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Is Confrontation the Bottom Line?

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IS CONFRONTATION THE BOTTOM LINE?

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I. THE FORMALITY MYSTERY

Despite general references to the "abuses targeted by the Confrontation Clause,"[1] and the use of Sir Walter Raleigh's trial as an example,[2] the Supreme Court has not given us much guidance about what it thinks the Framers were trying to accomplish. In defining the concept of "testimonial," it has not attempted to state what it is about "testimonial" evidence that makes it dangerous. At times, it seems bent on defining "testimonial" without reference to underlying goals, using as a guide to historical usage Noah Webster's 1828 dictionary definition.[3]

The Supreme Court's treatment of the formality requirement is a prime example. The Court states that "formality is indeed essential to testimonial utterance."[4] One longs for a statement as to why formality is essential—an explanation demonstrating what it is about formal out-of-court statements that makes them more dangerous to the rights of the accused.

Some of the elements that the Court treats as increasing "formality"—and therefore making it more likely that a statement will be excluded as "testimonial"—are counterintuitive. For example, the fact that a statement is recorded reduces the government's ability to manipulate its contents, yet it is counted as one of the things that made the statement in *Crawford*[5] more "formal" than the statement in *Hammon*[6] (though the Court does not believe that this difference in formality is enough to justify a different result). One of the Court's most puzzling statements concerns the relevance of punishment for lying to police officers. The Court stated that "the solemnity of even an oral declaration of a relevant past fact to an investigating officer is well enough established by the severe consequences that can attend a deliberate falsehood,"[7] and "it imports sufficient formality, in our view,

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1 Davis v. Washington, 126 S. Ct. 2266, 2281 (2006).

2 *Davis*, 126 S. Ct. at 2274 n.1; Crawford v. Washington, 341 U.S. 36, 44 (2004).

3 *Crawford*, 341 U.S. at 51.

4 *Davis*, 126 S. Ct. at 2279 n.5.

5 *Crawford*, 341 U.S. at 44.

6 *Hammon v. Indiana* is the other case decided in the *Davis* opinion. For the *Davis* Court's reference to the greater formality of a recorded statement, see 126 S. Ct. at 2278.

7 *Id.* at 2276.

that lies to such [police] officers are criminal offenses."[8] The point of making lies a crime is presumably to help the police get better evidence, but the Court uses it as a reason to exclude the evidence.

The Court does not tell us why it is important that it is a crime to lie to police officers. Perhaps the Court's implicit reasoning runs something like this:

1. The paradigm example of a "testimonial" statement is testimony under oath before a judicial officer.
2. The more a statement resembles that paradigm, the easier it is to say that it is "testimonial."
3. In the paradigm case, the in-court witness testifies under oath, and hence can be punished for lying.
4. In the case before us, the declarant's statement is analogous to in-court testimony because, like a witness under oath, the declarant could be punished for lying.

Thus the danger of criminal punishment is a feature that the in-court witness and the out-of-court declarant have in common if the declarant's lies can result in a criminal sanction. But similarities that make no functional difference should not matter. If the defendant's case is similar to Sir Walter Raleigh's case because both Sir Walter Raleigh and the defendant have a beard, that similarity should not count against the government. A fortiori, features that reduce the danger of abuse should not count against the government. In the Raleigh case,[9] the defendant was allowed to speak on his own behalf and to make legal arguments to the judges. Obviously, the mere fact that a modern-day defendant is allowed to speak and argue does not make the case more like the Raleigh case in any way that would make the defendant's conviction a better candidate for reversal.

Formalities can make a case better or worse than the Raleigh case. If one thinks of the Confrontation Clause as seeking to prevent adversarial abuses, then certain formalities might cut in favor of letting the evidence in, such as the formality of videotaping a declarant's statement. In a sense, recording makes the statement more like in-court testimony, because in-court testimony is often transcribed. But it also gives the trier a chance to find out more about the declarant's demeanor and the conditions under which the declarant was questioned—perhaps even something about whether unfair pressure had been applied to the

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[8] *Id.* at 2279 n.5.

[9] *The Trial of Sir Walter Raleigh* (1603), *in* 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1, 1–60 (T.B. Howell ed., London, R. Bagshaw 1809), *cited in Crawford*, 541 U.S. at 43. For a partial description of Raleigh's arguments in his own defense, see J.G. PHILLIMORE, HISTORY AND PRINCIPLES OF THE LAW OF EVIDENCE 157 (1850), cited and quoted in JOHN R. WALTZ & ROGER C. PARK, CASES AND MATERIALS ON EVIDENCE 97–98 (rev. 10th ed. 2005).

declarant. Not every formality increases the need for confrontation.

Treating "formality" as a negative factor will lead to curious results in cases where the state attempts to provide substitutes for in-court cross-examination. Suppose that a witness is dying of an unrelated affliction and there is an attempt to preserve testimony through deposition. One can imagine a spectrum of attempts to provide a substitute for in-court cross-examination, such as cross-examination by electronic link in the case of vulnerable victims, or cross-examination by an appointed attorney in "John Doe" cases where no suspect is in custody. Under the formality-is-bad approach, every effort to improve the accuracy of recording or to test the declarant's story would only make the evidence more likely to be excluded, until a line is crossed and the formalities become powerful enough to be deemed "confrontation."

It is hard to accept the Court's puzzling notion that the laws against lying to police increase formality, and therefore increase the likelihood that the statement will be excluded on grounds that it violates the Sixth Amendment. Professor Robert Mosteller does an excellent job of arguing that it would not be reasonable to treat statements differently depending upon whether the state has a law against lying to the police, and that the formality requirement is ahistorical and unrelated to the purposes of the Confrontation Clause.[10]

In order to sustain the formality requirement, a justification is needed to explain why formality helps avoid the evils that the Confrontation Clause sought to combat. A possible explanation exists[11]—formality puts the declarant on notice that the statement is likely to be used prosecutorially—but that explanation fits better with an approach that considers formality only as evidence of the declarant's intent, and not as an independent requirement. And under that explanation it would make no sense to make admissibility turn on something that a reasonable declarant would not know (such as whether lying to police is a state offense).

Perhaps the Court took a wrong turn in making the question turn upon whether a statement is "testimonial." That concept has led to a puzzling search for analogues to the formalities that surround in-court testimony. It might have been better to have focused on the words "accused" and "witnesses against" in the Sixth Amendment, and to have ruled that the defendant had the right to face his accusers, that is, those who have made accusatorial statements that are used in court against

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[10] *See* Robert P. Mosteller, *Softening the Formality and Formalism of the "Testimonial" Statement Concept*, 19 REGENT U. L. REV. 313, 323–29 (2006-2007).

[11] The Court suggests this explanation by saying that the formal features of *Crawford* "strengthened the statements' testimonial aspect—made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events." *Davis*, 126 S. Ct. at 2278.

him. If the central concept were whether a statement was "accusatorial" instead of whether it was "testimonial," then the concept would not have come with the baggage of "formality."

II. DECLARANT PERSPECTIVE VS. POLICE PERSPECTIVE

In its central holding distinguishing between testimonial and nontestimonial interrogations, the *Davis* Court also leaves us in the dark about why it chose the particular test that it endorses. The Court held that statements are nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency."[12] Conversely, the Court held that statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[13] These passages raise some unanswered questions, including whether the relevant "objective" purpose is one that would impute to the police officer in light of facts known to the officer, or one that would impute to the declarant in light of facts known to the declarant.[14]

One possible interpretation is that the test shifts the focus from the declarant to the police. Under that view, the question would be what intent the court should impute to a reasonable police officer in light of the facts known to the police at the time of the interrogation. But it is also possible to interpret the Court's language as saying that it is the apparent purpose of police questioning, viewed from the point of view of the declarant, that matters. Under that interpretation, the crucial question would be whether it would appear to a reasonable declarant that the police were trying to give help, or whether it would appear that the police were gathering evidence.

The distinction can make a difference in several situations:

1. An undercover agent, for the primary purpose of gathering information for prosecution, questions a gang member, who has no clue about that purpose. The gang member makes statements that incriminate the defendant. Here, the Court seems to think that the declarant's state of mind governs. The Court suggested that view by citing *Bourjaily v. United States* as an example of a case not involving testimonial evidence because statements were "made unwittingly to a

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[12] *Id.* at 2269.

[13] *Id.* at 2273–74.

[14] I am discarding other possibilities, such as the perspective of an omniscient disembodied observer, as being too hard to conceive or implement.

[government] informant."[15] That reference suggests that if the declarant does not know that the police are gathering evidence for prosecution, a statement is not testimonial, no matter what the police know.

2. A social worker in the special victims unit questions a child victim. Her primary purpose is to gather evidence, but a reasonable child in the victim's position would think that the social worker was trying to help in an emergency (or perhaps the reasonable child would not have a clue about the social worker's aims). One could construe the *Davis* test to mean that the state of mind of the declarant is what matters here, in which case the child's statement would not be testimonial.

3. The declarant secretly knows that she is safe, but the 911 operator reasonably thinks that the declarant is in danger. In *Davis*, the Court notes that "McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (*as far as any reasonable 911 operator could make out*) safe."[16] This passage suggests that if the caller knew she was safe, but the 911 operator did not, the Court's emergency doctrine would still apply and the resulting statement would not be testimonial. Nonetheless, it is plausible to think that the ultimate state of mind that is to be objectively imputed is still the declarant's state of mind. Her objectively indicated state of mind would be one of believing that, because she has given the police information that would make them think that she is in danger, the police are trying to help, not to gather evidence.

The declarant-perspective interpretation is consistent with the Court's later statement that "it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate."[17] It is also consistent with two of the definitions in *Crawford*'s menu: the one that defines testimonial statements as statements that bear a resemblance to ex parte testimony and "'that *declarants would reasonably expect to be used prosecutorially*,'"[18] and the one that defines statements as "testimonial" when they were "'made under circumstances which *would lead an objective witness reasonably to believe that the statement would be available for use at a later trial*.'" [19]

In other words, the "primary purpose" test could be viewed from the

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[15] Crawford v. Washington, 541 U.S. 36, 58 (2004) (citing Bourjaily v. United States, 483 U.S. 171, 181–84 (1987)).

[16] 126 S. Ct. at 2277 (emphasis added).

[17] *Id.* at 2274 n.1.

[18] 541 U.S. at 51 (emphasis added) (quoting Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02–9410)).

[19] *Id.* at 52 (emphasis added) (quoting Brief of Amici Curiae the National Ass'n of Criminal Defense Lawyers et al. in Support of Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02–9410)).

point of view of the declarant. Based on what the declarant knew at the time, would a reasonable declarant believe that the questioner's primary purpose was to give emergency assistance or to gather evidence? Does it look like the police are trying to give help or build a case? The difference between the police point of view and the declarant point of view makes a difference when the police have knowledge that the declarant does not have.

The main difference between the two declarant-expectation definitions in *Crawford*'s menu[20] and the *Davis* definition may not be one of a shift from declarant perspective to questioner perspective. Instead, the difference may consist of redefinition of what the declarant must expect in order for a statement to be deemed "testimonial." It was possible to read *Crawford* to mean that if the declarant could foresee prosecutorial use of the statement, then the statement was testimonial. After *Davis*, a statement can be nontestimonial even if the declarant foresees prosecutorial use—so long as the declarant believes that the "primary purpose" (not necessarily the sole purpose) of the police was to render aid in an emergency.

In deciding whose perspective to use, a discussion of what the Court is seeking to accomplish would have been helpful. There would still be a debatable question whether the declarant perspective or the police perspective should govern. If the dangers against which the Clause protects include coercive or suggestive questioning, then a focus on police intent would be appropriate. If the concern is about conniving declarants who know that their statements will be used prosecutorially, a focus upon the declarant's state of mind would be appropriate. If the Clause is broad enough to protect against both dangers, then it should apply when prosecutorial goals are the primary motive for either the questioner or the declarant.

III. FORFEITURE OF CONFRONTATION RIGHTS

I agree with the result that Professor Richard Friedman would reach, creating a broad forfeiture rule that would allow out-of-court statements to be admitted when the trial judge determines that the defendant's misconduct caused the declarant's unavailability.[21] I believe that the rule would require an expansion of existing doctrine,[22] but that

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[20] *See supra* text accompanying notes 18–19.

[21] The views that I attribute to Professor Friedman in this paper are based on my interpretation of his oral presentation on October 14, 2006, at *Crawford, Davis* & the Right of Confrontation: Where Do We Go from Here?, a symposium hosted by Regent University Law Review. *See generally* Richard D. Friedman, *Forfeiture of the Confrontation Right After* Crawford *and* Davis, 19 REGENT U. L. REV. 487 (2006-2007).

[22] *See* Roger W. Kirst, *Does* Crawford *Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 72–74 (2005). If forfeiture were available

the expansion can be justified on functional grounds.

In arguing for that justification, one can draw an analogy to admissions doctrine. According to the prevailing view, trustworthiness is not the basis for receiving admissions of a party opponent. Instead, their reception into evidence is a function of the adversary system.[23] That does not mean that the trial is a game and the declarant loses because he made the wrong move. The evidence is admissible because the central goal of the hearsay rule, to protect trial evidence from adversarial abuse, is not at risk of being defeated when admissions come in. The hearsay rule aims at encouraging the adversaries to produce the best evidence. It helps prevent angle-shooting maneuvers that would lead to the substitution of hearsay for live testimony. One such angle-shooting maneuver includes manufacturing hearsay evidence and then preventing the declarant from testifying. In the case of statements of a party opponent, there is not much chance that adversarial machinations will deprive the trier of good evidence. To the extent that a statement of a party helps the opponent, it is probably not poisoned by hard-to-penetrate machinations with an eye to litigation. For example, no danger exists that the party offering the statement would have been able to substitute hearsay for live testimony by persuading the opposing party

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under existing doctrine when the defendant has murdered the declarant, then the dying declaration exception would not be needed. And if the declarant had been killed by the defendant, it would not matter whether the declarant was aware of the imminence of death, and statements would not be excluded for lack of that awareness. (For an example of such an exclusion, see Shepard v. United States, 290 U.S. 96 (1933).) Professor Friedman suggested that forfeiture principles help explain why the classic dying declaration exception was limited to homicide cases and to statements about the cause of death. But these limits can be explained with traditional hearsay reasoning. A statement about who murdered the declarant is trustworthy, if the declarant believes he is dying, because the declarant isn't afraid of retaliation and has no motive to incriminate anyone except the guilty party. (I suppose it's possible to imagine a situation in which someone would want to take revenge upon someone other than his killer, but surely that situation must not be very common.) A dying declarant might have a motive to lie in statements about things other than the cause of death, such as debts that would be owed to his estate, or in cases not involving homicide, for example, to protect a loved one who caused an accidental death or even to protect an abortionist whose acts caused death to be imminent. But the declarant is unlikely to want to lie about who murdered her. Moreover, the fact that the exception was often justified on religious grounds—fear of divine punishment for lying—does not preclude the possibility that trustworthiness considerations such as those mentioned above had a role in shaping its contours.

[23] See the Advisory Committee's Note to FED. R. EVID. 801(d)(2) and sources cited in Roger C. Park, *The Rationale of Personal Admissions*, 21 IND. L. REV. 509 (1988). Since writing the article just cited, I have become convinced that adversarial considerations are more important than I then considered them to be. For convincing arguments about the role of the adversarial dynamics in shaping evidence law, see Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477 (1998), and Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 278–97 (1988).

to make the statement and then disappear.

Similar considerations support extending the forfeiture doctrine to cases where the defendant kills the victim for reasons other than preventing testimony. When the government can prove that the defendant killed the declarant,[24] there is less danger that the declarant became unavailable because of some hard-to-penetrate government machination, such as sending the declarant to a secret prison and not telling the lawyers what happened to him. Moreover, judges will be tempted to allow the jury to hear the voice of a murdered victim when confrontation has been made impossible by misconduct of the defendant; letting the evidence in under forfeiture doctrine will make it easier to maintain a firm rule requiring confrontation in other situations.

Admittedly, the case for forfeiture is strongest when the defendant's purpose was to prevent testimony. Forfeiture doctrine is then needed to protect the judicial system against abuse, and to prevent the hearsay rule from encouraging misconduct. But the case for forfeiture is strong enough even when the defendant's misconduct is rooted in some other motive besides the desire to prevent testimony.

IV. THE SPECTER OF *OHIO V. ROBERTS*

The specter of *Ohio v. Roberts*[25] haunts scholarly discussions of *Crawford*. It seems to be commonly accepted that the test articulated in *Ohio v. Roberts*, which incorporated trustworthiness as a criterion, led to evasion of the Confrontation Clause ban, because courts applying the trustworthiness concept on a case-by-case basis were too generous in letting in prosecution evidence. This has led to a fear of justifying confrontation doctrine in terms of trustworthiness, and perhaps to a broader fear of justifying confrontation doctrine in terms of aims beyond that of ensuring confrontation. But saying that the purpose of confrontation is confrontation does not carry us very far when it is time to decide many of the issues that have arisen. The Framers of the Sixth Amendment may have done the basic weighing of values, but they did not answer questions such as whether one should use a declarant perspective or a police perspective in deciding whether a statement is testimonial, whether a primary purpose of rendering aid overrides a secondary purpose of gathering evidence for prosecution, or what the boundaries of forfeiture doctrine should be. In deciding those questions, it is best to talk openly about dangers of abuse of power, adversarial

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[24] In ruling on a claim of forfeiture, the trial judge would determine whether the defendant murdered the victim. *See* FED. R. EVID. 104(a). Of course, that determination would be made only for the purpose of determining whether the evidence was admissible, and the finding would not be communicated to the jury.

[25] *Ohio v. Roberts*, 448 U.S. 56 (1980), is the case that was overruled by *Crawford*.

manipulation, incentives to gather inferior evidence, and even concerns about accuracy.

Using a functional approach does not necessarily mean adopting a balancing test or leaving things to a trial judge's discretion. For example, it is perfectly consistent with a functional approach to the First Amendment to say that prior restraint is per se unconstitutional, or with a functional approach to hearsay doctrine to say that the hearsay rule never prohibits receiving the statement of a party opponent. Rigid rules are justifiable under a functional approach when the harms of uncertainty and misuse of discretion outweigh the harms of overinclusiveness and underinclusiveness. A per se rule is often appropriate when protecting against abuses of state power because judges are likely to be under political pressure. They should be able to say, "I had to do that," rather than, "I decided to do that in the exercise of my discretion."

Under a functional approach, for example, it is perfectly reasonable to have a bright line rule prohibiting vehicles in the park,[26] instead of a rule that states that vehicles are allowed except when benefit outweighs danger. The latter rule would ask enforcers to balance on a case-by-case basis whether the benefit outweighs the danger, taking into account factors such as the size of the vehicle, how much noise it makes, and whether the driver is skilled. But when the question arises whether a World War II tank on a pedestal is a vehicle, the judge is better off thinking about what the rule is trying to accomplish than looking up "vehicle" in the dictionary.

My point is debatable. I cannot demonstrate conclusively that it is better to identify underlying goals than merely to say that "the purpose of confrontation is confrontation."[27] Identifying specific goals can be divisive, even uncivil, when it involves foreseeing abuse of power. Moreover, a danger exists that if underlying goals are made explicit, then judges will evade their responsibilities in hard cases by saying that the policy reasons for confrontation do not apply. But if courts cannot be trusted to reach the right result when they make their policy goals explicit, perhaps they cannot be trusted when they hide their goals, devise fictions, or borrow concepts from dissimilar areas of the law. Stating goals makes the law clearer and easier to critique. Confrontation should not be the bottom line.

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[26] This hypothetical is derived from H.L.A. Hart's famous example of interpreting a rule prohibiting vehicles in a park in H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08 (1958).

[27] I owe Peter Tillers credit for characterizing the idea that I am criticizing as "the idea that the purpose of confrontation is confrontation." Posting of Peter Tillers, Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, peter@tillers.net, to Evid-fac-l@chicagokent.kentlaw.edu (Nov. 10, 2006).