

CRAWFORD, DAVIS & THE RIGHT OF CONFRONTATION: WHERE DO WE GO FROM HERE?

*Afternoon Panel Discussion**

Participants: Richard D. Friedman,[†] Laird C. Kirkpatrick,[‡]
Robert P. Mosteller,^{**} Christopher B. Mueller,^{††} Roger C. Park,^{‡‡}
and Penny J. White^{***}

Moderated by James J. Duane^{†††}

Professor Duane: You have made it all the way through to the end, to the most exciting part of it all. We'll have an opportunity now for some conversation and dialogue among the members of the panel, and we'll answer some of your questions as well. So if you've got some issue that's of burning significance to you, put your questions to the experts in a suitably leading fashion, and if they agree with you, you can cite the *Regent Law Review* in your next court appearance—show it to the judge. Professor Friedman has asked if he could go first—and of course I said yes—to share a few thoughts that he has been collecting as he listened to some of the others.

Professor Friedman: Thank you. I wanted to thank you all for staying for the entire day. I have just a couple comments on Roger's presentation and a few more on Laird's.

I don't think that willingness to lie when making dying declarations is the most important point regarding the unreliability of dying declarations.¹ And, of course, I was jocular before when I was saying I

* This panel discussion took place as part of a symposium hosted by Regent University Law Review on October 14, 2006, at Regent University School of Law.

[†] Ralph W. Aigler Professor of Law, University of Michigan Law School.

[‡] Hollis Professor of Legal Procedure, University of Oregon Law School; Visiting Professor, The George Washington University Law School (2006).

^{**} Harry R. Chadwick, Sr., Professor of Law, Duke Law School.

^{††} Henry S. Lindsley Professor of Law, University of Colorado School of Law.

^{‡‡} James Edgar Hervey Chair in Litigation, University of California, Hastings College of the Law.

^{***} Associate Professor of Law and Interim Director for the Center for Advocacy and Dispute Resolution, University of Tennessee College of Law.

^{†††} Professor of Law, Regent University School of Law.

¹ Cf. Roger C. Park, *Is Confrontation the Bottom Line?*, 19 REGENT U. L. REV. 459, 464 n.22 (2006-2007) ("A statement about who murdered the declarant is trustworthy, if the declarant believes he is dying, because the declarant isn't afraid of retaliation and has no motive to incriminate anyone except the guilty party.").

would use it as an opportunity to even old scores,² but I do agree with Roger that if I knew who had murdered me, I would probably have a deeper grudge against him personally than against anybody else. But I think the key question is: Does the dying person necessarily know who delivered the fatal blow? Often that person does not, so I think willingness to lie is only part of what goes into unreliability.

Also, Roger raised a question concerning my statement that the imminence of death is important under forfeiture theory because if death was imminent when the statement was made, then the state couldn't reasonably have provided an opportunity for cross-examination. But he said, "Then why should the victim's knowledge of imminent death be critical?"³ and I agree. It shouldn't matter. All I said is that the dying declaration exception *closely* reflects forfeiture theory.⁴ It doesn't come out exactly the way it would if I were developing it in accordance with my forfeiture theory. But I think the exception reflects, as Roger put it, a "groping" toward that theory, and I think it's pretty close. I think it comes out pretty closely.

In fact, I think forfeiture better reflects the dying declaration than the stated rationale for the exception. The stated rationale is that the gates of Heaven are about to open, and that nobody would die with a lie upon his lips. But this applies to *anything* said on the verge of death—and we don't have an exception of that sort.

One slightly broader comment on what Roger says about a functional approach:⁵ I do agree that there is a value to having a functional approach to what is testimonial, but I think, and Justice Scalia has addressed this, we have to be aware of excess functionality. In other words, I think what we really need to avoid is asking case by case, does the function of the Confrontation Clause get advanced by keeping this out or by letting this piece of evidence in. If it's a case-by-case determination, I think we've thrown the whole thing away, and that I think is what happened under *Roberts*.⁶

² Richard D. Friedman, *Forfeiture of the Confrontation Right After Crawford and Davis*, 19 REGENT U. L. REV. 487, 489 (2006-2007) ("For myself, I've always said that if I were in that situation, I'd look at it as an opportunity to even some old scores without adverse consequences!").

³ See Park, *supra* note 1, at 465 n.22 (stating that if forfeiture applied "when the defendant has murdered the declarant," then "it would not matter whether the declarant was aware of the imminence of death").

⁴ See Friedman, *supra* note 2, at 490-91.

⁵ Park, *supra* note 1, at 466-67.

⁶ *Ohio v. Roberts*, 448 U.S. 56 (1980).

Some comments on Laird's presentation. Laird is one of several who have said it was kind of sneaky language in *Davis* about *Roberts*.⁷ I don't know; to me, it seemed blatant that the Court went out of its way—and it was very surprising to me that they did this—but they went out of their way to say “*Roberts* is dead, and nontestimonial statements are not covered by the confrontation right.” I think that's the proper result. I think that, and I suggested this last night, that the Confrontation Clause, the confrontation right, applies to witnesses. So the question is: was this person acting as a witness in some sense? *Testimony*, as I said, is in many languages just another form of the word for *witness*.⁸ Testifying is what witnesses do. I think holding the confrontation right inapplicable to nontestimonial statements is the better result. I think the Confrontation Clause comes out better if it is limited to witnesses because we achieve much more moral clarity.

Laird has put together an impressive list of cases in which *Roberts* theoretically could come to the aid of defendants.⁹ But I think the fact is, as a rule, in work-a-day practice, it just doesn't; it just didn't. For in the couple of years between *Crawford* and *Davis*, once a court held that the statement was nontestimonial, most of them would say, “Well, now we still have to apply *Roberts*.” And then, surprise, surprise, in almost every one, so far as I'm aware, the court said, “Oh well, it's reliable.” And they did this because it's such an easy thing to hold that the statement is reliable. Maybe there were some cases in which *Roberts* caused a statement to be excluded, but there weren't a lot; I know of only one, and that one was dubious anyway.

Now Laird says properly that what we're aware of mainly are the appellate cases.¹⁰ Granted. But the trial courts are not of concern here in any event. Let's think about this, putting habeas cases aside for the moment. *Roberts* could have independent impact in causing an out-of-court statement to be excluded in the trial court only if the rule against hearsay didn't already cause the statement to be excluded. But if the

⁷ Laird C. Kirkpatrick, *Nontestimonial Hearsay After Crawford, Davis and Bockting*, 19 REGENT U. L. REV. 367, 368 (2006-2007) (“Justice Scalia, in language so cryptic that it escaped the attention of many readers of the opinion, including the preparer of the headnotes, signaled his view that nontestimonial hearsay was no longer subject to the Sixth Amendment.” (footnote omitted)); see also James J. Duane, *The Cryptographic Coroner's Report on Ohio v. Roberts*, CRIM. JUST., Fall 2006, at 37, 38 (“The official syllabus to the *Davis* case prepared by the Reporter of Decisions and the West headnotes to the opinion make no mention of *Roberts* at all, much less any mention that *Roberts* was finally overruled in that case. And the lower courts have thus far been almost completely unable to accurately decipher what *Davis* said on that point.”).

⁸ See Richard D. Friedman, *Crawford and Davis: A Personal Reflection*, 19 REGENT U. L. REV. 303, 305 (2006-2007).

⁹ Kirkpatrick, *supra* note 7, at 370–71 nn.18–32.

¹⁰ *Id.* at 376; see also discussion *supra* pp. 509–10.

hearsay rule hasn't caused exclusion, then the statement must be within some exception to the rule. If it is within a "firmly rooted" exception, then that is enough to satisfy *Roberts*; if it isn't within such an exception, then it probably falls within the residual exception, which requires a finding of trustworthiness, and *that* would also suffice for *Roberts*. In other words, *Roberts* could cause exclusion by a trial judge only if she said, "The rule against hearsay doesn't keep this evidence out, but I don't think it should come in because it's too unreliable to satisfy the Confrontation Clause." And that just didn't happen. If a trial court wants to keep evidence out, it can keep it out as hearsay; it doesn't need *Roberts* to keep the evidence out. If the trial court is not inclined to keep it out, *Roberts* is not going to push the court to keep it out, because *Roberts* is just so open-ended. And I think really in all these types of cases—child testimony and statements made to private parties and all that—in many of them, yes, as Laird acknowledges, I would like to see the statement called testimonial. If the statement is called testimonial, then we'll have a hard-edged rule. Until such time, I don't believe that any rule is likely going to keep the evidence out.

Habeas cases are the one situation in which a court conceivably could say, "Well, I don't have any control over the domestic state law of hearsay, but I'm going to keep it out on constitutional grounds." But I don't think there are a lot of habeas cases either in which the courts kept evidence out on *Roberts* grounds. With lab reports, it's just remarkable how much the courts' reaction is simply "Oh, that's reliable," and so the evidence just comes on in.

As far as the statutes that Laird has referred to,¹¹ I don't think *Roberts* has limited the legislature very much at all because it says in effect, "Find that a particular kind of statement is reliable, and then it can come in."

I think that real defense of the confrontation right is much better if we have a clear principle, and that principle is: the confrontation right applies to testimonial statements. I was very glad to hear Laird talk about law reform efforts because if those who agree with us about what the results should be don't have confidence that the Supreme Court and the lower courts are going to come up with a robust definition of testimonial, then I think it's perfectly valid to have evidentiary law, either in the rules or by statutes, to keep out categories of evidence that we think should be kept out. So I think it would be good to get that kind of legislation through the legislature.

¹¹ Kirkpatrick, *supra* note 7, at 376–78.

On the history, we debated this in Brooklyn, but I don't find Tom Davies's argument persuasive.¹² At the time of the Confrontation Clause, there really wasn't a lot of hearsay law as such. Courts often said that hearsay is no evidence, but there wasn't even a real definition of what hearsay is until after 1800. And in any event, the understanding of what hearsay was at the time of the framing clearly didn't apply to written statements.

And there is lots of hearsay that did come in despite the articulation of the rule against hearsay. It was really quite unformed. Long before the time of the Confrontation Clause, there was a fundamental principle as to how witnesses testify: face to face, brow to frowning brow. This was established long before the Confrontation Clause wrote it into our Constitution.

Thanks very much.

Professor Park: Thank you. Rich and I agree on so many things that it's sort of like talking about the difference between Methodists and Presbyterians, just a little bit of difference on emphasis. But I would say that the fact that the declarant might be wrong in naming who killed him doesn't mean that the judges didn't take into account the lack of a motive to lie in deciding that the exception was a good idea.

On the sneaky point, I think that both Laird and Rich are right. I think Justice Scalia went out of his way to get rid of *Roberts*, and I think he did it in a sneaky fashion.

Professor Kirkpatrick: I would feel a lot more comfortable if the Supreme Court, in adopting the testimonial approach to confrontation advocated by Rich, had also adopted Rich's definition of which hearsay is "testimonial." If it ultimately does so, some of the concerns I mentioned in my talk will be alleviated. But only time and future cases will answer this question.

We know that the Solicitor General and others will likely be arguing in opposition to Rich that the Confrontation Clause shouldn't apply to hearsay statements made in private settings.

As to whether *Roberts* provides much protection against nontestimonial hearsay, it is true that most reported cases applying *Roberts* have found its requirements to be satisfied. But I think the case law can be misleading as a measure of the impact of *Roberts*, because only a defendant can appeal. Thus the cases we see in the appellate reports are cases where the hearsay was admitted under *Roberts*, the

¹² See generally Thomas Y. Davies, Not "the Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Right, 15 J.L. & POL'Y (forthcoming 2007).

defendant appealed, and the appellate court affirmed the trial judge's ruling. What we don't see are cases where the trial court excluded the hearsay as unreliable under *Roberts*, or required a declarant to take the stand rather than admitting the out-of-court statement because of *Roberts*. We also don't see the cases where the prosecutor refrained from offering a hearsay statement of questionable reliability because of *Roberts*. It would take an empirical study, rather than merely a review of the appellate case law, to fairly assess the impact of *Roberts*, particularly in the area of child sexual abuse prosecutions.

Roberts has played an important role in providing a constitutional backstop against unreliable hearsay, even if it fits a hearsay exception. Remember that in *Idaho v. Wright*, the Idaho Supreme Court essentially said: "We think the child's statements are reliable enough to satisfy the catchall exception to the hearsay rule, but we don't think they are reliable enough to satisfy the Confrontation Clause of the Sixth Amendment."¹³ And the U.S. Supreme Court agreed that the statements violated the Confrontation Clause, despite being admissible as a matter of state evidence law.¹⁴ So for more than twenty-five years, *Roberts* has played an important role as a constitutional safeguard. But if the dictum in *Davis* becomes law, and *Roberts* is indeed dead, there will be no Sixth Amendment protection at all against nontestimonial hearsay, no matter how unreliable it may be and no matter how much a defendant has a legitimate need to cross-examine the declarant.¹⁵

Professor Mueller: It seems to me that there are actually three areas in which *Roberts* could continue to play a constructive role. They are the three biggest hearsay exceptions that are not firmly rooted. They are the catchall exception, the special rifle shot exception for child victim hearsay, and also the against-interest exception in a private party setting. And those are three areas in which you could very readily imagine that you would, number one, want some kind of a constitutional standard to apply in connection with state convictions and, number two, you would want some kind of a background constitutional value in case an analysis under those exceptions does not yield an end result you can live with.

¹³ 775 P.2d 1224, 1226–27 (Idaho 1989) ("The hearsay rules and the Confrontation Clause have similar policy objectives. However, they are not coextensive. Some out-of-court declarations which are admissible under hearsay exceptions may violate confrontation rights.").

¹⁴ 497 U.S. 805 (1990).

¹⁵ See *Whorton v. Bockting*, No. 05-595, 2007 WL 597530 (U.S. Feb. 28, 2007) (stating that there is no constitutional protection against nontestimonial hearsay); see also Kirkpatrick, *supra* note 7, at 369–70 (discussing the *Bockting* case).

And so, Rich, it seems to me that you have very often said that you think the Confrontation Clause will play a better role if we have something clean and simple, and I guess I'm going to reiterate that I don't think you can have something as clean and simple as you want to make it. And we don't know where we are going to wind up with the coverage of testimonial statements, but we have, whatever it is, two and a half years worth of cases that say, with only one exception that I know of, that the only time statements are testimonial is when they are made to police. You have a huge number of accusatory statements that are made in private settings that so far courts—the only one exception that I can think of is an Illinois case¹⁶—have said are not testimonial. So if the present trend continues, if there's not a complete reversal of that trend, there is going to be a large body of hearsay that, to use Bob's preferred term, contains accusatory material, and yet is outside the testimonial category.

Professor Friedman: I certainly agree with Laird that it would be better if the Supreme Court agrees with me. I think that would be a good result. But as far as simplicity and cleanness, forfeiture is going to be complicated. I do think that the affirmative command of the Confrontation Clause can be stated pretty crisply, and I have tried to do that today in a relatively simple definition of *testimonial* that the Court could adopt: A testimonial statement may be introduced against an accused only if he has had, or waived, or forfeited an opportunity to confront the witness, which must occur at trial unless the witness is not then available. We are debating an academic point, but if the Court were to say, "Well, testimonial statements and some nontestimonial statements are covered," then I think that makes it more complicated.

So Chris, you say that only one case that you know of treats a statement made in a private setting as testimonial. We discussed this last night. I thought there were more, but I certainly acknowledge that the vast majority of the courts have found the other way. Well, you know, I've got to say, even now most of the courts are still fighting a rear-guard action against *Crawford*. They don't still quite believe it. I think something quite dramatic is changing, and they are regarding their job as trying to figure out ways to say things that will allow them to keep on doing what they were doing before. And that is one of the encouraging things to come out of *Davis* and *Hammon*, that the end result in *Hammon* anyway, really stops some of these lower courts from doing what they have been doing.

¹⁶ *In re E.H.*, 823 N.E.2d 1029 (Ill. App. Ct. 2005), *vacated*, No. 10020, 2006 WL 3741951 (Ill. Dec. 31, 2006).

But you know what, if these lower courts are going to be that constrained or stingy in calling something testimonial, I think that the idea that they are then going to say, “Oh, but those statements are actually unreliable and shouldn’t be allowed in,” is just unimaginable really. In fact, many of the opinions—let’s take lab reports as a prime example—what you see oozing into the opinion is reliability talk. They can’t get out of the habit of talking about reliability because they’re so used to it. Roger Park, one of the great evidence scholars of our time, can’t get out of the habit of talking about reliability in the context of—

Professor Park: Not on a case-by-case basis.

Professor Friedman: I know. Not on a case-by-case basis. You don’t do it on a case-by-case basis because you’re much more subtle than most of the courts. But most courts, they talk about why lab reports have to come in. And basically, they are saying these reports are highly reliable. Sometimes they goof and say that explicitly, but sometimes you just read between the lines. So the idea that if *Roberts* were there, that all of a sudden these courts would say, “Ah, it’s unreliable,” when they didn’t before *Crawford*—I don’t see it.

Professor Mueller: Well, *Roberts* is at least a bit of a less blunt instrument than the testimonial category. It does allow you to distinguish among different statements of similar kinds. And I know you’re not in favor of any kind of reliability analysis, but we have been doing that as a judicial system in the Anglo-American tradition for 200 years. I don’t blame courts for being a little bit reluctant to say, “We don’t know how to do that. We’ve never done it right. It’s been wrong from the beginning.” I don’t feel that it’s been as much a disaster myself as you clearly feel it has been.

We have a series of exceptions. They are not perfect—the dying declaration exception being one of the least perfect. But we have criteria that we have some faith in that have worked for a long time, and one of the things that bothered me some in Scalia’s position in *Crawford* is that he was so purposefully destructive of every approach to applying the *Roberts* doctrine that I always thought that he killed more than he should have tried to kill. I am not as persuaded as he is, and perhaps not as persuaded as Rich is, that judicial efforts to assess the reliability of particular statements by reference either to criteria of exceptions or to a more general standard is quite as disastrous as that. I actually—well, I should stop. I want to ask Penny a question because she said something very provocative, but you go ahead.

Professor White: I wanted to say something about judges. My role in *Crawford* for the last three years has been to go to about twelve judicial conferences and try to help these judges who must make these decisions like this [*snapping fingers*], make them correctly. And I do think that there is a great majority of judges who want to get it right. And I remember what we told them. We took *Crawford* and we took all the non-definitions of testimonial, all the phrases that Justice Scalia put in there: statements that may lead an objective person to think it would be used prosecutorially, *ex parte* affidavits, everything that he said about what might be included in the concept of testimonial statements. There were about twelve different things you could pull out of the opinion, and we said, “Okay, focus on these.” The trial judges are in the trenches and they are looking at these guideposts, but most trial judges are very reticent to make law in this age of “let’s attack activist judges.”

So they are going to go with what’s defined and leave it to the appellate courts, in most states their highest court, to make the law if they are going to go beyond the four corners of *Crawford*. So what I saw trial judges trying to do was maybe oversimplify it, to create cubby holes out of *Crawford*, and try to stick the statement into a cubby hole. And if it didn’t fit in a cubby hole, as in Tennessee, my state, for example, the court said we are going to continue to apply *Ohio v. Roberts* for everything else.

Well, then along comes *Hammon* and *Davis* and we get this other slice of the definition. And so now I see judges reticent to say “Well, private statements—we don’t have any examples here. We got Sylvia Crawford talking to the police, we got Hammon, Davis, these statements are all made to agents.” So in the trenches, judges who are trying to do what the law requires them to do, which is to rule based upon precedent and not make new law, are waiting for the higher courts to decide what that is. I think many of them are doing as well as we can expect them to do.

Professor Friedman: I take that point. I don’t mean to suggest bad faith on the part of most judges. I just do think that the orientation among many judges—particularly in the domestic violence context—is that they are used to their mode of operation. I guess I don’t have anything terribly against judges assessing reliability for some purpose; I just don’t think it has anything to do with what the confrontation right is all about. And I guess I disagree with Chris to some extent; I don’t think *Roberts* was working. I mean, *Roberts* was what produced the result in the Washington Supreme Court in *Crawford*¹⁷ and the Indiana Supreme

¹⁷ State v. Crawford, 54 P.3d 656 (Wash. 2002).

Court in *Hammon*,¹⁸ and *Roberts* is what produced all these cases in which autopsies can come in and lab reports without witnesses. But it wasn't articulating what the Confrontation Clause was about, and it wasn't articulating a principle anyone could understand except: "Uh, it looks like it's accurate, and so it comes in." The whole right, it just disappeared.

Professor Mueller: I agree with you that *Roberts* was not working very well. I'm a little bit like Laird I suppose on this point: it wasn't a very good instrument, but it's better than no instrument at all. I guess that's where I'm coming out. What I really wanted to ask Penny, because it's so interesting and because it's so beyond my familiarity, is what is the big thing that stops confrontation from playing a huge role in capital sentencing? Is it a concern over cost? Or is it a concern that if you apply confrontation to the prosecutor, then you have a similar high evidentiary standard that applies to the defense, so you'll get less information? What is it that stops the last step from being taken?

Professor White: I don't think it's the latter. Although some folks would like to suggest that applying a high standard will cut back on mitigating evidence, there is a constitutional principle that would prohibit that from happening. I think it's that we still harbor the misbelief that more is better, and that more is quantity, not quality. And I just think that it's easy. There is the *Williams*¹⁹ decision out there, and a judge can just latch on to it and say, "Well, that's the precedent." And *Williams* has never been reinterpreted by the Supreme Court following the *Apprendi* line of cases. So I just think it's the simplest approach. Plus, many judges also have the legislative endorsement of *Williams* by the multitude of statutes, including the Federal Death Penalty, which say that not even the rules of evidence apply in sentencing.

Professor Mosteller: I am going to speak on a different point, and it's about the future. When you look at the purpose language in *Davis*, there is a dichotomy between forward looking, which is not testimonial, and backward looking, which is testimonial: forward looking in the sense of an ongoing emergency, backward looking in the sense of establishing past facts for the purpose of potential use at trial.

In looking at some children's cases I've seen lately, which may be resolved as to confrontation by the private/public division, there are discussions about purposes that are not testimonial that would also be backward looking. There are more than two purposes in the world. When

¹⁸ *Hammon v. State*, 809 N.E.2d 945 (Ind. 2004).

¹⁹ *Williams v. New York*, 337 U.S. 241 (1949).

we're talking about police, it seems like the only purpose the police might be about that's not testimonial is something that is an ongoing emergency. Let's assume that there's a possibility of a statement to a private individual being testimonial.

Consider a medical purpose. A medical statement can be very backward looking and still be taken for the purpose to determine medical care.

If governmental agents are covered in addition to police, it may be possible that social workers who have the job of taking care of the health and welfare of the children may be able to develop statements that are not testimonial in the sense that they are not for the purpose of law enforcement. They may also be very backward looking.

It has appeared to me that, at least in some courts, there's a potential for an avoidance of testimonial statements by the handing off of certain kinds of initial investigations to people who are not in law enforcement and for whom the purpose will be something other than law enforcement. Then if the statement is used later for trial as an incidental purpose, it may not be covered as testimonial.

I don't know if that will occur, but as I was looking through a number of cases, I suddenly realized that in *Davis* there were only two purposes. They were kind of neat: forward looking is good, backward looking is bad. When you think about the other potential purposes that might be out there, it may be that there will be a number of situations that are quite backward looking and also will be quite useful for the prosecution, but were created for a different purpose than prosecution.

Those types of developments are a potential for an impact on the purpose language of *Davis*, which seemed to me as pernicious from my biases. In any case, this is certainly interesting and certainly something to keep your eye on. I hadn't really thought about it until I was looking at all the children's cases.

Purpose also applies to parents. Parents, in addition to being private, are doing something other than purposeful development of testimony. So I saw at least three different purposes used by three different groups—doctors, social workers, and parents—and the courts were starting to say that maybe all of those were not testimonial. So in terms of thinking into the future and possibilities, I wanted to throw out these developments.

Professor Mueller: I think that's exactly what's happening. I mean, I read the cases exactly the same way. You just see case after case in which there is a child talking to a doctor or to a family member and somebody says, "Well, this is testimonial," but the answer is "No, they are concerned with the well-being of the child and trying to treat the child, which is not testimonial." They are looking specifically at the

purpose of the parent and the doctors and the child's medical statements, and they're concluding it's child-victim hearsay or an excited utterance. That's exactly what the cases are doing.

Professor Duane: I agree. It's further evidence of what you, Professor Mosteller, call the "pernicious" implications, possibly, of the Supreme Court's recent focus: in part, on the attitude and perception of the declarant and what she was thinking when she made her remarks. I would be interested in hearing the panel's reaction to this fact pattern. There was a recent case decided by the U.S. Court of Appeals in which the government knowingly procured the assistance of an undercover informant to assist them with an investigation. They gave him a recording device, a wire to wear. They gave him a list of questions to ask, and they told him who to go talk to. And at the government's explicit direction, this informant wearing the wire went and talked to these other people who thought that they were talking to a friend. And when these recorded statements were later offered into evidence against a third individual at his federal criminal trial, he objected on hearsay grounds; he objected on confrontation grounds; and the U.S. Court of Appeals summarily affirmed the trial judge's ruling admitting the evidence, saying, "Well, *Crawford* doesn't apply. This isn't testimonial because the guy who was making the comment didn't know he was talking to a police agent. He thought it was just what *Crawford* called a 'casual remark' overheard by an acquaintance," which is faithful to a couple of lines of *Crawford* taken out of context, but I think it does violence to the other lines of *Crawford* where the Supreme Court spoke so eloquently about the Framers' supposedly resolute concern against allowing the government to knowingly participate in the creation of evidence to be used at trial.

Professor Friedman: That's very interesting. I hadn't known about a case just like that, but I think that—

Professor Duane: Well, you can find a citation to it in a footnote in the next issue of the *Regent Law Review*.²⁰

Professor Friedman: I'll look forward to it. I've been expecting cases like that because there clearly is the possibility of abuse, and I think it probably has to be addressed by a doctrine of estoppel, somewhat similar to forfeiture. In fact, at the Brooklyn conference, one speaker there said that we shouldn't be talking about forfeiture, we should be talking about estoppel—estoppel of the defendant—and maybe

²⁰ See *United States v. Johnson*, 440 F.3d 832 (6th Cir. 2006).

the prosecution should be estopped too in certain circumstances where there is some sort of manipulation.²¹ The difficulty—and I don't mean that it should prevent a doctrine of estoppel of the prosecution from being adopted, it just makes the theory more complicated—is that most people support the doctrine by which statements of conspirators are admissible. (Well, Charlie Nesson is not here, so maybe he wouldn't.) And I think it became quite clear in the argument of *Crawford* that they weren't going to go for any theory under which those didn't come in, and one of the advantages of the declarant orientation is that those statements seem quite easily to be nontestimonial because if a statement is truly in support of a conspiracy, say to an undercover informant, then the speaker doesn't have any testimonial anticipation. But maybe we can distinguish those cases and the type of cases that James mentioned just on the estoppel theory. In other words, it's okay for the government to infiltrate people who are doing bad things and to get them to say things that put the finger on each other but it's not okay for the government to get people who are just going about their business, not doing anything bad, to act as witnesses without their knowledge and perhaps against their will. So that may be the proper approach.

Professor Duane: Very interesting. I apologize for interrupting this freeflowing dialogue, perhaps only temporarily, but we've been promising our guests all day long an opportunity to pose a few questions to our panel of experts, so let's give them that chance now. Any of you have any comments, questions, observations?

Question 1: First I just want to say thank you. It has been a wonderful day, and last night as well. Listening to you all speak has been an amazing opportunity. My question goes a little bit to what you were saying, Mr. Friedman, about the amicus brief in *Hammon*. And also, Professor Wagner approached the issue of how child abuse cases and domestic violence cases are a different kind of criminal case. What is your opinion about whether there should be some accommodation made in these instances other than the fact that they are possibly allowed to testify from a remote video theater or from behind a screen? But also, maybe it goes to the question of what constitutes unavailability of the witness? So I just wanted to hear your thoughts on that. Thank you.

Professor Friedman: Well, I certainly—and thank you for your comments—I certainly don't think there are different standards that

²¹ See James Flanagan, *Foreshadowing the Future of Forfeiture/Estoppel by Wrongdoing: Davis v. Washington and the Necessity of the Defendant's Intent to Intimidate the Witness*, 15 J.L. & POL'Y (forthcoming 2007).

apply by virtue of the fact that it's, say, a domestic violence case. Justice Scalia made some withering comments to that effect during the argument. I do think that intimidation is a concern in domestic violence cases with particular frequency, and I think that the proper approach is to apply forfeiture to them. So as far as unavailability, forfeiture only applies if the witness is unavailable, and unwillingness to testify is a form of unavailability. If the reason the witness is unavailable is because of the accused's wrongdoing, then forfeiture is possible. I think that forfeiture needs to be proved and not assumed, but I think it's a particularly important issue in the areas of domestic violence and with child witnesses.

Professor Mosteller: With respect to child abuse, I've done a fair amount of research in the area and I've written an article about the Confrontation Clause in that area.²² One perspective on the Confrontation Clause is that it should be a "get out of jail free" card for the defendant. Another is that it ought to be an incentive to create confrontation. I want to highlight a set of experiences I've seen. Oregon has a hearsay exception that basically admits any statement by a child in a sexual abuse case—any statement—as long as the child testifies.²³ As a result, prosecutors in Oregon spend a lot of time trying to get children able to testify.

It has been my reaction when I've read cases in which it seems advantageous to prosecutors not to get children to testify, that the children tend to be unavailable more than in other situations. I'm not trying to say there are not situations in which children are unable to testify, but I think with a lot of work children can be helped to be able to testify in the courtroom.

One of the things that happened after *Maryland v. Craig*²⁴ was that there were fewer cases of children testifying by video link than had been expected, and most people in the field believe it was because prosecutors came to the conclusion that remote TV was less effective in getting convictions. So there was a tendency to work to secure direct testimony. I've spent time talking with prosecutors, and many of those who work mostly with children spend a heck of a lot of time empowering the children.

I'm not using empower in an exact sense, but testimony does that. Lots of different things happen when children testify, but for some children, the ability to testify, the ability to go into that courtroom and to

²² See Robert Mosteller, *Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411 (2005).

²³ OR. R. EVID. 803(18a)(b) (OR. REV. STAT. § 40.460(18a)(b) (2005)).

²⁴ 497 U.S. 836 (1990).

be able to talk about the abuse, is in the end an empowering event. But the effect isn't certain. If the child "wins," it's an empowering event; if the child is thought badly of, it's a harmful event. One of the other things that is the most harmful to the kid is the lack of mom's support. At least some studies have suggested that the mom's support is more important than almost anything else.

So I want us to think about the Confrontation Clause as a way to get confrontation happening as opposed to a way to exclude hearsay. At least one of the advantages in having a more vigorous Confrontation Clause is that more people might testify in court. As a result, defendants might lose more of the time. So confrontation might be bad for defendants, but it's better for our system of justice. If we have a doctrine that is vibrant, and if it creates the right kind of incentives, the result is that people appear in the courtroom. Folks who are making the accusations make them to the face of the individual, the defendant gets to cross-examine, and then the jury decides the case on the basis of the best evidence.

I think there are some ways in which there can be multiple benefits. In a state like Oregon, which has a hearsay rule that admits any statement of a child in a sexual abuse case if the child testifies, there is an actual experiment. Tom Lininger, a law professor from Oregon, has written some articles which reflect something of the perspective that encouraging confrontation can be consistent with effective prosecution.²⁵ I suspect he has been influenced by what he has seen in that state in children's cases—both goals can be accomplished.

Professor Friedman: Can I just add: I agree absolutely with what Bob said. I mean, it's a very important point and it applies not only to children but to domestic violence victims as well. In fact, in arguing *Hammon*, one of the fun things about preparing that case was the amount of information I could find on the web about police departments and domestic violence organizations and first responders. I just found out all their protocols and a lot of it went into my briefs. One of the *amici* against us was Cook County, Illinois, which had its own brief saying that the world is going to end for domestic violence prosecution if the states

²⁵ See Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 306–10 (2006) (arguing to maintain unavailability preference for nontestimonial hearsay to encourage confrontation); Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353 (2005) (attempting to modify cross-examination so as to reduce victim's anxiety while maintaining defendant's confrontation rights); Tom Lininger, *Yes, Virginia, There Is a Confrontation Clause*, 71 BROOK. L. REV. 401, 408–09 (2005) (arguing that prosecutors should focus on facilitating confrontation rather than arguing for its elimination); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 784–97 (2005) (proposing additional ways to allow confrontation before trial through the expansion of preliminary hearings, the creation of new special hearings, and the use of depositions).

lose these cases. Cook County has a program that they're very proud of called "Target Abuser Call," in which they bring victims to court. They say they get eighty percent of them there, a very high percentage of victims testifying, a high conviction rate, and they keep them safe. But it costs money. And I really felt—I tried to make this point—that there was a good chance that domestic violence prosecution in this nation may really have been improved along the lines that Bob was saying if Davis had won. Because the message that would have gone out from the Supreme Court, and then from every prosecutor's office in the country to every legislature, was that the Supreme Court really means business. We've got to put more money into domestic violence prosecutions in terms of persuading women to come and testify and in terms of protecting them. I think it would have been very dramatic if Davis had won.

Question 2: I just had a follow-up question to Professor Mosteller regarding that Oregon law. What would you feel about a federal rule or an addition to the federal rules, that creates sort of a blanket exception for hearsay where, let's say, a child is under five years old, or a child is under seven years old, or whatever psychologists decide is the point at which the cognitive abilities of a child have not fully developed? There's really not a point to having confrontation where there is sexual abuse and the child is under a certain age because it's not hard for a defendant's lawyer to get up and fluster this child and get him to contradict himself and to make it look as though everything that he'd said didn't really happen, because children can at the same time, as I'm sure you know, think that two plus two can equal four and five. So it doesn't seem to me that the right to confront a child that young really serves any purpose. What about just creating a blanket exception for children under a certain age where the right to confrontation is tossed out the window and another hearsay exception is allowed?

Professor Mosteller: I have trouble finding the justification for the blanket exception that admits hearsay for very young children. I know that children aren't supposed to be full-fledged witnesses, at least under some perspectives they aren't supposed to be. However, if you read the cases, a question like "What happened to you?" produces the answer "Stacy hit me right here [*pointing to forehead*]" by a 29-month old. It seems like an accusation. It seems like something significant.

Now my question is, did the child really say that? Or is that a manipulation of the child's words? When the child is there in the courtroom, we can get a view of what is possible and how the statement

squares up. If you look at *Idaho v. Wright*,²⁶ the statement that the doctor was making that Laird quoted, there is almost nothing in the excluded statement about what the child actually said. It's the doctor's summary. The child in that case is two-and-a-half years old. How much of the statement was what the child said? How much did the doctor pull out of the child? So that's one justification for wanting the child to testify.

Now, what's going to happen in front of the jury? I think cross-examining children is hard as heck. I've seen almost nobody that can do it well. If the defense attorney beats up on the child, it does no good at all. If you can't run circles around a child using age-inappropriate language, then you're pretty poor.

So the ability to cross-examine may not get you very much, and people may argue about it being ineffective cross-examination. They have a point. But I have some trouble saying there is no need to cross-examine if the words come in with a very adult meaning: "Stacy hit me here." I've got "Stacy hit me here" coming in to prove that Stacy is the person who hit me here. The only accusation that Stacy hit the child comes from the child. We should try to help that child come into the courtroom in order to hear what the child would say or not say there. Then we've learned something. I think you should bring in both the hearsay statement and the child's statement.

I've met with some defense attorneys who try to cross-examine children, and they really do say you turn the rules on their head. The best I've personally talked to is a lawyer in Oregon who basically said, "If my whole point is that it was all suggestive and I do a suggestive cross-examination in the courtroom, what have I accomplished? Absolutely nothing." So this person was very gentle. There are a whole bunch of issues about cross-examining children in the courtroom. Can a defense attorney ever do it well? I think that about ninety-five percent will look awful doing it. I think in fact, in most situations, if the child testifies, not much will get accomplished on cross-examination for the defense.

But I have some trouble when the child's statement comes in for the purpose of doing exactly what it is intended to do—that is, to convict a guy on the basis of a very focused accusation—when we let this hearsay in without doing our best to get the surrounding information.

Just one other thing: the possibility of revealing adult manipulation is not a new idea. I was reading something about one of the cases that was cited by the U.S. Supreme Court, the case of *King v. Braiser*.²⁷ In one of the treatises cited, Lord Hale basically said that we need children to testify even without being under oath because if the mother tells us

²⁶ 497 U.S. 805 (1990).

²⁷ 168 Eng. Rep. 202 (K.B. 1779).

what the child said, we'll only have the word of the mother about what was said. It may be that she is not saying it exactly like what the child said. Being able to compare what the child will say in the courtroom with what the child is supposed to have said outside the courtroom allows the jury to figure it all out. Let the jury figure it all out. Let the statement of the child in—and potentially convict the accused—but we've got a richer mix.

If we can figure out a way to get a richer mix, then I think we've accomplished a little something here. We can't accomplish perfection in the cross-examination of this individual because crossing the child is one of the toughest things that any defense attorney could ever accomplish. But I think a blanket exception takes us in the wrong direction.

Professor White: Let me add a short comment in response to the assertion that the right to confront a child victim does not serve any purpose: the defendant just might be innocent. And many of these child sexual abuse cases have no physical evidence. I have a client serving forty-eight years in the penitentiary for a nonphysical-evidence crime based upon the testimony of a department of social services worker and an ex-wife. The defendant just might be innocent. So I don't think that we can say that there is no purpose or no good gained from having the actual victim there on the stand subject to cross-examination. I mean, it would be a simpler case if there was always physical evidence: if there was a bruise, if in a sexual case there was physical evidence. But given the expansive definition of rape and the expansive definition of sexual battery, there may be no physical evidence. There may only be testimony. And we do have the presumption of innocence and the burden of proof rests upon the state. So that's something I don't think we should lose sight of. There are innocent individuals charged with heinous, heinous offenses.

Professor Friedman: This isn't part of your question, but I wonder if those who have had experience in these cases can help out. It seems to me that probably cross-examining a child in this context tends to be different from cross-examining an adult in this respect. With an adult, what you hope to do is: okay, you say X right, now I'm going to get you to say Y, and then I'm going to show that X and Y are very incompatible, maybe logically incompatible, and at least very unlikely. It seems to me that with children, usually if you try to do anything like that, it's a flop. And the most you can do is reveal the child's cognitive limitations. And maybe the jury has a sense of that ahead of time, maybe not. But it seems to me that with a child, cross-examination has to be gentle, in part because you can't have the rigorous logical testing. It's

more just trying to show in general that this child is not a reliable truth-telling machine.

Professor Mosteller: That's true occasionally. The one person who did what sounded to me to be a wonderful examination, a trial lawyer from Oregon, had the theory that the child was right that abuse happened but that another person was the abuser. She was arguing that there was a reason for the child to place the blame on a certain individual.

Lots of these cases come out of tumultuous family situations; lots of times the abuse is true, but there's also a bias by an adult. The reason the charge of abuse surfaced in this case was that the mother was charged with burglarizing the alleged abuser's apartment. So the whole point of the examination was a single question—the lawyer spent one day getting to the question she wanted to ask. The reason she spent a day getting there was to get the child to talk without clamming up. Interestingly, she said that prosecutors and judges are so interested in defense lawyers not being mean to a child that as long as you are kind to the child, you can ask about lots of things. And her sense was that something awful did happen because every time she led the child to a certain room in the house with her questions, the child would just clam up.

What she ultimately got to was that the first time that the child supposedly told her mother about the abuse was when they were driving away from the house after the mother committed the burglary. The abuse never came out until that point. And this was the first time that she and her mother ever had the conversation about it. The defense attorney's whole theory was generated at that point, and the corroboration of the theory was that the story had never been told to mom before the burglary had taken place. That was something the child was able to tell the cross-examiner. She got one actual answer to an important question.

But a lot of times I think I would agree with your point, Rich. I think it would be a very good point to show what limited kind of information the child can recall; to show what the child can remember; to show how reasonable it was for this to have been the story; and maybe some other logical things that children would likely say.

Question 3: First of all, I am also tremendously honored to have you all here. I just wanted to focus my question specifically to Professor Friedman and those who are opposed to Professor Friedman on forfeiture—

Professor Friedman: That is everybody.

Question 3: So I guess the entire panel in some sense. It seems like everybody up until this point has talked a lot about the mens rea that is associated with forfeiture and less has been said about the actus reus. And I guess one of the reasons why I bring it up is because I feel that if a judge is determining what the actus reus is, then in order to have a forfeiture, I think you run into problems when a judge is trying to summarily determine whether that person has waived it or not.

For example, take a state that refuses to recognize the *Redline* limitation to felony murder.²⁸ How is a judge to decide the forfeiture question if a robber walks into a bank, holds up the bank teller, a policeman breaks in, and the robber runs out the back door, and the police officer shoots at the robber but instead kills the teller? How does forfeiture apply? I mean, in other words, the actual act of the bank robber was no less wrong, but has he actually forfeited his right to confrontation because the act facilitated the chain of events that led to the lack of confrontation?

Professor Friedman: So, in other words, before the bank teller got shot, she made some kind of testimonial statement?

Question 3: Right. The officer walks in and she says, "Hey, he's the one." And as the bank robber is running out, the police officer draws his weapon and shoots.

Professor Friedman: That's a great exam question. I don't have any strong view on that. That's very interesting because clearly, most people here would say that there can't be forfeiture because the primary intent was not to render the person unavailable as a witness—that wasn't the motivation. For me, it's a closer call because I don't think that motivation that way is essential. On the other hand, there wasn't even the intent to render the person dead. So I guess my inclination would be to say no forfeiture, but that is a very interesting hypothetical which I think is close to the line. I might use that if you don't mind.

Professor Mosteller: I want to respond to a slightly different situation, but to tell you why I'm worried about forfeiture and want to have some restrictions on it. My concern comes from child abuse cases. Is it possible that the reason the child is not testifying is because of the abusive act by the defendant? If you don't have to show an intent to make the witness unavailable by the wrongful act, and you make forfeiture very broad, it will be relatively easy to find.

²⁸ See *Commonwealth v. Redline*, 137 A.2d 472 (Pa. 1958).

I'm interested in trying to set up barriers that are difficult for judges to breach when they are deciding forfeiture. Otherwise what we may get is testimony by an expert that the abuse made the child unavailable to testify, and that if she testified, it would be permanently damaging to her. Do you think that evidence might be forthcoming? I suspect it might be if that testimony would facilitate the ability to bring in the hearsay. So I worry about setting up easy barriers for judges to go across. Doing so would run counter to what I said about trying to bring more people in to court to testify.

In a death case, forfeiture is not so flexible. There is no way to manipulate unavailability. But if we are talking about a live witness, who may or may not be available, it's just a step from what has happened before. In the case of *Ohio v. Roberts*,²⁹ the prosecutors didn't look very hard, it seemed to me, for a witness who had gone out to California and become a hippie. If they hadn't had her preliminary hearing testimony in "the bank," I bet they would have looked about ten times harder. It's just human nature that if you need to get a person to testify, then you're going to work harder at it than if you don't care. I worry about an easy set of decisions that a judge can make based on expert testimony that will establish forfeiture so that the witness is unavailable and as a result the hearsay statements of that person can come in.

In a death case, if you want a broad forfeiture doctrine and can figure out a doctrine to cabin it to death cases, I don't have problems. If someone was shot and is dead, there is little manipulation possible. But a broad forfeiture doctrine doesn't stay put with death cases. It goes into other areas. That's the reason that I worry about tearing down the barrier with respect to the easiest case—the murder case. I thought the best rhetorical device of Justice Scalia in *Crawford* was that we do not deny the right to trial by jury because a judge makes the decision that the defendant is guilty. Similarly, under forfeiture, you shouldn't be able to deny the right to cross-examination and to confrontation, which might have been the essence of the defendant's jury trial, because a judge makes exactly the same kind of decision but just puts a different legal label on it.

So the more amorphous the forfeiture doctrine is, the more I worry. The chief evil of *Roberts* was its unpredictability and its manipulability. If you have a forfeiture doctrine that has those same possibilities, I worry. I know it's a different doctrine, but the practical results are much the same, especially in child abuse and domestic violence cases where the alleged crime itself could be argued as the reason for the person's unavailability. That's why I want to be cautious in liberalizing the

²⁹ 448 U.S. 56 (1980).

forfeiture doctrine and to set up as many meaningful barriers as possible.

Professor Friedman: I think it's a very valid concern. That's why I've said I think that the principal restraints against the overuse of the forfeiture doctrine are going to be procedural, if the Court adopts those. And by procedural restraints, I mean at least largely what I have referred to as the mitigation requirement, that is, that the prosecution be required to take steps to limit the damage to the confrontation right. But I do think that to a very large extent, if you say to courts, "Well, this hearsay will come in if you find that the declarant is afraid and that the declarant is afraid because of conduct of the defendant," then it will be found. But I think that if there are procedural steps that the prosecution and the court have to go through, then it's less easy to manipulate.

Professor Mueller: There is actually a case—there may be more than one, but the *Cherry* case is the one that I know about: *United States v. Cherry*.³⁰ It's a Tenth Circuit case in which the intent is clearly there. One of two co-conspirators realizes that there is a stool pigeon who has been talking to the police, and he decides that he needs to kill this guy. And he drives to the house and kills him. And then the conspirator is charged along with his colleague, and one of the two killed the stool pigeon, the other was simply along for the ride. The question was whether both had forfeited their confrontation rights on account of the act of the one in purposefully killing the stool pigeon in order to keep him from testifying. And the answer given by the court was "yes" if it was within the scope and contemplation of the conspiracy by the time it happened, if it was something that could be foreseen by the colleague by going along or continuing in this conspiracy as it unfolded, but "no" if it was simply something that happened during the conspiracy. So the conspirator along for the ride could not forfeit his confrontation right if the murder wasn't within the contemplation of the conspiracy. In this case, I believe they remanded for the trial judge to think more about this. But the activities of the person in question included apparently obtaining a car to drive to the place where this guy was shot. And so it looks a lot to me as though the trial judge was being invited to say, "Even though she didn't pull the trigger, she was a participant in his murder. She knew about it. It was within the contemplation of what they were doing, and therefore she lost her confrontation right along with the guy who actually pulled the trigger." So one of the other areas in which we are going to have to talk about what forfeiture means is how many people forfeit, particularly if you have a joint criminal enterprise.

³⁰ 217 F.3d 811 (10th Cir. 2000).

Question 4: Thank you very much for being here. We have very much enjoyed all of your input. I have often heard that the status of the law is like a pendulum in which you get periods in which the law is very much skewed in favor of the prosecution, and other times in which it is very skewed in favor of the defendant, the accused. Do you think that *Crawford* and *Davis* may have been motivated by a desire on the part of the Court to swing the pendulum back a bit in the direction of the accused?

Professor Friedman: I don't think Justice Scalia was motivated at all to give defendants a break, to push the law more in favor of criminal defendants. I don't think that was it at all. I do think he said, "Gee, there is a constitutional right that is at the center of our system of criminal jurisprudence that is being ignored and misunderstood. And it has got to be articulated and defended with real vigor." That's my sense. Obviously, part of that is his general approach to the Constitution. He's an originalist. And so, I think he found it just plain offensive. I don't think it's a standard "be nice to prosecutors or be nice to defendants" approach.

Professor Mueller: I agree with Rich on that. There's just one other thing—and this is a place where my good friend Laird and I don't always see eye to eye. The Supreme Court tried twice, really without success in my judgment, really more than twice, to deal with against-interest statements by third parties offered against defendants. Now they made a royal mess of it in my opinion in the *Williamson* case.³¹ They made another royal mess of it in the *Lilly* case,³² and there it is for a third time in the *Crawford* case. So one other reason for *Crawford* is to get the Court out of a situation that it could not figure out how to handle. It could not figure out a rational way of dealing with third-party confessions implicating the accused, and since almost all of these are statements to police, statements in guilty plea allocutions, or statements in other clearly testimonial settings, *Crawford* was, as it turns out, a convenient way of cutting a real Gordian knot that the Court had just struggled with and couldn't handle.

Professor Park: When you come to a conference like this you tend to hear about the unsettled areas. But I think *Crawford* really did clear some things up: grand jury testimony, plea allocutions, third party confessions—you can't use them.

³¹ *Williamson v. United States*, 512 U.S. 594 (1994).

³² *Lilly v. Virginia*, 527 U.S. 116 (1999).

Professor Friedman: I think one of the more interesting aspects of the issue is that *Crawford* was 7-2 on the question of whether to adopt the testimonial approach. Everybody but Rehnquist and O'Connor, across the whole spectrum, joined in. And it was 9-0 on the result.

Question 5: I have a question about forfeiture by wrongdoing. Maryland has adopted a state statute that is similar to it, but they've used a clear and convincing standard, and they've said the rules of evidence must be strictly applied at the preliminary hearing. And so it seems to me that they aren't treating this like an ordinary preliminary matter. And I was wondering if you agree with that. Should forfeiture be treated differently depending on the nature of the right being forfeited?

Professor Friedman: I don't. I mean it's an interesting approach. But I think that most threshold issues are dealt with by a court without having to adhere to strict evidentiary rules. That should probably apply here as well. I think that there is a concern over bootstrapping—that is, using the statement the admissibility of which is at issue to prove threshold facts that are essential for the statement to be admitted. My only real concern on this matter is that I think that even on a preliminary matter it may not be appropriate to allow critical proof on the basis of a testimonial statement that the accused has not had a chance to cross-examine. But as I was trying to say this morning—I am not sure I said it very well—at the end of the day, the court is going to say either, “There hasn't been forfeiture, and so the statement doesn't come in,” or, “There has been forfeiture, and the defendant forfeits whatever confrontation right he had with respect to this statement at the preliminary hearing as well as at trial.” So either way, I don't think the defendant has a complaint about the fact that the court may be relying on the truth of the statement itself to determine whether it should be admitted.³³

I do think that the forfeiture doctrine has to be constrained, but I think that preventing bootstrapping is being restrictive in the wrong place. I think that other procedural aspects of the forfeiture doctrine are where the courts should be more restrictive, but these are hard to work out. In other words, what procedures, what hoops are you going to make the prosecution jump through before saying the witness is unavailable as a result of the accused's wrongdoing, and so there is forfeiture? It is a lot harder to jimmy with such procedural hoops than with a standard of proof, such as clear and convincing evidence. And even to say that this evidence or that evidence is admissible, I don't think that is going to be a huge difference.

³³ See also Friedman, *supra* note 2, at 489–90.

Professor Mueller: One of the real problems that the forfeiture case presents—I don't want to answer the question you asked because it's too hard, but I'll answer a slightly different question—is a situation where you have a person who is afraid to testify, and that person doesn't even want to come into court and say to the judge, "I'm afraid to testify," because the person's afraid to do that too. So then what you have is his emissary, a lawyer, maybe a prosecutor, who says, "You know the reason we can't call Frank is because he's afraid to death of the defendant, and the reason he's afraid to death of the defendant is that the defendant has threatened him." And so what you have is a presentation in chambers without the defendant present, although the defense counsel *might* be present—although even that is difficult—because you have to tell the defense counsel that he can't reveal everything that is going on to his client.

And so what you have is a decision on a critical preliminary point made on the basis of really presentations by one lawyer, the prosecuting authority, and with the defense counsel, in effect, unable to do anything to test or check this. And you are not even talking to the guy who is afraid because he is afraid. And that's the basis on which the decision is being made—that the defendant has forfeited his right to confront this guy. I mean if the guy is dead, you can understand not bringing him in, and you can understand this situation too. But it isn't just a question of burden of proof, or just a question of bootstrapping, it's a question of deciding it on essentially non-evidence, the most casual kind of evidence you can imagine.

Professor Friedman: Chris, can I ask you then, what would you think of a procedural rule that if the prosecution is claiming forfeiture or intimidation, and the declarant is physically able to come to the court, that the declarant has to be brought, at least in chambers, to explain why she won't testify? I suspect that if that were done, maybe some declarants wouldn't show up, but as Bob says, you know when the prosecution needs it, my goodness, it often happens. And maybe a lot of these cases where they say they're too scared to come, the prosecution figures out a way of providing sufficient protection, at least to bring the person in chambers.

Professor Mueller: It does seem to me—I mean, I haven't thought about it enough to give you a mature reaction. But it seems to me that such a procedural rule would be a little bit better. And then you'd want, it seems to me, to let defense counsel do some cross-examining, or questioning, or what not, but not let the defendant be present. And it seems to me that you couldn't even let the defendant know that this was

happening, but it would seem to me, my initial impression, that it would be a good step.

Professor White: But then consider the jury. I mean, let's not forget about those twelve people sitting out there. What inference are they drawing from the judge making a preliminary finding that this defendant is such a bad egg that he's even threatened the witnesses to keep them from testifying? Maybe my greatest fault is to get us in another direction, but this week the Court heard a case about whether the jury would be drawing impermissible inferences about a defendant when the victim's family came into court with pictures of the victim on their lapels.³⁴ And to the Court, the question was: Is this like shackling, where the jury is drawing a negative inference about the presumed innocent accused by virtue of their appearance? Forfeiture presents the same situation; it's similar to introducing bad character evidence about the defendant. We've got to somehow make sure that the jury doesn't conclude that the defendant is guilty of the crime charged because he is the type of person who would cause forfeiture of testimony.

Professor Friedman: Well, we certainly don't announce to the jury that there is a forfeiture.

Professor White: Well, if all of those determinations are made behind closed doors, isn't it at least a possible inference the jury is going to draw? As to why that testimony is being presented in a way that is different from the confronted testimony of other witnesses?

Professor Friedman: A knowledgeable jury—well, maybe over time.

Professor Park: Maybe over time, but if they have as much trouble with the hearsay rules as my students do, I don't know if they'll be able to pick out why the hearsay is coming in.

Professor Duane: It appears now that the forfeiture doctrine gives us one more compelling reason to make sure that no lawyer inadvertently slips through the jury selection process. A lawyer in the jury room could be lethal to the defense.

³⁴ *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006) (holding that the decision to allow family members to wear pictures of the victim in the courtroom "was not contrary to or an unreasonable application of clearly established federal law").

Professor Mosteller: It seems to me that moving the standard to clear and convincing evidence would be one change that one could make a good argument for. However, I think it would have to be done by state law. My guess is that when the Supreme Court looks at it, they won't establish that standard. They tend on admissibility issues to stay with preponderance of the evidence. I think the last time they've used clear and convincing with respect to a finding like that was in *Wade* on the issue of an independent source for the in-court identification when the lineup was unconstitutional.³⁵ That was by clear and convincing evidence.

The argument for the Maryland evidence rule would be to avoid "bootstrapping." At least in terms of the rhetorical argument, to admit the evidence you would have to decide that this individual did the crime to find that he forfeited his right. It seems wrong. I understand that the concern is not technically correct, but you can see where the Maryland rule is coming from. I basically think it's a response to the kind of instinct I have been trying to put forward: be careful to try to set up barriers, make it a little bit harder to find forfeiture. I feel this way since I have trouble figuring out how to implement Friedman's mitigation idea.

If you are asking me what would be the kind of things that might be somewhat helpful to constrain forfeiture, the Maryland approach seems to me something feasible and moves in the right direction, although it might not be technically correct. And with respect to standard of proof, I believe any change will have to be done at the state level if it is going to be done at all.

Question 6: Thank you so much for coming. Some of our professors have expressed that there has been a shift within evidence to go away completely from hearsay across the world, particularly in Europe, where there's a merging of the civil and common law systems. And Professor Friedman, last night you said you would like to see the Confrontation Clause expanded to subsume some of the hearsay exceptions, while dismissing the rest. Do you see that as part of this shift, or as a bolstering of the adversarial system? I tend to be a fan of the adversarial system. I want to know if we should see the testimonial approach as a strengthening of it or as a compromise.

Professor Friedman: The idea is that if the basic concept of the Confrontation Clause were established robustly around the world, would that mean we've more places to travel for conferences? I'm working on

³⁵ United States v. Wade, 388 U.S. 218 (1967).

India particularly. It's the largest country in the world with an Anglo-American legal system.

I don't think the confrontation right is actually necessarily tied to the adversarial system as we know it, although it obviously finds its most natural home within the Anglo-American system of jurisprudence. As I've suggested, that's where the right really flourished for centuries. It's the great pride of English criminal jurisprudence.

But the European cases are very interesting in this regard because you don't have what we normally think of as an adversarial system—that is, the evidence isn't generated as much by the sides, the parties. The defense lawyer doesn't have as aggressive a role, and yet the European Court has sort of inferred from the European Convention on Human Rights that there is a right to have the testimony given in front of the accused, and to ask questions. So it's sort of a lumping on top of the more European model; it is obviously introducing an aspect of an adversarial system into that process. But I do think it's perfectly compatible with other systems.

The most familiar early mention of a confrontation right occurs in the *Book of Acts*, where the Roman governor says that it is not in the manner of the Romans to put a person to death without the chance to confront the accuser.³⁶ Some translations use the word “confront,” some translations “face to face.” There, it doesn't seem like any adversarial system as we know it. It's just a situation where the mob wants this guy convicted and executed, and the government is either going to do it or not.

Here's an even older instance of confrontation, which I find absolutely fascinating. The Bible, in *Deuteronomy*, prohibits the death penalty on the word of a single witness.³⁷ But the people of the Dead Sea Scrolls asked: What if somebody commits a crime, but only one person sees it, and then later he commits the same crime, so he's a serial criminal? And they concluded that each of those counts as one witness, but you can accumulate them, and you have to record them. And so they say if he commits the crime and only one person sees him, the testimony is recorded for possible future use; we thus have the first known deposition. They bring the person in front of whoever's going to record it, and then that's one strike; this is an old-fashioned rule of two or three strikes and you're out. It's not an adversarial system, but clearly the anticipation is that the defendant and the witness are going to be face to face. So I think the confrontation right is perfectly compatible with systems other than an adversarial system as we know it.

³⁶ *Acts* 25:16.

³⁷ *Deuteronomy* 19:15.

Professor Duane: I regret that it's my unenviable assignment to have to draw a close to this discussion. When you watch the energy and seemingly unflagging patience with which our participants have agreed to engage in this conversation, you will be amazed to know two things. One, they're not being paid by the hour, and I hope that they don't share your surprise with that revelation. And number two, we did not ask them, and they did not agree, to stay past four o'clock, so let's give them our thanks. And thanks to all of you for coming and staying and joining with us. It's been a pleasure.