

SOLOMON'S SWORD: THE LOSER GETS PROCESS

*Charles Nesson**

Thank you, James.¹ James really did bring me an apple, that's why I remembered him. I think no other student's ever done that before—I highly recommend it. So, tell me who you are. How many are law students? How many are law faculty types? How many are lawyers? How many are worse?

Alright, so confrontation is the subject, *Crawford* and *Davis*. Confrontation is a word that evidence scholars tend to denude of its emotion. And there are other words like that in Evidence, in fact at the core of Evidence. Words like “guilt” and “privilege.” You know, real things that actually affect real people, that somehow get lost in the professionalism of categories and distinctions.

Confrontation is like a crystallized moment. It's a moment that each one of us experiences. We experience it with our father when we first stand up or with our older brother or sister or wife, husband, dean, institution, country. There are moments when we know that we are standing up and representing a truth that we express. So that's the feeling: it's a crystallized moment.

Solomon's sword. The wisdom of Solomon. The theater of trial is rhetorical space. You know the story. Two harlots, each with a child. One of them dies in the night. A dispute as to who was the mother of the living child. They bring it before Solomon. They each speak, and Solomon says bring me the sword. And wham!—at that moment, there's a crystallization of character. The story tells it: one woman says, “Split it, that'd be fair.” And the other says, “No, give it to the other.” And Solomon makes his judgment, and all of Israel stands in awe because they see the wisdom of God to do judgment is in him.² Well that's the moment.

Cross-examination is our trial method of swinging Solomon's sword. It's the device that the American—the Anglo-American—jury system has devised for crystallizing character in a moment. That's the essence of it. In the theater of the courtroom, with the jury looking on, under the aegis of a fair judge conducting a fair procedure, cross-examination produces the moment when truth is on the line and the jury witnesses and decides. That's the core algorithm of the process. That's why it's been

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¹ Addressing Professor James J. Duane of Regent University School of Law.

² 1 *Kings* 3:16–28.

such an immense success, such a powerful base for the most powerful legal profession in any country in the world.

So here's the story of confrontation—told to you quickly. It starts with Sir Walter Raleigh, perceived to be an enemy of the state. He is prosecuted by the evil Lord Coke, who locks his friend Cobham up in the Tower of London, exacts a confession from him, puts Raleigh on trial, and offers the confession as the evidence. And Raleigh stands and says, "Will you convict an Englishman on the basis of a piece of paper?" And they falter around a little bit, convict him, and execute.³ And that injustice rings down through the centuries from 1600 until the time when we adopt our Confrontation Clause as part of the Bill of Rights.

So what's the core idea of the Confrontation Clause? It says the accused shall have the right to confront. Now it says the "witnesses against," but think what it is: it's to confront your accuser. It's to confront Cobham. The "witnesses against" express the accusation against. So, here this right, ensconced in our Constitution, and then not a single case decided on this fundamental right for how long? In 1789 our Constitution gets adopted. The first confrontation case was when? Eighteen ninety-five—106 years later. Why? Were there no issues? This is curious. It has nothing to do with the 14th Amendment. It has to do with the fact that there was no appeal of issues relating to confrontation. There was no appellate court. In the federal system, there was the Supreme Court and then the district courts that rode the circuits. And the only question for the Supreme Court was whether the district judge had jurisdiction to do the job that he was out on the hustings doing. And if Judge Roy Bean had jurisdiction to be sitting in the court he was sitting in, then whatever Judge Roy Bean said in that court was okay. Confrontation was a trial issue. No appeals. No opinions.

Eighteen ninety-five changes it because that's when the intermediate courts of appeal had come into being. And the first case that gets reversed and sent back presents an issue of hearsay when the two key witnesses are missing and the prosecutor wants to introduce the sworn testimony that had been cross-examined in the first trial. And *Mattox* stands up and says, "Would you convict an American on the basis of a piece of paper?" And that case goes to the Supreme Court.⁴

At this point they have lost it: they don't know what the Confrontation Clause is. They look at it. A big thing has started to intervene. The West system had been adopted in 1880. That meant that scholars could do research and read all the cases. And a guy named Wigmore, with a green eyeshade on, is reading all the hearsay cases and

³ *The Trial of Sir Walter Raleigh* (1603), in 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1, 1–60 (T.B. Howell ed., London, R. Bagshaw 1809).

⁴ *See Mattox v. United States*, 156 U.S. 237 (1895).

sorting them into categories, and he's got categories and categories of hearsay. And so the Supreme Court says: "We don't know exactly what this means. But we can tell you this, this testimony is better than the dying declaration, and nobody ever thought we were going to get rid of that. So if it's more reliable than the dying declaration, that's good enough for us." And that was it for the Confrontation Clause more or less for the next sixty years.

Justice Black embarked on his program to incorporate the Bill of Rights one by one after failing to do it wholesale. He finally gets to the Confrontation Clause in 1965 and holds in a nice, clean, slick opinion that it's a violation of the Confrontation Clause to use an unconfro- nted preliminary hearing transcript against a defendant.⁵ There's a constitutional right to cross-examine and suddenly the world explodes—a defendant wins. Defendants see that every hearsay claim presents a potential Confrontation Clause question and cases start to bubble up. And the Justices of the Supreme Court start saying to themselves: "Whoa, are we going to have to rationalize every hearsay exception? That's going to be really tough." And so they start struggling to try and get away from this thing.

I clerked during this period. I saw Justice Harlan get himself wound up in this. Really, among the judges, the term that floated around was "the ganglion of hearsay." How do you rationalize it? And so in the cases of this period, you can see them trying to escape. And finally *Roberts*⁶ does it. Justice Blackmun, he just does it. He just says, straight out, all traditional hearsay is constitutional. That's it—not going to explain. This is a complete corruption of course. The idea that somehow this great principle has been reduced to this ridiculous consequence is a travesty.

*Crawford*⁷—Solomon's sword in Justice Scalia's hands. He does a beautiful job of killing *Roberts*. He just, *swish*, cuts it. He explains that a principle that is so discretionary is not worth anything. He exhibits an understanding that the way a good judicial process should work is kind of like a software algorithm—you want it to be clean. The more the credibility of the judge is entwined with the outcome of the proceeding, the worse the result. This was very hopeful. But then, *Davis*.⁸

Davis is a mystery to me in this sense: it's hard for me to see how someone I thought was as perceptive as Justice Scalia was in *Crawford* could so badly understand the principle that I thought he had enunciated and demonstrated in *Crawford*. Okay, let's make it simple. These are 911 calls that are up before the Court. *Davis* is a 911 call from

⁵ See *Pointer v. Texas*, 380 U.S. 400 (1965).

⁶ *Ohio v. Roberts*, 448 U.S. 56 (1980).

⁷ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁸ *Davis v. Washington*, 126 S. Ct. 2266 (2006).

someone who's in difficulty. The question is: Can the transcript come in without violating the Confrontation Clause? Who is Davis's accuser? There were apparently two live witnesses at the trial. They were both police officers who had come after the event and could testify that they saw bruises. But who identified Davis as the assailant? QED. End of case. Who was Davis's accuser? So where did the accuser get lost in this? How can *Davis* be written so far down this path of "testimonial" that in only one step away from its point of origin in *Crawford* it's lost sight of the driving principle?

Davis disempowers. How can that be? *Davis* should require all 911 services to run a little recorded tape that says, "Somebody will be right with you. You're next in line." It should contain a warning. Well, let's just imagine the situation. It's a domestic violence situation. It's between a man and a woman. They have an emotional relationship. Maybe they're married, maybe they're close to marriage, who knows? But we're talking about stuff that we all understand, stuff that goes on between two people of different gender, sometimes the same gender, who feel intensely about each other, and it breaks into violence. And one person, the woman typically, is getting abused physically and calls 911 for help because she can't think of anything else to do. Someone on the other end of the line should say to her (after *Davis*), "Before you speak to the 911 operator, please understand that the testimony you give may be used against the person you love in a prosecution over which you have no control." Why should that warning be given? It should be given because too many people find themselves in the position of having brought in the police because they desperately needed help in a moment, but then finding that they've destroyed the environment that makes up their life—that their opposite member has lost his job or gone to jail, or they've lost their kids. It can be really bad. So, *Davis* disempowers. Somehow the idea took foot in *Davis*—and prevailed—that the way to protect women is to disempower them.

Davis also completely undercuts the key point of brilliance in *Crawford*—understanding the power of neutral procedure—because it puts the judges back into the picture on a factual determination in which the evidence they receive will be offered by prosecutors and consist of the testimony of cops. And judges in the real world have no choice but to believe them. I think of this as the mega-meta-dropsy testimony on searches that you may recall after *Mapp*.⁹ Suddenly there was a tremendous spate of people allegedly seen "pulling drugs out of their pockets and dropping them in front of policemen on the street," all approved by the court system. So see that not just as fabrication, but see

⁹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

it as loss of the credibility of the judge, Solomon. The wisdom of the court lies in a clean algorithm.

Okay, so where did the accuser get lost? Well, first you have to note the word “accuser.” That word isn’t used in the Confrontation Clause itself. The “accused” is used. We’re protecting the accused; we’re giving the accused the power to confront the accusation against him as communicated by the witnesses. But it’s the accusation that’s the core. Where did we get from accusation? This was the crucial move. Justice Scalia says the text of the Confrontation Clause applies to witnesses against the accused—in other words, those who bear testimony.¹⁰ Whoops, done. That’s it. Now we’re off into the deep weeds of what’s “testimony.” And we can talk about that even though it’s not mentioned anywhere.

Time for questions. Time for reactions. That’s my talk.

Question 1: *Davis* and *Hammon* are actually two decisions in one.¹¹ You speak about *Davis*, but *Hammon* involved similar circumstances and was decided, I think, in favor of your approach to *Crawford* and the Confrontation Clause. My question, though, is why—if excited utterance has been around forever, almost as long as dying declaration—why isn’t excited utterance an appropriate exception under the Confrontation Clause and consistent with *Davis* and *Crawford*?

Professor Nesson: Well, I’m going to answer the question that I thought you were going to ask first, and then I’m going to answer yours. You mentioned *Hammon*, and I had the pleasure of sitting with Richy last night and listening to him talk about *Hammon*. And he says *Hammon*’s an easier case than *Davis*. I say it’s not. It’s only easier if you’ve already lost yourself in the testimony weeds. If you actually look at what’s driving it, *Hammon*’s a case in which not only does the woman make the 911 call, but then she makes a decision in an environment in which she knows very well that she’s offering evidence. So if anything, in terms of the empowered woman, I’m more concerned about the *Hammon* case than I am about *Davis*. I’m frankly concerned about both, and I think all this talk about “from whose perspective” is irrelevant. That’s where I thought you were going to go on *Hammon*.

On excited utterances, first you start with the dying declaration. The dying declaration is not immune from consideration under a rethought Confrontation Clause. The dying declaration—just so we all understand—is based on the idea that a man will not meet his maker with a lie upon his lips. In modern form, neither man nor woman will

¹⁰ *Crawford*, 541 U.S. at 51.

¹¹ *Hammon v. Indiana* was the companion case to *Davis*.

meet his or her maker, yada yada. Alright, it's been around for a long time. It's one of the best pieces of evidence in this rhetorical theater that we're talking about. Wigmore tries to justify these things in terms of reliance, and he comes up with this explanation.

My experience has not been that people at the extremity of life suddenly get truthful. In fact, it seems to me that there's a fair amount of fantasy involved in a lot of what goes on. Plus, they're usually shot full of drugs—it's really bad. And what is the dying declaration that we're worried about? The classic dying declaration is the guy who is wheeled into Bellevue Hospital. He's got bullets in him. He's on his way out we imagine. The scene we imagine is Father O'Brien, with his collar on, saying, "You're about to die, my son. I give you your last rites," and so on and so forth. And the guy says, "Greg did it." But the truth is that it's much more likely that there's a police officer there who is instructed to tell the person that he's dying so that he's aware of it. And the guy says, "Uhhhh, ugggg," and the cop then comes and testifies that he clearly said, "Greg did it." And that's the way it works. And so I don't think the dying declaration should be immune from confrontation analysis. I would be as equally sensitive to a cop testifying to a dying declaration as a cop testifying to anything else. This focus on the police fabricating the testimony goes right back to Cobham. And I would do the same with excited utterances—it's just a different cut.

Question 2: How would you be able to handle an Enron prosecution without the hearsay exception for business records if you had to produce the witness to every transaction, and could not rely on the custodian to lay the foundation for the introduction of a massive quantity of documents?

Professor Nesson: That's an excellent question, and it's exactly the question on which Harlan flubbed up in 1972. They are floundering around; they are all floundering around looking for some rationale for the Confrontation Clause that saves them from the hearsay problem. Well, Wigmore is the source of the problem. He has sorted everything into these twenty-two bins, and now he looks at the Confrontation Clause and says to himself, "Can it be that this Confrontation Clause wipes out all this work I have done? That can't be." And so he authors an interpretation of the Confrontation Clause that includes the famous line that some forms of hearsay are so good and so trustworthy that cross-examination would be an act of "supererogation."¹² Now just pause for a

¹² 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1420, at 251 (James H. Chadbourn ed., rev. ed. 1974) ("The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the

moment. This is utter fantasy. There is no defense attorney in the world who would forgo cross-examination of an accusing witness—none. So this thing should have been a laugh, but it was repeated again and again and again—extraordinary.

So Harlan went for one of these things where Wigmore said, “At least the Confrontation Clause should require the production of all available witnesses.” And he wrote that.¹³ And this is the guy who came up through big time New York law practice where the number one hearsay exception is business records. And the next year, he says, “Oh no,” and then actually writes an opinion saying, “I take it back. I got it wrong.”¹⁴ But then he didn’t know what to do. There was this theory of confrontation that it just meant that you got to cross-examine whatever witness the other side put on. If they offer two police officers, you can stand up and cross-examine them. But that is the extent of the right. And Harlan would fall back on due process as if that was somehow going to be his protection. He had no theory of confrontation.

Well to me, the key here is to focus on the accusation, to recognize that the testimony is the fork in the road that leads you into this ridiculous looking-up-in-the-dictionary form of trying to resolve constitutional structure. At least focus on the right concept. The right concept is the accusation and the communication of the accusation. Now I think that within that framework there would be loads of work to do. And surely you would preserve the forms of hearsay that have served enormously well in many regards. There are some that I think are worth chucking, but business records is not one of them.

bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.”)

¹³ *California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J., concurring) (“[T]he Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to produce any available witness whose declarations it seeks to use in a criminal trial. [And] even were this conclusion deemed untenable as a matter of Sixth Amendment law, it is surely agreeable to Fourteenth Amendment ‘due process,’ which, in my view, is the constitutional framework in which state cases of this kind should be judged.”).

¹⁴ *Dutton v. Evans*, 400 U.S. 74, 95 (1971) (Harlan, J., concurring) (“Nor am I now content with the position I took in concurrence in *California v. Green*, *supra*, that the Confrontation Clause was designed to establish a preferential rule, requiring the prosecutor to avoid the use of hearsay where it is reasonably possible for him to do so—in other words, to produce available witnesses. Further consideration in the light of facts squarely presenting the issue, as *Green* did not, has led me to conclude that this is not a happy intent to be attributed to the Framers absent compelling linguistic or historical evidence pointing in that direction.”).

Question 3: My question has to do with the fact that when you started looking at the empowerment of women, it took you off of the central purpose and theme that you had going on until then. Imagine that in the *Davis* case, the police had talked to the woman and said, “How do you feel about us going ahead with your statement?” And she said, “Fine, go ahead,” and then signed something. The police then took it and went to court with it. That doesn’t really solve the cross-examination problem. What do you mean by the Confrontation Clause? All that beautiful language? That rhetoric? I think in some ways you are making it easier on yourself. I think this might be a situation where you do have a conflict between the idea of self-empowerment on the one hand and the fact that it might not be good for the victims on the other. I think you have to address that and find ways to resolve this deep problem we have in society.

Professor Nesson: Well, you make an excellent point. In some ways as I thought through what I wanted to say here this morning, it was shaped by my conversation with Richard Friedman last night where I was really trying to understand what the dynamic was that would have led Justice Scalia to write *Davis*. And he was talking about compromise and the influence from the Ginsburg wing of the Court. And I felt that was the real opposition. The tragedy of *Davis* is that it really means that *Crawford* changes very little. It deeply undercuts *Crawford*. After *Crawford*, there was a choice; there was a fork in the road. We could have gone in the direction of expanding the confrontation right and just making it really clear so that people knew what the rules were. And then yes, you would have to come to court if you wanted to succeed in making an accusation. That was the choice. Or, we could try to minimize the impact on the existing ways of doing business as much as possible—change as little as possible by finding every nuance we could in whatever was offered by the Court. It is like Lenny Bruce said: “It’s not the Supreme Court that runs the show; it’s the lower court judges that sweep up the store. They are the ones that run it.”¹⁵ So we needed not only the articulation of the principle of *Crawford*, but then a clarion rearticulation to follow up as well—we needed the Court to say this is

¹⁵ To view the exact quote that Professor Nesson paraphrases, go to <http://www.law.umkc.edu/faculty/projects/ftrials/bruce/bruceownwords.html> (“The law is a beautiful thing. The people who attack the law don’t really understand it. You know what it’s like? It’s like the Supreme Court, that’s the daddy and it runs the store because it knows how. All the state courts; they’re the clerks, and the daddy says, ‘Now you just sweep the floor and unpack the stock and that’s it—I don’t want you to place any orders or change the displays, and keep your hands out of the register.’ But the minute he turns his back all the clerks think they know how to run it better, and they start changing everything and ordering the wrong things and it’s a mess. The Supreme Court, the big daddy, it knows what is, but the little guys keep trying to run the store.”).

what we actually meant. Richy actually offered exactly the right line—exactly the right line—when he said that statements made to the cops violate the Confrontation Clause if they are used against the accused. That's it. Nice and clean.