

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

*Morning Panel Discussion**

Participants: Richard D. Friedman,[†]
Christopher B. Mueller,[‡] and Charles Nesson**

Professor Nesson: In my talk,¹ Richy—which you listened to—I left out a step that’s a crucial point on the relationship of empowerment and disempowerment to the hearsay issue. In *Davis*,² I think you feel that Justice Scalia was, in a sense, up against a sensibility represented by Justice Ginsburg in the direction of admitting the testimony, and that sensibility prevails in effect in *Davis*.

I’m assuming that the reason Justice Ginsburg would advance that position is based on a premise that she thought she was helping the victims of domestic abuse because she was guarding them against the possibility of intimidation that would lead them not to testify. On that basis, she thinks she’s protecting them by, by my lights, disempowering them—leaving them with no ability to call 911 for help without, at the same time, bringing along the full force of prosecution. That seems a very odd position to me. It seems like one that has a rhetorical appeal, that somehow the law is coming to the aid of the poor female victim. But it seems based on a very faulty view, both a faulty view of reality and a faulty view of what’s important in the Confrontation Clause.

I was wondering: Do you disagree with that? And if you do disagree with that, how do you deal with it?

Professor Friedman: Well, it’s a very important question. I guess I’ll answer the question you asked.

Professor Nesson: *[To James Duane]* I’m never gonna live that one down! I’ll get you back sometime later! *[Laughter]*

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¹ Charles Nesson, *Solomon’s Sword: The Loser Gets Process*, 19 REGENT U. L. REV. 479, 482–83 (2006-2007).

² *Davis v. Washington*, 126 S. Ct. 2266 (2006).

Professor Friedman: I don't think I disagree with Justice Ginsburg. I think I'm agnostic on it because in that case, as a lawyer trying to represent a client, and more generally an academic trying to figure out what the Confrontation Clause is about, I think it is a type of landmine. But I think I recognize both sides.

The fact is that in *Davis* and *Hammon*³ there was an amicus brief by, I believe, fifty-eight domestic violence organizations arguing for admissibility of the evidence. These are organizations coming from the point of view of supporting victims of domestic violence. The easy call is the idea that domestic violence is more easily prosecuted if the statements come in and the complainant does not have to confront the accused, is not subject to cross-examination, and doesn't have to show forfeiture or anything like that.

But then there's the other view as well, which you've just articulated very well, which is: Does this view, combined with certain prosecutorial and no-drop policies, take all power away from the victims, who are predominantly women? I think there's force on both sides. It was clear at argument which side was moving Justice Ginsburg.

Professor Nesson: Yeah.

Professor Friedman: And maybe that is short-sighted. I am not a sociologist. I will say that I am confident that in *Hammon*, the reason Amy Hammon didn't testify was not that she was scared of her husband. She actually did not want a restraining order and said she loved her husband. She did not feel threatened by his presence. I suspect that she made the decision—the type that you're saying—that she recognized her life and the lives of her children would be better off if her husband was not prosecuted. If that was her decision, I think she was right because he lost his job and, as a result, things were bad for the family. She may well have been better off had he not been prosecuted.

At the same time, we have to recognize that domestic violence is a recurrent problem in many circumstances, and that in many cases women will follow the path of least resistance, which is to remain in the situation at their peril. I don't think it's unreasonable for prosecutors to say, "I'm going to prosecute whether the woman wants to or not. My rationale stems from paternalistic concerns and because I have a broader social view in mind—that it's important to be tiger-ish about this crime."

I don't know what the best result is. I'm glad it's not my job to figure out what the best is, but I think it's a very difficult issue.

Professor Nesson: Thank you.

³ *Hammon v. Indiana* was the companion case to *Davis*.

Professor Mueller: I just want to comment on one thing, which is by way, I suppose, of asking Rich a question as well. I'm very distressed at the notion that killing or making unavailable a witness forfeits a confrontation right regardless of the purpose or intent of the actor. I'm very disturbed at the idea that we will not give a defendant charged with murder what I will call a fair trial because he's committed the crime that he's charged with. I was uncomfortable with Rich alluding to the *Bourjaily* case.⁴ All of us who have studied or taught evidence know that the Supreme Court there said you could count the conspirator statement—Jim, I always have called it “co-conspirator,” but I guess I've put one too many syllables into it—as a conspirator statement by looking at the statement itself. I never thought that was right to start with. To carry that doctrine over to “we're going to use the statement to prove the crime that the defendant is charged with committing so that we can admit the statement to convict him of that crime” is pulling too many rabbits out of a hat.⁵

I think there ought to be independent proof that he has done something to put the witness off the stand. If we're going to construe this as an equitable doctrine, it seems to me that the purpose of the conduct of the accused has to have something to do with the operation of the courts. If it doesn't have anything to do with the operation of the courts—the accused is just angry, or a murderer, or committing a bank robbery and kills somebody, and therefore that person can't testify—I don't think that's a good reason to deprive him of a fair trial. I think that's a bad way to go, and I very much hope we don't go in that direction.

Professor Friedman: Well, I think it's a good way to go and I very much hope we *do* go in that direction. I don't have a lot to add beyond that I think *Bourjaily* was rightly decided. It's a logical matter. Just because it happens to be an overlap of issues, or even a complete overlap of issues, I don't think we wipe out the general principle that the court decides threshold issues on its own body of evidence, which is generally unrestrained. I think that approach should apply in this context as well. But I guess I'm saying—

Professor Nesson: But Richy, wait a second, wait a second—

⁴ *Bourjaily v. United States*, 483 U.S. 171 (1987).

⁵ See Richard D. Friedman, *Forfeiture of the Confrontation Right After Crawford and Davis*, 19 REGENT U. L. REV. 487, 492 (2006-2007) (arguing that there is “no harm done” in using the testimonial statement as evidence of forfeiture).

Professor Friedman: Let me just finish one aspect of this. I'm sorry—

Professor Mueller: Listen to your teacher! *[Laughter]*

Professor Friedman: I will! I will! But first I want to respond. You've got to handle dying declarations.

Professor Mueller: I do it the same way Justice Scalia did it. They're just grandfathered in.

Professor Friedman: Oh, that was something that he threw out because they haven't been able to figure it out yet. But that's not a rationale. What is the rationale?

Professor Mueller: Just because you don't believe in originalism doesn't mean that some of the rest of us can't believe in it, a little bit.

Professor Friedman: Well, you can believe in originalism. That's fine. I still think this is what motivated the courts. I don't think it's particularly good hearsay law. You wind up with a very complex doctrine: when all of a sudden this thing comes in from left field, all of a sudden we have an exception. It makes more sense to say, "The reason why I'm allowing the statement is because I conclude that you killed him," not "The reason I'm allowing this in is because I think it's so reliable because the gates of heaven were open and no one would lie in that situation."⁶

Professor Nesson: If you take the principle of *Crawford*,⁷ which says we have to get judges out of the role of making discretionary decisions based on presentations of evidence by prosecutors and police that favor the prosecution and police, you couldn't pick a better example than the judge who admits the evidence in a murder case because the judge has made a decision that the defendant is guilty. You just couldn't pick a better example. Why, when you come to dying declarations, aren't you attacking it from "to whom is the statement made"? If we're talking about dying declarations to cops, you're fine with *Crawford*. They go out, and they should go out. If you're not talking about dying declarations to cops, you're first not talking about a very big problem at all. You're in the realm of the *Crawford* problem which is: What do we do with the non-cop hearsay? That's still something to consider, but I can't see that

⁶ See *id.* at 489–90.

⁷ *Crawford v. Washington*, 541 U.S. 36 (2004).

this is the central problem. What I can see is that forfeiture, like the other weeds of testimonial issues, is going to be used by judges and prosecutors who don't want to change—to rationalize the same kind of stuff they've been doing for years that has made a travesty of the Confrontation Clause and, I must say, led by prosecutorial forces that think somehow you're advancing something by lowering the standards by which we convict people.⁸

Professor Friedman: Even before *Crawford*, I felt that the general testimonial approach works best to the advantage of defendants, which is not my goal. I'm not a defense lawyer as such. I'm an academic. But I think we get a better doctrine if it's simpler.⁹ I think that the doctrine is more in accordance with the language of the Confrontation Clause, and its history and purpose, if it's simpler. And that is a doctrine that doesn't admit of exceptions. I don't think you need exceptions, just as we don't have exceptions for the right of trial by jury or the right to counsel. We don't say, "Well, in this case he's really guilty so let's not bother." I think the right to confront witnesses is the same thing.

I think that if we're wondering about the long-term health of the Confrontation Clause, we should eliminate the *sui generis* exception and have a simple edifice that says you have a right to confront which you can forfeit—no exceptions.¹⁰ I think that works best to protect the right, and that it will benefit defendants long-term.

Professor Nesson: That's got about as much content to it as the difference between an exclusion and an exception. What difference whether we call it a forfeiture exception or a forfeiture exclusion? The fact is you're going to admit hearsay under certain circumstances, and the circumstances under which you're going to admit them are the circumstances where the judge has decided that the defendant's guilty.

Professor Mueller: But it's actually worse than that, Rich, I think. I'm sorry. I need to say—I'm one of the guys who signed the amicus brief because Rich was willing to let me sign. And I did not work on it

⁸ See Nesson, *supra* note 1, at 482–83.

⁹ See Richard D. Friedman, *Crawford and Davis: A Personal Reflection*, 19 REGENT U. L. REV. 303, 308 (2006-2007) ("I do really believe that there is something very satisfying about a constitutional right that can be expressed in language that a young kid can understand. I think it has a robust quality to it.").

¹⁰ See Friedman, *supra* note 5, at 487 ("Notice that there's no room for hearsay exceptions within the doctrine as I've stated it. That is, there is no room for the idea that if a statement falls within a hearsay exception—excited utterance or any other—therefore, it is excepted from the confrontation right. The statement of the confrontation right, as I've given it, is integral; it states the whole doctrine.").

whatsoever, except to kibitz with him a little bit. I don't think he took any of my suggestions, and it's probably a better brief because he didn't.

Professor Friedman: You were my house guest at the time, which is I think how I got you to sign the brief. *[Laughter]*

Professor Mueller: Well, that's true.

Professor Friedman: Poor hospitality, I know—I think it was sitting on your bed. *[Laughter]*

Professor Mueller: All I'm trying to say is that I support the testimonial idea. I think it was a wonderful advance, and we owe Richard a debt of gratitude for it. When I have at him from this side just as Charles is having at him from the other side—there are few people I admire more than Rich for what he's accomplished in this case.

I actually think, Rich, that the idea that this is going to be a simple doctrine when you implement forfeiture and then add on to it the prosecutor's duty to mitigate—and we're going to talk about all kinds of nuances there—this is going to be every bit as complicated as reliability analysis. It's just going in a different direction. We're going to be talking about the relative conduct of the parties, the availability of the evidence, who should have called the witness, who made the witness unavailable, and who was really at fault here. That's going to be, in its way, just as complicated as trying to figure out whether the evidence was reliable. It also goes off in kind of a collateral direction. We're talking about the conduct of the parties instead of focusing on whether we're convicting people on stuff that we can actually trust. I don't think this is going to be a simple solution to a complicated problem. It's going to be a complicated solution to a complicated problem.

Professor Friedman: I might have misstated myself. Let me clarify. I agree absolutely that complicated questions can arise. I think the forfeiture doctrine itself is quite complex. What I meant, though, was that I think that under a robust view of forfeiture, one can state the entirety of the Confrontation Clause doctrine rather simply. The principle is that a testimonial statement cannot be offered for its truth against the accused unless the accused has either had or forfeited an adequate opportunity to confront the witness, which must occur at trial unless the witness is not then available. That's it. No exceptions to that—no room for *Roberts*-types of exceptions to that. I'm saying that the forfeiture approach to the confrontation right is a sturdy edifice which will hold up better than saying that exceptions exist to which no one knows what will happen over time.

I agree that forfeiture is very complex. I agree that, one way or the other, the evidence gets in. But in one way you've advanced the centrality and nobility of the confrontation principle. I don't think there's anybody who wants to exclude the classic dying declarations. I wasn't sure, Charlie, whether you were saying you would exclude dying declaration statements made to a cop.

Professor Nesson: Yes, I would exclude it. I would exclude accusatory statements made to police. Yes, absolutely. Nice and clean—just what you argued for.

Professor Friedman: But the forfeiture principle would apply. For hundreds of years, these statements have come in. Let's put it this way. I knew before *Crawford* that we had to be ready to handle dying declarations. If we got that question and took the view that you take—that a dying declaration made to a cop, because it is accusatory, is barred by the Confrontation Clause if the accused had no opportunity to cross-examine the victim—we would not have gotten the result in *Crawford* or *Hammon*. People would say that it's just not a tolerable theory.

I think an accusation of murder made to a private person by a dying victim is also testimonial. I don't think that it's a situation of: "Jack killed me. I am just telling you that for your own amusement and edification." It's a situation of: "Jack killed me. I want you to pass that on." In both cases it's testimonial, but something else kicks in.

Professor Nesson: Could you see *Fensterer*¹¹ not as a confrontation problem, but as an expert witness problem? Could you look at *Fensterer* and say, "The problem is, here was an expert who was allowed to testify who demonstrated a total lack of respectable methodology?" Therefore, the problem is one of sufficiency and not one of confrontation. On the other side of that, recognize that when you stand up to deal with the witness who has hurt you, if you can demonstrate that the witness doesn't remember anything, didn't keep any notes, and did a really sloppy job, you've done a pretty good job of cross-examination. It doesn't guarantee that the jury isn't going to convict. That's the sufficiency problem. You would need to exclude the expert, and therefore have a lack of evidence to produce the lack of conviction. Why not see *Fensterer* that way rather than seeing confrontation as requiring more than the ability to face your accuser, ask your accuser questions, and generate any kind of response? Such a response under pressure like that would be revealing of character.

¹¹ See *Delaware v. Fensterer*, 474 U.S. 15 (1985).

Professor Mueller: I think I agree with absolutely everything that you've said. All I know is that *Fensterer* is always trotted out as an explanation for why cross-examination was sufficient under the Confrontation Clause. It is the go-to place when you're trying the defendant, and even though you couldn't make any headway with the guy, your right to confront him was adequate.¹² In *Fensterer*, I have to say that I don't remember that the expert did what you say he did, which is to demonstrate a complete disrespect for all underlying methodology. I'm a fan, among other things, of *Daubert*¹³ as opposed to *Frye*.¹⁴ I think that judges being more actively involved in appraising the adequacy of science—and under the new, revised version of FRE 702, being more actively involved in appraising the methodology, the application of the methodology, and the sufficiency of the basis—I think that's all to the good. If an expert comes in and says, "I have no recollection what type of test I did here. I just have a feeling that what I found is that this hair was jerked out by force, but if you ask me how I got to that, I wouldn't have a clue," I think the judge under 702 could easily exclude it. What judges often do, as I'm sure we all know, is let it in for what it's worth, hope the jury will do the right thing, and then they grant a judgment of acquittal afterwards. I think in the criminal case, unlike the civil case, judges are almost reluctant to grant a directed verdict of acquittal afterwards. Once they give it to the jury, they're almost committed to let the jury convict the guy. Yes, I would love it if judges were to say that this is just not good enough evidence to send a guy to jail.

Professor Nesson: Thank you.

¹² For a more in-depth discussion of *Fensterer*, see Christopher B. Mueller, *Cross-Examination Earlier or Later: When Is It Enough to Satisfy Crawford?*, 19 REGENT U. L. REV. 319, 344–45 (2006-2007).

¹³ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (stressing that the proper inquiry in determining the admissibility of expert testimony under Rule 702 is evidentiary reliability).

¹⁴ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (adopting the "general acceptance" standard for admitting expert testimony), *superseded by rule*, FED. R. EVID. 702, *as recognized in Daubert*, 509 U.S. 579.