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CONFRONTATION AS A HOT TOPIC: THE VIRTUES OF GOING BACK TO SQUARE ONE

By Richard D. Friedman

I have been working so obsessively on the accused's right to confront the witnesses against him[1] that I am gratified that the organizers of this conference have designated confrontation as one of the "hot topics" of Evidence law. I am not so egotistical as to think that my work has made confrontation into a hot topic; I am just glad to know that I am working where a good deal of action is, and that other scholars recognize that confrontation is an important area in which dramatic changes may be occurring.

My particular interest is in the question of the extent to which the confrontation right requires exclusion of statements made out of court—what might be called the hearsay aspect of confrontation. The prevailing doctrine virtually conforms this aspect of confrontation to the ordinary law of hearsay. If an out-of-court statement is offered to prove the truth of what it asserts, so that it falls within the basic definition of hearsay, then there is a potential confrontation problem, but if the statement falls within one of the many hearsay exemptions that may be characterized as "firmly rooted," then the statement is almost certain to satisfy scrutiny under the Confrontation Clause. Even if the statement does not fall within such an exemption, there is a residual doctrine that corresponds closely to the residual hearsay exception provided by Federal Rule of Evidence 807: if the circumstances that surround the making of the statement provide sufficient "particularized indicia of

1. See my articles, *Confrontation Rights of Criminal Defendants*, *in* J. F. NIJBOER & J. M. REIJNTJES, PROCEEDINGS OF THE FIRST WORLD CONFERENCE ON NEW TRENDS IN CRIMINAL INVESTIGATION AND EVIDENCE 533-41 (1997); *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998); *Thoughts from Across the Water on Hearsay and Confrontation*, 1998 CRIM. L. REV. 687; *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 HASTINGS L.J. 545 (1998); *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997); Lilly v. Virginia: *Glimmers of Hope for the Confrontation Clause?*, INT'L COMMENT. ON EVIDENCE, July 10, 2000, *available at* http://www.law.qub.ac.uk/ice/ (last visited Sept. 9, 2003); *Remote Testimony*, 35 MICH. J. L. REF. 695 (2002); *see also* Richard Friedman & Bridget McCormack, *Dial-In Testimony*, 151 U. PA. L. REV. 1171 (2002).

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trustworthiness," then the confrontation problem is resolved.

This doctrine is an utter failure. Instead of articulating an independent basis for the age-old and constitutionally-enshrined confrontation right, it makes the right dependent on the vague and unpredictable morass of hearsay law. Supposedly, according to the Supreme Court, the right is based on the desire to produce reliable evidence. But the paradigm of acceptable evidence, live testimony subject to oath and cross-examination, may be completely unreliable; indeed, when two witnesses give conflicting testimony, we know that at least one of them is not reliable. Reliability is not an appropriate standard for determining admissibility. The purpose of trials is to sort out the reliable from the unreliable; evidence should not be barred at the threshold because the court regards it as unreliable. On the other side of the coin, one may wonder how often a statement is so reliable that cross-examination would be of little value to the accused. Certainly, the Supreme Court has been willing to regard as satisfying the reliability standard some statements—such as dying declarations—that pose obvious concerns that defense counsel would eagerly explore if given the opportunity. Moreover, if admitting a statement would otherwise violate the confrontation right, it is clearly inappropriate to admit it nonetheless because the court decides that it is reliable. Suppose a potential witness says to a friend,

> I observed Defendant commit the crime, but I really don't want to go to court to testify, take the oath and undergo cross-examination. I'm going to tell you my testimony. You relay it in court, and if it's considered reliable it will be admitted. I hope it will be. I had a good opportunity to observe, I have no apparent reason to lie, and I'm talking to you soon after the event.

Even without developing a theory of what the confrontation right means, it seems clear that a statement made under such circumstances should not be admitted, even if a court concluded, as it well might, that the circumstances surrounding the making of the statement endow it with considerable reliability.

This hypothetical helps point the way to a better understanding of the confrontation right. In my view, the essence of the right is that a witness may not testify against the accused without being brought before the accused. Medieval continental systems generally provided for witnesses to give their testimony out of the presence of the parties, but the English refused to accept such a system and instead insisted

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that—as had been the practice with the ancient Hebrews[2] and Romans[3]—witnesses testify "face to face" with the accused. The confrontation right, then, basically means this: If a person makes a testimonial statement, that statement cannot be introduced against an accused unless the accused has had an adequate opportunity to cross-examine the person, face to face[4] and under oath. A person who makes a testimonial statement is acting as a witness, and the basic idea of the Confrontation Clause is that if a person acts as a witness against an accused, then the accused has a right to confront her. There is obvious ambiguity in the term testimonial statement, but it captures the idea sufficiently well for present purposes to say that a statement is testimonial if it was made with the reasonable anticipation that it was creating evidence for use in a prosecution.

Two aspects of this approach are particularly noteworthy. First, its scope is far narrower than that of the rule against hearsay. The hearsay rule applies to any out-of-court statement offered to prove the truth of what it asserts. But the confrontation right, as I conceive it, applies only to testimonial statements, the type of statement that makes a person a witness. Thus, a statement made in the ordinary course of business, including conspiratorial business, would not be a testimonial statement, and so would not invoke the confrontation right. But a statement describing a crime and knowingly made to authorities, or to an intermediary designated to convey the statement to the authorities, would be a testimonial one.

Second, the approach is very simple. It does not depend for its viability on a long list of exceptions, as does the current approach. Instead, it sets out a straightforward, bright-line rule: If a person's testimonial statement is to be introduced against an accused, the accused must have an opportunity to confront her. That rule is absolute, in the same way that the rights to a jury and to counsel are absolute. We do not deprive an accused of the right to have counsel in his defense or to have his case decided by a jury simply because we regard the case against him as overwhelming. Similarly, if a witness testifies in court, we do not excuse her from cross-examination because her testimony appears so reliable. And the same principle should apply when a person acts as a witness by making a testimonial statement out of court; no

2. *See Deuteronomy* 19:15-19.

3. *See Acts* 25:16.

4. I will put aside here the question of the applicability of the face-to-face requirement with respect to child witnesses.

matter how reliable the statement appears to be, it should not be used against the accused unless he has had an adequate opportunity to examine the witness.

Indeed, the only appropriate qualifications to the accused's right to confront the witnesses against him are those of waiver and forfeiture. Like most rights, the confrontation right can be waived; if the prosecution offers a testimonial statement that was taken without the accused having an opportunity to confront the witness, but the accused fails to object, ordinarily the right should be deemed waived. And if the accused's own misconduct, such as killing or intimidating the witness, accounts for the witness's failure to testify subject to cross-examination, then the accused should be held to have forfeited the confrontation right because he cannot complain about his inability to confront the witness if he created that inability.

Part of the explanation for the simplicity of this approach is its narrowness: Given that the scope of the right is not unduly broad, a series of exceptions is not necessary to make the doctrine viable. And another part of the explanation, to put matters bluntly, is that this approach gets it right. If a legal system articulates well the motivating principle behind a doctrine, then the doctrine can usually be stated in relatively simple terms. If the system fails to articulate that principle, then it can approach sensible results only by a series of relatively ad hoc approximations. The ready analogy is to the Ptolemeian and Copernican systems. The movement of the planets could be described accurately in the Ptolemeian system, which placed the earth at the center of the solar system, but only at the expense of enormous complexity, featuring mysterious cycles and epicycles. The Copernican system, placing the sun at the center, provided a far simpler description of, and a persuasive explanation for, the movement of the planets.

The change I propose has much the same tenor. It is consistent with most, and probably even all, of the *results* of the confrontation cases decided by the Supreme Court,[5] though it obviously reaches those results by a far different route than does the prevailing doctrine. Thus, I do not agree with Professor Raeder's suggestion that reconceptualizing confrontation law would require a wholesale disruption of caselaw.

5. This is a point made at length in the amicus brief of the American Civil Liberties Union in *Lilly v. Virginia*, 527 U.S. 116, 125-29 (1999). I was one of the authors of that brief. I also make the point in an amicus brief filed on behalf of eight other law professors and myself in *Crawford v. Washington*, 54 P.3d 656 (Wash. 2002), *cert. granted*, 72 U.S.L.W. 3146 (U.S. Aug. 25, 2003) (No. 02-9410).

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Nor, for that matter, do I believe that a reconceptualization of the sort I have advocated would constitute "starting over." It would, instead, be a return to the original principle that underlay the establishment of the confrontation right in the first place, the principle that ours is a system in which prosecution witnesses must testify face-to-face with the accused.

Finally, I do not agree that it is impractical to hope for a reconceptualization of this sort. Three justices—Scalia, Thomas, and Breyer—have explicitly indicated a willingness to rethink confrontation doctrine, and along lines that share at least significant aspects of the approach I have presented. And now the Court as a whole has given significant new grounds for hope. The Court has granted certiorari in *Crawford v. Washington*,[6] in which one of the Questions Presented is:

> Whether this Court should reevaluate [the] Confrontation Clause framework established in *Ohio v. Roberts*,[7] and hold that the Clause unequivocally prohibits the admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statements.

Obviously, I believe the answer should be resoundingly in the affirmative. The grant of certiorari gives reason to hope that the Court will soon recognize that the current doctrine offers little explanatory power because it fails to take into account what the confrontation right is really about, that patchwork solutions of the type suggested by Professor Raeder will not solve the problem, and that a clear and robust sense of the confrontation right can be attained by insisting simply that a testimonial statement cannot be offered against an accused unless he has had an opportunity to confront the witness face-to-face.

6. 72 U.S.L.W. 3146 (U.S. Aug. 25, 2003) (No. 02-9410).
7. 448 U.S. 56 (1980).

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