

Fall 2007

Kids Say the Darndest Things: The Prosecutorial Use of Hearsay Statements by Children

Tom Lininger
University of Oregon School of Law

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Courts Commons](#), [Evidence Commons](#), and the [Juvenile Law Commons](#)

Recommended Citation

Lininger, Tom (2007) "Kids Say the Darndest Things: The Prosecutorial Use of Hearsay Statements by Children," *Indiana Law Journal*: Vol. 82 : Iss. 4 , Article 4.

Available at: <https://www.repository.law.indiana.edu/ilj/vol82/iss4/4>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Kids Say the Darndest Things: The Prosecutorial Use of Hearsay Statements by Children

TOM LININGER*

INTRODUCTION

I am honored that Professor Aviva Orenstein¹ and the editors of the Indiana Law Journal have invited me to write a brief commentary on the longer submissions by Professors Robert Mosteller and Thomas Lyon. Professor Mosteller's scholarship on the Confrontation Clause has long impressed me as among the most cogent in this area,² and Professor Lyon's interdisciplinary work has shed new light on the challenges of cross-examining children.³ My fellow commentator Myrna Raeder has written authoritatively about the use of hearsay in prosecutions of domestic violence.⁴ While I may quibble with these authors over some points, my disagreement certainly does not indicate any lack of admiration for their important scholarship.

Rather than offer a blow-by-blow review of the other authors' work, I will present my own responses to three questions that the other authors have addressed. First, how can we distinguish between testimonial and nontestimonial hearsay statements by accusers in child abuse prosecutions? Second, when the accusers' out-of-court statements are in fact testimonial, how might we facilitate confrontation in a manner that does not impose onerous burdens on the accusers? Third, what are the proper parameters of forfeiture doctrine in the context of prosecutions for child abuse?

I would summarize my approach as follows: rather than sidestep the strictures of the Confrontation Clause with expedient, but intellectually dishonest, interpretations of the term "testimonial," courts should meet the challenge squarely. They should recognize that a substantial proportion of statements by alleged victims of child abuse are in fact testimonial. This conclusion should not foreclose prosecutions, however. Courts should consider a wide range of alternatives for the cross-examination of child witnesses,

* Assistant Professor, University of Oregon School of Law.

1. For an insightful analysis of Federal Rules of Evidence 413 and 414, which liberally admit propensity evidence in prosecutions of child abuse, see Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487 (2005).

2. Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring Confrontation*, 39 U. RICH. L. REV. 511 (2005) [hereinafter Mosteller, *Encouraging and Ensuring Confrontation*]; see also Robert P. Mosteller, *Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411 (2005); Robert P. Mosteller, "Testimonial" and the Formalistic Definition—The Case for an "Accusatorial" Fix, 20 CRIM. JUST. 14 (2005).

3. Thomas D. Lyon, *Applying Suggestibility Research to the Real World: The Case of Repeated Questions*, 65 LAW & CONTEMP. PROBS. 97 (Winter 2002); Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017 (2000) [hereinafter Lyon, *Child Witnesses and the Oath*]; Thomas D. Lyon, *Let's Not Exaggerate the Suggestibility of Children*, 38 CT. REV. 12 (2001) [hereinafter Lyon, *Let's Not Exaggerate*].

4. Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions After Crawford*, 20 CRIM. JUST. 24 (2005); Myrna S. Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311 (2005) [hereinafter Raeder, *Remember the Ladies and the Children Too*].

including cross-examination in settings other than trial. Courts and legislatures should also take the Supreme Court's cue to explore the full breadth of forfeiture doctrine, which extinguishes confrontation rights when defendants have wrongfully caused the unavailability of declarants. In short, the solution to the "*Crawford* problem" is not gamesmanship in defining the term "testimonial," but resourcefulness in meeting the requirement of cross-examination.

I. THE NEW TAXONOMY OF HEARSAY AFTER *CRAWFORD* AND *DAVIS*

In *Crawford v. Washington*⁵ and *Davis v. Washington*,⁶ the U.S. Supreme Court held that the Sixth Amendment requires confrontation of hearsay declarants whose statements are "testimonial." In *Crawford*, the Court considered three possible definitions of "testimonial," but left for another day the precise formulation of the definition.⁷ In *Davis*, the Court gave clearer guidance as to the meaning of "testimonial" in investigations of domestic violence. "[S]tatements 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," but the statements are generally testimonial if the emergency has ended and the police are investigating past crimes.⁸

Distinguishing testimonial from nontestimonial statements is more difficult in child abuse cases than in cases involving domestic violence against adult victims. In the latter category of cases, victims are more likely to complain to police shortly after the violence, so the temporal parameters set by the *Davis* ruling are more likely to come into play.⁹ The bright-line rule in *Davis* will rarely apply to child abuse cases, because the government usually does not question the complainant during the pendency of the

5. 541 U.S. 36 (2004).

6. 126 S. Ct. 2266 (2006).

7. Justice Antonin Scalia, the author of the majority opinion in *Crawford*, listed three possible "formulations" of testimonial statements:

[(1)] "ex parte in-court testimony or its functional equivalent— that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" [(2)] "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [and (3)] "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial"

Crawford, 541 U.S. at 51–52 (citations omitted) (first omission in original). While Justice Scalia did not choose between these three formulations, he did note that they all "share a common nucleus and then define the Clause's coverage at various levels of abstraction around it." *Id.* at 52.

8. *Davis*, 126 S.Ct. at 2273–74.

9. A significant proportion of the hearsay at issue in prosecutions of domestic violence consists of statements to 911 operators and statements to officers from complainants who have called for emergency assistance. Raeder, *Remember the Ladies and the Children Too*, *supra* note 4, at 322 (characterizing the excited utterance exception as the "workhorse of domestic violence cases").

emergency.¹⁰ Thus, the Supreme Court's only guidance for child abuse cases is the original *Crawford* decision, which is lamentably imprecise.¹¹

Professor Mosteller has very thoroughly canvassed the lower courts' interpretations of "testimonial" after *Crawford*.¹² Rather than survey the whole spectrum here, I will simply note its two poles. Some courts have inquired whether the child declarant could foresee the later prosecutorial use of the declarant's statements.¹³ Other courts have focused on the intentions of the government in eliciting statements from the declarant, or in arranging for other interviewers to elicit statements from the declarant.¹⁴ These two approaches might be distinguished as the "declarant-centered" approach and the "government-centered" approach.

I submit that neither approach is independently sufficient. The declarant-centered inquiry is underinclusive because many young children do not understand the criminal justice system and do not apprehend the likelihood that a statement to an investigating official will be preserved for later use in court. If the child declarant's understanding of the potential for prosecutorial use were the sine qua non of testimonial hearsay, the naïveté of children could make many of them immune from cross-examination. Ironically, the characteristics of children that heighten the urgency of cross-examination would diminish its likelihood. Moreover, the declarant-centered approach invites manipulative conduct by police investigators. So long as police leave the child declarant with the impression that he or she is not speaking under formal circumstances, the government could avoid producing the child declarant in court. For example, police could simply take the declarant to meet with an intermediary who is

10. Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 Ind. L.J. 917, 949 (2007).

11. Dissenting in *Crawford*, Chief Justice Rehnquist expressed his fear that the difficulty of discerning "testimonial" hearsay would cause consternation for prosecutors.

But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of testimony the Court lists is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

Crawford, 541 U.S. at 75 (Rehnquist, C.J., dissenting).

12. See Mosteller, *supra* note 10, at 944–65.

13. See, e.g., *Commonwealth v. DeOliveira*, 849 N.E.2d 218 (Mass. 2006) (concluding that even though police brought child to hospital for examination by doctor, and police remained at hospital to find out results of interview, they were not present during the interview, and a reasonable child in the declarant's position would not have foreseen prosecutorial use of statement to doctor); *State v. Bobadilla*, 709 N.W.2d 243, 255–56 (Minn. 2006) ("Moreover, given T.B.'s very young age, it is doubtful that he was even capable of understanding that his statements would be used at a trial. As amicus American Prosecutors Research Institute makes clear, children of T.B.'s age are simply unable to understand the legal system and the consequences of statements made during the legal process.").

14. See, e.g., *State v. Krasky*, 721 N.W.2d 916, 923 (Minn. Ct. App. 2006) (holding that in prosecution of alleged child abuse, statement elicited from accuser by nurse was testimonial because nurse practitioner was acting "in concert with" police); *State v. Mack*, 101 P.3d 349, 352 (Or. 2004) (finding that statements by three-year-old to social worker were testimonial where social worker was "serving a proxy for the police").

not conspicuously allied with police, but who does in fact conduct a forensic interview.¹⁵

On the other hand, the government-centered approach has significant drawbacks. Even where a government agent meets with a child for a nonforensic purpose, it is conceivable that a child could intentionally make an accusatory statement that merits classification as “testimonial.” For example, when a child blurts out an allegation of abuse to a government official who was not expecting to hear such a comment, the intent of the accuser should matter more than the intent of the audience. A child who writes a note about abuse and delivers it to a passive government official is no less an “accuser” than a child who makes such an allegation in response to interrogation.

The best approach would combine elements of the declarant-centered standard and government-centered standard. Ideally, courts would apply these two standards in the alternative. In other words, a child declarant’s statement would be testimonial if the child could foresee later prosecutorial use, or if the government elicited the statement (or contrived a third-party interview that elicited the statement) for forensic purposes. Such a hybrid approach might draw support from the *Davis* ruling, which primarily stressed the purpose of the government investigators, but also noted that the declarants’ intentions are an important part of the inquiry.¹⁶ I salute Professor Mosteller for capturing all the nuances of the case law in this area, and for avoiding the traps of the facile approaches urged by the most strident advocates on the left and the right.

II. FACILITATING CROSS-EXAMINATION OF CHILD DECLARANTS

Professor Lyon’s expertise in psychology gives him a unique appreciation of the challenges that arise in the cross-examination of child witnesses. Not every child fully understands the obligation to tell the truth.¹⁷ Some children may be highly suggestible, although it is important not to overstate this risk.¹⁸ Research suggests that inept cross-examination of children may distort their testimony;¹⁹ Wigmore’s characterization of

15. See, e.g., *Bobadilla*, 709 N.W.2d at 255–56; see also Michael Siegel & Daniel Weisman, *The Admissibility of Co-Conspirator Statements in a Post-Crawford World*, 34 FLA. ST. U. L. REV. (forthcoming 2007) (arguing that the classification of some co-conspirator statements as testimonial might be consistent with *Crawford* and *Davis*, even though the declarants are not aware that they are under surveillance by law enforcement agents).

16. The *Davis* Court stressed that it did not intend to imply that statements made in the absence of any interrogation are necessarily nontestimonial. 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. . . . 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 *Davis*, 126 S. Ct. at 2274, n.1.

17. Lyon, *Child Witnesses and the Oath*, *supra* note 3, at 1029.

18. Lyon, *Let’s Not Exaggerate*, *supra* note 3, at 14.

19. Thomas D. Lyon, *The New Wave in Children’s Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004, 1042–45 (1999) (collecting research); see also A. Leo Levin, Arlene Fickler & Malia Brink, *From Competency to Rules of Limited Exclusion: Seeking Better Tools for the Search for Truth*, 27 LITIG. 23, 32 (2001) (“Lawyers struggle tremendously with how to cross-examine a child witness effectively to expose influence without causing further influence and distorting the truth or harming the child.”).

cross-examination as the “greatest engine ever invented for the discovery of the truth”²⁰ may be unduly sanguine in the context of child testimony. Finally, it is important to bear in mind that courtroom testimony can be highly traumatic for children, and this trauma may amount to a “second victimization” of the accuser.²¹

Cognizant of such hazards, courts and legislatures should explore a range of alternatives for facilitating the cross-examination that the Sixth Amendment demands. One solution that predates *Crawford* and *Davis* is remote testimony by the accuser, relayed to the courtroom via closed-circuit television. In *Maryland v. Craig*,²² the Supreme Court approved the constitutionality of such cross-examination in child abuse cases if the trial court has made a record showing that the child’s fragility necessitates remote testimony. Can *Craig* survive *Crawford* and *Davis*? To be sure, *Craig* resorted to the teleological reasoning that the Court deplored in *Crawford*: according to the *Craig* majority, the need to protect child witnesses outweighed the benefit of in-court examination. Moreover, the author of the dissent in *Craig* was none other than Justice Antonin Scalia, who now leads the Court’s pro-confrontation majority. Yet there is a strong likelihood that *Craig* will withstand *Crawford* and *Davis*. The Supreme Court’s new jurisprudence has focused on the question of when confrontation is necessary, but the Court has not revised its standards for what types of cross-examination are adequate. The few lower courts that have considered this question have concluded that *Craig* remains viable after *Crawford* and *Davis*.²³ Thus lower courts should continue to allow remote testimony, where appropriate, to reduce the hardship of cross-examination in prosecutions of child abuse.

20. 5 WIGMORE ON EVIDENCE § 1367 (J. Chadbourne rev., 1974).

21. George K. Goodhue, Comment, *Maryland v. Craig: Balancing Sixth Amendment Confrontation Rights with the Rights of Child Witnesses in Sexual Abuse Trials*, 26 NEW ENG. L. REV. 497, 498 (2001) (“An extensive body of professional research clearly demonstrates that many victimized children, when forced to testify in open court in the presence of the accused, suffer a second victimization and traumatization.”).

22. 497 U.S. 836 (1990).

23. In *United States v. Pack*, for example, the court held that the remote testimony allowed in *Craig* is still permissible after *Crawford*.

We are not persuaded by the appellant’s further contention that the decision in *Crawford* renders the holding in *Craig* unsound. *Crawford* applies only to testimonial statements made prior to trial. The live, remote video testimony at issue in this case was presented at trial. In addition to being a departure from long-standing precedent, the appellant’s reasoning assumes away the constitutional issue in this case—whether the confrontation that occurred is constitutionally sufficient. *Crawford* does not address this question. The proper standard to be applied is that set forth in *Craig*, not *Crawford*. Applying that standard, we hold that the appellant’s right to confrontation of the witness in this case was not violated. This assignment of error is without merit.

NMCCA 200400772 (N-M. Ct. Crim. App. Oct. 26, 2006), available at <http://www.jag.navy.mil/NMCCA/PAK%20D.%20200400772%20PCE.doc>. See also *State v. Blanchette*, 134 P.3d 19, 22 (Kan. Ct. App. 2006) (“The decision in *Crawford* does not affect the constitutionality of K.S.A. 22-3434, which allows a child victim to testify by closed-circuit television. . . .”); *State v. Henriod*, 131 P.3d 232, 237 (Utah 2006) (“We disagree with the conclusion of the district court that *Crawford* abrogated *Craig*.”); *State v. Vogelsberg*, 724 N.W.2d 649, 650 (Wis. Ct. App. 2006) (upholding use of barrier between defendant and victim upon showing that “child would likely be further traumatized by having to face his abuser at trial.”).

Another important technique to mitigate children's trauma is pretrial cross-examination. Some commentators have suggested that battered women find depositions less intimidating than examination at trial, because the pace is more bearable and there are greater opportunities for breaks and conferences with counsel.²⁴ The same reasoning should apply to children. The Supreme Court's prior rulings, as well as lower court rulings, indicate that pretrial cross-examination is sufficient to satisfy the strictures of the Confrontation Clause.²⁵ Perhaps the defense might actually prefer to examine the child accuser in a setting comparable to the multidisciplinary centers where the government often elicits the initial accusatory statements. If children are more comfortable and forthright in such settings, isn't it only fair to allow defense counsel the same opportunities that the government enjoys?

A final important step is to reduce the asperity of in-court cross-examination. Child witnesses should be allowed to bring a support person who will stand by their side when they testify in court.²⁶ Ideally, child witnesses would have their own counsel with

24. See Nicole A. F. Lindenmyer, *Washington v. Crawford: Must Crime Victims Testify Against the Defendant?*, BATTERED WOMEN'S LEGAL ADVOC. PROJECT TECHNICAL ASSISTANCE PACKET 4 (2004), <http://www.bwlap.org/TAPS/Crawford.PDF> (noting that depositions are less stressful for victims than trial testimony, and encouraging prosecutors to arrange for pretrial depositions of victims as a means of satisfying confrontation requirements); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 784-97 (2005) (suggesting that greater pretrial confrontation of accusers would ease their burden after *Crawford*); Mosteller, *Encouraging and Ensuring Confrontation*, *supra* note 2, at 610-12 (advocating greater use of pretrial hearings to provide confrontation required by *Crawford*).

25. See *California v. Green*, 399 U.S. 149, 165 (1970) (holding that cross-examination of accuser at preliminary hearing was sufficient to meet constitutional requirements); *People v. Jurado*, 131 P.3d 400 (Cal. 2006) (concluding that pretrial cross-examination satisfied Sixth Amendment); *State v. Estrella*, 893 A.2d 348 (Conn. 2006) (same); *State v. Young*, 87 P.3d 308 (Kan. 2004) (same); *State v. Mohamed*, 130 P.3d 401 (Wash. Ct. App. 2006) (same). *But see* *People v. Frey*, 92 P.3d 970 (Colo. 2004) (cross-examination at pretrial hearings does not satisfy Confrontation Clause because defense attorneys have different motives at this stage).

26. Fourteen states now allow "support persons" in the courtroom. ARIZ. R. CRIM. P. 39(b)(9) (2004) (giving the victim the "right to name an appropriate support person, including a victim's caseworker, to accompany the victim at any interview, deposition, or court proceeding, except where such support person's testimony is required in the case."); CAL. PENAL CODE § 868.5 (West 2005) (allowing one support person to stand or sit by the witness's side when she takes the stand); COLO. REV. STAT. § 16-10-401 (2004) (a "victim's advocate"—defined as "any person whose regular or volunteer duties include the support of an alleged victim of physical or sexual abuse or assault"—may remain at trial even if the general public is sequestered.); 725 ILL. COMP. STAT. 120/4(9) (2005) (all victims of crime have "[t]he right to have present at all court proceedings, subject to the rules of evidence, an advocate or support person of the victim's choice."); MICH. COMP. LAWS § 600.2163a (2005) (a victim of sexual assault or child abuse "who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony."); MINN. STAT. § 631.046 (2004) (victims of sexual assault or child abuse may bring a "parent, guardian, or other supportive person" to be present "at the omnibus hearing or the trial."); N.Y. CRIM. PROC. LAW § 190.25(3)(h) (McKinney 2005) (victims who are 12 years old or younger may be accompanied by a "social worker, rape crisis counselor, psychologist or other professional."); OKLA. STAT. tit. 22, § 60.4(K) (2004) (a support person may accompany a domestic victim, but may not make legal arguments); S.C. CODE ANN. § 59-105-40 (2004) (support persons may join victims during testimony during disciplinary proceedings at "institutions of higher learning."); S.D. CODIFIED

standing to object to inappropriate questions.²⁷ Courts should exercise their power under Federal Rule of Evidence 611 (and its state analogs) to control the manner of cross-examination. In particular, courts must insist on age-appropriate questioning. Jurisdictions should develop protocols for age-appropriate questioning, and should perhaps even publish “pattern questions” that are more likely to withstand objection, just as jurisdictions publish “pattern jury instructions” that are more likely to win the approval of trial courts.

In sum, *Crawford* and *Davis* do not require the abandonment of videotaped interviews in multidisciplinary centers. I agree with Professor Lyon that these interviews are an important means of investigating alleged abuse and treating victims’ injuries, both psychological and corporal. Courts should admit the videotapes but should also insist upon cross-examination of the accusers at some point. Demarcating the limits of acceptable cross-examination will be an important task for the lower courts, and perhaps even the Supreme Court, in the years ahead.

III. CLARIFYING THE FORFEITURE DOCTRINE

In both *Crawford* and *Davis*, the Supreme Court noted the continuing vitality of forfeiture doctrine, whereby a defendant forfeits confrontation rights if he wrongfully procures the unavailability of a hearsay declarant.²⁸ For some prosecutors, forfeiture has a talismanic appeal. A researcher for the American Prosecutors Research Institute has gone so far as to suggest that virtually all domestic violence cases present opportunities for forfeiture arguments.²⁹ Professor Mosteller has wisely cautioned that forfeiture doctrine, if construed too broadly, might become the exception that swallows the rule of the Confrontation Clause.³⁰ My own view lies somewhere in the middle.

LAWS § 23A-28C-7 (2006) (“victim or witness assistant” may accompany victim to court); VA. CODE ANN. § 19.2-265.01 (2004) (parent or guardian of minor victim, or any other adult chosen by victim, may be present at trial); WASH. REV. CODE § 7.69.030(10) (2005) (victim of violent or sex crime may have “a crime victim advocate from a crime victim/witness program, or any other support person of the victim’s choosing, present at . . . judicial proceedings related to criminal acts committed against the victim”); WYO. STAT. ANN. § 7-11-408(b) (2004) (a support person may be present with a child victim of incest or sexual assault during a videotaped deposition); see also *State v. Dunbar*, 566 A.2d 970 (Vt. 1989) (allowing for a victim of child molestation to testify with two support persons present).

27. See Tom Lininger, *Bearing the Cross*, 74 *FORDHAM L. REV.* 1353, 1398–400 (2005) (discussing the value of attorneys to accusers).

28. The *Crawford* Court indicated that “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds,” even if the hearsay at issue is plainly testimonial. *Crawford v. Washington*, 541 U.S. 36, 62 (2004). The *Davis* court discussed forfeiture in more detail, declaring that “when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce.” *Davis v. Washington*, 126 S.Ct. 2266, 2280 (2006). According to the *Davis* Court, “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” *Id.* After vacating one of the cases reviewed in *Davis*, the Court suggested that the prosecution explore the applicability of forfeiture doctrine on remand. See *id.*

29. Adam M. Krischer, *Though Justice May Be Blind, It Is Not Stupid: Applying Common Sense to Crawford in Domestic Violence Cases*, PROSECUTOR, Nov.–Dec. 2004, at 14.

30. Mosteller, *supra* note 10, at 987.

I favor a robust forfeiture doctrine, in part because *Crawford* and *Davis* have made the victim's testimony so much more important for the success of a prosecution. By making the victim indispensable, the new confrontation jurisprudence has made the victim a more attractive target for coercion by the defendant.³¹ The Confrontation Clause must be a shield, not a sword.³² At the same time, if the forfeiture argument becomes too facile, courts will deprive defendants of confrontation rights simply due to the nature of the charge—turning the presumption of innocence on its head.

In setting the parameters of the forfeiture doctrine, the most difficult challenge is to determine what conduct should effect a forfeiture of confrontation rights. Surely witness tampering (i.e., wrongful conduct undertaken with the intent of procuring the absence of the witness at trial) should qualify under the forfeiture doctrine. At the other extreme, conduct that incidentally and unforeseeably causes a witness to feel reluctant about testifying should not forfeit the defendant's confrontation rights. The tricky questions arise in the middle of the spectrum. For example, if the defendant intentionally caused the death of the victim, but did not do so for the primary purpose of causing the victim's absence at trial, should the defendant be able to invoke confrontation rights at trial?³³

I suggest that forfeiture doctrine should extend to situations in which the victim commits wrongful conduct that foreseeably and proximately causes the absence of the victim at trial. The terms "foreseeable" and "proximate" do not create a bright-line rule, but we have experience interpreting these terms in the context of tort law. I recognize that such a forfeiture rule would present more complications than a regime in which forfeiture is co-extensive with witness tampering, but I think the added complexity is worth the trouble. The criminal justice system should not reward an abuser whose conduct killed, incapacitated, or otherwise purposefully silenced a witness, even if the abuser's primary purpose was not to procure unavailability.

All states should codify forfeiture as a hearsay exception. At present, the doctrine is primarily a principle of constitutional interpretation that helps surmount the hurdle of the Confrontation Clause,³⁴ but a small number of jurisdictions have also created a

31. See *State v. Mechling*, 633 S.E.2d 311 (W. Va. 2006) (collecting various studies and articles indicating that over half of defendants in domestic violence cases issue threats or retaliate against accusers); see also *Davis*, 126 S.Ct. at 2279–80 ("This particular type of crime [domestic violence] is notoriously susceptible to intimidation and coercion of the victim to ensure that she does not testify at trial."); Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 442–43 (2006) (noting that "[m]any defendants charged with crimes of domestic violence engage in wrongdoing designed to make it impossible for their victims to testify against them," and arguing that this challenge has exacerbated the difficulty of "victimless" prosecutions after *Crawford*).

32. Professor Joan Meier made this argument very persuasively in the amicus brief that she filed in the *Davis* case. Brief for National Network to End Domestic Violence, Indiana and Washington Coalitions Against Domestic Violence, Legal Momentum, et al. as Amici Curiae Supporting Respondents, *Davis v. Washington*, 126 S. Ct. 1457 (2006) (Nos. 05-5224, 05-5705), 2006 WL 284229.

33. On this subject, I strongly recommend Professor Raeder's outstanding article in the *Brooklyn Law Review*, *supra* note 4.

34. The seminal case that addressed forfeiture by wrongdoing is *Reynolds v. United States*, 98 U.S. 145, 158–59 (1879) (ruling that a defendant who wrongfully procures the unavailability

hearsay exception based on the opponent's wrongful conduct.³⁵ The value of codification is significant. To begin with, the rule puts judges and attorneys on notice that forfeiture law is potentially applicable in a wide range of cases.³⁶ Further, the rule helps to ensure that statutory law is no more restrictive than constitutional law in the area of forfeiture. The present misalignment of constitutional and statutory law presents the risk that prosecutors might succeed in proving forfeiture as a constitutional matter, only to find that no statutory hearsay exception accommodates the hearsay in question.³⁷ This risk is especially great in child abuse cases because the excited utterance exception may not be available due to the lapse between the incident and the interview.³⁸

CONCLUSION

The effective prosecution of child abuse does not require the circumvention of the Confrontation Clause. We should not simply gerrymander the map of testimonial and

of a hearsay declarant cannot be heard to protest the admission of the absent declarant's hearsay statements). For examples of cases that acknowledge forfeiture principles in states without forfeiture statutes, see *State v. Valencia*, 924 P.2d 497 (Ariz. Ct. App. 1996); *People v. Moore*, 117 P.3d 1 (Colo. Ct. App. 2004); *State v. Hallum*, 606 N.W.2d 351 (Iowa 2000) (en banc); *State v. Meeks*, 88 P.3d 789 (Kan. 2004); *State v. Magouirk*, 539 So. 2d 50 (La. Ct. App. 1988), *opinion withdrawn in part on reh'g*, 561 So. 2d 801 (La. Ct. App. 1990); *State v. Fields*, 679 N.W.2d 341 (Minn. 2004); *State v. Turner*, No. C0-03-163 (Minn. Ct. App. Nov. 1, 2005); *State v. Sheppard*, 484 A.2d 1330, 1345-48 (N.J. Super. Ct. Law Div. 1984); *People v. Geraci*, 649 N.E.2d 817 (N.Y. 1995); *Gonzalez v. State*, 195 S.W.3d 114 (Tex. Crim. App. 2006); *State v. Ards*, No. 2005AP2806-CR. (Wis. Ct. App. 2006).

35. This doctrine appears in Federal Rule of Evidence 804(b)(6), was added to the Federal Rules in 1997, and appears in fourteen state analogs. *See, e.g.*, CAL. EVID. CODE §1350; DEL. R. EVID. 804(b)(6); HAW. R. EVID. 804(b)(7); 725 ILL. COMP. STAT. 5/115-10.2a; MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); OHIO R. EVID. 804(b)(6); PA. R. EVID. 804(b)(6); S.D.R. EVID. 804(b)(6); TENN. R. EVID. 804(b)(6). The supreme courts of Kentucky and Vermont added analogs of Federal Rule of Evidence 804(b)(6) to those states' evidence codes within a few months after the *Crawford* decision. KY. R. EVID. 804(b)(5); VT. R. EVID. 804(b)(6). In the summer of 2005, the Oregon legislature passed a unique forfeiture statute that now appears in Oregon Rule of Evidence 804(f)-(g).

36. In several cases over the last few years, advocates and trial judges overlooked opportunities to invoke the doctrine of forfeiture by wrongdoing. For example, in *People v. Kilday*, the prosecution failed to raise a forfeiture argument until the case reached the appellate level, and the court disallowed this argument. No. A099095, slip op. at 6 n.8 (Cal. Ct. App. June 30, 2004), *vacated on other grounds*, 20 Cal. Rptr. 3d 161 (Cal. Ct. App. 2004), *rev'd and superseded*, 105 P.3d 114 (Cal. 2005). Perhaps if California had a broader forfeiture statute such as the one recommended herein, the prosecution in *Kilday* would have recognized the opportunity to raise the argument in a timely manner. *See Davis*, 126 S.Ct. at 2280 (remanding Hammon's case to state court and suggesting that parties examine potential applicability of forfeiture doctrine); *Mechling*, 633 S.E.2d at 311 (remanding with suggestion to consider forfeiture).

37. *See* FED. R. EVID. 802 (indicating that "[h]earsay is not admissible except as provided by these rules"); *see also* CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE UNDER THE RULES 157, 359-84 (5th ed. 2005) (explaining that, when offering hearsay against the accused, the prosecution must deal separately with the strictures of statutory hearsay law and the constitutional confrontation requirements).

38. Mosteller, *supra* note 10, at 949-50.

nontestimonial hearsay. Rather, we should explore ways to allow confrontation of child witnesses in a manner and setting that reduces the hardship for these witnesses. We should also clarify the boundaries of forfeiture doctrine, so that defendants cannot profit from intimidation of witnesses. Just as in the era of *Maryland v. Craig*, we can adapt—but not abandon—confrontation law in order to address the exigencies of child abuse prosecutions.