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'Face to face': Rediscovering the right to confront prosecution witnesses

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Abstract. The Sixth Amendment to the United States Constitution protects the right of an accused 'to confront the witnesses against him'. The United States Supreme Court has treated this Confrontation Clause as a broad but rather easily rebuttable rule against using hearsay on behalf of a criminal prosecution; with respect to most hearsay, the exclusionary rule is overcome if the court is persuaded that the statement is sufficiently reliable, and the court can reach that conclusion if the statement fits within a 'firmly rooted' hearsay exception. This article argues that this framework should be abandoned. The clause should not be regarded as a constitutionalisation of the rule against hearsay. Rather, it reflects a principle of long standing in common law systems, and even in some others, that a statement that is testimonial in nature may not be introduced against a criminal defendant unless he has had an opportunity to confront and examine the witness who made the statement. Recognition of that principle, which may be achieved in the pending case of *Crawford v Washington*, is of interest not only in the United States, but to all adjudicative systems.

Station-house testimony and the confrontation right

For several centuries, prosecution witnesses in common-law criminal cases have given their testimony under oath, face to face with the accused, subject to cross-examination by him, and, if feasible, at trial. In recent decades, however, some American courts have tolerated prosecutors' use of testimony given in a different way—by making a statement to the police in the station-house.

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Here is the pattern of station-house testimony: an incident occurs that suggests that a crime has been committed involving at least peripheral participation by two or more people. The police take the confederates into custody. One of them makes a statement to the police that points the finger at, or otherwise tends to incriminate, another of them. That second confederate is tried for the crime, but at trial the person who made the statement is unavailable to be a witness. The prosecution therefore offers the statement made to the police shortly after the crime. The accused objects, claiming that introducing the statement would violate his right to confront the witnesses against him, which is guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution. The statement is nevertheless admitted, and the defendant is convicted.

Twice in recent decades, in *Lee v Illinois*¹ and *Lilly v Virginia*,² the Supreme Court of the United States has held that station-house testimony should not have been admitted against a criminal defendant. But in neither case did the court foreclose future use of this type of evidence, and some courts have continued to admit it. The principal reason for this continuing state of affairs, in my view, is that the court uses an unsatisfactory framework to analyse confrontation cases. That framework, tracing to the court's decision in *Ohio v Roberts*,³ makes the confrontation right presumptively applicable to any hearsay statement offered against a criminal defendant, but makes the presumption easily defeasible. The primary question under the *Roberts* framework, as the court has come to apply it, is whether the statement is deemed reliable, or trustworthy. Trustworthiness can be inferred, according to this doctrine, when the statement falls within a 'firmly rooted' hearsay exception, but when—as in *Lee* and *Lilly*—the court holds that no such exception applies, the trial court must assess the particular statement for 'individualized guarantees of trustworthiness'. Not surprisingly, in some cases trial courts find that even statements made in the station-house bear such guarantees.

I contend that this framework misses a great and noble principle that underlies the Confrontation Clause—that the testimony of a witness may not be used against an accused unless it was given under the conditions prescribed for testimony, among which are that it be under oath or affirmation, that it be given in the presence of the accused, and that it be subject to cross-examination. Implementation of the principle requires recognition that a statement may be testimonial in nature even though it was not made under the conditions prescribed for testimony. Given this recognition, resolution of cases of station-

1 476 US 530 (1986).

2 527 US 116 (1999).

3 448 US 56 (1980).

house testimony becomes quite simple. A statement made knowingly to authorities accusing another person of a crime is clearly a testimonial statement—even though it was made without oath or cross-examination and in the presence of no one but the authorities. If a report by the authorities of a statement made in this way may be considered by the trier of fact, then a system has been created that tolerates the giving of testimony behind closed doors. The very point of the Confrontation Clause was to prevent the creation of such a system. That a statement was made absent the conditions required by the system for testimony does not render the statement non-testimonial in nature—rather, if the statement was testimonial in nature, the absence of those conditions renders the testimony intolerable. Put another way, the Confrontation Clause gives the accused more than a right to confront ‘all those who appear and give evidence at trial’.⁴ Its primary impact is to ensure that prosecution witnesses *do* give their evidence at trial, or if necessary at a pre-trial proceeding at which the accused is able to confront them.

This is a principle that has lain for centuries at the heart of the Anglo-American system of criminal justice but that was obscured by the growth of hearsay law, which is broad in scope, limited by extensive exceptions, and extremely malleable in nature. And because of that obscuring effect, liberalisation of the rule against hearsay has occurred through much of the common law world without clear recognition of the confrontation principle—even as, ironically, the principle has gained significant recognition in Continental Europe. But the fact that the United States Constitution expressly articulates the confrontation right, and in terms having nothing to do with hearsay law, holds out the possibility that the independent nature of the right may be recognised.

Indeed, there is now hope that this recognition may be achieved in the near future. A case is pending before the Supreme Court that gives it the opportunity to establish a satisfactory conception of the Confrontation Clause, one that is independent of hearsay doctrine and that is historically well grounded, textually faithful, intuitively appealing and straightforward in application. The case, *Crawford v Washington*,⁵ follows the familiar pattern of station-house testimony. Michael Crawford, upset by a report that Kenneth Lee had made advances on his wife Sylvia, went with Sylvia to Lee’s apartment. A violent fight followed, during the course of which Crawford was cut badly on the hand and stabbed Lee in the stomach, seriously injuring him. That night, Sylvia and Michael Crawford both made tape-recorded statements to the police at the station-house. The statements were similar in many respects, but Sylvia’s tended to damage Michael’s contention of self-defence. Michael was eventually tried on charges stemming from the

⁴ *California v Green*, 399 US 149 at 175 (1970) (Harlan J concurring).

⁵ No. 02-9410.

incident. Sylvia was unwilling to testify at trial against her husband, and was deemed by all parties to be unavailable as a witness.⁶ Over Michael's objection, Sylvia's statement was introduced, and Michael was convicted. The Washington Supreme Court eventually upheld the conviction, holding that the 'interlock' of Sylvia's and Michael's statements rendered Sylvia's sufficiently trustworthy for Confrontation Clause purposes. Michael petitioned to the United States Supreme Court for certiorari, and the court granted the writ. One of the Questions Presented by Michael is:

Whether this Court should reevaluate [the] Confrontation Clause framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980), 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.

I believe that the court should answer this question in the affirmative. Instead of retaining the complex, manipulable framework it now supervises, the court should unequivocally declare that a statement that is testimonial in nature may not be used against an accused unless he has had an adequate opportunity to examine the maker of the statement. Obviously, there is some fuzziness in the term testimonial, but a serviceable definition is that if a reasonable person in the position of the maker of the statement would realise that the statement would likely be used in a criminal prosecution then it is testimonial. Just as the right to a jury trial and the right to counsel are not subjected to exceptions, the right to confront an adverse witness should not be subjected to exceptions—though the accused can waive the right or forfeit it by misconduct.

This article is drawn in large part from a brief *amicus curiae* I have filed on behalf of other law professors and myself in *Crawford*, arguing for adoption of the testimonial approach. Parts 1 and 2 of the article argue that the text of the Confrontation Clause and the history underlying it, respectively, support this approach, and not the *Roberts* framework. Part 3 below argues that the testimonial approach, unlike the *Roberts* framework, reflects values warranting constitutional protection—and, for that matter, warranting protection even in systems that do

6 The participants understood that Sylvia was invoking spousal privilege to refuse to testify. In fact, Washington law appears on its face to give the privilege to the accused spouse rather than to the testifying spouse. The Washington Supreme Court rejected the contention that, because it was formally Michael's invocation of the privilege that kept Sylvia off the stand, he abandoned the confrontation issue. In any event, it appears that Sylvia, who eventually pleaded guilty to a charge arising from the incident, could—and likely would if pressed—have refused to testify, on the basis of her privilege against self-incrimination. I will assume that Michael should not be held to have waived or forfeited his confrontation right on the basis that had he wished to do so he could have cross-examined Sylvia at trial. See also below n. 64.

not have a general rule against hearsay. Part 4 lays out operational questions that would govern implementation of the testimonial approach, and argues that this approach would be easier to apply consistently than is the *Roberts* framework. It would thus give better guidance to lower courts. At the same time, adoption of the testimonial approach would not require the Supreme Court to reverse any of its own decisions.

The juxtaposition of these last two points may be enlightening. The *Roberts* framework frequently yields very bad results in the lower courts, such as the tolerance of station-house testimony, because it is unpredictable and over-complicated, failing to articulate a basic principle that commands respect. And yet as the Supreme Court cases show, the framework is capable of producing good results. But the framework reaches good results consistently only if it is manipulated. In this respect, it resembles the Ptolemeian astronomical system. That system, too, was capable of yielding good results, but only if it was manipulated and made ever more complex to ensure that its results matched empirical observations. Ultimately, then, the system failed to explain coherently the phenomenon it was trying to describe. Because the system's predictive power was thus limited, it became necessary to adopt a new organising principle. In the confrontation context, too, a new organising principle is necessary: rather than treating the Confrontation Clause as a generalised attempt to exclude unreliable hearsay evidence, the court should recognise that the clause is a guarantee that *testimony* offered against an accused must be given in the manner prescribed for centuries, in the presence of the accused and subject to cross-examination.

1. Text

Begin with the text of the Confrontation Clause. It provides in simple terms:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

Now compare how this language squares respectively with the prevailing framework established by *Roberts*⁷ and with the testimonial approach proposed here. As modified by subsequent cases, the *Roberts* approach has these principal elements:

1. '[W]hen a hearsay declarant is not present for cross-examination at trial', use of the hearsay declaration is presumptively barred by the Confrontation Clause. The basic

⁷ 448 US at 66.

definition of hearsay, as expressed in Federal Rule of Evidence 801(c), is ‘a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted’. The text of the Confrontation Clause does not refer to hearsay, however, and nothing in it suggests that its scope is as broad as the definition of hearsay. A person who makes a statement in the ordinary course of her affairs, without any reasonable anticipation of litigation, is a hearsay declarant if the statement is later offered at trial to prove the truth of what it asserts, but it would be an unnatural reading to conclude that this makes her a ‘witness’ within the meaning of the Confrontation Clause.

2. *Even though it is hearsay, an out-of-court statement may be admitted against an accused (subject to the possible applicability of an unavailability requirement) if it is sufficiently reliable. Under this doctrine, statements are deemed reliable if the evidence either ‘falls within a firmly rooted hearsay exception’ or ‘contains “particularized guarantees of trustworthiness” such that adversarial testing would be expected to add little, if anything, to the statements’ reliability’.*⁸ Nothing in the text of the Confrontation Clause, however, suggests that if a statement falls within the scope of the clause its use against the accused may yet be allowed because of a judicial determination that the statement is reliable. The clause says that in *all* criminal prosecutions the accused shall enjoy the right to be confronted with *the* witnesses against him, not simply those whom judges deem sufficiently unreliable to warrant cross-examination. The clause contains no hint of a reliability test, and no suggestions of exceptions to its categorical bar.⁹

In short, the *Roberts* framework depends on a set of concepts—hearsay, reliability, and exceptions—none of which is supported by the text of the Confrontation Clause.

In contrast, that text squares very well with the testimonial approach, the core of which may be expressed as follows:

Use against an accused of the statement of a witness—that is, a statement that is testimonial in nature—violates a right of the accused

⁸ *Lilly*, 527 US at 124–5, quoting in part *Roberts*, 448 US at 66.

⁹ As originally articulated by *Roberts*, the framework also generally precluded use of hearsay unless the declarant was unavailable to testify at trial. Subsequent cases have cut back on this requirement. It applies to former testimony, as in *Roberts* itself; it has been held not to apply to statements falling within the exceptions for conspirator statements, *United States v Inadi*, 475 US 387 (1986), spontaneous declarations, and statements made in the course of receiving medical care, *White v Illinois*, 502 US 346 (1992). In other contexts its applicability is unclear.

unless the accused has or has had an adequate opportunity to confront the witness.¹⁰

The key aspect of this approach is equating a witness with a person who makes a testimonial statement. But that is a very natural reading. The Latin for witness is *testis*.¹¹ That word shares a root with *testimonium*, the core meaning of which is 'the testimony of a witness'.¹² And that, of course, is the source of the English word *testimony*. The derivation appears to be through the Old French;¹³ thus, in the modern French witness is *témoïn* and testimony is *témoïnage*.

Of course, to give this approach life, it is necessary to invest the word *testimonial* with meaning. As discussed in Part 4 below, there is some ambiguity about the edges of the word's meaning.¹⁴ For now, though, it suffices to say that a statement that is made with the reasonable anticipation that it will be used in a criminal prosecution should be considered testimonial, while a statement that is made in the ordinary course of affairs, with no prospect of evidentiary use in the offing, is not testimonial.

In *Crawford* the Solicitor General's Office has offered an intermediate position: the reach of the Confrontation Clause should be limited to testimonial statements, but even if a statement is testimonial the confrontation right does not apply if the witness is unavailable and the statement is sufficiently reliable. This conception has some of the same linguistic difficulties that the *Roberts* approach does; indeed, it is part of the approach taken by *Roberts* itself, but limited in scope to testimonial statements. Nothing in the text of the Confrontation Clause suggests that, though the accused has not enjoyed the prescribed right to confront a witness, the testimony of that witness may nevertheless be used against the accused because the witness is deemed to be unavailable and her testimony is deemed to be reliable.

10 A subsidiary principle is that if the accused has had an adequate opportunity to confront the witness at an earlier time but, without fault of the prosecution, the witness is unavailable to testify at trial, then the witness's prior statement may be used. Part 4 below contrasts this principle and the unsatisfactory method by which the prevailing framework treats unavailability.

11 A. Berger, 'Encyclopedic Dictionary of Roman Law', 43(2) Trans Am Phil Soc 335 at 735 (1953).

12 Ibid.

13 *The Oxford English Dictionary*, vol. 17, 2nd edn (1989) 833.

14 The same can be said about the term *confront*. In most cases, the meaning is clear: the witness must testify in the presence of the accused, subject to cross-examination. Sometimes, however, it is debatable whether the confrontation that has been offered is adequate—e.g., when or whether the witness and the accused may be in different rooms but connected by a video transmission, see, e.g., *Maryland v Craig*, 497 US 836 (1990), or whether the accused's opportunity to cross-examine is adequate. See, e.g., *United States v Owens*, 484 US 554 (1988). See also below nn. 60–2 and accompanying text. Such questions of the *adequacy* of confrontation are orthogonal to the question addressed here, *whether* the prosecution may use a prior statement as to which the accused has not had adequate confrontation.

The text of the Confrontation Clause is important not only because of its intrinsic authority but also because, as Part 2 of this article shows, it expresses a fundamental principle with deep historical roots: a witness may not testify against an accused unless she confronts him with the testimony.

2. History¹⁵

If an adjudicative system is rational, then it must rely in large part on the testimony of witnesses and prescribe the conditions under which they may testify. For many systems, one such condition is that testimony must be given under oath. Another common condition, characteristic of the common law system but not limited to it, is that testimony of a prosecution witness must be given in the presence of the accused, subject to questioning by him or on his behalf. The ancient Hebrews required confrontation,¹⁶ as did the Romans. A Roman governor, Festus, pronounced: 'It is not the manner of the Romans to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.'¹⁷

Once the irrational methods of medieval adjudication, such as trial by ordeal and by battle, withered away, Western legal systems developed different approaches to testimony. Continental systems tended to take testimony on written questions—behind closed doors and out of the presence of the parties—for fear that the witnesses would be coached or intimidated. By contrast, beginning in the 15th century and continuing for centuries afterwards, numerous English judges and commentators—John Fortescue, Thomas Smith, Matthew Hale, and William Blackstone among them—praised the open and confrontational style of the English criminal trial. In a celebrated 16th century description, for example, Smith spoke approvingly of an 'altercation' between accuser and accused. Nearly two centuries later, Sollom Emlyn proclaimed: 'In other Countries, the Witnesses are examin'd in private, and in the Prisoner's Absence; with us, they are produced face to face, and deliver their Evidence in open Court, the Prisoner himself being present, and at liberty to cross-examine them.' And later in the 18th century Blackstone spoke of 'the confronting of adverse witnesses' as being among the advantages of 'the English[] way of giving testimony, *ore tenus*'—that is, by word of mouth, or orally.

To be sure, the norm of confrontation was not always respected. First, a set of courts in England followed Continental procedures rather than those of the

15 A more extensive historical discussion, with fuller citations, is in R. D. Friedman and B. McCormack, 'Dial-In Testimony', 150 U Pa L Rev 1171 at 1202–9 (2002).

16 Deut. 19:15–18.

17 Acts 25:16.

common law. Precisely for that reason, they were politically controversial, and most of them (notably the Court of Star Chamber), being viewed as arms of an unlimited royal power, did not survive the upheavals of the 17th century. The equity courts did survive, but without criminal jurisdiction, and well before the end of that century the common law courts had a sophisticated body of doctrine governing when depositions taken in equity, subject to cross-examination on written questions, could be used in lieu of testimony at trial because the witness was unavailable.

Secondly, from the reign of Queen Mary justices of the peace were required by statute to examine felony witnesses, and these examinations were admissible at trial, even though the witness had not been cross-examined, if the examination was taken under oath (which was then regarded as the most important condition for the giving of testimony) and the witness was then unavailable. This treatment—which almost certainly was one of the chief abuses at which the Confrontation Clause was aimed—was a continuing source of controversy, and in 1696, in the celebrated case of *Rex v Paine*,¹⁸ the court refused to extend it to misdemeanour cases; eventually, the practice was abolished by statutes for felony cases as well.

Finally, and perhaps most significantly, in politically charged cases the Crown, trying to control its adversaries through the criminal law, sometimes used testimony taken out of the presence of the accused. Thus, the battle for confrontation was most clearly fought in the treason cases of Tudor and Stuart England. Even early in the 16th century, treason defendants demanded that witnesses be brought before them; often they used the term ‘face to face’. Sometimes these demands were heeded, but what is most notable is that they found recurrent legislative support, Acts of Parliament repeatedly requiring that accusing witnesses be brought ‘face to face’ with the accused. By the middle of the 17th century, the battle was won, and courts routinely required that treason witnesses testify before the accused and be subjected to questioning by him.

The notorious case of Walter Raleigh was one of many in which Crown prosecutors used confessions made by alleged accomplices of the accused even though the confessions were not made under oath or before the accused; the self-accusing nature of such statements was said to be an adequate substitute for the usual requirements of testimony. But in 1662, the judges of the King’s Bench ruled unanimously and definitively in *Tong’s Case* that a pre-trial confession ‘cannot be made use of as evidence against any others’ than the confessor himself.¹⁹

18 (1696) 87 Eng Rep 584, 90 Eng Rep 527, 90 Eng Rep 1062, 91 Eng Rep 246, 91 Eng Rep 1387, KB.
19 *Case of Thomas Tong* (1662) 84 Eng Rep 1061 at 1062, KB, cited in *Lilly*, 527 US at 141 (Breyer J concurring).

The confrontation right naturally found its way to America. There, the right to counsel developed far more quickly than in England, and with it an adversarial spirit that made confrontation especially crucial. The right became a particular focus of American concerns in the 1760s when the Stamp Acts and other parliamentary regulations of the colonies provided for the examination of witnesses upon interrogatories in certain circumstances. Not surprisingly, the early state constitutions guaranteed the confrontation right. Some used the time-honoured 'face to face' formula; as early as 1776, others, following Hale and Blackstone, adopted language strikingly similar to that later used in the Sixth Amendment's Confrontation Clause.

This account has not mentioned reliability. Though one of the advantages perceived for confrontation was its contribution to truth-determination, the confrontation right was not considered contingent, inapplicable upon a judicial determination that the particular testimony was unreliable.

Similarly, the law against hearsay has not played a role in this account. Hearsay law, like evidence law more generally, was not well developed at the time the constitutions of the states or of the United States expressed the confrontation right, much less during the previous centuries.²⁰ In expressing a fundamental procedural principle governing how testimony must be given, the Confrontation Clause was not meant to constitutionalise the law of hearsay.

To get some flavour of the law around the time of the adoption of the Confrontation Clause, consider this passage from *R v Woodcock*, a leading case from 1789 on development of what is now known as the dying declaration exception to the hearsay rule. Lord Chief Baron Eyre does not speak of a rule against hearsay or of exceptions to it; instead he speaks of the usual and alternative methods of creating evidence:

The most common and ordinary species of legal evidence consists in the depositions of witnesses taken on oath before the jury, in the

20 Tom Gallanis has written of the 'broad discretion' exercised by individual trial judges in the 1750s:

This discretionary power in the trial judge . . . extended to areas of evidentiary practice governed today by strict rules. Hearsay, for example, occupies much of the modern law of evidence but in 1755 was accepted almost without comment. . . . [In criminal cases, hearsay went almost as unregulated as in civil trials. . . . Some notion . . . existed of hearsay as an evidentiary problem, but the rules restricting it had not yet fully developed. The courts treated the whole matter inconsistently, and in most cases permissively.

T. P. Gallanis, 'The Rise of Modern Evidence Law', 84 Iowa L Rev 499 at 505, 512, 514-15 (1999).

face of the Court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give. But beyond this kind of evidence there are also two other species which are admitted by law: The one is the dying declaration of a person who has received a fatal blow; the other is the examination of a prisoner, and the depositions of the witnesses who may be produced against him, taken officially before a Justice of the Peace, by virtue of a particular Act of Parliament, which authorises Magistrates to take such examinations.²¹

We do not see here a broad hearsay rule with a long laundry list of exceptions. Instead, we see a basic norm as to how testimony shall be given, and then a limited set of alternatives. One of those is the admissions of the accused himself, which plainly do not present a denial of confrontation. Another is the statements taken pursuant to the Marian statute by justices of the peace, a practice that was controversial by this time in England and not accepted in America. Only one of the alternatives—dying declarations—might be thought to be a legitimate exception to the confrontation principle. But, as I will explain in Part 4, I believe the doctrine of dying declarations reflects not an exception to the confrontation right but rather a qualification that the right may be forfeited by misconduct.²²

In an *amicus* brief in *Crawford*, the Solicitor General's Office takes the view that as of the late 18th century the hearsay rule was subject to numerous well-established exceptions.²³ It would probably be more precise to say that numerous doctrines that later became treated as hearsay exceptions were well established by that time; until the reach of the rule against hearsay broadened, doctrines like the one supporting the admissibility of certain regularly kept records were not conceived as exceptions to that rule but rather as rules prescribing admissibility against an amorphous background dominated by judicial discretion. More significantly for present purposes, apart from dying declarations, none of the exceptions that were well established by the late 18th century concerned testimonial statements.²⁴

21 168 ER 352 at 352–3, 1 Leach 500 at 501–2.

22 This theory was articulated at least as early as the middle of the 19th century. See below n. 65.

23 Brief of United States as *Amicus Curiae*, *Crawford v Washington*, No. 02–9410, at 13 n. 5.

24 The Solicitor General's brief mentions statements of fact against penal interest, but there is no basis for concluding that such a rule was established, and Wigmore, which the brief cites, seems quite clearly to stand the other way: 5 Wigmore § 1476 at 352–8. The brief also mentions the exception for past recollection recorded, again relying on Wigmore. Wigmore does present some instances in which witnesses were allowed to present their prior writings as evidence rather than use them to refresh their memories—a departure from earlier law—but these appear to involve non-testimonial writings, 3 Wigmore § 735, at 78–80; moreover, a predicate for this exception is that one who made or adopted the writing testify subject to cross-examination.

If it was a relatively uncluttered confrontation right that was written into the Constitution, what happened later to muddy the picture? I will offer here a brief speculative account. I believe that the law of hearsay expanded to occupy the field. In the 18th century, the term hearsay was used in a way closely conforming to the lay sense of the word. Hearsay was what a witness contended she heard another person say. It would not generally have occurred to lawyers at the time to contend that the term hearsay included a statement written by that person, or a statement carefully recorded by authorities, which was clearly at the core of the concern underlying the Confrontation Clause; at the very least, such a conception would have represented advanced, adventurous thinking. Not until the beginning years of the 19th century did the conception that writings could be hearsay take hold.²⁵ The reason for this expansion appears to have been the growing role of criminal defence lawyers, who emphasised, with respect to non-testimonial statements as well as testimonial, the lack of an opportunity for cross-examination. This emphasis led to a recognition that evidence falls short of ideal when it depends for its value on the credibility of a person not testifying in court.²⁶ This recognition in turn led to, or at least was associated with, articulation of the modern conception of hearsay, as an out-of-court statement offered to prove the truth of what it asserts.²⁷ And the development culminated with the famous case of *Wright v Doe d. Tatham*,²⁸ which represents the high-water mark of hearsay law by treating as hearsay conduct that does not assert a given proposition but that apparently reflects the belief of the actor in that proposition.

Plainly, a rule excluding all or even nearly all the evidence within such broad bounds would be impractical. Establishment of a broad definition of hearsay also

25 See T. Peake, *A Compendium of the Law of Evidence* (1801) 10. Peake says, in the course of his discussion of hearsay, that certain written memoranda made in the ordinary course of business are admissible as 'not within the exception as to hearsay evidence'. He is using 'exception' in the same sense that today we would use 'objection'. The statement, therefore, is that these memoranda are not excluded by the hearsay rule; implicit may be the inchoate idea that other writings would be. About a decade later, Phillipps makes the principle clear: the exclusionary rule 'is applicable to statements in writing, no less than to words spoken', the only difference in this respect being that there is greater facility of proof in the case of writings than of oral statements: S. M. Phillipps, *A Treatise on the Law of Evidence*, 1st American edn from the 2nd London edn (1816) 173. The point did not gain instant universality. F. Buller, *An Introduction to the Law Relative to Trials at Nisi Prius*, R. W. Bridgman (ed.), 7th edn (1817) at 294b n., follows Peake's treatment, virtually to the point of plagiarism. J. Bentham, *Rationale of Judicial Evidence* (1827) 447-8, treats written evidence as distinct from hearsay, but claims that the same rules apply to both.

26 In a contemplative discussion, Thomas Starkie noted that the exclusionary rule does not apply 'where declarations . . . possess an intrinsic credit beyond the mere naked unauthorized assertions of a stranger': T. Starkie, *A Practical Treatise on the Law of Evidence*, 1st American edn (1826) 46.

27 Note the following passage from S. M. Phillipps, *A Treatise on the Law of Evidence*, 4th American edn from the 7th London edn (1839), not found in earlier editions (including the 6th edn of 1824): 'Hearsay is not admitted in our courts of justice, as proof of the fact which is stated by a third person.'

28 (1838) 5 Cl & F 670, 47 Rev Rep 136, 7 ER 559, HL.

meant that a variety of doctrines supporting the admissibility of particular categories of evidence would now be considered exceptions to the rule against hearsay, and since the early 19th century the trend has been to expand those exceptions. The articulated basis for the law has been largely shaped by Wigmore's emphasis on the trustworthiness of the hearsay. I suspect that the actual bounds of the doctrine have been shaped in significant part by unarticulated adherence to the principle that an accused should be able to confront the witnesses against him, but the principle has been diluted and obscured. An opportunity for cross-examination is regarded as beneficial, but because it cannot be guaranteed with respect to every hearsay statement, it is regarded as dispensable if the statement is reliable enough. Diminished in this development is the previous recognition of a critical difference between statements made 'for the express purpose of being given in evidence' and 'the natural effusions of a party, who must know the truth, and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth'.²⁹

So long as the Confrontation Clause was a limitation only on the federal judicial system, its bounds, and its relationship to hearsay doctrine, did not matter very much; pretty much any result the Supreme Court would reach by applying the Confrontation Clause it could reach by applying non-constitutional doctrine as well. But in 1965 the Supreme Court held that the Fourteenth Amendment incorporates the Confrontation Clause against the states.³⁰ The questions of what the clause prevents then became critical, because by applying the clause the court could control state judicial systems. The trouble was that by this time the court had nearly lost sight of the purpose behind the clause. And so in *Roberts*, after 15 years of deciding cases without an overall theory of the clause, the court concocted a doctrine that virtually conformed the meaning of the clause to ordinary hearsay law. But this was a doctrine without any roots in the history that led to the adoption of the clause.

This account makes recent developments under the European Convention on Human Rights noteworthy. The Convention contains nothing resembling a hearsay rule, of course, because most of the judicial systems falling under it do not have hearsay law. But Articles 6(1) and 6(3)(d) of the Convention contain, respectively, a general protection of a criminal defendant's right to a fair trial and a specific protection of his right 'to examine or have examined witnesses against him'. Under these provisions, the European Court of Human Rights has issued a series of decisions establishing a right of confrontation, which it has referred to as

29 Phillipps, above n. 25 at 175, quoting in part Eldon LC, in *Whitlocke v Baker* (1807) 13 Ves Jr 510 at 514, and citing *Berkeley Peerage Case* (1811) 4 Camp 402, 171 ER 128, in which some of the judges drew the distinction.

30 *Pointer v Texas*, 380 US 400 (1965).

such.³¹ Thus, the confrontation right, which gained its strongest recognition in the common law system but long pre-dated it, is once again a fundamental part of Western jurisprudence.

This development is particularly ironic given that in England, where the right first flourished, the recent tendency has been to undercut it. The Criminal Justice Act 2003 has advanced this trend by substantially limiting the rule against hearsay in criminal cases without recognising that at the core of the rule lies a principle—that a defendant has a right to confront those who testify against him—which applies to some out-of-court statements and continues to warrant protection.

3. Values

Securing testimony by a declarant, face to face with an accused, nearly always has some benefits in comparison to mere presentation of a prior statement by that declarant. But only when the prior statement was itself testimonial in nature is there justification for a systematic constitutional rule rejecting use of the statement if the accused has not had an opportunity to confront her—and for rejecting such use even if the declarant is unavailable to be a witness.

When the prosecution offers an ordinary hearsay statement, made without any anticipation of evidentiary use, it will often be better, taking into account considerations of truth determination and cost, to admit the statement rather than to exclude it. Considering just truth determination, live testimony of the declarant, perhaps supplemented by the hearsay statement, is presumably preferable to presentation of the hearsay statement alone. But sometimes the declarant cannot be feasibly produced as a witness, and so the choice is between admitting the statement and hearing nothing from the declarant. If the statement is significantly probative and not particularly prejudicial, which is true of much hearsay, it is better to admit it than to exclude it. And even if it would be possible to produce the declarant as a witness, the marginal benefits of insisting that this be done might not be worth the cost of doing so.

But whether such a non-testimonial hearsay statement should or should not be admitted is, of course, a matter of local evidentiary law. If a particular jurisdiction concludes that the probative value of such hearsay statements outweighs the prejudicial effect, either categorically or on a case-by-case basis, that jurisdiction should not be precluded by the Confrontation Clause from allowing such

31 For example, *Saïdi v France* (1993) 17 EHRR 251 at 270 ('Neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial.').

statements into evidence. Conversely, if the particular jurisdiction concludes that such statements should not be admitted, that choice is also entitled to respect. Except perhaps for extreme cases, each jurisdiction should be allowed to make its own determination—by broad rules or case by case, as it chooses—free of constitutional restraint as to what non-testimonial hearsay should be admitted in criminal cases.

Now consider the situation in which the prior statement was testimonial—that is, made with reasonable anticipation of evidentiary use. In this context, the same factors that weigh against admission of a prior statement if the accused has not had an opportunity to confront the declarant continue to do so, and I believe with extra force. But additional factors apply as well. The fundamental difference is this: when the statement is testimonial, the question is not simply an evidentiary one, whether the particular statement should be included in the body of information presented to the trier of fact. The declarant has effectively made the statement as part of the process of criminal justice rather than in the ordinary course of affairs. There is thus a basic procedural issue, of how a person shall give testimony against an accused. And there is no doubt that the constitutional demand is that such testimony be given face to face with the accused, subject to cross-examination.³²

Insisting on such confrontation as the required method for giving testimony serves several important instrumental purposes:

- Confrontation guarantees openness of procedure, which among other benefits ensures that the witness's testimony is not the product of torture or of milder forms of coercion or intimidation. This is particularly important given the contrast to early Continental systems, in which coercion of witnesses examined privately was very common.
- Confrontation provides a chance for the defendant, personally or through counsel, to dispute and explore the weaknesses in the witness's testimony. In Thomas Smith's day that chance came in the form of a wide-open altercation. Today it comes in the form of cross-examination, usually through counsel. The Supreme Court has repeatedly endorsed Wigmore's characterisation of cross-examination as 'beyond any doubt the greatest legal

32 Cf. *Lilly*, 527 US at 142 (Breyer J concurring), quoting *Maryland v Craig*, 497 US 836 at 862 (1990) (Scalia J dissenting) ('[T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was "face-to-face" confrontation.').

engine ever invented for the discovery of truth'.³³ Of course, as Wigmore recognised, cross-examination may sometimes lead the trier of fact away from the truth rather than towards it. But the constitutionally required 'beyond a reasonable doubt' standard of persuasion in a criminal case reflects the extreme disutility of a false conviction.³⁴ The same consideration demands that the accused be able to cross-examine adverse witnesses even if sometimes that requirement prevents the conviction of a guilty person.

- Confrontation discourages falsehood as well as assists in its detection. The prospect of testifying under oath, subject to cross-examination, and in the presence of the accused makes false accusation much more difficult than it would be otherwise, or so at least is the well-settled belief.³⁵
- If, as is usually the case, the confrontation occurs at trial or in a videotaped proceeding, the trier of fact has an opportunity to assess the demeanour of the witness.³⁶
- Confrontation eliminates the need for intermediaries, and along with it any doubt about what the witness's testimony is.

Beyond these instrumental purposes, confrontation serves a 'strong symbolic purpose'—again, one that has substantial force only when the prior statement is testimonial—that has been repeatedly recognised by the Supreme Court.³⁷ Even if confrontation had no impact on the quality of prosecution evidence, it would be important to protect because, as the court said in *Coy* and repeated in *Craig*, 'there

33 5 John H. Wigmore, *Evidence* § 1367, p. 32 (James Chadbourn rev. 1974), quoted in part in *Lilly*, 527 US at 123 (plurality opinion); *White*, 502 US at 356; *Craig*, 497 US at 844; *Perry v Leeke*, 488 US 272, 283 n. 7 (1989); *Kentucky v Stincer*, 482 US 730 at 736 (1987); *Green*, 399 US at 158; *Ford v Wainwright*, 477 US 499 at 415 (1986); *Lee*, 476 US at 540; *Watkins v Sowders*, 449 US 341 at 348 n. 4 (1981); *Roberts*, 448 US at 63 n. 6; cf. *United States v Salerno*, 505 US 317 at 328 (1992) (Stevens J dissenting) ('Even if one does not completely agree with Wigmore's assertion . . . one must admit that in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate.').

34 See *Re Winship*, US 358 at 361–4 (1970).

35 *Craig*, 497 US at 846; *Coy v Iowa*, 487 US 1012 at 1019–20 (1988) ('It is always more difficult to tell a lie about a person "to his face" than "behind his back"'). See also R. A. Posner, 'An Economic Approach to the Law of Evidence', 51 *Stan L Rev* 1477 at 1490 (1999) ('The witness whose credibility would be destroyed by cross-examination will not be called at all or will try to pull the sting of the cross-examiner by acknowledging on direct examination the facts that a cross-examiner could be expected to harp on.'). Of course, the same prospect may deter the giving of truthful testimony. But, again, the trade-off accords with the fundamental value underlying the 'beyond a reasonable doubt' standard. *Craig*, 497 US at 846–7; *Coy*, 487 US at 1020.

36 *Craig*, 497 US at 844; *Mattox v United States*, 156 US 237 at 242–3 (1895) (confrontation gives the accused the opportunity 'of compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief').

37 *Craig*, 497 US at 846; *Lee*, 476 US at 540.

is something deep in human nature that regards face-to-face confrontation between accused and accuser as “essential to a fair trial in a criminal prosecution”. It is not only fairness to the accused that is at stake, but also the moral responsibility of witnesses and of society at large, for ‘requiring confrontation is a way of reminding ourselves that we are, or at least want to see ourselves as, the kind of people who decline to countenance or abet what we see as the cowardly and ignoble practice of hidden accusation’.³⁸

The symbolic value of confrontation is enhanced by the historical background that I have reviewed in Part 2 of this article. Indeed, even if confrontation served no other value at all, it would be important to honour the right that accused persons have had for many centuries governing how witnesses against them may testify. Like Festus, we can say that it is not our way to allow an accused to be convicted of a crime without his having had a chance to have the witnesses against him testify to his face.

These symbolic and historic functions, as well as the instrumental values achieved by making confrontation the prescribed method for giving testimony, weigh heavily against the notion that the confrontation right may be abrogated on a case-by-case basis. That is, it would be inappropriate to hold that confrontation is unnecessary in a given case because the quality of the particular witness’s testimony is good enough even without confrontation. The Sixth Amendment does not provide that if the quality of the prosecution evidence in a given case is good enough then we may dispense with the right to jury or the right to counsel. The right to confront adverse witnesses should be treated the same way.

Indeed, this is clearly the rule with respect to in-court witnesses. Suppose a prosecution witness gives significant direct testimony at trial but that the accused, through no fault of his own, has no opportunity to cross-examine—perhaps the witness dies or simply refuses to answer all the accused’s questions. The direct testimony must be struck, without regard to its reliability.³⁹ There is no reason why the rule should be different with respect to a witness who makes a testimonial statement out of court but then fails, for reasons other than the accused’s wrongdoing, to testify at trial. Such testimony should not be allowed to help convict the accused.

The testimonial approach, then, reflects a basic principle that is central to our system of criminal justice. By contrast, the *Roberts* framework (and, to the extent

38 S. J. Clark, ‘An Accuser-Obligation Approach to the Confrontation Clause’, 81 Neb L Rev 1258 (2003).

39 See, e.g., *Toogood v Borg*, 828 F 2d 571, 572–3 (9th Cir. 1987) (explaining that when a prosecution witness cannot or will not submit to cross-examination, the direct testimony is struck, but that if this is inadequate a mistrial is required).

it adheres to that framework, the modified *Roberts* approach now advocated by the Solicitor General) does not implement values warranting constitutional protection. That approach purports to make reliability, or trustworthiness, the crucial consideration. But the enterprise is misguided.⁴⁰

A trial is not, and as a practical matter cannot be, limited to trustworthy evidence. Indeed, were there truly trustworthy evidence with respect to a given factual issue, the issue would not have to be tried at all, or at least the outcome would be virtually a foregone conclusion. In a trial all sorts of evidence that taken alone might be very *untrustworthy* are presented to the trier of fact. These include the live testimony of witnesses testifying from personal knowledge and subject to cross-examination—the paradigm of acceptable evidence and yet a species that is often highly unreliable.⁴¹ The trier of fact must assess all the evidence, and even though the individual items may be unreliable the evidence may be enough in the aggregate to support a finding of proof beyond a reasonable doubt.

Nevertheless, the perception has arisen that only if hearsay is sufficiently reliable is it safe to dispense with the usual requirement of cross-examination.⁴² The perception is unfounded empirically. There is no good support for the conclusion that jurors tend systematically to overvalue hearsay, and in some settings they seem to *undervalue* it.⁴³ To the extent that the ‘mission’ of the Confrontation Clause is to ‘advance the accuracy of the truth-determining process in criminal trials’,⁴⁴ the attempt to exclude hearsay not deemed sufficiently reliable is self-defeating.

Moreover, the doctrine that proceeds from this attempt is unworkable. Suppose that the doctrine were taken literally, and hearsay were allowed only ‘if the declarant’s truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility’.⁴⁵ If this standard were applied conscientiously, very few statements would meet it—and there is no ground for confidence that hearsay law would identify them. For example, it is self-evident that statements by conspirators in furtherance of their criminal

40 See, e.g., E. Swift, ‘Smoke and Mirrors: The Failure of the Supreme Court’s Accuracy Rationale in *White v Illinois* Requires a New Look at Confrontation’, 22 Cap U L Rev 145 at 148 (1993) (‘The Court’s accuracy rationale is the product of smoke and mirrors, rather than of a realistic analysis of the values underlying confrontation.’).

41 See, e.g., *United States v Wade*, 388 US 218 (1967); E. F. Loftus and J. M. Doyle, *Eyewitness Testimony: Civil and Criminal*, 3rd edn (1997).

42 See *Lilly*, 527 US at 123 (plurality opinion, speaking of statements containing guarantees of trustworthiness ‘such that adversarial testing would be expected to add little, if anything, to the statements’ reliability’).

43 R. C. Park, ‘Visions of Applying the Scientific Method to the Hearsay Rule’, Mich St DCL L Rev (2003, forthcoming).

44 *Tennessee v Street*, 471 US 409 at 415 (1985) (citation and internal quotation marks omitted).

45 *Idaho v Wright*, 497 US 805 at 820 (1990).

enterprise, admissible in federal court pursuant to Federal Rule of Evidence 801(d)(2)(E), are not a particularly trustworthy class of assertions.⁴⁶ Similarly, consider which of the following is more likely to reflect a reasonable assessment by defence counsel when a dying declaration is admitted, pursuant to rules like Federal Rule of Evidence 804(b)(2): (1) 'If only I could cross-examine the declarant, I could explore whether she really had an opportunity to observe her assailant, whether her mind was clear at the time she accused my client, and whether she had a grudge against him', or (2) 'It doesn't matter that I couldn't cross-examine. She knew she was about to die when she spoke, and no one would want to meet with her Maker with a lie on her lips, as the Supreme Court noted in *Idaho v Wright*,⁴⁷ so I couldn't have done a thing with her.' I do not contend that such statements should always be excluded—but only that they should not be admitted on the clearly false ground that they are reliable.

Finally, it is singularly inappropriate for the adjudicative system to say to an accused, in effect, 'Yes, it is true that you did not get a chance to question this witness. But we have concluded that this does not matter, because the statement was so reliable that cross-examination would have made very little difference.' Such a ruling ignores not only the human values underlying the Confrontation Clause but also the defendant's right to present his case to, and to attempt to persuade, the trier of fact.

But what of the Solicitor General's argument that where the witness is unavailable at trial, then 'necessity' calls for the admission of the out-of-court statement if it is deemed reliable? First, notice that the only area of dispute lies when the witness is unavailable at trial through the fault of neither party; if the accused's wrongdoing caused the unavailability of the witness, then he should be deemed to have forfeited the confrontation right, and plainly the confrontation right cannot be impaired if the prosecution's wrongdoing caused that unavailability. Secondly, notice that even if the witness is unavailable at trial the necessity rationale may be weak, because if the prosecution had reason to fear that the witness would become unavailable at trial it presumably was in a position, at an earlier time, to protect itself against that possibility and yet preserve the accused's confrontation right, by taking the witness's deposition.⁴⁸ Now, which party should bear the risk that the witness will be unavailable at trial through the fault of neither party? On the one hand, the prosecution bears the burden of proving

46 See C. B. Mueller and L. C. Kirkpatrick, *Federal Evidence*, 2nd edn (1994) 295 ('the case for reliability is at best marginal'). See also below n. 72.

47 497 US at 420.

48 See, e.g., Fed R Crim P 15. Perhaps—and I mean no more than that—it would be adequate to give notice to the accused of intention to use the testimonial statement if the witness becomes unavailable at trial, and to invite the accused to take her deposition if he wishes to preserve the confrontation right. See below text following n. 59.

guilt beyond a reasonable doubt; it is the party that wants to use the witness's testimony; and it was presumably able to protect itself against the risk of unavailability. On the other hand, the accused has no burden to produce evidence, and enjoys the right to be confronted with adverse witnesses. It seems apparent that the risk should be on the prosecution. If the witness becomes unavailable without fault of the accused, and the prosecution has not taken adequate steps to ensure that he has had an opportunity to confront her, then the prosecution should be foreclosed from using the witness's testimonial statement—and a court's judgment that the statement was reliable should not substitute for the confrontation right.

In sum, the Confrontation Clause is meant not to ensure that only reliable evidence is presented at trial but rather to guarantee the traditional principles by which testimony is given. This proposition points the way to the manner in which the clause can be implemented faithfully and practically.

4. Implementation

As compared to the *Roberts* framework, the testimonial approach gives better guidance to the lower courts, is more practical to implement, and is less susceptible to manipulation. The testimonial approach can be articulated in terms of four basic questions.

First, was the statement testimonial in nature? The statement falls within the scope of the Confrontation Clause if and only if the answer is affirmative. This question can be made operational in various ways. One possibility, which might be suitable as a theoretical matter but sometimes difficult to implement, would pose a subjective question, whether the particular declarant anticipated the likelihood of evidentiary use. A more practical possibility is an objective test that would ask: Would a reasonable person in the declarant's position anticipate that the statement would likely be used for evidentiary purposes?⁴⁹

49 Note that this test speaks of *evidentiary* purposes, and not merely *prosecutorial* purposes. This test would therefore pose a rather clear answer to an interesting hypothetical posed by Justice Kennedy at oral argument in the *Crawford* case, see Transcript, available at www.supremecourtus.gov/oral_arguments/argument_transcripts/02-9410.pdf, at 4-5: There is a serious automobile accident, in connection with which criminal charges are ultimately brought, and the prosecution offers evidence of a statement made shortly after the accident by an observer to a private insurance investigator. Now, given that there has been a serious accident, an observer making a statement to an investigator would almost certainly anticipate the likelihood that the statement might be used in some litigation. The observer would therefore be acting as a witness in making the statement, whether or not criminal prosecution was reasonably anticipated at the time. Under a somewhat narrower, but plausible, approach, the statement would not be testimonial unless not just litigation but criminal prosecution was reasonably anticipated. In that case, the answer would depend on the precise facts. If what the observer said was that the driver was weaving in an apparently drunken manner, then clearly criminal prosecution would be a foreseeable possibility.

In most cases, the exact wording of the test would not be decisive. It is clear, for example, that Sylvia Crawford's statement to the police was testimonial, under any reasonable approach. The statement was electronically recorded by the police in a police station after the incident at issue. The recording was made with considerable ceremony, clearly for use in later proceedings, and Ms Crawford spoke in response to questioning much as if in a deposition—but without oath or cross-examination. If statements made in such circumstances are allowed as proof at trial, then it is difficult to deny that the declarant is testifying when she makes such a statement, for there is no doubt that a reasonable person in her position would anticipate that her statements would likely be used as evidence in a future criminal proceeding.

Just as in *Crawford*, the question of whether a given statement should be considered testimonial can usually be rather easily resolved, as indicated by the following 'rules of thumb':⁵⁰ A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made directly to the authorities or not. If, in the case of a crime committed over a short period of time, a statement is made before the crime is committed, it almost certainly is not testimonial. A statement made in the course of going about one's ordinary business, made before a criminal act has occurred or with no recognition that it relates to criminal activity, is not testimonial. And neither is a statement made by one participant in a criminal enterprise to another, intended to further the enterprise.

Thus, testimonial statements include not only statements made as testimony at the trial itself,⁵¹ but also testimony given at a prior trial,⁵² or other judicial proceeding,⁵³ and statements, like the one *Crawford*, knowingly made to investigating authorities.⁵⁴ At the other end, some statements, including those made in furtherance of a conspiracy, can be rather easily deemed non-testimonial, because they were made absent any indication of evidentiary use,⁵⁵ and these do not raise a concern under the Confrontation Clause.⁵⁶

50 See R. D. Friedman, 'Confrontation: The Search for Basic Principles', 86 Geo LJ 1011 at 1040–3 (1998).

51 See *Coy v Craig*.

52 See *Mattox; Mancusi v Stubbs*, 408 US 204 (1972).

53 See *Pointer; Barber v Page*, 390 US 719 (1968); *Green*; and *Roberts*. All these cases involved statements made at preliminary hearings.

54 See *Douglas v Alabama*, 380 US 415 (1965); *Green*; *Lee*; *Lilly*; *United States v Owens*, 484 US 554 (1988).

55 See, e.g., *United States v Inadi*, 475 US 387 (1986); *Bourjaily v United States*, 483 US 171 (1987); cf. *Dutton v Evans*, 400 US 74 (1970) (statement made after commission of crime, not in furtherance of conspiracy, but not with evidentiary anticipation).

56 Of course, in some cases the evidence will be excluded under other bodies of law, including the local jurisdiction's hearsay law.

Statements made in furtherance of a conspiracy do highlight a significant issue, though. Both the subjective and the objective tests I have presented above make the perspective of the declarant decisive. That is, the critical question is whether, from the declarant's point of view, evidentiary use was foreseeable. Suppose, for example, a conspirator makes a statement to an undercover police officer. The officer, the recipient of the statement, anticipates that the statement will be used as evidence. But the declarant presumably has no reason to know this, and so the statement should not be deemed testimonial. It is the declarant's perspective that matters because it is the declarant who is arguably the witness. If the declarant is not in a position to realise that she is creating evidence for use in litigation, then she is not really acting as a witness. Recall that, as argued in Part 3 above, the confrontation principle comes into play when the declarant, rather than making a statement in ordinary course, creates evidence, thus playing a role in a pending or anticipated adjudicative process. That principle applies even if the police or prosecutors are nowhere in the picture; indeed, the principle applied long before there were police or public prosecutors. The Confrontation Clause puts an obligation on the state as adjudicator—not to allow a witness's testimony to be used against an accused unless the accused has had an opportunity to confront her—but the state as prosecutor is secondary. There are, of course, limitations on how the state may gather information for prosecutorial purposes, from other sources as well as from humans, but unless the source is a human who is acting as a witness the confrontation principle does not come into play.⁵⁷

I do not mean to suggest that in all cases it is clear whether a statement should be deemed testimonial. Inevitably, some cases remain near the borderline. For example, many statements that have been characterised as excited utterances and so deemed to fit within a 'firmly rooted' hearsay exception should be recognised as testimonial in nature. For example, in many cases callers to an emergency assistance service (reached in the United States by dialling 911) often do more than request immediate intervention to end or relieve an exigent, even dangerous situation; sometimes they provide information that may aid in

57 A broader view is possible, in which the statement would be considered testimonial if either the declarant or the recipient had reason to anticipate evidentiary use. A somewhat narrower variant would make the declarant's perspective decisive, unless the recipient, with evidentiary use in mind, induced the declarant to make the statement. These approaches are workable, but I believe the declarant-oriented approach stated in the text is preferable. That approach also has the advantage of not disrupting well-settled law.

One further variant on conspirators' statements bears note. Suppose that a conspirator makes a statement knowingly to a police officer, but does so in an attempt to cover up the conspiracy. If that statement is later offered by a prosecutor against another member of the conspiracy, it would almost certainly not be to prove the truth of the assertion (a point noted by the Deputy Solicitor General in the oral argument of *Crawford*, Transcript, above n. 49 at 29), and therefore it should not raise a confrontation problem. See below n. 63 (no confrontation problem where statement is not offered to prove its truth).

investigation of that situation and in a prosecution arising from it. In such a case, the call is testimonial in nature—whether or not the operator receiving the call is a police officer.⁵⁸ Thus, sometimes close factual inquiries will be necessary to determine whether a statement should be deemed testimonial. But, as I will discuss below, that fact itself is not troublesome.

Assuming the statement was testimonial, so that the declarant should be deemed to have been acting as a witness in making it, then the accused had a right to confront the witness. The second basic question, then, is: *Will the accused have had an adequate opportunity to confront the witness?* Usually, the answer to this question is clear. If the witness does not testify at trial, and there is no prior proceeding in which the witness testifies under oath, in the presence of the accused and subject to his opportunity to cross-examine her through counsel, the answer is negative.⁵⁹ The prosecution can guarantee an affirmative answer to this question by setting up a pre-trial deposition of the witness. Arguably, though not clearly, it should also be sufficient if the prosecution gives the accused notice that it may use a testimonial statement made by the witness, invites the accused to take her deposition, and guarantees the reasonable availability of the witness for such a deposition. Other interesting issues regarding adequacy of the opportunity for confrontation sometimes arise, such as whether the witness may testify via an electronic connection to the courtroom,⁶⁰ whether an opportunity to cross-examine at a preliminary hearing suffices,⁶¹ or whether the witness's memory loss at the time of cross-examination unduly impairs the opportunity.⁶²

If the accused will not have had an adequate opportunity to confront the witness, then introduction of the testimonial statement to prove the truth of what it

58 See Friedman and McCormack, above n. 15, 150 U Pa L Rev at 1241–3. Statements by young children will present some of the closest issues under the testimonial approach, just as they do in the current framework. See, e.g., *Wright*; *White*. Pre-trial statements by children to caregivers such as parents and physicians may be considered non-testimonial in some circumstances even though statements by adults in similar circumstances would likely be considered testimonial. Depending on the context, the statement of a very young child of limited understanding might be considered for purposes of the Confrontation Clause to be more like the barking of a dog, and so non-testimonial, than like the accusatory statement of an adult. A statement by a child in response to questioning by a police officer or physician to whom the child has been referred because of suspicions of abuse is more likely to be testimonial than is a spontaneous statement by the child before abuse has been suspected. See generally R. D. Friedman, 'The Conundrum of Children, Hearsay, and Confrontation', 65 Law & Contemp Probs 243, 249–52 (Winter 2002).

59 *Pointer*, *Douglas*, *Lee*, and *Lilly* all clearly fit into this category. So does *Crawford*, putting aside the questions of waiver and forfeiture, discussed below.

60 See *Craig*; see also statements of Scalia J, 535 US 1159, and of Breyer J, dissenting, 535 US 1162, in conjunction with the decision not to transmit to Congress a proposed amendment to Fed R Crim P 26 (2002).

61 *Green* holds that it does.

62 In *Owens*, such a loss was held not to be a concern with respect to the confrontation right. For a different view, see R. D. Friedman, 'Prior Statements of a Witness: A Nettle Corner of the Hearsay Thicket', 1995 Sup Ct Rev 277.

asserts⁶³ violates the accused's confrontation right unless the answer to the third question is in the affirmative: *Did the accused waive the right to confrontation by failing to object, or forfeit it by misconduct?*⁶⁴ The accused might forfeit the right, for example, by intimidating the witness, kidnapping her, or murdering her. An accused cannot complain about his inability to confront the witness if it is his own wrongful conduct that created that inability.⁶⁵ This principle—rather than the fiction that cross-examination would be practically useless anyway because a declarant would not want to die with a lie on her lips—best explains the admissibility of certain statements by dying witnesses.⁶⁶

63 Cf. *Tennessee v Street*, 471 US 409 (1985) (no confrontation violation where statement was not introduced to prove the truth of what it asserted).

64 In *Crawford*, in the Washington appellate and supreme courts, but not in opposing certiorari, the State contended that Michael Crawford, who strenuously asserted his confrontation right, nevertheless forfeited it by invoking marital privilege to keep Sylvia from testifying at trial. Under Washington law, the defendant spouse appears to be the holder of the privilege, but the State never challenged the assertion of Michael's lawyer that Sylvia was unwilling to testify, and Michael was never presented with a situation in which he could examine Sylvia if he declined to exercise a privilege to keep her off the stand. Indeed, it appears that, even apart from the spousal privilege, Sylvia had a right not to testify, because she was also subject to prosecution, and eventually pleaded guilty to a criminal charge related to the incident.

But put that aside, and suppose contrary to fact that, absent an assertion of privilege by Michael, Sylvia would have testified at trial. That assertion nevertheless should not cause the loss of Michael's confrontation right. He clearly did not waive the right, for he asserted it vigorously. Did he forfeit it? I believe the answer should be negative. The State granted Michael a right as a matter of law, and clearly he committed no wrongdoing by asserting that right. On balance, it seems best to limit the forfeiture doctrine to cases of wrongdoing. Cf. Federal Rule of Evidence 804(b)(6) (providing for forfeiture of hearsay objection by 'wrongdoing'). The Confrontation Clause provides that Michael has a right to prevent introduction of testimony against him unless he has had an adequate opportunity to examine the witness, and state law provides that Michael has a right not to be in the position of having his wife testify against him. Michael should not have to elect between those rights. Cf. *Green v United States*, 355 US 184 (1957) (rejecting claim that defendant forfeited double jeopardy right against retrial on acquitted offence by successfully asserting statutory right to appeal conviction on lesser offence).

The matter would be simplified if the State adopted the testimonial approach in implementing its own law of privilege. If the statement of a wife to the police about a crime the husband has allegedly committed can be used as evidence to help convict the husband, then the wife has testified against the accused. Given that the husband has a privilege to prevent his wife from testifying against him—not a judgment every jurisdiction makes, see, e.g., *Trammel v United States*, 445 US 40 (1980)—the privilege should extend to use at trial such station-house testimony.

65 See *McDaniel v State*, 16 Miss 401, 1847 WL 1763 (Miss. Err. & App. 1847) ('It would be a perversion of [the Confrontation Clause's] meaning to exclude the proof, when the prisoner himself has been the guilty instrument of preventing the production of the witness, by causing his death.').

66 If the trial court determines as a threshold matter that the reason the victim cannot testify at trial is that the accused murdered her, then the accused should be deemed to have forfeited the confrontation right, even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable. Just as in *Bourjaily* (above n. 55), bootstrapping does not pose a genuine problem. See R. D. Friedman, 'Confrontation and the Definition of Chutzpa', 31 Israel L Rev 506 (1997).

Note that if one took the rationale of the dying declaration exception seriously, it would justify admitting any statement made on the verge of death. The facts that the exception is limited to statements concerning the cause of the apparently impending death, and that within the criminal context it is limited to homicide cases, suggest that the motivating concern is that the victim cannot testify against the assailant at trial because the assailant killed her.

Even if the accused's wrongdoing is the initial cause of the witness's unavailability at trial, the prosecution ought to be held accountable if it does not do what it reasonably can to preserve the accused's confrontation right. Suppose, for example, the accused strikes a fatal blow, but the victim lingers for an extended period, during which the police take from her a statement that the prosecution eventually offers against the accused in a murder trial. This should not be allowed without asking hard questions as to why, if the police were able to take a testimonial statement from the victim, the accused could not have been given a chance to cross-examine.⁶⁷

If the testimonial statement was made at an earlier time, and the accused then had an adequate opportunity to confront the witness, a fourth question arises: *Has the witness been shown to be unavailable to testify at trial?* If the answer is negative, then the statement may not be used, because live testimony is possible and preferred.⁶⁸ If the answer is affirmative, however, the Confrontation Clause poses no obstacle to admissibility of the statement,⁶⁹ unless the prosecution's wrongdoing caused the unavailability. Taking the testimony at trial would be ideal, but the ideal is not possible; an opportunity for confrontation is what is essential, and the accused has had it.

I do not contend that resolution of all Confrontation Clause cases becomes easy under the testimonial approach. I do contend that this approach makes easy analysis of cases that, like those involving station-house testimony, pose the core concerns underlying the Confrontation Clause.⁷⁰ Some cases are close to the borderline, but that is as it should be. I also contend that this approach poses the questions that trial courts should be asking in addressing cases under the clause, questions that will lead to appropriate results. Indeed I have cited numerous Supreme Court cases in the discussion above to suggest that this approach is consistent with the results of the court's Confrontation Clause precedents.

That the court has reached sensible results under the *Roberts* framework does not suggest that the framework is accomplishing its purpose. On the contrary, the

Children who might otherwise testify at trial are particularly susceptible to intimidation by criminal defendants, in which case forfeiture might apply. See generally Friedman, above n. 58 at 252–5.

67 Cf. *R v Hamer* (CA 196/03 Ct App NZ, 22 July 2003) (murder case; holding inadmissible, on other grounds, statement made to police by victim who died weeks later after a period of partial recovery); *R v Forbes* (1814) 171 Eng Rep 354 (upholding the right of defendant to be present at deposition of dying victim and to cross-examine).

68 See *Barber*; *Roberts*, 448 US at 63 ('the Confrontation Clause reflects a preference for face to face confrontation at trial').

69 See *Mattox*; *Mancusi*; *Roberts*.

70 See *Lilly*, 527 US at 143 (Scalia J) (describing the case as involving 'a paradigmatic Confrontation Clause violation').

court has reached sensible results only by manipulating the framework. The framework itself has not led to the results, but has only obscured the unarticulated principle that supports them.

For example, the court has held that conspirator statements fall within a 'firmly rooted' hearsay exception and thus satisfy the *Roberts* reliability requirement.⁷¹ But the court did not even suggest that conspirator declarations are a particularly reliable set of statements. Quite the reverse is true.⁷² It would be much better to recognise that conspirator statements are simply not testimonial and so do not fall within the scope of the Confrontation Clause at all.

On the other side, consider *Lee*. At issue was a confession by an accomplice who, while inculcating the accused, also accepted responsibility for a central role in a cold-blooded and brutal murder. Justice Blackmun argued powerfully that the confession was 'thoroughly and unambiguously adverse to his penal interest', and that because the portion inculcating the accused was inseverable from the portion inculcating the declarant the statement could not be dismissed as merely an attempt to shift blame to the accused.⁷³ Nevertheless, a bare majority refused to treat the statement as a declaration against interest, saying in a footnote, 'That concept defines too large a class for meaningful Confrontation Clause analysis.'⁷⁴ This is an ironic response, given that the *Roberts* framework aims to simplify analysis by exempting from the Confrontation Clause categories of statements that fall within 'firmly rooted' hearsay exceptions and so are deemed 'without more' to be reliable. The majority then reached the highly contestable conclusion that the statement was not reliable, and so held that admission of the statement violated *Lee*'s confrontation right. This awkward holding would have been unnecessary had the court simply recognised that the accomplice's statement to the police was clearly testimonial; accordingly, it could not be introduced against *Lee* unless she had an opportunity to confront the accomplice.

Note, however, that adopting the Solicitor General's approach would do nothing to relieve the problem: although the statement was testimonial, the confrontation right would not necessarily attach under that approach because, treating the witness as unavailable as the *Lee* court did, the decisive issue would be the usual *Roberts* question of reliability. Indeed, one might wonder what the effect of the

71 *Bourjaily*, 483 US at 182-4.

72 *Ibid.* at 201 (Blackmun J dissenting) ('this exemption has never been justified primarily upon reliability or trustworthiness grounds and its reliability safeguards are not extensive'); *Inadi*, 475 US at 405 ('It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis of law' (quoting J. H. Levie, 'Hearsay and Conspiracy', 52 Mich L Rev 1159 at 1166 (1954))).

73 476 US at 551-3.

74 476 US at 544 n. 5.

Solicitor General's approach would be. So far as I am aware, the court has never held that reliability considerations justified admitting a statement that was clearly testimonial in nature and as to which the accused did not have an opportunity to confront the witness;⁷⁵ it has effectively excluded statements as unreliable when it should have excluded them as testimonial. If the court were to continue with this treatment—essentially treating testimonial statements as *per se* unreliable—then reliability review under the Solicitor General's approach would be an empty gesture, and that approach and the one presented here would be the same in substance. And indeed, the Solicitor General's brief in *Crawford* did not present a single actual case in which the result would be different under these two approaches. If, however, the court were to start deeming some testimonial statements by unavailable witnesses as sufficiently reliable to warrant admissibility despite the absence of an opportunity for confrontation, that might open the way to some jarring restrictions on the confrontation right.⁷⁶

Finally, consider the court's treatment of unavailability. In *Roberts*, the court appeared to state a broad rule that hearsay would not be admissible unless the declarant was shown to be unavailable to be a witness. But in *United States v Inadi*⁷⁷ and again in *White v Illinois*⁷⁸ the court restricted this principle, declining to apply

75 The closest perhaps is *White*, a case that involved statements that might (though not clearly) be deemed testimonial but were made by children and so involved considerations particularly applicable to children.

76 Thus, in its brief in *Crawford*, at 26, the Solicitor General argued that 'there may often be little reason to question the validity of statements made to officers at the scene by a disinterested bystander who directly observed the commission of a crime and promptly reported it to the police'. But surely the accused should have a right to cross-examine such a witness, and it would be hard to be certain in advance that such cross-examination would not be fruitful in suggesting difficulties that the witness had at least in perceiving the events.

The Solicitor General also raised a rather far-fetched hypothetical, *idem*, in which an accomplice makes a confession that divulges only his own role in a crime, without suggesting the involvement of another, but in doing so reveals details about the time and place of the offence that, when joined with other evidence, helps tie the accused to the crime. Again, one is left wondering how we can be certain that cross-examination with respect to such details would be worthless.

At oral argument in *Crawford*, the Deputy Solicitor General raised another, more plausible, hypothetical: One defendant pleads guilty and at his plea hearing makes a statement. A second defendant is then tried on charges arising out of the same incident. The first defendant refuses to testify—perhaps because he is awaiting sentencing and has a right not to incriminate himself, perhaps in contempt of court. The prosecution then offers the statement made in conjunction with the plea. Transcript, above n. 49 at 35–6. One can easily enough understand the desire of the prosecutor to introduce that statement. But this is essentially a replay of *Tong's Case* (above n. 19): the self-incriminating statement is testimonial, and absent an opportunity for confrontation it should not be usable against any defendant other than the one who made it. The fact that it was made in court rather than behind an investigator's door should not change this result. The prosecution can, if it wants, protect itself by making a demand in its plea negotiations with the first defendant that he testify at the trial of the second.

77 475 US 387 (1986).

78 502 US 346 (1992).

it to the statements involved there and implying that it applied only to former testimony.⁷⁹ That the court 'effectively abandoned' the unavailability requirement except for former testimony⁸⁰ was perplexing to knowledgeable observers. Calling this 'an ironic result', for example, one leading textbook says:

The major deficiency of hearsay is thought to be the absence of cross-examination, and one of the central concerns of the Confrontation Clause is to ensure that the cross-examination of testifying witnesses is not unduly hampered. Now it appears that the one traditional hearsay exception that turns on the opportunity for cross-examination may face a hurdle under the Confrontation Clause that no other hearsay exception need jump.⁸¹

The testimonial approach explains the conundrum. Former testimony should not be used in lieu of trial testimony if it is reasonably possible to cause the witness to testify at trial. But if the testimony of the witness cannot be secured at trial, then the former testimony is a satisfactory substitute, assuming the accused had an adequate opportunity at an earlier time to confront the witness. If the accused did not have such an opportunity—as in *Lee* and in *Lilly*—then the prior testimonial statement may not be used in place of trial testimony, whether the witness is available or not, so long as the accused did not waive or forfeit the confrontation right. If, on the other hand, the statement is not testimonial in nature, then the Confrontation Clause poses no obstacle to its admissibility (though local evidentiary rules might), whether the declarant is available or not. To a considerable extent, the hearsay exceptions other than the one for former testimony define, or can be manipulated to define, categories of evidence that are not testimonial. Statements falling within such categories should present no confrontation issue, irrespective of unavailability.

In short, the Supreme Court's results have been better than its reasons. It is therefore not surprising that lower courts have found the doctrine enunciated by the court difficult to follow and have often reached unacceptable results, sometimes tolerating what clearly amounted to station-house testimony. For example, even though every member of the court in *Lilly* agreed that the admission of a non-testifying accomplice's police confession against the defendant violated

79 In other settings, the court has avoided the issue of unavailability. *Lilly*, 527 US at 124 n. 1 (plurality opinion); *Wright*, 497 US at 816; *Lee*, 476 US at 539.

80 R. N. Jonakait, 'Restoring the Confrontation Clause to the Sixth Amendment', 35 UCLA L Rev 557 at 561 (1988).

81 R. O. Lempert, S. R. Gross and J. S. Liebman, *A Modern Approach to Evidence*, 3rd edn (2000) 756–7. See also, e.g., Swift, above n. 40 at 146–7 (criticising *White*'s 'blanket rejection of an unavailability requirement in most cases' and summarising negative academic response).

the Confrontation Clause notwithstanding the State's claim that the confession fell within the statement against penal interest hearsay exception, many lower courts since *Lilly* have admitted police confessions from non-testifying accomplices under that very same exception, often finding such statements to be exceptionally 'trustworthy'.⁸² Only if the court articulates the robust, easily understood principle that has guided its decisions even while escaping expression in them will the lower courts be able to follow its lead consistently.

I am hopeful that *Crawford* will be the vehicle that the court uses to restructure the law. The court could easily reach a sensible result in *Crawford* under the current framework. Indeed, there will never be a case in which achieving a sensible result will *require* the court to reject that framework. But, as I have shown, that fact does not suggest that the framework is succeeding. On the contrary, it means that the framework is so malleable as to have no guiding force. A court can reach any result it sees fit under the framework. If the court is inclined to hold that the Confrontation Clause does not preclude admissibility of a given statement, it can find adequate case-specific 'indicia of trustworthiness' to cite. If it is inclined to hold that the clause does preclude admissibility, it can cite reasons why the particular statement is not in fact sufficiently trustworthy, and as in *Lilly* it can hold that the 'firmly rooted' prong does not apply because the hearsay exception in issue is not 'firmly rooted' to the extent the exception is deemed to cover statements of a given description. Alternatively, except when a federal court reviews a state conviction, the court can issue a restrictive ruling on hearsay law, and thus exclude the evidence without reaching the confrontation issue—though doing so has collateral consequences in making hearsay law unduly rigid in contexts where the confrontation right is not at stake.⁸³

Thus, if the court continues to use the present framework, it can continue to reach sensible results, but some lower courts will also continue to manipulate the doctrine to reach unpredictable and indefensible results. I hope the court will not forsake the opportunity that *Crawford* presents to articulate and protect a noble principle of long standing, one that will provide clear guidance to the lower courts.

82 See R. W. Kirst, 'Appellate Court Answers to the Confrontation Question in *Lilly v Virginia*', 53 *Syr L Rev* 87 (2003) (reviewing post-*Lilly* cases).

83 Thus, e.g., *Williamson v United States*, 512 US 594 (1994), construed the exception for declarations against interest far more restrictively than most prior authorities suggested. See *McCormick on Evidence*, J. W. Strong (gen. ed.), 4th edn (1992) 344–5. The *Williamson* rule has limited applicability of the exception in civil as well as criminal cases. See *Silverstein v Chase*, 260 F 3d 142 (2d Cir. 2001).

Conclusion

Current doctrine relies on hearsay law to do the work that should be performed by the Confrontation Clause, and this has been detrimental to both. It has made hearsay law overly rigid, and it has obscured the meaning of the clause. Once it is recognised that the scope of the clause is narrower than that of hearsay law, that it applies only to those statements that are testimonial in nature, the essence of that right becomes apparent: it protects one of the central procedural aspects of our system of criminal justice, the presentation of testimony in the presence of the accused and subject to cross-examination. That right may be waived or forfeited, but it should not be subject to exceptions nor should it be trumped by a judicial determination that the particular statement at issue is reliable.

My focus has been on the Confrontation Clause, and on the law of the United States, but my interest is broader. Other common law countries do not generally protect the confrontation right by an explicit constitutional provision, but they share a heritage of adherence to the right. This might help explain a notable trend: the rule against hearsay has tended to wither away in civil litigation throughout the common law world, but, though it is under pressure, it has demonstrated residual strength in criminal cases. The reason, I believe, is a sense, usually implicit, that an accused should have a right to confront the witnesses against him. Recognising this principle as one separate from that of hearsay law would allow for greater protection of the principle even while hearsay law is left to develop or atrophy however seems best. Indeed, recognition of the principle would probably have led to a more cautious approach than that taken in the hearsay provisions of the Criminal Justice Act 2003. The cases under the European Convention on Human Rights demonstrate that even in a system without a rule against hearsay the right to confront witnesses is an important one worth protecting.