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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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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.

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 *témoignage*. 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

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

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

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

Comment [IT1]: Again, should this be changed to “so,” because it seems to contradict his third to last sentence in this paragraph.

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

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

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 toes¹⁸—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

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

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.

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.