CRAWFORD AT 20: AN INTRODUCTION TO THE SYMPOSIUM

by Richard D. Friedman*

The twentieth anniversary of *Crawford v. Washington* provides an ideal opportunity to reflect on the right of a criminal defendant to be confronted with the witnesses against him – on its origins and recent developments, current issues that it presents,[1] paths that it may take, and other changes that it may generate. I am grateful to the *Journal of Law Reform* for organizing this symposium and to all the participants for having made it a success.

In Section 1 of this introductory essay, I offer some comments on the origins, scope, and purpose of the confrontation right. Section 2 discusses the impact of *Crawford* and Section 3 indicates significant wrong turns that I believe the Supreme Court has made since issuing that transformative decision. Section 4 comments in particular on the oft-litigated topic of forensic lab reports. Section 5 shows how, even beyond the range of the Confrontation Clause of the Sixth Amendment to the United States Constitution, confrontation concerns may raise due-process issues. Finally, Section 6 discusses how *Crawford* might lead to a dramatic loosening and reshaping of American hearsay law.

I. ORIGINS, SCOPE, AND PURPOSE

In my view, the Confrontation Clause expresses a broader principle that has long characterized common-law jurisprudence: A witness must testify under oath, in the presence of the adverse party, subject to cross-examination, and, if reasonably possible, at trial. Testimony given in any other way may not be presented to the trier of fact. Thus, although the confrontation right is expressed as a rule of evidence, at base it is a fundamental procedural rule. (So it is not surprising that Jeff Fisher and Dave Moran both said at this symposium that they are "criminal procedure guys" and not "evidence guys.")

Robert Kry is clearly correct that the Confrontation Clause was meant to preserve the common-law form of trial in contradistinction to other forms of adjudication.[2] And, though the confrontation right is not limited

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1. For a very helpful compendium of such issues, see Paul F. Rothstein & Ronald J. Coleman, *Confrontation, the Legacy of Crawford, and Important Unanswered Questions*, 57 U. MICH. J.L. REFORM XX (2024).

2. Robert K. Kry, *Crawford and the Common Law Criminal Trial*, 57 U. MICH. J.L. REFORM XX (2024).

to common-law systems,[3] in a very real sense the broader principle *creates* the common-law trial: By requiring that witnesses testify in open court – rather than, say, by writing an affidavit or speaking to judicial officials behind closed doors – the principle ensures that witnesses, parties, and adjudicators will be brought together for a proceeding in which the evidence necessary for adjudication will be presented. This is, in Will Ortman's felicitous phrase, an instance of *inconvenient proceduralism*.[4]

At the symposium, Sherman Clark voiced the persistent "why question": What purposes does it serve? In particular, Sherman echoed Justice Holmes by suggesting that it is insufficient to insist that we retain the right because we always have.[5]

One may, of course, repeat John Henry Wigmore's famous assertion that cross-examination is "the greatest legal engine ever invented for the discovery of truth."[6] But I find this unsatisfying, for two reasons.

First, so far as I am aware there has been no persuasive demonstration that a cross-examination requirement actually is, on net, a benefit to the truth-determination process. I assume that sometimes it does reveal falsehood, or expose ambiguities, and that sometimes the anticipation of it discourages the presentation of false testimony. How often these benefits occur, we may wonder. And against them we must set the truthful testimony lost, either because the prospect of cross-examination discourages the witness from testifying or because it is too difficult or even impossible for cross-examination to be arranged.

Second, although Wigmore belittled the significance of literal confrontation – bringing witness and adverse party face to face, in the

3. This development is ably summarized in *id.*, at xx (manuscript pgs 2-4). Kry is absolutely right about the irony that England, where the confrontation right first reached full flower, has now walked away from it, *id.*at xx (manuscript pg 5), and that on occasion the right is imposed on the English by a court sitting in France.

Kry, following John Langbein, emphasizes the persistently small infrastructure of English government during the centuries after the Norman Conquest, making an inquisitorial form of adjudication impractical, as a reason for the growth of the confrontation right. *Id.* at xx (pg 2 of manuscript). That is an interesting insight, and it appears to me likely that this could be part of the explanation. But I suspect that deeper causes underlie both that small infrastructure and the growth of the confrontation right; one of them is an individualistic orientation that was deeper in England than on the continent. *See* Richard D. Friedman, *Anchors and Flotsam: Is Evidence Law "Adrift"?*, 107 YALE L.J. 1921, 1935–41 (1998).

4. William Ortman, Crawford *and Criminal Justice*, 57 U. MICH. J.L. REFORM XX (manuscript pg 2) (2024).

5. "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV." O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

6. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (Chadbourn rev. ed. 1974).

time-honored phrase[7] – that is in fact a significant aspect of the right; indeed, it appears to have been established before the right to cross-examine.[8]

I am therefore inclined to put weight on other factors. One is the transparency created by confrontation,[9] giving assurance that the witness's purported testimony is in fact her testimony and not the product of coercion, at least not coercion of the most overt type. There is also a broader sense of fairness to the adverse party, and the conveyance of a sense of fairness: "Before deciding whether to impose potentially serious consequences on you, we will let you see the witnesses against you give their testimony, and challenge it."[10] Sherman Clark may be right in emphasizing the responsibility of the witness: Testifying is a burden we impose on each other because it helps create a civil society.[11] And in the end, I do think that history on its own carries substantial weight: Given that we have been protecting criminal defendants, who tend to be among

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7. *Id.* § 1395 ("The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers."); *see* Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 445 (noting that some early state constitutions "used the time-honored 'face-to-face' formula").

8. Statutes in the 16th century provided that witnesses in treason cases be brought "face to face" with the accused. As late as 1649, John Lilburne was allowed to pose questions to a witness only through the court. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1205 (2002).

9. Consider, for example, the statement of Lord Chief Justice Popham, arguing in the Case of the Union of the Realms (1604) 72 Eng. Rep. 908, 913 (KB), for the superiority of English over Scots law. Popham particularly emphasized the preferability of live testimony over previously taken depositions:

> For the Testimonies, being viva voce before the Judges in open face of the world, he said was much to be preferred before written depositions by private examiners or Commissioners. First, for that the Judge and Jurors discern often by the countenance of a Witness whether he come prepared, and by his readiness and slackness, whether he be ill affected or well affected, and by short questions may draw out circumstances to approve or discredit his testimony, and one witness may contest with another where they are viva voce. All which are taken away by written depositions in a corner.

Case of the Union of the Realms (1604) 72 Eng. Rep. 908, 913 (KB) (Popham, C.J.).

10. *See, e.g.*, Coy v. Iowa, 487 U.S. 1012, 1017–18 (1988) ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' *Pointer v. Texas*, 380 U.S. 400, 404 (1965). . . . The phrase still persists, 'Look me in the eye and say that.'").

11. *See* Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation* Clause, 81 NEB. L. REV. 1258 (2003); Sherman J. Clark, *Confronting Algorithms: Conscience Catching in the Criminal Trial and* Beyond, 57 U. MICH. J.L. REFORM XX (manuscript pgs 5-6) (2024). Note that the Sixth Amendment phrases the confrontation right in the passive voice: The accused has the right not to confront adverse witnesses but *to be confronted by* them. The choice of wording, I believe, is not adventitious, and it is significant: The accused need not play an active role to exercise the right (beyond demanding it); the prosecution has the burden of assuring that the right is satisfied. Melendez-Diaz v. United States, 557 U.S. 305, 324–25 (2009).

the most vulnerable members of society, in a given way for half a millennium (and much longer than that if we look beyond common-law systems[12]), we should be reluctant to abandon that procedure unless for a very compelling reason.

Note that in summarizing the history of the confrontation right I have not discussed its status as of 1791, when the Sixth Amendment was ratified, nor as of 1868, when the Fourteenth Amendment, which the Supreme Court later held incorporated the Confrontation Clause against the states,[13] was ratified. At least in this context, I do not put much weight on what I sometimes call *snapshot originalism*, which looks at the precise particulars of the right at a given moment. I think much more significant here is what I will call *conceptual originalism*. The Confrontation Clause, I believe, was not intended to freeze in place the law of confrontation exactly as it stood in 1791, and only that law. Rather, it meant to establish as a matter of constitutional law a right that had existed in England, and in America,[14] for hundreds of years. In the terms used by Michael Pardo, the courts must engage in acts of *interpretation*, because the right was a pre-existing one, but it was not fully *constructed* in 1791;[15] the law of confrontation, like most if not all law, is never fully constructed, because it continues to grow over time.

A case discussed by Dave Moran helps make the point. In *People v. Taylor*, the prosecution attempted to invoke the dying-declaration doctrine to introduce a critical statement of a dying murder victim identifying the accused as his assailant.[16] The difficulty, though, was that there was no proof that the victim—who was shot through a window at night—had personal knowledge of who the assailant was.[17] Modern articulations of dying-declaration doctrine do not mention a personal knowledge requirement.[18] Dave is able to cite numerous cases from the 19th century and the early 20th century imposing such a requirement.[19] But from the Framing era? There is not much. He cites one case, but it bears only peripherally on the question.[20] I think the fairest view is that the question,

12. *See, e.g.*, Friedman & McCormack, *supra* note 8, at 1202.

13. Pointer v. Texas, 380 U.S. 400 (1965).

14. *See* Randolph N. Jonakait, *The Origins of the Confrontation Right: An Alternative History*, 27 RUTGERS L.J. 77, 81 (1995).

15. Michael S. Pardo, *Constructing Confrontation: Between Constitutional and Evidence Theory*, 57 U. MICH. J.L. REFORM XX (manuscript pg 8) (2024).

16. People v. Taylor, 737 N.W.2d 790, 793–94 (2007).

17. *See Id.*

18. *See, e.g.*, FED. R. EVID. 804(b)(2); MICH. R. EVID. 804(b)(3).

19. *See* David A. Moran, *"Yes, You're About to Meet Your Maker, but Did You Really See That Guy?": The Common Law and the* Crawford *Dying Declaration Exception*, 57 U. MICH. J.L. REFORM XX (pp. 3-4 of typescript) (2024).

20. *Id.*

like many, was not resolved at the time of the Framing, but that a sensible interpretation of the right, most consistent with the contours that had already been established, would include the requirement. A contrary view would not only freeze the right as of the moment of ratification, though the law was in a skeletal stage, but treat it as incapable of further development. I think it would be bizarre to think that this was the intended, or publicly understood, meaning of the Confrontation Clause.

II. THE IMPACT OF *CRAWFORD*

Note that just as I have not considered the precise content of the confrontation right at the time of the Framing, I also have not talked about hearsay. Jeff Bellin is right that in discussing the confrontation right we need not talk in terms of testimonial hearsay.[21] The right developed long before the rule against hearsay.[22] The two share elements in common—both reflect a norm of in-court testimony, and both come into play only if an out-of-court statement is offered to prove the truth of a matter that it asserts. But the confrontation right is a categorical one, limited to testimonial statements. The hearsay rule, fostered by lawyers' desire to cross-examine whenever feasible, is much broader, and subject to many exceptions.

Before *Crawford*, the Supreme Court treated the confrontation right largely as a constitutionalization of the rule against hearsay, with its emphasis on reliability and all its bizarre features and complexities. How bad was that? Several participants in this symposium have made the point that *Crawford* did not cause a huge change in results; in that sense it was not revolutionary.[23] I agree. But I will add a few points.

First, we must not ignore the significant pockets in which *Crawford* did change results. Forensic lab reports are no longer routinely admissible without live testimony from the author;[24] some fresh accusations may not be admitted unless the accuser is willing to testify live;[25] allocution statements may not be admitted against persons other than the one who

21. *See* Jeffrey Bellin, *The Needless Search for a Foundation-Era "Hearsay" Definition*, 57 U. MICH. J.L. REFORM XX (2024).

22. Friedman & McCormack, *supra* note 8, at 1208–09.

23. Edward K. Cheng & Monica A. Miecznikowski, Crawford's *Revolutions*, 57 U. MICH. J.L. REFORM XX (manuscript pg 2) (2024); Jeffrey Fisher, Professor of Law, Stanford L. Sch., Comment during keynote address at the University of Michigan Journal of Law Reform Symposium: Crawford at 20 (Mar. 8, 2024); Ortman, *supra* note 4, at xx (manuscript pg 3).

24. *E.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Smith v. Arizona, 144 S. Ct. 1785 (2024).

25. *E.g.*, Davis v. Washington, 547 U.S. 813, 829–32 (2006).

made the statement;[26] grand jury testimony can no longer be characterized as sufficiently reliable to warrant admissibility notwithstanding the absence of an opportunity for cross-examination.[27] Will Ortman points out powerfully that the vast majority of cases do not go to trial, and that the relation between evidence that the prosecution would be able to introduce and plea-bargaining results is tenuous at best.[28] No doubt he is correct, but in some cases the evidence that *Crawford* makes inadmissible absent live testimony is sufficiently central that without it the prosecution has no viable case. And, of course, the impact of *Crawford* in some cases is not to keep out prosecution evidence but to induce the production of live testimony.

Second, I believe that it is not surprising that articulating the proper basic meaning of the confrontation right did not alter most results, because before *Crawford* the confrontation principle significantly shaped hearsay law. That is, *for the most part* hearsay law is receptive to non-testimonial statements and (unless the declarant is unavailable and the adverse party has had an opportunity for cross-examination[29]) resistant to testimonial ones. For this reason, I have characterized the confrontation principle as "the mold that shapes hearsay law."[30]

Third, the purpose of those who advocated for adoption of the testimonial approach to confrontation was not to achieve a massive change in results in favor of criminal defendants.[31] Indeed, if that were the expected result of the adoption—if, for example, statements by confederates of the accused to undercover police officers would be barred by the Confrontation Clause—I am quite confident that it never would have happened.[32] The aim, instead, was to get the foundations right, and in that sense it is, in Will Ortman's nice characterization, "a peacock among pigeons";[33] as

26. *E.g.*, Hemphill v. New York, 595 U.S. 140, 151 (2022).

27. *E.g.*, Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Whatever else the term ['testimonial'] covers, it applies at a minimum prior testimony at a preliminary hearing, before a grand jury, or at a former trial . . . "); *see also, e.g.*, Williams v. United States, 268 F. App'x 563 (9th Cir. 2008). Note also *Crawford*'s description of the "demonstrated capacity" of the prior test, under *Ohio v. Roberts*, 448 U.S. 56 (1980), "to admit core testimonial statements that the Confrontation Clause plainly meant to exclude," and listing cases involving accomplice confessions, plea allocutions, grand jury testimony, and testimony given at trials of defendants other than the present one. *Crawford*, 541 U.S. at 63–64.

28. Ortman, *supra* note 4, at xx (manuscript pgs 3-7).

29. *See, e.g.*, FED. R. EVID. 804(b)(1).

30. Richard D. Friedman, *The Mold That Shapes Hearsay Law*, 66 FLA. L. REV. 433 (2014).

31. Note, for instance, that *Crawford* itself said that the Court's decisions were "largely consistent" with the new approach. Crawford v. Washington, 541 U.S. 36, 57 (2004). It pointed only to *White v. Illinois*, 502 U.S. 346 (1992), as a case that was arguably inconsistent with it. *Crawford*, 541 U.S. at 58 n.8.

32. Note the discussion in the *Crawford* oral argument. Transcript of Oral Argument at 11–15, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410).

33. Ortman, *supra* note 4, at xx (manuscript pg 8).

Jeff Fisher puts it, this was about architecture and framework.[34] *Crawford* was, as Edward Cheng and Monica Miecznikowski say, a *theoretical* revolution.[35] *Crawford* articulates well the basic idea behind the confrontation right—it is about the conditions under which prosecution testimony must be given—which the Supreme Court had not done previously. That is important in part because proper articulation of the principles underlying the doctrine helps reach sound results in those area where, as I have just suggested, *Crawford* does cause ~~had to~~ a difference in results. But even where *Crawford* leads to the same results as the prior doctrine, there is great value in articulating the principles that actually underlie those results in relatively simple, straightforward terms. Thus, like Cheng and Miecznikowski,[36] I have found apt an analogy to the Copernican revolution.[37] The Ptolemeian system was capable of producing accurate results. But it did not do so flawlessly, and it worked only at the expense of great complexity that was difficult to rationalize.[38] The Copernican model is far simpler and more elegant, explaining results in a way that makes sense.

Fourth, we should not forget how amorphous was the prior regime, which was geared to the reliability of the evidence. It depended not only on the uncertain bounds of "firmly rooted" hearsay exceptions,[39] but also on a case-by-case assessment of "particularized guarantees of trustworthiness."[40] Such a system could never be a sure guide to results. True, under *Crawford* a court must determine whether a statement is testimonial, and the Supreme Court has not yet developed a fully satisfactory conception of the term. But give it a chance; the Court only speaks occasionally on the question, and in the grand sweep of time *Crawford* is only in its infancy.

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34. Fisher, *supra* note 23.

35. *See* Cheng & Miecznikowski, *supra* note 23, at xx (manuscript pg 7-8).

36. *See* Cheng and Miecznikowski, *supra* note 23, at xx (manuscript pg 8).

37. Richard D. Friedman, *Confrontation as a Hot Topic: The Virtues of Going Back to Square One*, 21 QUINNIPIAC L. REV. 1041, 1044 (2003).

38. John Milton made the point memorably:

> [W]hen they come to model heaven
> And calculate the stars, how they will wield
> The mighty frame, how build, unbuild, contrive
> To save appearances, how gird the sphere
> With centric and eccentric scribbled o'er,
> Cycle and epicycle, orb in orb.

JOHN MILTON, PARADISE LOST, BOOK VIII, ll. 79–84 (1674).

39. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

40. *Id.*; Idaho v. Wright, 497 U.S. 805, 819 (1990) (holding that in making this determination "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.").

III. WRONG TURNS

The Supreme Court has, in my view, taken two significant wrong turns that have made sound development of confrontation doctrine substantially more difficult.

One of those is on the central issue I have just mentioned, the definition of the term "testimonial." Like Deborah Tuerkheimer, I believe the Court's use of a "primary purpose" test and its adjunct, the question of whether the statement has been used to resolve an ongoing emergency, has been very unfortunate.[41] One problem is that statements are often made with multiple purposes, and trying to sort out which one is "primary" can be a hopeless task.[42] This means not only that the test is sometimes difficult to apply and unpredictable but also that it is manipulable; a court wanting to admit a statement can often characterize some nontestimonial purpose as being the primary one motivating the statement. A closely related problem is that there is often no clear line between purposes that the Court would characterize as testimonial and others. Note, for example, that in *Williams v. Illinois* Justice Alito asserted that the lab report at issue "was sought not for the purpose of obtaining evidence to be used against [the accused], who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose"[43]—even though, if a "rapist who was on the loose" was found, one would naturally expect him to be prosecuted, and the lab report to be used as crucial evidence. But even more fundamentally, I believe that the "primary purpose" test mischaracterizes the inquiry. The critical factor is not purpose but expectation. A person may have no desire to create evidence for use in prosecution; think of a conspirator who testifies against a friend only to save her own skin. But if by making a statement she knowingly creates

41. Deborah Tuerkheimer, Class of 1967 James B.Haddad Professor of Law, Northwestern Univ., Remarks at the University of Michigan Journal of Law Reform Symposium: Crawford at 20 (Mar. 8, 2024); *see also* Deborah Tuerkheimer, Crawford's *Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 27-33 (2006), Deborah Tuerkheimer, *A Relational Approach to the Right of Confrontation and its Loss*, 15 BROOK. J.L. & POL'Y 725, 732-37 (2007).

42. Justice Thomas made this point, though looking at the matter from the interrogator's point of view, when the Court first adopted the "primary purpose" test. Davis v. Washington, 547 U.S. 813, 838–39 (Thomas, J., concurring in the judgment in part and dissenting in part). And this problem is even apart from the question of whose purpose is determinative. *See* Michigan v. Bryant, 562 U.S. 344, 367–68 (2011). Like Justice Scalia, I believe the question of whether a statement is testimonial must be considered from the perspective of the person who makes the statement, Bryant, 562 U.S. at 381 (Scalia, J., dissenting) (citing Richard D. Friedman, *Grappling With the Meaning of Testimonial*, 71 BROOK. L. REV. 241, 259 (2005)). That "declarant-centric" perspective, *Fisher v. Commonwealth*, 620 S.W.3d 1, 6, 9, 10 (Ky. 2021), may take into account the maker's understanding of the purposes and expected actions of an interlocutor. *Cf.* Rothstein & Coleman, *Unanswered Questions*, 57 U. MICH. J.L. REFORM XX (manuscript pg 3-4) (2024).

43. Williams v. Illinois, 567 U.S. 50, 58 (2012) (opinion of Alito, J.).

evidence that will be used in prosecution, then it seems clear to me that she has testified. And I think "use" here does not necessarily mean admission at trial; a reasonable anticipation of any use in the prosecutorial process should be sufficient.[44]

The second wrong turn came in *Giles v. California*, which severely limited the circumstances in which an accused may be held to have forfeited the confrontation right.[45] According to *Giles*, it is not enough for forfeiture that the accused engaged in serious wrongful conduct that foreseeably rendered a witness unavailable to testify; the accused may not be held to have forfeited the right unless he engaged in such conduct *for the purpose* of rendering the witness unavailable.[46] I have ranted against *Giles* often enough[47] that I will not do so here. But I will make three brief points.

First, among the harmful effects of *Giles* has been an entirely predictable narrowing of the category of testimonial statements;[48] if the accused should be deemed to have forfeited the confrontation right but *Giles* precludes that result, then courts will feel pressure to deem the statement at issue to be non-testimonial so that it may be admitted. Perhaps the most notable instance of this phenomenon is the Supreme Court's decision in *Michigan v. Bryant*,[49] quite possibly the worst of its post-*Crawford* confrontation decisions.

Second, Caren Myers Morrison has offered an extremely valuable perception indicating that *Giles* does not even have much of the impact it was intended to.[50] When would a defendant's wrongful conduct prevent a witness from testifying without that having been the intended effect? For the most part, this occurs only when the defendant kills a witness that he already knows, for reasons other than fear of the witness's testimony. And that kind of case is usually one involving domestic violence—but it is in that context in which language in *Giles* makes it easier for prosecutors to evade the decision's strictures.[51]

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44. *See generally* Richard D. Friedman, *Grappling with the Meaning of Testimonial*, 71 BROOK. L. REV. 241 (2005).

45. Giles v. California, 554 U.S. 353 (2008).

46. *Id.*

47. *E.g.*, Richard D. Friedman, Giles v. California: *A Personal Reflection*, 13 LEWIS & CLARK L. REV. 733 (2009).

48. *See* Richard D. Friedman, *Reflections on Giles, Part 2: Is Giles Bad for Defendants?*, CONFRONTATION BLOG (June 29, 2008, 6:43 PM), https://confrontationright.blogspot.com/2008/06/reflection-on-giles-part-2-is-giles-bad.html [https://perma.cc/QFF7-5HZQ].

49. Michigan v. Bryant, 562 U.S. 344 (2011).

50. Caren Myers Morrison, *Forfeiture by Wrongdoing in Domestic Homicide Cases: Where Are We Now?*, 57 U. MICH. J.L. REFORM XX (manuscript pg 2) (2024).

51. *Id.*

And third, *Giles* inevitably complicates and muddies confrontation doctrine. Were it not for *Giles*, one could say that the confrontation right has no exceptions; forfeiture is not truly an exception to the right but a form of abandonment. But *Giles* makes it inevitable that there will be a dying-declaration exception to the right, one that fits so badly with the theory of *Crawford* that *Crawford* itself described it as "*sui generis*."[52]

I do not expect the Supreme Court to correct these wrong turns in the near future. But just as the Court was willing to take a dramatically new course in *Crawford* itself, we can hope that over the long term it makes the corrections necessary for development of a confrontation doctrine that is so well based that it will endure for ages.

IV. FORENSIC LAB REPORTS

Forensic lab reports have been an ongoing concern for the Supreme Court since *Crawford*. The keystone decision was *Melendez-Diaz v. Massachusetts*, in which the Court held, 5–4, that such a report was testimonial.[53] The Court did not back down from *Melendez-Diaz* in either *Briscoe v. Virginia*[54] or *Bullcoming v. New Mexico*.[55] But in *Williams v. Illinois*, Justice Thomas joined the four *Melendez-Diaz* dissenters, though not their reasoning, to form a majority that allowed presentation of the results of a forensic lab report without the author of the report (or anyone from the lab) testifying at trial.[56] The fractured decision has created confusion ever since.

Williams was a Chicago rape case in which the authorities did not have a suspect until a Cellmark crime lab in Maryland issued a report on a vaginal swab taken from the victim.[57] A data-base search yielded a *cold hit*: The DNA profile reported by Cellmark matched that of Williams, a Chicago resident.[58] Justice Thomas thought the report was not

52. Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004). Were it not for *Giles*, dying-declaration cases could be treated within forfeiture doctrine. If the court makes a preliminary finding, for purposes of forfeiture only, that the accused's serious wrongful conduct predictably rendered the witness unavailable, then the defendant would be deemed to have forfeited the confrontation right. But *Giles* makes this approach impossible, because in dying-declaration cases there usually is not substantial evidence that the accused killed the victim *for the purpose* of rendering the witness unavailable as a witness. And the probative value of dying declarations is so great, they are so irreplaceable, and they have been regularly admitted for so long, that it is essentially unthinkable that courts would hold them inadmissible.

53. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

54. Briscoe v. Virginia, 559 U.S. 32 (2010) (I represented the petitioners in *Briscoe* and otherwise might not think the case warranted mention!).

55. Bullcoming v. New Mexico, 564 U.S. 647 (2011).

56. Williams v. Illinois, 567 U.S. 50 (2012).

57. *Id.* at 59.

58. *Id.*

testimonial because it was not sufficiently formal, a perspective that I have never understood.[59] (But Justice Thomas has at times spoken of solemnity alongside formality.[60] Solemnity, if taken to mean appreciation of the gravity of the consequences of one's statement, appears to me to be closer to the mark.[61]) And the four *Melendez-Diaz* dissenters, in an opinion by Justice Alito, concluded that the report was not testimonial in part on the basis that it was not directed at a "targeted individual"[62]—a test with no historical provenance that would, if adopted by a majority of the Court, eviscerate much of the Confrontation Clause. (Think about a crime-scene description, for example.)

I am nevertheless more sympathetic to something like the result in *Williams* than I was when the case was being litigated, and for reasons suggested at the symposium by Paul Rothstein.[63] As Justice Alito pointed out repeatedly, it would have been a remarkable coincidence if Cellmark, without having tested Sandy Williams's DNA, wrote out a profile that exactly matched his.[64] That fact has significant probative value, without reference to Cellmark's reliability as a forensic lab. On this theory, even without a witness from Cellmark, the prosecution would be allowed to prove the fact that the profile in the report matched that of Williams's DNA, but would not be allowed to say anything about the quality of Cellmark's work.

Mercifully, *Smith v. Arizona*,[65] which the Supreme Court decided after this symposium was held, has cleared up some of the confusion in this area. In particular, *Smith* has put beyond doubt this proposition: If a statement is presented in support of an expert opinion, but the statement supports the opinion only if the statement is true, then the statement is being presented for the truth of what it asserts.

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59. *Id.* at 103. For one thing, it seems to me that the report is very formal indeed. *See* RODNEY ANDERSON, CELLMARK DIAGNOSTICS, REPORT OF LABORATORY EXAMINATION: FEBRUARY 15, 2001 (2001), https://websites.umich.edu/~rdfrdman/CellmarkRpt3.pdf [https://perma.cc/U3VR-YP8G]. More fundamentally, I do not believe that lack of formality renders a statement non-testimonial; lack of the required formalities may render a testimonial statement unacceptable as evidence.

60. *E.g.*, *Williams*, 567 U.S. at 118 (Thomas, J., concurring in the judgment).

61. *See* Brief for Richard D. Friedman as Amicus Curiae Supporting Petitioner at 20, Smith v. Arizona, 144 S. Ct. 1785 (2024) (No. 22-899).

62. *Williams*, 567 U.S. at 82–84

63. Paul Rothstein, Carmack Waterhouse Professor of Law, Georgetown U. L. Ctr., Comment during Confrontation in Context: An Overview, and Historical and Comparative Perspectives Panel at the University of Michigan Journal of Law Reform Symposium: Crawford at 20 (Mar. 8, 2024).

64. *Williams*, 567 U.S. at 86 ("beyond fanciful"). *See generally* Richard D. Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L.J. 667 (1987) (arguing, in the context of *Bridges v. State*, 19 N.W.2d 529 (Wisc. 1945), that a statement might be considered highly probative, even if the declarant is not considered particularly reliable, if the only alternative explanation would be a remarkable coincidence).

65. 144 S. Ct. 1785 (2024).

V. DUE-PROCESS CONSIDERATIONS

Except perhaps for the eligibility phase of capital cases, the Confrontation Clause is not applicable in sentencing proceedings. I do not believe that the basic doctrine will change any time soon. But there is a safety valve we should not ignore. In various settings, including civil ones, in which the Confrontation Clause itself does not apply, there is nevertheless a due-process right to be confronted with adverse witnesses.[66] This makes sense: Recall that the Confrontation Clause is an exemplification of a broader confrontation principle, the basic aspect of common-law jurisprudence under which a party has a right to demand that witnesses testify in the party's presence and subject to cross-examination. Because this broader principle is a matter of generalized due process, it does not have the hard edge of the Confrontation Clause; it is subject to being outweighed by countervailing considerations. But at least in some settings, an adjudicator should not, say, allow a witness to testify without providing for cross-examination, or allow a readily available witness to furnish an affidavit rather than testifying live.

I believe that a due-process approach may also help solve other problems in the realm of confrontation. Rothstein and Coleman suggest that there may be a due-process issue with respect to evidence generated by artificial intelligence.[67] And, though Tom Lyon and I disagree with respect to many details as to how the law should treat child observers,[68] I believe we are in broad agreement on one architectural principle: At least with respect to very young children, treating them as witnesses for purposes of the Confrontation Clause makes very little sense. They do not have the cognitive abilities to be deemed witnesses; also, as noted above, Sherman Clark has made the intriguing point that witnessing should be deemed an obligation of citizenship, and arguably children below some level of maturity should simply be deemed not ready for it.[69] The answer, Steve Ceci and I have suggested, is to treat them not as witnesses but still as sources of evidence; the accused should have a due-process right of examination, but by a qualified forensic examiner operating under a

66. *E.g.*, Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (noting that parole revocation is subject to a good-cause limitation); *see* Nick Klenow, Due Process: Protecting the Confrontation Right in Civil Cases (May 19, 2015) (unpublished note), https://confrontationright.blogspot.com/2015/05/civil-confrontation.html [https://perma.cc/QE9K-JDZY].

67. Rothstein & Coleman, *supra* note 1 at XX (manuscript at 15-16).

68. *Compare* Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004 (1999), *with* Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33 (2000).

69. Clark, *supra* note 11.

prescribed protocol.[70] And perhaps the same principle ought to be applied to some disabled witnesses, whose difficulties in testifying have been described in this symposium by Jasmine Harris.[71]

VI. THE FUTURE OF HEARSAY

Cheng and Miecznikowski point to one of the most intriguing possible consequences of *Crawford*: Now that the confrontation right is protected independently of hearsay law, the possibility of dramatically loosening the latter becomes very salient. This idea should not be startling; most of the common-law world has virtually eliminated the hearsay rule in civil litigation.

My own approach would operate on a few basic premises: First, it is critical to protect the rights of a criminal defendant with respect to testimonial statements; other litigants have rights, but of a less hard-edged nature, with respect to such statements as well. Second, beyond testimonial statements there is no reason to create categorical rules like the law of hearsay. The admissibility of most evidence is subject to judicial discretion, and that can apply to non-testimonial hearsay as well. Third, the principal considerations that ought to determine how that discretion should be exercised are procedural ones, addressing such matters as the relative abilities of the parties to produce the declarant as a live witness, and procedures can be adjusted to give the parties incentives to act in efficient ways. Fourth, if live testimony of a declarant would be admissible, then usually secondary evidence of that witness's statement ought to be as well because it will usually be more probative than prejudicial. I offer a separate paper expanding on these premises and proposing a new set of rules to govern the hearsay realm.[72]

* * *

Whatever else it did, *Crawford* compelled courts and commentators to think anew about many issues. We can expect the law in this realm to remain a lively topic of discussion for decades to come. I hope that this symposium will prove to be a valuable part of the conversation.

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70. Richard D. Friedman & Stephen J. Ceci, *The Child Quasi Witness*, 82 U. CHI. L. REV. 89 (2015)

71. Jasmine Harris, Professor of Law, U. Pa. Carey L. Sch., Comment during Confrontation and Vulnerable Witnesses Panel at the University of Michigan Journal of Law Reform Symposium: Crawford at 20 (Mar. 8, 2024).

72. Richard D. Friedman, *A Proposal to Replace the Hearsay Rules*, 57 U. MICH. J.L. REFORM XX (2024).