Crawford, Davis, and *Way* Beyond

by Richard D. Friedman*

Until 1965, the Confrontation Clause of the Sixth Amendment to the Constitution hardly mattered. It was not applicable against the states, and therefore had no role whatsoever in the vast majority of prosecutions. And if a federal court was inclined to exclude evidence of an out-of-court statement, it made little practical difference whether the court termed the statement hearsay or held that the evidence did not comply with the Confrontation Clause. But then the Supreme Court held the Clause applicable to the states,[1] and that meant that, potentially at least, the Clause mattered a great deal. Now the Court could invoke the Clause to hold that evidence of a statement could not be admitted in a state prosecution, notwithstanding that the evidence complied with the state's hearsay law. And adoption of the Federal Rules of Evidence in 1975 meant that black-letter hearsay law would pose no obstacle to some statements that the federal courts might nonetheless determine to violate the confrontation right.

The trouble was that the Supreme Court did not have a good conception of what the Confrontation Clause meant. The Clause seemed to require exclusion of some hearsay, but it would be intolerable to treat it as excluding all hearsay. The Court floundered, eventually articulated a rationale that the Clause was meant to exclude only unreliable hearsay, and leaned heavily on the established, and expanding, body of hearsay exemptions to determine what was reliable. This meant that the Clause still had only a very limited effect. The lower courts usually could find a basis for admitting a statement, either fitting it within an exemption or making a case-specific determination of reliability. And, though the Supreme Court occasionally swooped down and held the admission of a given statement to be a violation of the Clause, the law was highly unpredictable because it was not rooted in any solid underlying theory.

Crawford v. Washington[2] changed all that. The Court held that the Confrontation Clause does not constitutionalize the prevailing law of hearsay. Rather, it enunciates a simple, and long-standing, procedural rule: A prosecution witness must give testimony in the presence of the accused, subject to cross-examination. If an out-of-court statement is testimonial in nature, therefore, it may not be admitted against an accused unless the accused has had (or forfeited) an opportunity to examine the witness, and even then it will be accepted only if the witness is unavailable to testify at trial.[3]

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[1] Pointer v. Texas, 380 U.S. 400 (1965).

[2] Crawford v. Washington, 541 U.S. 36 (2004).

[3] *Crawford* also holds out the possibility that statements fitting within the "dying declaration" exception to the hearsay rule might also fall outside the confrontation right. In my view, the proper way to handle dying declarations is through forfeiture doctrine rather than to create an exception to the right.

Doctrinally, the transformation was remarkably swift and total. The upshot is that we are at the threshold of a new era. This is not only the first time that the Confrontation Clause really matters; it is the first time that the distinction between the commands of the Clause and the contents of ordinary hearsay law will really matter. This means that many basic questions have to be rethought, or approached completely from scratch. That is very exciting. And I think it renders silly the fears that the testimonial approach will prove to be as indeterminate as the reliability approach was. The reliability approach was incoherent and failed to express any principle worth protecting; therefore it was, as Justice Scalia said in *Crawford*, permanently unpredictable.[4] The new world of the testimonial approach is a little more than two years old; one cannot expect that by now all significant questions would have been resolved and that the courts would all apply those resolutions smoothly and consistently.

Indeed, in arguing *Hammon v. Indiana*,[5] I suggested that the Court *not* try to do too much all at once; the Court should be attempting to build a framework that will last for centuries, I contended, and it is more important that it be built well than that it be built quickly.[6] And indeed, just as it did in *Crawford*, the Court decided the *Davis* and *Hammon* cases without offering a comprehensive definition of what "testimonial" means. But now we have some more guideposts than we had: The statements at issue in *Hammon* are testimonial, and the key ones at issue in *Davis* are deemed not to be.

***Davis, Hammon*, and Framework Questions**

This result is better than it might have been – and better, I believe, than the results most of the lower courts had reached – but not as good as it should have been. If Hammon had lost, then we would have created a system in which a complainant could create evidence for trial simply by making an accusation to a police officer in her living room, at least so long as the accused was not in the same room and was in the presence of another officer. Thus, the Supreme Court would have endorsed the toleration demonstrated by most courts in the years before *Crawford* and by many even afterwards of a practice that should be deemed a core violation of the Confrontation Clause. That practice took advantage of the Court's pre-*Crawford* holding that a statement deemed to fit within the jurisdiction's hearsay exception for spontaneous declarations was exempt from the Confrontation Clause;[7] invoking some remarkably generous interpretations of the hearsay exception, courts routinely admitted even accusatory statements made to authorities, even if made hours after the incident, and even if the accuser was present but did not testify. Many

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[4] 541 U.S. at 68 n.10.

[5] 126 S.Ct. 2266 (2006) (decided sub nom. *Davis v. Washington*).

[6] Transcript of argument in *Hammon v. Indiana*, No. 05-5705, at 63, *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-5705.pdf.

[7] White v. Illinois, 502 U.S. 346 (1992).

courts, presumably having gotten so accustomed to the practice they found it almost unthinkable to do without it, continued to tolerate it after *Crawford*. But once one understands and accepts in good faith the transformation wrought by *Crawford*, *Hammon* becomes an easy case, and the opinion of the Court reflects that fact.[8]

Davis was plainly a much tougher case. When the complainant, Michelle McCottry, spoke to a 911 operator, she was still in distress, the assault had allegedly occurred just moments before – so recently that she spoke in the present tense – she was not yet protected by a police officer, and the accused was at large. I still thought Davis should have won. Jeff Fisher and I contended for a simple, intuitively appealing proposition that would have clarified the law greatly if it ha been adopted – that an accusation of crime made to a police officer or other law enforcement official is testimonial. Moreover, to the extent purpose matters, it appears to me that the purpose of the conversation – on the part of both McCottry and of the 911 operator – was not to provide immediate protection to McCottry. Davis was evidently leaving the house as the call began, McCottry expressed no fear that he would return in the immediate future, and the operator told her that the police were first *going to find the accused* and then *come talk to* the complainant.[9] Had the operator been concerned that the accused was likely to return in the immediate future to the house, then this would make no sense at all; rather than roaming the streets of the city looking for the accused, while he might have returned to the house, at least one officer should first have been posted to the house. Clearly, the aim of the state officers, and presumably also the desire of the complainant, was that the accused be arrested and that sanctions – at least for violation of the restraining order mentioned in the call by the complainant, and perhaps also for criminal violations – be imposed on him.

The Supreme Court did not see it that way. The Court enunciated a test that, while not comprehensive, it regarded as adequate to resolve these cases:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[10]

The emphasis on the "primary purpose" of the questioner is perplexing. Determining a

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[8] 126 S.Ct. at 2278 (*Hammon* "much easier" than *Davis*, the statements being "not much different" from those in *Crawford*).

[9] In fact, it appears that the officers did go directly to McCottry, but that was not the anticipation of the parties to the conversation.

[10] 126 S.Ct. at 2273-74.

"primary purpose" is of course a difficult matter, because so often, as Justice Thomas correctly points out in dissent, the questioner has more than one important purpose, and they may meld together.[11] Labeling one purpose after the fact as primary seems to be a rather arbitrary exercise[12] – and thus the test is an invitation to manipulation that will enhance the chances that the evidence will be received.[13]

But beyond this, why should the purpose of the questioner matter? I have previously stated at length reasons why the witness's perspective should be the crucial one in determining whether a statement is testimonial.[14] And, curiously, the *Davis* Court seems to agree. As the Court made very clear, statements made absent interrogation – volunteered statements or ones made in response to open-ended questions – may be testimonial.[15] (Thus, one of the fallacies adopted by some lower courts in the wake of *Crawford* is dispelled.[16]) "And of course," the Court further states, "it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate."[17]

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[11] 126 S.Ct. at 2283 ("In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence.").

[12] Id. at 2284-85.

[13] Of course, even the test that I think is optimal, based on the reasonable anticipation of a person in the position of the declarant, is potentially manipulable. *E.g.*, State v. Stahl, 111 Ohio St.3d 186, 855 N.E.2d 834 (2006). Indeed, in some circumstances a test based on the primary purpose of the questioner will be more likely to lead to a conclusion that the statement is testimonial, because whatever the understanding of a reasonable person in the position of the declarant it is not reasonably deniable that the questioner solicited the statement for forensic purposes. *E.g.*, State v. Justus, 2006 WL 3392069 (Mo. 2006). Nevertheless, I believe that a test based on purpose of the questioner will be more subject to manipulation, because often the questioner – frequently a police officer or some other repeat witness who is part of the criminal justice system – will learn to recite a formula that will give a friendly court cover for concluding that the questioner's primary purpose was not forensic.

[14] *Grappling with the Meaning of "Testimonial"*, 71 BROOK. L. REV. 241, 255-59 (2005).

[15] 126 S.Ct. at 2274 n.1.

[16] I have discussed this fallacy in *Grappling*, *supra*, 71 BROOK. L. REV. at 263-66. That passage was adapted from an entry called "The Interrogation Bugaboo" that I posted on The Confrontation Blog, http://confrontationright.blogspot.com/ (Jan. 20, 2005, 1:12 EST).

[17] 126 S.Ct. at 2274 n.1.

So how do we reconcile these divergent statements? I am inclined to believe that the Court (or at least a substantial portion of it) does recognize that the declarant's perspective is the better one, and that at least the Court has not rejected that perspective. Consider this thought experiment. Suppose there is a statement *not* made in response to interrogation that, under whatever the applicable test may be, is testimonial; as I have just noted, *Crawford* explicitly recognized that there are such statements, and plainly the test for determining that such statements are testimonial can have nothing to do with interrogation. Now suppose that the same statement is made in identical circumstances except that it is in response to an interrogation conducted primarily for the purpose of resolving an ongoing emergency. So now the statement is characterized as nontestimonial under *Davis*. But why would the purpose of the interrogator preempt whatever the underlying standard was that led to the statement being characterized as testimonial absent the interrogation? The more likely explanation, I believe, is that the Court recognizes (or would if forced to confront the matter) the existence of some broad, underlying standard that has nothing to do with an interrogator's purpose, but that it perceives that if the statement is taken in response to an interrogation held for emergency resolution purposes the probability is very small that the statement would be characterized as testimonial under that underlying standard. In this view, *Davis* is perfectly compatible with a general test based on the anticipation of a reasonable person in the position of the declarant. The Court might well believe that, if a statement is made in response to interrogation, and the interrogation was conducted primarily for the purpose of resolving an emergency, then it is highly unlikely that a reasonable person in the declarant's position would anticipate that the statement would be used for prosecution. It might be unlikely both because the circumstances that govern the interrogator also affect the declarant, and because the fact and nature of the interrogation govern the declarant's understanding of the situation. And the Court might also believe that the interrogator's purpose is more easily determinable in this setting than the declarant's understanding.

This view is supported by the fact that the *Davis* Court slipped easily into speaking about the call from the viewpoint of the declarant: According to the Court, "McCottry's call was plainly a call for help against bona fide physical threat. . . . She was seeking aid, not telling a story about the past."[18] And in discussing *Crawford*, the Court spoke of factors that "strengthened the statements' testimonial aspect – made it more *objectively apparent*, that is, that the purpose of the exercise was to nail down the truth about past criminal events."[19]

This view also gains strength with a focus on an ambiguity in the declarant-perspective test that has not received much open discussion.[20] When we speak of the anticipation of a reasonable person in the declarant's position, we are referring to a hypothetical person who has all the information about the particular situation that the declarant does, and no more – thus, if the

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[18] 126 S.Ct. at 2276.

[19] 126 S.Ct. at 2279 (emphasis added).

[20] *But cf.* United States v. Brito, 427 F.3d 53, 61-62 (1st Cir. 2005).

declarant is speaking to an undercover police officer, the hypothetical person would not know that her audience is collecting information for use in prosecution. But is the anticipation of the reasonable person assessed (a) from the vantage point that the declarant actually occupied, speaking in the heat of the moment, or (b) as if she considered the probable use of her statement after the fact, reflecting calmly while sitting in an armchair? I think the better perspective might br from the armchair, because it would better help the Confrontation Clause achieve its goal of preventing the creation of a system precluding use of prosecution testimony not given subject to confrontation. But I think the armchair view is a very tough sell; it is a great deal easier to come to the conclusion that the heat-of-the-moment view is the proper one, because that one focuses on the actual circumstances of the declarant when she made the statement. And, to the extent the *Davis* Court focused on the intent or anticipation of the declarant, it seems clearly to have taken the heat-of-the-moment view. I still believe that under that view the statements in *Davis* should have been deemed testimonial, but it is certainly plausible that a caller in McCottry's position would not, in the heat of the moment, consider the prospect of prosecutorial use of her statements unless her attention was called to it.

In short, I do not think we can draw from *Davis* any inference adverse to general application of the declarant-perspective approach.

Operational Ambiguities

A test relying on the terms "primary purpose" and "ongoing emergency" test is extremely ambiguous, and the *Davis* Court deepened the ambiguity when it applied the test to the cases before it. I am afraid that many post-*Davis* courts, as in the *Roberts* era and in the brief *Crawford*-to-*Davis* era, will approach cases by looking for whatever toehold they can find to admit accusatory statements that were made absent an opportunity for confrontation.

Some aspects of the *Davis* opinion should counsel a conscientious court to treat the "ongoing emergency" doctrine restrictively. The Court emphasized that "McCottry was speaking about events *as they were actually happening*"[21] – and if this is not strictly accurate, the Court's emphasis on the point is all the more significant. Indeed, though the Court gave various indications of when the emergency ended in *Davis*, it explicitly said the emergency ended "when Davis drove away form the premises"; after that, further statements would be testimonial, and redaction would be necessary.[22] Furthermore, the Court explicitly regarded *Hammon* as a "much easier" case – suggesting that the statements in *Davis* were close to the line and those in *Hammon* were not.[23] The Court said that when the officer elicited Amy Hammon's oral accusation of her husband, "he was not seeking to determine (as in *Davis*) 'what is happening,' but 'what

[21] 126 S.Ct. at 2276.

[22] 126 S.Ct. at 2277.

[23] 126 S.Ct. at 2278.

happened.'"[24] And it was sufficient for the result that "Amy's statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation."[25]

Moreover, the Court's treatment of *King v.* Brasier,[26] an English case from 1779, is highly significant. There, as the *Davis* Court indicated, a young girl, "immediately on her coming home" after an assault,[27] told her mother about the incident. *Davis* distinguished the case, while appearing to endorse it: The case would be helpful to Davis if it more closely resembled the facts of his case, the Court said, "[b]ut by the time the victim got home, her story was an account of past events."[28] Thus, notwithstanding the immediacy of the report – and notwithstanding, also, that the declarant was a young child and her audience included no law enforcement officers – the statement was testimonial. And, significantly, that is the way that the *Brasier* court referred to the child's accusation, as testimony. We should not be distracted by the question of whether *Brasier* was known in the United States at the time the Sixth Amendment was drafted or adopted. In the respect relevant to the inquiry here, *Brasier* made no new law. Rather, its significance is that it reflects the common understanding of the time. The debated question there was whether, given the declarant's youth, her out-of-court statement could be admitted. And a premise of the debate was that if she had been an adult the statement could not have been used – and for the reason that if the result were otherwise then testimony given out of court would be admitted against the accused. Whatever one thinks of originalism in general, or even as a method for understanding the Confrontation Clause, I believe that a common understanding at the time of the Framing that an out-of-court accusation, even one made very soon after the event, was testimonial in nature and therefore not admissible, should be given considerable weight, as reflecting a deeply seated understanding of the confrontation right.

So all this should persuade a conscientious court not to stretch the idea of "ongoing emergency" very far at all. And yet a court inclined to do so – and I believe most are – has some material to work with, beyond the notorious looseness in the term "emergency." "[E]ven . . . the operator's effort to establish the identity of the assailant" in *Davis* was necessary to resolve the emergency, said the Court, "so that the dispatched officers might know whether they would be encountering a violent felon." That identification statements may be admitted is often critical, of course, as it was in this case. But I really wonder. Would the officers, knowing no more than

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[24] 126 S.Ct. at 2278.

[25] 126 S.Ct. at 2279.

[26] 1 Leach 199, 168 Eng. Rep. 202 (1779).

[27] *Davis* describes the girl as a rape victim, but the report of the case indicates that the crime was attempted rape.

[28] 126 S.Ct. at 2277.

that they were trying to find someone accused of having just committed a violent crime of passion, be lax in their precautions? Moreover, there is no indication that the 911 operator searched Davis's record before the officers found him.

Further, the Court noted that officers at the scene "need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim."[29] Preliminary indications lend force to the anticipation that courts will frequently seize on this language as license to admit any statement made before the accused is in custody or at least in the presence of an officer. It is significant in this regard that in *Hammon* itself the state supreme court held the statement admissible on the ground that it was necessary to allow the officers to secure and assess the situation.

In short, most of the indications from the *Davis* opinion are that the dividing line between testimonial and nontestimonial should lie much closer to the situation in *Davis* than to that in *Hammon* – but I believe that, until the Supreme Court intervenes once again, most of the lower courts will place it much closer to the situation in *Hammon*.

Formality

In *Crawford*, the Court pointed to the formality of the circumstances under which Sylvia Crawford made her statements as a factor supporting the conclusion that the statements were testimonial. And so some lower courts chose to treat formality as a prerequisite for a statement to be considered testimonial. I have elsewhere stated at length reasons why this conclusion is fallacious and even wrong-headed.[30] In brief, formalities, including the oath and opportunity for cross-examination, are required conditions of acceptable testimony. A statement is not rendered non-testimonial by the absence of formalities; rather, if the statement is genuinely testimonial in nature, the lack of formalities makes the statement unacceptable. A rule that only formal statements will be characterized as testimonial is not only theoretically backwards but it creates a perverse incentive: Those wanting to give or take testimony without it being subjected to confrontation could simply do so informally.

Thus, I had hoped that the decisions in *Davis* and *Hammon* would put to rest the notion that to be characterized as testimonial a statement must meet some standard of formality. And my hopes were raised at argument, because not only was it obvious that Justice Scalia, the author of

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[29] 126 S.Ct. at 2279, *quoting* Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty., 542 U.S. 177, 186 (2004).

[30] *Grappling*, *supra*, at 266-69, adapted from an entry called "The Formality Bugaboo" that I posted on The Confrontation Blog, http://confrontationright.blogspot.com/ (Jan. 2, 2005, 12:55 EST).

Crawford, got the point, but he articulated it with some force.[31] I would have offered long odds at that point against the result that Justice Scalia would write an opinion for the majority that preserved even the possibility of a formality requirement. And yet that is just what happened. The *Davis* opinion appears to be the product of considerable compromise, and one of the chief pieces of evidence on point is the superficial ambiguity with which it deals with formality.

In distinguishing *Davis* from *Crawford*, the Court relied in part on the greater formality of the circumstances under which the statement in *Crawford* was made.[32] Moreover, in responding to Justice Thomas, who would have imposed quite a stringent formality test, the Court said in a footnote, "We do not dispute that formality is indeed essential to testimonial utterance."[33]

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[31] Note the following dialogue between Justice Scalia and Thomas Fisher, the Indiana Solicitor General, shortly after Justice Scalia had posed a hypothetical involving an unsolicited accusatory affidavit.

> **JUSTICE SCALIA**: . . . [S]urely the affidavit isn't – isn't what's magical. I mean, I'm going to change my hypothetical. The person recites his accusation on a tape recorder and mails the tape to the court. Now, are you going to say, well, it's not an affidavit? You'd exclude that as well, wouldn't you?
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> **MR. FISHER**: Well, I – I don't know that I would because, again, you've got the – you've got the form that *Crawford* was concerned about. The affidavit is the classic form.
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> **JUSTICE SCALIA**: That would make no sense at all. I mean, that – that is just the worst sort of formalism. If you do it in an affidavit, it's – it's bad, but if you put it on a tape, it's – it's good. I – I cannot understand any reason for that.

Transcript of Oral Argument in *Hammon v. Indiana No. 05-5705, available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-5705.pdf, at 34-35.

[32] 126 S.Ct. at 2276-77.

[33] 126 S.Ct. at 2278 n.5. One other passage could breed confusion in this context. The Court quoted a paragraph from *Crawford* that included the statement, "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," 126 S.Ct. at 2274, *quoting Crawford*, 541 U.S. at 51, and then said, "A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter." 126 S.Ct. at 2274. In context, it is clear that the "limitation so clearly reflected in the text of the constitutional provision" is to testimonial statements, not to formal statements made to government officers. The passage addressed the question "whether the Confrontation Clause applies only to testimonial hearsay." *Id.* As in *Crawford*, the Court offered formal statements to government officers as the clearest example of testimonial statements, not as the exclusive one; indeed, in the same discussion, the Court explicitly reserved the question "whether and when statements made to someone other than

But prosecutors would be unwise to celebrate the adoption of a meaningful formality requirement. The comparison of *Davis* and *Crawford* does not purport to adopt any such requirement. It merely lists the difference in formality as one among four factors justifying a different result between the two cases. And declining to dispute a proposition is not the same thing as asserting it. Moreover, in the context in which the Court responded to Justice Thomas the discussion was essentially *dictum*, because it was not necessary for the Court to resolve whether there was a formality requirement. The discussion came during the Court's analysis of *Hammon*, from which Justice Thomas dissented on the ground that the statement was not sufficiently formal, and the Court held that indeed it was.[34]

The opinion contains three other passages that lend great force to the conclusion that either there is no formality requirement or, if there is one, it adds nothing to the requirement that the statement be made in anticipation of prosecutorial use. First, the Court noted that most of the early cases involving confrontation requirements "involved testimonial statements of the most formal sort – sworn testimony in prior judicial proceedings or formal depositions under oath – which invited the argument that the scope of the Clause is limited to that very formal category." But immediately the Court rejected that argument: The English cases were not limited to "prior court testimony and formal depositions," and here the Court cited to the passage in *Crawford* in which it said "We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK.."[35] Similarly, the *Davis* Court added that it is not "conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition."[36] Exactly right; this is why I have said that the argument for a formality requirement is wrong-headed.

Second, in comparing *Hammon* with *Crawford*, the Court acknowledged that "the *Crawford* interrogation was more formal," but asserted that none of the features that made it so "was essential to the point" that Sylvia Crawford's statements were testimonial. The Court noted

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law enforcement personnel are 'testimonial.'" *Id.*

[34] The Court said, in support of this conclusion, "It imports sufficient formality, in our view, that lies to [police] officers are criminal offenses." 126 S.Ct. at 2278 n.5. Of course, the Court did not mean to suggest that if lies to police officers were not criminal offenses, then statements to them could not be testimonial. Among other problems, that rule would allow states to eviscerate the confrontation right. One could, for example, easily imagine a state decriminalizing false accusations of domestic violence made to the police, to protect alleged victims from the supposed threat of prosecution and (in fact) to obviate the necessity for them to testify subject to confrontation.

[35] 541 U.S. at 52 n.3.

[36] 126 S.Ct. at 2275-76.

that those features (that the interrogation "followed a *Miranda* warning, was tape-recorded, and took place at the station-house") "strengthened the statements' testimonial aspect – made it more objectively apparent, that is, that the purpose of the exercise was to nail down the truth about past criminal events."[37] The implication seems clear that there is no strict formality requirement, or that if there is one it is satisfied by demonstrating that it was objectively apparent to the declarant that the interrogation was being held for prosecutorial purposes. Thus, the Court then said that in *Hammon* "[i]t was formal enough that Amy's interrogation was conducted in a separate room, away from her husband (who tried to intervene), with the officer receiving her replies for use in his "investigat[ion]."[38] These factors do not fit easily in the category "formal" – but they clearly demonstrate that the shared understanding of the conversation was that Amy Hammon was creating evidence that would likely be used in prosecution.

Finally, in responding to Justice Thomas, the Court criticized a formality test, noting that his dissent "has not provided anything that deserves the description "workable"– unless one thinks that the distinction between 'formal' and 'informal' statements qualifies." Moreover, the Court pointed out that Justice Thomas "even qualifies that vague distinction by acknowledging that the Confrontation Clause 'also reaches the use of technically informal statements when used to evade the formalized process' . . . ."[39]

Perhaps the Court believes that a statement that is testimonial in nature will inevitably be attended by some formal aspect, particularly if the Court's conception of formality is very broad. Or perhaps all that formal means to the Court in this context is that the circumstances are such as to give notice that the statement will be used in prosecution. In any event, it seems unlikely that the Court will interpret formality to mean more than a showing of such circumstances – which, means that formality will turn out merely to be an odd way of phrasing what, under the optimal view, should be the critical question in determining whether a statement is testimonial.

The Opinion That Might Have Been Written

I will summarize much of the discussion above by presenting a synopsis of what I might have produced had I been a law clerk under instructions to draft an opinion reversing in *Hammon* but affirming in *Davis*.

> Petitioners ask us to adopt the principle that an accusation made to a known law enforcement officer is necessarily testimonial. For the most part, that principle holds, but we are unwilling to adopt it as an inflexible rule. Determining whether a statement is testimonial must take into account the actual circumstances of the declarant when she

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[37] 126 S.Ct. at 2278.

[38] 126 S.Ct. at 2278.

[39] 126 S.Ct. at 2278 n.5, quoting in part Thomas, J., dissenting in part, *id.* at 2283.

makes the statement. In *Davis*, McCottry began speaking just after a frightening incident had occurred, while she was in unprotected and in clear distress, and while her alleged assailant was not only at large but nearby; thus, in describing his conduct, she began speaking in the present tense. We do not believe that, until she acknowledged that he was driving away, the attention of a reasonable person in her position and in the heat of that moment would likely be focused on the ultimate prosecutorial use of her statement. From that moment on, but not until then, her statements should be deemed testimonial.

Hammon is a much easier case. By the time Amy Hammon made her accusation, she was with a police officer in one room and her husband was with another officer in another room. The fact that the officer with her immediately asked for an affidavit simply confirmed what any reasonable person in her position would have understood already – that when she told a police officer that her husband had assaulted her, the statement was likely to be used for prosecution.

Such an opinion would, I believe, have been less likely to be manipulated by lower courts in favor of the prosecution than is the actual *Davis* opinion. And yet there is nothing in *Davis* that prevents the Supreme Court from interpreting the Confrontation Clause in the way this hypothetical draft does. Before *Davis*, it was apparent that a strong message from the Supreme Court was necessary to demonstrate that the lower courts should not treat the new doctrine staked out by *Crawford* as a mere linguistic curio that ultimately posed no insuperable obstacle to the same types of results that had been commonplace beforehand. The same remains true after *Davis*.

Other Issues

The issues discussed thus far in this article will continue to be tremendously important in Confrontation Clause jurisprudence. But there is a wide range of other issues that will also be very important and controversial and will need to be resolved over coming years. Below is a catalogue of some of these issues – I do not claim to be exhaustive – together with summary thoughts on each. Note that, although the first few of these bear on the question of what statements are testimonial, the others raise more procedural concerns.

(1) To what extent should statements by government agents, including autopsy and laboratory reports, be considered testimonial? It seems clear to me that such statements made in contemplation of prosecution of a particular crime must be considered testimonial. But courts have not always so held.[40]

[40] I would also consider as testimonial a certificate validating an instrument, such as a radar gun, because it is made in contemplation of use in prosecutions. That it is made in contemplation of multiple prosecutions does not seem to me to alter the situation materially. *But see* Rackoff v. State, 2006 WL 3345286 (Ga. 2006). This is, however, a closer question.

(2) To what extent may statements other than to law enforcement personnel – to other government agents and to private persons – be characterized as testimonial? Davis, like *Crawford*, does not resolve the matter definitively. But a rule that only statements to law enforcement personnel, or only to government agents, could be considered testimonial, would be disaster. It would allow a witness to use another type of person as an intermediary to relay testimony to court, and avoid the need to take an oath or face the accused or submit to cross-examination. Nor is this scenario unrealistic. We may be sure that there would be victims' rights organizations delighted to relieve complainants of the burdens of testifying in court.

(3) To what extent, if any, should the age, maturity, and mental condition of a declarant be considered in determining whether she can be a witness for purposes of the Confrontation Clause and whether particular statements by her are testimonial? On the one hand, it may seem odd for the question of whether a statement is testimonial to be determined as if the declarant had the understanding of a competent adult when in fact she is a child or a person of deficient intelligence. On the other hand, if the standard for determining whether a statement is testimonial is based, as I believe it should be, on the perspective of a reasonable person in the position of the declarant, then a consistent application of the standard would probably require disregarding the particular declarant's deficiencies. With respect to extremely young children, however, it seems to me that there is a plausible argument that they may be incapable of being witnesses within the meaning of the Confrontation Clause.

(4) In what situations can the state be estopped from denying the testimonial nature of a statement because an interrogator or state agent withheld from the declarant information that would have made apparent the likely prosecutorial use of the conversation? Assuming, again, that the critical question is the understanding of a reasonable person in the position of the declarant, then the state, or some other agent attempting to create evidence for prosecution, will sometimes have an incentive to hide from a declarant the likely prosecutorial use of the declarant's statements. Suppose the declarant is not suspected of wrongdoing, and the agent believes that she would make a conscientious decision not to volunteer testimony against the accused. Then if the agent hides the prosecutorial intent to secure a statement that would be testimonial given knowledge of that intent, the state should probably be estopped from denying that the statement is in fact testimonial. But if the declarant makes the statement in furtherance of a criminal activity, such as a conspiracy, then there should be no estoppel.

(5) To what extent, if any, may the state attempt to constrain exercises of the confrontation right intended only to impose costs on the prosecution? This strikes me as a very difficult topic. There are situations in which a conscientious court would recognize that a given type of written statement is testimonial, but the expense of producing the author as a live witness is considerable, and there may be reason to believe that the accused has no plausible expectation that confrontation will do him any good. In such a situation, the accused may nevertheless be tempted to insist on the right to confrontation, reckoning that if producing the witness is costly to the prosecution but cost-free to the defense then the prospect of confrontation improves the accused's bargaining power. Perhaps the state may attempt to restrain such exercises of the right – but this is far from clear. Defining what are acceptable constraints – perhaps some kind of good faith requirement? – and the

situations in which they may be imposed are not easy matters. I am not sure whether opening this Pandora's box would be worthwhile in the end.[41]

(6) To what extent, if any, may the state impose on the accused the burden of securing an opportunity for confrontation? The state should be allowed to provide that the accused waives the confrontation right if he does not make a timely demand that the witness be produced. And perhaps, at least if the prosecution gives notice that it intends to rely on a witness but there is reason to believe that the witness will not be available to testify at trial, the accused may be held to have waived the confrontation right if he does not demand an opportunity to depose the witness before trial. But beyond that. the accused should not be required to create his own opportunity to "be confronted with" (note the passive phrasing) an adverse witness. In particular, the confrontation rights of the accused should not be deemed satisfied by giving him the opportunity to subpoena the witness.[42]

(7) What standards govern the adequacy of a pretrial opportunity for cross-examination? One effect of *Crawford*, as courts, legislatures, and lawyers adjust to it, should be a substantial increase in the number of depositions taken to preserve testimony. But suppose such a deposition is offered immediately after the incident in question, and by the time of trial the witness is unavailable to testify. The accused may well contend that the early opportunity to examine the witness was inadequate. Such a contention, I believe, should be resolved not by a *per* se rule – either that early timing does or does not render the opportunity inadequate – but on the facts of the particular case. That is, the accused should be required to demonstrate with particularity how a later opportunity for confrontation would have been materially superior.

Another situation in which adequacy is an issue arises when the accused has a prior opportunity to examine the witness, but not necessarily the motivation to conduct the examination as if it were for trial purposes. This occurs, for example, in jurisdictions that allow depositions for discovery; the lower courts have divided on the question of whether the opportunity to take a discovery deposition suffices for the Confrontation Clause if the witness is unavailable at trial.[43] If

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[41] *See generally* Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475 (2006).

[42] This is the issue posed by the petition for *certiorari* in Pinks v. North Dakota, seeking review of State v. Campbell, 719 N.W.2d 374 (N.D. 2006). For further comments on the general issue, see the entries on the Confrontation Blog titled "Shifting the Burden," http://confrontation-right.blogspot.com/2005/03/shifting-burden.html (Mar. 16, 2005, 3:27 EST), and "Shifting the Burden, Take 2," http://confrontationright.blogspot.com/2006/08/shifting-burden-take-2.html (Aug. 2, 2006, 2:15 EDT). The latter entry also comments on *Campbell*.

[43] *See, e.g.*, Corona v. State, 929 So.2d 588 (Fl. 5th Dist. App. 2006) (adequate); Lopez v. State, 888 So.2d 693 (Fl. 1st Dist. App. 2004) (inadequate). California v. Green, 399 U.S. 149 (1970), answers in the affirmative the corresponding question with respect to preliminary

the answer is affirmative, then careful defense counsel will have to seize every opportunity to take a deposition, lest the witness become unavailable and a prior testimonial statement becomes admissible with no further opportunity for confrontation. This could radically increase the expense of criminal proceedings. The prosecution should probably bear the burden of determining when there is a sufficiently strong chance that the witness will become unavailable to warrant a prompt confrontational proceeding.

(8) If the accused has not been identified, or has been identified and not arrested, may the prosecution preserve the testimony of a witness? If the accused has been identified but has avoided arrest, the state probably ought to be able to appoint counsel, who could examine the witness in case the witness later becomes unavailable. The accused has not had a chance to be face to face with the witness, but probably the accused should bear that risk in this situation. The question becomes more difficult if the accused has not yet been identified. But even in this situation, it may be clear that the testimony of the witness would be harmful to an accused, and in what way – if, for example, the witness is testifying that a crime was committed. Perhaps the court could appoint counsel for the eventual defendant, to examine the witness on that point. If the accused is later identified and brought to trial, and the witness is then unavailable, the adequacy of the opportunity for cross-examination may be addressed at that time.

(9) To what extent does the Confrontation Clause apply to the sentencing phase of a capital case, and to what extent is there a right – based perhaps in the Due Process Clause – to confront declarants whose statements are testimonial in nature and are introduced against the accused in criminal proceedings other than the trial? John Douglass has argued that "the whole of the Sixth Amendment applies to the whole of a capital case."[44] Thus, the confrontation right would apply not only at the guilt phase of a capital trial but also at the sentencing phase – determining both whether the defendant is eligible for the death penalty and whether that penalty actually ought to be imposed. Not all courts have been willing to go that far. Beyond arguments applicable only to capital cases – based on the unified nature of capital trials at the time of the Framers – there is another sort of argument that applies more broadly to other proceedings in a prosecution. Suppose that, at say, a suppression hearing a witness for the prosecution gave direct testimony and then the court excused her on the ground that her testimony was too reliable to require cross-examination. Even if the Confrontation Clause does not apply to that hearing, it seems likely that doing so would violate the accused's constitutional rights. And if that is true, then at least arguably the same principle should apply if the witness gave testimony before the hearing.

(10) What standards and procedures should govern forfeiture of confrontation rights?

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hearings.

[44] John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1967 (2005).

Among the many important questions on this topic are the following:

(a) Must the conduct that allegedly rendered the witness unavailable to testify subject to confrontation have been motivated in significant part by the desire to achieve that result? At least with respect to serious intentional wrongful conduct, the answer should be negative. The idea behind forfeiture doctrine is that the accused cannot complain about a situation caused by his own wrongdoing.[45] If the witness is unavailable because the accused murdered her, it is no answer to a forfeiture argument to say that the accused did not murder her for the purpose of rendering her unavailable.

(b) May the conduct that allegedly rendered the witness unavailable to testify subject to confrontation have been the same conduct with which the accused is charged? Yes. There is no reason why not. The argument that this is question-begging, assuming the matter at issue, is based on a misconception. The judge determines the question of forfeiture. The jury (if three is one) determines guilt. Those are separate determinations. If both depend, at least in part, on the same factual issue, so be it.

(c) May the challenged statement itself be used in demonstrating forfeiture? Yes. Under the principle of Federal Rule of Evidence 104(a), the judge, in determining a preliminary issue of fact, may rely on any evidence not privileged. That includes the statement in issue. Now, of course, the accused contends that the statement is testimonial in nature (and unless it is, there is no need to reach the forfeiture issue). Under the principle discussed above, the confrontation right might be held to apply even at this preliminary hearing. So then we have an infinite regress. But in the end, the court will either decide that the accused forfeited the right – in which case use of the statement, both at the preliminary hearing and at trial, does not violate the accused's rights – or that he has not, in which case the statement will not be presented at trial.

(d) What is the standard of persuasion in demonstrating that the accused forfeited the confrontation right? It may be that the Supreme Court will require only the more-likely-than-not standard. Given the right at stake, I believe a higher standard, perhaps "clear and convincing evidence," might be more appropriate.

(e) To what extent is the prosecution foreclosed from claiming forfeiture because it failed to mitigate the problem? In particular,

(I) If the witness is dead, when is the prosecution foreclosed from claiming forfeiture if it did not arrange for a deposition? It may seem grotesque to arrange for a deposition of a dying person, but the authorities have never shown much compunction about taking a statement from a victim even in the final moments of life. Certainly if the victim lingers for days while still communicative, and arguably for a shorter period, the prosecution ought to arrange

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[45] *See* Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997).

a deposition.[46]

(ii) If the prosecution is contending that the witness is intimidated, what procedures must the government go through to assure that as much of the confrontation right as possible has been preserved? For example, to what extent must it exert coercion against the witness, and must it attempt to secure cross-examination without the witness's testimony? These questions can be excruciatingly difficult. The court probably should not conclude that the witness is unavailable to testify because the accused has intimidated her unless the court has attempted to compel the witness to testify – not simply by serving her with a subpoena, but by enforcing it, if necessary by the contempt sanction. But that is not a move that a court can take lightly unless it is very confident that it can protect the witness. And it is unimaginable in the case of a child witness – though the court should consider sanctions against anyone who has exerted influence over the child to prevent her from testifying.

The matter is complicated because, even if the witness is unwilling to testify in the usual manner – in the presence of the accused and subject to cross-examination, in open court at trial – that does not mean that no aspect of the confrontation right can be preserved. To the extent that the state has not attempted all reasonable means of securing the witness's testimony subject to some form of confrontation, the conclusion that the accused has caused the lack of confrontation should be deemed erroneous as a matter of constitutional law. Perhaps at an earlier time the witness would have been willing to testify at a deposition, and arguably the prosecution should be held accountable for failing to offer one then if it had information suggesting that she might be unwilling to testify later. Perhaps the witness would be willing to testify subject to cross-examination, so long as the accused was not present, or in chambers, and these possibilities ought to be explored.

If forfeiture doctrine is left unconstrained, it could swallow much of the confrontation right. I do not believe that the proper method for constraining forfeiture doctrine lies in artificially limiting the type of misconduct that can be considered to forfeit the right, or limiting the type of evidence that can be used to prove forfeiture. An elevated standard of persuasion might be of some help, but probably not very much. The key, I believe, is to require that before the court concludes that the accused has forfeited the confrontation right the state (including the prosecution and the court) must take reasonable steps to preserve however much of the confrontation right as is feasible.

Pedagogy and Law Reform

I will close with a few interrelated thoughts going beyond the application of *Crawford* and *Davis* to criminal prosecutions. I will approach these from the point of pedagogy, but my interest

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[46] I have addressed this issue in an entry called "Forfeiture, the Prosecutorial Duty to Mitigate, and Rae Carruth," posted on the Confrontation Blog, http://confrontationright.blogspot.com/2005/03/forfeiture-prosecutorial-duty-to.html (March 4, 2005, 3:39 pm)

goes beyond the relatively parochial question of how law professors should teach this material to practical, though longterm, matters of law reform.

First, should confrontation be addressed in courses in Criminal Procedure or in Evidence, or in both? I firmly believe the answer is both. *Crawford* makes clear that the confrontation right is not a mere rule of evidence but a fundamental principle of procedure. And it therefore has significant procedural consequences, long before a case ever comes to trial – for example, *Crawford* should push criminal justice systems more in the direction of facilitating depositions for the preservation of testimony. At the same time, for reasons that I will now discuss, the confrontation right must occupy a significant place in a course on Evidence.

Before *Crawford* many Evidence teachers spent a great deal of time on the rule against hearsay and little or no time on the confrontation right. This approach always struck me as intellectually timid, because to a very large extent when the rule against hearsay *justifiably* calls for exclusion of evidence the driving force is the confrontation right. But I suppose the approach could then be justified on pragmatic grounds by teachers who did not want to look beyond the law as it then stood, for the confrontation right virtually never required exclusion of evidence that standard hearsay doctrine would permit. *Crawford* changed that. Now the confrontation right clearly has independent force, and I believe it is utterly irresponsible to teach hearsay law without spending a great deal of time on the confrontation right, if for no other reason than that the right effectively preempts many of the results that hearsay law might otherwise seem to prescribe. It would be absurd, for example, to spend time examining the "excited utterance" exception and all the expansive interpretations that court have given it without recognizing that many of those applications are now rendered unconstitutional.

And now, in light of *Davis*, I will make a stronger statement: It doesn't make much sense to teach confrontation *after* teaching hearsay. Rather, the two should be integrated, with the confrontation right being emphasized first – just as historically it was well developed long before modern hearsay law took shape – and driving the organization of coverage. Again taking the hearsay exception for excited utterances as an exception, it would clearly be a mistake to work through its contours and only at some later time say, "Many of those applications really don't matter, because they would be unconstitutional."

We Evidence teachers are going to have to work out a sound integrated approach over time, but here is what tentatively strikes me as a sensible approach.

(1) The natural starting point is the basic confrontation principle enunciated by *Crawford* – that testimonial statements cannot be used against an accused if he has not had (or forfeited) an opportunity for confrontation. Thus, after an historical nod to cases like *Raleigh*, *Crawford* itself is a good place to begin.

(2) Then it makes sense to delve into the question of what "testimonial" means, and this of course calls for discussion of *Davis*; this would also be a good time to discuss the difference between accomplice confessions, which are testimonial, and conspirator statements, which are not

testimonial because not made in anticipation of prosecutorial use. Other bounds on the doctrine may then be examined:

(3) When does a testimonial statement not pose a confrontation problem because it is offered for some ground other than the truth of a matter it asserts? *Tennessee v. Street*[47] is a natural for discussion here, as are questions such as whether or when a testimonial statement may be admitted in support of an expert opinion[48] or to show the course of an investigation.[49]

(4) Is the confrontation problem really relieved, as the Court held in *California v. Green*[50] and reaffirmed in *Crawford*,[51] by the appearance of the witness at trial, even though the witness does not testify to the substance of the prior statement? Understanding this problem helps one realize why, as in Fed. R. Evid. 801(d)(1), rulemakers have hesitated to eliminate the hearsay bar to all prior statements of a witness who testifies at trial.[52]

(5) When should a witness be deemed unavailable? Several of the Supreme Court's pre-*Crawford* cases – including *Ohio v. Roberts*[53] – are still good law on this point, and Fed. R. Evid. 804(a), which prescribes standards of unavailability for purposes of the hearsay rule, could be discussed here.

(6) What is an adequate opportunity for cross-examination? Materials related to Fed. R. Evid. 804(b)(1) may come in here,[54] as does the interesting question of whether a discovery

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[47] 471 U.S. 409 (1985).

[48] *E.g.*, People v. Goldstein, 6 N.Y.3d 119, 843 N.E.2d 727, 810 N.Y.S.2d 100 (2006).

[49] E.g., United States v. Eberhart, 434 F.3d 935 (6th Cir. 2006).

[50] 399 U.S. 149 (1970).

[51] 541 U.S. at 59 n.9.

[52] Rule 801(d)(1) exempts from the hearsay rule limited categories of prior statements of a trial witness – some prior inconsistent statements, some prior consistent statements, and most prior statements of identification – but does not create a general exemption for prior statements of a trial witness.

[53] 448 U.S. 56 (1980) (holding (dubiously) that the witness whose prior testimonial statement was at issue was unavailable in the circumstances).

[54] That Rule excepts a statement from the hearsay rule if the declarant is unavailable to testify at trial, the statement is prior testimony, and

> the party against whom the testimony is now offered, or, in a civil action or proceeding, a

deposition suffices for the confrontation right.[55]

(7) What constitutes a sufficient ground for forfeiture, and what procedures must be followed before the right may be deemed forfeited? Cases involving dying declarations would fit in well here.

This outline demonstrates that a full exploration of issues related to the confrontation right does not depend on prior examination of hearsay law. On the contrary, not only does the confrontation right stands on its own bottom, but discussion of the confrontation right helps explain some aspects of hearsay law; in some cases it may give them better grounding and in others it may help expose their weaknesses.

After this canvass of the confrontation right, I think it is possible to work relatively quickly through the most significant issues related to hearsay when the confrontation right is not at issue. And this is why I say my interest here runs beyond the purely pedagogical, because not only as teachers but also as scholars and potential law reformers the question we should constantly be asking in this realm is, "Is this really necessary?"

That is, once we have protected the confrontation right, as *Crawford* does, by a separately articulated doctrine that does not depend on hearsay law, do we need the elaborate structure of hearsay doctrine, with its complex definition of hearsay and its remarkably long and intricate set of exemptions? My own feeling is that outside the context in which the confrontation right properly applies – testimonial statements offered against criminal defendants – much hearsay ought to be admitted, and that to the extent exclusion is warranted it ought to be under a doctrine much more open-textured than the one we have now.

I believe a softer form of confrontation doctrine should apply to testimonial statements offered against litigants other than a criminal defendant. Working out the shape of such a doctrine could be a significant challenge for the next generation of evidence scholarship. Beyond that, the judgment of admissibility should depend on a case-by-case assessment of factors such as the probative value of the statement, the probability that cross-examination would be useful, and the relative abilities of the parties to produce the declarant as a live witness.[56]

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predecessor in interest, had an *opportunity and similar motive to develop the testimony* by direct, cross, or redirect examination.

Emphasis added.

[55] *Compare, e.g.*, Corona v. State, 929 So.2d 588, 595-96 (Fl. 5th Dist. Ct. App. 2006), *with* Belvin v.. State, 922 So.2d 1046, 1053-54 (Fl. 4th Dist. Ct. App. 2006).

[56] Some years ago I made a preliminary attempt to reconceptualize hearsay doctrine, outside the context where the Confrontation Clause applies, along such lines, in the unfortunately

Indeed, I am hopeful that over the next few decades, pressure will mount to move hearsay law in this direction. I base this hope on anticipation that, now that hearsay law is no longer necessary to do the work that the Confrontation Clause should perform, its silliness and superfluousness will become more apparent. And I believe the development will be advanced greatly if Evidence teachers organize coverage around the confrontation right and then ask, "What further hearsay law, if any, do we need?"

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named *Toward a Partial Economic, Game-theoretic Analysis of Hearsay* 76 MINN. L. REV. 723 (1992), and in *Improving the Procedure for Resolving Hearsay Issues*, 13 CARD. L. REV. 883 (1991). I believe much of the analysis in those articles remains sound, but I did not then explore the possibility of a softer form of confrontation doctrine applying to testimonial statements offered against parties other than a criminal defendant.