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HEARSAY'S LAST HURRAH

Despite the encomia it has accumulated for generations, the hearsay rule gets little love today. Most lawyers, judges, and scholars, along with most laypeople who give the matter any thought, understand the dangers of secondhand testimony. They think the legal system should try to hear from witnesses directly. Nonetheless they are unlikely to defend the hearsay rule—with its esoteric formalism, its perplexing exceptions, and its arbitrary harshness—as the best way to guard against indirect evidence. Years of trial practice can sometimes give a lawyer a certain fondness for the oddities of hearsay law, but it is the kind of affection a volunteer docent might develop for the creaky, labyrinthine corridors of an ancient mansion, haphazardly expanded over the centuries. The charm arises largely from the elements of quirky dysfunctionality. Scholars, for their part, sometimes argue for preserving the hearsay rule, but almost always in a form very different from what we have today.[1] About the best that anyone has to say for the hearsay rule in its traditional con-

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[1] See, for example, Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 Cal L Rev 1339 (1987); Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 Hastings L J 477 (1998); Michael L. Siegel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 BU L Rev 893 (1992).

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figuration is that it is the devil we know and have learned to live with,[2] and that it has so many exceptions that perhaps it no longer matters.[3]

Unsurprisingly, then, the hearsay rule has long been in decline, not just in the United States but everywhere. Britain, where the rule was first formulated, largely eliminated it forty years ago in civil cases and since then has drastically limited its scope in criminal cases—allowing judges to admit, for example, any hearsay statements by witnesses who are unavailable to testify at the time of trial.[4] Other Commonwealth nations have taken similar steps.[5] In the United States, hearsay exceptions have expanded steadily for decades.[6] Civil-law countries, particularly in Europe, have been bolstering the right of criminal defendants to have their accusers questioned in court,[7] but this is a procedural right, not a rule of evidence. It operates, in the main, not to exclude statements but to allow them to be challenged.[8] The hearsay rule in its traditional form—a broad rule of evidentiary exclusion for statements made by witnesses outside of court—has been slowly withering for decades, in the United States and around the world.[9]

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[2] See, for example, Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U Pa L Rev 165, 194–95 (2006).

[3] See, for example, Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 Minn L Rev 797 (1992); Richard O. Lempert, *Anglo-American and Continental Systems: Marsupials and Mammals of the Law*, in John Jackson, Máximo Langer, and Peter Tillers, eds, *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honor of Professor Mirjan Damaška* 395, 402 (Hart, 2008); Siegel, 72 BU L Rev at 894 (cited in note 1) (noting the widespread belief "that, despite the irrational nature of hearsay law, most judges use the current rule of exclusion and its myriad exceptions to admit reliable evidence, to exclude unreliable evidence, and to achieve 'rough justice' in the majority of cases").

[4] See Criminal Justice Act, 2003, c 44, § 116 (UK); Criminal Justice (Scotland) Act, 1995, c 20, § 17 (UK).

[5] See text accompanying notes 131–40.

[6] See, for example, Richard D. Friedman, *The Confrontation Right Across the Systemic Divide*, in Jackson, Langer, and Tillers, eds, *Crime, Procedure and Evidence* at 261, 265 (cited in note 3); Allen, 76 Minn L Rev at 797 (cited in note 3).

[7] See, for example, Stefano Maffei, *The European Right to Confrontation in Criminal Proceedings: Absent, Anonymous and Vulnerable Witnesses* (Europa, 2006); Stefan Trechsel, *Human Rights in Criminal Proceedings* 291–326 (Oxford, 2005).

[8] See, for example, Friedman, *Confrontation Right Across the Systemic Divide* at 268 (cited in note 6). As developed by the European Court of Human Rights, the right to confrontation also operates as a rule of sufficiency, disallowing convictions based "solely or decisively" on government depositions of absent witnesses; this aspect of the rule is currently under challenge. See text accompanying notes 173–74.

[9] See, for example, Mirjan Damaška, *Of Hearsay and Its Analogues*, 76 Minn L Rev 425, 457 (1992).

Nor is it surprising, given how little respect the hearsay rule gets, that there has never been much support for constitutionalizing it. The Sixth Amendment right of every criminal defendant "to be confronted with the witnesses against him"[10] has long been thought to "stem from the same roots" as the hearsay rule.[11] For a quarter century, in fact, the application of the Confrontation Clause closely tracked hearsay doctrine. The Supreme Court interpreted the clause to allow the use of hearsay evidence against a criminal defendant as long as the evidence had "adequate 'indicia of reliability,'" and one way to satisfy the test—probably the most common way—was to show that the statement in question fell within a well established exception to the hearsay ban.[12] But the "indicia of reliability" test was unpopular with commentators, largely (but not only) because it seemed to yoke the content of the constitutional right to hearsay law.[13] Criticism of the test mounted steadily,[14] and the Supreme Court finally abandoned it when deciding *Crawford v Washington* in 2004.[15] As reinterpreted in *Crawford*, the Confrontation Clause broadly protects a criminal defendant against "testimonial" statements provided outside of court. The *Crawford* doctrine has since been reaffirmed and elaborated in three subsequent decisions: *Davis v Washington*,[16] *Giles v California*,[17] and—just last spring—*Melendez-Diaz v Massachusetts*.[18] In each of these cases, as in *Crawford*, Justice Scalia wrote for the Court.

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[10] US Const, Amend VI.

[11] *Dutton v Evans*, 400 US 74, 86 (1970) (plurality).

[12] *Ohio v Roberts*, 448 US 56, 66 (1980).

[13] See, for example, Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 129 (Yale, 1997); Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 Creighton L Rev 763 (2000); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L Rev 557, 558 (1988); Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 Cato Sup Ct Rev 439, 448.

[14] See, for example, *Lilly v Virginia*, 527 US 116, 140–43 (1999) (Breyer, J, concurring) (taking sympathetic notice).

[15] 541 US 36 (2004).

[16] 547 US 813, 824 (2006).

[17] 128 S Ct 2678 (2008).

[18] 129 S Ct 2527 (2009). There was speculation the Court might reconsider *Melendez-Diaz* when it granted review in *Briscoe v Virginia*, 78 USLW 3434 (US 2010). After briefing and argument, though, the Court released a one-sentence, per curiam opinion, vacating and remanding "for further proceedings not inconsistent with the opinion in *Melendez-Diaz*." Id. The next significant elaboration of the *Crawford* doctrine will likely come when the Court decides *Michigan v Bryant*, No 09-150, 78 USLW 3082 (US, cert granted March 1, 2010). See note 218.

Unlike the test it supplanted, the rule announced and applied in the *Crawford* line of cases has been roundly praised, in significant part because it is thought to have "detached the meaning of the Clause from the hearsay rule."[19] Not all of the reaction to the *Crawford* doctrine has been favorable, of course. The focus on "testimonial" statements has been criticized as too vague and too reductive;[20] beyond that, much of the reasoning in these cases has been originalist, and commentators have quarreled, predictably, with the Court's legal history.[21] Even critics of *Crawford* and its successor cases, though, have tended to give the Court credit for decoupling confrontation doctrine from hearsay law. Whatever the Court got wrong in these cases, at least it ended the "shotgun wedding" of hearsay and confrontation.[22] No longer "shrouded by the hearsay rule," confrontation doctrine can develop independently—and, with luck, more sensibly.[23]

That is the conventional understanding of *Crawford*, broadly shared by the doctrine's fans and by its critics. I will argue here that the truth is more complicated and less comforting. *Crawford* has, in fact, severed the *operational* link between hearsay and con-

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[19] Friedman, *Confrontation Right Across the Systemic Divide* at 266 (cited in note 6).

[20] See, for example, Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford's Birth Did Not Require That Roberts Had to Die*, 15 J L & Pol 685 (2007); Roger C. Park, *Is Confrontation the Bottom Line?* 19 Regent U L Rev 459 (2007).

[21] See, for example, Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 Brooklyn L Rev 105 (2005); Thomas Y. Davies, *Not the Framers' Design: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J L & Pol 349 (2007); Tom Harbison, *Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians are Nontestimonial and Admissible as an Exception to the Confrontation Clause*, 58 Mercer L Rev 569 (2007).

[22] Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 SC L Rev 185 (2004); see also Amar, *Constitution and Criminal Procedure* at 129 (cited in note 13) (criticizing, before *Crawford*, "the Court's shotgun wedding of the hearsay rule and the confrontation clause"); Anthony Bocchino and David Sonenshein, *Rule 804(b)(b)—The Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause*, 73 Mo L Rev 41 (2008); Andrew King-Ries, *An Argument for Original Intent: Restoring Rule 801(d)(1)(A) to Protect Domestic Violence Victims in a Post-Crawford World*, 27 Pace L Rev 199, 200 (2007); Roger W. Kirst, *A Decade of Change in Sixth Amendment Confrontation Doctrine*, 6 Intl Commentary on Evidence, issue 2, art 5, at 21 (2009); Robert P. Mosteller, *Evidence History, the New Trace Evidence, and Rumblings in the Future of Proof*, 3 Ohio St J Crim L 523, 529–30 (2006); Deborah Turkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 NC L Rev 1, 36–37 (2006); John Robert Knoebber, Comment, *Say That to My Face: Applying an Objective Approach to Determine the Meaning of Testimony in Light of Crawford v. Washington*, 51 Loyola L Rev 497, 503–15 (2006).

[23] Friedman, *Confrontation Right Across the Systemic Divide* at 265 (cited in note 6).

frontation: it has expanded the category of cases in which the hearsay rules will allow—but the Confrontation Clause will prohibit—the introduction of an out-of-court statement. By implication, the *Crawford* doctrine's focus on "testimonial" statements has also enlarged the category of hearsay violations that do not implicate the Confrontation Clause; the Court has made clear that the introduction of nontestimonial statements raises no constitutional concerns, no matter how the statements are treated under the hearsay rule.[24] In addition to this operational decoupling of hearsay and confrontation, *Crawford* has also separated the areas of law at the *argumentative* level, making clear that the pertinent factors in interpreting and applying the Confrontation Clause differ in kind from the considerations that govern the scope of the hearsay rule. But *Crawford* has left intact, and actually strengthened, the *historical* link between hearsay and confrontation: the idea that the Confrontation Clause and the hearsay rule share the same origins and the same thrust. The operational and argumentative decoupling of hearsay and confrontation has been accomplished in the *Crawford* line of cases by tying the Confrontation Clause to eighteenth-century hearsay rules, or what the Court imagines those rules to have been. Far from deconstitutionalizing hearsay, the Court has woven the hearsay rule into the Sixth Amendment more tightly than ever, but it has done so with the rule in its eighteenth-century form, or at least in its eighteenth-century form as now reconstructed by the Court.

The major difference between the eighteenth-century hearsay rule and its modern-day counterpart is that the eighteenth-century rule was less developed and subject to fewer exceptions. So *Crawford* has revived and entrenched—albeit only for evidence offered against a criminal defendant—a particularly rigid version of the hearsay rule. Furthermore, the Court has given that rule a bite it never had in the 1700s, when appellate oversight and legal publication were also less developed. Even more so than today, rules of evidence in the eighteenth century were largely subject to discretionary waiver by the presiding judge, because there was no realistic sanction for ignoring them.[25] And it was far less clear, even to a conscientious

[24] See *Wharton v Bockting*, 549 US 406, 420 (2007); *Davis v Washington*, 547 US 813, 824 (2006).

[25] See, for example, Julius Goebel Jr. and T. Raymond Naughton, *Law Enforcement in Colonial New York* 642 (Commonwealth Fund, 1944); T. P. Gallanis, *The Rise of Modern Evidence Law*, 84 Iowa L Rev 499, 502, 534 (1999).

judge, what the rules of evidence *were*: this was before evidence codes, before the great treatises of the nineteenth century, and before readily available case reports.[26] The rigidity of the eighteenth-century hearsay ban was tempered by its lack of clarity and by the difficulty of enforcing it. *Crawford* has constitutionalized eighteenth-century hearsay law, but without these structural limitations.

The reason the hearsay rule has so few real friends today is that it excludes too much probative evidence with too little justification. This is especially true of the uncompromising version of the hearsay rule the Supreme Court has now read into the Sixth Amendment, despite the limitation to evidence introduced against a criminal defendant. For the very reasons the hearsay rule has long been in decline throughout the common-law world, the new, constitutionalized version of the hearsay ban will almost certainly weaken over time. For the immediate future, though, *Crawford* has given the hearsay rule a new lease on life.

That should give us pause, I will argue, for three different reasons. The first and most obvious is the dysfunctionality of the hearsay rule in its traditional form. The eighteenth-century hearsay rule was not the final, polished product of centuries of common-law reworking; it was an inchoate, overly rigid version of a principle that, for good cause, was later qualified and limited by a famously long set of exceptions. For evidence introduced against criminal defendants, *Crawford* tries to freeze the hearsay rule "in 1791 . . . amber."[27] Over the long term, the effort is likely to fail, but in the short term it will generate predictable injustices. This would be bad enough if the injustices all took the form of guilty defendants escaping punishment. But the *Crawford* doctrine may also help to convict some innocent defendants. The strict application of the hearsay rule to prosecution evidence may bolster the application of the rule to evidence offered by criminal defendants—partly because it will lend credence to the idea that hearsay is too unreliable to serve as evidence in criminal cases, and partly because restrictions on defense evidence strike many judges and legislators as fairer and more reasonable when they counterbalance restrictions on prosecution evidence.

The second reason to be concerned about this effort is that it

[26] See, for example, Charles Alan Wright and Kenneth W. Graham, 30 *Federal Practice and Procedure* § 6344 at 393–94 (West, 1997).

[27] Amar, *Constitution and Criminal Procedure* at 44 (cited in note 13).

may stunt the development of confrontation law. The Supreme Court has never said that the Confrontation Clause protects *only* against certain forms of hearsay. On the contrary, the Court has made clear that a confrontation violation may be found when a prosecution witness testifies in court but outside the defendant's presence[28] or without the opportunity for cross-examination.[29] Nonetheless, by treating the Confrontation Clause as, first and foremost, a codification of eighteenth-century evidence rulings, *Crawford* diverts attention from dimensions of confrontation not captured by the hearsay rule—dimensions that may grow increasingly important as scientific evidence plays a larger and larger role in criminal prosecutions.[30] The Confrontation Clause could be read broadly to guarantee criminal defendants a meaningful opportunity to challenge—"to know, to examine, to explain, and to rebut"—the proof offered against them.[31] That reading would not require the Court to stray from the constitutional text and what we know of its aims, but it would require a wider inquiry into constitutional purpose, and a less wooden style of interpretation, than the Court has showed in the *Crawford* line of cases.

More to the point, it would require recognizing that the kind of "confrontation" a criminal defendant needs and deserves may in many cases have little to do with excluding hearsay evidence—or, for that matter, with sitting in court and watching a witness testify, on direct and then on cross-examination. Ironically, the best place to find traces of these larger dimensions of confrontation today may be in the rulings of the European Court of Human Rights interpreting provisions of the European Human Rights Convention that were modeled, in part, on the Sixth Amendment. Because the European Court of Human Rights explicitly disavows any concern with evidence law—that is a matter each member nation decides for itself—the emerging confrontation jurisprudence in Europe is largely decoupled from the hearsay rule, not just operationally and argumentatively, but as a matter of historical understanding, as well.

The third and final reason to be concerned about the way the

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[28] See *Coy v Maryland*, 487 US 1012 (1988), but consider *Maryland v Craig*, 497 US 836 (1990) (making clear that the right to a face-to-face meeting is not absolute).

[29] See *Davis v Alaska*, 415 US 308 (1974).

[30] See, for example, Mirjan Damaška, *Evidence Law Adrift* 144–47 (Yale, 1996).

[31] Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J Pub L 381, 402 (1959).

Supreme Court has linked the Confrontation Clause with the hearsay rule is that it impedes the cross-fertilization between the doctrines governing out-of-court statements in criminal cases and the parallel rules in civil cases. Special rules of proof for civil or criminal cases have long been viewed with skepticism; there has been a rebuttable presumption that evidence law should apply equally across the board. That presumption has created a constructive dialectic between the rules and practices governing proof in civil cases and the parallel rules and practices in criminal cases.[32] A hearsay exception developed in civil cases might give rise to difficulties in criminal cases—and those difficulties might lead to reconsideration of the exception in civil cases, as well. Everyone recognizes that the rules in civil and criminal cases sometimes *should* be different, but it is a useful exercise to ask, repeatedly, whether that is true in particular instances, and if so, why.

Confrontation doctrine and hearsay law both used to be like evidence law more broadly in this respect: there was a regular practice of comparing practices across the civil-criminal divide. With respect to confrontation, that practice has been in decline for some time; today the Confrontation Clause is typically treated as having no implications for civil cases. Even in high-stakes civil cases—cases involving civil commitment, say, or the termination of parental rights—invocations of the Confrontation Clause are rejected out of hand.[33] Still, as long as confrontation law loosely tracked modern hearsay law, a certain sort of dialectic between civil and criminal cases was inevitable in confrontation cases, because the hearsay rule itself operated the same, for the most part, across the civil-criminal divide. This, in fact, was a standard criticism of confrontation doctrine before *Crawford*: the doctrine failed to account for the distinctive concerns raised in criminal cases. After *Crawford*, the Confrontation Clause continues to be linked to hearsay law, but to eighteenth-century hearsay law, not the modern, more lenient hearsay law applied in civil cases.

Confrontation discourse thus is now fully decoupled from the concerns raised in civil cases. Confrontation decisions have no im-

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[32] See David A. Sklansky and Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 Georgetown L J 683, 728–33 (2006).

[33] See, for example, *Cabinet for Health & Family Services v A.G.G.*, 190 SW3d 338 (Ky 2006) (termination of parental rights); *In re T.W.*, 139 P3d 810 (Mont 2006) (same); *In re Commitment of Polk*, 187 SW3d 550, 555–56 (Tex App 2006) (civil commitment).

plications, even indirectly, for civil cases, and the problems judges face in adjudicating civil cases do not inform the development of confrontation doctrine. This separation of criminal cases from civil cases has generally been viewed as all for the good, part of what makes *Crawford* such a welcome departure. But it impedes a form of doctrinal cross-comparison that in the past has helped both hearsay law and confrontation law progressively improve.

Over the long term, the cross-comparison is probably inevitable, whatever the Supreme Court says. The issues encountered in civil and criminal cases are too similar for judges and lawyers not to draw analogies. Eventually the language of confrontation will appear again in civil and administrative cases, at least where the stakes are high enough to make a comparison to criminal cases seem natural. Eventually, too, the eighteenth-century hearsay rules the Supreme Court has imported into the Confrontation Clause will be softened in response to the same pressures that have led to the worldwide, decades-long weakening of the hearsay rule. In the interim, though, the Court's new confrontation jurisprudence will insulate the hearsay rule applied to prosecution evidence in criminal cases from the exceptions that have evolved over the last two centuries. It may also, by treating civil and criminal cases as essentially incomparable, temporarily reinforce the reluctance of courts to invoke the nonhearsay dimensions of confrontation law in civil cases.

Part I of this article will discuss the hearsay rule, its long and nearly universal decline, and the reasons it has so few champions. Part II of the article will discuss the Supreme Court's dramatic refiguring of confrontation law in *Crawford v Washington* and subsequent cases, and the underappreciated manner in which these decisions have tightened rather than weakened the link between hearsay and confrontation. Part III will explore the ramifications of that development.

In the pages that follow, I will distinguish repeatedly between a categorical rule of evidentiary exclusion, barring evidence of out-of-court statements even when the people who made those statements are now dead or otherwise unavailable to testify in court, and a preferential rule of procedure, requiring live testimony when possible, but allowing evidence of earlier statements by witnesses who cannot now be brought to court. This may sound like a narrow, technical distinction. But it is precisely what distinguishes the hearsay rule in its traditional form—increasingly found only in the

United States—from a more sensible rule toward which much of the rest of the world is now converging, and which could serve as the starting point for a richer and more meaningful understanding of our own constitutional right to confrontation.

I. Hearsay's Decline

When I began teaching evidence law, my colleague Kenneth Graham warned me that the chief difficulty students have with the hearsay rule is not that they find it hard to *understand*; rather it is that they find the rule hard to *believe*. Much of what goes on in an evidence course is, in fact, acculturation. Students gradually become comfortable with a body of doctrine that initially strikes them as too weird to be true. Maybe they grow too comfortable: hearsay law is such a prominent feature of our adjudicatory system that judges, lawyers, and law professors sometimes lose sight of how odd and counterintuitive the rule is, and how unusual from a global perspective.

To appreciate the significance of the new link the Supreme Court has forged between the hearsay rule and the Confrontation Clause, we need to retrieve the sense of strangeness we had about the rule when it was first explained to us. And we need to rid ourselves of the erroneous impression, reinforced by some writing about the hearsay rule, that civil-law countries are beginning to adopt it. It is true that some civil-law systems, particularly in Europe, have been strengthening their insistence on firsthand evidence. In critical and instructive ways, though, the European rules differ from the hearsay rule as we know it.

The following overview of the hearsay rule will proceed in three stages. First, I will discuss how the rule works, what makes it distinctive, and the familiar if discomfiting fact that nothing seems to justify it. Next, I will review what is known about the history of the rule: how it arose, how it withered, and how—at least in America—it has clung to life. Finally, I will discuss the civil-law analogs to the hearsay rule, emphasizing both their similarities and their key differences from what the great treatise writer John Henry Wigmore called "the most characteristic rule of the Anglo-American law of evidence."[34]

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[34] John Henry Wigmore, 2 *A Treatise on the System of Evidence in Trials at Common Law* § 1365 at 1695 (Little Brown, 1904).

A. THE RULE, ITS EXCEPTIONS, AND ITS JUSTIFICATIONS

Wigmore also called the hearsay rule "the greatest contribution," aside perhaps from trial by jury, of our "eminently practical legal system to the world's jurisprudence of procedure."[35] Few commentators since have been so charitable; the hearsay rule and its exceptions have become "one of the law's most celebrated nightmares."[36] At bottom, though, the rule rests on a simple, commonsensical idea: if you are trying to find out what happened, it is best to hear directly from someone who was there. Call it the principle of the horse's mouth.

There are two ways to implement that principle. The first is getting the horse into court; the second is refusing to listen to or look at any evidence of what the horse has previously said. The first is the thrust of the Confrontation Clause: every criminal defendant has a right "to be confronted with the witnesses against him."[37] The second strategy is the strategy of the hearsay rule. The two strategies are related, of course, because one way to get a witness into court is to refuse to consider evidence of his or her earlier statements. That will give any party interested in the witness's story an incentive to have the witness testify. But sometimes live testimony from the witness is impossible: the witness is dead, or cannot be found, or refuses to testify. At that point the two strategies diverge. They diverge, too, with regard to a separate question: if the witness testifies, are his or her earlier statements still inadmissible?

In the lingo of evidence law, the term "witness" is usually reserved for someone who testifies in court; someone who says something outside of court is called a "declarant." In its pure form, then, the hearsay rule bars the out-of-court statements of a declarant even if the declarant is now dead or otherwise unavailable, and even if the declarant actually testifies, becoming a witness.

A rule this sweeping threatens to exclude vast amounts of evidence that no sane system of adjudication could disregard. In a fraud prosecution, for example, suppose the government proves that the defendant's employees told customers, falsely, that the coins the customers were purchasing were made of gold. Or, in a

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[35] Id.

[36] Peter Murphy, *Evidence and Advocacy* 24 (Oxford, 5th ed 2002).

[37] US Const, Amend VI.

tax evasion case, suppose the defendant claims good faith and testifies that the income she reported was the income her accountant told her she had earned. Imagine that the plaintiffs in an automobile collision case introduce evidence that the defendant admitted to bystanders that he had run a red light. In a homicide case, suppose that a police officer testifies that the victim told the officer, just before dying, "It was my husband. He shot me point blank." Or imagine that, to support his alibi, the defendant in a robbery case introduces records kept by his employer, showing he was at work when the crime took place.

Hearsay doctrine has made its peace with cases like this in two ways. First, an out-of-court statement counts as "hearsay" only if the party introducing the statement is asking the jury to *believe* the statement—or, as lawyers say, to take it as proof of "the truth of the matter asserted."[38] Defining hearsay in this way removes many out-of-court statements from the reach of the hearsay ban. Evidence of fraudulent claims, for example, is not barred by the hearsay rule, because it is not introduced to prove the truth of those claims: the prosecutors are not trying to show that the coins actually were made of gold.[39] Similarly, information that the tax evasion defendant received from her attorney is not hearsay if it is introduced to show that the defendant acted in good faith (although it *would* be hearsay if it was offered as proof of the defendant's actual income).

This definitional move can only take us so far, though. It does not help with the statement about the automobile accident, or the homicide victim's statement to the police officer, or the records of the robbery defendant's employers. Each of those statements,

[38] See, for example, FRE 801(c).

[39] See, for example, *United States v Saavedra*, 684 F2d 1293, 1297–98 (9th Cir 1982). In the 1800s and early 1900s, courts often exempted out-of-court utterances from the hearsay ban on the ground that they were part of the *res gestae*—the "things done." This phrase was applied not only to statements that were themselves part of the alleged crime or tort (because they were fraudulent, defamatory, or otherwise transgressive) but also to utterances that were essentially "verbal acts" rather than assertions (such as, "You're fired," or "I'm giving this to you."). The *res gestae* label was attached, as well, to assertions that fell within certain common-law exceptions to the hearsay rule, including the exceptions for "excited utterances" and "present sense impressions." See, for example, *Black's Law Dictionary* 1335 (West, 8th ed 2004) (Bryan A. Garner, ed); *United States v Elem*, 845 F2d 170, 173–74 (8th Cir 1988). Wigmore and other early twentieth-century commentators hated the vagueness of the term and urged its abandonment. See, for example, Judson F. Falknor, Book Review, 33 Tex L Rev 977, 982 (1955). None of the modern evidence codes employ the phrase, and it has largely—although not entirely—passed out of usage. See Chris Blair, *Let's Say Goodbye to Res Gestae*, 33 Tulsa L J 349 (1997).

though, would be admissible under one of the exceptions that have developed to the hearsay rule. These exceptions are the second way the hearsay rule has made its peace with the manifest desirability of admitting, and allowing juries to rely on, many out-of-court statements. The Federal Rules of Evidence codify some three dozen exceptions to the prohibition of hearsay.[40] They include an exception for "admissions" (i.e., statements made by the party against whom they are introduced at trial, like the statement by the defendant in the collision case),[41] an exception for "dying declarations" (like the statement by the shooting victim),[42] and an exception for regularly maintained business records, made under circumstances conducive to accuracy (like the time cards that the robbery defendant wants to introduce).[43]

The hearsay ban now has so many exceptions that it is sometimes suggested that little of the original rule remains. Cumulatively, it is said, the exceptions have turned hearsay from a "rule of exclusion" into a "rule of admission,"[44] a rule that allows the introduction of "virtually any hearsay statement that has probative value."[45] There is some truth to that characterization: on paper, at least, the hearsay rule today is a shadow of its former self. Nonetheless the rule still can show its teeth. This is notably true when criminal defendants and civil litigants seek to introduce their own, out-of-court statements.[46] Prosecutors, for their part, can find themselves barred by the hearsay rule from proving what victims said outside of court—even the victims in homicide trials, who obviously cannot be called to testify at trial. The "dying declaration" exception does not reach the statements of a homicide victim reporting attacks by the defendant, or expressing fear of the defendant, in the days or weeks preceding her death. That is why, for example, the trial judge in the murder prosecution of O. J.

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[40] FRE 801(d) & 802–04.

[41] FRE 801(d)(2).

[42] FRE 804(b)(2).

[43] FRE 803(6).

[44] Allen, 76 Minn L Rev at 800 (cited in note 3).

[45] Ronald J. Allen and George N. Alexakis, *Utility and Truth in the Scholarship of Mirjan Damaška*, in Jackson et al, eds, *Crime, Procedure and Evidence* at 327, 343 (cited in note 3).

[46] See Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?* 76 Minn L Rev 473 (1992); Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendants' Post-Crime State of Mind Hearsay*, 38 Seton Hall L Rev 975 (2008).

Simpson excluded evidence that one of Simpson's alleged victims, his ex-wife Nicole Brown Simpson, told relatives, friends, and a battered women's hotline counselor that Simpson was stalking her, had assaulted her, and had threatened to kill her. The "relevance and probative value" of these statements struck the judge as "obvious and compelling"; it seemed "only right and just that a crime victim's own words be heard . . . in the court where the facts and circumstances of her demise are to be presented." But the hearsay rule would not allow it.[47]

Decisions excluding statements by homicide victims were growing less common before *Crawford*, largely because of hearsay reforms aimed precisely at avoiding such results.[48] In the wake of O. J. Simpson's acquittal, for example, California adopted a new exception to the hearsay rule, allowing the introduction of certain out-of-court reports of "the infliction or threat of physical injury upon the declarant."[49] For the exception to apply, the report had to be made promptly, had to be written, recorded, or made to a medical professional or law enforcement officer, and had to be "made under circumstances that would indicate its trustworthiness."[50] But *Crawford* throws many if not most of those reforms into doubt. In 2003, for example—the year before the Supreme Court decided *Crawford*—a California jury convicted Dwayne Giles of murdering his ex-girlfriend Brenda Avie. Giles admitted he shot Avie, but he claimed self-defense. Part of the evidence against him was testimony from a police officer who responded to a report of domestic violence involving Giles and Avie three weeks before the homicide. According to the officer's testimony, Avie told him the following:

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[47] *People v Simpson*, No BA097211, 1995 WL 21768, *4–5 (Cal Super, Jan 18, 1995). The same statements were ruled admissible in a subsequent civil trial of wrongful death claims brought against Simpson; the judge in the civil trial reasoned that the statements were relevant to Nicole Brown Simpson's "state or mind" shortly before she was killed. See Gerald F. Uelmen, *The O. J. Files: Evidentiary Issues in a Tactical Context* 104 (West, 1998). For an earlier, equally notorious example, see F. Tennyson Jesse, *The Trial of Madeleine Smith* (Hodge, 1927). Madeleine Smith was unsuccessfully prosecuted in Edinburgh in 1857 for the murder of her former lover, Emile L'Angelier, who died from arsenic poisoning. The trial court excluded, on hearsay grounds, a diary in which L'Angelier recorded that he visited with Smith just before he took ill; as a result, no evidence was presented that the two had any contact in the critical period. The jury returned a verdict of "not proven." See id at 32, 35.

[48] See text accompanying notes 141–43.

[49] Cal Evid Code § 1370(a).

[50] Id.

> [S]he had been talking to a female friend on the telephone when appellant became angry and accused her of having an affair with that friend. Avie ended the call and began to argue with appellant, who grabbed her by the shirt, lifted her off the floor, and began to choke her with his hand. She broke free and fell to the floor, but appellant climbed on top of her and punched her in the face and head. After Avie broke free again, appellant opened a folding knife, held it about three feet away from her, and said, "If I catch you fucking around I'll kill you."[51]

The trial court ruled this testimony admissible under the hearsay exception California had crafted for injury reports,[52] but the Supreme Court, applying *Crawford*, threw out Giles's conviction. Since Giles never had an opportunity to cross-examine Avie, her hearsay statements could not be used against him.[53]

Another example: A Wisconsin jury convicted Mark Jensen in 2008 of murdering his wife, Julie, by poisoning her.[54] Jensen claimed Julie had killed herself. The evidence to the contrary included a letter she had given to a neighbor, setting forth her fears that her husband would kill her and insisting that she would never commit suicide. The Wisconsin courts admitted the letter, reasoning that if a defendant is responsible for the unavailability of a witness, he forfeits any right to object to the admissibility of the witness's out-of-court statements.[55] But the Supreme Court's subsequent decision in *Giles v California* throws that reasoning—and Jensen's conviction—into great doubt.[56]

The traditional justification for the hearsay rule is that out-of-court statements are so unreliable that the system is better off without them, even when it is impossible to hear directly from the declarant, and even when the declarant actually testifies in court and can be questioned about the earlier statements. As the canonical

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[51] *People v Giles*, 2009 WL 457832, at *2 (Cal Super, Feb 25, 2009).

[52] See id.

[53] *Giles v California*, 128 S Ct 2678 (2008). The Court reasoned that the Confrontation Clause would allow the introduction of Avie's statements against Giles only if the trial court determined that Giles had killed Avie *in order to prevent her from testifying* and remanded to allow the California courts to address that question. See id at 2693; notes 219–23 and accompanying text.

[54] See Tom Kertscher, *Jensen Guilty of Homicide*, Milwaukee J Sentinel (Feb 22, 2008), at A1.

[55] *State v Jensen*, 727 NW2d 518, 521 (Wisc 2007).

[56] See Tom Kertscher, *Poison Case May Be Retried*, Milwaukee J Sentinel (June 26, 2008), at B1.

story has it, out-of-court statements pose four risks of unreliability: a *narration* risk (i.e., the risk that the declarant did not mean what he or she seemed to say); a *sincerity* risk (the risk that the declarant intentionally fabricated); a *memory* risk (the risk that the declarant misrecalled what happened); and a *perception* risk (the risk that the declarant misperceived things to begin with). Those risks are present when someone testifies in court, too—when a mere "declarant" becomes a "witness." But then the risks are subject to three safeguards: the oath the witness takes to tell the truth, the jury's ability to watch the witness's demeanor, and the opportunity for cross-examination.[57] The last of these three safeguards has long been thought especially important; Wigmore, expressing what has become the conventional view, labeled cross-examination "beyond any doubt the greatest legal engine ever invented for the discovery of truth."[58] This account has been invoked to justify not just the hearsay rule itself but also its exceptions, each of which has at some point been defended on the ground that the statements to which it applies present reduced risks of unreliability; or are subject to procedural safeguards that seem to be reasonable substitutes for the oath, demeanor evidence, and cross-examination; or ought in fairness to be admitted without regard to their reliability.[59]

A large, venerable, and steadily expanding body of commentary assesses, often quite negatively, the explanations that have been offered for various exceptions.[60] It is hard to read this literature without sensing that justifications for the hearsay exceptions have had to clear a remarkably low bar—reflecting, no doubt, mixed feelings about the hearsay ban itself. The mixed feelings are easy to understand, because the traditional story about the risks of hearsay evidence is so weak. The problem with the traditional story is not that it is implausible. To be sure, the oath is no longer thought

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[57] For the canonical account, see, for example, Kenneth S. Broun et al, *McCormick on Evidence* § 245 at 125 (West, 6th ed 2006); Edmund Morris Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation* 119–27 (Columbia, 1956); Wright and Graham, 30 *Federal Practice and Procedure* §§ 1623–27 (cited in note 26).

[58] Wigmore, 2 *Treatise on the System of Evidence* § 1367, at 1697 (cited in note 34).

[59] See, for example, Laurence H. Tribe, *Triangulating Hearsay*, 87 Harv L Rev 957, 961–69 (1974).

[60] For entertaining examples, see Robert M. Hutchins and Donald Slesinger, *Some Observations on the Law of Evidence*, 28 Colum L Rev 432, 437–39 (1928) (ridiculing the arguments for the "excited utterance" exception to the hearsay rule), and Joseph H. Levie, *Hearsay and Conspiracy*, 52 Mich L Rev 1159, 1161–66 (1954) (same for the "co-conspirator admissions" exception).

to provide much protection against perjury,[61] and some experiments suggest that demeanor evidence may mislead juries more often than it assists them.[62] Cross-examination has always had its skeptics, too; if the technique can expose the mendacious, it can also confound the honest[63] and prove clumsy against the mistaken.[64] Still, there generally is good reason to prefer live, sworn testimony, tested by cross-examination, to secondhand accounts of a witness's earlier statements. The problem is that the hearsay rule creates more than a preference. It excludes the secondhand accounts even when bringing the witness to court is impossible, and even when the secondhand accounts would supplement rather than substitute for in-court testimony.

That is to say, the problem with the traditional justification for the hearsay rule is that it gives no reason to exclude secondhand accounts when firsthand accounts are unavailable or are also being provided. Assume that hearsay can be unreliable in precisely the ways that the canonical story suggests. Judges and juries then have reason to take secondhand accounts with a grain of salt. But why deny them the evidence altogether? A wide range of evidence is routinely introduced despite the well-known dangers that it could be misleading: think about eyewitness identifications, for example, or the testimony of cooperating codefendants. The general approach of evidence law is to allow the introduction of evidence even when its probative value is only marginal, allowing the judge or the jury to give it whatever weight it deserves. Usually evidence is excluded only when its probative value is "substantially outweighed" by the danger that it will bog down the proceedings, lead the factfinders astray, or have some other bad consequence.[65] Granting that

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[61] See, for example, John L. Watts, *To Tell the Truth: A Qui Tam Action for Perjury in Civil Proceedings Is Necessary to Protect the Integrity of the Civil Judicial System*, 79 Temple L Rev 773, 774–75 (2006).

[62] See Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 Neb L Rev 1157, 1190–94 (1993); Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 Cardozo L Rev 2557, 2559–66 (2008); Olin Guy Wellborn III, *Demeanor*, 76 Cornell L Rev 1075 (1991).

[63] See, for example, John H. Langbein, *The Origins of Adversary Criminal Trial* 246–47 (Oxford, 2003). Even Wigmore, who extolled cross-examination as "the most efficacious expedient ever invented for the extraction of truth," acknowledged parenthetically that "it is almost equally powerful for the creation of false impressions." Wigmore, 1 *Treatise on the System of Evidence* § 8 at 25 (cited in note 34).

[64] Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk,"* 14 Widener L Rev 429, 440–41 (2009).

[65] See, for example, FRE 401–03.

hearsay can be unreliable, what reason is there to think the jury is better off without it?

One possibility is that juries are likely to give hearsay more weight than it deserves. Perhaps juries understand the dangers associated with eyewitness identifications or accomplice testimony but are apt to overlook the reasons to be skeptical of secondhand information. Perhaps, but there is little reason to think so. In fact, the best available evidence is to the contrary: mock juries do not seem to overvalue hearsay.[66] It is striking, too, that none of the hundreds of prisoners exonerated over the past few decades by DNA evidence appear to owe their wrongful convictions to hearsay evidence. Often the problem was faulty eyewitness identifications; in other cases there were false confessions; sometimes there was sloppy or fraudulent lab work.[67] But it is difficult to find even a single case in which hearsay evidence has been blamed for the conviction of a defendant later exonerated by DNA evidence—and that despite the well-known proliferation of exceptions to the hearsay ban in the decades leading up to *Crawford*.[68]

Another possibility is that excluding hearsay, even when the out-of-court declarant is unavailable to testify in court, is the best way, in the long run, to produce more reliable evidence: if not in-court testimony, then at least some more reliable or better documented form of hearsay, which can be made admissible under an exception to the hearsay rule.[69] But no one has ever explained why those purposes require excluding hearsay when the party offering it has

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[66] See Friedman, *Confrontation Right Across the Systemic Divide* at 264 (cited in note 6); Peter Miene, Roger C. Park, and Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 Minn L Rev 683 (1992); Richard F. Rakos and Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 Minn L Rev 655, 664 (1992); Roger C. Park, *Visions of Applying the Scientific Method to the Hearsay Rule*, 2003 Mich St L Rev 1149; consider Margaret Bull Kovera, Roger C. Park, and Stephen D. Penrod, *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 Minn L Rev 703, 703 (1992) (reporting that "mock jurors are more skeptical of hearsay testimony than eyewitness testimony").

[67] See, for example, Edward Connors et al, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* 15–20 (Natl Inst J, 1996); Brandon L. Garrett, *Judging Innocence*, 108 Colum L Rev 55, 122 (2008); Samuel R. Gross et al, *Exonerations in the United States 1989 Through 2003*, 95 J Crim L & Criminol 523 (2005).

[68] A false confession introduced against the defendant who made it qualifies, technically, as hearsay, but the hearsay rule will never keep it out; it falls squarely within the "admissions exception." See, for example, FRE 801(d)(2); text accompanying note 41.

[69] See, for example, Damaška, 76 Minn L Rev at 458 (cited in note 9).

done everything we could want them to do.[70] My colleague Eleanor Swift, for example, suggests the justification for the hearsay rule is that it forces a party to prove the facts necessary to trigger one of the rule's exceptions[71]—say, that the statement in question is a regularly maintained business record, made under circumstances conducive to accuracy.[72] But those purposes could be served just as well if the hearsay ban were replaced with a requirement that contextual evidence of this sort accompany out-of-court statements offered into evidence. Professor Swift has in fact argued for just such a rule.[73]

Even Wigmore ultimately concluded that the hearsay rule, as a rule of exclusion, should give way to a simple rule of a preference. The "spirit of the rule," he thought, was "to insist on testing all statements by cross-examination, *if they can be*"; accordingly, "if the person has passed beyond the power of the law to procure him, the test may be dispensed with."[74] Wigmore thought any stricter application of the hearsay rule was senseless:

> No one could defend a rule which pronounced that all statements thus untested [by cross-examination] are *worthless*; for all historical truth is based on un-cross-examined assertions; and every day's experience of life gives denial to such an exaggeration. What the Hearsay rule implies—and with profound verity—is that all testimonial assertions *ought to be* tested by cross-examination, as the best attainable measure; and it should not be burdened with the pedantic implication that they must be rejected as worthless if the test is unavailable.[75]

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[70] A rigid hearsay rule, despite its over- and underinclusiveness, might plausibly produce better results than letting all-too-human judges decide case by case whether excluding an out-of-court statement will produce more benefits than costs. See Schauer, 155 U Pa L Rev at 195–97 (cited in note 2). But that is an argument for having a rule, not for having a rule that operates even when witnesses are unavailable and even when they actually testify.

[71] See Eleanor Swift, *Abolishing the Hearsay Rule*, 75 Cal L Rev 495 (1987).

[72] See FRE 803(6).

[73] See Swift, 75 Cal L Rev (cited in note 1).

[74] John Henry Wigmore, *A Supplement to a Treatise on the System of Evidence in Trials at Common Law* xxix (Little Brown, 2d ed 1915).

[75] Id. Nonetheless, Wigmore continued to classify hearsay as an "analytic" rule rather than a "preferential," "prophylactic," "simplificative," or "synthetic" rule. John Henry Wigmore, 1 *Treatise on the Anglo-American System of Evidence in Trials at Common Law* xliii, lxxxv (Little Brown, 2d ed 1923). By an "analytic rule," Wigmore meant a rule that subjects evidence "to a scrutiny or analysis calculated to discover and expose in detail its possible weaknesses, and thus to enable the tribunal to estimate it at no more than its actual value." Id 2 § 1360 at 1. Wigmore thought hearsay was the only rule of this kind, and the "scrutiny

The American Law Institute took the same view of hearsay when it promulgated its Model Code of Evidence in 1942. Drafted by the evidence scholar Edmund Morgan, the Model Code declared hearsay admissible whenever the declarant either was "unavailable as a witness" or was "present and subject to cross-examination."[76] But the ALI itself conceded the "radical" nature of this proposal,[77] and "professional reception . . . varied between chilliness and heated antagonism."[78] The hearsay provisions of the Model Code of Evidence helped ensure that it was never adopted anywhere.[79] Reformers took note.[80] Later efforts to codify evidence law, culminating in the 1975 adoption of the Federal Rules of Evidence, kept hearsay as a categorical rule of exclusion and not just a rule of preference, albeit a categorical rule riddled with a labyrinthine series of exceptions.[81]

Wigmore's view—that hearsay should be a rule of preference, not a rigid rule of exclusion—has continued to attract scholarly support. Often this support takes the form of an explicit appeal to the "best evidence rule," once said to be the organizing principle of Anglo-American evidence law.[82] Eighteenth- and nineteenth-century treatises commonly identified, as the first and most important canon of evidence law, the requirement that litigants put forward the best evidence available on any contested issue.[83] There seems little doubt that this principle was "at the very least one of the basic

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or analysis" he had in mind consisted of "Cross-examination and Confrontation." Id. Cross-examination, he thought, was "the essential and indispensable feature"; confrontation was "subordinate and disposable." Id § 1362 at 3.

[76] American Law Institute, Model Code of Evidence Rule 503 (1942).

[77] Id, Rule 503 comment a.

[78] John MacArthur Maguire, *Evidence: Common Sense and Common Law* 153 (Foundation, 1947).

[79] See, for example, James H. Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(C) of the Uniform Rules of Evidence*, 75 Harv L Rev 932, 945 (1962).

[80] See, for example, Wright and Graham, 30 *Federal Practice and Procedure* § 6336 at 126–27 (cited in note 26); John H. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 Vand L Rev 741, 741 (1961).

[81] See, for example, Michael Ariens, *A Short History of Hearsay Reform, with Particular Reference to Hoffman v. Palmer, Eddie Morgan and Jerry Frank*, 28 Ind L Rev 183, 223–25 (1995).

[82] See, for example, George F. James, *The Role of Hearsay in a Rational System of Evidence*, 34 Ill L Rev 788, 797–98 (1940); Dale A. Nance, *The Best Evidence Principle*, 73 Iowa L Rev 227 (1988); Siegel, 72 BU L Rev 893 (cited in note 1).

[83] See, for example, John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 Colum L Rev 1168, 1173 (1996); Nance, 73 Iowa L Rev at 248 (cited in note 82) (citing sources).

elements in the early development of the rule of hearsay exclusion."[84] By the early twentieth century, though, the influential evidence scholar James Bradley Thayer—Wigmore's teacher—had rejected the best evidence rule as a true principle of Anglo-American evidence law; instead, he argued, relevant evidence is and should be admissible, regardless of its strength, unless a specific rule of evidence calls for its exclusion.[85] Thayer's view won out, and today the best evidence rule survives only as a narrow requirement that a party seeking to prove the content of a document must, in certain circumstances, produce the original.[86]

Even before Thayer, moreover, the hearsay rule was commonly described, including by champions of the best evidence rule, as a flat prohibition rather than simply a rule of preference. For example, Simon Greenleaf—the leading American evidence scholar of the nineteenth century, and the author Thayer identified most closely with the best evidence rule—associated the hearsay prohibition with the recognition that "every living witness should, if possible, be subjected to the ordeal of a cross-examination."[87] But he took pains to make clear that exclusion of hearsay was not premised solely on the fact that "this species of testimony supposes something better, which might be adduced in the particular case"; on the contrary, "its intrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds, which may be practised under its cover, combine to support the rule, that hearsay evidence is totally inadmissible."[88]

Greenleaf was quoting here, and the source—Chief Justice Mar-

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[84] James, 34 Ill L Rev at 796 (cited in note 82).

[85] James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 264–66, 484–507 (Little Brown, 1898). Regarding Thayer's influence, see Nance, 73 Iowa L Rev at 248 (cited in note 82); David A. Sklansky, *Proposition 187 and the Ghost of James Bradley Thayer*, 17 Chicano-Latino L Rev 24, 24–25 (1995).

[86] See, for example, FRE 1001–1002; *United States v Gonzales-Benitez*, 537 F2d 1051 (9th Cir 1976). But see Nance, 73 Iowa L Rev at 227 (cited in note 82) (arguing, "against the tide," that "there exists, even today, a principle of evidence law that a party should present to the tribunal the best evidence reasonably available on a litigated factual issue").

[87] Simon Greenleaf, 1 *A Treatise on the Law of Evidence* § 98 (Little Brown, 1842). Thayer, too, thought the basic problem with hearsay was that "something which should come through an original witness is sought to be put in at second hand," effectively "nullify[ing] the requirement that witnesses should personally appear and testify publicly in court." Thayer, *Preliminary Treatise on Evidence* at 501 (cited in note 85).

[88] Greenleaf, 1 *Treatise on the Law of Evidence* § 99 (cited in note 87).

shall's opinion for the Supreme Court in *Queen v Hepburn*,[89] probably the most widely cited American hearsay case of the early nineteenth century—warrants a brief digression. Mima Queen was a slave suing to emancipate herself and her child on the ground that her ancestor, Mary Queen, was brought to the United States as a free woman. Mary and those who knew her history firsthand were no longer alive, so Mima supported her claim with deposition testimony recounting what Mary and others who knew her had said.[90] The federal trial court excluded the depositions as hearsay, and in 1813 the Supreme Court affirmed.[91]

The ruling in *Queen v Hepburn* struck Justice Gabriel Duvall as so senseless and so unjust that he issued the only significant dissent of his twenty-four years on the Supreme Court.[92] Duvall was from Maryland, and he wrote that Maryland law—under which Queen's petition was tried—recognized a hearsay exception for cases where a slave claimed that a long-dead ancestor had been free. Excluding hearsay in such cases, Duvall stressed, would effectively make them impossible to pursue. Hearsay was admissible here for the same reason it was admissible, under well-recognized exceptions, to prove ancestry or land boundaries: "because from the antiquity of the transactions to which these subjects may have reference, it is impossible to produce living testimony."[93] But the Court saw the equities differently. Chief Justice Marshall reasoned that the death of the speaker could not justify the admission of hearsay; otherwise "no man could feel safe in any property, a claim to which might be supported by proof so easily obtained."[94]

Queen v Hepburn seems to have had precisely the impact Justice Duvall warned it would have, closing the door to emancipation

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[89] 11 US (7 Cranch) 290 (1813). For brief discussions of the case, see Wright and Graham, 30 *Federal Practice and Procedure* § 6321 at 18 (cited in note 26); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 Yale L J 718, 725–26 (1975); Jason M. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 NC L Rev 535, 584–85 (2004); Donald M. Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 Stan L Rev 532, 533 (1969).

[90] 11 US at 293–95.

[91] Id at 293, 296.

[92] See William L. Reynolds, *Maryland and the Constitution of the United States: An Introductory Essay*, 66 Md L Rev 923, 931–32 (2007); Norman R. Williams, *Gibbons*, 79 NYU L Rev 1398, 1425 n 148 (2004).

[93] 11 US at 297 (Duvall, J, dissenting).

[94] Id at 296 (opinion of the Court).

petitions like Mima Queen's.[95] It also came to stand, authoritatively, for the view that hearsay was such "intrinsically weak" evidence that it was banned even when the speaker could not come to court and testify.[96] As Thayer explained, "[n]either the original speaker's death, alone, nor the highly probative character of the circumstances under which he spoke, alone, are enough" to make hearsay admissible—"and not the two together except in special cases."[97] As we have seen, even Simon Greenleaf, the great American champion of the best evidence principle, accepted this view of hearsay, largely on the authority of *Queen v Hepburn*. This remains the accepted view; indeed, it was largely the departure from this orthodoxy that doomed the Model Code of Evidence. And it is largely the adherence to this orthodoxy that makes the hearsay rule today so hard to defend, and so weakly defended.

B. HISTORY OF THE RULE

What can explain the development and persistence of a rule so famously difficult to defend? It is hard to read *Queen v Hepburn*, with its nearly obscene solicitude for the repose of "property" owners, and not suspect that class interests may be part of the story. One of the things that case underscores is that the hearsay ban handicaps litigants who are unable to track down live witnesses and bring them to court—and all things being equal, poor litigants are more likely than rich litigants to suffer that disability. Moreover, the established exceptions to the hearsay rule may themselves reflect class bias. *Queen v Hepburn*, for example, refused to recognize a hearsay exception for statements regarding the free status of someone long dead, but it did nothing to throw into doubt the established hearsay exception for statements regarding land boundaries. Under the "business records" exception to the hearsay rule, commercial enterprises can introduce their records, rather than suffer the inconvenience of calling a series of their present and former employees into court, because—as Wigmore explained—such records are relied upon "in the most important

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[95] See *Davis v Wood*, 14 US (1 Wheat) 6 (1816); Gillmer, 82 NC L Rev at 585–86 (cited in note 89).

[96] See, for example, Morgan, *Some Problems of Proof* at 111–12 (cited in note 57). The case is still cited for this proposition. See, for example, *United States v Florex*, 985 F2d 770, 778 (5th Cir 1993); *United States v Gomez-Lemos*, 939 F2d 326, 333 n 2 (6th Cir 1991); *Valmain v State*, 2009 WL 863471, *7 (Miss 2009) (Kitchens dissenting); *Garza v Delta Tau Delta Fraternity National*, 948 So2d 84, 91 (La 2006).

[97] Thayer, *Preliminary Treatise on Evidence* at 501 (cited in note 85).

undertakings of mercantile and industrial life"; they are "expedients which the entire commercial world recognizes as safe."[98] There is no parallel exception, it goes without saying, for records or statements routinely relied upon by laborers, the unemployed, or the illiterate.

Once you start looking, it is easy to find other signs of class bias in the development of hearsay law. *Wright v Tatham*[99]—the English case in which "the scope of the hearsay rule reached its high water mark"[100]—threw out a will leaving a large country estate to the testator's servant; the evidence excluded as hearsay would have rebutted the suggestions of mental incompetence successfully advanced by the testator's well-born cousin.[101] The Supreme Court's famous decision in *Mutual Life Insurance Co. v Hillmon*[102] pushed back the other way, crafting a novel exception to the hearsay rule and, not coincidentally, helping to protect insurance companies against claims they suspected were fraudulent.[103]

In these ways and in others, the interests of the wealthy may well have influenced the development of hearsay law. It would be surprising if they had not. But class interests of this kind cannot be the whole story, or even most of the story. They do not explain,

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[98] Wigmore, 2 *Treatise on the System of Evidence* § 1530 at 1895–96 (cited in note 34); see also, for example, Wright and Graham, 30 *Federal Practice and Procedure* § 6321 at 15 (cited in note 26) (observing that "[t]he role of business interests in the development of the business-records exception is well-known").

[99] 7 Adolph & E 313, 112 Eng Rep 488 (Ex Ch 1837), and 5 Cl & Fin 670, 47 Rev Rep 136 (HL 1838).

[100] Friedman, *Confrontation Right Across the Systemic Divide* at 263 (cited in note 6).

[101] The best account of the case remains Maguire, 14 Vand L Rev at 749–60 (cited in 80). The disputed evidence consisted of letters sent to the testator and addressing him in a manner that suggested that the letter writers thought he was mentally competent. One letter, for example, discussed the settlement of a legal dispute with the testator. The English courts treated the letters as "implied assertions" of the testator's competence and reasoned that the hearsay rule should apply to implied assertions as well as explicit assertions. The weight of authority is now to the contrary, on both sides of the Atlantic: the hearsay rule is generally restricted to statements (verbal or otherwise) that are offered into evidence to prove the facts they were intended to communicate. See, for example, FRE 801(a), (c) & Advisory Committee Note; Criminal Justice Act, 2003, c 44, § 115(3) (UK); *United States v Zenni*, 492 F Supp 464 (ED Ky 1980). But consider, for example, *State v Dullard*, 668 NW2d 585, 595 (Iowa 2003) (noting and adopting minority position that "unintentional assertions in speech" should be treated as hearsay).

[102] 145 US 285 (1892).

[103] See Brooks W. MacCracken, *The Case of the Anonymous Corpse*, Am Heritage (June 1968), at 51; John MacArthur Maguire, *The Hillmon Case—Thirty-Three Years After*, 38 Harv L Rev 709 (1925). For an extended, fascinating argument that the insurance companies, rather than the claimant, may have been guilty of fraud, see Marianne Wesson, *The Hillmon Case, the Supreme Court, and the McGuffin*, in Richard Lempert, ed, *Evidence Stories* 277 (Foundation, 2006).

for example, why the hearsay rule gained hold at a particular time—nor why simpler and more reliable ways for protecting wealth and power did not develop, instead. Any complicated and obscure area of legal doctrine is likely to favor the wealthy more than the poor, simply because the continuous battle over the contours of legal doctrine favors those with better access to lawyers and more in common with judges and legislators. But why a ban on *hearsay*? Recent work in legal history places the credit—or blame—not with a socioeconomic class, but with a particular professional class: lawyers.

To be sure, this was no part of Wigmore's explanation. Wigmore traced the origins of the modern hearsay rule in England to the seventeenth and early eighteenth centuries.[104] He thought the hearsay rule arose as a slow but natural response to the shift away from self-informing juries in the 1500s and early 1600s: once witnesses began to testify in court, the system began to recognize the great value of cross-examination and to distrust statements not subject to that check.[105] As we have seen, Wigmore came to view the hearsay rule as essentially a rule of preference: whenever possible, witnesses should be brought to court and cross-examined.[106] He recognized, however, that the hearsay rule had expanded to ban out-of-court statements even by declarants who were now dead or otherwise unavailable,[107] and to ban the earlier statements of witnesses who actually come to court and testify.[108] These struck him as "pedantic" results in tension with "the great spirit of the rule."[109] What had happened, he thought, was that the hearsay rule had been "overworshipped and overworked."[110]

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[104] See John Henry Wigmore, *The History of the Hearsay Rule*, 17 Harv L Rev 437, 445, 448 (1904). Wigmore incorporated this article into his treatise, the first edition of which appeared two years later. See Wigmore, 2 *Treatise on the System of Evidence* § 1364 (cited in note 34).

[105] See Wigmore, 17 Harv L Rev at 443, 451–52, 454–58 (cited in note 104). Wigmore thus located the origins of the hearsay rule about a century before the emergence of modern evidence law as a "consciously and fully realized" system of rules; that happened, he thought, between 1790 and 1830. See Wigmore, 1 *Treatise on the System of Evidence* § 8 at 26–27 (cited in note 34).

[106] See notes 74–75 and accompanying text.

[107] See, for example, Wigmore, 17 Harv L Rev at 452–53 (cited in note 104).

[108] Wigmore, *Supplement* at xxviii–xxix (cited in note 74).

[109] Id at xxix.

[110] Id at xxviii. Wigmore is often said to have attributed the rise of the hearsay rule to distrust of lay juries. See, for example, Gallanis, 84 Iowa L Rev at 501 (cited in note 25); Frederick W. J. Koch, *The Hearsay Rule's True Raison D'Etre: Its Implications for the New Principled Approach to Admitting Hearsay Evidence*, 37 Ottawa L Rev 249, 252 (2005–06). It is true that Wigmore's teacher, James Bradley Thayer, saw the jury as "the occasion of

Wigmore did see a connection between the rise of the hearsay rule and the growing role of lawyers in criminal trials, but he thought the rule influenced the role, not vice versa. Once the hearsay rule firmly established the importance of cross-examination, Wigmore explained, pressure grew to allow defense attorneys to question prosecution witnesses in all felony trials—a practice that, before the middle of the eighteenth century, was permitted only in treason trials.[111] As the practice spread, it spurred rapid developments in "the art of interrogation," as well as in certain procedural rules.[112] The increased use of cross-examination pushed aside, for example, "the old fixed tradition that a criminal trial must be finished in one sitting," and it spurred changes to "the various rules of evidence naturally most applicable on cross-examinations—particularly, the impeachment of witnesses."[113] It did not occur to Wigmore that the expanding role of trial lawyers might have contributed to the growth of the hearsay rule. The story of the hearsay rule, he thought, was the story of a rule that arose naturally, as a logical reaction to the demise of the self-informing jury, but then was unthinkingly taken a little too far.

More recent historical work casts doubt on Wigmore's account. An emerging consensus dates the hearsay rule—as a genuine rule, honored more in the observance than in the breach—to the late eighteenth century and early nineteenth century.[114] There are earlier cases invoking the rule; that is what misled Wigmore. But through the mid-1700s, the "rule" was flagrantly flouted, typically

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our law of evidence"; the whole point of the rules, he thought, was to prevent jurors "from being confused and misled." Thayer, *Preliminary Treatise on Evidence* at 2, 3 (cited in note 85). It is true, as well, that Wigmore acknowledged his debt to Thayer's treatment of evidence law as "directly appurtenant to jury trial." Wigmore, 1 *Treatise on the System of Evidence* at xii (cited in note 34). But Wigmore in fact placed much less emphasis than Thayer on the need to protect jurors from misleading evidence and, in particular, did not stress that theme when reviewing the history of the hearsay rule. For that matter, even Thayer's treatment of the history of the hearsay rule downplayed concerns about jurors' gullibility, instead highlighting "the necessity of discriminating the office of a witness from that of a juror." Thayer, *Preliminary Treatise on Evidence* at 500 (cited in note 85). The central impetus for the rule's development, Thayer explained, was that "repeating hearsay was not regarded as legitimate testifying." Id at 499.

[111] See Wigmore, 17 Harv L Rev at 45 (cited in note 104).

[112] Id at 457–58.

[113] Id.

[114] See Langbein, *Origins of Adversary Criminal Trial* at 234, 238–42 (cited in note 63); Friedman, *Confrontation Right Across the Systemic Divide* at 263 (cited in note 6); Gallanis, 84 Iowa L Rev at 512–15, 535–36 (cited in note 25).

without discussion.[115] Moreover, until the late 1700s, even judges who disparaged out-of-court statements as "no evidence" appear to have generally allowed it when the declarants were unavailable to testify, or when the declarants actually did testify and their prior statements were introduced as "corroboration."[116] Beginning in the 1780s, though, the hearsay rule grew more prominent: lawyers invoked it more often, judges applied it more strictly, and treatises discussed it more extensively.[117] By the end of the eighteenth century, "the contours of the modern rule against hearsay were largely in place."[118]

T. P. Gallanis suggests that the hearsay rule took root in the 1780s because of the increasing prevalence of defense counsel in criminal cases. Old Bailey judges began allowing defense lawyers to participate in felony trials in the 1730s,[119] but relatively few defendants employed trial counsel until the 1780s, when the practice began to expand.[120] Until the early nineteenth century, defense lawyers in criminal cases were not allowed to address the jury; their role was largely restricted to questioning of prosecution witnesses.[121] So defense counsel focused their energies on cross-examination—and, Gallanis suggests, on evidentiary objections, and more particularly on objections to forms of evidence that denied them the opportunity for cross-examination.[122] Gallanis argues that aggressive cross-examination and aggressive invocation of the hearsay rule emerged hand-in-hand in criminal cases in the 1780s and then migrated to civil cases. The chief vectors, he proposes, were lawyers who appeared both in civil and in criminal cases: "[a]s lawyers began working more and more in criminal trials it

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[115] See Langbein, *Origins of Adversary Criminal Trial* at 239–40 (cited in note 63); Gallanis, 84 Iowa L Rev at 501 n 11, 512, 536 (cited in note 25). Langbein and Gallanis focus on English trials, but the same laxity was found on this side of the Atlantic. See, for example, Goebel and Naughton, *Law Enforcement in Colonial New York* 642–43 (cited in note 25).

[116] See Langbein, *Origins of Adversary Criminal Trial* at 238–39 (cited in note 63); Goebel and Naughton, *Law Enforcement in Colonial New York* 651–52 (cited in note 25).

[117] See Gallanis, 84 Iowa L Rev at 536 (cited in note 25).

[118] Id at 535; see also Langbein, *Origins of Adversary Criminal Trial* at 242 (cited in note 63).

[119] See Langbein, *Origins of Adversary Criminal Trial* at 167–77 (cited in note 63).

[120] See Gallanis, 84 Iowa L Rev at 544 (cited in note 25), citing John M. Beattie, *Scales of Justice*, 9 Law & Hist Rev 221, 227 (1991).

[121] See Langbein, *Origins of Adversary Criminal Trial* at 171, 296–318 (cited in note 63).

[122] See Gallanis, 84 Iowa L Rev at 545–46 (cited in note 25).

is natural that the skills and techniques needed for success in that arena would, over time, be deployed on the civil battlefield as well."[123] As Gallanis acknowledges, the evidence for his account is suggestive rather than conclusive.[124] But no serious challenge has emerged to his narrative, and there appears to be an emerging scholarly consensus that the hearsay rule, in its modern form, took root in the late 1700s, and that this development owed much to the "lawyerization" of criminal trials during the same period.

In the early 1800s, the hearsay ban stiffened and grew more firmly entrenched.[125] By 1813, as we have seen, the Supreme Court thought it obvious that the "intrinsic weakness" of hearsay warranted its exclusion even when the declarant was no longer alive.[126] *Wright v Tatham*,[127] the hearsay ban's "high water mark,"[128] reached the House of Lords in 1838. As the rule rigidified, exceptions proliferated—but not without limits, as Mima Queen discovered. By the late nineteenth century, hearsay doctrine had assumed its modern appearance: a strict rule of evidentiary exclusion, accompanied by a long and confusing set of exceptions. American judges and lawyers grew accustomed to the rule, and proposals for radical reform—for example, turning the hearsay ban into a rule of preference, applicable only when live testimony could be substituted—were rebuffed.[129] Throughout the twentieth century, though, the overall course of hearsay doctrine was toward liberalization, chiefly through the steady expansion of the exceptions to the hearsay ban.[130]

Outside the United States, the liberalization went further, and it picked up pace in the last decade of the twentieth century and the first decade of the twenty-first.[131] By statute, England made firsthand hearsay admissible in civil trials in 1968,[132] abolished the

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[123] See id at 549–50.

[124] See id at 550.

[125] See id at 535.

[126] See *Queen v Hepburn*, 11 US (7 Cranch) 290 (1813); text accompanying notes 89–97.

[127] 7 Adolph & E 313, 112 Eng Rep 488 (Ex Ch 1837), and 5 Cl & Fin 670, 47 Rev Rep 136 (HL 1838); see notes 99–101 and accompanying text.

[128] Friedman, *Confrontation Right Across the Systemic Divide* at 263 (cited in note 6).

[129] See text accompanying notes 74–81.

[130] See Allen, 76 Minn L Rev at 797 (cited in note 3).

[131] See id at 811–12.

[132] Civil Evidence Act, 1968, c 64, § 2 (UK).

rule entirely for civil cases in 1997,[133] and in 2003 created a broad exception in criminal cases for firsthand hearsay from declarants unavailable to testify at trial.[134] This last exception was borrowed from Scotland, where it had been in place since 1995.[135] Like England, Scotland had earlier abolished the hearsay rule in civil cases.[136] Meanwhile the Supreme Court of Canada, in a series of decisions over the past two decades, declared hearsay admissible whenever it is "reliable" and "necessary," and made clear that hearsay is "necessary" when the declarant is now dead or otherwise unavailable.[137] Legislation in Australia in the 1990s created a series of sweeping exceptions to the ban on firsthand hearsay, including one that applies across the board in civil cases, and another that applies in criminal cases to any statement "made in circumstances that make it likely [to be] reliable."[138] New Zealand followed suit in 2006, statutorily exempting from the hearsay rule all prior statements by testifying witnesses, and any statement by an unavailable witness, so long as "the circumstances relating the statement provide reasonable assurance that the statement is reliable."[139] The story has been similar in other common-law jurisdictions.[140]

Much of the impetus for these reforms came from heightened concern, over the past several decades, with criminal victimization of women and children, especially in cases of domestic violence, child abuse, and sexual molestation. There was a widespread sense

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[133] Civil Evidence Act, 1995, c 38, § 1 (UK).

[134] Criminal Justice Act, 2003, c 44, § 116 (UK).

[135] Criminal Justice (Scotland) Act, 1995, c 20, § 17 (UK).

[136] Civil Evidence (Scotland) Act, 1988, c 32, § 2(1) (UK); see David Field and Fiona Raitt, *Evidence* 180 (Green, 2d ed 1996).

[137] See, for example, Bruce Archibald, *The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?* 25 Queen's L J 1 (1999); Hamish Stewart, *Khelawon: The Principled Approach to Hearsay Revisited*, 12 Can Crim L Rev 95, 96–97 (2007).

[138] Commonwealth Evidence Act, 1995, §§ 63, 65 (Australia). The Act applies only in federal and territorial courts, but similar reforms were enacted by some state legislatures. See Marian K. Brown, *Reform and Proposed Reform of Hearsay Law in Australia, New Zealand, Hong Kong, and Canada, with Special Regard to Prior Inconsistent Statements* at 8 (unpublished paper presented at 2007 Annual Conference of the International Society for the Reform of Criminal Law), online at http://www.isrcl.org/Papers/2007/Brown.pdf.

[139] Evidence Act, 2006, § 18 (NZ). The legislation followed a series of liberalizing decisions by the New Zealand Court of Appeal. See Elizabeth McDonald, *Going "Straight to Basics": The Role of Lord Cooke in Reforming the Rule Against Hearsay—From Baker to the Evidence Act 2006*, 39 Vict U Wellington L Rev 143 (2008).

[140] See, for example, Brown, *Reform and Proposed Reform of Hearsay Law* at 16–20 (cited in noted 138) (regarding Hong Kong).

that criminal justice systems offered too little protection and too little justice to vulnerable victims. A prominent part of the problem was that the hearsay rule often left victims "voiceless" in court, even when they had made earlier statements that seemed to cry out for legal consideration.[141] The same considerations drove hearsay reforms in the United States, as well.[142] Traditional exceptions—particularly those for "state of mind" and for statements to medical personnel—were stretched both by legislators and by courts, often controversially, to facilitate the introduction of statements by victims, especially when the victims were unavailable, unable, or simply frightened to testify at trial.[143]

In the United States much of this reform agenda has been stalled, at least for the time being, by the Supreme Court's reinterpretation of the Confrontation Clause in *Crawford v Washington* and later cases. I will discuss *Crawford* and its consequences below. First, though, I want to provide some additional framing for that discussion by examining the treatment of out-of-court statements in civil-law jurisdictions.

C. THE CIVIL-LAW COMPARISON

The hearsay rule has long been understood as a distinguishing mark of common-law trials, one of the key features setting those trials apart from their counterparts in civil-law jurisdictions. Often the hearsay rule has been tied to another distinguishing feature of common-law trials, the jury system. The hearsay rule has been seen as a consequence of the commitment to trial by jury; the notion has been that the Anglo-American legal tradition developed the hearsay rule, and should retain it, because lay jurors (in contrast to professional judges) are ill-equipped to evaluate secondhand

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[141] Id at 2–3.

[142] See, for example, Andrea Dworkin, *In Nicole Brown Simpson's Words*, LA Times (Jan 29, 1995), at M1, M6; text accompanying notes 47–50.

[143] See, for example, *White v Illinois*, 502 US 346 (1992); *United States v Joe*, 8 F3d 1488 (10th Cir 1993); Richard D. Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U Pa L Rev 1171, 1173–92 (2002); Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 Ind L Rev 687, 708–17 (2003); Cynthia Jennings, Comment, *Accommodating Child Abuse Victims: Special Hearsay Exceptions in Sexual Offense Prosecutions*, 16 Ohio N U L Rev 663, 665–68, 672–77 (1989); Note, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?* 49 Duke L J 1041, 1044–58 (2000).

testimony.[144] The common-law jury trial has thus served both to explain the hearsay rule and to justify it.[145]

Both the explanation and the justification have fallen from favor, for reasons I have already discussed. Recent work in legal history links the rise of the hearsay rule not to the rise of jury trial—a much earlier development—but to the emergence of the adversary, lawyer-driven criminal trial.[146] And experiments with mock juries have produced no evidence that lay adjudicators are prone to overvalue hearsay;[147] few scholars today suggest that the hearsay rule is a necessary accommodation to the use of lay adjudicators in common-law trials. Even scholars relatively sympathetic to the hearsay rule, or to some conceivable permutation of it, tend to shy away from the claim that jurors, in particular, need to be protected from hearsay.[148]

Sometimes it is suggested that the jury system—or more precisely the division of authority between the judge and the jury—creates the necessary conditions for the hearsay rule, and for other rules of evidentiary exclusion, by allowing the decision about exclusion to be made by someone uninvolved in the ultimate weighing of the evidence.[149] The "'unitary' character of the adjudicative body" in civil-law trials is said to render a ban on hearsay impractical: when "the same persons decide the admissibility of evidence and the weight it deserves," the exclusion of probative evidence "[i]nevitably . . . acquire[s] a more pronounced aura of psychological unreality."[150] Whether the hearsay rule really depends on a bifurcated tribunal is debatable. As a formal matter, evidence law assumes that it does not: the hearsay ban and other rules of evidentiary exclusion apply in bench trials just as in jury trials.[151] And even if this assumption is mistaken—even if the hear-

[144] Wigmore is often blamed, unfairly, for this account of the hearsay rule. See note 110.

[145] See, for example, Damaška, *Evidence Law Adrift* at 31 (cited in note 30) (calling this the conventional justification).

[146] See text accompanying notes 114–24.

[147] See note 66 and accompanying text.

[148] See, for example, Damaška, *Evidence Law Adrift* at 31 (cited in note 30); Schauer, 155 U Pa L Rev 165 (cited in note 2).

[149] See, for example, Damaška, *Evidence Law Adrift* at 46–52 (cited in note 30).

[150] Damaška, 76 Minn L Rev at 427–28 (cited in note 9).

[151] But see Schauer, 155 U Pa L Rev at 166–67 (cited in note 2) (noting that American trial judges frequently ignore the hearsay rule when sitting without a jury, and that some scholars have suggested this informal practice should be officially authorized).

say rule cannot meaningfully be applied without a bifurcated court—that is an argument, at best, against exporting the hearsay rule to civil-law jurisdictions. It is not an argument for retaining the hearsay rule in common-law countries. Not everything feasible is desirable.

Over the last decade, though, a different suggestion has surfaced about the hearsay rule and civil-law trials. The new claim is that the hearsay rule not only is *feasible* in civil-law jurisdictions, but that it is increasingly being *adopted*—or at least that civil-law countries have analogs to hearsay that are all but indistinguishable from the Anglo-American ban. Thus, for example, Richard Lempert asserts that "differences in the treatment of hearsay" in common-law and civil-law jurisdictions are "[i]n practice . . . not that great."[152] This "convergence" is partially due, he suggests, to the many exceptions to the hearsay ban in Anglo-American law, and to the fact that "even where exceptions do not neatly fit statements offered," Anglo-American trial judges "will often find some way to admit hearsay that [they] think is reliable."[153] But Lempert claims there is convergence from the other side as well: "Continental systems . . . often treat hearsay with suspicion, discounting it when it is not corroborated with other evidence, and in one Continental system, Italy, theoretical barriers to admitting hearsay appear similar to what they are in the United States and England."[154]

There has in fact been a long-term weakening of the hearsay ban in common-law jurisdictions.[155] It is wrong, though, to suggest that the American hearsay ban has no bite, or to lump together hearsay barriers in the United States and in England—particularly after *Crawford*. Preventing a criminal defendant from offering evidence of his own out-of-court statements, or preventing the prosecution from proving that a homicide victim had earlier complained about threats by the defendant, is virtually inconceivable anywhere outside the United States. It is a mistake, also, to suggest that there is no practical difference between excluding hearsay and

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[152] Lempert, *Anglo-American and Continental Systems* at 402 (cited in note 3). For roughly similar observations, see, for example, Allen and Alexakis, *Utility and Truth* at 343, 346 (cited in note 45).

[153] Lempert, *Anglo-American and Continental Systems* at 402 (cited in note 3).

[154] Id.

[155] See text accompanying notes 130–43.

treating it with suspicion. Everyone agrees that secondhand evidence is less reliable than firsthand evidence, all else being equal. The question is whether to use it cautiously—as we do or should do with, say, eyewitness identifications—or to exclude it entirely. The murder prosecutions of Dwayne Giles and Mark Jensen throw the difference into sharp relief.[156] Finally, it is wrong, it turns out, to suggest that Italy, or any other civil-law country, has adopted a hearsay rule similar to what is found in the United States.

Continental legal systems have long recognized the advantages of hearing from witnesses directly, but they have never adopted a rule of exclusion as rigid as the traditional Anglo-American ban on hearsay. Roman canon law addressed the deficiencies of secondhand evidence with what amounted to corroboration requirements and related rules of sufficiency, specifying the circumstances in which oral hearsay, in conjunction with other evidence, could provide the basis for factual findings.[157] These were restrictions on relying on hearsay, not on considering it, and, like the rest of the Roman canon rules of evidence, they started out malleable and "hedged in with numerous qualifications."[158] By the late seventeenth century, though, the system of proofs was rigidifying, and by the eighteenth century it had become a prominent target of Enlightenment attack.[159] In the wake of the French Revolution, Continental legal systems moved sharply away from the medieval system of evidence; the new ideal was free proof.[160] The hearsay rule, of course, could hardly be more alien to that ideal.

Nonetheless modern Continental legal systems have, in fact, erected barriers to certain uses of derivative proof. These barriers have two sources: the principle of "immediacy" embraced by Continental legal systems since the nineteenth century, and the fair trial guarantee in the European Human Rights Convention. The principle of immediacy requires that witnesses testify orally at

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[156] See text accompanying notes 51–56.

[157] See Damaška, 76 Minn L Rev at 440 (cited in note 9). "Although a general approach to derivative proof [whether written or oral] can . . . be detected, submerged, in Roman-canon law, a terminology limiting 'hearsay' to its oral form became habitual and survives on the Continent to the present day." Id at 439.

[158] Id at 441.

[159] See id at 441–44.

[160] See, for example, id at 445.

trial.[161] As a formal matter, it bars only the medieval practice of having witnesses testify before one official, with another official then deciding the case. "Narrowly conceived as a weapon against 'official' mediation, the principle does not apply to hearsay witnesses, although they also 'mediate' between the factfinder and original sources of information."[162] Nonetheless the principle of immediacy is occasionally invoked in support of a broader disapproval of relying on hearsay when the original witnesses are available to testify.[163] Even this broader, intermittently applied version of the principle, though, does not amount to a ban on hearsay; it is strictly a rule of preference.[164] This is true even in Italy, often said to have adopted a version of the hearsay rule closely approximating the traditional common-law rule, along with other elements of "adversarial" criminal trials. Recent amendments to the Italian constitution do in fact restrict the admissibility of out-of-court statements, but the restrictions do not apply when "examination of the witness is impossible for objective reasons independent of the parties' will."[165]

The same may be said of the limitations imposed on hearsay by the fair trial provisions of the European Human Rights Convention. Adopted in the aftermath of World War II, the Convention provides, among other things, that every criminal defendant "is entitled to a fair and public hearing" and "to examine or have examined witnesses against him."[166] Over the past two decades, the European Court of Human Rights (ECHR)—charged with

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[161] See, for example, id at 446–48; Sarah J. Summers, *Fair Trials: The European Criminal Procedure Tradition and the European Court of Human Rights* 47–58 (Hart, 2007). Summers suggests that the requirement that proof be presented orally is separable, strictly speaking, from the requirement that proof be presented directly to the adjudicator, but she notes that the two ideas "are frequently referred to together or interchangeably" in European discussions of criminal procedure. See Summers, *Fair Trials* at 48.

[162] Damaška, 76 Minn L Rev at 447 (cited in note 9).

[163] See id at 447.

[164] See, for example, id; Stefano Maffei, *European Right to Confrontation* at 183–84 (cited in note 7) (discussing French case law); Antonio Pablo Rives Seva, *El Testimonio de Referencia en la Jurisprudencia Penal*, Revista Peruana de Jurisprurdencia, R196 4 no 11:LXVII-LXXIII (2002), online at http://noticias.juridicas.com/articulos/65-Derecho%20Procesal%20Penal/200001-testimoniojpenal.html (discussing Spanish case law).

[165] Michele Panzavolta, *Reforms and Counter-Reforms in the Italian Struggle for an Accusatorial Criminal Law System*, 30 NC J Intl L & Comm Reg 577, 611–12 (2005); see also William T. Pizzi and Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 Mich J Intl L 429, 462 (2004).

[166] European Convention for the Protection of Human Rights and Fundamental Freedoms, § I, arts 6, 3(d), Nov 4, 1950, 213 UNTS 221.

implementing the Convention[167]—has interpreted these provisions to require, as a general matter, that evidence "be produced at a public hearing, in the presence of the accused" and that "the accused . . . be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statement or at a later stage."[168] These are procedural requirements, not rules of admissibility.[169] The ECHR has repeatedly stressed that "the admissibility of evidence is primarily a matter for regulation by national law"; the court understands its task as "not to give a ruling on whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair."[170] Accordingly, the ECHR has found violations of the Convention when informants have been questioned but their identities not disclosed to the defense,[171] and when alleged victims of child sexual abuse have been questioned by police officers but not by magistrates.[172] It has also ruled, more recently, that the Convention does not permit government depositions of witnesses who do not testify at trial to be the "sole or decisive basis" for a criminal conviction, even if the witness' absence is beyond the prosecution's control.[173] The "sole or decisive" rule is currently under challenge,[174] and it operates, in any event, as a

[167] Id § IV; see also John D. Jackson, *Transnational Faces of Justice: Two Attempts to Build Common Standards Beyond National Boundaries*, in *Crime, Procedure and Evidence* at 221, 227 (cited in note 3); Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 Ind L J 810, 826–30 (2000).

[168] *P. S. v Germany*, App No 33900/96, para 21 (Eur Ct H R, Dec 20, 2001), online at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en; see also *Kostovski v Netherlands*, App No 1145/85, 12 Eur H R Rep 434, 447, para 41 (1989). For helpful overviews of the case law, see Stefan Trechsel, *Human Rights in Criminal Proceedings* at 291–326 (cited in note 7); Roger W. Kirst, *Hearsay and the Right of Confrontation in the European Court of Human Rights*, 21 Quinnipiac L Rev 777 (2003); and Sarah J. Summers, *The Right to Confrontation After Crawford v. Washington: A "Continental European" Perspective*, 2 Intl Commentary on Evidence, issue 1, art 3, at 1 (2004).

[169] See, for example, Friedman, *Confrontation Right Across the Systemic Divide* at 268–69 (cited in note 6).

[170] See, for example, *P. S. v Germany*, para 19.

[171] See *Saidi v France*, App No 14647/89, 17 Eur H R Rep 251, 268, para 44 (1993).

[172] See *P. S. v Germany*.

[173] See *Al-Khawaja v United Kingdom*, App Nos 26766/05 & 22228/06, 49 Eur H R Rep 1, 59, para 23 (2009).

[174] The Supreme Court of the United Kingdom has declined to follow the decision, and the Grand Chamber of the European Court of Human Rights has agreed to review it. See *Regina v Horncastle*, 2 WLR 47, 53, 74, 96, 98 (2010); Ian Dennis, *The Right to Confront*

rule of sufficiency, not a rule of admissibility. The ECHR has never disapproved the mere introduction of hearsay statements by witnesses who are dead or otherwise unavailable at the time of trial.[175] Nor is it clear whether the European Human Rights Convention imposes any restrictions at all on the introduction of hearsay evidence through "intermediaries" other than government officials.

The bottom line is that the hearsay rule—as a categorical rule of exclusion, rather than a procedural principle of preference or a rule of evidentiary sufficiency—remains alien to civil-law legal systems. It is also, as we have seen, on the decline in most common-law nations. The lone exception is the United States. Until recently the hearsay rule was in decline here, too. What has changed that, ironically, is the line of cases beginning with *Crawford* and extending, most recently, to *Melendez-Diaz v Massachusetts*—decisions widely applauded, even by their detractors, for *decoupling* constitutional law from the hearsay rule.

II. Hearsay and Confrontation

The irony of the *Crawford* line of cases is that these decisions, celebrated for taking evidence law out of the Bill of Rights, have in fact given the hearsay rule a new, constitutionally protected lease on life. To understand how that has happened, we need to explore not just the *Crawford* doctrine itself but the tradition against which it has taken shape, because confrontation doctrine and hearsay law have a long history of mutual entanglement. This part will therefore begin with a discussion of confrontation law pre-*Crawford*, before continuing with an examination of *Crawford*, *Davis*, *Giles*, and *Melendez-Diaz*, paying particular attention to the various ways in which these cases have altered the relationship between the Confrontation Clause and the hearsay rule. The Supreme Court's new approach to confrontation has, in fact, weak-

Witnesses: Meanings, Myths and Human Rights, 2010 Crim L Rev 255, 271; *Al-Khawaja v United Kingdom*, App Nos 26766/05 & 22228/06 (Eur Ct H R, Mar 8, 2010) (accepting referral to Grand Chamber), online at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=&sessionid=48342600&skin=hudoc-pr-en.

[175] Consider *Ferrantelli & Santangelo v Italy*, App No 19874/92, 23 Eur H R Rep 288, 309, para 52 (1996) (finding no error in introduction of accomplice's confession against defendants, in part because the confession was corroborated, and in part because "the judicial authorities . . . cannot be held responsible for" the accomplice's death before the defendants' trial).

ened some links between hearsay doctrine and the Sixth Amendment, but at the same it has strengthened other connections between the two bodies of law.[176]

A. BACKGROUND

The Confrontation Clause of the Sixth Amendment entitles every criminal defendant "to be confronted with the witnesses against him." There are two key terms here: "confronted" and "witnesses." The Supreme Court has interpreted "confronted" to mean, more or less, "cross-examined in the defendant's presence."[177] We will return later to the merits of that reading, but it has been largely settled for decades. There is controversy only at the edges, about the limits that can be placed on cross-examination[178] and the circumstances in which the questioning may occur outside the defendant's presence.[179]

Most of the controversy about the Confrontation Clause has involved its scope rather than its content; it has involved, that is to say, the proper definition of the term "witnesses." One way to read that term, of course, is as a reference to people who come to court and testify. The Confrontation Clause, on this interpretation, has nothing to say about hearsay. It simply governs trial procedures, giving defendants a right to "confront"—by cross-examination or otherwise—the individuals who testify against them at trial. This was Wigmore's reading of the Confrontation Clause. He thought the clause meant only that "*so far as testimony is required under the Hearsay rule to be taken infra-judicially*, it shall be taken in a certain way, namely, subject to cross-examination,—

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[176] Portions of the following discussion expand on David Alan Sklansky, *Anti-Inquisitorialism*, 122 Harv L Rev 1634, 1643–52 (2009).

[177] See, for example *Dutton v Evans*, 400 US 74, 95 (1970) (Harlan, J, concurring in the result) (suggesting that "[i]f one were to translate the Confrontation Clause into language in more common use today, it would read: 'In all criminal prosecutions, the accused shall enjoy the right to be present and to cross-examine the witnesses against him."); *Davis v Alaska*, 415 US 308, 316 (1974) (quoting with approval Wigmore's statement that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination").

[178] See, for example, *Davis v Alaska*, 415 US at 316–17.

[179] See, for example, *Maryland v Craig*, 497 US 836, 850 (1990) (holding—on a 5–4 vote—that a prosecution witness can testify by closed-circuit television, without physically "confronting" the defendant, if the procedure is "necessary to further an important public policy" and "the reliability of the testimony is otherwise assured").

not secretly or 'ex parte' away from the accused."[180] This was also the position reached ultimately by the second Justice Harlan,[181] and it is the position taken by some scholars today.[182]

But it has never been the Supreme Court's view. The Court has consistently reasoned that the Confrontation Clause protects criminal defendants against some uses of hearsay evidence. In fact the vast majority of the Supreme Court's Confrontation Clause cases have involved challenges to hearsay evidence.[183] Repeatedly, the Court has said that the hearsay rule and the Confrontation Clause "protect similar values"[184] and "stem from the same roots."[185]

In the traditional telling, the roots of the Confrontation Clause lie in grievances about prosecutions based on affidavits and depositions taken ex parte from the defendants' accusers—especially in the infamous English treason trials of the 1500s and early 1600s, and most particularly in the 1603 trial of Sir Walter Raleigh. Raleigh was convicted of joining the so-called Main Plot to depose James I and to place Arabella Stuart on the throne. The core evidence against him consisted of a written examination of the plot's alleged leader, Lord Cobham, and a letter Cobham later wrote. Raleigh asked repeatedly, but unsuccessfully, for Cobham to be brought from his cell to the courtroom. The trial ended in a sentence of execution, which was eventually carried out.[186] Widespread revulsion at the conduct of Raleigh's trial has been credited with helping spur development of the common-law right to con-

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[180] Wigmore, 2 *Treatise on the Anglo-American System of Evidence* § 1397, at 101 (cited in note 75). Wigmore explained that "[t]he Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially,—this depends on the law of Evidence for the time being,—but only what mode of procedure shall be followed—*i.e.* a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given infra-judicially." Id.

[181] See *Evans*, 400 US at 94 (Harlan, J, concurring).

[182] See, for example, Amar, *Constitution and Criminal Procedure* at 94 (cited in note 13).

[183] See, for example, Penny J. White, *Rescuing the Confrontation Clause*, 54 SC L Rev 537, 555–91 (2003) (reviewing pre-*Crawford* case law).

[184] See, for example, *Ohio v Roberts*, 448 US 56, 66 (1980); *California v Green*, 399 US 149, 155 (1970).

[185] See, for example, *Roberts*, 448 US at 66; *Evans*, 400 US at 86.

[186] See, for example, Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke* 190–217, 414–16 (Atlantic, 1956); Allen D. Boyer, *The Trial of Sir Walter Raleigh: The Law of Treason, the Trial of Treason and the Origins of the Confrontation Clause*, 74 Miss L J 869, 895 (2005).

frontation, later codified in the Sixth Amendment.[187] It has also been suggested that the case may have helped motivate English courts to develop the modern ban on hearsay evidence,[188] but that does not quite fit the timing: recent historical work indicates that the hearsay rule did not take shape in its modern form until the late eighteenth century.[189]

Regardless, the Court has thought it plain that the Confrontation Clause excludes some hearsay.[190] At the same time, the Justices have been wary of treating *all* prosecution hearsay as a violation of confrontation; that would "abrogate virtually every hearsay exception" and be "too extreme."[191] Over a century ago, in its first case applying the Confrontation Clause, the Supreme Court warned that "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."[192] The Court retained this pragmatic perspective on the Confrontation Clause throughout the 1900s. The trick was deciding where to draw the line.

Thirty years ago, in *Ohio v Roberts*, the Court drew the line at reliability. The Justices reasoned that the "underlying purpose" of confrontation was "to augment accuracy" by "ensuring the defendant an effective means to test adverse evidence." So prosecution hearsay was barred by the Confrontation Clause unless it carried "adequate 'indicia of reliability'"—either because the statements

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[187] See, for example, *Green*, 399 US at 157 n 10; Francis Howard Heller, *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* 104–06 (Kansas, 1951); Boyer, 74 Miss L J at 895–901 (cited in note 186); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 Rutgers L J 77, 81 n 18 (1995). For skeptical assessments of this received understanding, see Kenneth W. Graham Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 Crim L Bull 99, 100 (1972); Frank R. Herrmann and Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 Va J Intl L 481 (1994). Even the Supreme Court has begun to back away from the Raleigh story. Writing for the majority in *Melendez-Diaz*, Justice Scalia stressed that "[t]he right to confrontation was not invented in response to the use of the *ex parte* examinations in *Raleigh's Case*," although he reiterated that the case involved "a paradigmatic confrontation violation"—which was precisely why, Justice Scalia said, Raleigh's conviction "provoked such an outcry." 129 S Ct at 2534.

[188] See, for example, James W. Jennings, *Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials*, 113 U Pa L Rev 741, 746 n 31 (1965).

[189] See text accompanying notes 114–18.

[190] See, for example, *Roberts*, 448 US at 63.

[191] Id.

[192] *Mattox v United States*, 156 US 237, 243 (1895).

at issue fell, by statute or common law, within a "firmly rooted" exception to the hearsay ban, or because they bore "particularized guarantees of trustworthiness."[193] The Court eventually made clear that it deemed all of the myriad hearsay exceptions codified in the Federal Rules of Evidence and adopted by most of the states to be "firmly rooted." This amounted to allowing the Confrontation Clause to track the Federal Rules of Evidence, because most states have copied the Federal Rules of Evidence virtually verbatim.

The only exceptions a majority of the Court ever found *not* to qualify were the catchall provisions in the Federal Rules of Evidence and most state evidence codes for statements "not specifically covered" by other exceptions "but having equivalent circumstantial guarantees of trustworthiness"; the Court reasoned that "ad hoc" assessments of reliability did not deserve the weight given to "longstanding judicial and legislative experience" in evaluating particular categories of extrajudicial statements.[194] Statements admitted under the catchall exceptions could still survive a Confrontation Clause challenge, but only if they had "particularized guarantees of trustworthiness," which the Court interpreted *not* to include corroboration. "To be admissible under the Confrontation Clause," the Court explained, "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial."[195]

B. FROM CRAWFORD TO MELENDEZ-DIAZ

Partly because it seemed odd to hitch constitutional doctrine to the twists and turns of evidence law, the *Roberts* approach to the Confrontation Clause was never popular with commentators, and by the time the Court decided *Crawford v Washington* in 2004,

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[193] *Roberts*, 448 US at 66. *Roberts* also suggested that when a prosecution witness was available to testify in court, the Confrontation Clause "normally" called for the exclusion of the witness's out-of-court statements even in the face of "indicia of reliability." Id. But the Court made clear that "[a] demonstration of unavailability . . . is not always required," id at 65 n 7, and even the qualified requirement later fell by the wayside, applied only to statements admitted under hearsay exceptions that themselves required a showing of unavailability. See *White v Illinois*, 502 US 346, 355–56 (1992); *United States v Inadi*, 475 US 387, 394 (1986); Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford's Birth Did Not Require That Roberts Had to Die*, 15 J L & Pol 685, 694 n 28 (2007).

[194] *Idaho v Wright*, 497 US 805, 817 (1990).

[195] Id at 822.

it was ready for a new approach. Michael Crawford was convicted of stabbing a man who allegedly tried to rape Crawford's wife, Sylvia. The evidence against him included a tape-recorded police interrogation of Sylvia Crawford, in which she described the stabbing. Sylvia declined to testify against her husband at trial, invoking spousal privilege, but the prosecutors introduced her tape-recorded interrogation. Based in part on that evidence, the jury rejected Crawford's claim of self-defense. The trial judge found no violation of the Confrontation Clause, because Sylvia's statements appeared reliable. The statements did not fall within a firmly rooted exception to the hearsay rule, but they had "particularized guarantees of trustworthiness": they were based on direct observation, they were made soon after the events in question, they did not seek to shift blame, they were made under questioning by a "neutral" law enforcement officer, and they "interlocked" with Michael Crawford's own statements to the police. The intermediate appellate court reversed, finding the statements insufficiently reliable, but the state supreme court reinstated the conviction, relying chiefly on the manner in which the statements by Michael Crawford and Sylvia Crawford "interlocked."[196]

The United States Supreme Court reversed. Writing for the majority, Justice Scalia made clear he agreed with Washington's intermediate court of appeals about the reliability of Sylvia Crawford's statements to the police, but he declined simply to "reweigh[] the 'reliability factors' under *Roberts*."[197] Instead, he took the occasion to revisit *Roberts* and to reject its entire approach, at least as applied to statements made in a police interrogation, or to other hearsay that seemed "testimonial." For those statements, "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[198] That meant that testimonial hearsay was inadmissible against a criminal defendant unless the defendant actually received an opportunity to cross-examine the witness, either at trial or in an earlier proceeding. And even then, statements by a witness who did not appear at trial would be inadmissible if the witness were available and could in fact be called to the stand.[199] The only

[196] 541 US at 38–42.

[197] Id at 67; see also id at 68.

[198] Id at 68–69.

[199] See id at 53–54, 68.

exceptions the Court signaled it would accept to these imperatives were the equitable principle of "forfeiture by wrongdoing"[200] and, possibly, the venerable rule admitting dying declarations[201]—doctrines that the Court has since made clear are to be applied narrowly, with strict adherence to their contours in eighteenth-century common law.[202]

The Court declined in *Crawford* to offer any precise definition of "testimonial" hearsay or any comprehensive set of criteria for distinguishing it from nontestimonial hearsay. The point, though, was to focus constitutional attention on "the principal evil at which the Confrontation Clause was directed," namely, the practice of questioning prosecution witnesses in ex parte, pretrial examinations, in lieu of having them testify at trial allowing the defendant to cross-examine them.[203] The Confrontation Clause, Justice Scalia suggested, was both narrower and broader than the hearsay rule:

> [N]ot all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under the hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.[204]

"Testimonial" hearsay, then, was hearsay that raised "the Sixth Amendment's core concerns," the concerns raised by questioning prosecution witnesses the way Lord Cobham was questioned—before trial and away from the defendant, instead of at trial, in the defendant's presence, and subject to cross-examination. Instead of defining the category of cases that raised these concerns, the Court took note of three alternative definitions and declined to choose among them. One possibility, suggested Crawford's lawyers, was "*ex parte* in-court testimony or its functional equivalent—

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[200] Id at 62.

[201] See id at 56 n 6 (suggesting that if "an exception for testimonial dying declarations . . . must be accepted on historical grounds, it is *sui generis*").

[202] See *Giles v California*, 128 S Ct 2678 (2008); text accompanying notes 222–24.

[203] *Crawford*, 541 US at 50.

[204] Id at 51. Regarding the Court's association of ex parte examinations with civil-law systems of adjudication, see Sklansky, 122 Harv L Rev 1634 (cited in note 176).

that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially."[205] Another possibility, floated by Justice Thomas in an earlier case, was "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[206] Still another possibility, suggested by amici in *Crawford*, was "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[207] Any of these definitions, the Court reasoned, would make statements given during a police interrogation "testimonial."[208]

Nor did the Court say in *Crawford* whether the *Roberts* test, or any other requirements derived from the Confrontation Clause, would continue to apply to *nontestimonial* hearsay introduced against a criminal defendant. The Court answered the latter question two years later, though, in *Davis v Washington*. Writing again for the Court, Justice Scalia explained that the focus on testimonial statements was "so clearly reflected in the text" of the Confrontation Clause that it "must fairly be said to mark out not merely its 'core,' but its perimeter."[209] *Davis* thus makes clear that the Confrontation Clause now applies only to testimonial hearsay. *Davis* also threw some limited, additional light on the key term "testimonial," at least in the context of questioning by police officers, 911 operators, or other law enforcement personnel. In that context, the Court held, statements are testimonial only if "the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," rather than to respond to "an ongoing emergency."[210] The Court therefore found no con-

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[205] *Crawford*, 541 US at 51.

[206] Id at 51–52, quoting *White*, 502 US at 365 (Thomas, J, concurring in part and concurring in the judgment).

[207] *Crawford*, 541 US at 52, quoting Brief for National Association of Criminal Defense Lawyers et al as amici curiae.

[208] *Crawford*, 541 US at 52.

[209] 547 US 813, 824 (2006).

[210] Id at 822. *Davis* said nothing about statements not in response to law enforcement questioning, other than to disavow any suggestion that they were "necessarily nontestimonial." Id n 1.

stitutional violation in the evidence used to convict Adrian Davis of assault: statements his former girlfriend, Michelle McCottry, made after calling 911 to report that he was attacking her. Those statements included the name of her attacker, provided in response to questions from the 911 operator. But the Court thought that even the questions about the assailant's identity appeared "necessary to resolve the present emergency," because police dispatched to the scene would want to "know whether they would be encountering a violent felon."[211] The heart of the matter was that "[a]lthough one *might* call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. . . . She simply was not acting as a *witness*; she was not *testifying*."[212]

In this respect the Court thought McCottry's statements contrasted sharply with the statements at issue in *Hammon v Indiana*, a case consolidated for decision with *Davis*. Herschel Hammon was convicted of battery based on statements his wife, Amy Hammon, had made to police officers who came to the Hammons' house in response to a "domestic disturbance" report.[213] The Court found these facts essentially indistinguishable from the circumstances in *Crawford*. "There was no emergency in progress," so it was "entirely clear . . . that the interrogation was part of an investigation in possibly criminal past conduct."[214] Amy Hammon's statements were therefore testimonial, unlike Michelle McCottry's statements. Justice Thomas, concurring in *Davis* but dissenting in *Hammon*, could not see the difference: neither the 911 call in *Davis* nor the at-the-scene questioning in *Hammon* looked to him much like formal, "*ex parte* examinations."[215] But this turned out to be too much originalism even for Justice Scalia, who warned that "[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction."[216] Amy Hammon's statements were formal enough—either (as the Court suggested at one point) because she was questioned

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[211] Id at 827.

[212] Id at 827–28.

[213] Id at 819–21.

[214] Id at 829–30.

[215] Id at 835 (Thomas, J, concurring in part and dissenting in part), quoting *Crawford*, 541 US at 50.

[216] Id at 830 n 5.

away from her husband, in a separate room, "with the officer receiving her replies for use in his 'investigat[ion],'"[217] or (as the Court suggested elsewhere) because "lies to [police] officers are criminal offenses."[218]

Given the outcome in *Hammon*, it is understandable that the state of California did not even try to convince the Supreme Court that Brenda Avie's statements to a police officer about Dwayne Giles were nontestimonial,[219] and it is unsurprising that on remand in *Giles* the California Court of Appeal concluded with little discussion that the statements were, in fact, testimonial.[220] Avie, like Hammon, was questioned by a police officer responding to a domestic violence call, after the police had separated her from her alleged assailant and at a point when "[t]here was no emergency in progress."[221] The central question in *Giles v California* was whether the Confrontation Clause allowed a testimonial statement to be used against a criminal defendant when the reason the declarant could not testify in court and be cross-examined was that the defendant had killed her. The California courts thought yes, but the Supreme Court disagreed. Writing once again for the Court, Justice Scalia explained that there *is* an exception to the Confrontation Clause for "forfeiture by wrongdoing," but that it applies only when the defendant has culpably rendered the declarant unavailable *for the purpose of preventing her from testifying against him*.[222] The Court also took the occasion of deciding *Giles* to suggest that there is a separate Confrontation Clause exception for "dying declarations," but that this exception, too, is to be narrowly construed, in conformity with its contours at common law.[223]

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[217] Id at 830.

[218] Id at 830 n 5. The Court has agreed to review a lower court decision concluding, under *Davis*, that a homicide victim's statement to the police, shortly after he had been shot, was "testimonial," because "the 'primary purpose' of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator," rather than to help the police respond to an "ongoing threat." See *People v Bryant*, 768 NW2d 65, 67, 71 (Mich 2009), cert granted, 78 USLW 3082 (2010).

[219] *Giles v California*, 128 S Ct 2678, 2682 (2008).

[220] *People v Giles*, 2009 WL 457832, at *3 (Cal Super, Feb 25, 2009).

[221] *Davis v Washington*, 547 US at 829–30; see *People v Giles*, 2009 WL at *4; text accompanying note 51.

[222] *Giles v California*, 128 S Ct at 2693.

[223] Id at 2682–83. In *Crawford*, the Court had noted that there was founding-era authority for admitting dying declarations, even in cases where the declarations were plainly tes-

Because the Court now reads the Confrontation Clause to preserve "the right of confrontation at common law, admitting only those exceptions established at the time of the founding,"[224] most of Justice Scalia's majority opinion in *Giles*—and a large portion of Justice Breyer's dissent—was devoted to discussion of common-law decisions from the seventeenth, eighteenth, and early nineteenth centuries. One striking feature of these cases is that they rarely if ever use the term "confrontation" or speak of a right to face or to challenge one's accuser in court. They do not use the term "hearsay" either, but they are very plainly cases about the admissibility of proof: the question in each was whether a certain statement, made by a witness who is no longer available to testify, should be treated as evidence.[225] In *Giles*, as in *Crawford* and *Davis*, the Court assumed that at the time of the adoption of the Bill of Rights these cases—or at least the evidentiary principles on which they relied—were understood to be part of the right to "confrontation" secured by the Sixth Amendment.

The Court assumed, in other words, that the Confrontation Clause was intended, or was originally understood, to incorporate and to codify common-law strictures against prosecutorial reliance on "testimonial" hearsay. But there is little evidence in support of that assumption—or, for that matter, against it. It amounts to a leap of faith. Like the rest of the Bill of Rights, the Sixth Amendment lacks the kind of legislative history that would throw appreciable light on its meaning.[226] The debates over the ratification of the Constitution itself help explain why the Bill of Rights *as a whole* was adopted, but those debates do little to clarify the meaning of key terms such as "confront" or "witnesses." If anything, those debates suggest that the Bill of Rights was understood at the time of its adoption to codify not particular legal rules but general principles that could and were expected to evolve over time.[227]

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timonial. But *Crawford* expressly declined to decide "whether the Sixth Amendment incorporates an exception for testimonial dying declarations." 541 US at 56 n 6.

[224] 128 S Ct at 2682, quoting *Crawford*, 541 US at 54.

[225] See, for example, *Lord Morley's Case*, 6 How St Tr 769 (H L 1666); Harrison's Case, 12 How St Tr 833 (H L 1692); *King v Woodcock*, 1 Leach 500, 168 Eng Rep 352 (1879); *Queen v Scaife*, 117 QB 238, 117 Eng Rep 1271 (KB 1851); *State v Moody*, 3 NC 31 (Super L & Eg NC 1798).

[226] See, for example, Epstein, 14 Widener L Rev at 430 (cited in note 64).

[227] See, for example, Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 Md L Rev 150 (2007); Larry Kramer, *Two (More) Problems*

The originalist reasoning in *Crawford*, *Davis*, and *Giles* has been challenged on two main grounds. The first is that originalism is a mistaken approach to constitutional interpretation; the second is that the Court is wrong about what kind of evidence was commonly allowed by eighteenth-century common law. There is much to be said for each of these objections, but the point I want to flag here is different. For the sake of argument, grant that originalism is a coherent and attractive approach to constitutional interpretation.[228] Grant even the more specific and more dubious claim that the right to confrontation, as incorporated against the states by the Fourteenth Amendment, should be interpreted as it was understood when the Sixth Amendment was adopted.[229] Finally, grant for the sake of argument that certain forms of hearsay were flatly inadmissible against criminal defendants at the time that the Sixth Amendment was framed and adopted, even in cases where the declarant was dead or otherwise unavailable at the time of trial. It still does not follow that hearsay of that kind is constitutionally inadmissible. There is a missing premise: that the Sixth Amendment right to be confronted with adverse witnesses was understood by its framers and adopters to include all the restrictions that had developed by the late eighteenth century on the use of hearsay against criminal defendants.

The same unsupported assumption—that the right to "confrontation" was understood in the late eighteenth century to mean, at least in significant part, a right against prosecution hearsay—underlies the Court's most recent confrontation decision, *Melendez-Diaz v Massachusetts*. Luis Melendez-Diaz was convicted of drug trafficking based partly on laboratory results showing that bags seized from Melendez-Diaz and two codefendants contained cocaine. No one from the state laboratory testified in court; instead, pursuant to a state statute, the prosecution submitted notarized "certificates" from analysts at the laboratory, indicating that the materials in question had been examined and determined to

with Originalism, 31 Harv J L & Pub Pol 907 (2008); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv L Rev 885 (1985).

[228] But see, for example, Mitchell N. Berman, *Originalism Is Bunk*, 84 NYU L Rev 1 (2009).

[229] But see, for example, Sklansky, 122 Harv L Rev at 1674–77 (cited in note 176) (suggesting there is little evidence the Framers and adopters of the Fourteenth Amendment "aimed to extend to the states not only the restrictions imposed by the Bill of Rights, but also the way those restrictions were understood by eighteenth-century common law judges").

contain cocaine.[230] The Massachusetts courts saw no confrontation problem, because the certificates bore little resemblance to the kind of "*ex parte* examinations" the Confrontation Clause was intended to bar; instead, they were "akin to business or official records"[231]—and the Supreme Court itself had opined that business records, like most other statements covered by hearsay exceptions at common law, "by their nature were not testimonial."[232]

On a 5–4 vote, the Supreme Court reversed and remanded. Writing once again for the majority, Justice Scalia found the case "straightforward." It involved, he said, "little more than the application of our holding in *Crawford v. Washington*."[233] There was "little doubt" that the laboratory certificates fell "within the 'core class of testimonial statements,'" under any of the alternative definitions described in *Crawford*: the certificates were, in essence, affidavits, made for the express purpose of providing evidence for use at trial.[234] Accordingly, they could not substitute for live testimony "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that the petitioner had a prior opportunity to cross-examine them."[235] The Court reasoned that traditional hearsay exceptions for business records and official records did not apply to statements produced for use at trial. And even if they *did* apply, it would not matter: they were still testimonial. The Court explained that business records and public records

> are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here—prepared specifically for use at petitioner's trial—were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.[236]

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[230] *Melendez-Diaz*, 129 S Ct at 2531.

[231] *Commonwealth v Verde*, 827 NE2d 701, 706 (Mass 2005). The Appeals Court of Massachusetts relied on *Verde* in affirming Melendez-Diaz's conviction, 2007 WL 2189152, *4 (July 31, 2007), and the Supreme Judicial Court denied review, 874 NE2d 407 (2007).

[232] *Crawford*, 541 US at 56.

[233] 129 S Ct 2527, 2533, 2536 (2009).

[234] Id at 2532.

[235] Id.

[236] Id at 2539–40.

The Court's discussion of what it called "the business-and-official-records hearsay exceptions"[237] papered over some long-standing controversies. It is true, as Justice Scalia pointed out, that in 1943 the Court ruled that an accident report prepared by a railroad employee fell outside the traditional business records exception, because the report was "calculated for use essentially in the court, not in the business"; its "primary utility" was "in litigating, not in railroading."[238] Subsequently, though, an influential ruling by the Second Circuit, construing a successor statute, limited exclusion to situations in which the author of the accident report was himself potentially liable and therefore had a "motive to fabricate."[239] The Federal Rules of Evidence intentionally skirted the issue, which the drafters characterized as a "source of difficulty and disagreement" that did not lend itself to "[t]he formulation of specific terms which would assure satisfactory results in all cases."[240] The business records exception in the Federal Rules of Evidence applies to *any* records made "in the course of a regularly conducted activity," whether made with litigation in mind or not,[241] but it also calls for exclusion, on a case-by-case basis, if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."[242] *Government* records are treated more restrictively: reports of "police officers and other law enforcement personnel" made in the course of official duty are generally inadmissible in criminal cases.[243] But there has been continued disagreement about who counts as "law enforcement personnel": medical examiners, for example, are often excluded.[244] And federal appellate courts have repeatedly found the limitations on the admissibility of reports by "police officers and

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[237] Id at 2539.

[238] *Palmer v Hoffman*, 318 US 109, 114 (1943) (construing Act of June 20, 1936, 49 Stat 1561, codified until repeal at 28 USC § 695); see *Melendez-Diaz*, 129 S Ct at 2538. On the background of the case and its role in the broader story of hearsay reform, see Ariens, 28 Ind L Rev at 191–224 (cited in note 81).

[239] *Lewis v Baker*, 526 F2d 470, 473 (2d Cir 1975) (construing the Federal Business Records Act, June 25, 1948, 62 Stat 945, codified as amended at 28 USC 1732).

[240] Advisory Committee Note, FRE 803(6).

[241] Id.

[242] FRE 803(6).

[243] FRE 803(8); see *Melendez-Diaz*, 129 S Ct at 2538.

[244] See, for example, *United States v Rosa*, 11 F3d 315 (2d Cir 1993); Carolyn Zabrycki, Comment, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 Cal L Rev 1093, 1123–24 (2008).

other law enforcement personnel" inapplicable to "routine" or "non-adversarial" records.[245]

Presumably, the majority in *Melendez-Diaz* felt comfortable ignoring these complexities—and the dissent did not mention them, either—because under *Crawford* they were irrelevant: modern exceptions to the hearsay rule do not override restrictions imposed by the Confrontation Clause. What mattered was whether a forensic lab report would have been admissible against a criminal defendant when the Sixth Amendment was adopted in 1791. Of course there were no forensic lab reports in 1791. So the majority and the dissenters in *Melendez-Diaz* reached for analogies. The dissent, by Justice Kennedy, said lab reports were like copyists' certifications—routinely relied upon in eighteenth-century courts—declaring that copies of public records were true and accurate.[246] Justice Scalia's majority opinion said they were more like a certification by a clerk that a particular record could *not* be found—which Justice Scalia suggested was inadmissible at common law.[247]

Justice Kennedy did not challenge the Court's assumption that the right to "confrontation" at the time of the framing was understood to include a criminal defendant's right against hearsay statements by an absent witness, but he did complain, repeatedly and at length, that the Court was turning confrontation law into a "formalistic," "wooden," and "pointless" set of rules, unmoored from "common sense," from earlier case law, and from goals of the Sixth Amendment.[248] He also warned that extending *Crawford* from "ordinary" witnesses to forensic analysts threatened serious disruption of criminal prosecutions nationwide, and was "unjustified by any demonstrated deficiency in trials."[249] Justice Scalia

[245] See, for example, *United States v Brown*, 9 F3d 907, 911–12 (11th Cir 1993); *United States v Orozco*, 590 F2d 789, 793–94 (9th Cir 1979).

[246] *Melendez-Diaz*, 129 S Ct at 2552–53 (Kennedy, J, dissenting).

[247] Id at 2538–39 (opinion of the Court). The earliest authority Justice Scalia cited for this proposition was a Louisiana case decided in 1917, but he also referenced the third edition of Wigmore's treatise, which in turn cited, inter alia, Tennessee cases decided in 1796 and 1806. See Wigmore, 2 *Treatise on the System of Evidence* § 1678, at 753 n 3 (cited in note 34). Wigmore, like Justice Scalia, took it as "certain" under common law "that the only evidence receivable would be the testimony on the stand of one who had made the search" and that a "certificate of *due search* and *inability to find* was not receivable." Id at 752–53. He predicted, though, that this would "someday be reckoned as one of the most stupid instances of legal pedantry in our annals." Id at 754.

[248] *Melendez-Diaz*, 129 S Ct at 2544, 2547 (Kennedy, J, dissenting).

[249] Id at 2543, 2550–51.

doubted that the Court's ruling would prove unduly disruptive, partly because some states had already adopted the rule announced in *Melendez-Diaz*, and there was "no evidence that the criminal justice system" in those states had "ground to a halt."[250] Justice Scalia doubted, too, that "confrontation will be useless in testing analysts' honesty, proficiency, and methodology,"[251] and he pointed out that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials."[252] Ultimately, though, *Melendez-Diaz* treated utilitarian considerations of this kind as beside the point. "The Confrontation Clause may make the prosecution of criminals more burdensome," but that was the nature of constitutional rights. The clause required what it required, and the Court lacked the power to modify it.[253] Similarly, there might be "other ways—and in some cases better ways—to challenge or verify the results of a forensic test," but the Confrontation Clause "guarantees one way":[254] the "crucible of cross-examination."[255]

Justice Kennedy was surely right to call this reasoning "formalistic," but the formalism started with *Crawford*, not with *Melendez-Diaz*. Justice Scalia had a point in claiming that he was "faithfully applying *Crawford*" in *Melendez-Diaz*, and that the dissenters were seeking to resurrect the pragmatism of the old "indicia of reliability" approach to the Confrontation Clause, "a mere five years after it was rejected in *Crawford*."[256] The formalism so apparent in *Melendez-Diaz* is the formalism of *Crawford*.

Melendez-Diaz made other things clear, as well. It underscored, as I have already suggested, the particular "form" of *Crawford*'s formalism: the equation of "confrontation" with "cross-examination," and the rigid insistence that "confrontation" means freedom from any prosecution hearsay that would have been officially disapproved in the late eighteenth century. And the alignment of votes in *Melendez-Diaz* served as a reminder that the formalism of *Crawford* cannot be understood as "conservative" or "liberal," at least not as those terms are generally understood in the context

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[250] Id at 2541 (opinion of the Court).

[251] Id at 2538.

[252] Id at 2537.

[253] Id at 2540.

[254] Id at 2536.

[255] Id at 2536, quoting *Crawford*, 541 US at 61–62.

[256] *Melendez-Diaz*, 129 S Ct at 2533.

of constitutional criminal procedure. Justice Scalia's majority opinion in *Melendez-Diaz* was joined by Justice Stevens, Justice Souter, Justice Thomas, and Justice Ginsburg. Dissenting with Justice Kennedy were Chief Justice Roberts, Justice Breyer, and Justice Alito. The debate was not between "law and order" Justices and "civil rights" Justices. The debate, to a great extent, was between formalism and pragmatism, between Justice Scalia's famous insistence on "the rule of law as a law of rules"[257] and the kind of "consequential" approach to constitutional interpretation championed by Justice Breyer.[258]

C. DECOUPLING AND RECOUPLING CONFRONTATION AND HEARSAY

What can be said, then, about the relationship between the Confrontation Clause and the hearsay rule after *Crawford*, *Davis*, *Giles*, and *Melendez-Diaz*? These cases have been applauded, even by their critics, for detaching confrontation doctrine from evidence law. There is a broad consensus that, whatever its flaws, at least the rule announced in *Crawford* has ended the "shotgun wedding" of hearsay and confrontation;[259] at least the Sixth Amendment is no longer "shrouded by the hearsay rule."[260] The reality is more complicated.

The *Crawford* line of cases have certainly weakened the *operational* link between confrontation and hearsay. That is to say, they have made it easier for an out-of-court statement to be barred under the Sixth Amendment even though it falls within an exception to the hearsay rule, and—conversely—easier for evidence to be inadmissible hearsay without also violating the Constitution. Before *Crawford*, the Court reasoned that statements falling within any established, categorical exception had sufficient "indicia of reliability" to satisfy the demands of the Confrontation Clause. After *Crawford*, things are different. As Justice Scalia made plain

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[257] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175 (1989).

[258] Stephen Breyer, *Our Democratic Constitution*, 77 NYU L Rev 245, 247 (2002). It is no coincidence that Justice Blackmun, who articulated the "indicia of reliability" test in his opinion for the Court in *Ohio v Roberts*, 448 US 56 (1980), shared Justice Breyer's concern for "real-world consequences," Breyer, *Our Democratic Constitution* at 249. See, for example, Linda Greenhouse, *Becoming Justice Blackmun* (Times, 2005); Harold Hongju Koh, *Justice Blackmun and the "World Out There,"* 104 Yale L J 23 (1994); Note, *The Changing Social Vision of Justice Blackmun*, 96 Harv L Rev 717 (1983).

[259] See notes 19 and 22.

[260] Friedman, *Confrontation Right Across the Systemic Divide* at 265 (cited in note 6).

for the Court in *Melendez-Diaz*, forensic lab reports are constitutionally inadmissible against a criminal defendant, absent cross-examination of the analyst, regardless of whether the reports fall within the "business records" or "public records" exception to the hearsay rule. And just as satisfying the hearsay rule no longer means that evidence satisfies the Confrontation Clause, prosecution evidence that *violates* the hearsay rule does not automatically violate the Sixth Amendment. *Davis* made explicit what *Crawford* had strongly suggested: only "testimonial" hearsay implicates the Confrontation Clause. In many ways, the line between testimonial and nontestimonial hearsay remains indistinct, but the Court has made reasonably clear that certain kinds of hearsay—casual remarks among friends, for example—are nontestimonial and therefore raise no constitutional problems, even when their introduction violates the hearsay rule.

In addition to weakening the *operational* link between confrontation and hearsay, the *Crawford* doctrine has also loosened the *argumentative* connection between the two bodies of law. Writing for the Court in these cases, Justice Scalia has stressed again and again that confrontation questions are not to be decided by assessing the reliability of particular kinds of hearsay, the hardships that would be caused by its exclusion, or even the reasons for believing that cross-examination would actually serve a useful purpose. This kind of weighing, he has said, has already been done for us by the Framers and adopters of the Bill of Rights. The Confrontation Clause of the Sixth Amendment codifies and makes mandatory a particular, across-the-board balancing of the advantages and disadvantages of allowing testimonial hearsay to be introduced against criminal defendants without the safeguard of cross-examination. The Constitution does not allow us to revisit that balancing. Therefore the kinds of inquiry that are routine in hearsay cases—inquiries into the risks of unreliability attendant to particular kinds of hearsay, and the grounds for thinking that cross-examination is or is not essential—have no place in rigorous application of the Sixth Amendment. Rather, the proper inquiries are historical and analytic. What matters fundamentally is what the Confrontation Clause meant to the people who framed and adopted it. And since the Court thinks the answer to *that* question is that the Confrontation Clause was originally understood to codify common-law restrictions on the use of testimonial hearsay

against criminal defendants, deciding a confrontation case today requires an analytic inquiry into the nature of the hearsay involved—is it testimonial or nontestimonial?—as well as a historical inquiry into any common-law doctrines that might have allowed the use of the evidence against criminal defendants in the late eighteenth century. The inquiry is resolutely and self-consciously nonconsequentialist—one might say legalistic.

This is where the chief complication lies in describing the link between confrontation and hearsay after *Crawford*. For although *Crawford* and its successor cases have weakened the operational and argumentative connections between the Sixth Amendment and evidence law, they have done so by strengthening another kind of link between the two bodies of law. Call it the *historical* link. Confrontation doctrine is now bound more tightly than ever to a particular *stage* of hearsay law: hearsay doctrine as of the time of the drafting and adoption of the Sixth Amendment. Indeed, the chief job of the Confrontation Clause has become preserving and enforcing eighteenth-century protections against prosecution hearsay. The Court has decoupled confrontation doctrine from *modern* hearsay law by yoking it to the hearsay law of the late 1700s, or—more accurately—to the Court's idealized version of the hearsay law of the late 1700s, a version far tighter and more consistent than what was actually applied in founding-era criminal trials.

The story of hearsay law since the late 1700s is a story of harmonization followed by decline. Over the course of the nineteenth century, the rules of evidence were applied with new consistency, uniformity, and predictability; the hearsay rule became a real rule. Almost as soon as that happened, though, exceptions to the rule began proliferating and expanding, and over the past century the hearsay rule has grown progressively weaker, in the United States and throughout the common-law world. It was hard to find any examples of hearsay exceptions being narrowed or eliminated; the process was "one of ever-increasing scope for the exceptions."[261] If anything, that process accelerated as the twentieth century drew to a close. So linking the Confrontation Clause to the *modern* hearsay rule, as the Court did before *Crawford*, meant that in criminal cases as in civil cases, restrictions on the use of out-of-

[261] Allen, 76 Minn L Rev at 799 (cited in note 3).

court statements steadily loosened. Linking the Confrontation Clause to *eighteenth-century* hearsay law—and to the law on the books, not the law in practice—does something very different. It resurrects and preserves the hearsay rule in a particularly inflexible and relatively undeveloped form. The *Crawford* doctrine is not "conservative" or "liberal" in traditional criminal justice terms, but it is "conservative" in an older, less specialized sense. If by the end of the twentieth century the hearsay rule seemed to be in "death throes,"[262] the Supreme Court now has given it—or an (imagined) eighteenth-century version of it—a new lease on life.

III. Ramifications

Resurrecting and preserving an old legal rule can be a good thing. Not all change is for the better. The whole point of a constitution, on one view, is to insulate certain rules from the vicissitudes of politics and public opinion.[263] Nonetheless there are at least three reasons to be concerned about the way the Supreme Court has now read eighteenth-century hearsay rules into the Constitution—wholly apart from whether the Court's originalist reasoning is convincing.[264] First, the long-term decline of the hearsay rule has been well deserved. The uncompromising version of the rule dusted off and constitutionalized by the Court has little to recommend it and will lead to predictable injustices. Second, the *Crawford* doctrine, with its antiquarian focus on eighteenth-century rules of evidence, has diverted attention from what should be the central question under the Confrontation Clause today: how to guarantee twenty-first-century criminal defendants a meaningful opportunity to meet and to challenge the evidence against them. Third, by creating two bodies of hearsay law—one, still evolving, for use in civil cases and to evidence introduced by criminal defendants, and a second, frozen in eighteenth-century amber and applicable only to evidence introduced by prosecutors—the Court has stifled a form of doctrinal cross-comparison

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[262] Id at 798.

[263] This is, of course, Justice Scalia's view. See, for example, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3 (Princeton, 1997).

[264] On the latter question, see Sklansky, 122 Harv L Rev at 1670–77 (cited in note 176); note 21.

that could lead to progressive improvement of the rules governing the use of out-of-court statements both in civil cases and in criminal cases.

A. THE CELEBRATED NIGHTMARE

The reason that the hearsay rule has long been in decline throughout the Anglo-American world is that it is dysfunctional—something that became apparent as soon as it began to be applied in earnest. The archaic, uncompromising version of the rule that the Supreme Court has now read into the Sixth Amendment excludes too much probative evidence with too little justification. This is true even when the rule is applied only to evidence offered against criminal defendants. In a limited but important group of cases, it generates predictable injustices.

We have already touched on the most conspicuous subcategory of those cases: murder prosecutions in which the victim, in the days or weeks leading up to her death, complained about threats, assaults, or other incriminating behavior by the defendant. I say "her death" because the defendants in these cases tend to be men, and the victims tend to be women.[265] Much of the liberalization of the hearsay rule over the last twenty years—in the Commonwealth and, before *Crawford*, in the United States—has been part of a more general movement to make the criminal justice system more responsive to violence against women, especially violence committed by intimates, former intimates, and would-be intimates. The legal system still struggles to protect women against domestic violence, and the hearsay rule makes it harder—especially in cases where the victim's death prevents her from repeating in court the complaints she earlier made about the defendant. Judge Lance Ito, who presided over O. J. Simpson's murder trial, was right: "It seems only just and right that a crime victim's own words be heard . . . in the court where the facts and circumstances of her demise are to be presented."[266]

The hearsay rule can hinder domestic violence prosecutions even when the victim is still alive, because women abused by their domestic partners often do not want to testify at trial. Sometimes

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[265] Madeleine Smith and Emile L'Angelier notwithstanding. See note 47.

[266] *People v Simpson*, No BA097211, 1995 WL 21768, *4–5 (Cal Super, Jan 18, 1995); see note 47 and accompanying text.

they fear retaliation, and sometimes they simply have a change of heart. Either way, prosecutors often want to use, in lieu of live testimony, statements that victims of domestic violence have previously provided to the police or to 911 operators. The hearsay rule will typically make the earlier statements inadmissible, and some of the liberalization of the rule over the past two decades has been aimed squarely at allowing prosecutors to get around this obstacle. The exceptions for "excited utterances" and "present sense impressions" have been stretched, and new exceptions have been created for reports of abuse or threats of abuse. *Crawford* and its successor cases, particularly *Davis* and *Giles*, have rendered most of those efforts unconstitutional—except, possibly, in cases where the doctrine of equitable forfeiture applies. Justice Scalia stressed in *Davis* that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation," and he strongly suggested that the "wrongdoing" could include scaring a witness into silence.[267] Although *Giles*, as we have seen, limited the doctrine of equitable forfeiture to cases involving conduct *aimed* at preventing a witness from testifying,[268] that condition may well be satisfied in many cases in which a victim of domestic violence declines to testify against her abuser. Nevertheless, it remains to be seen how often domestic violence prosecutors will actually be able to demonstrate the factual predicate necessary for invoking the doctrine of equitable forfeiture.

In cases where prosecutors cannot make that showing, it will often be debatable whether the *Crawford* doctrine has advanced or set back the interests of justice. Substituting prior statements of victims for courtroom testimony in domestic violence cases—notwithstanding that the victims were alive and locatable—was a controversial practice, and criticism of the practice provided some of the impetus for the Court's decision in *Crawford*.[269] Part of the intuitive appeal of the confrontation right is the idea that accusers should have to look into the eyes of the person they are accusing. More than once, Justices of the Supreme Court have invoked President Eisenhower's reported description of the code he learned growing up in Abilene, Kansas: "In this country, if some-

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[267] *Davis v Washington*, 547 US 813, 833–34 (2006).

[268] See notes 219–23 and accompanying text.

[269] See, for example, Friedman and McCormack, 150 U Pa L Rev at 1171 (cited in note 143).

one dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow."[270] This idea has little force when there is no possibility of bringing the defendant face to face with his accuser, because his accuser is dead, but it may be good reason to insist on courtroom testimony when it can, in fact, be obtained. Or then again, it might not be. Perhaps the whole idea of looking your accuser in the eye is itself a gendered privileging of physical force and intimidation, an artifact and an instrument of patriarchy.[271] If so, then virtually every case of domestic violence that cannot now be prosecuted because of *Crawford*, *Davis*, and *Giles*—and there appear to be a great many[272]—is a case of justice impeded.

For present purposes, we need not go that far. Even without a strict version of the hearsay rule, like the one the Supreme Court has now read into the Constitution, a rational legal system—especially one with a constitutional clause guaranteeing a right of "confrontation"—might well require accusers to meet the person they are accusing face to face. That is, in fact, precisely the kind of rule many legal systems around the world seem to have adopted, while abandoning or rejecting the hearsay rule in its traditional form. Where the American hearsay rule, now constitutionalized, goes beyond these overseas analogs is in excluding statements by witnesses who are now dead or otherwise unavailable, possibly because of the defendant's own wrongdoing, but not because of wrongdoing that can be proven to have had the *goal* of preventing testimony. This is not a large category of cases, but neither is it merely hypothetical. Cases of this kind recur with some regularity, and they tend to attract attention. Every time the statements of a homicide victim like Nicole Brown Simpson, Brenda Avie, or Julie Jensen are ruled inadmissible, a toll is taken.

It is a toll that may not be measured only in terms of justice left undone. Even when a conviction can be secured without use

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[270] *Coy v Iowa*, 487 US 1012, 1017–18 (1988), citing 1953 speech by President Eisenhower quoted in Pollitt, 8 J Pub L at 381 (cited in note 31); see also *Coy*, 487 US at 1017 ("The phrase persists, 'Look me in the eye and say that.'"); *Jay v Boyd*, 351 US 345, 372 (1956) (Frankfurter, J, dissenting) (invoking President Eisenhower's 1953 description of the Abilene code); id at 374–75 (Douglas, J, dissenting) (same).

[271] For a thoughtful argument along these lines, see Mark Egerman, *Avoiding Confrontation* (unpublished manuscript, 2010) (on file with author).

[272] See, for example, Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va L Rev 747, 749–50 (2005).

of the victim's statements, but especially when it cannot, refusing to allow the jury to hear the victim's own words can erode the "moral credibility" of the criminal justice system—its ability to build consensus and to secure compliance.[273] More particularly, it may send a signal about the seriousness with which the state takes domestic violence, and the degree to which it can be relied upon to protect the victims of domestic violence and to bring the perpetrators to account.

Nor will these tolls be paid only when statements from dead victims are excluded in homicide cases. Similar costs may arise when chemists, medical examiners, or other forensic analysts die or otherwise become unavailable before trial, and their reports become inadmissible. The majority and the dissenters in *Melendez-Diaz* argued at length about how difficult it will be for prosecutors to call laboratory analysts to the stand instead of relying on their reports, but virtually all of the discussion assumed that the analysts *could* be called to testify, at least in theory. In cases of that kind, the Court may well be right that requiring live testimony will not be burdensome, because in the vast run of cases defendants will waive the requirement.[274] But when calling the witness is impossible, waivers are much less likely. It is one thing for defense counsel to waive the right to live testimony when calling the analyst seems like an empty exercise; it is quite another thing—in many cases it would probably be malpractice—to waive that right when the analyst is dead, and insisting on live testimony means keeping the lab results out of the trial altogether.

It is rare, fortunately, for forensic chemists to die before trial, but it happens more often with medical examiners.[275] Autopsies typically are conducted shortly after death, but it can sometimes take years for a homicide case to be charged, let alone come to trial. Partly because autopsies are often conducted when it is not yet clear that there will be a criminal investigation—or even when it is reasonably clear that there will not be one—autopsies could in theory be distinguished from chemical analysis of seized substances, the kind of forensic analysis involved in *Melendez-Diaz*. Autopsy reports can also be distinguished from the laboratory

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[273] Paul H. Robinson and John M. Darley, *The Utility of Desert*, 91 Nw U L Rev 453, 457, 471–78 (1997); see also Tom R. Tyler, *Why People Obey the Law* (Princeton, 1990).

[274] See *Melendez-Diaz v Massachusetts*, 129 S Ct 2527, 2542 (2009).

[275] See, for example, *People v Geier*, 41 Cal 4th 555, 602 (2007).

analyses in *Melendez-Diaz* on the ground that medical examiners typically do not submit their results in a formal statement signed under oath: part of the majority's reasoning in *Melendez-Diaz* was that the certificates at issue in that case were "quite plainly affidavits: 'declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.'"[276] It is hard to believe, though, that the result in *Melendez-Diaz* would have been different had the certificates been unsworn. The critical point for the Court seemed to be that the certificates were "functionally identical to live, in-court testimony," because they provided "the precise testimony the analysts would be expected to provide if called at trial,"[277] and they were "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"[278] Much the same could be said about autopsy reports, even if it will often be less clear whether the facts found in an autopsy will ultimately prove relevant in a criminal trial.

And, in fact, the majority opinion in *Melendez-Diaz* strongly suggested that autopsy reports, like the reports of forensic chemists, are "testimonial" for purposes of the Confrontation Clause. Responding to an argument raised by the dissent—which suggested that coroners' reports were admissible at common law without the coroner's testimony, and that modern-day forensic laboratory results should be treated similarly—Justice Scalia insisted that "whatever the status of coroner's report at common law in England, they were not accorded any special status in American practice."[279]

Before the Supreme Court decided *Melendez-Diaz*, every court that had considered the status of autopsy reports under *Crawford* had deemed them nontestimonial—sometimes on the ground that autopsies are not carried out in anticipation of litigation, sometimes on the ground that coroners are not allied with law enforcement, sometimes on the ground that they are "descriptive" or "factual," and sometimes on the ground that they fall within

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[276] See *Melendez-Diaz*, 129 S Ct at 2532, quoting *Black's Law Dictionary* at 62 (cited in note 39).

[277] Id at 2532.

[278] Id at 2531, quoting *Crawford v Washington*, 541 US 36, 52 (2004).

[279] *Melendez-Diaz*, 129 S Ct at 2538.

the business records exception to the hearsay rule.[280] These arguments seemed dubious even before *Melendez-Diaz*. Nevertheless, it is worth taking seriously the unanimous sentiment by courts that autopsy reports should not be deemed testimonial.

Carolyn Zabrycki argues persuasively that those decisions have been driven by the pragmatic recognition that excluding an autopsy report in a case where the medical examiner is not available to testify can derail a murder prosecution without advancing any significant, countervailing goal. She points out that autopsies, unlike lab tests, generally cannot be redone: "The body decomposes and exhumation poses multiple difficulties."[281] Meanwhile the practical benefits of cross-examining the medical examiner will typically be slight: examiners "rarely remember the details of an individual autopsy at the time of trial," and if the goal is to expose deviations from standard practice or discrepancies in the report, questioning another examiner from the same office will likely be as helpful as questioning the examiner who carried out the autopsy.[282] Beyond that, medical examiners—like the state laboratory analysts in *Melendez-Diaz*—are formally independent of the police and the prosecutors. They are at low risk of being caught up in what the Supreme Court has memorably called "the often competitive enterprise of ferreting out crime."[283]

None of this is to say that cross-examination of medical examiners will never be valuable, nor even that medical examiners should be excused from testifying. It is to say, though, that excluding an autopsy report because the author is dead or otherwise unavailable to testify is the sort of thing that has given the hearsay rule such a bad name. Constitutionalizing results of this kind should give us pause.

The injustices caused by excluding prosecution evidence will involve, by definition, erroneous acquittals rather than erroneous injustices, but that should provide little comfort. In the first place,

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[280] See Zabrycki, 96 Cal L Rev at 1101–13 (cited in note 244).

[281] Id at 1114.

[282] Id at 1116.

[283] *Johnson v United States*, 333 US 10, 14 (1948). Zabrycki suggested that the Supreme Court should deem a statement testimonial only if the statement was generated or elicited with the participation of "adversarial governmental officials" responsible for investigating or prosecuting the defendant. Zabrycki, 96 Cal L Rev at 1137–38 (cited in note 244). Justice Kennedy noted this suggestion with approval in his *Melendez-Diaz* dissent, see 129 S Ct at 2552, but the majority was unreceptive.

wrongful acquittals are a form of injustice. There was once a fashion in legal scholarship to dismiss pro-defense errors as socially inconsequential. The idea was that criminal trials serve solely to protect individuals against the state, and that it "inflicts no tangible harm on anyone when a criminal evades punishment."[284] That sentiment is less common today, and for good reason: it trades too obviously on a picture of the criminal justice system in which "victims do not appear."[285]

In any event, the Court's new approach to confrontation threatens unjust convictions as well as unjust acquittals. Partly this is because the *Crawford* line of cases have diverted attention from other, better ways to give meaning to the Confrontation Clause—a matter I will take up below. And partly it is because constitutionalizing the hearsay rule for prosecution evidence inevitably, if indirectly, bolsters the rule's application to evidence offered by criminal defendants, too. On a rhetorical level, it lends respectability to the old idea that hearsay's "intrinsic weakness" justifies keeping it from the jury, even when live testimony cannot be substituted. On a practical level, restrictions on prosecution hearsay make it easier to defend rules that "level the playing field" by blocking defense hearsay.

Thus, for example, the Federal Rules of Evidence contain an exception to the hearsay ban for statements by an unavailable declarant that were so plainly contrary to the declarant's interest that no reasonable person would be expected to make them unless they were true.[286] Absent corroboration, though, that exception is unavailable for statements "tending to expose the declarant to criminal liability and offered to exculpate the accused."[287] The thinking is that evidence of this kind is too unreliable: there is too large a risk of "fabrication either of the fact of the making of the confession or in its contents."[288] Before *Crawford*, this rule was sometimes defended on the ground that it blocked the defense from using unreliable hearsay analogous to some of the unreliable

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[284] David Luban, *The Adversary System Excuse*, in David Luban, ed, *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 83, 91 (Rowman, 1983); see also Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 Am Bar Found Res J 543, 553 (suggesting that "the basic purpose" of criminal procedure is "to avoid one type of error").

[285] William H. Simon, *The Ethics of Criminal Defense*, 91 Mich L Rev 1703, 1708 (1993).

[286] FRE 804(b)(3).

[287] Id.

[288] Advisory Committee Note to FRE 804(b)(3).

hearsay the Confrontation Clause stopped the prosecution from introducing. Now that the Supreme Court has suggested that the Confrontation Clause provides no protection against any form of prosecution hearsay, so long as it is "nontestimonial," amendments are pending to re-level the playing field—not by removing the corroboration requirement for statements against penal interest offered by the defense, but by statutorily extending that requirement to the prosecution.[289]

B. OTHER APPROACHES TO CONFRONTATION

On its face, the Sixth Amendment does not make testimonial hearsay inadmissible against criminal defendants. It gives a defendant the right "to be confronted with the witnesses against him." A major cost of the *Crawford* doctrine, beyond the injustices it will generate directly by excluding probative evidence offered by the prosecution, and indirectly by bolstering the exclusion of probative evidence offered by criminal defendants, is the distraction it will provide from more promising ways to interpret the Confrontation Clause.

It says something about the state of constitutional interpretation today that virtually all of the opinions in *Crawford*, *Davis*, *Giles*, and *Melendez-Diaz*—the dissents included—have assumed, at least for the sake of discussion, (*a*) that the Confrontation Clause should be interpreted today the same way it was interpreted in 1791, (*b*) that the clause was understood in 1791 to codify the then-existing law of hearsay as it applied to evidence offered against criminal defendants, and (*c*) that "to be confronted with" means, essentially, to have your lawyer cross-examine. Not all of these assumptions are new: the third, as we have seen, dates back at least to Wigmore, and the first reflects the strong version of originalism that Justices Scalia and Justice Thomas have long championed. The second

[289] See Report of the Advisory Committee on Evidence Rules (May 12, 2008). The proposed Committee Note explains that "[a] unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception." Id, attachment at 2; see also, for example, Letter to Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure, Judicial Conference of the United States, by Professor David P. Leonard, Loyola Law School, Los Angeles, at 3 (Feb 14, 2009) (commenting that "it is sensible and fair to level the playing field by imposing the same restrictions on the prosecution as are imposed on the accused").

assumption is the only one added by *Crawford*. Nonetheless, all three assumptions are leaps of faith.

Suppose we did not make them. How might we give meaning to the Confrontation Clause? One well-pedigreed strategy, which might be called liberal originalism, seeks to understand what a clause signified when it was adopted—what evils it aimed to prevent, and why—and then asks how we can best be faithful to those purposes today.[290] The guiding thought, once commonplace but today increasingly contrarian, is that a constitutional right "must be capable of wider application than the mischief which gave it birth"; otherwise principles "declared in words might be lost in reality."[291] A related strategy—less frequently endorsed than the first, but perhaps more often practiced—focuses not so much on the wording of the a constitutional clause but on the set of evolving, common-law principles for which it has served as a focal point. The question under this approach would be, not what purposes the Confrontation Clause was originally intended to serve, but what purposes our constitutional tradition suggests that it should serve today. David Strauss, who champions this second approach, calls it "common law constitutional interpretation."[292] Fortunately, we do not need to choose between the two approaches, because either would produce the same result: an understanding of the Confrontation Clause less tethered to hearsay and cross-examination, and aimed more broadly at providing criminal defendants with a meaningful opportunity "to know, to examine, to explain, and to rebut"[293] the proof offered against them.

Start with liberal originalism, which takes as its touchstone the

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[290] See, for example, Jeb Rubenfeld, *Revolution by Judiciary* (Harvard, 2005); James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago, 1990); Lawrence Lessig, *Fidelity in Translation*, 71 Tex L Rev 1165 (1993); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 Colum L Rev 1739, 1743, 1746–47, 1763–64 (2000).

[291] *Weems v United States*, 217 US 349, 373 (1910); see also, for example, *Harmelin v Michigan*, 501 US 957, 1015 (Kennedy, J, concurring in part); *Browning-Ferris Industries of Vt v Kelco Disposal*, 492 US 257, 276 (1989); *Thompson v Oklahoma*, 487 US 815, 821 n 4 (1988); *Glass v Louisiana*, 471 US 1080 (1985) (Brennan, J, dissenting); *Rummel v Estelle*, 445 US 263, 307 (1980) (Powell, J, dissenting); *Gregg v Georgia*, 428 US 153, 171 (1976) (opinion of Stewart); *Estes v Texas*, 381 US 532, 564 (1965) (Warren, J, concurring); *Poe v Ullman*, 367 US 497, 551 (1962) (Harlan, J, dissenting); *Olmstead v United States*, 277 US 438, 473 (1928) (Brandeis, J, dissenting).

[292] See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877 (1996).

[293] Pollitt, 8 J Pub L at 402 (cited in note 31).

broad underlying aims of the Confrontation Clause when it was adopted. To "confront" meant, in the late eighteenth century, essentially what it means today: to face or to challenge. Thus Alexander Hamilton, writing as Publius, complained that the anti-Federalist pamphleteer Cato had made claims about the Constitution that were refuted by the plain text of the document, and he called for Cato to be "confronted with the evidence of this fact," so that he could try to "justify or extenuate the shameful outrage he has offered to the dictates of truth and to the rules of fair dealing."[294] Similarly, James Madison argued that the Articles of Confederation could be dissolved without the unanimous consent of the states, because a breach by any party to the pact absolved the others from their continuing obligations, and any state that objected to dissolving the Confederation would have difficulty answering "the MULTIPLE and IMPORTANT infractions with which they may be confronted."[295] Another anti-Federalist, the Federal Farmer, wrote that the "unalienable or fundament rights in the United States" included the rights of a criminal defendant "to have witnesses face to face" and "to confront their adversaries before the judge."[296] It was common, in the context of court proceedings, to speak of confronting "accusers" as well as "witnesses";[297] several of the state bills of rights, for example, gave criminal defendants the right to be confronted with "accusers and witnesses."[298] Noah Webster's dictionary defined "confronted" as "[s]et face to face, or in opposition; brought into the presence of."[299] Webster offered several definitions of the root word "confront," including: (1) "[t]o stand face to face in full view; to face; to stand in front"; (2) "[t]o stand in direct opposition; to oppose";

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[294] Federalist 67 (Hamilton), in Ian Shapiro, ed, *The Federalist Papers* 340, 341 (Yale, 2009).

[295] Federalist 43 (Madison), in *The Federalist Papers* 219, 226 (cited in note 294).

[296] Letters from the Federal Farmer, No VI (Dec 25, 1787), reprinted in Herbert Storing, ed, 2 *The Complete Anti-Federalist* 262 (Chicago, 1981).

[297] See, for example, The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents (Dec 12, 1787), reprinted in Storing, 3 *The Complete Anti-Federalist* at 151 (cited in note 296); The Impartial Examiner, No I, Virginia Independent Chronicle (March 5, 1788), reprinted in Storing, 5 *The Complete Anti-Federalist* at 183 (cited in note 296).

[298] North Carolina Declaration of Rights § VII (1776); Vermont Declaration of Rights Ch I, § X (1777); see also Delaware Declaration of Rights § 14 (1776) ("accusers or witnesses").

[299] Noah Webster, 1 *An American Dictionary of the English Language* (Converse, 1828).

and (3) "[t]o set face to face; to bring up in the presence of; as an accused person and a witness, in court, for the examination and discovery of the truth; followed by with." And he defined "confrontation" as "[t]he act of bringing two persons into the presence of each other for examination and discovery of truth."[300]

There is little reason to suppose, therefore, that the phrase "confronted with the witnesses against him" would have been understood in 1791 as simply a way of referring to cross-examination and nothing more. Instead, the phrase likely carried the two broad connotations it does today: to meet the witnesses face to face; and to oppose them, to challenge their testimony. Both connotations can be found more explicitly in precursors to the Sixth Amendment. The Massachusetts Declaration of Rights and the New Hampshire Bill of Rights, for example, both gave a criminal defendant the right "to meet the witnesses against him face to face,"[301] while the North Carolina Declaration of Rights guaranteed the right "to confront the accusers and witnesses with other testimony."[302]

The language and the background of the Confrontation Clause suggest that the paradigmatic evil against which it took aim—what Jed Rubenfeld would call its "core, actuating application" or "foundational paradigm case"[303]—was, in fact, a case like Raleigh's: a case, that is to say, where state authorities questioned the key witness against a defendant outside his presence, and the defendant then requested but was denied the opportunity to face and to challenge the witness.[304] As the Court pointed out in *Crawford*, the revolutionary generation had close and bitter familiarity with proceedings of this kind, because a 1769 act of Parliament allowed customs cases to be brought in vice-admiralty courts, which historically relied on depositions and on oral testimony taken by the judge in private.[305] The language and history of the Confrontation Clause suggest something else, as well: that the underlying value the Confrontation Clause sought to protect was not, first and

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[300] Id.

[301] Massachusetts Declaration of Rights § XII (1780); New Hampshire Bill of Rights § XV (1783).

[302] North Carolina Declaration of Rights § VII (1776).

[303] Rubenfeld, *Revolution by Judiciary* at 119, 134 (cited in note 290).

[304] See text accompanying notes 186–87.

[305] See *Crawford*, 541 US at 47–48; Pollitt, 8 J Pub L at 395–97 (cited in note 31).

foremost, the specifics of cross-examination but the broader ability of an accused to test and to challenge the state's proof.

That is a value that runs deep in the Anglo-American legal tradition (and, as we have seen, in the Continental legal tradition).[306] It is also a value that is plainly worth caring about. Protecting a defendant's ability to probe the evidence offered against him serves, in fact, three more basic goals. It helps to ensure the accuracy of verdicts. It guards against authoritarian abuse of the criminal justice system—a particular concern, obviously, of the Revolutionary generation. And it accords the defendant a degree of dignity, allowing him some agency in the adjudication process and treating his input and his objections as worthy of respect. For all of these reasons, fidelity to the Framers' purposes is not the only route to this broader view of confrontation—the view that confrontation means more than cross-examination, that it means a meaningful opportunity to test and to challenge the prosecution's evidence. That is also the understanding of confrontation likely to be generated by a more open-ended assessment of how best to extend our evolving constitutional traditions.[307]

Attending to the broad values underlying the Confrontation Clause does not require ignoring its narrower aims. There are at least two reasons to interpret the Confrontation Clause today to prohibit, at a minimum, what happened to Raleigh—to require, that is to say, that the state call witnesses to testify at trial, in the defendant's presence and subject to in-court challenge, rather than rely on testimony taken in private or statements given outside of court. The first applies only to the strategy of liberal originalism. Fans of that strategy often distinguish between, on the one hand, extending a constitutional clause beyond "the mischief which gave it birth" and, on the other hand, ignoring that mischief or treating its prohibition as up for grabs. Jed Rubenfeld, for example, draws a sharp line between the "fundamental commitments" made by the Constitution and the "mere intentions" of the framers and ratifiers.[308] But he thinks that the "foundational applications" of

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[306] Consider Dennis, 2010 Crim L Rev at 271 (cited in note 174) (arguing that the confrontation rights protected under UK and European law should be understood to rest, first and foremost, on a defendant's interest in "test[ing] the probative value of the evidence").

[307] See Strauss, 63 U Chi L Rev 877 (cited in note 292).

[308] Rubenfeld, *Revolution by Judiciary* at 15 (cited in note 290).

a constitutional provision—the core, paradigmatic cases in which it was expected to apply—are themselves "definitive of the Constitution's commitments"; they are part of (but decidedly not all of) what the Constitution binds the nation to do or not to do.[309] They differ in this respect from expectations that a constitutional provision would *not* apply in a particular way: *those* understandings, "even if held by every framer and ratifier, are not commitments."[310] So "American judges are free to determine, and in fact have determined, that the Constitution's commitments require considerably more than was originally contemplated—but not less."[311]

This kind of appeal will mean little to believers in common-law constitutional interpretation. But there is a second, more pragmatic reason to think the Confrontation Clause should continue to prohibit the paradigmatic evil of Raleigh's trial—the evil, that is to say, of denying a defendant the right to meet and to challenge the key witnesses against him face to face. There may be times when the "foundational applications" of a constitutional provision no longer seem necessary, or even helpful, for securing the broader, "fundamental commitment" to which the provision seems to point, or for which it serves as a useful reminder. Those are test cases for modified, one-way-ratchet originalism of the kind that Jed Rubenfeld defends. They are also test cases, of a kind, for common-law constitutional interpretation: they force us to decide how free we really are from what might be thought the hard nucleus of original intent. The Second Amendment might present a test case of this kind; certainly there are many people who think that it does. But the Confrontation Clause is not in that category. Virtually no one thinks that what happened to Raleigh should be allowed to happen today: nobody suggests that it should be permissible to question a criminal defendant's alleged coconspirator outside the defendant's presence, introduce the results in court, and refuse to allow the defendant to question the witness himself or through his attorney.

The reason no one argues for that procedure is that it seems as threatening today as it did in the eighteenth century—or, for that matter, in Raleigh's time—to the underlying value protected

[309] Id; see also id at 119, 134.

[310] Id at 15.

[311] Id at 147.

by the Confrontation Clause, the ability of a defendant to test the prosecution's evidence. That is why the procedural right of a criminal defendant to challenge prosecution witnesses in open court, when they are available to testify, is so widely recognized as fundamental today, not just in common-law systems but also in civil-law countries and as a matter of international law.[312] The American hearsay rule—barring indirect evidence even when, through no fault of the government, direct proof is impossible—is more and more a global anomaly. But the procedural right to have informants and alleged accomplices questioned in open court has much broader support.

We can therefore safely bracket the question whether, at some point in the future, there might be grounds for thinking that procedure an obsolete means to the underlying goals of the Sixth Amendment. We are nowhere near that point today. I want to bracket, as well, certain recurring questions about how the courtroom confrontation should proceed: what limits should be allowed on cross-examination,[313] and whether some vulnerable witnesses, such as a young child the defendant is accused of abusing, should be permitted to testify outside the defendant's presence.[314] These are important questions, but they are tangential to the issue at the heart of this article: the Supreme Court's use of the Confrontation Clause to constitutionalize the hearsay rule. And they cast no doubt on the continued prohibition, under the Confrontation Clause, of the procedures followed in Raleigh's trial, and in the smuggling cases that so rankled the American colonists.

The Supreme Court was right in *Crawford* to treat those cases as the paradigmatic abuses targeted by the Confrontation Clause. The Court was right, also, to infer from those "foundational applications" that the Confrontation Clause bars some prosecution hearsay: that it is not limited, as Wigmore suggested, to governing the mode of testimony for any witness that the state chose to call at trial.[315] Construed that narrowly, the clause would prohibit ex parte taking of testimony at trial—the kind of thing permitted in vice-admiralty courts—but not the procedures followed in cases

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[312] See text accompanying notes 161–75.

[313] See, for example, *Olden v Kentucky*, 488 US 227 (1988); *Delaware v Van Arsdall*, 475 US 673 (1986); *Davis v Alaska*, 415 US 308 (1974).

[314] Compare *Coy v Iowa*, 487 US 1012 (1988), with *Maryland v Craig*, 497 US 836 (1990).

[315] See note 180 and accompanying text.

like Raleigh's. As Justice Scalia pointed out for the Court in *Crawford*, Raleigh was "perfectly free to confront those who read Cobham's confession in court."[316] That option plainly did not give Raleigh what the Confrontation Clause aimed to provide: a meaningful opportunity to test and to challenge the state's proof. Given how powerfully the procedures in Raleigh's case threatened the underlying goals of the Confrontation Clause, and given the notoriety of the case from the seventeenth century on, restricting the clause as Wigmore suggested has little to recommend it.

For similar reasons, it makes little sense to read the Confrontation Clause to bar evidence of out-of-court statements only when they are obtained through some kind of formal, judicial or quasi-judicial procedure. Justice Thomas has suggested the provision should be interpreted in this way,[317] but the Court has been right to reject the suggestion. Even if Cobham's interrogation is thought sufficiently formal to satisfy Justice Thomas's test, the modern analogs of that interrogation are typically carried out by police officers, in settings that have few trappings of procedural formality. Letting prosecutors rely on those statements, and denying criminal defendants a chance to question the witnesses who make them, straightforwardly abridges defendants' right to test and to challenge the evidence against them. Criticizing Justice Thomas's position, Justice Scalia reasoned sensibly in *Davis* that "[r]estricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction"[318]—a nice way of saying that the provision "must be capable of wider application than the mischief which gave it birth."[319]

So the Court was right in *Crawford*—and in *Davis*, *Giles*, and *Melendez-Diaz*—to focus on the paradigmatic abuses targeted by the Confrontation Clause, and it was right to generalize from those abuses. The problem was how the Court generalized. Instead of seeing, in the Confrontation Clause, a fundamental commitment to let criminal defendants test and challenge the state's proof, the Court saw a provision aimed, above all, at barring "the civil-law mode of criminal procedure."[320] *That* was "the principal evil at

[316] *Crawford*, 541 US at 51.

[317] See *Davis v Washington*, 547 US 813, 835–36 (2006) (Thomas, J, dissenting in part).

[318] Id at 830 n 5 (opinion of the Court).

[319] *Weems*, 217 US at 373.

[320] *Crawford*, 541 US at 50.

which the Confrontation Clause was directed"[321]—the alien procedural system of Continental Europe. The *Crawford* line of cases are part of a broader, recently revived pattern in constitutional criminal procedure: the treatment of "civil-law traditions"[322] and their "magistrate-directed, inquisitorial legal system,"[323] as a kind of constitutional bogeyman, a negative polestar against which our system can be defined. Elsewhere I have argued, on general grounds, that this approach to constitutional criminal procedure is unjustified and misguided.[324] Here I want to stress the way in which it clouded the Court's view of the Confrontation Clause.

Because the Court has treated the Confrontation Clause as aimed, first and foremost, at entrenching the common-law system of criminal adjudication and warding off the rival, civil-law system, the Justices have found it easy to suppose that the confrontation the Sixth Amendment guarantees must have to do, at bottom, with promoting cross-examination (long celebrated as the common law's most important and most distinctive contribution to criminal adjudication) and prohibiting hearsay (the best known and most characteristic feature of the Anglo-American law of evidence). The Court's fixation on the divide between common-law systems and civil-law systems pushed it away from any understanding of the Confrontation Clause that would tie it to values shared by the common-law and civil-law traditions—such as protecting a defendant's broad ability to test and to challenge the state's proof.

Suppose we took seriously the idea that the fundamental aim of the Confrontation Clause is not guarding against civil-law taint but instead safeguarding the ability of a defendant to probe and to fight back against the evidence offered against him. What would safeguarding that ability mean, in our day—beyond barring the kind of ex parte testimony that made Raleigh's trial so infamous?

Melendez-Diaz is a nice point of entry for that inquiry, because the laboratory analyses at issue in that case are part of an epochal, ongoing transformation of criminal adjudication: the rapidly increasing importance of scientific evidence. In a variety of ways, the "scientization of proof"[325] has rendered traditional ways of

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[321] Id.

[322] *Blakely v Washington*, 542 US 296 (2004).

[323] *Sanchez-Llamas v Oregon*, 548 US 331, 357 (2006).

[324] See Sklansky, 122 Harv L Rev 1634 (cited in note 176).

[325] Damaška, *Evidence Law Adrift* at 147 (cited in note 30).

challenging the prosecution's case—including cross-examination—flagrantly inadequate.[326] Defense attorneys lack the technical training to assess scientific evidence and to spot its potential weaknesses.[327] They lack connections with independent experts and the resources to hire them.[328] They lack access to the computerized databases upon which the most advanced forms of forensic science, such as DNA typing, heavily rely.[329] Even if they could mount a meritorious challenge to the scientific evidence offered by the prosecution, they generally lack an audience—on the bench or in the jury box—with the background to understand it.[330] Beyond all this, an individual defense attorney, bound by tradition and professional ethics to a single-minded focus on the representation of a particular client, lacks the time, the incentive, and the organizational platform needed to oversee forensic laboratories in the systematic way that legal scholars and scientists increasingly say is required.[331]

There is growing recognition that these deficiencies have allowed shoddy and sometimes fraudulent forensic science to go unchallenged, leading in a distressing number of cases to wrongful convictions.[332] Justice Scalia's majority opinion in *Melendez-Diaz* cited a review by Brandon Garrett and Peter Neufeld of the first 220 convicted defendants subsequently exonerated by DNA testing; their findings make clear that "invalid forensic science" was involved in a significant fraction of these cases.[333] What Justice

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[326] See, for example, id; Brandon L. Garrett and Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va L Rev 1, 33, 89 (2009); Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Cal L Rev 721 (2007).

[327] See, for example, Murphy, 95 Cal L Rev at 753–56, 770–71 (cited in note 326).

[328] See, for example, id at 771–72; Garrett and Neufeld, 95 Va L Rev at 33–34 (cited in note 326).

[329] See Murphy, 95 Cal L Rev at 751–53, 772–74 (cited in note 326).

[330] See, for example, Damaška, *Evidence Law Adrift* at 144–47 (cited in note 30); National Research Council, Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science in the United States: A Path Forward* 85 (National Academies, 2009); Murphy, 95 Cal L Rev at 768–70 (cited in note 326).

[331] See, for example, National Research Council, *Strengthening Forensic Science* at 214–15 (cited in note 330); Murphy, 95 Cal L Rev at 761–63 (cited in note 326).

[332] See, for example, Pamela R. Metzger, *Cheating the Constitution*, 59 Vand L Rev 475, 491 (2006).

[333] See Garrett and Neufeld, 95 Va L Rev 33 (cited in note 326). Justice Scalia read the study to conclude that "invalid forensic testimony contributed to the convictions in 60% of the cases," *Melendez-Diaz v Massachusetts*, 129 S Ct 2527, 2537 (2009), but this exaggerates the findings. Out of the 220 cases of exoneration they reviewed, Garrett and

Scalia glossed over is that all of these cases of bad forensics contributing to wrongful convictions appear to have involved live, in-court testimony by forensic analysts.[334] Garrett and Neufeld did not identify *any* cases in which hearsay from forensic analysts contributed to the conviction of innocent defendants. (Indeed, as I noted earlier, none of the exoneration cases to date involve trials in which hearsay exceptions of any kind seem to have played a significant role.) Instead, what they found was that cross-examination of the analysts was rarely effective in disclosing flaws in their work or their reasoning;[335] that defense counsel rarely retained their own experts, because "courts routinely denied funding";[336] and that even when defendants *did* present testimony from their own experts, the experts were sometimes "inexperienced" and lacked "access to the underlying forensic evidence."[337] The result was that there was rarely a "meaningful challenge" to "invalid forensic science testimony."[338]

The Court acknowledged in *Melendez-Diaz* that there might be "other ways—and in some cases better ways—to challenge or verify the results of a forensic test," but it reasoned that "the Constitution guarantees one way: confrontation."[339] That is surely true, but the Court also assumed that "confrontation" was synonymous with "testing in the crucible of cross-examination"[340]—an assumption that, for reasons that I hope are becoming clear, has little to recommend it. The text says "confronted with," not "cross-examine." The framers and ratifiers of the Sixth Amendment do not appear to have used those terms interchangeably. And reading the Confrontation Clause as narrowly focused on cross-examination and

Neufeld identified 156 in which forensic evidence was presented—71% of the total. See Garrett and Neufeld, 95 Va L Rev at 12 (cited in note 326). They obtained trial transcripts for 137 of those 156 cases, and concluded that 60% of those 137 cases—a total of 82—"involved invalid forensic science testimony." See id at 12–14. Their findings thus suggest that bad forensics were involved in somewhere around 43%—i.e., 60% of 71%—of the 220 cases of exoneration that Garrett and Neufeld reviewed.

[334] See Garrett and Neufeld, 95 Va L Rev at 12 (cited in note 326). Some of the cases, though, did involve one examiner reporting work carried out by another. Telephone interview of Brandon Garrett, July 30, 2009.

[335] See Garrett and Neufeld, 95 Va L Rev at 10–11, 89 (cited in note 326).

[336] Id at 11.

[337] Id at 90.

[338] Id.

[339] *Melendez-Diaz*, 129 S Ct at 2536.

[340] Id, quoting *Crawford*, 541 US at 61.

the exclusion of hearsay increasingly disserves the underlying goal of the provision by diverting attention from what defendants require, today, in order to mount a meaningful challenge to the state's proof.

In the case of forensic science, meaningful confrontation likely requires a good deal more than disclosure of the results reached by the prosecution's analysts and their methodology. At a minimum, defendants probably need access to independent experts, to the underlying databases on which the state relies, and—where feasible—to samples and materials that will allow them to carry out their own tests.[341] The Supreme Court has rejected, in other contexts, the argument that effective confrontation may require pretrial access to certain categories of critical information,[342] but that position deserves reconsideration. It may also be that defendants cannot challenge forensic proof effectively on an individual, case-by-case basis; to make the Confrontation Clause more than an empty formalism in the increasing number of criminal cases that rely heavily on scientific proof, it may be necessary to put into place certain systemic protections—for example, regulatory oversight of forensic labs, and facilitation of information-pooling by defense attorneys.[343]

In addition to creating new challenges for criminal defendants, scientific advances have also changed our understanding of what defendants need in order to confront more traditional forms of state proof. For example, evidence has been accumulating for almost a century that eyewitness identifications are far less reliable than jurors (and many judges) tend to think they are, that they are prone to certain predictable forms of error, and that cross-examination offers limited protection against these risks. The evidence has grown much more compelling over the past few decades, partly because of a steadily growing body of research by experimental psychologists, partly because a broad consensus has emerged among experts about what that research shows, and partly because a majority of the wrongful convictions exposed by subsequent DNA testing have involved erroneous eyewitness testi-

[341] See, for example, Murphy, 95 Cal L Rev at 753, 790–91 (cited in note 326).

[342] See *United States v Ritchie*, 480 US 39 (1987); *United States v Bagley*, 473 US 667 (1985); Wayne R. LaFave et al, 6 *Criminal Procedure* § 24.3(a), at 341–43 (3d ed 2007).

[343] See Murphy, 95 Cal L Rev at 777, 788–91 (cited in note 326).

mony, against which cross-examination proved ineffective.[344]

An emerging consensus among psychologists and legal experts familiar with the problems of eyewitness identifications supports the use of expert testimony to inform the jury about those problems. Expert testimony of this kind is now widely accepted—but far from universally accepted.[345] Many courts continue to reason that expert testimony about the hazards of eyewitness identifications is unnecessary and inappropriate, and that cross-examination can be relied upon as a sufficient check against error. This is particularly common when eyewitness identification testimony is corroborated by other evidence, even when the other evidence is itself questionable. Courts often reason that cross-examination, followed and supported by defense counsel's arguments to the jury, is the historic and time-tested way for criminal defendants to expose the weakness in prosecution evidence, including eyewitness identifications.[346] They assume, in other words, what the Supreme Court assumed in *Crawford* and its successor cases, echoing Wigmore: that confrontation means cross-examination and nothing more. But perhaps a right to confront eyewitness testimony in the twenty-first century should mean more than an opportunity for cross-examination, at least in any case in which an eyewitness identification plays an important role. Perhaps it should entail some properly circumscribed entitlement to challenge the prosecution's proof through expert testimony on the hazards of eyewitness identifications. Precisely how such an entitlement should be circumscribed is a question for another article. The important point for present purposes is that the Supreme Court has closed off this avenue of inquiry as a matter of constitutional doctrine by reading the Confrontation Clause as, effectively, a codification of eighteenth-century hearsay doctrine.

In theory, analysis of this kind could be conducted without reference to the Confrontation Clause; instead, courts could ask whether a particular kind of assistance in confronting the state's proof is included in the right to present a defense—a right the

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[344] See Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L Rev 727 (2007).

[345] See, for example, id; Richard S. Schmechel et al, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Research*, 46 Jurimetrics J 177 (2006).

[346] See, for example, *Ford v Dretke*, 135 F Appx 769, 772 (5th Cir 2005); Epstein, 36 Stetson L Rev at 727–28 (cited in note 344).

Supreme Court has derived "in significant part" from "the Fourteenth Amendment's due process guarantee of fundamental fairness."[347] Two decades ago, in *Ake v Oklahoma*, the Court relied upon this right in concluding that the state needed to provide a court-appointed psychiatrist to an indigent capital defendant who made clear before trial that his sanity would play a large role in his defense.[348] The Court reasoned in *Ake* that fundamental fairness required giving a criminal defendant access to the "basic tools of an adequate defense."[349] The same language could be used in asking what resources, access, and organizational support a defendant needs in order to meaningfully challenge forensic science evidence or an eyewitness identification.[350]

In practice, though, the right recognized in *Ake* has proven narrow. Some lower courts have explicitly limited *Ake* to the context of court-appointed psychiatrists. Others have reached essentially the same result by refusing to treat anything as a "basic tool of an adequate defense" if the defense could be raised without it.[351] As David Harris has pointed out, "the presence of a psychiatrist in *Ake* was an all-or-nothing proposition": insanity was the only defense raised, and it was inconceivable that the defense could be raised without a psychiatrist.[352] When a resource requested by the defense is not "a virtual necessity"[353] in this sense—because, for example, forensic science or eyewitness testimony is only part of the prosecution's case, or because cross-examination is thought to be the classic, "most basic" way to challenge the prosecution's evidence—courts often find *Ake* inapplicable.[354]

The problem is twofold. First, confrontation is not always

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[347] *Ake v Oklahoma*, 470 US 68 (1985).

[348] Id at 86–87.

[349] Id at 77, quoting *Britt v North Carolina*, 404 US 226, 227 (1971).

[350] See, for example, Jay A. Zollinger, Comment, *Defense Access to State-Funded DNA Experts: Considerations of Due Process*, 85 Cal L Rev 1803 (1997).

[351] See, for example, David A. Harris, *The Constitution and Truth Seeking: A New Theory of Expert Services for Indigent Defendants*, 83 J Crim L & Criminol 469, 484–87 (1992).

[352] Id at 486.

[353] *Ake*, 470 US at 81, quoting Martin R. Gardner, *The Myth of the Impartial Psychiatric Expert—Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 Law & Psychol Rev 99, 113–14 (1976).

[354] *Ford*, 135 F Appx at 772; see Epstein, 14 Widener L Rev at 439 (cited in note 64); Paul C. Ginnelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 Cornell L Rev 1305, 1356 (2004); Harris, 83 J Crim L & Criminol at 484–86 (cited in note 351); Zollinger, 85 Cal L Rev at 1810–15 (cited in note 350).

treated as an integral part of the right to present a defense. Second, when confrontation *is* treated as an integral part of the right to present a defense, it tends to be understood narrowly as a right to cross-examination, rather than more robustly as an opportunity "to know, to examine, to explain, and to rebut"[355] the state's evidence. The first half of the problem could be addressed by understanding the right to present a defense the way a number of scholars have urged that it be understood: as a kind of interpretive synthesis of a criminal defendant's Sixth Amendment rights to confrontation "with the witnesses against him" and to "compulsory process for obtaining witnesses in his favor"—and perhaps also of the Sixth Amendment right to "the Assistance of Counsel."[356] The second half of the problem, though, requires reading the right to confrontation less woodenly than the Supreme Court has done. It requires a construction of the clause attendant to its broad, underlying purposes, and not just to the specific "mischief which gave it birth."[357]

c. civil and criminal cross-comparison

Beyond the predictable injustices that will result from the exclusion of probative evidence, and beyond the distraction the *Crawford* line of cases provide from more productive ways to interpret the Confrontation Clause, there is a third reason to be concerned about the manner in which the Supreme Court has now constitutionalized the hearsay rule. We have seen that the damage caused by recent confrontation cases may be aggravated by the ramifications the decisions will have outside the area of their direct application: restrictions on prosecution hearsay are likely to bolster restrictions on hearsay offered by criminal defendants. At the same time, though, *Crawford* will make a different, more helpful kind of doctrinal cross-comparison *less* likely.

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[355] Pollitt, 8 J Pub L at 402 (cited in note 31).

[356] US Const, Amend VI; see, for example, Harris, 83 J Crim L & Criminol 469 (cited in note 351); Jonakait, 27 Rutgers L J 77 (cited in note 187); Peter Westen, *The Compulsory Process Clause*, 73 Mich L Rev 72, 182–84 (1974); consider *California v Green*, 399 US 149, 176 (Harlan, J, concurring) (suggesting that "the confrontation guarantee may be thought, along with the right to compulsory process, merely to constitutionalize the right to a defense as we know it"); Amar, *Constitution and Criminal Procedure* at 130, 244 n 189 (viewing the Confrontation Clause and the Compulsory Process Clause as "fraternal twin[s]").

[357] *Weems*, 217 US at 373; see note 291 and accompanying text.

Because the version of the hearsay rule the Supreme Court has read into the Confrontation Clause is the eighteenth-century version—or at least what the Justices take to have been the eighteenth-century version—the Court has effectively frozen the hearsay rule, as applied to the evidence offered against criminal defendants, in the 1790s. The hearsay rule operating in civil cases, meanwhile, can continue its evolution—and gradual decline. The rhetorical support that *Crawford* and subsequent cases have provided for the hearsay rule—the credence these decisions lend to the traditional treatment of hearsay as too unreliable to count as evidence—might be expected to spill over to civil cases, just as it has to evidence offered by criminal defendants. But while judges and legislators often seek to "level the playing field" between prosecutors and criminal defendants, there is no similar instinct to equalize the restrictions on civil and criminal litigants. They are not on the same playing field to begin with.

In the wake of *Crawford*, for example, the Advisory Committee on Evidence Rules has sought to equalize the restrictions placed on the prosecutors and criminal defendants invoking the hearsay exception for declarations against penal interest, but it has made no effort to have the same rule apply in civil and criminal cases. The committee has proposed that both prosecutors and criminal defendants—but not civil litigants—be required to supply corroboration for any hearsay they seek to introduce under the exception for declarations against penal interest. The inconsistency between the rule in criminal cases and civil cases does not trouble the committee, given "the different policy questions that might be raised with respect to declarations against penal interest offered in civil cases"[358]—an oblique reference, presumably, to the fact that neither side in a civil case is bound by the Confrontation Clause. Nor is the committee alone in its approach; as far as the committee could tell, only one court had ever suggested that the corroboration requirement should be extended to civil cases.[359] In contrast, appellate courts have repeatedly and uniformly applied the corroboration requirement to all statements against penal interest offered in criminal cases, even though the explicit language

[358] Report of the Advisory Committee on Evidence Rules 2 (May 12, 2008); see note 289 and accompanying text.

[359] Id.

of the rule applies only to evidence offered by the defense.[360]

It was once much more common to compare the rules governing hearsay and confrontation in criminal cases with the parallel rules in civil cases. There was a kind of informal, rebuttable presumption that the rules should be similar, absent some special reason for them to differ. That presumption also operated—and continues to operate—for evidence law more generally. As a result there has long been a continual and constructive dialectic between the rules and practices governing proof in civil cases and the parallel rules and practices in criminal cases.[361] A hearsay exception developed in civil cases might give rise to difficulties in criminal cases—and those difficulties might lead to reconsideration of the exception in civil cases, as well.

Confrontation doctrine and hearsay law both used to be like evidence law more broadly in this respect; there was a regular practice of comparing practices across the civil-criminal divide. Like the rest of evidence law, the hearsay rule is framed the same for criminal and for civil cases, and so are most (but not all) of the exceptions to the rule. The Confrontation Clause, in contrast, is limited by its terms to criminal cases. But there is, or was, a tradition of treating the rule as pointing toward a broader principle of fairness applicable not just in criminal prosecutions but in civil and administrative proceedings as well—particularly those civil and administrative proceedings with stakes arguably as important as those in many criminal cases.

In the 1950s, for example, the procedures followed in employment cases involving alleged "security risks" were forcefully and sometimes successfully challenged on the ground that, as a matter of logic and basic fairness, the right to confrontation set forth in the Sixth Amendment "applies with equal vigor to civil proceedings."[362] Here is the Supreme Court in 1959, for example, striking down procedures used to revoke the security clearance of an engineer employed by a government contractor:

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[360] See Edward J. Imwinkelried, *Rethinking the Limits of the Interpretive Maxim of Constitutional Avoidance: The Case Study of the Corroboration Requirement for Inculpatory Declarations Against Penal Interest (Federal Rule of Evidence 804(b)(3))*, 44 Gonzaga L Rev 187, 189, 200–01 (2009).

[361] See Sklansky and Yeazell, 94 Georgetown L J at 728–33 (cited in note 32).

[362] Pollitt, 8 J Pub L at 401 (cited in note 31); see also, for example, Robert B. McKay, *The Right of Confrontation*, 1959 Wash U L Q 122, 128–67.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative and regulatory actions were under scrutiny.[363]

Eleven years later, the Court quoted this language when ruling that welfare recipients facing a termination of their benefits have a due process right "to confront and cross-examine the witnesses relied upon by the department."[364] But *Goldberg v Kelly* proved to be the beginning of the end—not just of welfare rights as a branch of due process, but of the idea that the Confrontation Clause could meaningfully be invoked in civil cases as well as criminal cases. Nowadays invocations of the Confrontation Clause are rejected out of hand in civil cases, no matter how high the stakes.[365]

The legal historian S. F. C. Milsom has stressed the productive use the common law has made of the dialectic—the confrontation, if you will—between "lines of reasoning" that develop "in separate compartments" but on occasion "come sufficiently close for a situation which has traditionally fallen under the one to be represented as within the other."[366] This is a method of development that draws strength from redundancy and inconsistency. In order for it to work, sets of rules need to develop separately, but not entirely separately; there needs to be periodic cross-comparison,

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[363] *Greene v McElroy*, 360 US 474, 496–97 (1959).

[364] *Goldberg v Kelly*, 397 US 254, 270 (1970).

[365] See note 33.

[366] S. F. C. Milsom, *Reason in the Development of the Common Law*, in *Studies in the History of the Common Law* 149, 152 (Hambledon, 1985).

but not full coordination, between two or more bodies of law that address similar problems.

Some areas of constitutional law have precisely this character, and have developed in much the way Milsom described. First Amendment law is a good example, and so is Fourth Amendment law. Each of these fields has developed a hodgepodge of overlapping doctrinal boxes that develop semiautonomously. First Amendment law has separate rules for commercial speech, for public forums, for campaign finance, and so forth; Fourth Amendment law has specially tailored doctrines for automobile searches, for border searches, for searches incident to arrest, for "special needs" searches, and on and on. In each case, there are regular complaints (mostly from scholars, not from judges or lawyers) about doctrinal disorder, but there is reason to think the redundancy and inconsistency have facilitated the progressive improvement of the law: "overall disorder" is the price paid for "logical strength in detail."[367] Equal protection doctrine, by contrast, is much more unified, and the uniformity may well have stunted its development.[368] Various aspects of civil and criminal procedure have historically had the opposite problem: the separate sets of rules for civil cases and for criminal cases have been kept *too* isolated from each other, and there has been too little cross-comparison.[369]

Evidence law, to its benefit, has been different. Special rules of proof for civil or criminal cases have been viewed with skepticism, and that skepticism has proven useful.[370] Everyone recognizes that the rule governing proof in civil and criminal cases sometimes *should* diverge, but it is has proven productive to ask whether that is true in particular instances, and if so, why. Confrontation doctrine and hearsay law both used to be like evidence law more broadly in this respect, but over the past few decades confrontation has come to be seen, more and more, as a concern in criminal cases only.

The *Crawford* line of cases promises to accelerate that process.

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[367] Id at 166; see also, for example, David A. Sklansky, *The Private Police*, 46 UCLA L Rev 1165, 1271–72 (1999).

[368] See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 Stan L Rev 1283, 1312–15 (1995).

[369] See Sklansky and Yeazell, 94 Georgetown L J at 696–727 (cited in note 32).

[370] See id at 728–33.

When confrontation law loosely tracked *modern* hearsay law, a degree of cross-fertilization between civil and criminal cases was inevitable, because the hearsay rule itself operated the same, for the most part, across the civil-criminal divide. After *Crawford*, the Confrontation Clause continues to be linked to hearsay law, but to eighteenth-century hearsay law, not the modern, more lenient hearsay law applied in civil cases. As a consequence, confrontation discourse thus is now fully decoupled from the concerns raised in civil cases: confrontation decisions do not implicate civil controversies, and the problems judges encounter in civil cases do not inform the development of confrontation doctrine. For the most part, *Crawford*'s decoupling of the criminal and civil rules for out-of-court statements has been warmly applauded. I have tried to suggest here why the applause may not be warranted. By yoking the Sixth Amendment to eighteenth-century hearsay law, the recent confrontation decisions have impeded a form of doctrinal cross-comparison that in the past has helped both hearsay law and confrontation law progressively improve.

Over the long term, the cross-comparison is probably inevitable, whatever the Supreme Court says. The issues encountered in civil and criminal cases are too similar for judges and lawyers not to draw analogies. Over the long term, the hearsay rule is probably doomed, in criminal as well as civil cases. It keeps out too much probative evidence, with too little justification. There are good reasons to insist on live testimony, when it can feasibly be procured. When direct proof is unavailable, though, flatly barring secondary evidence makes little sense. That is why the hearsay rule has long been in decline around the globe, and that is why its days are likely numbered in the United States, as well.

For the time being, though, *Crawford* has given the hearsay rule a final day in the sun. The results will be predictable injustices, in the form both of guilty defendants escaping conviction and innocent defendants found guilty; a diversion of judicial and legislative attention from other, more promising ways to bring meaning to the Confrontation Clause; and less appreciation than ever before for the respects in which out-of-court statements in criminal and civil cases raise similar concerns.