DANFORTH V. MINNESOTA: THE CONFRONTATION CLAUSE, RETROACTIVITY, AND FEDERALISM

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> Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison.[1]

INTRODUCTION

Consider Dan, a nice, ordinary man.[2] Several years ago, Dan was accused of sexually abusing a minor.[3] He vehemently denied the accusation and asserted his innocence. The minor, a six-year old child, did not testify at trial. Instead, the prosecution prepared a videotape of the child accusing Dan. When the prosecution asked the judge to play the tape for the jury, Dan objected. He argued that the prosecution not only prepared the tape, but also directed its content. If they did not like how one accusation played, they could simply film another.

Dan asserted that because he could not cross-examine the child, showing the tape would violate the Sixth Amendment's Confrontation Clause, which states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[4] The judge overruled Dan's objections and admitted the tape based on an exception to the general rule prohibiting the admissibility of out-of-court accusations. The exception, created by a Supreme Court decision in 1980, held such accusations were admissible if they bore "adequate indicia of reliability."[5] Dan was convicted, his appeal denied, and his petition for certiorari denied as well.

Dan was still in prison in 2004 when, in the landmark decision of *Crawford v. Washington*,[6] the Court overruled the "indicia of reliability" exception, holding that "the only indicium of reliability sufficient to satisfy

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[1] Fay v. Noia, 372 U.S. 391, 441 (1963).

[2] The facts in the introduction are hypothetical, although loosely based on *Danforth v. Minnesota*, 128 S. Ct. 1029 (2008). The facts of *Danforth* are discussed *infra* in Part II.B.

[3] This Note does not address the complex and sensitive questions presented by attempting to evaluate the respective constitutional rights of the accused and accuser in child sexual abuse cases. For a thoughtful discussion of these issues, see Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691.

[4] U.S. CONST. amend. VI.

[5] Ohio v. Roberts, 448 U.S. 56, 66 (1980), *overruled by* Crawford v. Washington, 541 U.S 36 (2004).

[6] 541 U.S. 36 (2004).

constitutional demands is the one the Constitution actually prescribes: confrontation."[7] The Court concluded that admitting evidence like a videotaped accusation prepared by the prosecution violates the Constitution, absent an opportunity to cross-examine the accuser.[8]

But things still looked bleak for Dan. After *Crawford*, the Court firmly held the jailhouse door shut on those imprisoned under the indicia of reliability exception.[9] To understand why the Court would deny those imprisoned under an unconstitutional rule the opportunity to challenge their convictions, it is first necessary to examine a "much-maligned"[10] corner of the Court's criminal procedure jurisprudence—its retroactivity doctrine.

Under the retroactivity doctrine, the Court has created a double standard for applying new constitutional rules.[11] When the Court announces a new rule, as in *Crawford*, the rule applies to pending and future cases (i.e., cases on direct review), but does not "retroactively" apply to final judgments challenged through a habeas petition or other form of post-conviction challenge (i.e., cases on collateral review). A judgment becomes final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."[12] Because Dan's conviction became final before *Crawford* was decided, if he sought federal habeas relief, *Crawford*'s rule would not retroactively apply.

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[7] *Id.* at 69. For a discussion of *Crawford*'s status as a landmark decision, see generally Fred O. Smith Jr., Note, Crawford*'s Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 STAN. L. REV. 1497, 1498 (2008) ("Courts have called the decision a 'bombshell,' a 'renaissance,' and the dawning of a 'new day' in the Sixth Amendment's Confrontation Clause jurisprudence. News reports have called the decision 'an earthquake rocking America's criminal justice foundations.'" (footnote omitted)); Brian Spitser, Note, *The Case for the Retroactive Application of* Crawford v. Washington, 71 BROOK. L. REV. 1631, 1632 n.7 (2006) (collecting commentators' reactions to *Crawford*).

[8] *Crawford*, 541 U.S. at 68.

[9] Whorton v. Bockting, 549 U.S. 406, 421 (2007). For a general discussion of federal post-conviction remedies including habeas corpus, see generally 39 C.J.S. *Habeas Corpus* §§ 1-431 (2003).

[10] Note, *Rethinking Retroactivity*, 118 HARV. L. REV. 1642, 1646, 1663 (2005). *See, e.g.*, Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161, 166 (2005) ("For the past forty years, the Court has struggled with these concerns, producing a lineage of cases that have generated varying reactions as to their efficiency and fairness in deciding who benefits from a change in decisional law.").

[11] Not only has the retroactivity doctrine created a constitutional double standard, it has also created an asymmetric standard as well. If a new constitutional rule benefits criminal defendants, it does not apply retroactively and is not available to habeas petitioners; however, if the rule benefits the prosecution, it applies retroactively and is available to oppose habeas petitions. Lockhart v. Fretwell, 506 U.S. 364, 373 (1993). This asymmetry drew a sharp dissent from Justice Stevens in *Lockhart*, who wrote that "[a] rule that generally precludes defendants from taking advantage of post-conviction changes in the law, but allows the State to do so, cannot be reconciled with this Court's duty to administer justice impartially." *Id.* at 388-89 (Stevens, J., dissenting).

[12] Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987).

Four years after *Crawford*, in a second landmark decision, *Danforth v. Minnesota*,[13] the Court empowered the states to provide the retroactive relief which the federal system denied.[14] *Danforth* stands for the broad proposition that states may retroactively apply each new constitutional rule of criminal procedure, not only *Crawford*'s Confrontation Clause rule.[15] This Note's thesis is that, notwithstanding this generalized power, in particular state courts should retroactively apply *Crawford*.[16]

Principally, *Crawford* merits retroactive application because cross-examination is central to discovering the truth at trial.[17] The Supreme Court has emphasized "the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case."[18] Likewise, Dean Wigmore has described cross-examination as the "greatest legal engine ever invented for the discovery of truth."[19] *Crawford* also merits retroactivity because of fundamental fairness.[20] The Confrontation Clause protects "a fundamental right essential to a fair trial in a criminal prosecution."[21] It is

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13 128 S. Ct. 1029 (2008).

14 *Id.* at 1033.

15 *Id.* ("The question in this case is whether *Teague* [*v. Lane*, 489 U.S. 288 (1989),] constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. We have never suggested that it does, and now hold that it does not.").

16 This Note argues that retroactivity of new rules in state courts should be determined one rule at a time, that is, on a case-by-case basis, and that retroactivity will make sense for some states, but not others.

For a more sweeping thesis, advocating that state courts should "universally" apply all new rules of federal constitutional doctrine retroactively, see Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," after* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 56 (2009) ("A [general] rule of retroactivity in state postconviction proceedings simultaneously preserves a state's power to develop federal constitutional doctrine, while supporting—if universally applied by all states—the supremacy of that doctrine by ensuring its uniform application nationwide. . . . Retroactivity in postconviction proceedings should therefore be the preferred approach." (footnote omitted)).

17 *See* Crawford v. Washington, 541 U.S. 36, 61 (2004).

18 Pointer v. Texas, 380 U.S. 400, 404 (1965) (incorporating the Confrontation Clause).

19 5 JOHN H. WIGMORE, EVIDENCE § 1367 (3d ed. 1940), *quoted in* California v. Green, 399 U.S. 149, 158 (1970).

20 *See generally* 23 C.J.S. *Criminal Law* § 1514 (2006) ("The right of a defendant to confront the witnesses against him or her is a valuable and constitutionally protected right. It is a fundamental rule of law . . . ." (footnote omitted)).

21 *Pointer*, 380 U.S. at 404 (incorporating the Confrontation Clause). *Cf.* Paul J. Mishkin, *Foreword*: *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965). Professor Mishkin noted:

> Most constitutional requirements defining due criminal process have as their prime if not sole objective:
> "[T]he goal of insuring the reliability of the guilt-determining process—reducing to a minimum the possibility that any innocent individual will be punished. . . . If in this effort to insure that none but those guilty be convicted, many guilty go free, the price is not too great in the long view of democratic government. If there is any consideration basic to all civilized procedures it is this, no matter how disparate the means chosen to give it effect.

fundamentally unfair to have a constitutional double standard for such an essential right. Pragmatically, *Crawford* is a good candidate for retroactive application because of its straightforward, bright-line holding and its manageable effects on the states' orderly administration of justice.[22] Moreover, it is in the states' interests to retroactively apply *Crawford*.[23] Doing so, states reassert their importance in our federalist system as primary guardians of individual liberty.[24]

This Note argues that states should exercise their power recognized in *Danforth* to retroactively apply *Crawford*. Part I provides a general background on the origins of the Confrontation Clause and the retroactivity doctrine. Part II examines the Court's recent Confrontation Clause jurisprudence from *Crawford* through *Danforth*. Part III then explains why states should retroactively apply *Crawford* in light of *Danforth*.

> This consideration, often expressed in terms of 'fairness,' gives meaning to the great bulk of procedures that have become part of the due process of law . . . ."

Id. at 80-81 (quoting Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957)). Mishkin's article was referenced by both the majority and dissent in *Danforth*. *See* Danforth v. Minnesota, 128 S. Ct. 1029, 1038 n.12 (2008); *id.* at 1049 (Roberts, C.J., dissenting).

22 *See* Mary C. Hutton, *Retroactivity In The States: The Impact of* Teague v. Lane *on State Post-conviction Remedies*, 44 ALA. L. REV. 421, 445 (1993) ("[B]ecause of their proximity to the problem, state judges are better able to predict the impact of a criminal procedure rule, and thus can gauge what degree of response is necessary and appropriate. From this vantage point they can provide an adequate 'check' on the process. By doing so, they can declare how far to open the jailhouse door, rather than to keep it slammed shut, as appears to be the new role of the federal courts in habeas." (footnotes omitted)).

Of course, review of the convictions will be subject to harmless error analysis and convictions based on more than out-of-court testimonial statements not subject to cross-examination may be upheld despite the *Crawford* violation. *See* Chapman v. California 386 U.S. 18, 22 (1967) ("[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.").

23 *See* Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in* Danforth v. Minnesota, 102 NW. U. L. REV. COLLOQUY 365, 371-73 (2008) (discussing reasons why it is in states' interest to provide greater retroactive relief than afforded by the federal system); Lasch, *supra* note 16, at 43 ("Among the various options from which state courts may choose, full retroactivity is far and away the best choice, offering fairness to litigants, a voice for state courts in the development of federal constitutional doctrine, and uniformity in the application of constitutional rules announced by the federal courts.").

24 For example, the Confrontation Clause first appeared in a state rather than federal constitution. It was included in the Virginia Bill of Rights, authored by George Mason in 1776. *See infra* text accompanying notes 35-38.

I. BACKGROUND: THE CONFRONTATION CLAUSE AND RETROACTIVITY

A. *The Confrontation Clause*

The Sixth Amendment right of the accused "to be confronted with the witnesses against him"[25] is simply a procedural guarantee,[26] protecting the right of the accused to question the prosecution's witnesses. If the prosecution fails to produce a witness, it cannot introduce an out-of-court statement of that witness.[27] This simple, bright-line procedure reflects the Framers' judgment about the best method for determining the truth of accusations.[28] As the Court wrote in *Crawford*:

> [T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.[29]

In other words, the most reliable method of discovering the truth of accusations is through cross-examination.[30]

The origins of the Confrontation Clause are subject to debate.[31] Some trace the right to question one's accusers as far back as Roman times.[32] Others credit the English common law with developing the particular trial right of adversarial cross-examination.[33] Still others point to the specific trial of Sir Walter Raleigh for treason in 1603.[34]

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25 U.S. CONST. amend. VI.

26 *See* Crawford v. Washington, 541 U.S. 36, 61 (2004).

27 *See generally* 5 WIGMORE, *supra* note 19, § 1367; Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1041-43 (2003).

28 *Crawford*, 541 U.S. at 61.

29 *Id.*

30 *Id. See also* MATTHEW HALE, HISTORY OF THE COMMON LAW OF ENGLAND, 345-46 (Charles Runnington ed., 6th ed. 1820) (1713) ("[B]y this personal appearance and testimony of witnesses, there is opportunity of *confronting* the adverse witnesses . . . and by this means great opportunities are gained for the true and clear discovery of the truth."); Pointer v. Texas, 380 U.S. 400, 404 (1965).

31 *See* California v. Green, 399 U.S. 149, 172-74 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause comes to us on faded parchment."), *quoted in* Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 77 n.2 (1995).

32 *Crawford*, 541 U.S. at 43 ("The right to confront one's accusers is a concept that dates back to Roman times." (citing Coy v. Iowa, 487 U.S. 1012, 1015 (1988))).

33 *Id.* at 43 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES, 373-74 (3d ed. 1768)). Distinguishing the English common law procedure from the continental civil law's inquisitorial system, the Court in *Crawford* noted that "[t]he common-law tradition is one of live testimony in court subject to adversarial testing." *Id.*

34 Jonakait, *supra* note 31, at 81 n.18 (citing scholars who "have argued that the trial of Sir Walter Raleigh was the inspiration for the Confrontation Clause" including Daniel Shaviro, *The Supreme*

On the other hand, the express constitutional guarantee of confrontation is a uniquely American invention, first codified in the Virginia Bill of Rights in 1776, authored by George Mason.[35] Section 8 of the Virginia Bill of Rights states that "in all capital or criminal prosecutions a man hath a right . . . to be confronted with the accusers and witnesses."[36] From 1776 to 1783, seven more states adopted bills of rights; each included a confrontation clause.[37] And, although the United States Constitution did not initially include the right to confront one's accusers, in 1791 the Sixth Amendment remedied this omission with a confrontation clause closely resembling that of the Virginia Bill of Rights.[38]

One of the earliest cases to discuss the Confrontation Clause was *United States v. Burr*[39]—the trial of former Vice President Aaron Burr for treason in 1807.[40] Riding circuit, Chief Justice John Marshall wrote of the constitutional right of confrontation: "I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important."[41] Aside from its 1895 decision in *Mattox v. United States*,[42] however, the Court was relatively quiet on the Confrontation Clause's meaning for more than 150 years.[43]

Court's Bifurcated Interpretation of the Confrontation Clause, 17 HASTINGS CONST. L.Q. 383 (1990), Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485 (1987), and Frank T. Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972)).

35 *See* VA. CONST. art. I, § 8; Mosteller, *supra* note 3, at 748 n.277 (citing FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 34 (1969)). *See also* Jonakait, *supra* note 31, at 119 n.198 ("The available information thus permits only the following limited conclusion as to the immediate genesis of the Sixth Amendment: in its basic structure, compactness of arrangement, and enumeration of rights the amendment follows the recommendation of the ratifying convention of Virginia, which in turn was but an amplification of the corresponding section of the Bill of Rights drawn up by George Mason." (quoting HELLER, *supra*, at 33-34)).

36 VA. CONST. art. I, § 8.

37 *Crawford*, 541 U.S. at 48. The seven other states were Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire (in chronological order). *Id.*

38 The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. Section 8 of the Virginia Bill of Rights states: "[I]n criminal prosecutions a man hath a right . . . to be confronted with the accusers and witnesses." VA. CONST. art. I, § 8.

39 25 F. Cas. 187 (Marshall, Circuit Justice, C.C.D. Va. 1807).

40 Smith, *supra* note 7, at 1504-05.

41 *Burr*, 25 F. Cas. at 193, *quoted in* Smith, *supra* note 7, at 1505.

42 156 U.S. 237 (1895).

43 *See* Mosteller, *supra* note 3, at 718. In *Mattox*, the Court discussed the purpose of the Confrontation Clause in the following passage:

> The primary object of the [the Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at

This quiescence ended in 1965, when the Court "incorporated" the Confrontation Clause in *Pointer v. Texas*.[44] In *Pointer*, the Court held that because the Confrontation Clause is "a fundamental right essential to a fair trial in a criminal prosecution,"[45] it is constitutionally required in all criminal trials, whether state or federal.[46] The Court premised its holding on the importance of cross-examination to "bringing out the truth in the trial."[47]

The next major Confrontation Clause decision came in 1980, when the Court announced in *Ohio v. Roberts*[48] that since the Clause's "underlying purpose" was to ensure the reliability of evidence, an out-of-court statement should be admissible as long as it bears "adequate indicia of reliability."[49] The Court went on to hold that an out-of-court statement should be considered conclusively reliable, and thus admissible, whenever it fell within a "firmly rooted hearsay exception."[50]

As a result, cross-examination was no longer considered constitutionally required.[51] Instead, hearsay rules governed the admissibility of out-of-

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> him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox, 156 U.S. at 242-43.

[44] 380 U.S. 400 (1965). Originally, the Bill of Rights applied only to the federal government, but not to the states. Barron v. Baltimore, 32 U.S. 243, 247 (1833). For example, the Sixth Amendment applied in all federal criminal trials, but not in state trials. During the twentieth century, the Court began gradually changing this through its incorporation doctrine, making "a provision of the Bill of Rights which is fundamental and essential to a fair trial . . . obligatory upon the States." *Pointer*, 380 U.S. at 403 (quoting Gideon v. Wainwright, 372 U.S. 335, 342 (1963)) (internal quotation marks omitted). *See generally* 16C C.J.S. *Constitutional Law* § 1459 (2005) ("The Due Process Clause of the Fourteenth Amendment to the United States Constitution incorporates many or most of the specific protections defined in the Bill of Rights; which originally restricted only the federal government. These incorporated provisions thus apply to the states as well as the federal government." (footnotes omitted)).

[45] *Pointer*, 380 U.S. at 404.

[46] *Id.* at 403. *See generally* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE § 28.05 (5th ed. 2008) (discussing *Pointer* and constitutional dimensions of the Confrontation Clause).

[47] *Pointer*, 380 U.S. at 404 (citing 5 WIGMORE, *supra* note 19, § 1367).

[48] 448 U.S. 56 (1980).

[49] *Id.* at 65-66. *See* Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure:* Crawford*'s Birth did not Require that* Roberts *had to Die*, 15 J.L. & POL'Y 685, 694-98 (2007) (critiquing *Roberts* while finding merit in its reliability requirement for nontestimonial hearsay).

[50] *Roberts*, 448 U.S. at 66. *See generally* 23 C.J.S. *Criminal Law* § 1536 (2006) ("The state-of-mind exception, the excited utterance exception, and the exception for statements made for purpose of medical diagnosis or treatment to the hearsay rule are 'firmly rooted' for Confrontation Clause purposes." (footnotes omitted)).

[51] *Roberts*, 448 U.S. at 66 ("[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.").

court statements.[52] And "the rights of face-to-face confrontation . . . were easily ignored"[53] because

> [*Roberts*] required absolutely no showing of trustworthiness for statements admitted under the long list of established hearsay exceptions that *Roberts* itself colorfully lampooned as "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists," and allowed ad hoc balancing for the scrutinized statements that fell within non-traditional exceptions or problematic expansions of traditional exceptions.[54]

Together, *Roberts* and *Pointer* also represent two larger trends in the Court's jurisprudence in the latter half of the twentieth century. *Roberts* is an example of the Court creating new constitutional rules of criminal procedure by redefining what the Bill of Rights requires.[55] *Pointer* is an example of the Court expanding the application of the Bill of Rights through the incorporation doctrine.[56] Not surprisingly, *Pointer* also coincided with a dramatic rise in the number of habeas petitions filed in federal courts.[57] Partly in response to this flood of habeas petitions, and partly as a result of a remarkable compromise, the Court developed another new doctrine—retroactivity.[58]

B. *The Retroactivity Doctrine*

In brief, the retroactivity doctrine provides that when the Court announces a new constitutional rule, as it did in *Roberts* and *Crawford*,[59] the new rule applies to all cases not yet decided, and all future cases, but not to

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52 *See* Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause after* Crawford v. Washington, 15 J.L. & POL'Y 791, 791-92 (2007) ("[*Roberts*] permitted the use of hearsay in criminal cases under the Confrontation Clause so long as the evidence either fell into a 'firmly rooted' hearsay exception, or bore 'particularized guarantees of trustworthiness.' As the jurisprudence developed, nearly all of the hearsay exceptions were pronounced by the courts to be 'firmly rooted,' and in the relatively unusual circumstance that otherwise admissible hearsay was not firmly rooted, judges had a great deal of discretion with which to determine whether the evidence bore the necessary 'particularized guarantees of trustworthiness.'" (footnotes omitted)).

53 Mosteller, *supra* note 49, at 696.

54 *Id.* (quoting *Roberts*, 448 U.S. at 62).

55 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.8(a)-(b) (2d ed. 1999) [hereinafter LAFAVE].

56 *Id.*

57 *See* Hutton, *supra* note 22, at 433-35.

58 Richard H. Fallon Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1738-40 (1991).

59 Crawford v. Washington, 541 U.S. 36 (2004); *Roberts*, 448 U.S. 56. *See also* Whorton v. Bockting, 549 U.S. 406, 416 (2007) ("[I]t is clear that *Crawford* announced a new rule. The *Crawford* rule was not 'dictated' by prior precedent. Quite the opposite is true: The *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled.").

cases already finally decided.[60] Since the retroactivity doctrine's creation in the latter half of the twentieth century, its creation of a constitutional double standard has drawn steady criticism.[61]

1. Origins of the Retroactivity Doctrine

"Judicial decisions have had retrospective operation for near a thousand years," noted Oliver Wendell Holmes in 1910.[62] Indeed, until 1965, the Court had no retroactivity doctrine.[63] Instead, each holding applied to all cases, whether not yet decided, pending on direct appeal, or finally decided and challenged through collateral review.[64]

In the early 1960s, the Court, led by Chief Justice Earl Warren, began to significantly expand the rights of the criminally accused.[65] In what came

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60 *See generally* LAFAVE, *supra* note 55, § 28.6(b), (d), (e) (providing description of how the retroactivity doctrine is currently applied under the approach announced in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion)). The judgment becomes final after the conviction has been rendered, the appeals exhausted (or the time for appealing expired), and the petition for certiorari denied. Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987).

61 The first retroactivity decision, *Linkletter v. Walker*, 381 U.S. 618 (1965), was decided on June 7, 1965, and Professor Mishkin's still-leading article critiquing retroactivity, *The High Court, the Great Writ, and the Due Process of Time and Law*, was published in November 1965. Mishkin, *supra* note 21. *See* Danforth v. Minnesota, 128 S. Ct. 1029, 1038 n.12 (2008) (describing Mishkin's article as the work of a "thoughtful legal scholar").

Criticism of the retroactivity doctrine has continued in the following decades. *See, e.g.*, Entzeroth, *supra* note 10, at 166 ("For the past forty years, the Court has struggled with these concerns, producing a lineage of cases that have generated varying reactions as to their efficiency and fairness."); L. Anita Richardson & Leonard B. Mandell, *Fairness over Fortuity: Retroactivity Revisited and Revised*, 1989 UTAH L. REV. 11, 55 ("It was unnecessary in pre-*Linkletter* days to ponder the significance of fairness as a fundamental value in the context of retroactivity or to consider how best to secure it. Because retroactivity was the rule, no distinction was made between [direct and collateral] review.").

62 Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting), *quoted in* Hutton, *supra* note 22, at 425 n.22. Likewise, Blackstone wrote that under the common law, the courts' role is not to "pronounce a new law, but to maintain and expound the old one." 1 WILLIAM BLACKSTONE, COMMENTARIES, *69, *quoted in* Hutton, *supra* note 22, at 425. In *Danforth* the majority adopted the Blackstonian view while the dissent adopted a modern "positivist" view of the law. The majority reasoned:

> [T]he source of a "new rule" is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. What we are actually determining when we assess the "retroactivity" of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.

Danforth, 128 S. Ct. at 1035. In contrast, Chief Justice Roberts's dissent argued that "the question whether a particular federal rule will apply retroactively is, in a very real way, a choice between new and old law." *Id*. at 1056 (Roberts, C.J., dissenting).

63 *Id.* at 1036 (majority opinion); *see also id*. at 1048 (Roberts, C.J., dissenting).

64 WHITEBREAD & SLOBOGIN, *supra* note 46, § 29.06, at 902.

65 LAFAVE, *supra* note 55, § 2.8(a)-(b).

to be known as the "criminal procedure revolution,"[66] the Court extended the Bill of Rights' depth, by reaching down into the states to protect the accused through the incorporation doctrine, and the Bill of Rights' breadth, by broadly interpreting its protections for the criminally accused.[67]

In reaction to these changes, a compromise was struck when those leading the revolution and those opposing it agreed that new rules should not apply to final judgments.[68] Justice John Harlan, one of those opposed to the revolution, later wrote a first-hand account of the retroactivity doctrine's creation:

> That doctrine was the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field. Some members of the Court, and I have come to regret that I was among them, initially grasped this doctrine as a way of limiting the reach of decisions that seemed to them fundamentally unsound. Others rationalized this resort to prospectivity as a technique that provided an "impetus . . . for the implementation of long overdue reforms, which otherwise could not be practicably effected."[69]

The first case to implement the retroactivity doctrine was *Linkletter v. Walker*,[70] decided in 1965, the same year as *Pointer*.[71] In *Linkletter*, the Court decided that the exclusionary rule announced in *Mapp v. Ohio*[72] "would not be given retroactive effect; it would not, in other words, be applied to convictions that were final before the date of the *Mapp* decision."[73] With this, for the first time in its history, the Court held that the Constitution might not uniformly apply to all cases regardless of when they were decided.[74]

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66 *Id.* § 2.8(b) n.23.

67 *See generally id.* § 2.8(a) (discussing the Warren Court's "decisions that have both extended the application of various Bill of Rights guarantees to the states and adopted expansive interpretations of those guarantees").

68 Fallon & Meltzer, *supra* note 58, at 1739-40 ("[N]on-retroactivity initially commanded the allegiance of two quite distinct constituencies. One consisted of [reform-minded] Justices. . . . Other Justices less sympathetic to the Court's substantive holdings faced a tension between their long-term view that a retroactivity requirement would help to keep courts within sensible bounds and their short-term desire to limit the damage done by decisions that they thought 'fundamentally unsound.'").

69 Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in the judgments and dissenting in part) (quoting Jenkins v. Delaware, 395 U.S. 213, 224 (1969)).

70 381 U.S. 618 (1965). *See* Entzeroth, *supra* note 10, at 174.

71 *Linkletter*, 381 U.S. 618; Pointer v. Texas, 380 U.S. 400 (1965).

72 367 U.S. 643 (1961). In *Mapp*, the Court held "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Id.* at 655.

73 Danforth v. Minnesota, 128 S. Ct. 1029, 1037 (2008) (citing *Linkletter*, 381 U.S. at 636-40).

74 *See* Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and what it Might*, 95 CAL. L. REV. 1677, 1678-80 (2007) (discussing *Linkletter* and the "creation of nonretroactivity").

Nonetheless, the Court in *Linkletter* recognized that some new constitutional rules might merit full effect.[75] To help evaluate which rules would merit retroactivity, the Court created a three-pronged test, considering "the purpose of the rule, the reliance of the states on the prior law, and the effect on the administration of justice of retroactive application of the rule."[76] And, when the Court affirmed *Linkletter* two years later in *Stovall v. Denno*,[77] it restated the test as a balancing of: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[78]

Linkletter and *Stovall* ("*Linkletter-Stovall* balancing") all but guaranteed that the Court would not retroactively apply a new constitutional rule because the second and third prongs always weighed against retroactivity (indeed, the Court never retroactively applied a rule under *Linkletter-Stovall* balancing[79]). The reason? Because of the Court's incorporation doctrine, which essentially nationalized constitutional criminal procedure law,[80] each new constitutional rule of criminal procedure applied in the federal system as well as all fifty state systems. Thus, "the extent of the reliance by law enforcement authorities"[81] was on a nationwide scale, as was the potential "effect on the administration of justice."[82] These weighty considerations, the Court later acknowledged, "virtually compelled a finding of nonretroactivity."[83]

Scholarly criticism was immediate, beginning even before *Stovall* was decided.[84] Professor Paul Mishkin, for example, while generally supporting the creation of a retroactivity doctrine, opposed *Linkletter*'s second and

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75 *See Linkletter*, 381 U.S. at 629.

76 *Danforth*, 128 S. Ct. at 1036-37 (citing *Linkletter*, 381 U.S. at 629). In *Linkletter*, the Court wrote that the exclusionary "doctrine prior to *Mapp* is 'an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.' . . . [W]e must look to the purpose of the *Mapp* rule; the reliance placed upon the *Wolf* [*v. Colorado*, 338 U.S. 25 (1949),] doctrine; and the effect on the administration of justice of a retrospective application of *Mapp*." *Linkletter*, 381 U.S. at 636 (quoting Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940)).

77 388 U.S. 293 (1967).

78 *Id.* at 297.

79 *See* Griffith v. Kentucky, 479 U.S. 314, 324-25 (1987) (citing United States v. Johnson, 457 U.S. 537, 549-50 (1982)).

80 *See supra* note 44 (discussing incorporation doctrine).

81 *Stovall*, 388 U.S. at 297.

82 *Id.*

83 *Griffith*, 479 U.S. at 324-25.

84 *See* Roosevelt, *supra* note 74, at 1677 (noting that *Linkletter* was decided on June 7, 1965, and Mishkin's article, *The High Court, the Great Writ, and the Due Process of Time and Law*, *supra* note 21, was published in November 1965, more than a year before *Stovall* was decided).

third prongs.[85] As an alternative, Mishkin proposed an accuracy-based test, arguing that a new constitutional rule should not generally be given retroactive effect unless the rule increased the reliability of the fact-finding process.[86] In his words:

> Valuing the liberty of the innocent as highly as we do, earlier proceedings whose reliability does not measure up to current constitutional standards for determining guilt may well be considered inadequate justification for continued detention. . . . On this basis, habeas corpus would assess the validity of a conviction, no matter how long past, by any current constitutional standards which have an intended effect of enhancing the reliability of the guilt-determining process.[87]

Linkletter-Stovall balancing soon began to attract criticism from the bench as well.[88] "Retroactivity must be rethought," opined Justice Harlan two years after *Stovall* was decided.[89] In *Desist v. United States*,[90] the majority held that the new rule announced in *Katz v. United States*,[91] requiring a warrant for electronic surveillance, "should be given wholly *prospective* application."[92] In other words, the rule should apply to future cases, but not to cases pending on appeal or finally decided. Harlan's trenchant dissent responded:

> This Court is entitled to decide constitutional issues only when the facts of a particular case require their resolution for a just adjudication on the merits. . . . It is only if our decisions can be justified in terms of this fundamental premise that they may properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature.[93]

Harlan went on to conclude that "all new rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court."[94] And, for cases on collateral review, Harlan en-

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85 Mishkin, *supra* note 21. Mishkin's article, published as a *Harvard Law Review* Foreword, was referenced by both the majority and dissent in *Danforth* and was cited as "one of the more thoughtful legal scholars . . . discussing the effect of the *Linkletter* analysis." Danforth v. Minnesota, 128 S. Ct. 1029, 1049 (2008) (Roberts, C.J., dissenting); *see also id.* at 1038 n.12 (majority opinion).

86 Mishkin, *supra* note 21, at 81-82.

87 *Id.*

88 *See* Desist v. United States, 394 U.S. 244, 257 (1969) (Harlan, J., dissenting), *cited in Danforth*, 128 S. Ct. at 1037.

89 *Desist*, 394 U.S. at 258 (Harlan, J., dissenting) (internal quotation marks omitted), *quoted in* Anne N. Bosse, *Retroactivity and the Supreme Court*, MD. B.J., July-Aug. 2008, at 30, 31.

90 394 U.S. 244 (1969).

91 389 U.S. 347 (1967).

92 *Desist*, 394 U.S. at 246 (emphasis added). *See generally Rethinking Retroactivity*, *supra* note 10, at 1646 (providing a succinct history of the retroactivity doctrine's development).

93 *Desist*, 394 U.S. at 258-59 (Harlan, J., dissenting).

94 *Id.* at 258 (internal quotation marks omitted).

dorsed Mishkin's accuracy-based proposal as an alternative to *Linkletter-Stovall* balancing.[95]

Harlan maintained his criticism of *Linkletter-Stovall* balancing two years later in *Mackey v. United States*.[96] Dissenting in part, he proposed two simple, bright-line rules.[97] First, all new constitutional rules should apply to all cases on direct review.[98] Second, substantive rules—"those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"—should apply retroactively.[99] Harlan thought procedural rules,[100] on the other hand, generally should not apply retroactively unless they involved "bedrock" procedural principles "implicit in the concept of ordered liberty."[101] As an example of a "bedrock" procedural rule, Justice Harlan cited *Gideon v. Wainwright*,[102] which held that an indigent defendant has the right to appointed counsel in felony trials.[103]

Justice Harlan's proposals proved influential; his dissents in *Desist* and *Mackey* set up the framework around which the modern retroactivity doctrine is built.[104] First, in 1987, the Court adopted Harlan's bright-line rule for cases on direct review in *Griffith v. Kentucky*,[105] holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no

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95 *Id.* at 262 ("[A]ll 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures [should] be retroactively applied on habeas." (citing Mishkin, *supra* note 21, at 77-101)).

96 Mackey v. United States, 401 U.S. 667, 676-77 (1971) (Harlan, J., concurring in the judgments and dissenting in part).

97 *Id.* at 681. *Black's Law Dictionary* defines a "bright-line rule" as: "[a] legal rule of decision that tends to resolve issues, esp. ambiguities, simply and straightforwardly, sometimes sacrificing equity for certainty." BLACK'S LAW DICTIONARY 205 (8th ed. 2004).

98 *Mackey*, 401 U.S. at 681 (Harlan, J., concurring in the judgments and dissenting in part) ("[O]nce a rule has been adopted as part of our legal fabric . . . cases then pending in this Court should be governed by it.").

99 *Id.* at 692.

100 *Id.* (defining procedural rules as those that "forbid the government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior"). *See generally* Entzeroth, *supra* note 10, at 180-84 (detailing Justice Harlan's arguments in *Desist* and *Mackey*).

101 *Mackey*, 401 U.S. at 693 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.)). The phrase "implicit in the concept of ordered liberty" quotes Justice Cardozo's incorporation standard from the *Palko* case, thus equating retroactivity with incorporation standards. *See Rethinking Retroactivity*, *supra* note 10, at 1650.

102 372 U.S. 335 (1963).

103 *Mackey*, 401 U.S. at 693-94 (Harlan, J., concurring in the judgments and dissenting in part) (citing *Gideon*, 372 U.S. at 349). To date, *Gideon* is the only example pointed to by the Court of a new rule of criminal procedure that would merit retroactive effect. Whorton v. Bockting, 549 U.S. 406, 419 (2007).

104 *See* Fallon & Meltzer, *supra* note 58, at 1745-46.

105 479 U.S. 314 (1987).

exception."[106] Then, in 1989, the Court adopted Harlan's proposals for substantive and procedural rules in *Teague v. Lane*[107]—the decision establishing the modern retroactivity doctrine.[108]

2. *Teague v. Lane*: The Modern Retroactivity Doctrine

In *Teague*, the Court first set forth a broad definition of a "new constitutional rule," defining it as one "not *dictated* by precedent."[109] Next, the Court expressly adopted Harlan's proposal for the retroactivity of new substantive constitutional rules, writing: "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[110] Turning to the retroactivity of new procedural rules, the Court adopted Harlan's accuracy-based test (which in turn was an adoption of Mishkin's proposal[111]), holding that "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied."[112] Finally, the Court renamed Harlan's "bedrock" exception the "watershed rule" exception.[113] As a result, the "*Teague* watershed test" replaced *Linkletter-Stovall* balancing in federal retroactivity analysis.[114]

Teague's general principles are now firmly established as the federal rules for determining whether a new constitutional rule merits retroactive application.[115] First, a federal court classifies the rule as either substantive

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106 *Id.* at 328. *See generally* Bosse, *supra* note 89, at 31 (providing a succinct history of retroactivity).

107 489 U.S. 288 (1989) (plurality opinion). Although *Teague* was a plurality opinion, it was adopted by a majority of the Court later the same year. *See* Penry v. Lynaugh, 492 U.S. 302, 314 (1989), *overruled on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

108 *Teague*, 489 U.S. at 310 (plurality opinion) ("[W]e now adopt Justice Harlan's view of retroactivity."). *See generally Rethinking Retroactivity*, *supra* note 10, at 1652-56 (providing history of post-*Teague* jurisprudence).

109 *Teague*, 489 U.S. at 301. Under the Court's expansive definition of "new rules," nearly all constitutional decisions since have qualified as new rules. Entzeroth, *supra* note 10, at 195.

110 *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgments and dissenting in part)).

111 *See supra* note 95 and accompanying text.

112 *Teague*, 489 U.S. at 312 (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

113 *Id.* at 311.

114 *See, e.g.*, Whorton v. Bockting, 549 U.S. 406, 416 (2007) ("In *Teague* and subsequent cases, we have laid out the framework to be used in determining whether a rule announced in one of our opinions should be applied retroactively.").

115 Because neither substantive nor procedural rules have been given retroactive effect, a more realistic statement may be that *Teague*'s principles have become general rules for determining on what grounds the Court will decline to enforce the new rule retroactively. *See generally* Spitser, *supra* note 7, at 1646 n.103 (collecting Court decisions rejecting retroactive application for new constitutional rules).

or procedural.[116] Substantive rules place "primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," and presumably apply retroactively.[117] But, because no new rules have ever been classified as substantive, this retroactive application remains purely hypothetical. New procedural rules, on the other hand, do not apply retroactively,[118] although the Court has discussed an exceptional category of "watershed" procedural rules which would merit retroactive application.[119] To merit watershed status, a new rule of procedure must satisfy two requirements.[120] First, it must substantially increase the trial's accuracy by "prevent[ing] an impermissibly large risk of an inaccurate conviction."[121] Additionally, the rule must substantially affect "bedrock procedural elements essential to the fairness of a proceeding."[122] The new procedural rule must satisfy both elements to merit retroactivity, and, in the twenty years since *Teague* was decided, the Court has never retroactively applied a new rule.[123]

II. *CRAWFORD* TO *DANFORTH*: THE CONFRONTATION CLAUSE AND RETROACTIVITY

A. Crawford *and its Progeny: Redefining the Confrontation Clause*

In *Crawford v. Washington*,[124] the Court announced a new constitutional rule of criminal procedure: the Confrontation Clause bars admission of testimonial statements of an unavailable witness unless the defendant had a prior opportunity to cross-examine the witness.[125] Rejecting the *Roberts*

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116 *See Teague*, 489 U.S. at 301 (defining new constitutional rules as those "not *dictated* by precedent existing at the time the defendant's conviction became final").

117 *Id.* at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgments and dissenting in part)).

118 *Teague*, 489 U.S. at 301.

119 *Id.* at 311.

120 Whorton v. Bockting, 549 U.S. 406, 418 (2007).

121 *Id.* (quoting Schriro v. Summerlin, 542 U.S. 348, 356 (2004)) (internal quotation marks omitted).

122 *Id.* (quoting Tyler v. Cain, 533 U.S. 656, 670 (2001) (O'Connor, J., concurring)).

123 *Id. See generally* Spitser, *supra* note 7, at 1645-48 (discussing Court decisions rejecting new rules watershed status).

124 541 U.S. 36 (2004).

125 *Id.* at 59 ("[T]estimonial statements of witnesses absent from trial [are admissible] only where the [witness] is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness]."). *See generally* William M. Howard, Annotation, *Construction and Application of Supreme Court's Ruling in* Crawford v. Washington*, with Respect to Confrontation Clause Challenges to Admissibility of Hearsay Statement by Declarant Whom Defendant Had No Opportunity to Cross-Examine*, 30 A.L.R.6th 1 (2008) (collecting representative cases decided since *Crawford*).

rule,[126] which permitted evidence from unavailable witnesses as long as their statements bore "indicia of reliability,"[127] the Court concluded: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[128]

Instead, the Court crafted a simple, bright-line rule for testimonial statements, under which "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[129] Thus, out-of-court testimonial statements in criminal proceedings are now inadmissible unless: (1) the witness is unavailable and (2) the defendant previously had the opportunity to cross-examine the witness about the statement.[130]

Notably, *Crawford* does not apply to all out-of-court statements of unavailable witnesses; rather, it applies only to "testimonial statements."[131] While declining to give testimonial statements "precise articulation," the Court in *Crawford* held that, at a minimum, testimonial statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[132] The first three categories—testimony at a preliminary hearing, before a grand jury, or at a previous trial—are by definition "testimonial." That is, they are given under oath before a neutral magistrate.[133] On the other hand, the final category—a statement made during police interrogation—is less definitively "testimonial."

Of course, there are many types of police interrogation, and *Crawford* provided little guidance as to which types of police interrogation elicit tes-

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126 Ohio v. Roberts, 448 U.S. 56, 66 (1980). *See supra* Part I.A (discussing *Roberts*). *Cf. Bockting*, 549 U.S. at 416 ("[I]t is clear that *Crawford* announced a new rule. The *Crawford* rule was not 'dictated' by prior precedent. Quite the opposite is true: The *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled.").

127 *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66).

128 *Id.* at 62.

129 *Id.* at 69.

130 *Id.* at 68.

131 *Id.* at 55; *see also id.* at 55 ("The text of the Confrontation Clause reflects this focus. It applies to 'witnesses' against the accused—in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (citations omitted))).

132 *Id.* at 68.

133 *Crawford*, 541 U.S. at 51. The Court identified "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" as types of testimonial evidence. *Id.*

timonial statements.[134] Further explanation came two years later in *Davis v. Washington*,[135] when the Court created a purpose-based test for whether statements made during police interrogation are "testimonial."[136] The Court held that when the "primary purpose" of the interrogation is to help deal with an ongoing emergency, the statements are non-testimonial, and therefore admissible.[137] On the other hand, when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," the statements are testimonial, and therefore inadmissible, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness about the statements.[138] Courts, therefore, must determine whether the purpose of the police interrogation was to meet an ongoing emergency or to elicit statements for later use at trial.[139]

The Court in *Davis* also addressed a second significant question left open in *Crawford*—whether "the Confrontation Clause [applies] only to testimonial statements, leaving the remainder to regulation by hearsay law."[140] The Court answered in the affirmative, holding that testimonial statements "mark out not merely [the Confrontation Clause's] core, but its perimeter."[141]

Taken together, *Crawford* and *Davis* completely overruled *Roberts*.[142] *Crawford* overruled *Roberts*'s "indicia of reliability" exception for testimo-

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134 The Court noted that "[w]e use the term 'interrogation' in its colloquial, rather than any technical legal, sense. Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case." *Id.* at 53 n.4 (citation omitted).

135 547 U.S. 813 (2006).

136 *Id.* at 822.

137 *Id.*

138 *Id.*

139 *Id.* at 828.

140 Crawford v. Washington, 541 U.S. 36, 61 (2004) (concluding that the Court need not "definitively resolve" the question because the disputed statement was testimonial); *Davis*, 547 U.S. at 823.

141 *Davis*, 547 U.S. at 824 (internal quotation marks omitted).

142 Whorton v. Bockting, 549 U.S. 406, 416 (2007) ("The *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled."). *See generally* Mosteller, *supra* note 49, at 698-701 (discussing and critiquing *Crawford*, *Davis*, and *Bockting*).

Curiously, some federal courts of appeals continue to assert that, *Crawford* and *Davis* notwithstanding, *Ohio v. Roberts*, 448 U.S. 56 (1980), is still good law. For example, in *United States v. Thomas*, 453 F.3d 838 (7th Cir. 2006), the court wrote: "Where a hearsay statement is found to be nontestimonial, we continue to evaluate the declaration under *Ohio v. Roberts*." *Id.* at 844. This is curious, as *Roberts* involved a quintessentially "testimonial" hearsay statement, prior testimony at a preliminary hearing. *See Roberts*, 448 U.S. at 58. It did not involve any nontestimonial statements, and so squarely implicated the Confrontation Clause. *Id.* But, because *Roberts* roughly equated the Confrontation Clause with hearsay rules, the court in *Thomas* felt comfortable citing it for the proposition "that proffered hearsay may be admitted where it 'falls within a firmly rooted hearsay exception.'" *Thomas*, 453 F.3d at 844 (quoting *Roberts*, 448 U.S. at 66). In contrast to *Roberts*, *Thomas* involved a nontestimonial hearsay statement, a tape recording of an excited 911 caller describing an emergency as it happened. *Id.* This statement would not be considered testimonial under *Davis* because its purpose was to deal with an

nial statements, and *Davis* held that the Confrontation Clause only applies to testimonial statements.[143] Some have lamented *Roberts*'s demise,[144] but their grief is unnecessary given that *Roberts* roughly equated the Confrontation Clause with hearsay rules[145] and that *Crawford* did not alter the vitality of the hearsay rules for non-testimonial statements. Emphasizing the foregoing, the Court wrote in *Crawford*: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ."[146] Notwithstanding *Crawford*, hearsay rules survive the demise of *Roberts*. *Crawford* simply revitalizes the Confrontation Clause for testimonial statements.

Whether *Crawford* should be retroactively applied was the next question left open in *Crawford* later taken up by the Court. In *Whorton v. Bockting*,[147] the Court unanimously held that *Crawford* did not qualify under the *Teague* watershed exception, and therefore did not apply retroactively.[148] Writing for the Court, Justice Samuel Alito compared *Crawford* to *Gideon*—"the only case that we have identified as qualifying under this exception"—and concluded that although *Crawford* is "certainly important,"[149] it does not have the "bedrock" or "watershed" importance of *Gideon*.[150]

Nor, Justice Alito wrote, did *Crawford* improve the trial's overall accuracy.[151] He reasoned that although *Crawford* improved the accuracy of testimonial statements, it also potentially decreased accuracy because:

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ongoing emergency. *See Davis*, 547 U.S. at 822. Nevertheless, the court in *Thomas* cited *Roberts* (a Confrontation Clause case) to support its argument that the nontestimonial statements were admissible (under hearsay rules), thus reinforcing the conclusion that, under *Roberts*, hearsay rules and the Confrontation Clause were treated interchangeably. *See Thomas*, 453 F.3d at 844.

143 *Davis*, 547 U.S. at 823-24.

144 *See, e.g.*, Mosteller, *supra* note 49 (titling his article "Crawford*'s Birth did not Require that* Roberts *had to Die*"). Mosteller acknowledged, however, that "*Roberts* and its progeny allowed the prosecution to admit most hearsay that fell within established hearsay exceptions without any effort to produce even readily available declarants." *Id.* at 696.

145 *See infra* notes 212-15 and accompanying text (discussing *Roberts*'s relationship to hearsay rules).

146 Crawford v. Washington, 541 U.S. 36, 68 (2004). *See also supra* notes 140-141 and accompanying text.

147 549 U.S. 406 (2007).

148 *Id.* at 421.

149 *Id.* at 419-21.

150 *Id.* at 420-21 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)). *But see supra* note 7 (collecting other courts' and commentators' reactions to *Crawford*'s impact).

151 *Bockting*, 549 U.S. at 418-20. In reaching this conclusion, the Court candidly acknowledged that it had never found a risk of inaccurate conviction impermissibly large. *Id.* at 418 (collecting Court cases rejecting "watershed" status for new rules, including: Schriro v. Summerlin, 542 U.S. 348 (2004) (rejecting retroactivity for Ring v. Arizona, 536 U.S. 584 (2002)); Beard v. Banks, 542 U.S. 406 (2004) (rejecting retroactivity for Mills v. Maryland, 486 U.S. 367 (1988)); O'Dell v. Netherland, 521 U.S. 151 (1997) (rejecting retroactivity for Simmons v. South Carolina, 512 U.S. 154 (1994)); Gilmore v. Taylor, 508 U.S. 333 (1993) (rejecting retroactivity for a new rule relating to jury instructions on homicide);

> *Crawford* [eliminated the] Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.[152]

Whether or not this analysis is sound, given *Roberts*'s relationship to hearsay rules,[153] the matter seemed settled. Plainly, *Crawford*'s exclusion of testimonial statements was not available to prisoners seeking to challenge a final judgment.[154] Nevertheless, two months after deciding *Bockting*, the Court granted certiorari in *Danforth v. Minnesota*[155] to address whether state courts were prohibited from applying *Crawford* retroactively.[156] The Court's answer would catch some commentators by surprise.[157]

B. Danforth v. Minnesota*: The Confrontation Clause, Retroactivity, and Federalism*

1. *Danforth*'s Decade-Long Journey to the United States Supreme Court

In 1996, Steven Danforth was put on trial for criminal sexual conduct with a minor.[158] The minor, a six-year-old boy, did not testify at trial.[159] Nevertheless, the court admitted a videotaped interview of the child in which he accused Danforth of sexual abuse.[160] Danforth was convicted, and appealed on the ground that admitting the videotape violated his Sixth Amendment right of confrontation.[161] The Minnesota Court of Appeals af-

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Sawyer v. Smith, 497 U.S. 227 (1990) (rejecting retroactivity for Caldwell v. Mississippi, 472 U.S. 320 (1985))). *See generally* Spitser, *supra* note 7, at 1645-46 (discussing twelve Supreme Court decisions rejecting new rules' retroactive application).

152 *Bockting*, 549 U.S at 420.

153 *See supra* notes 49-54 and accompanying text.

154 *But see infra* Part III.B.1 (discussing reasons why *Crawford* did increase a trial's overall accuracy, the Court's statements in *Bockting* notwithstanding).

155 128 S. Ct. 1029 (2008). *Bockting* was decided Feb. 28, 2007. On May 21, 2007, certiorari was granted in *Danforth*.

156 *Danforth*, 128 S. Ct. at 1034.

157 *See, e.g.*, Susan N. Herman, *Criminal Procedure Decisions from the October 2006 Term*, 23 TOURO L. REV. 761, 776 (2008) ("My own prediction is that the Court will agree with Minnesota in limiting [*Crawford*'s nonretroactivity].").

158 *Danforth*, 128 S. Ct. at 1033.

159 Ellen Loeb & Valerie Robart, Danforth v. Minnesota: *Retroactivity, Criminal Procedure, Federalism*, LLIBULLETIN, *available at* http://www.law.cornell.edu/supct/cert/06-8273.html (last visited Aug. 22, 2009) (reviewing *State v. Danforth*, 573 N.W.2d 369 (Minn. Ct. App. 1997)).

160 *Id.*

161 *See Danforth*, 128 S. Ct. at 1033 (discussing the procedural history of the case).

firmed Danforth's conviction, holding that under *Roberts* the child's videotaped statements were "sufficiently reliable."[162] The Minnesota Supreme Court denied Danforth's appeal, the time for filing a writ of certiorari expired, and the judgment became final in 1998.[163]

After *Crawford* was decided in 2004, Danforth sought a writ of habeas corpus in state court.[164] Applying the federal *Teague* watershed test, the trial court and court of appeals each concluded that *Crawford* did not merit retroactive application, and so denied Danforth relief.[165] In 2006, the Minnesota Supreme Court granted review on the issue of whether it was "free to apply a broader retroactivity standard than that of *Teague*, and should apply the *Crawford* rule to [Danforth]'s case even if federal law did not require it to do so."[166] The court answered in the negative, holding that "Danforth is incorrect when he asserts that state courts are free to give a Supreme Court decision of federal constitutional criminal procedure broader retroactive application than that given by the Supreme Court."[167] The United States Supreme Court then granted certiorari to consider whether "*Teague* or any other federal rule of law *prohibits*" state courts from applying *Crawford* retroactively.[168]

2. The *Danforth* Decision

In a 7-2 decision, the Supreme Court held that *Teague* did not prevent state courts from retroactively applying *Crawford* and reversed and remanded the case to the Minnesota Supreme Court.[169] Writing for the majority, Justice John Paul Stevens reasoned that the federal presumption against retroactivity was justified on three grounds: (1) comity[170] between federal and state courts; (2) respect for the state courts' final judgments; and (3) uniformity of federal law.[171] The first two reasons support the states' power

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162 *Id.* (quoting *Danforth*, 573 N.W.2d at 375).

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.* (quoting Danforth v. State, 718 N.W.2d 451, 455 (Minn. 2006)) (internal quotation marks omitted).

167 *Danforth*, 128 S. Ct. at 1033 n.2 (quoting *Danforth*, 718 N.W.2d at 456) (internal quotation marks omitted).

168 *Id.* at 1034.

169 *Id.* at 1033.

170 *Black's Law Dictionary* defines "comity" as: "A practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts." BLACK'S LAW DICTIONARY 284 (8th ed. 2004).

171 *Danforth*, 128 S. Ct. at 1040-41.

to give broader retroactive relief than required by the federal retroactivity doctrine, while the third does not.[172]

Comity and respect for the states' final judgments are both based on federalism principles.[173] Because the states are reviewing their own judgments, the Court reasoned that neither comity nor finality should prevent the states from retroactively applying new rules.[174] While acknowledging that "*Teague* was also grounded in concerns over uniformity,"[175] the Court noted that "[n]onuniformity is, in fact, an unavoidable reality in a federalist system of government."[176] And, weighing the federal interest in uniformity against "the power of state judges to remedy wrongful state convictions," the Court concluded that federalism tipped the scales in the states' favor.[177]

The Court emphasized that its decision dealt not only with constitutional rights, but also with the scope of available remedies.[178] When a federal court decides not to retroactively apply a new rule under *Teague*, it limits the availability of federal habeas relief.[179] If a state court then decides to retroactively apply the new rule, the Court reasoned, it is simply expand-

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172 *Id.* at 1041.

173 *Id. See* Barry Kamins, *Door Open for "*Crawford*" Violations in CPL 440 Actions*, N.Y. L.J., Apr. 7, 2008, at 3 ("*Teague* was intended to limit the authority of federal courts to overturn state convictions, not to limit a state court's authority to grant relief for violations of new rules of constitutional law when reviewing its own state's convictions.").

174 *Danforth*, 128 S. Ct. at 1041. Professor Hutton has noted that the first *Teague* justification, comity, would not apply to states considering retroactively applying a new constitutional rule. Therefore, states would instead be balancing their interest preserving final judgments against individual rights:

> The tension in federal habeas between the vindication of individual rights and federal concerns over comity and finality remains, although the balance favoring one over the other oscillates. It is evident, however, that these competing views are peculiar only to the federal system, where comity and the federal-state balance play a major role in the Court's limiting the reach of federal habeas. When these factors are subtracted, all that remains is a competition between the interest in protecting individual rights and the state's interest in finality. That difference is crucial in examining state postconviction remedies in contrast to federal remedies, for the absence of the need for comity creates a compelling case for asymmetry in federal and state responses to postconviction relief.

Hutton, *supra* note 22, at 436-37.

175 *Danforth*, 128 S. Ct. at 1041. *See also* Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion).

176 *Danforth*, 128 S. Ct. at 1041. *See* Bosse, *supra* note 89, at 33 ("When the Supreme Court decides that a constitutional violation has occurred, its decision is to be applied uniformly throughout the nation. Whether to provide a remedy for that violation in state cases where the conviction has already become final is a question to be decided by each state individually.").

177 *Danforth*, 128 S. Ct. at 1047.

178 Stevens thus drew a distinction between rights and remedies. He noted that he was consciously using the term "redressability" rather than "retroactivity" to distinguish between available "remedies" and constitutional "rights." *Id.* at 1035 n.5. Stevens concluded that merely because "a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas courts." *Id.* at 1047.

179 *Id.*

ing the remedy from cases on direct review (as required by *Griffith*) to include cases on collateral review (as now permitted by *Danforth*).[180]

Chief Justice John Roberts, joined by Justice Anthony Kennedy, dissented. He argued that because *Griffith* bound state courts for cases on direct review, *Teague* should be "simply the other side of the coin," and therefore bind state courts for cases on collateral review.[181] Moreover, Roberts argued that retroactivity was not a remedial question, but rather a choice of law issue.[182] For Roberts, the choice was between the old rule and the new rule.[183] He reasoned that "when the question is what federal rule of decision from this Court should apply to a particular case, no Court but this one—which has the ultimate authority 'to say what the law is,'—should have final say over the answer."[184] Notwithstanding this dissent, however, states now have the power "to remedy wrongful state convictions."[185] The next Part examines how the states can exercise this power and the reasons why they should.

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[180] *Id.* For an unconventional, and probably unsound, argument that in *Danforth*'s wake, state courts may not only expand the availability of remedies on collateral review but also constrict their availability on direct review (in substance abrogating the Court's holding in *Griffith*), see Note, *Retroactive Application of New Rules*, 122 HARV. L. REV. 425, 432-34 (2008).

A sounder analysis of *Danforth*'s probable consequences has been put forth by Professor Somin, who writes that *Danforth* "establish[es] a floor for remedies below which states cannot fall. But there is no reason for it to also mandate a ceiling." Somin, *supra* note 23, at 365.

[181] *Danforth*, 128 S. Ct. at 1052 (Roberts, C.J., dissenting). Roberts's dissent noted that *Griffith* was binding for all criminal cases on direct review, whether state or federal. This, of course, plainly refutes the proposal put forth in *Retroactive Application of New Rules*, *supra* note 180. The *Danforth* majority similarly noted that the failure to apply new rules to cases pending on direct review was both "unprincipled and inequitable." *Danforth*, 128 S. Ct. at 1037 (citing Griffith v. Kentucky, 479 U.S. 314 (1987)).

[182] *Danforth*, 128 S. Ct. at 1054-55 (Roberts, C.J., dissenting). *See* Edward J. Loya Jr., *Judicial Supremacy and Federalism: A Closer Look at* Danforth *and* Moore, 2008 CATO SUP. CT. REV. 161, 171 n.51 ("Understanding the difference between the way the majority and the dissent conceptualized the case is crucial. If one understands *Teague* as establishing a 'choice of law' rule rather than a limit on the habeas remedy, then one is likely to agree with Chief Justice Roberts's view that *Danforth* implicates the Court's supreme authority to interpret federal law. But if one understands *Teague* as concerned primarily with establishing a limit on the habeas remedy, then one is likely to agree with Justice Stevens's view that states can use their own laws to overprotect beyond the Constitution." (citation omitted)).

[183] *Danforth*, 128 S. Ct. at 1055 (Roberts, C.J., dissenting) ("Since the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law . . . ." (quoting James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534-35 (1991))).

[184] *Id.* at 1057 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) (citation omitted).

[185] *Id.* at 1047 (majority opinion). Notably, after *Danforth* was remanded, the Supreme Court of Minnesota declined to retroactively apply *Crawford* and instead affirmed Steven Danforth's conviction. Danforth v. State (*Danforth Remand*), 761 N.W.2d 493, 500 (Minn. 2009). The Minnesota court's decision is discussed below in Part III.C.

III. APPLYING *DANFORTH* TO *CRAWFORD*: RETROACTIVITY IN THE STATES

A. *The Process: State Post-Conviction Procedures*

All fifty states have implemented procedures for challenging final judgments.[186] While these procedures vary in their details, most follow the same basic structure.[187] Typically, a state allows a prisoner to file a post-conviction petition challenging a final judgment whenever the prisoner alleges a "substantial denial of a constitutional right."[188] A prisoner generally begins the challenge by petitioning the state trial court, and if the petition is denied, appealing to the state's intermediate appellate court, then to the state's court of last resort.[189]

Danforth went through each stage of this state post-conviction process, before eventually being appealed to the United States Supreme Court.[190] In the wake of the Court's holding in *Danforth*, petitions seeking retroactive application of *Crawford* in state post-conviction proceedings have already reached several state appellate courts.[191] In deciding whether to retroactively apply *Crawford*, state courts must consider not just federal retroactivity precedent, but their own state retroactivity doctrines as well.[192]

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186 *See* Survey, *Post-Conviction Relief Through DNA Testing*, Westlaw 50 State Surveys (2008) (collecting statutes and rules governing post-conviction relief from all 50 states) [hereinafter Westlaw 50 State Survey].

187 LAFAVE, *supra* note 55, § 28.11(b) n.34. For a discussion of the "typical lifespan of a criminal case," see generally Lasch, *supra* note 16, at 4.

188 Westlaw 50 State Survey, *supra* note 186, ¶ 4.

189 Carey v. Saffold, 536 U.S. 214, 219 (2002) (citations omitted), *quoted in* LAFAVE, *supra* note 55, § 28.11(b) n.34. The Court in *Carey* reviewed post-conviction procedures typical of most states, writing:

> In most States, relevant state law sets forth some version of the following collateral review procedures. First, the prisoner files a petition in a state court of first instance, typically a trial court. Second, a petitioner seeking to appeal from the trial court's judgment must file a notice of appeal within, say, 30 or 45 days after entry of the trial court's judgment. Third, a petitioner seeking further review of an appellate court's judgment must file a further notice of appeal to the state supreme court (or seek that court's discretionary review) within a short period of time, say, 20 or 30 days, after entry of the court of appeals judgment.

Carey, 536 U.S. at 219 (citations omitted).

190 *See supra* Part II.B.1.

191 *See, e.g.*, Bennett v. State, 752 N.W.2d 452 (Iowa Ct. App. 2008) (unpublished table decision); Commonwealth v. Delong, 888 N.E.2d 956, 957-58 (Mass. App. Ct. 2008); *Ex parte* Lave, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008).

192 *See, e.g.*, *Delong*, 888 N.E.2d at 958 ("While a State may choose to apply the *Crawford* principle retroactively under its own law, see *Danforth v. Minnesota*, 128 S. Ct. 1029, 1041-42 (2008), there has been no indication to date that this is a view that the [Massachusetts] Supreme Judicial Court is likely to adopt."); *Lave*, 257 S.W.3d at 237 ("Although not required by the United States Supreme Court to do so, we adhere to our retroactivity analysis in *Keith* and its holding that *Crawford* does not apply retroactively to cases on collateral review in Texas state courts."). *See generally* Bosse, *supra* note 89, at

Most states have adopted either *Teague*'s watershed test or *Linkletter-Stovall*'s balancing test.[193] Other states have adopted the tests with modifications, adapting them to better reflect the states' particular value judgments.[194] These states have chosen to value accuracy and fundamental fairness above the mandatory minimums required by federal retroactivity rules. Nevada, for example, adapted *Teague* by lowering the threshold required to find a that new rule sufficiently enhances a trial's accuracy, thereby making its retroactivity test more responsive to accuracy-based rules.[195] Similarly, Missouri parallels *Linkletter-Stovall* balancing, but, by choosing to give added weight to considerations of fundamental fairness, has altered the balance in favor of retroactivity for new landmark rules.[196]

B. *The Policy: Why States Should Follow* Danforth *and Retroactively Apply* Crawford

Danforth stands for the broad proposition that states may retroactively apply all new rules of criminal procedure, not only *Crawford*'s Confrontation Clause rule.[197] Nevertheless, *Crawford* should be among the first rules retroactively applied for several reasons.[198]

1. *Crawford* Significantly Increases a Trial's Accuracy

Principally, state courts should retroactively apply *Crawford* because cross-examination—the "greatest legal engine ever invented for the discovery of truth"[199]—significantly increases a trial's accuracy. Indeed, it is the only constitutionally sufficient method for determining the truth of testimo-

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33 (discussing how *Danforth* will likely affect Maryland caselaw); Kamins, *supra* note 173, at 3 (discussing how *Danforth* will likely affect New York caselaw).

193 *See* Hutton, *supra* note 22, app. at 460 (charting states according to whether they follow *Teague*, *Linkletter-Stovall*, or another approach); *see also* Lasch, *supra* note 16, at 43-44 (same).

194 *See* Hutton, *supra* note 22, app. at 460. *See also infra* notes 195-96 and accompanying text.

195 Colwell v. State, 59 P.3d 463, 471 (Nev. 2002) (per curiam).

196 *Compare* State v. Whitfield, 107 S.W.3d 253, 268, 272 (Mo. 2003) (retroactively applying Ring v. Arizona, 536 U.S. 584 (2002), and reversing a petitioner's death sentence because "the right to trial by jury is a fundamental right"), *with* Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (rejecting retroactive application of *Ring* on federal habeas).

197 *Danforth*, 128 S. Ct. at 1033 ("The question in this case is whether *Teague* constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. We have never suggested that it does, and now hold that it does not.").

198 *See* Spitser, s*upra* note 7, at 1663 (concluding that "the right of confrontation is crucial to a fair trial, *Roberts* denied criminal defendants the enjoyment of that right, and *Crawford* corrected *Roberts*'s mistake. Only one conclusion follows: *Crawford v. Washington* must be applied retroactively").

199 5 WIGMORE, *supra* note 19, § 1367.

nial statements in criminal trials.[200] As the Court emphasized in *Crawford*, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[201]

The insight that cross-examination significantly improves the reliability of testimonial evidence is not novel.[202] Rather, it reflects the venerable judgment of the Framers that the best method for evaluating the reliability of accusations is through cross-examination.[203] Chief Justice Marshall himself warned that it is "incumbent on courts to be watchful of every inroad on a principle so truly important."[204] For more than two decades, the *Roberts* "indicia of reliability" exception made such inroads by authorizing admission of evidence not subject to cross-examination.[205]

On the other hand, an apparent obstacle to the conclusion that *Crawford* significantly increases a trial's accuracy is the Court's unanimous decision in *Bockting*, which held that *Crawford* does not remedy an "impermissibly large risk of an inaccurate conviction."[206] The Court in *Bockting* concluded that it was "unclear whether *Crawford*, on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials."[207] Nevertheless, *Bockting* should not prevent states from retroactively applying *Crawford* for two reasons.

First, the Court in *Bockting* erred in reasoning that overruling *Roberts* decreased a trial's accuracy with regard to nontestimonial statements.[208] The Court wrote:

> Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Un-

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200 Crawford v. Washington, 541 U.S. 36, 69 (2004).

201 *Id.*

202 *See, e.g.*, HALE, *supra* note 30, at 345-46 ("[B]y this personal appearance and testimony of witnesses, there is opportunity of *confronting* the adverse witnesses . . . and by this means great opportunities are gained for the true and clear discovery of the truth.").

203 *See* Whorton v. Bockting, 549 U.S. 406, 418 (2007) ("[T]he *Crawford* rule reflects the Framers' preferred mechanism (cross-examination) for ensuring that inaccurate out-of-court testimonial statements are not used to convict an accused."). *See also supra* Part I.A (discussing Confrontation Clause's history). Note that although the incorporation of the Sixth Amendment Confrontation Clause right to state court proceedings is mere decades old, rather than centuries, confrontation clauses appeared in state constitutions even before the Constitutional Convention. *See supra* notes 35-38 and accompanying text.

204 United States v. Burr, 25 F. Cas. 187, 193 (Marshall, Circuit Justice, C.C.D. Va. 1807).

205 Ohio v. Roberts, 448 U.S. 56, 66 (1980). *See Bockting*, 549 U.S. at 413 ("[T]he interpretation of the Confrontation Clause set out in *Roberts* was unsound in several respects.").

206 *Bockting*, 549 U.S. at 418. *See also supra* Part II.A (discussing *Bockting*).

207 *Bockting*, 549 U.S. at 420.

208 *Id.* at 418.

> der *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.[209]

Admittedly, the Confrontation Clause "has no application" to out-of-court nontestimonial statements.[210] Yet, the rules of hearsay do, and these rules survive *Roberts*'s demise.[211] Recall that, under *Roberts*, out-of-court statements were admissible if they fell within a "firmly rooted hearsay exception."[212] Consequently, the Confrontation Clause, as interpreted in *Roberts*, provided essentially the same protections as the rules of hearsay.[213] *Crawford* did not impact the rules of hearsay; these rules still stand, regardless of *Roberts* being overruled.[214] But *Crawford* did impact testimonial statements, requiring that they be subject to "the only indicium of reliability sufficient to satisfy constitutional demands"— confrontation.[215] In sum, *Crawford* increased a trial's accuracy for testimonial statements, while leaving intact the procedural safeguards for non-testimonial out-of-court statements, which are still subject to hearsay rules.[216]

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209 *Id.* at 420.

210 *See* Davis v. Washington, 547 U.S. 813, 824 (2006) (noting that the language in the Confrontation Clause is clearly limiting). *See also supra* notes 139-40 and accompanying text.

211 *See* Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law.").

212 Ohio v. Roberts, 448 U.S. 56, 66 (1980). *See* Mnookin, *supra* note 52, at 791-92 ("Prior to *Crawford*, rather little hearsay evidence was held to violate the Confrontation Clause. The previous framework for evaluating the Confrontation Clause, put into place by the 1980 decision in *Ohio v. Roberts*, permitted the use of hearsay in criminal cases under the Confrontation Clause so long as the evidence either fell into a 'firmly rooted' hearsay exception, or bore 'particularized guarantees of trustworthiness.' As the jurisprudence developed, nearly all of the hearsay exceptions were pronounced by the courts to be 'firmly rooted,' and in the relatively unusual circumstance that otherwise admissible hearsay was not firmly rooted, judges had a great deal of discretion with which to determine whether the evidence bore the necessary 'particularized guarantees of trustworthiness.'" (quoting *Roberts*, 448 U.S. at 66) (footnotes omitted)). *See generally* 23 C.J.S. *Criminal Law* § 1536 (2008) ("The state-of-mind exception, the excited utterance exception, and the exception for statements made for purpose of medical diagnosis or treatment to the hearsay rule are 'firmly rooted' for Confrontation Clause purposes." (footnotes omitted)).

213 *See* White v. Illinois, 502 U.S. 346, 366 (1992) (Thomas, J., concurring) ("Neither the language of the Clause nor the historical evidence appears to support the notion that the Confrontation Clause was intended to constitutionalize the hearsay rule and its exceptions. Although the Court repeatedly has disavowed any intent to cause that result, I fear that our decisions have edged ever further in that direction." (citations omitted)). *See also* 30B MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 7033 (Interim ed. 2008) (noting the "virtual, if not explicitly recognized, congruence between the confrontation rule and the hearsay rule and its exceptions brought about by *Ohio v. Roberts* and subsequent cases, i.e., the constitutionalization of the hearsay rule and its exceptions").

214 *Crawford*, 541 U.S. at 68.

215 *Id.* at 69.

216 *Id.*

The second reason why *Bockting* should not prevent states from retroactively applying *Crawford* on accuracy grounds is that states may use a more responsive standard.[217] Under the federal retroactivity doctrine, "[i]t is not enough . . . to say that [the] rule is aimed at improving the accuracy of trial."[218] Rather, to merit retroactivity, a new rule of procedure must also involve "bedrock procedural elements essential to the fairness of a proceeding."[219] This federal retroactivity standard has never been satisfied.[220] In contrast, at least one state has chosen not to require "'bedrock' or 'watershed' significance," but rather has elected to establish a retroactivity doctrine which holds that "if accuracy is seriously diminished without the rule, the rule is significant enough to warrant retroactive application."[221]

2. *Crawford*'s Retroactivity is Fundamentally Fair and Administratively Manageable

It is fundamentally unfair to keep someone imprisoned based upon evidence shown to be unreliable as a matter of constitutional law.[222] Consequently, prisoners convicted based upon evidence admitted under the constitutionally infirm *Roberts* indicia of reliability rule should have the right to challenge their convictions.[223] Fundamental fairness counsels in favor of retroactivity whether states have adopted *Linkletter-Stovall* or *Teague*. Because of the differing doctrinal details, however, states applying *Linkletter-Stovall* balancing are particularly well positioned to retroactively apply *Crawford*.

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217 *See, e.g.*, Colwell v. State**,** 59 P.3d 463, 471 (Nev. 2002) (per curiam) ("[A]s a state court we choose not to bind quite so severely our own discretion in deciding retroactivity."). *Colwell*'s holding is discussed below in Part III.C.

218 Whorton v. Bockting, 549 U.S. 406, 418 (2007) (quoting Sawyer v. Smith, 497 U.S. 227, 242 (1990)) (internal quotation marks omitted) (rejecting retroactivity for Caldwell v. Mississippi, 472 U.S. 320 (1985)).

219 *Id.* at 418 (quoting Tyler v. Cain, 533 U.S. 656, 665 (2001)).

220 *See generally* Spitser, *supra* note 7, at 1646 n.103 (collecting Court decisions rejecting retroactive application for new constitutional rules).

221 *Colwell*, 59 P.3d at 472.

222 *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("[T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."). *See also* Pointer v. Texas, 380 U.S. 400, 404 (1965) ("The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution."), *quoted in* Spitser, *supra* note 7, at 1631 n.3.

223 Of course, review of the convictions will be subject to harmless error analysis, and convictions based upon more than out-of-court testimonial statements admitted under the *Roberts* rule may be upheld despite the *Crawford* violation. *See* Chapman v. California 386 U.S. 18, 22 (1967) (discussing harmless error doctrine).

To review, *Linkletter-Stovall* balancing weighs three factors: (1) the purpose of the new rule; (2) law enforcement's reliance on the old rule; and (3) the effect of retroactive application on the administration of justice.[224] The first factor favors retroactivity because *Crawford*'s purpose is to restore "a fundamental right essential to a fair trial,"[225] and this fundamental fairness argument applies whether states follow *Linkletter-Stovall* or *Teague*. The reason states applying *Linkletter-Stovall* balancing are particularly well positioned to retroactively apply *Crawford* involves the second and third factors.

Consider the difference in scale between the federal government and the individual states. Because individual states are smaller than the nation as a whole, their reliance on the old rule is correspondingly smaller, and the effect of retroactive application on the administration of justice is more manageable.[226] Admittedly, the decision to retroactively apply *Crawford* will necessarily entail some additional administrative costs from reviewing final judgments. But, from an efficiency standpoint, the states are in a much better position than the federal government to assess what those costs will be.[227] Because they are the ones who will bear the costs of reviewing the cases, state courts are in the best position for weighing the administrative costs against the values of increased accuracy and fundamental fairness.[228]

The difference in administrative costs is most pronounced when comparing an individual state to nationwide application,[229] yet also holds true for inter-state comparison.[230] Because states vary in size, some will necessarily

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224 Stovall v. Denno, 388 U.S. 293, 297 (1967). *See supra* Part I.B.1 (discussing *Linkletter-Stovall* balancing).

225 *See generally Pointer*, 380 U.S. at 404 (explaining the Confrontation Clause's purpose). *See also supra* Part I.A (discussing the Confrontation Clause's purpose).

226 *Compare* State v. Whitfield, 107 S.W.3d 253, 269 (Mo. 2003) (retroactively applying Ring v. Arizona, 536 U.S. 584 (2002), and reversing a petitioner's death sentence in part because "the effect of application of *Ring* to cases on collateral review will not cause dislocation of the judicial or prosecutorial system. This Court's preliminary review of its records has identified only five potential such cases."), *with* Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (rejecting retroactive application of *Ring* on federal habeas, which would have impacted cases nationwide).

227 Somin, *supra* note 23, at 369 ("Minnesota courts presumably have greater knowledge about the impact of retroactivity on their own future proceedings than the justices of the Federal Supreme Court. They also have greater incentives to use their knowledge effectively.").

228 Hutton, *supra* note 22, at 445 ("[B]ecause of their proximity to the problem, state judges are better able to predict the impact of a criminal procedure rule, and thus can gauge what degree of response is necessary and appropriate. From this vantage point they can provide an adequate 'check' on the process. By doing so, they can declare how far to open the jailhouse door, rather than to keep it slammed shut, as appears to be the new role of the federal courts in habeas." (footnotes omitted)).

229 Recall that the Court has essentially nationalized constitutional criminal procedure law through its incorporation doctrine, thus causing each new constitutional rule to apply nationwide. *See supra* text accompanying notes 80-83.

230 For example, the Department of Justice reports that in 2007 Texas had a prison population of 171,790. HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE

be better positioned to effect *Crawford*'s retroactive application without unduly disrupting their judicial systems. To illustrate, in 2007, Texas's prison population was 171,790, while North Dakota's was only 1,363.[231] Only a fraction of these prisoners will have a colorable *Crawford* claim (although exactly what percent remains an open question). But, regardless of what that fraction is, in all likelihood, the smaller the state, the fewer claims. Of course, administrative costs may prove prohibitive in states with large prison populations like Texas (in fact, Texas has already declined to retroactively apply *Crawford*[232]). But in states with relatively small prison populations,[233] lower potential administrative costs may encourage courts to consider retroactivity.[234] Then again, smaller states may also have smaller budgets. In the final analysis, it seems the administrative burden is essentially an empirical question. But, in any event, it is one that the states are particularly well positioned to answer.

Crawford's clear, bright-line holding will also help mitigate administrative costs. *Crawford* applies only to a narrow group of cases—those in which a court admitted testimonial statements of an unavailable witness despite the lack of opportunity for cross-examination.[235] And, while retroactivity will always entail some administrative costs, declining to afford individuals constitutional rights also imposes costs on the courts, by weakening public confidence in the judicial system's fairness.[236] As one commentator has noted:

STATISTICS BULLETIN: PRISONERS IN 2007, at 2 tbl.2 (2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf [hereinafter PRISONER STATISTICS BULLETIN]. In contrast, Alaska, which applies *Linkletter-Stovall* balancing, had 5,069 prisoners in 2007, making potential administrative costs of reviewing final judgments much lower for Alaskan courts. *Id.*

231 *Id.*

232 *Ex parte* Lave, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008). In 2007, Texas had a prison population of 171,790. PRISONER STATISTICS BULLETIN, *supra* note 230, at 2 tbl.2.

233 In 2007, North Dakota had the fewest state prisoners, 1,363. PRISONER STATISTICS BULLETIN, *supra* note 230, at 2 tbl.2. Four other states had fewer than 3,000 prisoners (Maine, New Hampshire, Vermont, and Wyoming). *Id.* In contrast, both Texas and California had prison populations of more than 170,000. *Id.*

234 *Cf.* State v. Whitfield, 107 S.W.3d 253, 269 (Mo. 2003) (noting that retroactively applying the new rule at issue "to cases on collateral review will not cause dislocation of the judicial or prosecutorial system [because the court's] preliminary review of its records . . . identified only five potential such cases").

Whether retroactivity is properly a matter for the courts or the legislature is a topic beyond the scope of this Note. As the foregoing discussion has illustrated, however, the doctrine is of common law derivation and, to date, has been controlled by the courts.

235 *See* Davis v. Washington, 547 U.S. 813, 821 (2006) ("Only [testimonial statements] cause the declarant to be a 'witness' within the meaning of the Confrontation Clause.").

236 Discussing the necessity of public confidence in the courts, Professor Mishkin noted that:

> [P]ublic support . . . is the ultimate foundation of the Court's power. I think it is fair to say that a major element in the continuity of this support is the general fidelity to law (including the Constitution) and to courts as impartial expositors of it . . . . For therein lies an important source of the moral force that gives substance not only to the felt obligation to obey, but to

> [W]hile the states have an interest in finality, they also have an interest in justice, and they can control the circumstances which will warrant their court's intervention in an old case. They need not disturb convictions often—but they can retain the flexibility to do so when important constitutional issues are at stake.[237]

Crawford is one such issue, widely praised as the landmark decision that revitalized the fundamental right of confrontation.[238]

States following the *Teague* watershed test, given its presumption against retroactivity, are less likely to retroactively apply *Crawford*.[239] Within this group, however, some are more likely than others to seriously consider retroactively applying *Crawford*. Some states strictly follow the federal doctrine (i.e., a general rule against retroactivity) while others modify *Teague*'s test to provide at least potential retroactive effect for new constitutional rules.[240] Naturally, states who rigidly adhere to the federal doctrine will not apply *Crawford* retroactively.[241] Based on a strict application of the federal *Teague* watershed test, the Texas Court of Criminal Appeals has already declined to retroactively apply *Crawford*.[242] On the other hand, states adopting *Teague*'s accuracy-based approach,[243] while modifying its rigid standards to allow for retroactivity if "accuracy is seriously diminished without the rule,"[244] may conclude that *Crawford* does merit retroactivity.[245]

Pragmatically, states should retroactively apply *Crawford* because it is in their long-term interest to do so.[246] By offering their citizens robust con-

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> other pervasive attitudes toward the Court that are essential to the Court's effective operation.

Mishkin, *supra* note 21, at 67.

237 Hutton, *supra* note 22, at 444 (footnotes omitted).

238 *See, e.g.*, Mnookin, *supra* note 52, at 791 ("In 2004, in the landmark case of *Crawford v. Washington*, the Supreme Court dramatically transformed its approach to the Confrontation Clause of the Sixth Amendment . . . ." (footnote omitted)). *See also* sources cited *supra* note 7.

239 *See supra* Part I.B.2. Recall that under *Teague* the Court has never found a new constitutional rule to merit retroactivity. *See* Spitser, *supra* note 7, at 1646 n.103 (collecting cases). Notably, one state supreme court expressly declined to adopt *Teague* because it "essentially prevents state courts from achieving their goal [of correcting injustice because of] its focus on the impropriety of disturbing a final conviction." State v. Whitfield, 107 S.W.3d 253, 268 n.15 (Mo. 2003) (quoting Hutton, *supra* note 22, at 450).

240 S*ee* Hutton, *supra* note 22, app. at 460 (charting states according to, inter alia, whether they follow federal *Teague* or a modified form).

241 *See, e.g.*, *Ex parte* Lave, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008) (citing *Ex Parte* Keith, 202 S.W.3d 767 (Tex. Crim. App. 2006)) (applying *Teague* analysis in rejecting retroactivity for *Crawford*).

242 *Lave*, 257 S.W.3d at 237; *Keith*, 202 S.W.3d at 771 (holding *Crawford* non-retroactive).

243 S*ee supra* Part I.B.2 (discussing the plurality opinion of Teague v. Lane, 489 U.S. 288 (1989)).

244 Colwell v. State, 59 P.3d 463, 472 (Nev. 2002) (per curiam).

245 *See infra* Part III.C.

246 *See generally* Somin, *supra* note 23, at 371-73 (discussing policy advantages for states retroactively applying new rules).

stitutional protections, states assert their continuing relevance as sovereign powers in our federalist system.[247] As discussed above, a confrontation clause first appeared in a state rather than the federal Constitution.[248] By exercising the power recognized in *Danforth*, states can reassert their importance as the primary guardians of individual liberty.

States retroactively applying *Crawford* not only reassert their importance, but may also may make themselves more attractive places to live.[249] Admittedly, the potential retroactivity of new constitutional rules will probably not lead to mass migrations from one state to another.[250] And, of course, *Crawford*'s retroactive application would not directly affect foot-voters, as it would only apply to those currently in prison.[251] Nevertheless, given the alternative between a state which endorses a constitutional double standard and one which provides full constitutional protections, many would prefer the latter. Thus, although some effects may be subtle, on balance, retroactively applying *Crawford* is in the states' long-term interests both horizontally (from an inter-state competition perspective) and vertically (from a federalist perspective between the states and the federal government).

C. *The Precedent: State Decisions Retroactively Applying New Rules*

Because *Crawford* increases accuracy and involves a fundamental right, retroactively applying it is the right thing to do.[252] In doing so, states can rely on the express authority of *Danforth*,[253] as well as the persuasive

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247 Professor Somin has noted that the *Danforth* decision "captures some of the standard benefits of federalism. It allows us to reap more of the benefits of interstate diversity, mobility, and competition." *Id.* at 371.

248 *See supra* notes 35-38 and accompanying text.

249 Somin, *supra* note 23, at 371.

250 *Id.* at 372-73. Professor Somin notes:

> Given the costs of moving, few people or firms are likely to migrate merely because one state has better remedies than another for violations of constitutional rights. This, in turn, reduces the likelihood that states will try to compete with each other on this dimension. Nonetheless, there might be exceptions to this generalization. Residents who are particularly concerned about the danger of a given rights violation may take remedies into account in their moving decisions. In the Jim Crow era, when federal courts were extremely lax in enforcing constitutional protections for African-American criminal defendants, black migrants did indeed take into account the fact that northern criminal justice systems treated them more favorably than southern ones.

Id.

251 *See supra* Part II.B.2.

252 Crawford v. Washington, 541 U.S. 36, 74 (2004) ("[T]he Confrontation Clause's very mission . . . is to advance the accuracy of the truth-determining process in criminal trials." (quoting United States v. Inadi, 475 U.S. 387, 396 (1986) (internal quotation marks omitted))).

253 *See* Danforth v. Minnesota, 128 S. Ct. 1029, 1042 (2008) ("In sum, the *Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does

authority of an interlocking group of state decisions.[254] One leading precedent is *State v. Fair*,[255] in which the Supreme Court of Oregon held that states were "free to choose the degree of retroactivity . . . which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires."[256] The United States Supreme Court approved *Fair*'s holding in *Danforth*.[257] And even before *Danforth* was decided, the Supreme Court of Nevada in *Colwell v. State*[258] and the Supreme Court of Missouri in *Whitfield v. State*[259] both cited *Fair* as persuasive authority.

In *Colwell*, the Supreme Court of Nevada expanded the two *Teague* exceptions (albeit in dictum) to provide for potentially greater retroactive application of new rules.[260] First, the court broadened the availability of retroactive relief for substantive rules by "allowing the possibility"[261] that the court would consider a greater number of new rules substantive rather than procedural.[262] Next—and more relevant to *Crawford*'s potential retroactivity—the court eliminated *Teague*'s requirement that a new procedural rule have "'bedrock' or 'watershed' significance."[263] Rather, the court concluded that retroactivity was appropriate whenever the new rule significantly increased the accuracy of the fact-finding process.[264] This reasoning should support other states in retroactively applying *Crawford* under a modified form of *Teague* retroactivity analysis.[265]

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not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*.").

254 *See* State v. Fair, 502 P.2d 1150 (Or. 1972), *cited with approval in Danforth*, 128 S. Ct. at 1039; State v. Whitfield, 107 S.W.3d 253, 267 (Mo. 2003), *cited with approval in Danforth*, 128 S. Ct. at 1046; Colwell v. State, 59 P.3d 463, 471 (Nev. 2002) (per curiam).

255 502 P.2d 1150.

256 *Id.* at 1152, *quoted in Danforth*, 128 S. Ct. at 1039.

257 *Danforth*, 128 S. Ct. at 1039.

258 *Colwell*, 59 P.3d at 471 ("[W]e are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires." (quoting *Fair*, 502 P.2d at 1152) (internal quotation marks omitted)).

259 107 S.W.3d 253.

260 *Colwell*, 59 P.3d at 471. Although the court expanded *Teague*'s potential retroactivity for future cases, the court also rejected retroactivity for the new rule at issue, which held that the Sixth Amendment entitles "[c]apital defendants . . . to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Ring v. Arizona, 536 U.S. 584, 589 (2002).

261 *Colwell*, 59 P.3d at 472.

262 Recall that under *Teague*, a new substantive rule is presumptively retroactive, while a new procedural rule is presumptively not. *See supra* Part I.B.2.

263 *Colwell*, 59 P.3d at 472 (internal quotation marks omitted).

264 *Id.* ("[I]f accuracy is seriously diminished without the rule, the rule is significant enough to warrant retroactive application.").

265 *Id.* Note that although the Court in *Whorton v. Bockting*, 549 U.S. 406 (2007), held that *Crawford* did not qualify as a watershed rule because, while it may have "resulted in some net improvement in the accuracy of fact finding," it did not affect a change of *Gideon*'s magnitude, this "net improve-

Although *Fair* and *Colwell* provide persuasive authority for giving broader retroactive effect to new rules, neither court actually retroactively applied the new rule at issue to reverse a defendant's conviction.[266] In contrast, both the Supreme Court of Missouri in *State v. Whitfield*[267] and the Supreme Court of New Mexico in *State v. Forbes*[268] retroactively applied a new constitutional rule of criminal procedure to overturn a defendant's sentence.[269] Moreover, the court in *Forbes* reversed the defendant's conviction by retroactively applying *Crawford*; to date, it is the only state court of last resort to have done so.[270]

In *Whitfield*, the Supreme Court of Missouri retroactively applied the new procedural rule announced in *Ring v. Arizona*,[271] and reversed the defendant's death sentence.[272] *Ring* held that in capital cases the Sixth Amendment requires that a jury determine whether aggravating factors make the defendant "death eligible."[273] Under Missouri law, it was the judge who made this determination.[274] Citing both *Fair* and *Colwell*, the court concluded that "[s]o long as the state's [retroactivity] test is not narrower than that set forth in *Teague*, it will pass constitutional muster."[275]

The court then chose to apply *Linkletter-Stovall* balancing rather than *Teague*'s watershed test, noting that the *Teague* watershed test "essentially

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ment" may be significant enough to merit retroactive application under *Colwell*'s more responsive standard. *See Bockting*, 549 U.S. at 421 (2007) (citing Gideon v. Wainwright, 372 U.S. 335 (1963)); *Colwell*, 59 P.3d at 471.

266 *Colwell*, 59 P.3d at 473; State v. Fair, 502 P.2d 1150, 1152-53 (Or. 1972) (rejecting retroactivity for rule requiring prosecutors to "join in a single proceeding all charges arising out of the same act or transaction").

267 107 S.W.3d 253 (Mo. 2003).

268 119 P.3d 144 (N.M. 2005).

269 *Whitfield*, 107 S.W.3d at 271. It should be noted that *Whitfield* dealt with sentencing issues; the defendant's sentence had been increased based on aggravating factors not tried to a jury. *Id.* at 261-62. In contrast, *Crawford* involved trial procedure. Crawford v. Washington, 541 U.S. 36, 69 (2004). While the fact-finding phase of a trial may be considered analytically distinct from the punishment phase, the retroactivity doctrine analysis of *Whitfield* nevertheless stands as binding precedent for how Missouri courts are to apply their state retroactivity tests, and as persuasive precedent for other states seeking to give greater retroactive effect to new constitutional rules of criminal procedure.

270 State v. Forbes, 119 P.3d 144, 148 (N.M. 2005).

271 536 U.S. 584 (2002).

272 *Whitfield*, 107 S.W.3d at 256. *See generally* Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421, 438-49 (2004) (a symposium article discussing *Whitfield*, authored by the Missouri Supreme Court Judge who also wrote the *Whitfield* opinion).

273 *Ring*, 536 U.S. at 589; *Whitfield*, 107 S.W.3d at 256 ("[I]n *Ring v. Arizona*, the United States Supreme Court held that the Sixth Amendment entitles '[c]apital defendants . . . to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.'" (quoting *Ring*, 536 U.S. at 589) (citation omitted)).

274 *Whitfield*, 107 S.W.3d at 256.

275 *Id.* at 267 (citing Colwell v. State, 59 P.3d 463, 470 (Nev. 2002) (per curiam); State v. Fair, 502 P.2d 1150, 1152 (Or. 1972)).

prevents state courts" from retroactively applying new rules.[276] Applying the three-pronged *Linkletter-Stovall* balancing test, the court first concluded that the "purpose" prong favored retroactivity because *Ring*'s purpose was to preserve a fundamental Sixth Amendment right—the right to a jury.[277] The court also concluded that the "second and third factors clearly favor retroactivity" because of the new rule's narrow application.[278] Therefore, the court retroactively applied *Ring*'s new rule and reversed the defendant's death sentence, instead sentencing him to life without parole.[279]

Interestingly, both *Whitfield* and *Colwell* involved the potential retroactivity of the *Ring* decision.[280] In *Whitfield*, the Missouri Supreme Court retroactively applied *Ring* to spare a man's life; in *Colwell*, the Nevada Supreme Court declined to retroactively apply *Ring* and affirmed another man's death sentence.[281] And *Danforth*'s holding supports both decisions, although over Chief Justice Roberts's express objection.[282] In his dissent, Roberts illustrated his objection to the majority's holding with the following hypothetical:

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276 *Whitfield*, 107 S.W.3d at 268 n.15 (declining to apply *Teague* because it "essentially prevents state courts from achieving their goal [of correcting injustice], for through its focus on the impropriety of disturbing a final conviction, it diverts attention from constitutional violations and prohibits relief except in the very rare case." (quoting Hutton, *supra* note 22, at 450) (internal quotation marks omitted)).

277 *Id.* at 268. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

278 *Whitfield*, 107 S.W.3d at 268-69.

279 *Id.* at 272.

280 *Id.* at 256; *Colwell*, 59 P.3d at 466.

281 *Whitfield*, 107 S.W.3d at 272; *Colwell*, 59 P.3d at 473-74.

282 *Compare* Danforth v. Minnesota, 128 S. Ct. 1029, 1047 (2008) ("[S]uch nonuniformity is a necessary consequence of a federalist system of government."), *with id.* at 1048 (Roberts, C.J., dissenting) ("This interest in reducing the inequity of haphazard retroactivity standards and disuniformity in the application of federal law . . . was one of the main reasons we cited in *Griffith* for imposing a uniform rule of retroactivity upon *state* courts for cases on direct appeal. And, more to the point, it is the very interest that animates the Supremacy Clause and our role as the 'one supreme Court' charged with enforcing it.").

For a curious straddling of the two positions, see Lasch *supra* note 16, at 55. While supporting the majority's holding, that is, that states should retroactively apply new rules, he simultaneously shares Chief Justice Roberts's concern over disuniformity. *Id.* Lasch illustrates his concern with reference to the *Ring* rule, writing:

> The majority's answer in *Danforth*—that "such nonuniformity is a necessary consequence of a federalist system of government"—is no answer at all. It is one thing to believe that state courts can serve as laboratories of experimentation and thereby participate in a dialogue which contributes to the Supreme Court's reasoned development of constitutional criminal doctrine. But this is quite different from experimentation with respect to the retroactive application of a clear new rule announced by the Supreme Court, where it results in the kind of non-uniformity seen in the decisions applying *Ring*.

Id. (footnotes omitted).

> Of two criminal defendants, each of whom committed the same crime, at the same time, whose convictions became final on the same day, and each of whom raised an identical claim at the same time under the Federal Constitution, one may be executed while the other is set free—the first despite being correct on his claim, and the second because of it.[283]

If the Chief Justice's point was that we should not execute those who raise valid constitutional objections, it would be well taken. But this was not his argument. Rather, he argued that we should treat both defendants the same.[284] In practice, then, despite their "correct" constitutional claims, both defendants would be executed.[285] In fact, this is the current federal practice under the *Teague* test. No new constitutional rule has satisfied the *Teague* test in the two decades since it was created—it has instead become a general rule of non-retroactivity.[286] *Danforth* implicitly recognizes that if a new constitutional rule is to be applied retroactively, it will have to be in state courts in order to bypass *Teague*'s insurmountable bar.[287]

To date, several states have addressed whether to retroactively apply *Crawford* since *Danforth* was decided in February 2008.[288] The most thorough treatment of the issue, perhaps unsurprisingly, came on *Danforth*'s

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283 *Danforth*, 128 S. Ct. at 1047-48 (Roberts, C.J., dissenting). The *Danforth* majority responded, writing that:

> This assertion ignores the fact that the two hypothetical criminal defendants did not actually commit the "same crime." They violated different state laws, were tried in and by different state sovereigns, and may—for many reasons—be subject to different penalties. As previously noted, such nonuniformity is a necessary consequence of a federalist system of government.

Id. at 1047 (majority opinion).

284 *See id.* at 1053 (Roberts, C.J., dissenting) ("[T]he 'fundamental principle' of our Constitution, as Justice O'Connor once put it, is 'that a single sovereign's law should be applied equally to all.'" (quoting Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 4 (1985))).

285 *See* Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (rejecting retroactively applying *Ring* on federal habeas).

286 Whorton v. Bockting, 549 U.S. 406, 418 (2007) ("[*Teague*'s] exception is extremely narrow. We have observed that it is 'unlikely' that any such rules 'ha[ve] yet to emerge.' And in the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status." (quoting *Summerlin*, 542 U.S. at 352) (citations omitted)).

287 *See Danforth*, 128 S. Ct. at 1047 ("A decision by this Court that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial-only that no remedy will be provided in federal habeas courts.").

288 Bennett v. State, 752 N.W.2d 452, 2008 WL 2039303, at *6 (Iowa Ct. App. 2008) (unpublished table decision) ("The Iowa Supreme Court, however, has held that *Crawford* cannot be applied 'retroactively to support a claim for ineffective assistance of counsel.'" (quoting State v. Williams, 695 N.W.2d 23, 29 (Iowa 2005))); Commonwealth v. Delong, 888 N.E.2d 956, 958 (Mass. App. Ct. 2008) ("While a State may choose to apply the *Crawford* principle retroactively under its own law, there has been no indication to date that this is a view that the [Massachusetts] Supreme Judicial Court is likely to adopt." (citation omitted)); Danforth v. State (*Danforth Remand*), 761 N.W.2d 493, 500 (Minn. 2009) (on remand from United States Supreme Court); *Ex parte* Lave, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008) ("Although not required by the United States Supreme Court to do so, we adhere to our retroactivity analysis in *Keith* and its holding that *Crawford* does not apply retroactively to cases on collateral review in Texas state courts.").

remand to the Supreme Court of Minnesota.[289] In *Danforth v. State*,[290] the Minnesota Supreme Court declined to retroactively apply *Crawford*, and instead affirmed Stephen Danforth's conviction.[291] In reaching this conclusion, the court considered applying *Linkletter-Stovall* balancing or the modified-*Teague* analysis of *Colwell*, but ultimately opted to strictly adhere to the federal *Teague* standard instead.[292] First, the court rejected applying *Linkletter-Stovall* balancing because of the potential administrative costs, writing: "[I]f we were to apply *Crawford* retroactively under the *Linkletter-Stovall* test . . . the criminal justice system would be burdened with litigating the validity of convictions, like Danforth's conviction . . . ."[293] No discussion, however, was given to what the costs might be to evaluate the validity of convictions. The court then went on to reject *Colwell*'s modified-*Teague* analysis because of similar "administrative cost" concerns, writing:

> The *Colwell* standard would expand the retroactive application of new rules of constitutional procedure to cases where the absence of the new rule seriously diminished the accuracy of the trial but did not affect the fundamental fairness of the criminal proceeding. But relitigating cases in which a fundamentally fair trial has been held seriously distorts the allocation of very limited resources available to the criminal justice system.[294]

A forceful two-justice dissent took particular issue with this line of reasoning, with Justice Paul Anderson writing: "I fail to see how a trial that is conducted under a rule that *seriously* diminishes the accuracy of the trial is a 'fundamentally fair trial.'"[295] More generally, the dissent disagreed with the majority's strict adherence to the federal *Teague* watershed test,[296] in-

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289 *Danforth Remand*, 761 N.W.2d 493 (on remand from United States Supreme Court).

290 *Id.*

291 *Id.* at 500.

292 *Id.* at 499 (citing Stovall v. Denno, 388 U.S. 293 (1967); Linkletter v. Walker, 381 U.S. 618 (1965); Colwell v. State, 59 P.3d 463, 470 (Nev. 2002) (per curiam)).

293 *Danforth Remand*, 761 N.W.2d at 499. The court went on, writing that this administrative burden was too costly because convictions like Danforth's "were final before *Crawford* was announced and were perfectly free from error when finally decided." *Id.* Whether these convictions were "perfectly free from error" is debatable, at least in the eyes of the majority of the United States Supreme Court. *See* Danforth v. Minnesota, 128 S. Ct. 1029, 1047 (2008) (reasoning that merely because "a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas courts"). *But see id.* at 1055 (Roberts, C.J., dissenting) ("Since the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law." (quoting James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534-35 (1991))).

294 *Danforth Remand*, 761 N.W.2d at 499.

295 *Id.* at 501 (Anderson, Paul H., J., dissenting).

296 The dissent reasoned that "the fact there have been no 'watershed' rules announced by the Court in the 19 years since it decided *Teague* sends a signal that the *Teague* test as applied by the Court is 'unyielding or unworkable.'" *Id.* at 500. The majority disagreed with this analysis, writing: "That there have been no 'watershed' rules announced in the 19 years since *Teague* does not mean *Teague* is unyielding or unworkable. It simply means that such cases are rare." *Id.* at 500 (majority opinion).

stead arguing for adoption of *Colwell*'s modified-*Teague* analysis.[297] As another illustration of the interlocking nature of the state decisions discussed above, the dissent concluded by quoting the *Fair* statement[298]—the very same statement that had been quoted in *Danforth*, *Colwell*, and *Whitfield*.[299]

Other states that have considered retroactively applying *Crawford* in light of *Danforth* to date include Iowa, Massachusetts, and Texas.[300] Although these courts also declined to retroactively apply *Crawford*, only Texas foreclosed the possibility of doing so in the future.[301] For example, in *Bennett v. State*,[302] the Court of Appeals of Iowa concluded that they were bound by the Supreme Court of Iowa's decision in *State v. Williams*,[303] which held that *Crawford* "cannot apply retroactively to support a claim for ineffective assistance of counsel."[304] Because both *Bennett* and *Williams* were ineffective assistance of counsel claims, the court in *Bennett* concluded that "*Williams* precludes this court's retroactive application of *Crawford* in this case."[305] However, since *Williams* was decided before *Danforth*, and on narrow ineffective assistance of counsel grounds, *Crawford*'s retroactivity in Iowa potentially remains an open question,[306] the unpublished Iowa Court of Appeals decision in *Bennett* notwithstanding.[307]

Query, however, whether the adjective "rare" is a synonym of "nonexistent," which, in practice, is what cases qualifying under *Teague* have been.

297 *Id.* at 501-02 (Anderson, Paul H., J., dissenting).

298 *Id.* at 502 ("Adopting a modified *Teague* standard would enable us, as the Oregon Supreme Court has said, to be 'free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires.'" (quoting State v. Fair, 502 P.2d 1150, 1152 (Or. 1972))).

299 *See supra* notes 255-59 and accompanying text.

300 Bennett v. State, 752 N.W.2d 452, 2008 WL 2039303, at *6 (Iowa Ct. App. 2008) (unpublished table decision) ("The Iowa Supreme Court, however, has held that *Crawford* cannot be applied 'retroactively to support a claim for ineffective assistance of counsel.'" (quoting State v. Williams, 695 N.W.2d 23, 29 (2005))); Commonwealth v. Delong, 888 N.E.2d 956, 958 (Mass. App. Ct. 2008) ("While a State may choose to apply the *Crawford* principle retroactively under its own law, see *Danforth v. Minnesota*, there has been no indication to date that this is a view that the [Massachusetts] Supreme Judicial Court is likely to adopt." (citation omitted)); *Ex parte* Lave, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008) ("Although not required by the United States Supreme Court to do so, we adhere to our retroactivity analysis in *Keith* and its holding that *Crawford* does not apply retroactively to cases on collateral review in Texas state courts.").

301 *Bennett*, 752 N.W.2d 452, 2008 WL 2039303, at *6; *Delong*, 888 N.E.2d at 958; *Ex parte Lave*, 257 S.W.3d at 237.

302 *Bennett*, 752 N.W.2d 452.

303 695 N.W.2d 23 (2005).

304 *Id.* at 29.

305 *Bennett*, 752 N.W.2d 452, 2008 WL 2039303, at *6.

306 *Williams*, 695 N.W.2d at 30 ("Having decided the ineffective-assistance-of-counsel claim on the grounds that counsel was not required to anticipate a change in the law, we decline to further address the application of the *Crawford* holding . . . . [W]e recognize the law to be an evolving process that

Similarly, the Appeals Court of Massachusetts expressed reluctance to retroactively apply *Crawford* absent a clear signal from its state supreme court, finding that although "a State may choose to apply the *Crawford* principle retroactively under its own law, there has been no indication to date that this is a view that the [Massachusetts] Supreme Judicial Court is likely to adopt."[308] Notably, this statement came in dicta, since the court concluded that "irrespective of *Crawford*," the testimony at issue should not have been admitted.[309] Instead, the court focused its analysis on whether the error was harmless, concluding that it was.[310]

Harmless error analysis will be useful for states choosing to retroactively apply *Crawford* while seeking to limit its scope.[311] Of course, the primary limit on *Crawford*'s scope is inherent in the decision—it applies only to the limited class of cases in which a defendant was convicted based upon testimonial statements of an unavailable witness, and only if the defendant did not have a prior opportunity to cross-examine the witness.[312]

To date, only one state has retroactively applied *Crawford* to reverse a final judgment, and that decision came *before* the Court decided *Danforth*. In *State v. Forbes*,[313] the Supreme Court of New Mexico reversed a twenty-year-old conviction because of a *Crawford* violation, but did so based largely on the unique procedural history of the case.[314] In 1985, Ralph Earnest was tried for murder and several other serious offenses.[315] At trial, the prosecution sought to introduce a taped statement that an alleged accomplice had made to the police.[316] The trial court overruled Earnest's Confrontation Clause objection and he was convicted.[317] When Earnest appealed,

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often makes the resolution of legal questions a composite of several cases, from which appellate courts can gain a better view of the puzzle before arranging all the pieces.").

307 *Bennett*, 752 N.W.2d 452, 2008 WL 2039303, at *6.

308 Commonwealth v. Delong, 888 N.E.2d 956, 958 (Mass. App. Ct. 2008) (citation omitted).

309 *Id.*

310 *Id.*

311 *See generally* 5 C.J.S. *Appeal and Error* §§ 965-70 (2008) (reviewing harmless error doctrine); John E. Theuman, Annotation, *What Constitutes Harmless or Plain Error Under Rule 52 of the Federal Rules of Criminal Procedure—Supreme Court Cases*, 157 A.L.R. FED. 521 (1999) (collecting federal and state cases discussing what constitutes harmless error).

312 Crawford v. Washington, 541 U.S. 36, 59 (2004).

313 119 P.3d 144 (N.M. 2005).

314 *Id.* at 148. For a thorough, firsthand account of this case see J. Thomas Sullivan, Crawford*, Retroactivity, and the Importance of Being Earnest*, 92 MARQ. L. REV. 231 (2008). Professor Sullivan represented the defendant, Ralph Rodney Earnest, from his direct appeal in 1984 through his collateral challenges and eventual release from custody in 2006. *Id.* at 231 n.*.

315 The charges included "murder, conspiracy to commit murder, aggravated kidnapping, and conspiracy to commit kidnapping. . . . Earnest was also charged with possession of methamphetamine." *Id.* at 238.

316 State v. Earnest, 703 P.2d 872, 875 (N.M. 1985), *vacated*, New Mexico v. Earnest, 477 U.S. 648 (1986) (per curiam).

317 *Forbes*, 119 P.3d at 145.

however, the New Mexico Supreme Court reversed his conviction "for the very rationale stated by the United States Supreme Court in *Crawford*: that the admission of a prior statement . . . violated [Earnest's] rights under the Confrontation Clause."[318] The State then appealed to the United States Supreme Court, which vacated the New Mexico Supreme Court's decision and remanded with instructions to apply the indicia of reliability rule.[319] On remand, the New Mexico court then affirmed Earnest's conviction.[320]

After *Crawford* was decided, Earnest filed a habeas petition in state court.[321] The New Mexico Supreme Court granted the writ, but sought to limit its holding "to the very special facts of this case, highlighted by the fact that the very law this Court applied to Earnest's case twenty years ago has now been vindicated, which entitles him now to the same new trial he should have received back then."[322] Given the court's stated limitation, it is uncertain what precedential value *Forbes* will have in subsequent cases. Nevertheless, the decision stands as an express recognition that *Crawford* merits retroactivity, even if only in special cases.

CONCLUSION

Under *Danforth*, states may retroactively apply all new constitutional rules of criminal procedure, not merely *Crawford*'s new Confrontation Clause rule.[323] Notwithstanding this general power, *Crawford* in particular should be among the first rules retroactively applied for three simple reasons. Principally, *Crawford* merits retroactivity because it substantially increases a trial's accuracy. The most reliable method of testing the truth of accusations is through cross-examination.[324] In addition, *Crawford* merits retroactivity because of fundamental fairness. It is fundamentally unfair as a matter of constitutional law to keep someone imprisoned based upon evidence, the veracity of which a court refused to test in the only method "sufficient to satisfy constitutional demands"— confrontation.[325] Finally, *Craw-*

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318 *Id.*

319 *Earnest*, 477 U.S. 648.

320 *Forbes*, 119 P.3d at 145.

321 *Id.*

322 *Id.* at 148-49.

323 Danforth v. Minnesota, 128 S. Ct. 1029, 1033 (2008) ("The question in this case is whether *Teague* constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. We have never suggested that it does, and now hold that it does not.").

324 Crawford v. Washington, 541 U.S. 36, 61 (2004) ("[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.").

325 *Id.* at 69.

ford merits retroactivity from a pragmatic, federalist perspective. By eliminating a constitutional double standard for a fundamental right, states reassert their importance in our federalist system as primary guardians of individual liberty.