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CHAPTER 38

THE CONFRONTATION RIGHT

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I. INTRODUCTION

THE right of a criminal defendant to be confronted with the witnesses against him[1] has perhaps the oldest roots of any right in the criminal law. It has been a central aspect of the common law system of criminal jurisprudence for half a millennium, and of other systems before that. It is explicitly expressed and protected in the Sixth Amendment to the United States Constitution. In recent decades, it has also gained a significant foothold in the civil law world under the European Convention on Human Rights. And yet the right has often been misunderstood, and perhaps in large part for that reason, it has sometimes been treated cavalierly by judicial systems.

The basic idea behind the confrontation right is very simple: Any rational system of adjudication depends in large part on the testimony of witnesses. It is therefore essential that the system prescribe the method by which witnesses may give their testimony. Most systems, for example, insist that the witness first take an oath, or make an affirmation that has much the same effect. This procedure provides some assurance that the witness understands the solemnity of the occasion and the potential consequences of her conduct. This understanding is fortified by recognition that lying in these circumstances carries severe adverse consequences for the witness; in older days, the common belief was that damnation would follow,[2] but today the more widespread perception is that the witness is exposing herself to a perjury prosecution. Another condition on which some systems have insisted is that the witness testify face to face with the party against whom

[1] This essay will use a convention that, when speaking in general terms, it will refer to defendants as masculine and to witnesses as feminine.

[2] *See generally* Helen Silving, *The Oath: I*, 68 Yale L.J. 1329 (1959).

the evidence is presented, especially if that party is an accused—or put another way, that the witness confront the accused.[3]

Note that other methods of giving testimony are possible. For example, an adjudicative system might require that witnesses give their testimony in writing. This was the prevailing system for a time in ancient Greece.[4] In some settings, modern systems rely on affidavits, which are a written form of testimony, confirmed by oath or affirmation. Or an adjudicative system might require that the witness give her testimony orally to an official, in a proceeding closed to parties to the litigation. This method has characterized some Continental systems. Systems adhering to the confrontation right reject such other methods and instead insist that the witness give her testimony openly, face to face with the adverse party—and, in the modern day, not only under oath but subject to adverse questioning by that party.

Note also that this right is a procedural one, not merely one assessing the quality of evidence and rejecting evidence that might be deemed to hurt more than help the search for truth. That is, it is a right to insist that adverse testimony be given under certain prescribed procedures. The distinction is an important one because procedural rights tend to have a categorical nature rather than being subject to a cost-benefit analysis in each case. In this sense, the confrontation right is similar to, for example, the right to counsel. A court does not ask whether it is worthwhile in the given case, weighing the expense and possible delay that counsel might create against the potential improvement in the quality of the proceeding, that the accused be represented by counsel; rather, the accused simply has the right to counsel, because this is the procedure by which the system operates. Similarly, presenting the witnesses face to face with the accused when they give their testimony, and requiring that they be under oath or affirmation and subject to questioning on behalf of the accused, is the way an adjudicative system may operate. If so, there is no need for an assessment of costs and benefits in the particular case.

Though the confrontation right is itself a procedural rather than an evidentiary one, a system adhering to it will likely need to rely on a rule excluding secondary evidence of testimony. Suppose that a witness testifies out of court, not subject to confrontation, but the substance of the testimony is relayed to trial and presented to the trier of fact. Perhaps,

[3] The wording chosen here—the witness confronts the accused, and the accused has a right *to be confronted with* the witness—is very purposeful. The accused has a right to insist that the prosecutorial authority bring the adverse witnesses in front of him; the accused does not have to present the witnesses. In some settings, the distinction is very significant. *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324–25 (2009) (holding that "the Confrontation Clause [of the Sixth Amendment to the United States Constitution] imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court"; the prosecution may not present its evidence via affidavit and leave it to the witness to subpoena the affiant if he chooses).

[4] 5 Demosthenes, *Private Orations* 46:6, at 247–49 (A.T. Murray trans., 1939; Loeb Classical Library) (oration attributed to Apollodaurus: "The laws... ordain that... [a witness's] testimony must be committed to writing in order that it may not be possible to subtract anything from what is written, or to add anything to it."); Aristotle, *The Athenian Constitution* 53:4, at 145 (H. Rackham trans., 1942; Loeb Classical Library) ("The litigants are not permitted to put in laws or challenges or evidence other than those passed on by the Arbitrator, that have been put into the deed-boxes.").

for example, an in-court witness testifies (under oath and subject to confrontation and cross-examination) to what the primary witness said. If that evidence is allowed, then the confrontation right is substantially undermined, because the adjudicative system has endorsed a method by which a witness can testify in effect by speaking to another person and relying on that other person to pass her statement on to the trier of fact. In the common law system, the evidentiary doctrines preventing such evasion of the confrontation right have often been treated under the rubric of the rule against hearsay. But that rule is very broad, characterized by a jumble of exceptions, and often perplexing, both in operation and in underlying rationale. Furthermore, development of the rule against hearsay since about 1800 appears to have obscured the confrontation right until recently. The relatively recent development of a confrontation right under the European Convention on Human Rights, which primarily governs systems that do not have a hearsay rule, is a welcome and interesting advance.

Though the confrontation right is, or should be recognized to be, categorical in nature, it can be waived or forfeited. Waiver occurs rather readily, if the accused does not object to the presentation of testimony not taken subject to confrontation. Suppose, for example, a prosecutor wishes to introduce results of a forensic laboratory test; a report of that test should ordinarily be considered a testimonial statement by the analyst who prepared the report. The accused may nevertheless decide that there is no advantage to him in insisting that the analyst come to trial as a live witness; if the prosecution wishes to save money by presenting just the report, and the accused has no plausible basis for impeaching it, he may be satisfied that the evidence will be presented in a rather undramatic fashion.

Forfeiture of the right is generally thought to require wrongful conduct on the part of the accused that predictably caused (and, in one view, was designed to cause) the witness to be unavailable. In that circumstance, it may be inequitable if the court were to exclude testimony on the ground that the accused had no opportunity for confrontation; it was, after all, the accused's own wrongful conduct that caused that lack of opportunity. Conduct leading to forfeiture includes murdering the witness, intimidating her, or otherwise preventing her from coming to court.

The confrontation right, of course, comes with costs, in time, money, ordeal, and often in the loss of valuable evidence. It is therefore not surprising that most jurisdictions have not enforced the right with consistent rigor.

That is unfortunate. Despite its costs, the confrontation right is a central protection of a satisfactory criminal justice system; indeed, it may be said to create a genuine, open criminal trial. Section II of this chapter will develop this point, discussing the nature of the confrontation right, the purposes it serves, and its costs. Section III will discuss the history of the right. Section IV will discuss an array of issues that may arise in any jurisdiction (or in some cases, any common law jurisdiction). It will use as a touchstone the current status of the right in the United States, where it is best developed and explicitly protected by constitutional text, and where the conception of the right, bringing it closer to its historical roots, has dramatically changed in recent years. And Section V will discuss the status of the right in Europe.

II. Nature, Purposes, and Costs

What we today think of as the confrontation right has two distinct aspects, which usually exist together, but need not do so. First is what we may call the right of confrontation proper—the right of an accused to insist that adverse witnesses be brought face to face with him to give their testimony. Second is the right of cross-examination—the right of the accused to pose adverse questions to the witness, testifying under penalty of perjury.[5] This second aspect of the right may be considered part of a broader right to impeach an adverse witness—that is, to show reasons that the witness's testimony may not be credible.

John Henry Wigmore, the great American evidence scholar of the first half of the twentieth century, belittled the first of these aspects. The accused, he says, 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."[6] Ironically, as the next section will show, the right of confrontation proper developed long before the right of cross-examination. And it still serves important purposes.

Requiring a witness to testify face to face with the accused serves much the same purpose as the oath, and for many witnesses perhaps in a more meaningful way: It focuses the attention of the witness on the solemnity of the occasion, making it more likely that she will realize that her testimony may have serious adverse consequences for the particular person in whose presence she is testifying. As the United States Supreme Court has noted, "[t]he phrase still persists, 'Look me in the eye and say that.' "[7] Professor Sherman Clark has elaborated:

> We have decided that if one is willing to play [the witness's] central, crucial role in taking a man's liberty, one ought also to be willing to look him in the eye and literally stand behind his accusation. More to the point, and recognizing the strong sense in which rules of criminal procedure are a form not only of self-regulation but also self-definition, we have decided that we want to be the kind of people who stand face to face with those we would accuse.[8]

The right of confrontation proper therefore may be considered a basic requirement for the fundamental fairness of the system. It also helps ensure an open, transparent system

[5] In the early seventeenth century, treason defendants in England clearly had the right to demand that prosecution witnesses testify face to face, but they did not have a right to cross-examine. By contrast, in the old equity practice, parties had the right to pose adverse questions to the witness, in writing, but not the right to demand that the witness testify face to face. And in some settings, a modern-day court may allow an accused to cross-examine orally, through an attorney, without requiring the witness to come face to face with him. *E.g.*, Maryland v. Craig, 497 U.S. 836 (1990).

[6] 5 John Henry Wigmore, *Evidence* § 1395, at 150 (Chadbourn rev. 1974), *quoted in* Davis v. Alaska, 415 U.S. 308, 316 (1974), *and in* Coy v. Iowa, 487 U.S. 1012, 1029 (1988) (Blackmun, J., dissenting).

[7] *Coy*, 487 U.S. at 1018.

[8] Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 Neb. L. Rev. 1258, 1261 (2003).

of justice: There is no doubt what the witness's testimony is, and the chance that the testimony is the product of intimidation, or even torture (a very plausible possibility in earlier times) is eliminated.

As for cross-examination, Wigmore called it "beyond any doubt the greatest legal engine ever invented for the discovery of truth."[9] Though the statement may be hyperbolic, it certainly at least contains an element of truth. A witness's testimony may, for one or more of several reasons, be less probative than it first appears. Perhaps the witness had a poor opportunity to observe the events or conditions on which she reports, or she has poor powers of perception in general. Perhaps she has a poor memory of those events or conditions, or a poor memory in general. Perhaps some factor biases her, deflecting her from a sense of obligation in the particular case to tell the truth, or she may have little regard in general for the value of truth-telling. And perhaps she uses words, and in particular the words of her testimony, in a way that could mislead the trier of fact as to her intended meaning. If a witness were able to testify without being subjected to probing questions designed to reveal such flaws in her testimony, those flaws would more likely go unnoticed by the trier of fact. What is more, without the prospect of probing questions, the witness might feel free to be looser with her testimony; knowledge that she will be examined closely, and not by a friendly interrogator, is a powerful incentive to be careful and accurate. Questioning by a neutral interrogator, such as the judge presiding over the trial, may have considerable benefit. But the judge is unlikely to have the incentive to prepare and press searching lines of examination. No alternative procedure is likely to reveal flaws in the testimony as thoroughly as is cross-examination, and no alternative procedure is likely to assure the accused that the testimony has been thoroughly tested. But the right to impeach the witness need not be limited to cross-examination; for example, the testimony of other witnesses may demonstrate that a critical accusatory witness has a bias against the accused.

Of course, both aspects of the confrontation right come with costs as well. Most pervasive are costs in money and time: It may be expensive and time-consuming for a witness to appear at trial (or at another testimonial event attended by the accused); cross-examination, and responses to it, are likely to consume a great deal of time, both in preparation and in court. Insisting on the confrontation right also sometimes causes the outright loss of evidence, most obviously because a witness may become unavailable, by death or otherwise, before she testifies subject to cross-examination.

Both aspects of confrontation—coming face to face with the accused and having to endure cross-examination and other forms of impeachment—also increase the personal ordeal of testifying. In some cases, even the prospect of confrontation may intimidate a witness from testifying at all, though her testimony would be truthful if she gave it; this possibility is of special concern when the witness is a vulnerable one who is the victim of the crime charged. If the witness does testify, intimidation may cause her to fail to do so fully or convincingly.

[9] Wigmore, *supra* note 6, § 1367, at 32.

Further, the confrontation right gives defendants, or their supporters, an incentive to prevent witnesses from testifying subject to confrontation, if they believe they can do so without detection. Measures of prevention might include intimidation, keeping the witness out of the way, or murder. And because of that possibility, it may be necessary for the prosecution to take unusual measures to protect a vulnerable witness, both before and after the testimony.

The costs are therefore considerable. Ultimately, though, the confrontation right is justified by its role in helping to create a just and free society. One of the primary needs for such a society is to ensure that the punitive powers of the state are, and are perceived to be, exercised fairly and openly, in such a way as to minimize the chance of wrongful conviction and to give the accused ample opportunity to challenge the evidence against him.

III. History

The principle that a witness testifying against an accused person must do so face to face with the accused is apparent as early as the time of the ancient Hebrews.[10] The ancient Romans similarly insisted on the practice.[11] Medieval adjudicative systems, by contrast, searched by means such as the ordeal for indications of the judgment of God, but when these systems lost the support of the Catholic Church in 1215, the necessity of relying on witnesses was restored. Continental systems took the testimony of witnesses behind closed doors, though the accused was sometimes allowed to pose written questions.[12] The English, by contrast, took testimony in the open, in the presence of the accused, and for centuries English jurists celebrated this confrontational style of testimony as one of the great glories of their system.[13]

This is not to say that the English always adhered to their own principles; in particular, the practice was inconsistent in politically contentious treason trials. But Parliament repeatedly and explicitly insisted that, even in this setting, the witnesses be brought face to face. By the middle of the seventeenth century, courts carefully protected the right in this context as in others. At first, they did not allow the accused to pose questions directly to the witness, but that right soon became established as well.[14]

The confrontation right naturally traveled to America with the English colonists, and perceived violations of it by the Crown during the tensions that led to revolution became one of the colonies' complaints. The earliest state constitutions, adopted shortly after

[10] Deuteronomy 17:6 and 19:15–18 strongly suggest the necessity of face-to-face testimony. The requirement is made explicit in the Dead Sea Scrolls, which provided, in effect, for a deposition to preserve testimony by bringing the witness in the presence of the accused. Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1023 n.64 (1998).

[11] Acts 25:16.

[12] Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1202–03 (2002).

[13] *Id.* at 1203–04.

[14] Friedman, *supra* note 10, at 1024 & n. 74.

independence, all protected the right—some speaking of confrontation and others using the time-honored "face to face" formula. And when the new nation adopted a Bill of Rights in 1791, it included, in the Sixth Amendment to the Constitution, protection of the right of an accused "to be confronted with the witnesses against him."[15]

Around the same time, however, a broader and more pliable doctrine took form in common law jurisprudence. This was the rule against hearsay, which is not limited to testimonial statements but covers *any* out-of-court statement that a party seeks to offer to prove the truth of an assertion it makes. It appears that the rule grew because of the increasing presence in civil litigation of lawyers, who articulated the disadvantages of being unable to cross-examine the maker of any out-of-court statement used adversely to them—and indeed, they were able to extend the principle even more broadly to those whose out-of-court conduct was offered to prove the truth of a belief apparently reflected by the conduct, even if the conduct did not articulate that belief.[16]

The rule against hearsay soon dominated discourse; courts excluded a statement on the ground that it was hearsay without speaking about bringing a witness face to face with the adverse party. But a blanket exclusion of all hearsay would be excessive, and so the rule has always been subject to an array of exceptions. As a result of these developments, the rationale behind the hearsay rule appeared nebulous. Courts began to treat the rule as a nuisance to be avoided when possible. The essential core behind the rule, the ancient confrontation right, became occluded.

A spur to change occurred in 1965, when the U.S. Supreme Court held that the Sixth Amendment confrontation clause binds state as well as federal courts. It thus became essential to determine just what the clause prohibits. (A federal court could reach any result contemplated by the clause by speaking of hearsay rather than of confrontation, but the clause only authorizes the Supreme Court to constrain state courts when there has been a violation of the confrontation right.) After fifteen years, the Court attempted in 1980 to articulate a general test.[17] It regarded the clause as a substantive protection against unreliable evidence, operating largely as a constitutionalization of the law of hearsay.

This approach, lacking any historical foundation or clear constraint and failing to articulate a principle worthy of respect, provided paltry protection of the confrontation right. At last, in 2004, the Court rediscovered the long-standing meaning of the right. In *Crawford v. Washington*,[18] the Court recognized that the clause creates not a substantive limitation on evidence that a court might deem to be unreliable, but rather a substantive procedural right that states the conditions under which a witness against an accused must give testimony—face to face, subject to cross-examination, and, if reasonably possible, at trial. *Crawford* was a transformational decision; it left unanswered, and even unposed, many important operational questions, some of which will be addressed in Section IV.

[15] Friedman & McCormack, *supra* note 12, at 1206–08.

[16] *Wright v. Tatham*, 5 Cl. & F. 670, 7 E.R. 559, 47 Rev. Rep. 136 (H.L. 1838).

[17] Ohio v. Roberts, 448 U.S. 56 (1980).

[18] 541 U.S. 36 (2004).

Even before *Crawford*, some non-adversarial systems, unburdened by the obscurity created by the rule against hearsay, began articulating a right of confrontation as a fundamental guarantee of criminal procedure.[19] Ironically, then, though for centuries England was the cradle of the right, and had scorned Continental systems for failure to recognize it, its nature has been so obscured by the rule against hearsay[20] that in recent years it has been compelled to adhere to the right by a court sitting on the European Continent.[21]

IV. Issues Arising under the Confrontation Right: The Case of the United States

This section focuses on the right as it stands in the United States, but it identifies issues that may be significant in any system, or in some cases, in any common law system.

1. The Basic Structure of the Right

Under *Crawford* and its progeny, the confrontation right applies to a statement that is testimonial in nature. That is not an adventitious choice of term. Testifying is the action of a witness.[22] (In many languages, the words for "testify" or "testimony" and for "witness" have the same root.) The purpose of the confrontation right is to ensure that witnesses testify face to face with the accused at trial, or if necessary at some other formal testimonial event.

Notice the negative implication: If a statement is *not* testimonial in nature, then the confrontation right does not apply.[23] The right is thus not nearly as broad as the rule against hearsay, which applies in general (but subject to many exemptions) to all out-of-court statements offered to prove the truth of what they assert. The right concerns only the procedure by which witnesses give their testimony.

[19] *E.g.*, Kostovski v. The Netherlands, App. No. 11454/85, Eur. Ct. H.R., Nov. 20, 1989; Delta v. France, App. No. 11444/85, Eur. Ct. H.R., Dec. 19, 1990.

[20] English courts do not speak of a confrontation right; they speak of the rule against hearsay, which continues to be very broad but subject to numerous exceptions and further undercut by statute. *E.g.*, Criminal Justice Act 2003, §§ 116(2)(a)–(d) (broad exemptions for statements made by persons who cannot be easily made trial witnesses).

[21] *See, e.g.*, William E. O'Brian Jr., *Confrontation: The Defiance of the English Courts*, 15 Int'l J. Evid. & Proof 93 (2011).

[22] *See Crawford*, 541 U.S. at 51 (noting that the confrontation clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' 1 N. Webster, An American Dictionary of the English Language (1828).").

[23] Davis v. Washington, 547 U.S. 813, 823–24 (2006).

If an out-of-court statement is testimonial, then (for the moment assuming that the accused has not waived or forfeited the right, and putting aside the possibility of exceptions to the right) it cannot be used against the accused to prove the truth of what the statement says unless the accused has had, or will have, an adequate opportunity for confrontation, which includes cross-examination.[24] Moreover, that right must occur at trial, unless the witness has become unavailable, by death or otherwise; in that case, evidence of the prior testimonial statement may be admitted.

In other words, the confrontation right contains an absolute rule (subject again to the same caveats) and a rule of preference. The absolute rule is that the testimony of witnesses may not be presented against an accused unless the accused will have had an adequate opportunity for confrontation, including cross-examination. The rule of preference is that unless the witness is deemed unavailable to testify at trial, the opportunity for confrontation must occur at trial; only if the witness is then unavailable may her prior testimonial statement be introduced for the truth of what it asserts.

This, of course, leaves open the central question of what should be considered a testimonial statement. The *Crawford* case did not attempt to resolve the matter. It did offer illustrations—such as "[a]n accuser who makes a formal accusation to government officers"[25]—and cited possible definitions, but it did not adopt one.

Under the most satisfactory of the definitions *Crawford* considered, testimonial statements are those made under circumstances that "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[26] The Court appeared to come close to adopting that definition in *Melendez-Diaz v. Massachusetts*, when, in rendering what it regarded as a "rather straightforward application" of *Crawford* to hold that a forensic laboratory report was testimonial, it regarded as sufficient that the analyst who authored the report clearly understood its anticipated evidentiary use.[27] But the Court has not consistently held to this approach.

2. Fresh Accusations

Crawford involved a statement by an observer of a knifing. She made the statement to the police, at a station house, "in response to structured police questioning" and under

[24] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009) ("A witness's testimony against a defendant is... inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination."). Note that the right applies only if the statement is presented to prove the truth of what it asserts; though the confrontation right has not been satisfied, it may be introduced for another purpose. The classic case is *Tennessee v. Street*, 471 U.S. 409 (1985). There, the accused contended that he had been coerced into repeating the substance of a confession given by a confederate. The prosecution was allowed to present the confederate's confession—not to prove the truth of the factual assertions made in it but to show that it was in fact substantially different from the accused's.

[25] 541 U.S. at 51.

[26] *Id.* at 52 (quoting Brief for National Association of Criminal Defense Lawyers).

[27] 557 U.S. 305, 309–12 (2009).

conditions of considerable formality, some hours later. In this context, the Supreme Court held, the statement was in response to a law-enforcement interrogation, and so testimonial "under any conceivable definition."[28] Subsequent cases involving accusations made closer to the time of the incident and under less formal conditions tested the bounds of the category of testimonial statements.

A pair of cases heard in tandem by the Court both concerned accusations of domestic violence made to the authorities shortly after the fact by women who did not ultimately testify at trial. The Court declared:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They 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.[29]

One might, of course, question (as one justice did) whether it is practical or even theoretically coherent, when the statement is made in the course of an emergency, to determine that one purpose or another is the primary one (assuming for purposes of argument that only one purpose can be primary, a matter that has not been resolved). Consider the facts of one of the two cases, *Davis v. Washington*. There, the accusations were made, as part of an emergency call, while the accused was not at large, but apparently still in the presence of the caller herself, who was in an obvious state of imminent distress. By a 9-0 vote, the Court concluded that at least the caller's first statements were not testimonial. Certainly the statement was made in significant part for assistance in resolving the emergency. But was it not made as well in expectation that it would cause legal consequences to be imposed on the alleged assailant? The fact that early on in the conversation the operator asked for the full name—including middle name[30]—of the suspect lends force to this view. So does the fact that, at the end of the call, the operator dispatched officers *to find the accused*,[31] not to go first to the caller to protect her.

By contrast, in the companion case, *Hammon v. Indiana*, the Court held by an 8-1 vote that the accusation was testimonial, and it indicated that it did not regard the issue as particularly close. There, after police responded to an emergency call, the woman made the statement to one officer in her living room while another officer held her husband, the accused, at bay in another room. The Court recognized that the interrogation lacked certain features in *Crawford* that helped demonstrate the testimonial nature of the statements there—that the questioning occurred in the station house, that it was tape-recorded, and that the speaker had been given formal warnings—but it declined to prescribe an independent condition that only statements bearing certain earmarks of

[28] 541 U.S. at 53 n.4.
[29] Davis v. Washington, 547 U.S. 813, 822 (2006).
[30] *Id.* at 817–18.
[31] *Id.* at 818.

formality would be considered testimonial. The statements in *Hammon* were "formal enough" to be deemed testimonial because "[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." The statements were "an obvious substitute for live testimony" because they did "precisely *what a witness does* on direct examination."[32]

The Court further expanded on the emergency idea in *Michigan v. Bryant*.[33] In that case, it appeared that, after being mortally wounded by gunshot, the victim drove himself several blocks to a parking lot. There, he made statements to various police officers identifying the assailant. None of the officers made any attempt to find the assailant immediately or to protect themselves or the victim, who died several hours later. Nevertheless, a majority of the Court concluded that the victim's statements were not testimonial. The majority thought the condition of the victim was of significance, because it shed light on whether he was capable of having "any purpose at all" in responding to the officers' questions (though many victims seem, even in extremis, to have a well-developed purpose to identify their assailants) and also on the officers' purpose in conducting the questioning. (Justice Scalia, the author of *Crawford* and *Davis*, pointed out in dissent that the proper perspective to take in assessing the testimonial quality of the statement is that of the speaker, the purported witness, not that of a questioner, if there is one.) The majority also thought that the fact that the assault was by firearm bore on the emergency question—even though there was no immediate attempt to find the shooter. It also suggested that there might be factors other than emergency that might lead a court to conclude that the "primary purpose" of the exchange was to prove facts for future prosecution.

Bryant indicates that the law governing fresh accusations is in an unfortunate state. The "primary purpose" test is unhelpful, and it tends to cause focus on the questioner, when there is one, rather than on the purported witness. It is too easy for a court to identify a purpose of a conversation other than proof of facts for prosecution and characterize that purpose as primary. It would be better if courts spoke in terms of the reasonable anticipation of the speaker (the purported witness), taking into account that any purpose of an interrogator, if apparent to the speaker, may be significant in assessing the reasonable anticipation of a person in the speaker's position. If such a reasonable anticipation is that the statement would likely be used in prosecution, the statement should be deemed testimonial.

In *Bryant*, it is difficult avoid the conclusion that the victim must have known that his statement would in all probability be used to prosecute the person he had identified as the shooter. If, in context, it would nevertheless be an unappealing result to prevent the trier of fact from learning of the accusation, that is presumably because if the accused did in fact kill his victim, he should not be able to complain about the absence of confrontation—which his wrongdoing had caused. This suggests that the shooter may have forfeited the right, a matter that is discussed in Section IV.4.

[32] *Id.* at 829–30. [33] 562 U.S. 344 (2011).

Bryant suggests that the law governing fresh accusations is in a dissatisfactory state. The "primary purpose" test does not correspond to the nature of the confrontation right and cannot provide clear guidance. The critical question should be whether a reasonable person in the position of the speaker would anticipate prosecutorial use.

3. Forensic Laboratory Reports

Forensic laboratory reports provide another situation in which the question of whether a statement is testimonial frequently arises. Before *Crawford*, it had become a common practice in many states for the prosecution to introduce such a report rather than presenting the live testimony of the analyst who prepared it. But in *Melendez-Diaz*, the Supreme Court, by a 5–4 vote, held that certificates attesting that analyzed substances contained cocaine were testimonial; it was clear that the analysts who prepared the reports were aware of the evidentiary use to which they would be put.

The *Melendez-Diaz* majority swept aside a slew of objections to its holding—that the statements in the report were not accusatory, that the analysts were not conventional or ordinary witnesses of the type traditionally associated with the confrontation right, that the reports did not recount historical events but rather presented the results of "neutral, scientific testing," that the reports were akin to the types of business records traditionally admitted, that the accused in each case could have called the analyst as his own witness had he so chosen, and that requiring the attendance of the analysts would be unduly costly. As to this last objection, and some of the others, the Court regarded it as not only insufficient in principle but as factually dubious. And indeed, some states had long managed perfectly well even while protecting the right of the accused to demand that the prosecution bring the lab analyst in as a live witness. The fact is that in most contexts—but not all—the accused has no desire for the lab analyst to testify live against him and is willing to allow the admission of the less dramatically potent report. The dissenters may well have thought that it is a worthless exercise to require lab analysts to come to court from time to time to answer, under oath, adverse questions posed on behalf of the accused persons whom their reports might condemn to punishment. But that idea should have been dispelled long ago by the recurrence of scandals that have besmirched some forensic laboratories. Moreover, the *Melendez-Diaz* Court made clear that a state can ease the burden by adopting a simple "notice and demand" statute. Under these statutes, if the prosecutor gives timely notice of intent to offer a written laboratory report, the accused must, if he wishes the author to testify live, make a timely demand to that effect or be deemed to have waived the confrontation right.

The four *Melendez-Diaz* dissenters did not give up, however.[34] In *Bullcoming v. New Mexico*,[35] they sought to limit the scope and effect of the doctrine. There, the analyst

[34] Indeed, almost immediately after the *Melendez-Diaz* decision, they made what appears to have been an abortive attempt to take advantage of a change of membership on the Court to secure reversal of one of its holdings. The attempt, if that is what it was, did not succeed. Briscoe v. Virginia, 130 S. Ct. 1316 (2010).

[35] 564 U.S. 247 (2011).

who prepared the report in question had been placed on administrative leave and did not testify at trial. In his place, the state presented another analyst from the same laboratory who had not observed the testing that underlay the report. The four *Melendez-Diaz* dissenters thought that was satisfactory—but five justices did not.

Subsequently, however, in *Williams v. Illinois*,[36] the bloc of four, while outvoted on virtually every principle it attempted to establish, was able to find a fifth vote for the result it sought. This was a "cold hit" DNA rape case. That is, at the time a swab (presumably containing the perpetrator's DNA) was taken from the victim, the authorities had not yet identified a suspect. The swab was sent to an out-of-state laboratory, which sent back a report asserting that male DNA with a given profile stated in the report had been found on the swab. Search of a database of DNA profiles identified the accused, Williams, who was then charged with the crime. At trial, no one from the out-of-state lab testified at trial. Indeed, the report itself was never formally presented in evidence; rather, the state presented an in-court witness who testified that, in her opinion, the profile matched that of the accused.[37] The four *Melendez-Diaz* dissenters concluded that there was no violation of the confrontation right; they did not believe the laboratory's report was presented for the truth of what it asserted, and they did not regard it as testimonial.

Five justices rejected the first of these contentions, which was based on the perception that the report was used only as the basis for the opinion of the in-court witness; the only proof of the DNA profile found on the crime-scene swab, an essential predicate for the in-court witness's opinion, was from the report made by the out-of-state laboratory.[38] And the four-justice bloc based their conclusion that the report was not testimonial in large part on the contention that the report was not directed at a "targeted individual."[39] The other five justices also rejected this contention, which seems to have no basis in the history or rationale of the confrontation right; there is much testimony, such as a description of the crime scene or of the crime itself, that is clearly subject to the confrontation right but that might be made before any targeted suspect is identified. But Justice Thomas—who had been the sole dissenter in *Hammon v. Indiana*, on the ground that

[36] 567 U.S. 50 (2012).

[37] The state did present a witness who had analyzed the sample containing the accused's known DNA profile.

[38] The predicate for the in-court witness's statement was that a competent forensic analyst had accurately generated a profile of DNA found on the crime-scene swab. The evidence may have been presented under an alternative theory that would have obviated the problem; the prosecution could have declined to rely on the accuracy of the lab but simply pointed to the remarkable coincidence that the lab had reported a series of numbers that happened to match the DNA of a person who lived near the crime scene and was a plausible suspect. It was extremely improbable that the lab would come up with a profile matching the accused's in any way other than by accurately testing his DNA—either by concocting a profile, or by mistakenly analyzing someone else's DNA, or by accurately analyzing the DNA of another person who happened to have the same DNA profile as the suspect (a remote possibility because it is highly unlikely, unless the suspect has an identical twin, that there is such a person). Given this extreme improbability, the inference becomes strong, even without relying on the accuracy of the lab, that in fact the lab analyzed the accused's DNA.

[39] 567 U.S. at 84.

the statement there was insufficiently formal to be testimonial—reached a similar conclusion here about the lab report because, although it was signed by two analysts and clearly contemplated evidentiary use, it was not formally certified. That made a majority of the Court for the proposition that the report was not testimonial, though there was no opinion for the Court, because Justice Thomas rejected the reasoning of the other four in the majority and no other justice joined in his idiosyncratic view.

Indeed, that view seems to turn matters on their head. It provides an incentive for states to encourage the production of, and to allow admissibility of, reports that are plainly produced in contemplation of prosecutorial use but that lack certification or some other measure of extreme formality. And it mistakes the significance of formality. A statement is not rendered non-testimonial by the absence of formalities. Rather, some formalities—notably the oath and, if they can be considered formalities, confrontation and cross-examination—are necessary to make testimony *acceptable*. In the Court's most recent case, Justice Thomas spoke of solemnity rather than formality; that may get closer to the mark if one recognizes that solemnity is not a matter of the mood with which one makes a statement but rather a measure of the speaker's recognition of the gravity of the consequences that might follow from prosecutorial use of her statement.

In the meantime, the 4–1–4 split in *Williams* has created a good deal of confusion, which is likely to persist until the Court once again turns to the realm of forensic lab reports.

4. Waiver and Forfeiture

Although the confrontation right is categorical in nature, the accused can waive or forfeit it. Waiver may be explicit or implicit. The accused waives the right simply by not making a timely objection to evidence that might violate it—and under a valid "notice and demand" statute, the objection may have to be made before trial.

The accused may forfeit the confrontation right when he engages in serious misconduct that foreseeably renders the witness unavailable to testify at trial. In that circumstance, it seems inappropriate to allow the accused to object on grounds of lack of confrontation to secondary evidence of the witness's testimony; after all, it was the witness's misconduct that caused the unavailability. The most common types of such misconduct are intimidating the witness and murdering her; in some cases, the accused may by force or trickery keep the witness from coming to court. It is also sufficient if the accused acquiesced in the wrongful conduct that caused the witness's unavailability.[40]

A forfeiture contention requires proof that satisfies the court in a side proceeding that the accused did in fact engage or acquiesce in the alleged misconduct and that it did

[40] *Cf.* Fed. R. Evid. 804(b)(6) ("a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant's unavailability as a witness"). Note the far more lenient approach taken in England and Wales: fear on the part of the witness is enough to excuse her from testifying at trial, without any need of showing that the accused played a role in creating that fear. Criminal Justice Act 2003, §§ 116(2)(e), 116(3).

indeed prevent the witness from testifying. This can be a difficult matter. Furthermore, a court carefully applying forfeiture doctrine should ask whether, even assuming the defendant engaged in the conduct and it led to the witness's unavailability, the prosecution could have taken measures to mitigate the problem. For example, if the witness is intimidated, the prosecution might take steps to protect her—before, during, and after her testimony.[41] And even if the accused mortally wounded the witness, there may be a period in which it would be feasible, and not inhumane, for the prosecution to take the witness's deposition subject to confrontation.[42]

A special problem arises when the conduct that allegedly caused the witness to be unavailable is the same as the conduct with which the accused is charged. Consider the facts of *Giles v. California*.[43] Giles's former girlfriend, Avie, made a statement to police describing an assault by Giles. Three weeks later, he shot Avie to death. He claimed self-defense. The prosecution sought to introduce evidence of the prior statement. Giles objected; the statement was testimonial under *Hammon v. Indiana*, and he had not had an opportunity to cross-examine Avie. But, said the prosecution, that was because Giles killed Avie. And that, of course, is the very conduct with which Giles was charged.

The identity of issues should not in itself be considered a problem. The same issue has become material to the case for two different reasons—determining whether Giles committed the crime charged and whether he forfeited the confrontation right—but that is neither unusual[44] nor a logical conundrum; the issue can be decided separately for each purpose. Indeed, if there is a jury, as in most American criminal trials, it will decide if the accused is guilty of the crime, but beforehand, the judge will decide, after a side proceeding and perhaps on a different evidentiary base, whether the accused has forfeited the confrontation right.

In *Giles*, however, the Supreme Court imposed another limitation on forfeiture doctrine: It is not sufficient for forfeiture that the misconduct have caused the unavailability of the witness and that this result was foreseeable; the misconduct must have been *intended* for that purpose.[45] Thus, even if the trial judge, in determining the forfeiture question, were to find that Giles had murdered Avie, there could be no forfeiture, no

[41] *See, e.g.*, Richard Devine, *Targeting High Risk Domestic Violence Cases: The Cook County, Chicago, Experience*, 34 APR Prosecutor 30 (Mar./Apr. 2000) (describing Target Abuse Call, which achieves goals of holding offenders accountable, with a 90 percent conviction rate, and ensuring safety of victims, approximately 80 percent of whom participate in prosecution).

[42] *See, e.g.*, R v. Forbes, Holt 599, 171 E.R. 354 (1812). Indeed, this consideration may explain the traditional hearsay exception for dying declarations; that exception only applies if the speaker appeared to be on the verge of death. The justification usually given for the exception is the dubious idea that the imminence of death guarantees reliability of the statement. A more plausible justification is that the traditional law reflects the confrontation right as qualified by the forfeiture doctrine, which in turn is limited by the prosecution's responsibility of mitigation—and that the necessity to mitigate by taking a victim's deposition subject to confrontation ends when death is imminent.

[43] 554 U.S. 353 (2008).

[44] For example, a defendant may be accused of a conspiracy crime, and the admissibility of a statement by another person may depend on showing that she and the defendant were members of the same conspiracy. *See, e.g.*, Fed. R. Evid. 801(d)(1)(E).

[45] 554 U.S. at 359–60; *see also* Fed. R. Evid. 804(b)(6) ("... and did so intending that result").

matter how abhorrent his reasons may have been, unless the evidentiary consequences of killing her were part of his thinking.

The *Giles* Court justified the result in part on equitable grounds, but it is difficult to see the equity in allowing a murderer to complain about his inability to cross-examine a witness when he himself rendered the witness unavailable by murdering her, and to succeed in the complaint because he was motivated to kill by unacceptable reasons other than desire to prevent live testimony.

Because the *Giles* rule yields unappealing results, a predictable consequence was that it would lead courts to compensate by adopting an unduly narrow conception of what statements are testimonial. And indeed, this appears to have come about in *Michigan v. Bryant*, discussed in Section IV.2, in which, because of *Giles*, a ruling of forfeiture was not available, and the Court permitted admissibility by taking a restrictive view of what is testimonial.

5. Children

Particularly vexing problems are presented when prosecutors offer the observations of children. This problem has become more salient in recent decades, as prosecutions for child abuse have become more common.

Evidence of the statement of a child may be highly probative evidence of a crime. Often, indeed, the statement describes, and is critical proof of, a crime of abuse imposed upon the child herself. But testifying at trial, especially in the presence of the person she is accusing, may be a particularly difficult ordeal for a young child, at least in the short term. The child's reaction, either in anticipation or in the event, may be to refuse to speak or otherwise to become incommunicative.

Nevertheless, the defendant's rights must be respected. It is a most unsatisfactory result for an accused to be subjected to criminal punishment, possibly very severe, and not have any opportunity to pose questions to the person whose statement is principally responsible for his conviction. Furthermore, prosecutors, recognizing that the live testimony of the child will likely have a powerful impact on the jury, often want the child to testify at trial. Sometimes, adequate preparation will mitigate the problem; if, for example, the prosecutor acclimates the child to the courtroom, lets her sit where she will be during trial, and shows her where the accused will be, the child may better able to testify face to face with the accused.

But when the child cannot, or will not, testify at trial, or at a pretrial proceeding subject to cross-examination and confrontation, courts may face a difficult choice. The situations may be broken down into two separate categories, depending on whether the witness appears willing and able to testify at trial under modified conditions. Further, the child's age and stage of development, and the audience of the statement, are factors that may critically affect analysis,

In the first category, the child is willing to testify at trial, but the prosecution seeks to modify the usual conditions of testimony. In a pre-*Crawford* case, *Maryland v. Craig*,[46] the

[46] 497 U.S. 836 (1990).

Supreme Court held that upon a sufficient showing of likely trauma to the child—there a girl six years old—the defendant's confrontation right must give way in part, and the child may testify out of the presence of the accused and the jury, so long as they can observe the testimony, including the witness's demeanor, by video transmission and the accused can communicate electronically with counsel. The *Craig* decision, reflecting an open-textured weighing of costs and benefits, is totally incongruous with the later decision in *Crawford*, but the Supreme Court has not shown any disposition to revisit the matter. In some cases, trial courts take seriously the burden of making a case-specific determination of whether the child is likely to suffer trauma from testifying in front of the accused; in others they reach that conclusion more perfunctorily.

In the second category of situations, when the child is determined to be completely unable to testify at trial, the court must determine whether the confrontation right precludes prosecution use of her earlier statement. If the child is very young, the court is unlikely to conclude that the statement was testimonial. Indeed, in *Ohio v. Clark*,[47] the only post-*Crawford* case in which the Supreme Court has considered the confrontation clause implications of statements by children, the Court indicated that it would be very unlikely that a statement by a very young child would ever be considered testimonial.[48]

One can go further, in a sense: A sound view is that below some threshold of age or cognitive development a child is incapable of being a witness altogether for purposes of the confrontation right. Very young children do not have the capacity to realize the solemn potential consequences of their statements—that their statements might cause others to change their view of reality and therefore to impose punishment on an accused person.[49] Arguably, they also are not at a stage of moral development at which it is appropriate to impose on them the burden and ordeal of being a witness.[50] On this view, thinking of very young children as witnesses under the framework used for adults is altogether inappropriate. (Views might vary as to what age or stage of development might be considered very young for these purposes.)

But to say that a very young child should not be considered a witness for purposes of the confrontation right does not mean that the accused should be left bereft of rights altogether. It still must be recognized that the child's statement may be critical evidence used to condemn the accused, and it appears to violate fundamental norms of fairness (expressed in the U.S. Constitution by the due process clauses of the Fifth and Fourteenth Amendments) to allow the accused to be convicted by virtue of the child's statement without having had an opportunity, if one can be reasonably afforded, to pose questions to the child in some manner. But such questioning should not be considered a testimonial event, and it need not be conducted by an attorney. Rather, the examination should be conducted, under an approved protocol, by a qualified expert; the child, in this view, is not a witness, but she is still a source of important evidence, and the examination is

[47] 135 S. Ct. 2173 (2015). [48] *Id.* at 2182.

[49] This is not inconsistent with the fact, known to parents of multiple children, that a very young child may come to understand that pointing a finger in blame to a sibling may cause the pointer to avoid punishment. That is a learned behavior of association, which does not require the complex understanding that one's statement may alter another person's understanding of reality.

[50] Clark, *supra* note 8.

not cross-examination, but rather expert examination of that source, who happens to be a very young human.[51]

Older children, who are fully able to appreciate the gravity of their statements, should be treated in the same manner as adults and thus subject to confrontation when their statements are fairly characterized as testimonial.

One other recurrent issue, which affects adults as well, arises with particular frequency with respect to children. After a suspected incident of abuse, the child may be examined by medical and social service personnel. Prosecutors will argue that the primary purpose of such an examination is care and treatment of the child, and that therefore any statements made by the child during the course of the examination should not be considered testimonial. But if the child is of sufficient maturity to realize that her statements will in all likelihood be passed on to police or prosecutorial authorities, and therefore used in legal proceedings against the alleged perpetrator, such statements should be deemed testimonial. Indeed, treating them otherwise gives the authorities a perverse incentive to stand back and allow medical and social service personnel to conduct whatever inquiry may be appropriate for law enforcement as well as other purposes, with everybody involved knowing full well that the child's statements will be used in an attempt to convict the accused person.

6. Remote Confrontation

As discussed in Section IV.5, the Supreme Court has provided that in some circumstances a child may testify from outside the courtroom, and outside the presence of the jury, with her testimony shown in the courtroom by electronic video transmission. The temptation arises to use the same technique when it is difficult or impossible to bring the witness to the courthouse. This can occur, for example, when a witness is very ill, or beyond the reach of the jurisdiction to compel her live appearance, or when an expert lives and works at a great distance from the court.

The accused might consent to have the testimony given remotely. And in some circumstances, though it is not possible for the witness to be brought to court, it is possible for the accused and counsel to be brought to the witness, where a deposition might be taken; given the unavailability of the witness at trial, the deposition would be admissible under traditional principles.

If we put these possibilities aside, we see that analysis of a procedure for remote testimony must take into account the two basic aspects of the confrontation right—the right to have witnesses brought face to face and the right to pose adverse questions. The former, as discussed in the historical section, has older roots, and if one gives it force then testimony given outside the physical presence of the accused raises a serious issue. Even before *Crawford*, the Supreme Court reflected this view. In 2002, it declined, by a

[51] This view is fully elaborated in Richard D. Friedman & Stephen J. Ceci, *The Child Quasi Witness*, 82 U. Chi. L. Rev. 89 (2015).

7–2 vote, to pass on to Congress (as it usually does with proposals emerging from the complex federal rule-making process) a proposal that, in some exigent circumstances and under prescribed conditions, would allow testimony to be taken away from court and outside the presence of the jury, but presented in the courtroom by contemporaneous two-way electronic-video transmission. "Virtual confrontation might be sufficient to protect virtual constitutional rights," wrote Justice Scalia, explaining his agreement with the decision. "I doubt whether it is sufficient to protect real ones."[52] Under a less categorical rule, the question would depend on whether the effects of confrontation are substantially diminished by the fact that the accused is visible to the witness only on screen rather than being immediately present. This is a subject on which, at present, there is little empirical basis for a firm conclusion.[53]

If the system puts little or no weight on the witness being brought face to face with the accused, and emphasizes only the right of adverse examination, it will naturally be more receptive to remote testimony given outside the presence of the accused. Even if so, assuming that the questioning counsel, as well as the accused, is not in the same room as the witness, there remains an open question whether the separation is likely to make adverse examination substantially less effective.

In any event, if remote testimony is to be allowed, a court should ensure that the quality of the transmission is sufficiently good, without noticeable lags, to prevent any gratuitous impairment of the ability of the cross-examiner to press the witness. And it should also ensure that each of the participants in the trial has a clear view of what is happening in the other room.

7. The Extent of Constitutionally Protected Impeachment

Now suppose that the witness does testify face to face with the accused, as the confrontation right demands. The right is not yet satisfied: The accused has a right to cross-examine the witness, and more broadly to impeach her. But plainly the accused's right must be limited; he cannot demand an answer to any question he pleases. And by nature, those limits must be dependent on the facts of the particular case. (This aspect of the right therefore stands in contrast with the categorical right to demand that an adverse witness be brought face to face.) Some guideposts may be stated, however.

On the one hand, the accused has no right to use confrontation as an opportunity for no or insubstantial reason, to harass the witness, to prolong the trial, or to create a distraction. And in some circumstances, if the accused poses a question to a witness and the witness fails to answer it, that is all the accused can demand.[54]

[52] Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure (April 29, 2002) (statement of Scalia, J.), 207 F.R.D. 89, 94.

[53] *See* Richard D. Friedman, *Remote Testimony*, 35 U. Mich. J.L. Ref. 695 (2002).

[54] In some circumstances, failure to answer fully may help the accused by suggesting that the witness is evasive and has not been telling the truth. But if a prior statement of the witness has been admitted and

On the other hand, the accused should be given a full opportunity to explore all potential sources of weakness in the witness's testimony. He should have some opportunity to reveal defects in the witness's general testimonial capacities—the abilities to perceive, remember, and communicate, and inclination to tell the truth. And especially, he should have ample opportunity to reveal defective operation of those capacities in the particular case.

Of particular importance is bias, which may be considered a factor relating to the particular case or parties that, whatever the witness's general character for truthfulness, may tend to dissuade her from telling the truth with respect to a given matter in the circumstances of the case being tried. The importance of allowing the accused to reveal bias is so important that *in some settings* it demands that other policies be overridden. These may include, for example, a rule against disclosure of a juvenile's prior disciplinary record[55] and the ordinarily strong policy against disclosure, in a rape case, of the complainant's sexual inclinations and prior sexual history.[56]

V. The Confrontation Right in Europe

In recent decades, many adjudicative systems outside the common law world have adopted a form of the confrontation right.[57] Most important is Article 6(3)(d) of the European Convention on Human Rights, which guarantees a criminal defendant the right "to examine or have examined witnesses against him...."[58] (Article 14, § 3(e), of the International Covenant on Civil and Political Rights is virtually identical.) Construction of this right has for the most part been unburdened by the presence of a rule against hearsay, because most of the systems to which the Convention applies have no such rule.

As with the confrontation clause of the U.S. Constitution, Article 6(3)(d) raises the question of who shall be considered witnesses. It has been clearly established that this is a term that has an "autonomous meaning" for purposes of the Convention—national courts cannot limit the coverage of the Convention—and that witnesses do not include only those who testify in court. Despite some loose language by the European Court on Human Rights that might suggest that anybody who makes a statement that is before the court and potentially used in fact-finding may be a witness, there seems to be an

the witness fails to confirm its substance, the natural conclusion may be that the witness believes her prior statement to be accurate but has since been intimidated.

[55] Davis v. Alaska, 415 U.S. 308 (1974).

[56] Lewis v. Wilkinson, 307 F.3d 413 (6th Cir. 2002) (holding that the confrontation right was violated by excluding portion of complainant's diary that could reasonably be read to imply that complainant fabricated rape charge for personal reasons).

[57] Stefano Maffei, *The Right to Confrontation in Europe: Absent, Anonymous and Vulnerable Witnesses* 9 (2d ed. 2009).

[58] The same provision also guarantees the right "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

underlying standard that, as in the United States, only statements testimonial in nature should invoke the right.[59] Statements made to investigating authorities are likely to make one be considered a witness, but other statements may have this effect as well.[60] The right is ordinarily exercised at trial, but the European Court has at least suggested that, if it is exercised at an earlier time, there may be no need for the witness to testify live at trial.[61] The right is one to put questions—ordinarily through counsel, but a system may provide that the defense has only the right to suggest questions for the judge to put.[62] The Convention has not been held to provide a right to have the witnesses brought face to face.[63]

The right to have witnesses examined is treated as part of a broader right to a fair trial under Article 6(1), and the European Court is sometimes quite lenient if it believes that, overall, the trial was fair. This passage from *Doorson v. The Netherlands* is characteristic:

> 80. Despite the Court of Appeal's efforts it was impossible to secure R.'s attendance at the hearing. In the circumstances it was open to the Court of Appeal to have regard to the statement obtained by the police, especially since it could consider that statement to be corroborated by other evidence before it.... Accordingly, no unfairness can be found in this respect....

The Court is also tolerant at times of anonymous evidence, though the result appears to depend on a case-specific weighing of all the circumstances.[64] The Court is receptive to special procedures in the case of child witnesses, and there appears to be a greater tendency in Europe than in the United States to apply such procedures as well with respect to adult complainants in sexual offense cases.[65]

[59] Maffei, *supra* note 57, at 85 (asserting that the practice of the European Court on Human Rights "fully aligns—albeit not explicitly—with the definition of *testimonial statements* developed in the U.S. after *Crawford*"). Maffei cites *Atánasov v. Macedonia (No. 2)*, App. No. 41188/06, Eur. Ct. H.R., Apr. 19, 2011, in which the domestic court had improperly relied on an accusatory letter, evidently written to the authorities.

[60] Maffei, *supra* note 57, at 84–85.

[61] Stefan Trechsel, *Human Rights in Criminal Proceedings* 307–08 (2005).

[62] *Id.* at 310–11.

[63] *See* Doorson v. The Netherlands, App. No. 20524/92, Eur. Ct. H.R., Mar. 26, 1996, § 25.

[64] Trechsel, *supra* note 61, at 315–18; Maffei, *supra* note 57, at 55–60.

[65] One analysis suggests that, in addition to protecting child witnesses from trauma, considerations that persuade a court in the United States that video testimony is justified include the need to combat international drug smuggling and to protect the national security, the health of a seriously ill witness, or a witness who has been intimidated (though note that in that case the forfeiture doctrine should apply). Jessica Smith, *Remote Testimony and Related Procedures Impacting a Criminal Defendant's Confrontation Rights*, University of California School of Government, Administration of Justice Bulletin No. 2013/02, at 10–11 (Feb. 2013). Although numerous commentators have advocated allowing such remote testimony in the case of adult rape complainants, e.g., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, National Crime Victim Law Institute, Violence Against Women Bulletin (Sept. 2011), it appears that so far very few courts have actually done so. *See R.T. v. Maria O.*, 56 Misc.3d 820, 53 N.Y.S. 3d 889 (Family Ct., Bronx Cty. 2017) (reviewing case law and highlighting *People v. Burton*, 556 N.W.2d 201 (Mich. App. 1996), a case involving a mentally infirm witness).

VI. Conclusion

Crawford and the development of an extensive body of law under Article 6(3)(d) to protect the right of an accused to question adverse witnesses have both been important and favorable developments. Over the long run, less categorical approaches such as that of the European Court may break down more quickly. The accused's right comes up against the interest in allowing a court to consider all highly probative evidence, and the temptation to favor the latter will often be difficult to resist unless the right is articulated in sturdy, categorical terms.

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