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## **DAVIS V. WASHINGTON AND HAMMON V. INDIANA: BEATING EXPECTATIONS**

*Robert P. Mosteller*\* †

I begin with a question of effectiveness: does the *new* Confrontation Clause doctrine effectively protect defendants with respect to the most important types of problematic out-of-court statements? Although they leave much room for the introduction of hearsay in the immediate aftermath of crime generally, *Davis v. Washington* and *Hammon v. Indiana* (together hereinafter *Davis*) are better opinions from that broad perspective than I had feared. The new doctrine now covers and provides substantial procedural protection for a very important class of problematic hearsay—statements made to government agents investigating past crime.

The protection of *Ohio v. Roberts* was figuratively a mile wide but usually not even an inch deep. Under it, firmly rooted hearsay that had independent evidentiary significance, such as an excited utterance, was automatically admitted, and even when core concerns were present, such as with statements against interest by co-defendants, its amorphous trustworthiness test was relatively ineffectual. But it was better than nothing and occasionally protected defendants from problematic hearsay—for example in *Lilly v. Virginia* (statements against interest by a codefendant) and *Idaho v. Wright* (accusatory hearsay produced by leading questions admitted under a catch-all exception in a child sexual abuse case). It would be easy to surpass *Roberts*, but I worried after *Crawford v. Washington* that the new doctrine would be roughly the *Roberts* inverse—deep but only an inch wide.

Two perspectives can be taken on the breadth of *Davis*. One is that cases exactly like Michael Crawford's and Hershel Hammon's establish the perimeter of the Confrontation Clause. The second is that the Clause will likely have a somewhat broader perimeter as the promising aspects of *Davis* are interpreted reasonably, rather than restrictively. No doubt, some of my current favorable reaction and occasional optimism come from having highly pessimistic expectations exceeded. I continue to worry that the full breadth of coverage is described by the facts of *Crawford* and *Hammon*, and in particular, I worry that the Court's strong invitation to use forfeiture to avoid exclusion of testimonial statements of unavailable declarants will be expansively developed. The Court in *Crawford* argued that the Framers would not have trusted judges to dispense with confrontation through a determination of reliability, which it likened to eliminating the right to a trial because of a defendant's obvious guilt. The law allows it and the doctrine is

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different, but under forfeiture the Court approves much the same result. Forfeiture permits judges, whom the Framers distrusted, to use the unfronted hearsay to determine the defendant guilty of securing unavailability and thereby dispense with confrontation. My concerns are far more than quibbles, but by covering statements made to investigative officers inquiring about past crime, the Clause now demands real confrontation for a major problematic area where *Roberts* often failed. After *Davis*, the doctrine unequivocally applies to most statements by criminal co-participants when questioned by the police. Whether it will extend to problematic hearsay in, for example, child sexual abuse cases is quite possible, but undetermined.

*Much uncertainty remains.* The *Crawford* decision left a remarkably large number of issues unresolved. *Davis* answered a few of those questions definitively and continued hints at the answers to several other questions (for example, there may be no protection when statements are made to individuals not known to be government officers), but it left most issues as it found them—unresolved.

*Backtracking from an attempt at a comprehensive definition.* Not only did *Davis* not attempt a comprehensive definition of what is meant by “testimonial,” but even more remarkably, it did not work within the three possible definitions set out in *Crawford*. Its positive holding was not in language directly relating to any one of those three definitions.

*Rejecting Justice Thomas’s definition.* While not building positively on any of *Crawford*’s definitions, *Davis*’s most important clarification of a possible interpretation of *Crawford* was its rejection of some of the more extreme readings of the formality and formalism of Thomas’s definition taken from his concurring opinion in *White v. Illinois* (with Scalia concurring). Thomas would have defined testimonial statements as “formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”

*Rejecting formality of statement form.* As I have stated elsewhere, *Crawford* had left open the possibility that the formality of the statement might be given dispositive weight, which could have led to manipulation by investigative officers in their decision to record a statement or to rely on memory or informal notes, an approach some lower courts had effectively embraced. In *Davis*, the Supreme Court largely eliminated that concern:

[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant instead of having the declarant sign a deposition. . . . The product of [police interrogation to prove or establish past crime], whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.

*Rejecting formality of proceedings and limitation of procedural situations resembling historical inquisitorial practices.* In his dissenting opinion in *Davis*, Thomas adhered to his earlier position and even embellished it along the lines that a number of lower courts had followed in limiting the testimonial concept to statements produced in proceedings that resembled

the historical practices believed to have animated the Framers' decision to include the Confrontation Clause in the Sixth Amendment. Scalia described these in *Crawford*—the Privy Council of Raleigh's case and the examining magistrates of the Marian Statutes. A number of lower courts excluded most statements received by officers in the field because they did not resemble the procedures employed by the examining magistrates under the Marian Statutes. Together, the formality of the form of the statement (written or recorded) and the formality of proceedings would have frequently permitted investigators to obtain accusatory hearsay statements and still avoid Confrontation Clause protection.

*Davis* rejected the effort to limit testimonial statements to those produced in procedures resembling the historical situations of concern to the Framers. In doing so, Scalia made a statement that rung remarkably like a justice who believes in an evolving Constitution: "Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction."

*Rejecting a rigorous interrogation requirement.* *Crawford* had presented the possibility that formality almost equivalent to Marian procedures would be achieved by a requirement of the rigorous stationhouse interrogation that occurred there. It spoke both of police interrogation and structured question. In *Hammon*, the questioning was in the field rather than in the police station and the person questioned was an apparent victim, so as one would imagine the questioning was not nearly as forceful and rigorous as that involved in *Crawford*, where Sylvia Crawford was a suspected co-participant in the aggravated assault. *Hammon* did involve questions—what the Court continued to term "interrogation." But the Court made explicit that neither pointed questioning nor even questioning itself was required: "The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation."

What is left of these various elements of formality, formalism, and interrogation? Scalia's opinion certainly did not remove all limitations, and it articulated one new potentially significant limitation. He stated, "It imports sufficient formality . . . that lies to [police] officers are criminal offenses." The possibility of prosecution for false statements in combination with the fact that the opinion continued to speak of interrogation, even when that term no longer appeared accurate, certainly allows future opinions to limit testimonial statements to those given to persons known to be government investigative agents, where false statements may be prosecuted as criminal offenses. Indeed, the Court did nothing to remove the broader possibility that only statements made to known government investigative agents would be covered. It assumed without deciding that, if 911 operators are not police officers, they may be agents of law enforcement when they conduct interrogations of 911 callers. The degree to which responses developed by non-law enforcement personnel are covered and when private individuals and organizations become "agents" are unanswered questions that are important in many cases, particularly those involving child sexual abuse.

*Webster's Dictionary as Constitutional Text.* If one were looking for a text for *Davis*, one would assume that text was the Sixth Amendment to the United States Constitution. Indeed, that is where Scalia begins with “witnesses against [the accused].” However, the true text he is interpreting is Noah Webster’s 1828 edition of *An American Dictionary of the English Language*. Testimony is defined there as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” As described above, Scalia did not emphasize the “solemn declaration or affirmation” aspect of the definition. Instead, he focused on “made for the purpose of establishing or proving some fact.” That is the core of the definition of testimonial statements in *Davis*. If made under police questioning, a statement is testimonial when “the circumstances objectively indicate that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

However, Scalia’s test makes a somewhat subtle shift from the “text.” In the text from Webster’s dictionary, the issue is the purpose of the declaration or affirmation. In Scalia’s test, it is the purpose of police questioning. Thus, he shifts the critical intent focus from speaker to questioner. But that perspective does not appear to be consistently followed. In a footnote on the same page, he states, “And of course even when interrogation exists, it is in the final analysis the declarant’s statements, not the interrogator’s questions, that the Confrontation Clause requires us to evaluate.” While this statement may not be speaking to precisely the same issue, it seems to say that the Constitution’s concern is the product of the interrogation and presumably the intent behind that product, rather than the questioning.

*Crawford* gave us a reason why focusing on the questioners, when they are government agents, would be appropriate. There the Court stated that “[i]nvolvement of government officers in the production of testimony with an eye toward trial present[s] unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar.” That might warrant particular scrutiny toward the intent of government interrogators. As I have discussed elsewhere, however, defendants are harmed just as much by malicious accusers acting on their own as they are by government manipulation of those witnesses, and there is reason to assume the Framers considered the malicious or mistaken witness perspective. The Confrontation Clause was responsive to the Marian Statutes, which applied to ordinary crime where government interest in manipulation would not have been clear, in addition to crime against the state, which was the subject of the Raleigh case and the Privy Council’s interrogation. Webster’s focus on the intent of the testifier as opposed to the questioner adds “textual” support to this historical argument.

If a single perspective must be chosen, it might well be that of the investigative questioner. Moreover, which party’s intent counts is not usually decisive. When the objectively discernable purpose of the police is to establish or prove a past fact potentially relevant to criminal prosecution, that should be readily observable to the speaker as well as the police.

*Davis*, however, did not resolve the issue of whose intent counts, and at some point, it must be addressed. I suggest that counting the declarant's perspective is most critical in situations where police interrogation is not involved. In that situation, if the witness intends to establish or prove a fact about a past crime, the statement should be considered testimonial. Such an analysis is needed, at least to avoid purposeful avoidance of the Confrontation Clause by a knowledgeable witness, and counting the declarant's perspective is certainly consistent with Webster's "text."

Although being interested in both the intent of the questioner and the speaker is unusual, it is quite appropriate for the Confrontation Clause. In the case of the Confrontation Clause, as opposed to the situation in *Miranda v. Arizona*, for example, the person being protected is not the witness who is being questioned. It is instead the defendant against whom the statement is being introduced. As Scalia notes, "it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends [the Confrontation Clause]." The harm in not being able to cross-examine the witness is the same whether the police intended to manipulate the witness, the witness intended to manipulate the police, or the witness was simply mistaken.

I end this Essay with a question about the future of the new Confrontation Clause doctrine as it applies to an area of problematic hearsay of special interest to me—statements by children in child sexual abuse. Here, I principally rely on omissions from the Supreme Court's two most recent Confrontation Clause opinions. Although in *Crawford* Scalia spent considerable time reconciling the new approach with the result in many of the Court's recent Confrontation Clause cases, he did not mention *Idaho v. Wright*, and his silence, while less remarkable, continued in *Davis*. Thus, we do not know whether the result in *Wright* is consistent with the new approach. The other case involving child sexual abuse is *White v. Illinois*, which was mentioned in both recent opinions as perhaps wrongly decided. However, that error in *White* is suggested only with respect to the statements to an investigating officer admitted as an excited utterance. The result is apparently not questioned as to other statements admitted under the "medical treatment" hearsay exception to a nurse and doctor, which were secured hours after the investigative questioning by the police officer with no indication that interest had subsided in establishing or proving what White had done.

One can imagine that the statement in *Wright*, which had strong investigative features, might fit within the testimonial definition of *Davis*, but it might be excluded because it was not a statement to a government officer and certainly not to a police officer where falsehoods are criminal. Resolving under what circumstances a person becomes an agent of the police would be important. Whether statements to doctors who have some treatment function will be virtually automatically excluded when they clearly also have a prosecution function must be answered. Will it be that first examinations are virtually always excluded? What if the conversations are recorded for potential other users as part of a team approach? Much is left to be decided, and the silence to this point regarding *Wright* certainly leaves the Court's options open.