See* Lowe's Home Ctrs., Inc. v. Gen. Elec. Co., 381 F.3d 1091 (11th Cir. 2004) (applying Georgia law to conclude that lost profits from a commercial venture are generally not recoverable); Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 299 F.3d 769 (9th Cir. 2002) (holding that in California evidence to establish lost profits cannot be speculative); Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., No. 03 Civ. 6731 (HB), 2005 WL 146807 (S.D.N.Y. Jan. 21, 2005) (affirming that lost profits are recoverable only if shown with reasonable certainty); Kinesoft Dev. Corp. v. Softbank Holdings, Inc., 139 F. Supp. 2d 869 (N.D. Ill. 2001) (holding that a new business cannot recover lost profits); Vescio v. Merchs. Bank, 272 B.R. 413 (D. Vt. 2001) (finding that the plaintiff must show an established history of profits in order to recover lost profits); PBM Prods., Inc. v. Mead Johnson & Co., 174 F. Supp. 2d 424 (E.D. Va. 2001) (holding that the "new business rule" requires that damages be certain); W. Publ'g Co. v. Mindgames, Inc., 944 F. Supp. 754 (E.D. Wis. 1996) (holding that a short track record of profits precluded the recovery of lost profits).

[34] *See, e.g.*, United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207 (10th Cir. 2000); United States *ex rel.* CMC Steel Fabricators, Inc. v. Harrop Constr. Co., 131 F. Supp. 2d 882 (S.D. Tex. 2000) (allowing the recovery of damages that were shown with reasonable certainty); Marathon Oil Co. v. Collins, 744 N.E.2d 474 (Ind. Ct. App. 2001).

[35] 218 F.3d 164 (2d Cir. 2000).

courts remain disinclined to employ an alternative remedy unless it is clear that the amount awarded fits the loss sustained.

Schonfeld and Hilliard were both shareholders of the International News Network (INN), a closely held cable television corporation. In March of 1994, INN contracted with the BBC for the exclusive right to broadcast its programming in the United States beginning in February of the next year.[36] As the parties planned the launch of the BBC in the United States, Cox Cable Communications approached INN about purchasing INN's contract rights to the BBC programming for $1.7 million with an equity interest of 5%.[37] Although interested at first, INN and Cox never completed the transaction. Instead, INN entered into another agreement with the BBC to begin the immediate broadcast of the programming contingent upon INN making timely payments.[38] Hilliard made repeated oral promises to Schonfeld that he would provide the funding for these payments. Despite these assurances, however, Hilliard never provided any money. Upon default the BBC gratuitously released INN from the contract without bringing suit in exchange for a complete dissolution of the agreement. Shortly after the deal fell through, Schonfeld sued Hilliard claiming that his oral promises to provide the funding for the BBC programming were fraudulent.[39] He sought damages for, among other things, the profits that would have accrued had the underlying contract with the BBC not been breached.

At trial Schonfeld attempted to recover his claim to INN's lost profits by using expert testimony to show that damages from lost profits were between $112 and $269 million.[40] In addition, Schonfeld argued in the alternative for "lost asset" damages, a claim he based on the Cox's $1.7 million offer to purchase the rights to the contract with the BBC.[41] The trial court dismissed all of his claims after finding that he had not proven any damages with reasonable certainty. Specifically, the court described Schonfeld's "lost asset" theory as a "back door" attempt to recover the same lost profits that the court had already determined were too speculative to consider.[42]

The U.S. Court of Appeals for the Second Circuit agreed with the district court's determination that the expert testimony concerning the loss of profits was insufficient to meet the requirement of reasonable certainty. But it overturned the district court's interpretation of

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36 *Id.* at 169.

37 *Id.*

38 *Id.* at 170. In reality, the contractual relationship was more complex and developed into the basic agreement mentioned above. *See id.*

39 *Id.*

40 *Id.* at 171.

41 *Id.*

42 *Id.*

Schonfeld's alternative "lost asset" theory of recovery. Holding that the exclusive right to broadcast the BBC programming in the United States was a tangible asset with an ascertainable value and that the loss of this asset was directly attributable to Hilliard's misconduct, it remanded the case for further proceedings.[43]

The Second Circuit's approach in *Schonfeld* is intriguing. While the court affirmed the all-or-nothing rule's application to a claim for lost profits that stem from the breach of a contract, it found it inappropriate with regard to the loss of the contract itself. But as the district court pointed out, because INN's only real asset was the contract with the BBC, the two claims were seeking practically the same thing. The Second Circuit appeared to take away with its right hand what it replaced with its left.

As its opinion makes clear, however, the Second Circuit was not providing recovery on the basis of some different breach, but rather was implementing a different measure of damages for the same breach. In recognizing that Schonfeld's loss of the rights to a contract that had as of yet not produced any profits was worth something for which he was entitled to compensation, the court implemented the loss of chance remedy. The court said as much itself (presumably without realizing it) when it stated that the "value of an income-producing asset . . . represents what a buyer is willing to pay for *the chance* to earn the speculative profits."[44] Thus what the court awarded under a "lost asset" theory was nothing more than the loss of chance remedy in disguise.

In reaching its decision, the court stated that the reason the value of an income-producing asset met the reasonable certainty requirement while the loss of profits calculations did not was because the asset's value was determined at a single point in time and therefore was not subject to all of the variables that made the extended profit calculations too speculative.[45] This is not completely accurate. As Hilliard had been quick to point out, the value of the contract was speculative for the same reasons that Schonfeld's attempt to prove lost profits was speculative. What the court implicitly affirmed, and what the loss of chance remedy explicitly approves, is that the opportunity itself has value, which when quantified monetarily (as an asset or otherwise) contains the appropriate discount for the speculative nature of the profits.

This bears itself out nicely in the case. Consider the discrepancy in value between the $112 to $269 million of projected profits Schonfeld's expert claimed the contract would have generated and the $1.7 million Cox was willing to pay for the rights to the contract. It is obvious that

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[43] *Id.* at 183.

[44] *Id.* at 177.

[45] *Id.*

Cox had discounted the value of the chance to provide the BBC's programming in consideration of the speculative nature of the future profits. Although seemingly schizophrenic, the final outcome in *Schonfeld* is perfectly rational.

The Second Circuit's reasoning appears convoluted because it gives the impression that it is compensating for an asset that is completely distinct from the lost profits. In fact it is simply treating the contract as it should be treated in this context: as an asset with a market value.[46] Contracts are used as assets in much the same way as any other form of capital.[47] A contract's value as an asset comes from its ability to constrain the actions of another in the future. The prime difference between the value of a contract and more conventional assets is that the contract's value is typically subject to a great deal more risk.[48] When someone buys a piece of machinery for a factory, the value of that asset to its purchaser is subject to a slight degree of risk because the seller may not deliver the machine or it may not function properly or it may break down unexpectedly.[49] The price of the asset reflects this risk. If, for example, less risk were involved as a result of an extended warranty, then the asset would cost more.[50]

Courts intuitively sense that the value of a contractual right is much less than the hypothetical or potential value of the profits that may come from it—hence their reluctance to allow recovery on the basis of these projections. It is the same reluctance that would attend an argument asserting that the value of the right to use a factory was equal to the anticipated profits for the subsequent year. The two are simply not the same. It is unfortunate, but quite understandable, that the result of this intuition is typically a complete denial of any recovery. As a

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[46] *See infra* notes 94–97 and accompanying text. Professor Eisenberg draws the same conclusion. *See* Eisenberg, *supra* note 4, at 1062 ("The damages the promisee suffers . . . are not his lost profits as such, but the loss of the value of an asset that consists of the promisee's right to earn profits under the contract.").

[47] Promissory notes, bonds, and bundles of consumer debt instruments are traded everyday by investors. For a number of examples, see generally Viva Hammer & Ann Singer, *Insurance Derivatives: A Tax Angle*, *in* TAX STRATEGIES FOR CORPORATE ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS & RESTRUCTURINGS 263, 299 (Louis S. Freeman ed., 2004).

[48] Or sometimes less. Consider again the loan contracts mentioned in *Schonfeld*, 218 F.3d at 177. Credit agencies provide ratings to banks and other lending institutions on the basis of the borrower's financial status and history. These ratings in turn dictate the amount of interest that the lending institution charges to the borrower as essentially a risk premium. Contracts for loans made to borrowers with excellent credit ratings are not typically subject to much risk at all. *See* Frank Partnoy, *The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U. L.Q. 619 (1999).

[49] *See generally* Daniel Keating, *Measuring Sales Law Against Sales Practice: A Reality Check*, 17 J.L. & COM. 99, 114–19 (1997).

[50] *Id.* at 116–17.

resolution for the tension between the demonstrable reality of a contract's value and this intuitive bar to recovery, the loss of chance remedy allows a court accurately to predict the value of a contract as an asset and permit a recovery for the true value of the plaintiff's loss, not the fanciful dreams he had hoped that the asset would produce.

III. THE LOST CHANCE REMEDY

A. Origins

The first and best known case to apply the lost chance remedy is *Chaplin v. Hicks*,[51] an English case in which the plaintiff was selected as one of fifty finalists in a beauty contest of over six thousand applicants.[52] Upon selection, the director of the competition scheduled an interview with the plaintiff but failed to give her timely notice of it. As a result, she was unable to attend.[53] The director subsequently eliminated the plaintiff from the competition, and she brought suit for breach of contract. Despite her inability to prove with reasonable certainty that she would have won the contest had she remained a contestant, the court awarded her damages based on her unadjusted numerical possibility of winning.[54]

Courts in the United States have intermittently followed the *Chaplin* analysis but typically only when the plaintiff has suffered a similar injustice, such as the loss of the chance to win a magazine subscription contest,[55] a hog showing contest,[56] or an encyclopedia puzzle contest.[57] Within the narrow realm of breaches of contract that occur in potential prize winning contests, the remedy of lost chance is a commonplace alternative. Outside this situation, however, the remedy is seldom considered.

The first American case to apply the loss of chance remedy to a scenario other than contests was *Taylor v. Bradley*,[58] an 1868 decision by the Court of Appeals of New York. Taylor was a farmer who had entered into a contract to farm land for three years with Bradley, who was only a prospective purchaser of the parcel of farmland which Taylor would farm pursuant to the contract.[59] Bradley decided not to purchase the farmland

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51 (1911) 2 K.B. 786.

52 *Id.* at 787.

53 *Id.* at 788.

54 *Id.*

55 Wachtel v. Nat'l Alfalfa Journal Co., 176 N.W. 801 (Iowa 1920).

56 Kansas City, M. & O. Ry. Co. v. Bell, 197 S.W. 322 (Tex. Civ. App. 1917).

57 Mange v. Unicorn Press, Inc., 129 F. Supp. 727 (S.D.N.Y. 1955).

58 39 N.Y. 129 (1868).

59 *Id.* at 129–30.

and was therefore unable to keep his contractual obligations to Taylor.[60] Taylor sued for breach of contract, but because the only consideration he received for the contract was the opportunity to farm the land, he was unable to identify any damages other than loss of potential profits. In finding for Taylor (and reversing the trial court), the Court of Appeals determined that justice required Taylor receive the value of his contract—the value of the opportunity to farm the land.[61]

Taylor is something of an anomaly in the history of cases dealing with contract damages awards. Since it was decided in 1858, almost no other courts, including those in New York, have followed it. Yet it clearly states the principle on which the loss of chance remedy is based: the plaintiff has lost an opportunity, and that opportunity has value that deserves compensation.

Despite the initial lackluster response generated by *Taylor*, the U.S. Supreme Court took note of the case seventy years later in *Story Parchment Co. v. Paterson Parchment Paper Co.*[62] The Court was trying to determine the proper amount of damages due under the Sherman Antitrust Act for an alleged conspiracy by Paterson to monopolize the interstate market for vegetable parchment.[63] The district court accepted a jury verdict for $65,000 based on lost profits which the circuit court reversed.[64] Reinstating the jury's award, the Court affirmed the approach in *Taylor* on two primary grounds. First, the Court trumpeted the merits of excluding an all-or-nothing type of recovery and, second, it applauded preventing a wrongdoer from profiting from his actions.[65]

B. Contemporary Status

With the Supreme Court's endorsement, it might have seemed that the lost chance remedy was finally ascending and superceding the requirement of reasonable certainty in those cases where the plaintiff was unable to prove lost profits. Unfortunately this was not the case. *Story* was decided under federal statutory law, and despite its reliance on *Taylor*, a pure breach of contract action, few courts adopted the alternative measure of recovery for determining contract damage

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60 *Id.* at 130.

61 *Id.* at 143–44.

> [T]he plaintiff is entitled to the value of his contract. He was entitled to its performance; it is broken; he is deprived of his adventure; what was this opportunity which the contract had apparently secured to him worth? . . . His damages are what he lost by being deprived of his chance of profit.

Id. at 144.

62 282 U.S. 555 (1931).

63 *Id.* at 559.

64 *Id.*

65 *Id.* at 562–63.

awards. Reasonable certainty remained the conventional criterion and continued to produce its unsatisfactory results, as it does to this day.

Since *Story* a few courts have applied the loss of chance remedy to breach of contract actions, including the courts in *Locke v. United States*[66] and *Miller v. Allstate Insurance Co.*[67] *Locke* resembles the prize and contest cases and offers a straightforward application of loss of chance to a breach of a requirements contract. The court's seemingly natural adoption of the remedy in this context perhaps elucidates part of the reason for its overall failure to win support in American courts.

Locke was one of four contractors on a list of providers that performed typewriter service repairs for the federal government.[68] All departments of the federal executive branch in the local area were required to use only the service providers on the list and no others.[69] Thus, for any particular job, Locke's statistical chance of getting a contract was one in four. (In reality, his chance was subject to many other contingencies, including his bid price, his rapport with the particular agency, and his availability.) Before Locke received any jobs, his name was improperly removed from the list.[70] He brought suit for damages, including the consequential damages of lost profits.[71]

In evaluating Locke's claim, the court recounted *Story* and affirmed the advantages of the loss of chance remedy over an all-or-nothing approach.[72] Relying on Professor McCormick, it concluded by stating that "where the value of a chance for profit is not outweighed by a countervailing risk of loss, and where it is fairly measurable by calculable odds and by evidence bearing specifically on the probabilities[,] the court should be allowed to value that lost opportunity."[73] The *Locke* court accepted the loss of chance remedy as a theory, but quickly limited its use only to those cases where an accurate assessment could be made of the value of the contract at the time of breach.[74] Although the court claimed to be applying the loss of chance remedy, its qualifying statements practically bound its use with a requirement of reasonable certainty.

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66 283 F.2d 521 (Ct. Cl. 1960).

67 573 So. 2d 24 (Fla. Dist. Ct. App. 1990).

68 *Locke*, 283 F.2d at 522.

69 *Id.*

70 *Id.* at 523.

71 *Id.*

72 *Id.* at 524.

73 *Id.* at 525.

74 *Id.* at 524 ("If a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery. The amount may be approximated *if a reasonable basis of computation is afforded.*" (emphasis added) (citation omitted)).

The court's tentative implementation of the remedy is informative. It is reasonable to infer that the court imagined the facts in *Locke* were uniquely suited to permit the use of the loss of chance remedy,[75] but that typically the facts would be such as to render the remedy inapplicable. It is likely this inference, more than anything else, that has hindered the expansion of the loss of chance remedy.

By 1990, the ability to assess the value of any commodity, good, or service was extensive. The sciences of probability and statistics were fine-tuned instruments of calculation in the hands of experts who used them to price everything from oil futures to life insurance. This reality, coupled with a sympathetic plaintiff, led a Florida court to award damages under the loss of chance remedy in *Miller v. Allstate Insurance Co.*[76] Miller was in an automobile accident that she believed might have been caused by a faulty accelerator mechanism.[77] She released the car to her insurance company, Allstate, only after reaching an oral agreement which provided that Allstate would return the car to her for use in a products liability suit against the manufacturer.[78] Instead of returning the car, Allstate sold the car to a salvage yard where it was disassembled. Miller, in turn, brought suit for breach of their agreement. The district court directed a verdict for Allstate on the grounds that Florida does not recognize a cause of action for the breach of a contract to preserve evidence, and that Miller did not lose the opportunity to bring suit against the manufacturer.[79] In reversing the lower court's ruling, the appellate court noted the same benefits afforded by the loss of chance doctrine that the U.S. Supreme Court had noted in *Story*: preventing a wrongdoer from prospering by his conduct and providing an award of at least some amount to a plaintiff.[80]

In ruling for Miller, the court stated that "[i]t is now an accepted principle of contract law . . . that recovery will be allowed where a plaintiff has been deprived of an opportunity or chance to gain an award or profit even where damages are uncertain."[81] The court did not, however, provide any citations for this proposition other than a few law

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[75] On remand, the court directed the trial commissioner to determine the total amount of typewriter-repair business for which Locke would have been eligible, whether there were any material facts that would probably have kept him from receiving the business, and the average costs he would have incurred in doing the work. *Id.* at 525. The court's instructions indicate that it believed it could account for at least the most important variables that would have affected Locke's profits and hence compensate him for the *profits* he would have made as opposed to the *opportunity* he lost.

[76] 573 So. 2d 24 (Fla. Dist. Ct. App. 1990).

[77] *Id.* at 25.

[78] *Id.*

[79] *Id.* at 26.

[80] *Id.* at 29–30.

[81] *Id.* at 29.

review articles and some cases from the early twentieth century. Although this lack of support reveals the shaky ground of the court's assertion, it does not belie the correctness of its decision. Even so, the precedent in *Miller*, like *Taylor*, has not been followed by many courts and is one of the few clear victories for the loss of chance remedy nationwide. This is probably so because the court did not provide any reliable guidelines for its application in practice. One is left wondering how even the most sophisticated statistical analysis could provide an accurate value for the loss of the chance to bring a lawsuit. In addition, the particular facts of the case in *Miller* are certainly unusual and thus make it easily distinguishable from the majority of other situations where the remedy could be used.

C. Restatement and Codification

In addition to the intermittent case law, the loss of chance remedy also finds support in the Restatement (Second) of Contracts (Restatement) and the Uniform Commercial Code (UCC). Section 348(3) of the Restatement states that "[i]f a breach is of a promise conditioned on a fortuitous event and it is uncertain whether the event would have occurred had there been no breach, the injured party may recover damages based on the value of the conditional right at the time of breach."[82] The official comment to this section of the Restatement makes it clear that this remedy is limited in its application to those promises that are aleatory in nature and does not apply where the injured party's performance is not based on some fortuitous event.[83] It also implies that its use is restricted to situations where the plaintiff has lost a chance of winning a prize or a contest.[84]

By limiting the loss of chance remedy's application to aleatory and prize winning scenarios, the drafters provided defendants seeking to escape liability with a persuasive argument. Indeed, it was precisely this argument on which Allstate relied in *Miller*.[85] As the court noted, however, the restriction of the Restatement has been questioned by commentators as a condition without justification.[86] It does not make sense to restrict its application to only aleatory contracts when the remedy could be applied in any situation where the plaintiff has lost an opportunity. In contrast to section 352 of the Restatement, which holds that new or unestablished businesses, like any other injured party, can

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82 RESTATEMENT (SECOND) OF CONTRACTS § 348(3) (1981).

83 *Id.* § 348 cmt. d.

84 *Id.* ("[H]e also has the alternative remedy of damages based on . . . what may be described as the value of his 'chance of winning.'"); *see also id.* § 348 cmt. d, illus. 5 (using a horse race as an example of when the remedy could be applied).

85 Miller v. Allstate Ins. Co., 573 So. 2d 24, 29–30 (Fla. Dist. Ct. App. 1990).

86 JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 580 (5th ed. 2003).

only recover lost profits if they can be proved with reasonable certainty,[87] the application of the loss of chance remedy under section 348 allows plaintiffs to recover the true value of what they have lost, rather than force them to suffer the result of a rule that probably undercompensates them. Moreover, it would prevent the breaching party from escaping liability and correct the perverse incentives created under section 352.

Section 2-715 of the UCC broadens the approach of the Restatement to provide consequential damages for "any loss . . . the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise."[88] The official comment specifically addresses any ambiguity in the code language for determining the damage amount by rejecting "any doctrine of certainty which requires almost mathematical precision in the proof of loss," and asserting that "[l]oss may be determined in any manner which is reasonable under the circumstances."[89] Any reasonable calculation would certainly include the loss of chance remedy. The drafters of the UCC obviously intended to reject an all-or-nothing rule and provide injured buyers with the certainty of at least some damage award in situations where there are no past performance reports to guide a court's decision. Although the UCC provides a remedy when the plaintiff cannot prove damages with reasonable certainty, the remedy is usually unnecessary under the UCC because the UCC only applies to the sale of goods, and traditionally goods have a going market value that is easy to calculate.

IV. EXTENDING THE LOST CHANCE REMEDY

A. A Model Solution

In 1988, the Supreme Court decided *Basic Inc. v. Levinson*.[90] A true win for the small shareholder and an even playing field, the case was also a triumph for law and economics. In ruling for the defendant, the Court based its decision primarily on an economic argument that asserted that any false or misleading material statement, made openly by a representative of a company whose stock is traded publicly, has an effect on the market and price of that stock.[91] Thus, investors who buy or sell after a materially misleading public statement is made do not have to prove that their decisions were affected by the communication; it is presumed that they were. Known as the fraud-on-the-market theory, the holding was the result of economic logic too compelling to be denied.

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87 RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981).

88 U.C.C. § 2-715(2)(a) (2003).

89 *Id.* § 2-715 cmt. 4.

90 485 U.S. 224 (1988).

91 *Id.* at 241–42.

If the difficulty in assessing damages under a loss of chance theory is truly the prime hindrance to the remedy's application, *Basic* is illustrative of how practitioners can promote change. The difficulty lies in demonstrating to a court's satisfaction the soundness of economic arguments that purport to provide calculations designed to supply the market price of a contract for which there is no ready market. One could argue that the only reason Hilliard managed to recover against Schonfeld was because the market had already provided a convenient figure for the court to use as a guideline. Had Cox never made an offer to INN with a price tag, it would have been exceptionally difficult, but not impossible, for the court to affix a value to the contractual rights of INN.

There are two primary means by which a court can value a lost chance. The first is to take the expected profit calculations provided by the plaintiff, average them, reduce the average for the time value of money (including inflation), and then reduce that value for the risk of the enterprise.[92] The court would rely on the plaintiff for the initial anticipated profit calculation but would make the final determination of the amount to award on its own. This value reflects the value of the opportunity or chance to earn the profits.[93] The second option is to treat the contract as an asset just as the court in *Schonfeld* did. But without the aid of an offered price or a reasonably thick market, the court would have to look to other means to establish the asset's value.

The best method a court could use is the Capital Asset Pricing Model (CAPM). Outlined by Professor Melvin Eisenberg in his article, *Probability and Chance in Contract Law*, the CAPM is the conventional tool used by financial analysts to determine the value of an income-producing asset.[94] Eisenberg argues that a contract's value can and should be determined using this model because the requirement of reasonable certainty to obtain lost profits does not accurately restore the injured party.[95] The CAPM predicts the value of the contract at the time of the breach—in other words, it supplies a value where there is no current market. Professor Eisenberg calls this the "expected-value measure."[96] Using current financial data, the CAPM accounts for the time value of money, the risk of unanticipated events that affect the entire market, and the unanticipated events that affect only the type of asset being evaluated. It then discounts the expected cash flow of the

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92 This is the approach advocated by Professor Schaefer. *See* Schaefer, *supra* note 4, at 741.

93 *Id.*

94 Eisenberg, *supra* note 4, at 1061–64.

95 *Id.* at 1063.

96 *Id.* (emphasis omitted).

asset by these variables.[97] The final result is essentially a hypothetical prediction of what an investor would be willing to pay for the asset: the contract's market value. The value does not represent the hypothetical profitability of the asset but rather the value of the opportunity to make those profits. This is the value of the lost chance.

Either approach—a court-imposed deduction to the expected profits or the CAPM—would provide the plaintiff with roughly the same recovery because both use similar considerations and calculations to place a market value on the opportunity the contract afforded. The CAPM, however, is probably a better method overall because calculating value under the CAPM shifts the focus to the object that the remedy is actually compensating for. Focusing on the remedy as compensation for an asset that represents the chance to earn profits, rather than proving and then discounting profits, is more accurate and is also more likely to succeed as an alternative remedy.

The obvious result of using a value that discounts for risk is that it compensates a plaintiff for a much lower amount than an expected profit's value. This result thus affirms what courts have implicitly recognized in rejecting lost profit calculations: a lost profit's award may vastly overcompensate the plaintiff. At the same time, this result affirms what commentators have recognized as the problem with the reasonable certainty requirement: consistent undercompensation of the plaintiff. The lost chance remedy, resolving both concerns, supplies what is ultimately a more just remedy that better accords with the accepted restorative norm of contract damage awards: it puts the plaintiff back into the position he would have been in had the defendant performed.[98]

In *Schonfeld*, the court relied on *Kenford*'s analysis of the reasonable certainty requirement to bar Schonfeld's lost profit claim.[99] But the *Schonfeld* court went on to note that in *Kenford* DSI had not raised a claim for "lost asset" damages, and thus, Schonfeld's claim under that theory was not barred under the precedent of *Kenford*.[100] Had DSI raised a claim under a lost asset or loss of chance theory, it might have successfully recouped the value of its lost opportunity to build and make profits on the stadium.

Supposing that Kenford and DSI made the claim for loss of chance damages as an alternative to lost profits, the court would have had a prime opportunity to apply the loss of chance remedy. Because there was no offer for the rights to the stadium before trial, and thus no objective price in the record for the court to utilize, it would have had to discern

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97 *Id.*

98 RESTATEMENT (SECOND) OF CONTRACTS § 331 (1981).

99 Schonfeld v. Hilliard, 218 F.3d 164, 173–74 (2d Cir. 2000).

100 *Id.* at 176.

the value of the contract at the time of the breach. This value would, in all likelihood, have been relatively easy to ascertain because of all the financial data that Kenford and DSI had already collected in their attempt to prove lost profits. Under the CAPM, all of the possible cash flows that the stadium might have produced would have been multiplied by their probabilities and the results summed. That cash flow would then have been discounted for the time value of money and the rate of risk for stadium revenues. The resulting number would have been multiplied by the rate of risk for unanticipated events in the market generally. This final value would have represented a hypothetical market value that an investor would be willing to pay for the right to build and operate the stadium—the value of the chance to make the hypothetical profits.

B. Potential Problem

Although the CAPM presumes to make accurate predictions of the market value for contracts that have no going market, the most obvious argument against such predictions is that they are generalized for an anonymous contract and do not predict with real accuracy the actual value of any particular asset. Thus, the argument goes, the predictions may still be too uncertain to be of assistance in computing the actual value of the plaintiff's lost chance. This is a valid concern and needs to be addressed.

When the Supreme Court adopted the fraud-on-the-market theory in *Basic Inc. v. Levinson*, it limited it's funtion to that of a rebuttable presumption.[101] Thus, the Court affirmed the validity of the economic theory in a generalized hypothetical context, but did not mandate the implementation of that theory upon every stock issuer who might make misleading statements regarding the status of merger negotiations to investors. Instead, if the issuer could show that the misleading statement was made in such a context that it had no effect on the market for the issuer's stock, the presumption would be rebutted and the plaintiff would still be forced to show the extent of its reliance damages without the benefit of the fraud-on-the-market theory.[102] Thus, if a situation arose in which a buyer of the issuer's stock heard a misleading statement concerning merger negotiations, but knew it to be false, he could not avail himself of the fraud-on-the-market theory. In essence, the Court constrained the use of the theory with a reality check.

The application of the lost chance remedy as calculated under the CAPM should be used in the same manner—that is, as a rebuttable presumption. In a situation where a start-up company's contract with

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[101] 485 U.S. 224, 245–46 (1988).

[102] *Id.*

another party for a crucial good or service is breached and leads to the loss of profits for the plaintiff's business, the defendant would be liable for the value of the contract at the time of breach. This value would presumably be equal to the value calculated under the CAPM. However, if the defendant can prove that this particular contract would have had no value to this particular plaintiff—say, because the plaintiff did not have the means to use the good or service—then the CAPM would not apply. Using the model in this manner would both prevent the court from being forced to ignore the reality of a contract's monetary value when attempting to provide the plaintiff with a remedy and preclude the plaintiff from opportunistically profiting from the favorable presumption.

V. CONCLUSION

The requirement of reasonable certainty was, in its historical context, an understandable response to a plaintiff who could not show with any reliable evidence what his lost profits from a new business might have been. If the aim of contract damages is to put the injured party back into the position it would have been in had the contract not been breached, then forcing an injured party to bear the loss of what it hoped for, but will never be sure of, is certainly a more reasonable alternative than rewarding its fanciful dreams with real gold. A business with a proven track record of profitability can realistically assert that, absent an extreme and unforeseen catastrophe, it expects the same returns at the time of the breach as it had in the past. Its *profits* are reasonably certain. But a new business can only be sure of its *opportunity*, and restitution for the loss of this opportunity is all that can be required of the breaching party to make the injured party whole.

Today courts (and practitioners) have the ability to accurately measure the value of a plaintiff's lost opportunity. Presented with this alternative, an alternative which works greater justice, the courts should take it. With the loss of chance remedy courts no longer face an all-or-nothing dilemma, but can force a breaching party to bear the true cost of its breach, and provide injured start-up companies and one-time-only event providers a more equitable restoration. The loss of chance remedy truly is "consistent with the generally approved purposes of giving a remedy in damages."[103]

Jeremy L. Pryor

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[103] CORBIN, *supra* note 1, at 233.