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Future of Confrontation Clause Developments: What Will Emerge When the Supreme Court Synthesizes the Diverse Lines of Confrontation Decisions

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THE FUTURE OF CONFRONTATION CLAUSE DEVELOPMENTS: WHAT WILL EMERGE WHEN THE SUPREME COURT SYNTHESIZES THE DIVERSE LINES OF CONFRONTATION DECISIONS?

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I. INTRODUCTION

The Supreme Court in 1965 extended the protection of the confrontation clause to state court defendants.[1] That holding led to unprecedented judicial and academic attention to a sixth amendment provision which previously had played a relatively insignificant role in the administration of criminal justice.

The Court's confrontation decisions in the last quarter century have treated diverse questions. This Article divides these confrontation issues into five categories, which are admittedly not complete enough to embrace all possible confrontation questions: 1) hearsay and confrontation, as in *Dutton v. Evans*[2] and *Bourjaily v. United States*;[3] 2) substantive domestic law restrictions on cross-examination and impeachment, as in *Davis v. Alaska*[4] and *Olden v. Kentucky*;[5] 3) procedural limitations upon face-to-face confrontation, without substantive limitations upon cross-examination, as in *Coy v. Iowa*;[6] 4) confrontation and discovery, as in *Pennsylvania v. Ritchie*;[7] and 5)

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1 Pointer v. Texas, 380 U.S. 400 (1965).
2 400 U.S. 74 (1970).
3 483 U.S. 171 (1987).
4 415 U.S. 308 (1974).
5 109 S. Ct. 480 (1988).
6 487 U.S. 1012 (1988).
7 480 U.S. 39 (1987).

confrontation restrictions upon the use of limiting instruction procedures, as in *Bruton v. United States*.[8]

Despairing of finding meaningful guidance for resolving modern confrontation issues in historical materials, thoughtful jurists and scholars have offered their own interpretations of the confrontation clause.[9] Most of the more ambitious academic theoreticians have focused on the hearsay-confrontation decisions.[10] These writers have criticized the Supreme Court's approach to hearsay and confrontation, usually concluding that it provides too little constitutional protection for the accused.[11]

In venturing guesses about future confrontation clause developments, and in offering suggestions, I take a step back from the hearsay-confrontation segment to get a better view of the whole picture. From this vantage, without regard to theory, the differences in the results as they might be charted on a liberal-conservative graph are amazing. For example, in one case, the Supreme Court found a confrontation clause violation where the accused had a full opportunity to cross-examine his accusers in the jury's presence, limited only by the inability of the accusers to observe the defendant during

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[8] 391 U.S. 123 (1968). Douglas v. Alabama, 380 U.S. 415 (1965), is also a case in which the Court viewed jury instructions as inadequate to prevent misuse of a hearsay statement and therefore used the confrontation clause to invalidate the procedure.

[9] *See, e.g.*, M. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523 (1988); Jonakit, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988); Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485 (1987); Note, *Reconciling the Conflict Between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 COLUM. L. REV. 1294 (1985); Comment, *The Confrontation Clause and the Hearsay Rule: A Problematic Relationship in Need of a Practical Analysis*, 14 FLA. ST. U.L. REV. 949 (1987). For another thoughtful discussion, see Seidelson, *The Confrontation Clause and the Supreme Court: Some Good News and Some Bad News*, 17 HOFSTRA L. REV. 51 (1988).

Older commentary concerning confrontation theory includes Baker, *The Right to Confrontation, the Hearsay Rules and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974); K. Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 Crim. L. Bull. 99 (1972); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978); Comment, *Federal Confrontation: A Not Very Clear Say on Hearsay*, 13 UCLA L. REV. 366 (1966).

Most commentators are critical of the Court's declaration that "indicia of reliability" can substitute for cross-examination so as to fulfill the confrontation clause guaranty. This criticism is wholly apart from their view of whether courts should require the prosecution to demonstrate the unavailability of the hearsay declarant before allowing it to introduce a hearsay declaration. *See infra* text accompanying notes 23-32.

[10] K. Graham, *supra* note 9; Jonakit, *supra* note 9; Kirst, *supra* note 9; Western, *supra* note 9.

[11] K. Graham, *supra* note 9, at 128-34; Seidelson, *supra* note 9, at 70-82; Note, *supra* note 9, at 1304-16. The reference is to the substitution of "reliability" for cross-examination. *See infra* text accompanying notes 33-49.

their testimony.[12] By contrast, the Court has allowed routine use of out-of-court accusations, without permitting any cross-examination by the defendant of the declarant, without requiring the prosecutor to demonstrate either the reliability of the particular hearsay utterance or the unavailability of the declarant, and without affording the jury an opportunity to scrutinize the declarant's demeanor.[13]

In the hearsay-confrontation cases, the Court has come close to adopting Justice Harlan's dictum that the confrontation clause should not shape the rules of evidence.[14] At the same time, in striking down domestic law limitations upon certain avenues of cross-examination and impeachment, the Court, including Chief Justice Rehnquist, with little fanfare, has embarked upon a course that could lead to very substantial constitutional law modifications of the domestic rules of evidence in criminal cases.[15]

Additionally, the hearsay decisions are difficult to reconcile with the limiting instruction cases. *Bruton* appears to prohibit de facto use by a jury of a codefendant's accusation against a defendant where the domestic law prohibits such use but relies upon limiting instructions which direct the jury to observe such restriction.[16] On the other hand, the hearsay-confrontation cases[17] allow states to make de jure use against a defendant of some of the very codefendant confessions which, under *Bruton*, would create confrontation clause problems if a state were to exclude them de jure while admitting them de facto through use of inadequate limiting instructions.[18]

Although there is little hope that a coherent theory of confrontation will emerge in the coming years, the Supreme Court probably will strive to reconcile the different lines of confrontation cases to produce a more uniform result. The Court's recent decision to grant certiorari in two cases posing different confrontation issues reinforces this belief.[19] Expecting that the various lines of authority

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12 For a discussion of Coy v. Iowa, 487 U.S. 1012 (1988), see *infra* text accompanying notes 80-86.

13 *See infra* text accompanying notes 23-49.

14 Dutton v. Evans, 400 U.S. 74, 93-100 (1970) (Harlan, J., concurring).

15 *See infra* text accompanying notes 49-71.

16 Bruton v. United States, 391 U.S. 123 (1968).

17 These are the cases from *Dutton*, 400 U.S. at 74, through Lee v. Illinois, 476 U.S. 540 (1986).

18 *See infra* text accompanying notes 97-103; *see also* Haddad & Agin, *A Potential Revolution in Bruton Doctrine: Is Bruton Applicable Where Domestic Evidence Rules Prohibit Use of a Codefendant's Confession as Evidence Against a Defendant Although the Confrontation Clause Would Allow Such Use?*, forthcoming in 81 J. CRIM. L. & CRIMINOLOGY (Summer 1990).

19 *See* Idaho v. Wright, 116 Idaho 382, 775 P.2d 1224 (1989), *cert. granted*, 110 S. Ct. 1107 (1990), *aff'd*, 58 U.S.L.W. 5036 (U.S. June 27, 1990) (No. 89-260); Craig v. Maryland, 316 Md. 551, 560 A.2d 1120 (1989), *cert. granted*, 110 S. Ct. 834 (1990), *vacated and*

will no longer remain independent satellites, this Article examines each of the areas in an effort to foresee what changes may occur with respect to confrontation clause interpretation.

II. HEARSAY AND CONFRONTATION: CONFRONTATION WITHOUT CROSS-EXAMINATION

As we enter the 1990s, two rules capture the current Supreme Court approach to confrontation clause challenges to the prosecution's use of hearsay evidence. First, according to the principle developed in *United States v. Inadi*,[20] the prosecution ordinarily can use hearsay evidence without, at the time of trial, demonstrating the unavailability of the hearsay declarant. Second, according to the *Bourjaily*[21] principle, the prosecution ordinarily can use hearsay that fits within a domestic law hearsay exception, even without making a particularized showing of the reliability of the hearsay declaration. Because of these rules, the confrontation clause offers little protection beyond that afforded by domestic hearsay law. This is true even though some contend that the unfettered use of hearsay against criminal defendants is exactly what the confrontation clause was meant to prevent.

A. THE AVAILABILITY OF THE HEARSAY DECLARANT

As Professor Michael Graham has perceptively observed, the tendency of courts is to shape the confrontation clause to conform to pre-existing domestic evidence law.[22] They do not wish to restrict the prosecution's use of hearsay beyond limitations which have evolved in domestic evidence law over the centuries. The opposite approach could lead to a quagmire. The courts would have to develop a separate body of hearsay principles, applicable only in criminal cases and only when the prosecution offers the hearsay.

Accordingly, the Supreme Court has rejected theories which would require major modifications of domestic hearsay rules. For example, it has rejected the principle that prefers live testimony over hearsay when the hearsay declarant is available at the time of

remanded, 58 U.S.L.W. 5044 (U.S. June 27, 1990) (No. 89-478). Both cases involve children and confrontation issues. The Idaho case concerns use of a child's hearsay statement, and the Maryland case involves use of a child's testimony through closed-circuit television. Will the Court approve the use of hearsay, which totally denies a defendant an opportunity to cross-examine, while disapproving a technique which affords the defendant an opportunity to cross-examine? The cases in tandem may provide the Court with an excellent opportunity to reconcile two different lines of confrontation cases.

20 475 U.S. 387 (1986).

21 Bourjaily v. United States, 483 U.S. 171 (1987).

22 Graham, *supra* note 9, at 549, 568.

trial.[23] Such a rule of preference can take either of two forms, a fact that jurists and scholars sometimes overlook. In the first form, the confrontation clause would prohibit the prosecution from offering as substantive evidence any out-of-court statement of a hearsay declarant where that declarant is available at the time of trial. In a second form, the rule would allow the use of hearsay as substantive evidence where the hearsay declarant is available at the time of trial, but only if the prosecution produces the declarant and makes him or her available to the defense for cross-examination. After seemingly accepting one or another of these rules in *Ohio v. Roberts*,[24] the Supreme Court in *Inadi* held that the rule of preference applies only in a narrow class of cases, noting that *Roberts* dealt only with hearsay admitted under the former testimony exception.[25]

If the Court adopted a rule favoring live testimony, it would impose upon the prosecution a requirement in garden-variety situations where none exists under traditional domestic law. None of the twenty-four exceptions under Federal Rule of Evidence 803 require a showing of the unavailability of the hearsay declarant.[26] If the Court declared that the confrontation clause requires such a showing, the prosecution would have to demonstrate the unavailability of the hearsay declarant (or, under the second form of the rule of preference, would have to produce the declarant) before, for example, it could use business records, official records, or coconspirator declarations.[27]

So far the United States Supreme Court has provided no list of hearsay exceptions as to which the confrontation clause requires a showing of the declarant's unavailability. In the coming decades, however, courts will likely hold that no showing of unavailability is required as to most hearsay exceptions. They will limit *Roberts* almost exclusively to cases in which the prosecution relies upon the former testimony exception.

The language of *Inadi* contains the seeds of such development.

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23 For a discussion of this approach, see generally Westen, *supra* note 9, at 613-24; California v. Green, 399 U.S. 149, 182-83, 186-87 (1969) (Harlan, J., concurring).

24 448 U.S. 56 (1980).

25 United States v. Inadi, 475 U.S. 387, 392-94 (1986). *Roberts* concerned FED. R. EVID. 804(b)(1)—the former testimony exception—and *Inadi* concerned FED. R. EVID. 801(d)(2)(E)—the exception for admissions by a coconspirator. *Id.*

26 *See* FED. R. EVID. 803(1)-(24). Arguably, the necessity of showing the unavailability of other evidence before a party can utilize the "catchall" exception of Rule 803(24) means that ordinarily the declarant will be unavailable at the time a court permits use of Rule 803(24). However, if unavailability of the declarant were always required, Rule 803(24) would be superfluous, in light of catchall exception Rule 804(b)(5), which explicitly requires a showing of unavailability.

27 *See* FED. R. EVID. 801(d)(2)(E), 803(b), 803(8).

In *Inadi*, the Court suggested that often the circumstances surrounding an earlier statement will make it more valuable in the truth-determining process than would be a version of events recited by the declarant in the presence of the trier of fact.[28] The *Inadi* Court placed coconspirator declarations in this category; it suggested that the rationale for the coconspirator exception is that circumstances surrounding the making of the statement tend to guarantee its trustworthiness.[29] The implication is that the confrontation clause will not require a showing of the declarant's unavailability where the statement fits within any hearsay exception justified by a "trustworthy circumstances" rationale. This, of course, is a primary rationale for almost every hearsay exception other than the exception for former testimony. Certainly if the Court has concluded, in the face of some evidence to the contrary,[30] that "trustworthy circumstances" provide the rationale for the coconspirator exception, courts should have no difficulty in drawing this conclusion as to excited utterances or business records or official records.[31]

The former testimony exception will likely stand practically alone as to the requirement that the prosecution demonstrate the hearsay declarant's unavailability. Indeed, under the Court's test in *Inadi*—even as to exceptions such as dying declarations or declarations against interest, where domestic law traditionally has required a showing of the declarant's unavailability—the Court today would probably not use the confrontation clause to mandate such a requirement.[32]

The development of hearsay-availability cases will meet the Supreme Court's desire to avoid both saddling the prosecution with new requirements in the hearsay area and significantly "constitutionalizing" the rule against hearsay.

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28 *Inadi*, 475 U.S. at 394.

29 *Id.* at 395-96.

30 The opposing view is that the coconspirator exception is a branch of the law of agency and was not adopted because of belief in the reliability of coconspirator declarations. *See id.* at 405-06 (Marshall, J., dissenting).

31 *See, e.g.*, State v. Palomo, 113 Wash. 2d 789, 783 P.2d 575 (1989) (holding that admission of an excited utterance does not require a showing of unavailability).

32 The issue could arise when a declaration fits within a state law concept of "unavailability" but the defendant urges the use of a more stringent federal constitutional standard of unavailability. *Compare* Barber v. Page, 390 U.S. 719 (1968) *with* Mancusi v. Stubbs, 408 U.S. 204 (1972). It also could arise if a state did away with the requirement of unavailability as to, for example, declarations against interest, as some commentators have long urged. *See, e.g.*, Note, *Declarations Against Interest: A Critical Review of the Unavailability Requirement*, 52 CORNELL L. REV. 301 (1967).

B. THE RELIABILITY OF THE HEARSAY DECLARATION

After putting to one side the declarant's availability, one must face another difficult question: even if the declarant is unavailable, does the confrontation clause prohibit the use of some or all hearsay offered over the objections of a criminal defendant? One approach would say that the clause allows any use of hearsay, as long as the prosecution demonstrates the declarant's unavailability.[33] Domestic law has not recognized such a broad hearsay exception, even though some scholars have argued that the prohibition against hearsay should never deprive the trier of fact of relevant evidence from the lips of unavailable declarants.[34] Thus the Supreme Court has had no need to go beyond those restrictions already established by domestic law to avoid setting new limits on the prosecution's use of hearsay.

Instead, the Court has adopted an interpretation of the confrontation clause which seemingly imposes some constitutional limitations in criminal cases upon the use of hearsay, even from unavailable declarants, without, in fact, placing any significant limitations upon the prosecution's use of hearsay beyond those required by domestic law.

The Court, over academic objections,[35] has said that "reliability" is an adequate substitute for cross-examination.[36] It has reasoned: 1) confrontation is designed to promote reliability; 2) sometimes the use of uncross-examined statements will not undermine the reliability of the fact-finding process; and 3) therefore, sometimes an opportunity for the defendant to cross-examine a hearsay declarant is unnecessary to fulfill the requirements of the confrontation clause—namely, when attendant circumstances surrounding the making of a statement tend to guarantee its

33 An analogous proposal was put forth by the drafters of ALI MODEL CODE OF EVIDENCE Rule 503 (1942). Without regard to constitutional considerations, the domestic rules they proposed would have rejected hearsay challenges whenever the declarant was unavailable.

34 The drafters of the Federal Rules of Evidence rejected this proposal. *See* FED. R. EVID. advisory committee's introductory note to Art. VIII.

35 *See, e.g.,* Kirst, *supra* note 9, at 517-20.

36 The Court began its substitution of reliability for cross-examination in its plurality opinion in Dutton v. Evans, 400 U.S. 74 (1970). The theory seemingly commanded the agreement of all nine justices in Lee v. Illinois, 476 U.S. 530 (1986), although only four dissenting justices agreed that the statement at issue was sufficiently reliable to be admissible without an opportunity for the defendant to cross-examine the hearsay declarant. Finally, in Bourjaily v. United States, 483 U.S. 171 (1987), a majority of the Court invoked the "reliability" standard in rejecting a confrontation clause challenge to the prosecution's use of the hearsay declaration in the case at hand.

trustworthiness.[37]

If the Court stopped there, the confrontation clause could require prosecutors to demonstrate the reliability of a hearsay declaration, on a statement-by-statement basis, before being permitted to introduce a hearsay declaration which met the requirements of a domestic law hearsay exception. Presumably courts would develop a jurisprudence specifying what factors are relevant to a determination of reliability, much as some did after the plurality in *Dutton*[38] first embarked upon the "indicia of reliability" approach to hearsay-confrontation questions.[39] If reliability were the only concern, it would be difficult to see anything wrong with such an approach. Thoughtful observers agree that many statements which fit within the criteria of one or another of the traditional hearsay exceptions—certainly including the coconspirator exception—are not trustworthy by themselves nor in comparison to some hearsay statements which fit within no traditional hearsay exception.[40]

The Supreme Court, however, simply does not want to constitutionalize the hearsay rule to such an extent. Accordingly, in *Bourjaily*,[41] it held that the prosecution, without being deemed guilty of a confrontation violation, can use hearsay which falls within the criteria of a "well-rooted" hearsay exception. This approach serves judicial economy, but undermines the reliability of the fact-finding process in some individual cases. Where the statement fits within a well-rooted exception, prosecutors need not make a case-by-case demonstration of reliability. Courts need neither develop nor apply a constitutional jurisprudence of "reliability."

Although the Court will probably not sacrifice these important administrative concerns, it is possible that the Court would allow a defendant—in the name of either due process or confrontation—an opportunity to overcome a "weighty" presumption that a statement is reliable if it fits within a well-rooted exception to the rule against hearsay. The Court may decide whether to read *Bourjaily* as creating

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37 *See Bourjaily*, 483 U.S. at 171; *Lee*, 476 U.S. at 530 (dictum); *Dutton*, 400 U.S. at 74.

38 *Dutton*, 400 U.S. at 74.

39 These courts include those which, before *Bourjaily*, rejected the notion that a statement which fit within the coconspirator exception, or some other well established exception, necessarily satisfied the confrontation clause. *See, e.g.*, United States v. Fahey, 769 F.2d 829 (1st Cir. 1985); Park v. Huff, 506 F.2d 849 (5th Cir.), *cert. denied*, 423 U.S. 824 (1975); *see also* United States v. Szabo, 789 F.2d 1484 (10th Cir. 1986) (articulating eight factors to be used to determine whether the confrontation clause permits use of the hearsay statement in question).

40 Many statements which fit within a narrowly construed declaration against interest exception are more reliable than some of the exaggerated coconspirator claims that *A* might make about *B*'s activities while trying to get *C* to join *A*'s scheme.

41 *Bourjaily*, 483 U.S. at 171.

a conclusive presumption of reliability, or whether to view it as creating a *rebuttable* presumption of reliability for any statement which fits within a well-rooted hearsay exception.

Perhaps because I favor the rebuttable presumption approach, I find the possibility of such a development in two sources. First, the Court in *Lee v. Illinois*[42] held that, although third-party inculpatory declarations against penal interest are presumptively unreliable and fit within no well-rooted exception, the prosecution should be allowed to demonstrate that, under all the surrounding circumstances, the weighty presumption of unreliability is overcome, thus satisfying the confrontation clause. If the confrontation clause allows the prosecution to overcome a presumption of unreliability despite a statement's non-conformity to the criteria of any well-rooted exception, it should allow the defendant an opportunity to overcome a presumption of reliability despite a statement's conformity to the criteria of a well-rooted exception.

Second, in the case of two significant hearsay exceptions— for business records and for official records—the Federal Rules of Evidence already allow opposition of hearsay on the ground that the particular statement is untrustworthy even though it otherwise fits within established criteria for the exception.[43] Moreover, the catch-all hearsay exceptions of Rules 803(24) and 804(b)(5) call for some case-by-case adjudication of reliability.[44]

Under these circumstances, assuming that the Court will persist in holding that reliability suffices as a substitute for cross-examination, the Court should allow a defendant an opportunity to demonstrate that some hearsay statements are so unreliable that the confrontation clause requires their exclusion—even as to statements which fit within well-rooted hearsay exceptions.

In the hearsay-confrontation area, the Court will probably consider two other issues. First, the Court must indicate which hearsay exceptions are well-rooted. For example, suppose that where the child is unavailable as a witness in a child sex-abuse case, a state permits use of the child's hearsay statements which fit within neither a traditional excited utterance exception nor a traditional prompt complaint of rape exception. As many states expand hearsay exceptions to meet societal demands for successful child-abuse prosecu-

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42 476 U.S. 530, 546 (1986).

43 These rules provide for the exclusion of certain records where circumstances "indicate lack of trustworthiness." FED. R. EVID. 803(6), (8).

44 These rules allow admission of certain hearsay which fits within no other hearsay exception if, among other requirements, the hearsay has "circumstantial guarantees of trustworthiness."

tions, will the Court declare that such statements fall within a well-rooted exception, so that the prosecution, under *Bourjaily*, need not demonstrate the reliability of the particular statement in order to satisfy the confrontation clause? As a second example, will the Court hold that the exception for inculpatory declarations against interest has become well-rooted, as more and more states follow Federal Rule 804(b)(3), construed so as to require corroboration of inculpatory declarations?[45] The Court must develop a test for determining what is a well-rooted exception, stressing longevity, current widespread use, or some combination of factors.[46]

As to statements admissible under any domestic law exception not considered to be well-rooted, the Court must spell out factors to be considered under the "indicia of reliability" test used to determine whether a particular statement can survive a defendant's confrontation clause challenge. Lower court cases indicate that *Dutton* and *Lee* leave some fundamental questions unanswered.[47] Perhaps the most important is the "boot-strapping" issue: may independent evidence tending to corroborate the hearsay statement, as distinguished from the facts surrounding the statement itself, be considered in determining the reliability of a statement for confrontation clause purposes?[48] As long as the Court does not deem the inculpatory declaration against penal interest exception to be well-rooted, the courts will probably develop this jurisprudence of reliability pri-

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[45] For an extensive list of decisions permitting prosecutors to use inculpatory third-party declarations against interest, see Haddad & Agin, *supra* note 18.

[46] The process could be analogous to the Court's efforts to define which industries can be subject to nonconsensual searches without a warrant issued upon probable cause to believe that criminal evidence is to be found. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594 (1981); Marshall v. Barlow's Inc., 436 U.S. 307, 336-37 (1978) (Stevens, J., dissenting). I hope the process proves easier when it comes to developing guidelines for the classification of "well-rooted" hearsay exceptions than it has been in developing guidelines for classifying certain industries as subject to special regulation.

[47] *See, e.g.*, United States v. Szabo, 789 F.2d 1484 (10th Cir. 1986) (using non-exhaustive list of eight factors in resolving confrontation clause challenge to prosecution-sponsored hearsay); United States v. Alfonso, 738 F.2d 369 (10th Cir. 1984) (stressing, as do many decisions, "non-crucial" nature of the hearsay as one element is multi-factor test for evaluating confrontation clause challenges); Williams v. Melton, 733 F.2d 1492, 1497-98 (11th Cir. 1984) (Clark, J., dissenting) (arguing that strength of corroborating testimony should not be critical to the admissibility of the challenged hearsay); United States v. Puco, 476 F.2d 1099 (2d Cir. 1973) (saying that use of even "crucial" or "devastating" hearsay may be constitutional in absence of cross-examination).

[48] Suppose that authorities discover *A*'s fingerprints at the scene of the crime. Does that make *B*'s hearsay assertion that *A* participated in the crime more reliable? Or should the court just examine the circumstances surrounding the making of *B*'s statement, including *B*'s motivation? For one discussion of "bootstrapping," see State v. Myren, 133 Wis. 2d 430, 436, 395 N.W.2d 818, 822 (1986); *see also Williams*, 733 F.2d at 1497-98 (Clark, J., dissenting).

marily in the context of statements offered under that exception.[49]

III. Confrontation Limitations upon Substantive Domestic Law Restrictions of Cross-Examination and Impeachment

Domestic civil and criminal evidence rules, while generally allowing wide latitude, place some limitations upon the right of a party to cross-examine and impeach an adverse witness. Some limitations flow from policy considerations which place other values above the search for truth. For example, domestic law may prohibit asking an adverse witness whether he confessed to his priest a different version of events from the one he has related on direct examination.[50] Other limitations reflect a belief that the proposed cross-examination will impede the search for truth. For example, domestic law may prohibit a prosecutor from eliciting information about a testifying defendant's dated prior conviction.[51] Often those rules whose rationale lies in the search for truth allow the trial judge a measure of discretion in balancing probative worth versus undue prejudice.

In contrast to its practice in hearsay-confrontation cases, the Supreme Court, from 1968 in *Smith v. Illinois*[52] through 1988 in *Olden*,[53] has been willing to use the confrontation clause to "constitutionalize" cross-examination and impeachment rules.[54] In individual cases, it has "second-guessed" domestic law restrictions as applied to a criminal defendant's right to cross-examine a prosecution witness. It has done so even where, viewed as a whole, domestic law permitted the defense wide latitude in cross-examining the witness.

The Warren Court began the process in *Smith*. *Smith* concerned an informant who testified for the prosecution in a drug case and acknowledged on cross-examination that he had used a pseudonym when he identified himself during direct examination.[55] The trial judge, while allowing the defense other avenues of cross-examination, denied defense efforts to elicit from the witness his true name

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49 *See, e.g.*, United States v. Holland, 880 F.2d 1091 (9th Cir. 1989); United States v. Kusek, 844 F.2d 942 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 157 (1989).

50 Most jurisdictions have a privilege which protects certain confidential communications made to clergymen. *See, e.g.*, Ill. Rev. Stat. ch. 110, 8-803 (1989).

51 *See* Fed. R. Evid. 609(b).

52 390 U.S. 129 (1968).

53 Olden v. Kentucky, 109 S. Ct. 480 (1988).

54 *See also, e.g.*, Delaware v. Van Arsdall, 475 U.S. 673 (1986).

55 *Smith*, 390 U.S. at 135 (Harlan, J., dissenting).

and address.[56] In fact, the defendant had known both the witness and one of his friends for a time, and defense counsel had once represented the witness.[57]

The *Smith* Court invalidated on confrontation grounds the state trial judge's restriction of cross-examination. It relied upon *Alford v. United States*,[58] a case not of constitutional dimension. In *Alford*, the Court held on domestic law grounds that a federal judge should have allowed defense counsel to elicit testimony that a prosecution witness was currently residing in federal custody.[59] Traditional evidence rules ordinarily permit examination of a witness concerning his or her address so that the trier of fact can consider where the witness is "coming from" in assessing his or her credibility.[60] The *Alford* Court was more concerned that proof of federal custody might help the jury assess whether the witness had a bias or motive to give testimony favoring the government.[61] Thus the Court overruled the trial judge, without suggesting that the confrontation clause mandated such a result.

Once the witness in *Smith* admitted that his true name was not "James Jordan," testimony about his true name would hardly seem to be of an impeaching nature. Whether the witness was named Able or Baker or Cain, by itself, would make no difference. This distinction should have made *Alford* inapposite. At the same time, a generalized concern for the safety of informants might represent a legitimate state interest in prohibiting questions concerning the true names and addresses of informants.

Nevertheless, the *Smith* Court invoked *Alford* as precedent for invalidating, on confrontation clause grounds, the limitation which prohibited Smith from pursuing one line of cross-examination.[62] By invalidating the limitation, *Smith appeared* to create an opening for the Court to use the confrontation clause to constitutionalize criminal discovery. The *Smith* Court declared, "The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."[63]

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56 *Id.*
57 *Id.*
58 282 U.S. 687 (1931).
59 *Id.* at 693.
60 *Id.* at 691-93.
61 *Id.* at 693.
62 Smith v. Illinois, 390 U.S. 129, 132 (1968).
63 *Id.* at 131.

As this Article discusses later, *Smith* has not led down a road of constitutionally-mandated discovery.[64] Rather it has led to a series of decisions in which the Court has invalidated, on a case-by-case basis, a variety of trial court domestic law limitations upon defense cross-examination of prosecution witnesses.

A. THE PROBATIVE WORTH CASES

Olden is among the most recent of the probative worth cases. There the defense contended that the female complainant in a sexual assault case had constructed her story in order to deceive a male friend as a means of explaining her presence in the defendant's company.[65] When the male friend testified for the prosecution, the trial judge sustained objections to defense questions designed to demonstrate that the male witness and the female complainant had lived together.[66] The judge believed that undue prejudice to the search for truth would outweigh whatever value the evidence would have for impeachment. That possibility existed, he said, because the Kentucky jury might be disturbed that the complainant was Caucasian and her male lover, the witness, was Black.[67] The Supreme Court reversed and held that the confrontation clause required that the defense be able to explore the relationship between the complainant and the male witness.[68]

The balancing process seems to support the Supreme Court's rejection of the trial judge's conclusion that sustaining the prosecution objections would further the search for truth. However, in the absence of wholesale limitations upon cross-examination, why should the Supreme Court use the confrontation clause to dictate to a state the proper scope of cross-examination and impeachment? Especially in the area of probative worth versus undue prejudice, as distinguished from the privilege area, courts cannot articulate hardfast rules. Accordingly, federal court intervention through the confrontation clause, as demonstrated by *Olden*, will amount to second-guessing on a case-by-case basis and cannot hope to yield any firm doctrine. Hence the *Olden* line greatly departs from the approach of the hearsay cases, as embodied in *Bourjaily*.[69] The *Bourjaily* message is that even if confrontation concerns should

64 *See infra* text accompanying notes 93-96.

65 Olden v. Kentucky, 109 S. Ct. 480, 482 (1988).

66 *Id.*

67 *Id.*

68 *Id.* at 484.

69 *See supra* text accompanying note 41.

shape the rules of evidence, they must not do so on a case-by-case basis, as distinguished from a category-by-category basis.

The Court, through its hearsay decisions, allows prosecutors the right to use hearsay accusations without affording the defendant *any* cross-examination of an accuser or even an opportunity to argue against admissibility on reliability grounds. Why has the Court then used the confrontation clause to strike down limitations upon particular restrictions on cross-examination of those accusers who do appear, even where the state trial court has otherwise allowed wide latitude in cross-examination?

Moreover, the same Court which evidences an unwillingness in the hearsay area to rewrite evidence rules in the name of confrontation seems to have opened the door to constitutionalizing the area of legal relevance—extending the reach of the confrontation clause even beyond regulation of the proper scope of cross-examination. As I read *Olden*, if the witness, having been required to answer questions concerning his relationship with the complainant, denied a sexual relationship, the confrontation clause would have mandated that the defendant be allowed to call witnesses to impeach his denial.[70] Courts may be venturing far, in the name of confrontation, to shape basic rules of relevance and to second-guess the domestic law weighing of probative worth versus prejudice.

Professor Ronald Allen has pointed out that the hearsay cases and the impeachment cases are compatible in one sense: both favor the admissibility of evidence, whether offered by the prosecution or the defense.[71] Recognizing that functional regularity, I still seek doctrinal consistency.

The Supreme Court will probably someday reconsider the *Smith-Olden* line of decisions in light of its hearsay-confrontation rulings. The Court may retreat from its present approach and leave to domestic law the balancing of probative worth against undue prejudice, with respect to both cross-examination and extrinsic impeachment evidence.

B. THE EVIDENTIARY PRIVILEGE CASES

Where the defendant asserts that invocation of an otherwise

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[70] *See Olden*, 109 S. Ct. at 482. The Supreme Court opinion does not indicate precisely whether the trial court excluded extrinsic evidence of the relationship. Wholly apart from probative worth issues, some courts allow extrinsic evidence of bias only where the opponent confronted the witness with the alleged source of bias. *See* C. McCORMICK, EVIDENCE § 40, at 87 (3d ed. 1984).

[71] Discussion with Professor Ronald Allen, Professor of Law, Northwestern University (Feb. 1990).

proper privilege would impermissibly limit his or her confrontation rights, courts must struggle to apply the line of decisions which began with *Davis*.[72] In *Davis*, a domestic evidentiary privilege protected against revelation of juvenile delinquency matters where the prosecution witness was on juvenile probation.[73] The Supreme Court held that to prohibit this avenue of cross-examination, which might expose a motive for the witness to cooperate with the prosecution, would be to deny the defendant his confrontation clause rights.[74] Society cannot benefit from the policies underlying the confrontation clause and, at the same time, benefit from the testimony of the witness. Phrased another way, courts cannot make the defendant bear the cost of the privilege, even when the price is the shutting off of but one avenue of cross-examination.[75]

The privilege cases are inconsistent with the spirit of the hearsay cases. The hearsay cases hold that often confrontation is adequate without any cross-examination. The privilege cases declare that cross-examination limited in but one respect is inadequate. The hearsay cases are unwilling to use the confrontation clause to constitutionalize the rules of evidence. The privilege cases use the clause for just such a purpose.

The privilege cases are different from the probative worth-undue prejudice cases in that they may allow for something more than case-by-case adjudication. Courts may be able to determine which privileges must give way to confrontation and which may stand. For example, if the prosecution is to benefit from the testimony of a witness, must the defendant be allowed to explore conversations between the witness and the lawyer for the witness if such conversations, but for the privilege, would be proper material for impeaching the witness's present version of events? Thus far, however, the Supreme Court has articulated no guidelines for determining which privileges must fall in the path of a defendant's right to confront witnesses.[76]

Some domestic limitations upon cross-examination are based upon notions of both limited probative worth and policy-privilege—for example, rape shield statutes and statutes denying admission of dated convictions of non-party witnesses. Faced with a defense

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72 Davis v. Alaska, 415 U.S. 308 (1974).

73 *Id.* at 310-11.

74 *Id.* at 317-18.

75 For a recent treatment of the "privilege" cases, which considers confrontation, compulsory process, and due process, see White, *Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence*, 80 J. CRIM. L. & CRIMINOLOGY 377 (1989).

76 *See id.*

claim that the restrictions violate the defendant's confrontation rights, the United States Supreme Court will probably establish limitations upon the use of the confrontation clause to rewrite domestic principles concerning cross-examination and impeachment.

IV. Procedural Limitations upon the Mode of Cross-Examination: Cross-Examination Without Confrontation

In a third line of cases, the Supreme Court has established that a confrontation clause violation may occur even where domestic law has not prevented a defendant from asking the prosecution witness even a single question from among those which he or she desires to pose. This line of cases contrasts with the hearsay cases, where domestic law has afforded no cross-examination, and with the substantive cross-examination limitation cases, where domestic law has restricted one avenue of cross-examination.

The issues in the third line arise in the context of domestic law departures from the normal mode of witness examination. Usually direct examination and cross-examination occur in the presence of the trier of fact. The defendant and the witness are both present, each able to view the other. The cross-examination immediately follows the direct-examination.

In certain kinds of cases, generally to ease the discomfort of young witnesses or alleged sexual assault victims, many jurisdictions recently have departed from the procedural norms for examination of witnesses. The law, for example, may permit the witness to be in a room separate from the defendant and the jury at the time of the examination, as his or her testimony is televised live to the courtroom.[77] The testimony of the witness may also be taken in the defendant's presence but out of the jury's presence, with the jury viewing either a live or a taped telecast of the testimony.[78] Another variation provides that the direct testimony of the witness, given in the presence of the defendant, may be presented on tape to the jury, with cross-examination occurring in the defendant's and the jury's presence, but with a delay between the earlier taped direct testimony and the opportunity for cross-examination.[79]

In *Coy*,[80] the Supreme Court invalidated a procedure in which, without any particularized showing of necessity, young, alleged vic-

77 *See, e.g.*, N.Y. Crim. Proc. Law 65.00-.30 (McKinney Supp. 1988).

78 *See, e.g.*, Ga. Code Ann. 17-8-5 (Supp. 1977).

79 *See, e.g.*, People v. Bastien, 129 Ill. 2d 64, 541 N.E.2d 670 (1989) (procedure invalidated).

80 Coy v. Iowa, 487 U.S. 1012 (1988).

tims of a sexual assault were allowed to testify against the alleged offender while they were behind a screen. To some extent, the defendant could see the teenage accusers, but they could not see him at all. The Court held that the right of a "face-to-face" meeting is part of the confrontation clause protection.[81] Citing President Eisenhower's reflections upon Kansas justice in his youth, the Court noted that the right of the accused to stand face to face with his accuser serves both the appearance and the reality of fair procedure.[82] The very trauma that flows from a face-to-face meeting may make it more difficult for someone to accuse another falsely. The Court said that nothing can compel the accuser to look the accused in the eye, but if the accuser looks away, the jury can assess such conduct in evaluating credibility.[83] It added that although some strong interest might create an exception to the right to face-to-face confrontation, the Court would not approve the 1985 Iowa statute.[84] That statute created a presumption that, in sex abuse cases, the alleged, youthful victim would always be so traumatized as to permit use of the Iowa "screening" procedures.[85] Nor would the Court comment upon the validity of other procedural departures from the normal mode of cross-examination.[86]

I cannot reconcile this line of cases with the hearsay-confrontation cases. Suppose that a young witness, shortly after an alleged offense, made an out-of-court accusation against the accused which fit the criteria of the "well-rooted" exception for excited utterances. Under such circumstances, very likely, even when the witness, for whatever reason, did not appear for cross-examination, the confrontation clause would permit the trial court to admit that statement for its truth without any individualized scrutiny of the statement's reliability. In such a case, the accuser would never stand "face to face" with the accused. Yet if that witness instead came to court and answered every question posed by the defense, the use of a one-way mirror between witness and accused would violate the confrontation clause absent an individualized showing of necessity for such a procedure.

Perhaps there is room to use the confrontation clause to invalidate procedural limitations upon cross-examination. However, the Supreme Court should not elevate procedural limitations over sub-

81 *Id.* at 1016.
82 *Id.* at 1017-18.
83 *Id.* at 1019.
84 *Id.* at 1020-21.
85 IOWA CODE 910A.14 (1987).
86 *Coy*, 487 U.S. at 1021.

stantive limits on cross-examination. Suppose that the defense has a choice between 1) either no cross-examination or cross-examination which is somewhat limited, perhaps because of an evidentiary privilege and 2) unlimited cross-examination, marred only by the presence of a one-way mirror placed between the witness and the defendant. Surely the defense would prefer to pose the questions.

Professor Ian Ayres has suggested that defenders of the Court might distinguish the hearsay-confrontation cases from cases involving either substantive or procedural limitations upon cross-examination.[87] They might contend that live testimony has a special impact. Thus when the witness appears and gives direct testimony before the trier of fact, the confrontation clause ordinarily disdains limitations upon cross-examination and upon face-to-face confrontation. Hearsay testimony has less impact; therefore, cross-examination and face-to-face confrontation are less important where the "witness" is hearsay declarant.

My response is twofold. First, as a matter of law, both hearsay and live testimony are significant: the assertions of fact contained in either may get the prosecution beyond the directed-verdict zone. Second, as the Supreme Court in *Inadi* has noted, a thoughtful person would often give greater credence to a hearsay statement than to in-court testimony.[88] The assertion that hearsay which fits within a domestic law hearsay exception—from dying declarations to coconspirator statements—has little impact when compared to courtroom testimony is too slender a trellis to support the argument for denying cross-examination and face-to-face confrontation in one case but requiring it in the other.

In the future, the Court will evaluate other sorts of departures from procedural norms in examining witnesses.[89] Unfortunately, *Coy* gives little guidance. Even though, unlike some state law counterparts, the confrontation clause does not use the term "face to face," the *Coy* Court placed literal emphasis upon that concept. The Court should avoid applying the concept of face-to-face in as rigid a manner in the future as it did in *Coy*. Instead, if it continues to invalidate procedural restrictions where no substantive limitations upon cross-examination are at issue, it should consider whether the pro-

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87 Discussion with Professor Ian Ayres, Professor of Law, Northwestern University (Feb. 1990).

88 United States v. Inadi, 475 U.S. 387, 395 (1986). *See supra* text accompanying note 28.

89 *See, e.g.*, Maryland v. Craig, 316 Md. 551, 560 A.2d 1120 (1989), *cert. granted*, 110 S. Ct. 834 (1990), *vacated and remanded*, 58 U.S.L.W. 5044 (U.S. June 27, 1990) (No. 89-478). For a discussion of *Craig*, see *supra* note 19.

cedure allows the trier of fact a meaningful opportunity to scrutinize the demeanor of the witness.

As long as the Court gives broad approval to the use of hearsay—where the trier of fact may have no opportunity to scrutinize the declarant's demeanor—consistency mandates that the Court not conclude that a procedure such as the presentation to a jury of videotaped testimony fails to provide a constitutionally adequate opportunity for demeanor scrutiny.

V. CONFRONTATION AND DISCOVERY

Except as to exculpatory evidence, the Supreme Court has been reluctant to constitutionalize criminal discovery. Apart from *Brady* material,[90] and except for disclosure of informers in certain cases,[91] the Court has mandated that the prosecution disclose only reciprocal information when a jurisdiction requires discovery to flow from the defense to the prosecution.[92] Under the Court's analysis, presumably, if the defense must disclose the names and addresses of alibi witnesses, the prosecution must disclose the names and addresses of witnesses who would rebut the alibi. Arguably, if the defense must reveal in advance of trial the written statements of its witnesses, so also must the prosecution. Absent obligations imposed upon the defense, however, the Court has not mandated that the prosecution reveal before trial the names or addresses of its witnesses or anything that would reveal to the defense the expected substance of their testimony.

Smith, discussed above,[93] pointed toward a road not taken. A court which, like the *Smith* Court, declared that knowledge of the true name and address of a witness is the starting point for meaningful out-of-court investigation and effective in-court cross-examination might well use the confrontation clause to mandate broad pretrial discovery. In the real world, where mid-trial continuances are necessarily rare, revelation at trial of the names and addresses of the witnesses, and of the substance of their testimony, may come too late to make cross-examination effective.

However, in *Ritchie*, a plurality of the Court emphasized that nothing in the right of confrontation mandates that the defendant be afforded pretrial discovery.[94] A majority of the Court seriously questioned whether even the compulsory process clause could serve

90 Brady v. Maryland, 373 U.S. 83 (1963).
91 Roviaro v. United States, 353 U.S. 53 (1957).
92 Wardius v. Oregon, 412 U.S. 470 (1973).
93 *See supra* text accompanying notes 52-64.
94 Pennsylvania v. Ritchie, 480 U.S. 39, 52-53 (1987).

to require any *pretrial* disclosure.[95] The *Ritchie* Court employed a due process analysis which, at best, would require pretrial disclosure of *favorable* material.

Thus the confrontation clause appears to be a dead letter in the area of pretrial discovery. Those who believe that discovery in criminal cases advances the search for truth might lament this fact, especially if they believe that the Supreme Court should concentrate its constitutional criminal procedural energies on decisions which upgrade the reliability of the factfinding process.[96]

On the other hand, *Ritchie* is consistent with the hearsay-confrontation cases. It keeps the Court out of adjectival areas normally left to domestic law. It leaves it to states to both determine which procedures best serve the goal of reliability and balance reliability concerns against other considerations. It avoids case-by-case constitutional adjudication. For these reasons, when the Court evaluates the various lines of confrontation clause cases in light of each other, it is not likely to use the confrontation clause to shape pretrial discovery.

VI. THE *BRUTON* LIMITING-INSTRUCTION ANOMALY: CONFRONTATION DISAPPROVAL OF DE FACTO USE OF HEARSAY WHERE THE CONFRONTATION CLAUSE WOULD APPROVE DE JURE USE

In 1980 and more fully in 1990, I have written concerning a confrontation clause anomaly to which Professor Seidelson also made brief reference in 1988.[97] As Professor Seidelson stated, there are two lines of cases which, at some point, may cross paths.[98] In the *Bruton* line, the Supreme Court has held that, where domestic law makes a codefendant's confession inadmissible as to the defendant, the confrontation clause prohibits the prosecution from making de facto use of that confession, at least where the confessing codefendant does not testify and make himself available for cross-examination by the defendant.[99] In *Dutton* and *Lee*, however, the Court has indicated that sometimes the codefendant's confession may bear

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95 *Id.* at 56.

96 United States District Court Judge James B. Zagel stated these views in an unpublished lecture he delivered before becoming a judge. For a discussion of Judge Zagel's speech, see Haddad, *Post-*Bruton *Developments: A Reconsideration of the Confrontation Rationale, and a Proposal for a Due Process Evaluation of Limiting Instructions*, 18 AMER. CRIM. L. REV. 1, 34 n.175 (1980).

97 *See* Haddad, *supra* note 96; Haddad & Agin, *supra* note 18; Seidelson, *supra* note 9, at 82-90.

98 Seidelson, *supra* note 9, at 82-90.

99 Bruton v. United States, 391 U.S. 123 (1968).

adequate "indicia of reliability" so that a domestic law hearsay exception which permitted use of the codefendant's confession in resolving the defendant's guilt would not violate the confrontation clause.[100]

Thus if State *X* chooses to make *A*'s confession de jure admissible against *B* under a declaration against penal interest hearsay exception, it will not necessarily violate *B*'s confrontation rights even when *A* does not testify. However, if State *X* deems *A*'s confession inadmissible but, so that the defendants can be tried jointly, uses a presumptively ineffective limiting instruction procedure, *Bruton* seems to say that the procedure amounts to a de facto use of *A*'s confession against *B* which violates *B*'s right to confront witnesses.

This anomaly cannot stand scrutiny[101] as prosecutors finally begin to focus attention on it.[102] It is probable that the Court eventually will withdraw its support from the confrontation clause rationale for *Bruton* and will come to view the *Bruton* problem in its proper context. The Court will ask whether a jurisdiction which, under domestic law, absent any constitutional compulsion, has deemed evidence inadmissible, or admissible only for a limited purpose, may undermine its own policy decision by utilizing a jury instruction that is likely to be ineffective. I do not know the answer to that question, but the answer will probably come wrapped in a procedural fairness-due process garb. Thus if the Court declares that the state cannot make de facto use of a hearsay declaration where the confrontation clause would have permitted the de jure use, the Court will declare that the state's abandonment of its own evidentiary policy violates due process of law.[103]

VII. CONCLUSION

One need not be a student of the development of the law to observe that parallel lines of cases in related areas eventually may influence one another, or that periodically a court will feel obligated to synthesize its own precedents. The future of the confrontation clause lies in such a process. Confrontation decisions cannot forever stand in such different parts of a liberal-conservative spectrum.

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100 Dutton v. Evans, 400 U.S. 74, 88-89 (1970); Lee v. Illinois, 476 U.S. 530, 539 (1986); *see supra* text accompanying note 42; Haddad & Agin, *supra* note 18.

101 For a complete analysis of this anomaly, see Haddad & Agin, *supra* note 18.

102 Prosecutors have finally begun to seek to avoid *Bruton* by arguing that severance is not required where the codefendant's statement is reliable enough to satisfy the confrontation clause even though domestic law prohibits use of the statement as evidence against the defendant. For cases illustrating this point, see Haddad & Agin, *supra* note 18.

103 *See* Haddad & Agin, *supra* note 18.

Of course the composition of the Court at the time of the synthesis will greatly determine which cases fall.

If the Court does not take a sharp turn in favor of the rights of the accused, the philosophy of the hearsay-confrontation line of cases should prevail. The Court will be most reluctant to use the confrontation clause to reshape prevailing domestic evidentiary and procedural rules, especially where intervention would be on a case-by-case basis. Thus decisions in the tradition of *Dutton*, *Inadi*, *Bourjaily*, and *Ritchie* will ascend. The future does not bode well for the would-be progeny of *Smith*, *Davis*, *Olden*, *Coy*, or *Bruton*. The Court might well overrule some of these decisions or significantly limit their application.