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Richard D. Friedman

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CRAWFORD, DAVIS, AND WAY BEYOND

*Richard D. Friedman**

INTRODUCTION

Until 1965, the Confrontation Clause of the Sixth Amendment to the United States Constitution hardly mattered.¹ It was not applicable against the states, and therefore had no role whatsoever in the vast majority of prosecutions. Moreover, if a federal court was inclined to exclude evidence of an out-of-court statement, it made little practical difference whether the court termed the statement hearsay or held that the evidence did not comply with the Confrontation Clause.

But the Supreme Court's decision in *Pointer v. Texas*² to apply the Clause to the states meant that, potentially at least, the Clause mattered a great deal. The Court could invoke the Clause, as it did in *Pointer* itself, to hold that evidence of a statement could not be admitted in a state prosecution, notwithstanding that the evidence complied with the state's hearsay law.³ And the steady liberalization of hearsay law, which was advanced by adoption of the Federal Rules of Evidence in 1975 and by subsequent codifications based on those Rules adopted by most of the states, increased the potential significance of the Confrontation Clause; it meant that black-letter hearsay law

* Ralph W. Aigler Professor of Law, University of Michigan Law School.

¹ The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

² 380 U.S. 400 (1965).

³ See also, e.g., *Barber v. Page*, 390 U.S. 719 (1968).

would pose no obstacle to some statements that the federal courts might nonetheless determine to violate the confrontation right.

The impact of the Clause was limited, however, by the fact that the Supreme Court did not have a good conception of what the Clause meant. The Clause seemed to require the exclusion of some hearsay, but treating it as excluding all hearsay would be intolerable. The Court floundered, eventually articulating in *Ohio v. Roberts*⁴ a rationale that the Clause was meant to exclude only unreliable hearsay, and leaning heavily on the established and expanding body of hearsay exemptions to determine what was reliable.⁵ Consequently, the Clause still had only a very limited effect. The lower courts usually could find a basis for admitting a statement, either by fitting it within an exemption or making a case-specific determination of reliability.⁶ And, though the Supreme Court occasionally swooped down and held the admission of a given statement to be a violation of the Clause,⁷ the law was highly unpredictable because it was not rooted in any solid underlying theory.⁸

*Crawford v. Washington*⁹ changed the landscape dramatically. In *Crawford*, the Supreme Court held that the Confrontation Clause does not constitutionalize the prevailing law of hearsay.¹⁰ Rather, it enunciates a simple and long-standing procedural rule: A prosecution witness must give testimony in

⁴ 448 U.S. 56 (1980).

⁵ *Id.* at 66 (“Reliability can be inferred without more where the evidence falls within a firmly rooted hearsay exception.”).

⁶ Note the catalogue of cases reviewed in *Crawford v. Washington*, 541 U.S. 36, 63-65 (2004).

⁷ *E.g.*, *Lilly v. Virginia*, 527 U.S. 116 (1999); *Idaho v. Wright*, 497 U.S. 805 (1990).

⁸ *Crawford v. Washington*, 541 U.S. 36, 63 (2004) (“The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.”); *id.* at 68 n.10 (“the *Roberts* test is *inherently*, and therefore *permanently*, unpredictable”).

⁹ 541 U.S. 36 (2004).

¹⁰ *Id.* at 60-62.

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the presence of the accused, subject to cross-examination.¹¹ Therefore, if an out-of-court statement is testimonial in nature, it may not be admitted against an accused unless the accused has had (or forfeited) an opportunity to examine the witness, and even then it will be accepted only if the witness is unavailable to testify at trial.¹²

Doctrinally, the transformation was remarkably broad and swift. The upshot is that we are at the threshold of a new era. This is the first time that the Confrontation Clause really has a substantial impact in itself; put another way, this is the first time that the distinction between the commands of the Clause and the contents of ordinary hearsay law will really be significant. Many basic questions will have to be rethought, or approached completely from scratch. That is intellectually very exciting. Moreover, because the change is so new and broad, fears that the testimonial approach will prove to be as indeterminate as the reliability-oriented approach that it replaced are, I believe, misguided. The reliability approach was incoherent and failed to express any principle worth protecting. Therefore, it was, as Justice Scalia said in *Crawford*, permanently unpredictable.¹³

Given that the new world of the testimonial approach is a little more than two years old, one cannot expect that by now all significant questions would have been resolved and that the lower courts would all apply those resolutions smoothly and consistently. Indeed, in arguing *Hammon v. Indiana*,¹⁴ I suggested that the Court *not* try to do too much all at once; rather, the Court should be attempting to build a framework that will last for centuries, and it is more important that it be built well

¹¹ *Id.* at 59.

¹² *Id.* *Crawford* also holds out the possibility that statements fitting within the “dying declaration” exception to the hearsay rule might fall outside the confrontation right. *Id.* at 56 n.7. In my view, the proper way to handle dying declarations is through the doctrine of forfeiture rather than by creating an exception to the right.

¹³ *Id.* at 68 n.10.

¹⁴ 126 S. Ct. 2266 (2006), *decided sub nom.* *Davis v. Washington*, 126 S. Ct. 552 (2006).

than that it be built quickly.¹⁵ And in the end, just as in *Crawford*, the Court decided *Hammon* and its companion, *Davis v. Washington*,¹⁶ without offering a comprehensive definition of what “testimonial” means. Now, though, we have some additional guideposts: The statements at issue in *Hammon* are testimonial, while the key ones at issue in *Davis* are deemed not to be.

In Part I of this Article, I discuss *Davis* and *Hammon* and the fundamental question of how a court should determine whether a statement is testimonial. I conclude that the *Davis* opinion is consistent with what I believe is the best approach, one that asks what the anticipation would be of a reasonable person in the position of the declarant. Part II analyzes ambiguities in the operational test created by *Davis*. I believe that the “ongoing emergency” doctrine stated by *Davis* was intended to be quite narrow, but that lower courts are likely to treat it quite broadly. Part III then discusses whether a statement can be testimonial only if it was made formally. *Davis* appeared to point in different directions with respect to this question. I conclude that on the best view of the case either there is no formality requirement or, if there is such a requirement, it adds nothing to the requirement that the statement be made in anticipation of prosecutorial use. In Part IV, I offer a brief draft of an opinion that the Court might have written, reaching the same results that it did in *Davis* and *Hammon* but yielding less leeway for manipulation by the lower courts. Part V summarizes some of the other major issues that must be resolved in coming years to generate a sound and coherent understanding of the confrontation right. Finally, Part VI presents interrelated thoughts on pedagogy and law reform. I contend that the confrontation right should drive the discussion of hearsay in Evidence courses, and that the transformation of confrontation doctrine should cause us to consider radically reshaping the ordinary law of hearsay.

¹⁵ Transcript of Oral Argument at 63, *Hammon v. Indiana*, 126 S. Ct. 2266 (2006) (No. 05-5705), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-5705.pdf (hereinafter “*Hammon* Transcript”).

¹⁶ 126 S.Ct. 2266 (2006).

CRAWFORD, DAVIS AND WAY BEYOND 557I. *DAVIS, HAMMON, AND FRAMEWORK QUESTIONS*

The holdings of the Supreme Court in *Davis* and *Hammon* are better, I believe, than the results most of the lower courts had reached, but not as good as they should have been.

In *Hammon*, the police came to the Hammon house in response to a domestic disturbance call. Though Amy Hammon at first denied that anything was wrong, she gave them permission to enter. They saw signs that there had been an altercation, and Hershel Hammon told them that he and Amy had had an argument, but he denied that it had become physical. One officer remained with Hershel while the other spoke with Amy in another room. This time, in response to further questioning, she said that Hershel had hit her. Amy failed to appear at Hershel's trial on a domestic battery charge, and so the prosecution, over Hershel's objection, offered the officer's account of what Amy had told her. Hershel was convicted, the Indiana courts affirmed, but the United States Supreme Court reversed.

If Hammon had lost in the Supreme Court, then we would have created a system in which a complainant could create evidence for trial simply by making an accusation to a police officer in her living room, at least so long as the accused was not in the same room and was in the presence of another officer. The Supreme Court would have endorsed the toleration, demonstrated by most courts in the years before *Crawford* and by many even afterwards, of a practice that should be deemed a core violation of the Confrontation Clause.

That practice, which Bridget McCormack and I have labeled "dial-in testimony," took advantage of the Court's pre-*Crawford* holding that a statement deemed to fit within the jurisdiction's hearsay exception for spontaneous declarations was exempt from the Confrontation Clause.¹⁷ By invoking some remarkably generous interpretations of the hearsay exception, courts routinely admitted accusatory statements made to authorities, even if made hours after the incident and even if the ac-

¹⁷ See *White v. Illinois*, 502 U.S. 346, 357 (1992).

cuser was present but did not testify.¹⁸ Moreover, many courts, presumably having gotten so accustomed to the practice, found it almost unthinkable to do without it and continued to tolerate it after *Crawford*.¹⁹ But once one understands and accepts in good faith the transformation wrought by *Crawford*, *Hammon* becomes an easy case, and the opinion of the Court reflects that fact.²⁰

Davis was plainly a much tougher case. When the complainant, Michelle McCottry, spoke to a 911 operator, she was still in distress, the assault having allegedly occurred just moments before—so recently that she spoke in the present tense. She was not yet protected by a police officer, and the accused remained at large.²¹

Nonetheless, I thought that *Davis* should have won. In arguing our respective cases, Jeff Fisher, who was *Davis*'s counsel, and I contended for a simple, intuitively appealing proposition that would have clarified the law greatly if it had been adopted: that an accusation of crime made to a police officer or other law enforcement official is testimonial.²²

But the Supreme Court declined to take so broad a view. The Court enunciated a test that, while not comprehensive, it regarded as adequate to resolve these cases:

Statements are nontestimonial when made in the course of police interrogation under circumstances

¹⁸ See Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1147 (2002).

¹⁹ Note, for example, the set of cases in which the Supreme Court, after deciding *Davis* and *Hammon*, granted certiorari, vacated, and remanded for reconsideration. These are analyzed in a memorandum prepared by the Public Defender Service for the District of Columbia and available at <http://confrontationright.blogspot.com/search?q=o%27toole>.

²⁰ 126 S. Ct. at 2278 (*Hammon* "much easier" than *Davis*, the statements being "not much different" from those found to be testimonial in *Crawford*).

²¹ *Id.* at 2279.

²² Transcript of Oral Argument at 3, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (No. 05-5224), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-5224.pdf; *Hammon* Transcript, at 3.

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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.²³

Even under this test, I think Davis should have won. It appears to me that the purpose of the conversation—on the parts both of McCottry and of the 911 operator—was not to provide immediate protection to McCottry. In fact, Davis was evidently leaving the house as the call began, McCottry expressed no fear that he would return in the immediate future, and the operator told her that the police were first *going to find the accused* and then *come talk to* the complainant.²⁴ Had the operator been concerned that the accused was likely to return to the house in the immediate future, then her statement to McCottry would make no sense at all; rather than roaming the streets of the city looking for the accused, at least one officer should have been posted to the house in case he returned there. Clearly, the aim of the state's agents, and presumably also the desire of the complainant, was that the accused be arrested and that sanctions—at least for violating the restraining order mentioned in the call by the complainant, and perhaps also for criminal violations—be imposed on him.

More fundamentally, though, I do not believe that the decisive question in deciding whether a statement is testimonial should be one of “primary purpose,” either of the declarant or of the state agents. Determining a “primary purpose” is of course a difficult matter because so often, as Justice Thomas correctly pointed out in his dissent, the questioner has more than

²³ *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006).

²⁴ *Id.* at 2271. In fact, it appears that the officers did go directly to McCottry, but that was not the anticipation of the parties to the conversation. *Id.*

one important purpose, and they may meld together.²⁵ Labeling one purpose after the fact as primary seems to be a rather arbitrary exercise²⁶—and thus the test invites manipulation to enhance the chance that the evidence will be received.²⁷

Furthermore, why should the purpose of the questioner matter? I have previously stated at length reasons why, in determining whether a statement is testimonial, the witness' perspective should be the crucial one.²⁸ And, curiously, it seems the *Davis* Court agreed. Dispelling one of the fallacies adopted by some lower courts in the wake of *Crawford*, the Court made very clear that statements made absent interrogation—volunteered statements or ones made in response to open-ended questions—may be testimonial.²⁹ Further, the Court stated, “And

²⁵ *Id.* at 2283 (“In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence.”).

²⁶ *Id.* at 2284-85.

²⁷ Of course, even the test that I think is optimal, based on the reasonable anticipation of a person in the position of the declarant, is potentially manipulable. *See, e.g.*, *State v. Stahl*, 855 N.E.2d 834 (Ohio 2006). Indeed, in some circumstances a test based on the primary purpose of the questioner is more likely to lead to a conclusion that the statement is testimonial, because whatever the understanding of a reasonable person in the declarant's position, it is not reasonably deniable that the questioner solicited the statement for forensic purposes. *See, e.g.*, *State v. Justus*, 205 S.W.3d 872 (Mo. 2006). Nevertheless, I believe that a test based on the primary purpose of the questioner will be more subject to manipulation, because often the questioner—frequently a police officer or some other repeat witness who is part of the criminal justice system—will learn to recite a formula that will give a friendly court cover for concluding that the questioner's primary purpose was not forensic.

²⁸ *See* Richard D. Friedman, *Grappling with the Meaning of “Testimonial,”* 71 BROOK. L. REV. 241, 255-59 (2005) [hereinafter *Grappling*].

²⁹ *Davis v. Washington*, 126 S. Ct. 2266, 2274 n.1 (2006) (“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.”). In *Grappling*, *supra* note 28, at 263-66, adapted from a posting titled “The Interrogation Bugaboo” that I made to The Confrontation Blog, <http://confrontationright.blogspot.com/> (Jan. 20, 2005, 1:12 EST), I have

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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."³⁰

So how do we reconcile these divergent statements? I am inclined to believe that the Court (or at least a substantial portion of it) does recognize that the declarant's perspective is the better one, and that at least the Court has not rejected that perspective. Consider this thought experiment. Suppose there is a statement *not* made in response to interrogation that, under whatever the applicable test may be, is testimonial; as I have just noted, *Crawford* explicitly recognized that there are such statements, and plainly the test for determining that such statements are testimonial can have nothing to do with interrogation. Now suppose that the same statement is made in identical circumstances except that it is in response to an interrogation conducted primarily for the purpose of resolving an ongoing emergency. So now the statement is characterized as nontestimonial under *Davis*. But why would the purpose of the interrogator preempt whatever the underlying standard was that led to the statement being characterized as testimonial absent the interrogation? Most likely, I believe, the Court does recognize (or would if forced to confront the matter) the existence of some broad, underlying standard that has nothing to do with an interrogator's purpose. Such a view is easily consistent with a perception that if the statement is taken in response to an interrogation conducted largely to resolve an emergency, the probability is very small that the statement would be characterized as testimonial under that underlying standard.

In this view, *Davis* is perfectly compatible with a general test based on the anticipation of a reasonable person in the position of the declarant. The Court might well believe that, if a statement is made in response to an interrogation and the interrogation was conducted primarily for the purpose of resolving an emergency, then it is highly unlikely that a reasonable person in

discussed the fallacy that only statements made in response to interrogation can be testimonial.

³⁰ 126 S. Ct. at 2274 n.1.

the declarant's position would anticipate that the statement would be used for prosecution; it might be unlikely both because the circumstances that govern the interrogator also affect the declarant, and because the fact and nature of the interrogation govern the declarant's understanding of the situation. And the Court might believe that the interrogator's purpose is more easily determinable in this setting than is the declarant's understanding.

This view is supported by the fact that in *Davis* the Court slipped easily into speaking about the call from the viewpoint of the declarant. According to the Court, "McCottry's call was plainly a call for help against bona fide physical threat,"³¹ and "[s]he was seeking aid, not telling a story about the past."³² Similarly, in discussing *Crawford*, the Court spoke of factors that "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"³³

This view also gains strength with a focus on an ambiguity in the declarant-perspective test that has not received much open discussion.³⁴ When we speak of the anticipation of a reasonable person in the declarant's position, we are referring to a hypothetical person who has all the information about the particular situation that the declarant does, and no more. Thus, if the declarant is speaking to an undercover police officer, the hypothetical person would not know that her audience is collecting information for use in prosecution.

But the question then is whether the anticipation of the reasonable person should be assessed (a) from the vantage point that the declarant actually occupied, speaking in the heat of the moment, or (b) as if she considered the probable use of her statement after the fact, reflecting calmly while sitting in an armchair. Arguably, the better perspective is from the armchair, because that would help the Confrontation Clause achieve its

³¹ *Id.* at 2276.

³² *Id.* at 2279.

³³ *Id.* at 2278 (emphasis added).

³⁴ *But cf.* *United States v. Brito*, 427 F.3d 53, 61-62 (1st Cir. 2005).

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goal of preventing the creation of a system that allows prosecutors to use testimony not given subject to confrontation. The armchair view is a very tough sell, however. The path of least resistance is to conclude that the heat-of-the-moment view is the proper one, because it focuses on the actual circumstances of the declarant when she made the statement. And, to the extent the *Davis* Court focused on the intent or anticipation of the declarant, it seems clearly to have taken the heat-of-the-moment view.

I believe that even under that view the statements in *Davis* should have been deemed testimonial. But the opposite conclusion is certainly plausible; a caller in McCottry's position might not, in the heat of the moment, consider the prospect of prosecutorial use of her statements unless her attention was called to it. In short, it may well be that the Court's conclusion that McCottry's statement was not testimonial rested on a perception that a reasonable person in her position would not, in the heat of the moment, anticipate prosecutorial use. I therefore do not think we can draw from *Davis* any inference adverse to general application of the declarant-perspective approach.

II. OPERATIONAL AMBIGUITIES

A test relying on the terms "primary purpose" and "ongoing emergency" is extremely ambiguous, and the *Davis* Court deepened the ambiguity when it applied the test to the cases before it. I am afraid that this ambiguity will encourage many post-*Davis* courts to approach cases, as they did in the *Roberts* era and in the brief *Crawford-to-Davis* era, by looking for whatever toehold they can find to admit accusatory statements that were made absent an opportunity for confrontation.

Some aspects of the *Davis* opinion should, however, counsel a conscientious court to treat the "ongoing emergency" doctrine restrictively. The Court emphasized that "McCottry was speaking about events *as they were actually happening*"³⁵—and if this is not strictly accurate, the Court's emphasis on the point is all

³⁵ *Davis v. Washington*, 126 S. Ct. 2266, 2276 (2006).

the more significant. Indeed, though the Court gave various indications of when the emergency ended in *Davis*, it explicitly said the emergency ended “when Davis drove away from the premises”; subsequent statements would be testimonial, and redaction would be necessary.³⁶

Furthermore, the Court explicitly regarded *Hammon* as a “much easier” case—suggesting that the statements in *Davis* were close to the line and those in *Hammon* were not.³⁷ The Court said that when the officer elicited Amy Hammon’s oral accusation of her husband, “he was not seeking to determine (as in *Davis*) ‘what is happening,’ but ‘what happened.’”³⁸ And it was sufficient for the result that “Amy’s statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation.”³⁹

Moreover, the Court’s treatment of *King v. Brasier*,⁴⁰ an English case from 1779, is highly significant. There, as the *Davis* Court indicated, a young girl, “immediately on her coming home” after an assault, told her mother about the incident.⁴¹ The Supreme Court distinguished *Brasier*, while appearing to endorse it. The case would be helpful to *Davis* if it more closely resembled the facts of his case, the Court said, “[b]ut by the time the victim got home, her story was an account of past events.”⁴² Thus, notwithstanding the immediacy of the report—and also notwithstanding the facts that the declarant was a young child and that her audience included no law enforcement officers—the statement was testimonial. Significantly, that is just how the *Brasier* court referred to the child’s accusation, as testimony.⁴³

³⁶ *Id.* at 2277.

³⁷ *Id.* at 2278.

³⁸ *Id.*

³⁹ *Id.* at 2279.

⁴⁰ 1 Leach 199, 168 Eng. Rep. 202 (1779).

⁴¹ *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006) (quoting 1 Leach 199, 168 Eng. Rep. 202). The *Davis* court describes the girl as a rape victim, but the report of the case indicates that the crime was attempted rape.

⁴² *Id.* at 2277.

⁴³ 168 E.R. at 202-03 (holding that because “no testimony whatever can

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The significance of *Brasier* for present purposes does not depend on whether the case was known in the United States at the time the Sixth Amendment was drafted or adopted.⁴⁴ *Brasier* made no new law relevant to the inquiry here; rather, its significance is that it reflects the common understanding of the time.

The debated question in *Brasier* was whether, given the declarant's youth, her out-of-court statement could be admitted. A premise of the debate was that if she had been an adult the statement could not have been used, because to allow it to be used would be to tolerate admission against the accused of testimony given out of court.

Thus, *Brasier* indicates that a common understanding at the time of the framing of the Sixth Amendment was that an out-of-court accusation, even one made very soon after the event, was testimonial in nature and therefore not admissible. Whatever the merits of originalism may be, in general or more narrowly as a method for construing the Confrontation Clause, such a deeply seated understanding of the confrontation right should be given considerable weight in determining the Clause's modern meaning.

A conscientious court should therefore be persuaded not to stretch the idea of "ongoing emergency" very far at all. Yet a court inclined to do so—and I believe most are—has some material to work with, beyond the notorious looseness in the term "emergency."

In *Davis*, the Court held that "even . . . the operator's effort to establish the identity of the assailant" was necessary to resolve the emergency, "so that the dispatched officers might know whether they would be encountering a violent felon."⁴⁵ This holding is highly significant given how often, as in *Davis*,

be legally received except upon oath," the child's statement to her mother and another woman "ought not to have been received").

⁴⁴ Cf. 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, 157 n.163 (2005) (contending that Framers of the Confrontation Clause could not have known about *Brasier*).

⁴⁵ 126 S.Ct. at 2276.

an identification statement is critical to the prosecution, but it strikes me as dubious. Would the officers, knowing no more than that they were trying to find someone accused of having just committed a violent crime of passion, be lax in their precautions? My skepticism is deepened by the fact that there is no indication that the 911 operator searched Davis' record before the officers found him.

Further, the Court noted that officers at a potential crime scene "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim."⁴⁶ Preliminary indications lend force to the anticipation that courts frequently will seize upon this language as a license to admit any statement made before the accused is in custody or at least in the presence of an officer. It is significant that in *Hammon* itself the Indiana Supreme Court had held the statement admissible on the ground that it was necessary to allow the officers to secure and assess the situation.⁴⁷ The United States Supreme Court rejected that conclusion, of course—but there is not much ground for confidence that in similar circumstances other lower courts would not reach the same conclusion that the Indiana Supreme Court did.

In short, most of the indications from the *Davis* opinion are that the dividing line between testimonial and nontestimonial should lie much closer to the situation in *Davis* than to that in *Hammon*. Nonetheless, I believe that until the Supreme Court intervenes once again, most of the lower courts will place that line much closer to the situation in *Hammon*.

III. FORMALITY

In *Crawford*, the Supreme Court pointed to the formality of the circumstances under which Sylvia Crawford made her statements as a factor supporting the conclusion that the statements

⁴⁶ *Id.* at 2279 (quoting *Hiibel v. Sixth Judicial Dist. Ct. of Nev.*, 542 U.S. 177, 186 (2004)).

⁴⁷ *See Hammon v. State*, 829 N.E.2d 444, 457-58 (Ind. 2005).

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were testimonial.⁴⁸ Some lower courts took this language for more than it was worth, by treating formality as a prerequisite for a statement to be considered testimonial.⁴⁹ I believe this conclusion is fallacious and even wrong-headed.⁵⁰

In brief, formalities, including the oath and opportunity for cross-examination, are required conditions of acceptable testimony. A statement is not rendered non-testimonial by the absence of formalities; rather, if the statement is genuinely testimonial in nature, the lack of formalities makes the statement unacceptable. A rule that only formal statements will be characterized as testimonial is therefore theoretically backwards. Moreover, it creates a perverse incentive: those wanting to give or take testimony without it being subjected to confrontation could simply do so informally.

Thus, I had hoped that the decisions in *Davis* and *Hammon* would put to rest the notion that to be characterized as testimonial a statement must meet some standard of formality. My hopes were raised at argument, because not only was it obvious that Justice Scalia, the author of *Crawford*, understood the point, but he articulated it with some force.⁵¹ I would have offered

⁴⁸ 541 U.S. at 53 n.4.

⁴⁹ This was, for example, the view of the Indiana Court of Appeals in *Hammon*. 809 N.E.2d 945, 952 (2004) (“It appears to us that the common denominator underlying the Supreme Court’s discussion of what constitutes a ‘testimonial’ statement is the official and formal quality of such a statement.”).

⁵⁰ For a fuller discussion of my view on this subject, see *Grappling*, *supra* note 28, at 266-69, adapted from a Posting of Richard D. Friedman of “The Formality Bugaboo,” to The Confrontation Blog, <http://confrontationright.blogspot.com>.

⁵¹ Note the following dialogue between Justice Scalia and Thomas Fisher, the Indiana Solicitor General, shortly after Justice Scalia had posed a hypothetical involving an unsolicited accusatory affidavit.

JUSTICE SCALIA: . . . [S]urely the affidavit isn’t—isn’t what’s magical. I mean, I’m going to change my hypothetical. The person recites his accusation on a tape recorder and mails the tape to the court. Now, are you going to say, well, it’s not an affidavit? You’d exclude that as well, wouldn’t you?

MR. FISHER: Well, I—I don’t know that I would because,

long odds at that point against the result that Justice Scalia would write an opinion for a majority of the Court that preserved even the possibility of a formality requirement. And yet that is just what happened.

The *Davis* opinion appears to be the product of considerable compromise, and one of the chief pieces of evidence on point is the superficial ambiguity with which it deals with formality. In distinguishing *Davis* from *Crawford*, the Court relied in part on the greater formality of the circumstances under which the statement in *Crawford* was made.⁵² Moreover, in responding to Justice Thomas, who would have imposed quite a stringent formality test, the Court said in a footnote, “We do not dispute that formality is indeed essential to testimonial utterance.”⁵³

Prosecutors would be unwise, however, to celebrate the adoption of a meaningful formality requirement. The comparison of *Davis* and *Crawford* does not purport to adopt any such re-

again, you’ve got the—you’ve got the form that *Crawford* was concerned about. The affidavit is the classic form.

JUSTICE SCALIA: That would make no sense at all. I mean, that—that is just the worst sort of formalism. If you do it in an affidavit, it’s—it’s bad, but if you put it on a tape, it’s—it’s good. I—I cannot understand any reason for that.

Hammon Transcript at 34-35.

⁵² See *Davis v. Washington*, 126 S. Ct. 2266, 2276-77 (2006).

⁵³ *Id.* at 2278 n.5. One other passage could breed confusion in this context. The Court quoted a paragraph from *Crawford* that included the statement, “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,” *Id.* at 2274 (*quoting Crawford v. Washington*, 541 U.S. 36, 51 (2004)), and then said, “A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core,’ but its perimeter.” *Id.* In context, it is clear that the “limitation so clearly reflected in the text of the constitutional provision” is to testimonial statements, not to formal statements made to government officers. The passage addressed the question “whether the Confrontation Clause applies only to testimonial hearsay.” *Id.* As in *Crawford*, the Court offered formal statements to government officers as the clearest example of testimonial statements, not as the exclusive one; indeed, in the same discussion, the Court explicitly reserved the question “whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’” *Id.*

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quirement. It merely lists the difference in formality as one of four factors justifying a different result between the two cases.⁵⁴ With respect to the Court's response to Justice Thomas, it is important to note that declining to dispute a proposition is not the same thing as asserting it. Moreover, in the context in which the Court responded to Justice Thomas, the discussion was essentially *dictum*, because it was not necessary for the Court to resolve whether there was a formality requirement; the discussion came during the Court's analysis of *Hammon*, from which Justice Thomas dissented on the ground that the statement was not sufficiently formal, and the Court held that indeed it was.⁵⁵

The *Davis* opinion also contains three other passages that lend great force to the conclusion that either there is no formality requirement or, if there is one, it adds nothing to the requirement that the statement be made in anticipation of prosecutorial use. First, the Court noted that most of the early cases imposing confrontation requirements "involved testimonial statements of the most formal sort—sworn testimony in prior judicial proceedings or formal depositions under oath—which invites the argument that the scope of the Clause is limited to that very formal category."⁵⁶

But the Court immediately rejected that argument: the English cases were not limited to "prior court testimony and formal depositions,"⁵⁷ and the Court cited to the passage in *Crawford* in which it said, "We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought

⁵⁴ *See id.* at 2276-77.

⁵⁵ The Court said, in support of this conclusion, "It imports sufficient formality, in our view, that lies to [police] officers are criminal offenses." *Id.* at 2278 n.5. Of course, the Court did not mean to suggest that if lies to police officers were not criminal offenses, then statements to them could not be testimonial. Among other problems, that rule would allow states to eviscerate the confrontation right. One could, for example, easily imagine a state decriminalizing false accusations of domestic violence made to the police, to protect alleged victims from the supposed threat of prosecution and (in fact) to obviate the necessity for them to testify subject to confrontation.

⁵⁶ *Id.* at 2275-76.

⁵⁷ *Id.* at 2276.

trial by *unsworn ex parte* affidavit perfectly OK.”⁵⁸ Similarly, the *Davis* Court added that it is not “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 deposition.”⁵⁹ Exactly right. This is why I have said that the argument for a formality requirement is wrong-headed.

Second, in comparing *Hammon* with *Crawford*, the Court acknowledged that “the *Crawford* interrogation was more formal,” but asserted that none of the features that made it so “was essential to the point” that Sylvia Crawford’s statements were testimonial.⁶⁰ The Court noted that those features (that the interrogation “followed a *Miranda* warning, was tape-recorded, and took place at the station-house”) “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.”⁶¹ The Court then said that in *Hammon* “[i]t was formal enough that Amy’s interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his ‘investigat[ion].’”⁶² These factors do not fit easily in the “formal” category—but they clearly demonstrate that the shared understanding of the conversation was that Amy Hammon was creating evidence that would likely be used in prosecution.

Finally, in responding to Justice Thomas, the Court criticized a formality test, noting that his dissent “has not provided anything that deserves the description ‘workable’—unless one thinks that the distinction between ‘formal’ and ‘informal’ statements qualifies.”⁶³ Moreover, the Court pointed out that Justice Thomas “even qualifies that vague distinction by acknowledging that the Confrontation Clause ‘also reaches the use of technically

⁵⁸ 541 U.S. at 52 n.3.

⁵⁹ *Davis v. Washington*, 126 S. Ct. 2266, 2275-76 (2006).

⁶⁰ *Id.* at 2278.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 2278 n.5

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informal statements when used to evade the formalized process'"⁶⁴

Perhaps the Court believes that a statement that is testimonial in nature inevitably will be attended by some formal aspect, particularly if the Court's conception of formality is very broad. Or perhaps all formal means to the Court in this context is that the circumstances are such as to give notice that the statement will be used in prosecution. In any event, it seems unlikely that the Court will interpret formality to mean more than a showing of such circumstances—which means that formality will turn out merely to be an odd way of phrasing what, under the optimal view, should be the critical question in determining whether a statement is testimonial.

In short, it appears that *Davis* prescribes no stringent rule that a statement can be testimonial only if it is formal. If there is a formality requirement, it is satisfied by demonstrating that it was objectively apparent to the declarant that the interrogation was being held for prosecutorial purposes.

IV. THE OPINION THAT MIGHT HAVE BEEN WRITTEN

In this Part, I will summarize much of the discussion above by presenting a synopsis of what I might have produced had I been a law clerk under instructions to draft an opinion holding for Hammon but against Davis:

Petitioners ask us to adopt the principle that an accusation made to a known law enforcement officer is necessarily testimonial. For the most part, that principle holds, but we are unwilling to adopt it as an inflexible rule. Determining whether a statement is testimonial must take into account the actual circumstances of the declarant when she makes the statement. In *Davis*, McCottry began speaking just after a frightening incident had occurred, while she was unprotected and in clear distress, and while her alleged assailant was not only at large but nearby; thus, in

⁶⁴ *Id.* (quoting in part Thomas, J., dissenting in part).

describing his conduct, she began speaking in the present tense. We do not believe that, until she acknowledged that he was driving away, the attention of a reasonable person in her position and in the heat of that moment would likely be focused on the ultimate prosecutorial use of her statement. From that moment on, but not until then, her statements should be deemed testimonial.

Hammon is a much easier case. By the time Amy Hammon made her accusation, she was with a police officer in one room and her husband was with another officer in another room. The fact that the officer who was with her immediately asked for an affidavit simply confirmed what any reasonable person in her position would have understood already—that when she told a police officer that her husband had assaulted her, the statement was likely to be used for prosecution.

Such an opinion would, I believe, have been less likely than is the actual *Davis* opinion to be manipulated by lower courts in favor of the prosecution. But there is nothing in *Davis* that prevents the Supreme Court from interpreting the Confrontation Clause in the way this hypothetical draft does. Before *Davis*, it was apparent that a strong message from the Supreme Court was necessary to demonstrate that the lower courts should not treat the new doctrine staked out by *Crawford* as a mere linguistic curio that ultimately poses no insuperable obstacle to the same types of results that had been commonplace beforehand. The same remains true after *Davis*.

V. OTHER ISSUES

The issues discussed thus far in this article will continue to be tremendously important in Confrontation Clause jurisprudence. But there is a wide range of other issues that also will be very important and controversial and will need to be resolved in coming years. This Part sets forth a catalogue—which does not purport to be exhaustive—of some of these issues, together with

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summary thoughts on each. Note that, although the first few of these bear on the question of what statements are testimonial, the others raise more procedural concerns.

(1) *To what extent should statements by government agents, including autopsy and laboratory reports, be considered testimonial?* It seems clear to me that such statements made in contemplation of prosecution of a particular crime must be considered testimonial. But courts have not always so held.⁶⁵

(2) *To what extent may statements other than to law enforcement personnel—to other government agents and to private persons—be characterized as testimonial?* Davis, like Crawford, does not resolve the matter definitively. But a rule that only statements to law enforcement personnel or only to government agents could be considered testimonial would be a disaster. It would allow a witness to use another type of person as an intermediary to relay testimony to court, and avoid the need to take an oath, face the accused, or submit to cross-examination. This scenario is not unrealistic; we may be sure that victims' rights organizations would often seize the opportunity to relieve complainants of the burdens of testifying in court.

(3) *To what extent, if any, should the age, maturity, and mental condition of a declarant be considered in determining whether she can be a witness for purposes of the Confrontation Clause and whether particular statements by her are testimonial?* On the one hand, it may seem odd for the question of whether a statement is testimonial to be determined as if the declarant had the understanding of a competent adult when in fact she is a child or a person of deficient intelligence. On the other hand, if the standard for determining whether a statement is testimonial is based, as I believe it should be, on the perspective of a reasonable person in the position of the declarant, then consistent

⁶⁵ See, e.g., *State v. Craig*, 853 N.E.2d 621 (Oh. 2006), *cert. denied*, 127 S.Ct. 1374 (2007).

I would also consider as testimonial a certificate validating an instrument such as a radar gun, because it is made in contemplation of use in prosecutions. That it is made in contemplation of multiple prosecutions does not seem to me to alter the situation materially. *But see Rackoff v. State*, 637 S.E.2d 706 (Ga. 2006). This is, however, a closer question.

application of the standard probably would require disregarding the particular declarant's deficiencies. With respect to extremely young children, however, I believe that there is a plausible argument that they may be incapable of being witnesses within the meaning of the Confrontation Clause.

(4) *In what situations can the state be estopped from denying the testimonial nature of a statement because an interrogator or state agent withheld from the declarant information that would have made apparent the likely prosecutorial use of the conversation?* Assuming, again, that the critical question is the understanding of a reasonable person in the position of the declarant, then the state or some other agent attempting to create evidence for prosecution will sometimes have an incentive to hide from a declarant the likely prosecutorial use of the declarant's statements. Suppose the declarant is not suspected of wrongdoing, and the agent believes that she would make a conscientious decision not to volunteer testimony against the accused. Then if the agent hides the prosecutorial intent to secure a statement that would be testimonial, given knowledge of that intent, the state probably should be estopped from denying that the statement is in fact testimonial. But if the declarant makes the statement in furtherance of a criminal activity, such as a conspiracy, then there should be no estoppel.

(5) *To what extent, if any, may the state attempt to constrain exercises of the confrontation right intended only to impose costs on the prosecution?* This strikes me as a very difficult topic. There are situations in which (a) a conscientious court would recognize that a given type of written statement is testimonial, but (b) the expense of producing the author as a live witness is considerable, and (c) the accused appears to have no plausible expectation that confrontation will do him any good. In such a situation, the accused may nevertheless be tempted to insist on the right to confrontation, reckoning that if producing the witness is costly to the prosecution but cost-free to the defense then the prospect of confrontation improves the accused's bargaining power. Perhaps the state may attempt to restrain such exercises of the right, but this is far from clear. Moreover, defining what are acceptable constraints—perhaps some kind of good faith re-

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quirement—and the situations in which they may be imposed are not easy matters. I am not sure whether opening this Pandora's box would be worthwhile in the end.⁶⁶

(6) *To what extent, if any, may the state impose on the accused the burden of securing an opportunity for confrontation?* The state should be allowed to argue that the accused waives the confrontation right if he does not make a timely demand that the witness be produced. And perhaps, at least if the prosecution gives notice that it intends to rely on a witness but there is reason to believe that the witness will not be available to testify at trial, the accused may be held to have waived the confrontation right if he does not demand an opportunity to depose the witness before trial. Beyond this, however, the accused should not be required to create his own opportunity to “be confronted with” (note the passive phrasing) an adverse witness. In particular, the confrontation rights of the accused should not be deemed satisfied by giving him the opportunity to subpoena the witness.⁶⁷

(7) *What standards govern the adequacy of a pretrial opportunity for cross-examination?* One effect of *Crawford*, as courts, legislatures, and lawyers adjust to it, should be a substantial increase in the number of depositions taken to preserve testimony. Suppose such a deposition is offered immediately after the incident in question, and by the time of trial the witness is unavailable to testify. In this situation, the accused may well contend that the early opportunity to examine the witness was inadequate. Such a contention, I believe, should be resolved not by a *per se* rule—either that early timing does or does not render the

⁶⁶ See generally Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475 (2006).

⁶⁷ This is the issue that was posed by the petition for certiorari in *Pinks v. North Dakota*, No. 06-564, unsuccessfully seeking review of *State v. Campbell*, 719 N.W.2d 374 (N.D. 2006), *cert. denied*, 127 S. Ct. 1150 (2007). For further comments on the general issue, see Posting of Richard D. Friedman of “Shifting the Burden,” to the Confrontation Blog <http://confrontationright.blogspot.com/2005/03/shifting-burden.html> (Mar. 16, 2005, 3:27 EST), and “Shifting the Burden, Take 2,” <http://confrontationright.blogspot.com/2006/08/shifting-burden-take-2.html> (Aug. 2, 2006, 2:15 EST). The latter entry also comments on *Campbell*.

opportunity inadequate—but on the facts of the particular case. That is, the accused should be required to demonstrate with particularity how a later opportunity for confrontation would have been materially superior.

Another situation in which adequacy is an issue arises when the accused has a prior opportunity to examine the witness, but not necessarily the motivation to conduct the examination as if it were for trial purposes. This occurs, for example, in jurisdictions that allow depositions for discovery; the lower courts are divided on the question of whether the opportunity to take a discovery deposition suffices for the Confrontation Clause if the witness is unavailable at trial.⁶⁸ If the answer is in the affirmative, then a careful defense attorney will have to seize every opportunity to take a deposition, lest the witness becomes unavailable and a prior testimonial statement becomes admissible with no further opportunity for confrontation. This could radically increase the expense of criminal proceedings. The prosecution probably should bear the burden of determining when there is a sufficiently strong chance that the witness will become unavailable to warrant a prompt confrontational proceeding.

(8) *If the accused has been identified as a suspect and not arrested, or has not been identified, may the prosecution preserve the testimony of a witness?* Suppose the prosecution identifies a person as a suspect in a murder but does not yet have enough evidence to arrest him, and a key witness may later become unavailable. The prosecution ought to be able to preserve that witness's testimony by giving the suspect notice and taking the witness's deposition. Now suppose that the authorities have identified the suspect as the murderer, but that he has managed to avoid arrest. The state probably ought to be able to appoint counsel who could examine the witness at a deposition in case the witness later becomes unavailable. The accused has not had a chance to be face to face with the witness, but probably the

⁶⁸ See, e.g., *Corona v. State*, 929 So. 2d 588 (Fla. Dist. Ct. App. 2006) (adequate); *Lopez v. State*, 888 So.2d 693 (Fla. Dist. Ct. App. 2004) (inadequate). *California v. Green*, 399 U.S. 149 (1970), answers in the affirmative the corresponding question with respect to preliminary hearings.

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accused should bear that risk in this situation.

The question becomes more difficult if the accused has not yet been identified. Even in this situation, it may be clear that whoever the accused is, the testimony of the witness would be harmful to him and in what way. If so, it is possible to imagine a solution. For example, suppose a pathologist performs an autopsy on a person who died of a gunshot wound and writes a report concluding that the wound came from close range but was not self-inflicted. Whoever the eventual defendant may be, this statement—which I believe is clearly testimonial—will be harmful to him. Now suppose the court appoints provisional counsel for the eventual (but as yet unidentified) defendant to examine the pathologist at a deposition. If the accused is later identified and brought to trial, and the pathologist is then unavailable, then the deposition should be admitted against the accused unless he is able to show at that time particular circumstances why the opportunity for cross-examination was inadequate given provisional counsel's lack of knowledge at the time of the deposition of who his client was.

(9) *To what extent does the Confrontation Clause apply to the sentencing phase of a capital case, and to what extent is there a right—based perhaps in the Due Process Clause—to confront declarants whose statements are testimonial in nature and are introduced against the accused in criminal proceedings other than the trial?* John Douglass has argued that “the whole of the Sixth Amendment applies to the whole of a capital case.”⁶⁹ Thus, the confrontation right would apply not only at the guilt phase of a capital trial but also at the sentencing phase—determining both whether the defendant is eligible for the death penalty and whether that penalty actually ought to be imposed. Not all courts have been willing to go that far.⁷⁰ Beyond arguments applicable only to capital cases—based on the unified nature of capital trials at the time of the Framers—there is another

⁶⁹ John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1967 (2005).

⁷⁰ *E.g.*, *United States v. Fields*, 2007 WL 926864 (5th Cir. 2007); *Summers v. State*, 148 P.3d 778 (Nev. 2006).

sort of argument that applies more broadly to other proceedings in a prosecution. Suppose that at a suppression hearing a witness for the prosecution gave direct testimony and then the court excused her on the ground that her testimony was too reliable to require cross-examination. Even if the Confrontation Clause does not apply to that hearing, it seems likely that denial of an opportunity for cross-examination would violate the accused's constitutional rights. And if that is true, then at least arguably the same principle should apply if the witness gave testimony before rather than at the hearing.

(10) *What standards and procedures should govern forfeiture of confrontation rights?* Among the many important questions on this topic are the following:

(a) *Must the conduct that allegedly rendered the witness unavailable to testify subject to confrontation have been motivated in significant part by the accused's desire to achieve that result?* At least with respect to serious intentional wrongful conduct by the accused, the answer should be negative. The idea behind the forfeiture doctrine is that the accused cannot complain about a situation caused by his own wrongdoing.⁷¹ For example, if the witness is unavailable because the accused murdered her, it should not be a defense to a forfeiture argument to say that the accused did not murder her for the purpose of rendering her unavailable.⁷²

(b) *May the conduct that allegedly rendered the witness unavailable to testify subject to confrontation have been the same conduct with which the accused is charged?* Yes. There is no good reason why not. The argument that applying forfeiture doctrine in this context would be question-begging—that is, assuming the matter at issue—is based on a misconception. The judge determines the question of forfeiture. The jury (if there is one) determines guilt. Those are separate determinations. If both de-

⁷¹ See Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506, 516-21 (1997), available at <http://www.personal.umich.edu/~rdfrdman/friedman.pdf>.

⁷² E.g., *State v. Jensen*, 727 N.W.2d 518, 34-35 (Wis. 2007); *People v. Giles*, 55 Cal. Rptr.3d 133 (2007).

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pend, at least in part, on the same factual issue, so be it.

(c) *May the challenged statement itself be used in demonstrating forfeiture?* Yes. Under the principle of Federal Rule of Evidence 104(a), the judge in determining a preliminary issue of fact may rely on any evidence not privileged.⁷³ That includes the statement in issue. Now, of course, the accused contends that the statement is testimonial in nature (and unless it is, there is no need to reach the forfeiture issue). Under the principle discussed above, the confrontation right might be held to apply even at this preliminary hearing.⁷⁴ Logically, then, there appears to be an infinite regress. In the end, though, the court will decide either that the accused has forfeited the right or that he has not. In the first case, use of the statement both at the preliminary hearing and at trial does not violate the accused's rights and in the second case, the statement will not be presented at trial, so there will not be a violation.

(d) *What is the standard of persuasion for demonstrating that the accused forfeited the confrontation right?* It may be that the Supreme Court will require only that the prosecution satisfy the "preponderance of the evidence" standard in proving the factual predicates for forfeiture—that is, demonstrate that those predicates are more likely true than not.⁷⁵ Given the right at stake, a higher standard, perhaps "clear and convincing evidence," might be more appropriate.

(e) *To what extent is the prosecution foreclosed from claiming forfeiture because it failed to mitigate the problem? In particular,*

(i) *If the witness is dead, when is the prosecution foreclosed from claiming forfeiture if it did not arrange for a deposition?* It may seem grotesque to arrange for a deposition of a dying person, but the authorities have never shown much compunction about taking a statement from a victim even in the final moments of life. Certainly if the victim lingers for days

⁷³ Fed. R. Evid. 104(a).

⁷⁴ See *supra* pp. 124-25.

⁷⁵ Cf. *Lego v. Twomey*, 404 U.S. 477 (1972) (holding that preponderance standard is sufficient constitutionally for determining voluntariness of confession).

while still communicative, and arguably for a shorter period, the prosecution ought to arrange a deposition.⁷⁶

(ii) *If the prosecution is contending that the witness is intimidated, what procedures must the government pursue to assure that as much of the confrontation right as possible has been preserved? For example, to what extent must it exert coercion against the witness, and must it attempt to secure cross-examination without the witness' testimony?* These questions can be excruciatingly difficult. The court probably should not conclude that the witness is unavailable to testify because the accused has intimidated her unless the court has attempted to compel the witness to testify—not simply by serving her with a subpoena, but by enforcing it, if necessary, with the contempt sanction. This is not a move that a court can take lightly unless it is very confident that it can protect the witness. And it is unimaginable in the case of a child witness—though the court should consider sanctions against anyone who has exerted influence over the child to prevent her from testifying.

The matter is complicated because, even if the witness is unwilling to testify in the usual manner—in the presence of the accused and subject to cross-examination, in open court at trial—that does not mean that no aspect of the confrontation right can be preserved. To the extent that the state has not attempted all reasonable means of securing the witness' testimony subject to some form of confrontation, the conclusion that the accused has caused the lack of confrontation should be deemed erroneous as a matter of constitutional law. Perhaps at an earlier time the witness would have been willing to testify at a deposition, and so arguably the prosecution should be held accountable for failing to offer one then if it had information suggesting that she might be unwilling to testify later. Also, perhaps the witness would be willing to testify subject to cross-examination so long as the accused was not present or in the judge's chambers, and

⁷⁶ See Posting of Richard D. Friedman, "Forfeiture, the Prosecutorial Duty to Mitigate, and Rae Carruth," to The Confrontation Blog, <http://confrontationright.blogspot.com/2005/03/forfeiture-prosecutorial-duty-to.html> (March 4, 2005, 3:39 EST).

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these possibilities ought to be explored.

If forfeiture doctrine is left unconstrained, it could swallow much of the confrontation right. I do not believe that the proper method for constraining forfeiture doctrine lies in artificially limiting the type of misconduct that can be considered to forfeit the right, or limiting the type of evidence that can be used to prove forfeiture. An elevated standard of persuasion might be of some help, but probably not very much. The key, I believe, is to require that before the court concludes that the accused has forfeited the confrontation right, the state (including the prosecution and the court) must take reasonable steps to preserve however much of the confrontation right as is feasible.

VI. PEDAGOGY AND LAW REFORM

This Part will set forth a few interrelated thoughts transcending the application of *Crawford* and *Davis* to criminal prosecutions. I will approach these from the point of pedagogy, but my interest goes beyond the relatively parochial question of how law professors should teach this material to practical, though long-term, matters of law reform.

First, should the confrontation right be addressed in courses in Criminal Procedure or in Evidence, or in both? I firmly believe the answer is both. *Crawford* makes clear that the confrontation right is not a mere rule of evidence but a fundamental principle of procedure.⁷⁷ Therefore, it has significant procedural consequences long before a case ever comes to trial. For example, *Crawford* should push criminal justice systems more in the direction of facilitating depositions for the preservation of testimony.

At the same time, the confrontation right must occupy a significant place in a course on Evidence. Before *Crawford*, many Evidence teachers spent a great deal of time on the rule against

⁷⁷ 541 U.S. at 42 (“bedrock procedural guarantee”). *See also id.* at 61 (“[T]he Clause ‘is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner’”).

hearsay and little or no time on the confrontation right. This approach always struck me as intellectually timid, because to a very large extent when the rule against hearsay *justifiably* calls for exclusion of evidence, the driving force is the confrontation right. Even so, before *Crawford* the approach could be justified on pragmatic grounds by teachers who did not want to look beyond the law as it then stood, for the confrontation right rarely required exclusion of evidence that standard hearsay doctrine would permit. After *Crawford*, however, the confrontation right clearly has independent force. In my view, this change makes it utterly irresponsible to teach hearsay law without spending a great deal of time on the confrontation right, if for no other reason than that the right effectively preempts many of the results that hearsay law might otherwise seem to prescribe. It would be absurd, for example, to spend time examining the “excited utterance” exception and all the expansive interpretations that courts have given it without recognizing that many of those applications are now rendered unconstitutional.

And now, in light of *Davis*, I will make a stronger statement: It does not make much sense to teach confrontation *after* teaching hearsay. Rather, the two should be integrated, with the confrontation right being emphasized first—just as historically it was well developed long before modern hearsay law took shape—and driving the organization of coverage. Again, taking the hearsay exception for excited utterances as an example, it clearly would be a mistake to work through its contours and only at some later time say, “Many of those applications really do not matter, because they would be unconstitutional.”

Evidence teachers are going to have to work out a sound integrated approach over time, but here is what tentatively strikes me as a sensible approach:

(1) The natural starting point is the basic confrontation principle enunciated by *Crawford*—that testimonial statements cannot be used against an accused if he has not had (or forfeited) an opportunity for confrontation.⁷⁸ Thus, after an historical nod to

⁷⁸ 541 U.S. at 62, 68.

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cases like *Raleigh*,⁷⁹ *Crawford* itself is a good place to begin.

(2) Then it makes sense to delve into the question of what “testimonial” means, and this of course calls for discussion of *Davis*. This also would be a good time to discuss the difference between accomplice confessions, which are testimonial, and conspirator statements, which are not testimonial—in my view because they are not made in anticipation of prosecutorial use. Other bounds on the doctrine may then be examined.⁸⁰

(3) When does a testimonial statement not pose a confrontation problem because it is offered for some ground other than the truth of a matter it asserts? *Tennessee v. Street*⁸¹ is a natural case for discussion here, as are questions such as whether or when a testimonial statement may be admitted in support of an expert opinion⁸² or to show the course of an investigation.⁸³

(4) Is the confrontation problem really relieved, as the Supreme Court held in *California v. Green*⁸⁴ and reaffirmed in *Crawford*,⁸⁵ by the appearance of the witness at trial, even though the witness does not testify to the substance of the prior statement? Understanding this problem helps one realize why, as in Federal Rule of Evidence 801(d)(1), rulemakers have hesitated to eliminate the hearsay bar to all prior statements of a witness who testifies at trial.⁸⁶

(5) When should a witness be deemed unavailable? Several of the Supreme Court’s pre-*Crawford* cases—including *Ohio v. Roberts*⁸⁷—are still good law on this point, and Federal Rule of

⁷⁹ *Raleigh’s Case*, 2 How. St. Tr. 1 (1603).

⁸⁰ *Crawford*, 541 U.S. at 56.

⁸¹ 471 U.S. 409 (1985).

⁸² See, e.g., *People v. Goldstein*, 843 N.E.2d 727 (N.Y. 2005).

⁸³ See, e.g., *United States v. Eberhart*, 434 F.3d 935 (7th Cir. 2006).

⁸⁴ 399 U.S. 149, 157-67 (1970).

⁸⁵ *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004).

⁸⁶ Rule 801(d)(1) exempts from the hearsay rule limited categories of prior statements of a trial witness—some prior inconsistent statements, some prior consistent statements, and most prior statements of identification—but does not create a general exemption for prior statements of a trial witness. Fed. R. Evid. 801(d)(1).

⁸⁷ 448 U.S. 56, 75 (1980) (holding (dubiously) that the witness whose

Evidence 804(a), which prescribes standards of unavailability for purposes of the hearsay rule, could be discussed here.

(6) What is an adequate opportunity for cross-examination? Materials related to Federal Rule of Evidence 804(b)(1) may come in here,⁸⁸ as does the interesting question of whether a discovery deposition suffices for the confrontation right.⁸⁹

(7) What constitutes a sufficient ground for forfeiture, and what procedures must be followed before the right may be deemed forfeited? Cases involving dying declarations would fit in well here.⁹⁰

This outline demonstrates that a full exploration of issues related to the confrontation right does not depend on prior examination of hearsay law. On the contrary, not only does the confrontation right stand on its own, but discussion of the confrontation right helps explain some aspects of hearsay doctrine; in some cases the discussion may give the doctrine better grounding and in others it may help expose its weaknesses.

After this canvass of the confrontation right, it is possible to work relatively quickly through the most significant issues related to hearsay when the confrontation right is not at issue. Not only as teachers, but also as scholars and potential law reformers, the question we should constantly be asking in this realm is, "Is this really necessary?" That is, once we have protected the confrontation right, as *Crawford* does, by a separately articulated doctrine that does not depend on hearsay law, do we need the elaborate structure of hearsay doctrine with its complex defi-

prior testimonial statement was at issue was unavailable under the circumstances).

⁸⁸ That Rule excepts a statement from the hearsay rule if the declarant is unavailable to testify at trial, the statement is prior testimony, and "the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an *opportunity and similar motive to develop the testimony* by direct, cross, or redirect examination." Fed. R. Evid. 804(d)(1) (emphasis added).

⁸⁹ Compare *Corona v. State*, 929 So. 2d 588, 595-96 (Fla. Dist. Ct. App. 2006), with *Belvin v. State*, 922 So. 2d 1046, 1053-54 (Fla. Dist. Ct. App. 2006).

⁹⁰ E.g., *State v. Meeks*, 88 P.3d 789 (Kans. 2004).

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nition of hearsay and its remarkably long and intricate set of exemptions? My own feeling is that outside the context in which the confrontation right properly applies—testimonial statements offered against criminal defendants—much hearsay ought to be admitted, and that to the extent exclusion is warranted it ought to be under a doctrine much more open-textured than the one we have now.

Probably, a softer form of the confrontation doctrine should apply to testimonial statements offered against litigants other than a criminal defendant. Working out the shape of such a doctrine could be a significant challenge for the next generation of evidence scholarship. Beyond that, the judgment of admissibility should depend on a case-by-case assessment of factors such as the probative value of the statement, the probability that cross-examination would be useful, and the relative abilities of the parties to produce the declarant as a live witness.⁹¹

Indeed, I am hopeful that over the next few decades pressure will mount to move hearsay law in this direction. I base this hope on anticipation that, now that hearsay law is no longer necessary to do the work that the Confrontation Clause should perform, its silliness and superfluousness will become more apparent. And I believe the development will be advanced greatly if Evidence teachers organize coverage around the confrontation right and then ask, “What further hearsay law, if any, do we need?”

⁹¹ Some years ago, in two articles, one bearing a particularly unfortunate name, I made a preliminary attempt to reconceptualize the hearsay doctrine, outside the context where the Confrontation Clause applies, according to the factors suggested in the text. See Richard D. Friedman, *Toward a Partial Economic, Game-theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723 (1992); Richard D. Friedman, *Improving the Procedure for Resolving Hearsay Issues*, 13 CARD. L. REV. 883 (1991). I believe much of the analysis in those articles remains sound, but I did not then explore the possibility of a softer form of confrontation doctrine applying to testimonial statements offered against parties other than a criminal defendant.

CONCLUSION

The pair of cases decided under the name of *Davis* confirms that *Crawford* is for real. That is, *Crawford* not only requires courts to adopt a new way of thinking and expressing themselves about the Confrontation Clause, but it also causes a change of results, even some results that courts had reached routinely and almost casually in recent years. The result in *Hammon* is one of those; before *Crawford*, Amy Hammon's statement was easily admissible, and after *Crawford* the statement is quite plainly inadmissible.

Ideally, the court would have reversed the conviction in *Davis* itself on the basis that an accusation made to a law-enforcement officer is testimonial within the meaning of *Crawford*. The facts of that case, however, made reversal unappealing. The Court could have written an opinion holding that the statements at issue were not testimonial but explicitly examining the matter from the point of view of a reasonable person in the position of the declarant; an opinion taking this approach might have relied on the perception that in the heat of the moment a reasonable person in McCottry's position would not have anticipated evidentiary use of her statements. The opinion actually written by the Court is consistent with that approach, however. Similarly, although the Court did not deny that a statement must be formal to be testimonial, the opinion may easily be read not to create a formality requirement that has independent significance.

Fresh accusations will continue to create controversial questions under *Crawford*, but there is a wide variety of other issues, many of them procedural, that must be resolved before we have a sturdy, comprehensive doctrine of the Confrontation Clause. The process will take decades, and it will require repeated intervention by the Supreme Court. Meanwhile, even as the courts are reconceptualizing the confrontation right, academics should consider possible transformations in the law of hearsay. Now that the confrontation right has its own independent footing, hearsay law is not necessary to protect it. Much of the law of hearsay that does not involve testimonial statements should wither away over the next few decades. What remains should bear none of the complexity and haphazard quality that have plagued generations of students and lawyers.