THE "HORSE-STEALER'S" TRIAL RETURNS: HOW *CRAWFORD*'S TESTIMONIAL–NONTESTIMONIAL DICHOTOMY HARMS THE RIGHT TO CONFRONT WITNESSES, THE PRESUMPTION OF INNOCENCE, AND THE "BEYOND A REASONABLE DOUBT" STANDARD

*Liza I. Karsai**

ABSTRACT

The Sixth Amendment to the U.S. Constitution provides a criminal defendant with the right to confront the witnesses against him. In Crawford v. Washington*, the Supreme Court set out a bright-line test, under which the right of confrontation applies only to (1) witnesses who appear at trial, and (2) hearsay declarants whose out-of-court statements are "testimonial." The Court has never fully defined "testimonial" but, at a minimum, testimonial statements include "formal" statements made for the primary purpose of establishing or proving a past fact for use as evidence. Hearsay statements that were not made with the primary purpose of furnishing evidence—such as statements to friends and family members, statements to jailhouse informants, and government surveillance recordings of statements made by individuals who lacked awareness of the surveillance—have been classified as "nontestimonial" in the Court's dicta or by lower courts applying* Crawford*'s test. Nontestimonial statements are subject only to any hearsay rules in the relevant jurisdiction. Accordingly, if the hearsay rule is liberalized or abolished in the future, the effect would be to further liberalize the admission of unconfronted, nontestimonial statements as evidence of guilt at a criminal trial.*

This Article challenges Crawford*'s approach and cautions against the liberal admission of unconfronted, nontestimonial hearsay. At Sir Walter Raleigh's 1603 trial, when Raleigh complained that common law trials were by*

* Associate Professor of Law, Atlanta's John Marshall Law School. This Author thanks Dean Richardson Lynn, Professor Anthony Baker, and Professor Jeffrey van Detta for their helpful comments on earlier drafts of this Article. This Authors also wishes to thank her research assistant, Faith Lynn, for providing excellent research and other support. Finally, this Author is grateful to Mary Wilson, Head of Public Services at Michael J. Lynch Law Library at Atlanta's John Marshall Law School, for her invaluable research assistance.

witnesses, Judge Warburton reportedly responded, "I marvel, Sir Walter, that you being of such Experience and Wit, should stand on this Point [that the common trial of England is by jury and witness]; for so, many Horse-stealers may escape, if they may not be condemn'd without Witnesses." By defining "witness" as only a person who testifies at trial or has made a testimonial statement, Crawford *allows a trial that permits the use of nontestimonial hearsay as a substitute for the production of witnesses to the events.* Crawford *thus, in part, revives the 17th century use of unconfronted hearsay and, taken to its extreme, allows convictions without the necessity of live-witness testimony.*

Examination of the history and evolution of the hearsay rule and of the Confrontation Clause demonstrates that Crawford*'s rationale lacks support.* Crawford*'s ill-effects are threefold: (1)* Crawford *operationally reduces the Confrontation Clause to an imprecise rule of evidence; (2) it ignores the nonepistemic values of the hearsay rule and the Confrontation Clause; and (3) it further weakens the right to confront witnesses, the presumption of innocence and the "beyond a reasonable doubt" standard. Proposals to redefine "testimonial" illustrate that* Crawford*'s bright-line test will naturally fluctuate based on the assessed importance of convicting guilty defendants as compared to the danger of convicting innocent defendants.*

The problem with modern Confrontation Clause jurisprudence is not the linkage between the Confrontation Clause and the hearsay rule. Rather, the problem is that the right has been linked with postratification hearsay exceptions that are founded upon positivist justifications of courtroom efficiency and government need. Scholars and the Court should reconsider the right from the perspective of the individual whom the right is supposed to protect, rather than from the perspective of the system that seeks to convict the individual. A better approach to the right would require confrontation of witnesses and hearsay declarants whose statements are offered to prove a fact supporting a finding of guilt of the charged crime, tempered by the use of equitable rules, such as the doctrine of forfeiture by wrongdoing. Restoring the Confrontation Clause requires that the government produce witnesses to testify viva voce, so that confrontation can occur.

TABLE OF CONTENTS

I. INTRODUCTION

In 1928, Frank Lowden described the courts as part of the "machinery" of the criminal justice system, comprised of the criminal, the police, and the courts.[1] The interrelationship of these three parts of the machinery led Lowden to express the moral that "[o]ur police must catch a larger per cent of criminals, and our courts must tighten up on their procedure" so that the prisons, reformatories, and probation "divisions of the machinery of criminal justice can act" upon a greater "part of the criminal crop."[2] Historically, the Supreme Court's interpretation of constitutional rights has played a large role in maintaining the criminal justice system's machinery by setting its procedures. How and whether a

1. Frank O. Lowden, *Criminal Statistics and Identification of Criminals*, 19 J. AM. INST. CRIM. L. & CRIMINOLOGY 36, 36–37 (1928). Lowden was the chairman of a subcommittee on "pardons, parole, probation, penal laws and institutional correction" that prepared a report submitted to the National Crime Commission. *Id.* at 36 n.1.

2. *Id.* at 37.

defendant is able to rely upon the constitutional rights enshrined in the Bill of Rights depend upon the Court's views of criminal justice reform.[3]

In 1980, in *Ohio v. Roberts*, the Court made it easier to convict defendants by permitting the government to introduce hearsay statements that fell within a "firmly rooted" hearsay exception or were accompanied by independent indicia of reliability.[4] Less than 25 years later, the Court abandoned *Roberts* because "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."[5] Instead, the Court adopted a bright-line test: statements that are "testimonial" in nature are subject to confrontation, while those that are "nontestimonial" are not.[6] Close examination of *Crawford v. Washington* suggests that, laudable though its original goals may have been,[7] it is irreconcilable with

3. *See* Louis D. Bilionis, *Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law*, 52 UCLA L. REV. 979, 995–98 (2005). Professor Bilionis writes:

> [B]y the year 2000, Chief Justice Rehnquist himself would come to author the definitive reaffirmation of *Miranda*. He could do so without discomfort because by then the reformation [of criminal law] had triumphed. A long string of decisions of lesser public notoriety had recast criminal justice in terms far more favorable to the forces of law and order than popular opinion might ever realize. Fourth, Fifth, Sixth, and Fourteenth Amendment rights against various police practices remained, but they applied in confined circumstances and were reviewed under standards more forgiving of law enforcement. . . . Trial safeguards like the right to effective assistance of counsel, the right of confrontation, and the right to the disclosure of exculpatory evidence were subordinated to the government's interest in obtaining convictions and making them stick.

Id. at 995–96 (footnotes omitted).

4. Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004). In *Roberts*, the Court noted that, if read literally, the Confrontation Clause would require exclusion of hearsay when the declarant is unavailable at trial. *Id.* at 63. "[I]f thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Id.*; *see, e.g.*, Reynolds v. United States, 98 U.S. 145, 158 (1878) (justifying admission of witness's former sworn trial testimony in another case against the same defendant not on the ground that the defendant had a prior opportunity for cross-examination, but because the defendant forfeited his right to confrontation by making the witness unavailable).

5. *Crawford*, 541 U.S. at 61.

6. *Id.* at 68.

7. *See, e.g.*, Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2003–2004 CATO SUP. CT. REV. 439, 445, 451 (2004) (praising the *Crawford* Court for "mak[ing] clear that the principal—and perhaps only—focus of the

the Sixth Amendment right to confront witnesses,[8] the presumption of innocence, and the beyond the reasonable doubt standard, because it allows proof of facts through witnesses without an opportunity to confront them. In an age of unprecedented capacities for wiretapping and technological surveillance that make possible the gathering and processing of nontestimonial hearsay,[9] *Crawford* leaves open the potential for trial and conviction without the presentation of witnesses with firsthand knowledge. For example, *Crawford* has enabled the evidentiary use of a coconspirator's wiretapped conversation without requiring production of that witness, on grounds that the statements are nontestimonial and fall within a hearsay exception.[10] If hearsay exceptions are expanded, or if the hearsay rule is abolished, more unconfronted, nontestimonial evidence will be admissible with no opportunity for confrontation.

Scholars who favor evidence-law reform in the tradition of evidence scholar Professor James Bradley Thayer[11] advocated abolishing the hearsay rule or greatly expanding the number of exceptions to the rule.[12] The

Confrontation Clause is *testimonial* statements," which is "in accord with the basic idea that motivated [its] adoption"); *see also Crawford*, 541 U.S. at 57–60 (asserting that the Court's precedent had been faithful to the conclusion articulated by *Crawford* that the Confrontation Clause bars the admission of unconfronted testimonial statements against the accused, while also excoriating the *Roberts* test for being both too narrow and too broad in its reach).

8. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

9. *See generally* 1 DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS § 11:15 (2d ed. 2012) (discussing PATRIOT Act and Foreign Intelligence Surveillance Act (FISA) case law addressing the standard for permissible warrantless electronic surveillance when obtained in part for domestic law enforcement purposes).

10. United States v. Johnson, 581 F.3d 320, 324–26 (6th Cir. 2009).

11. In his 19th century treatise on evidence law, Professor Thayer argued for greater freedom of evidentiary admissibility and asserted that the hearsay rule should be an exception to a general rule of admissibility. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 522 (Boston, Little, Brown & Co. 1898).

12. *See, e.g.*, Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 HASTINGS L.J. 545, 564 (1998).

> In criminal cases as well as in civil, much hearsay is not testimonial, and this should be treated hospitably . . . .
>
> . . . .
>
> . . . [But w]hen a criminal prosecutor offers a testimonial statement, the

prospect of freely admitting unconfronted, nontestimonial hearsay, however, recalls the 1603 trial of Sir Walter Raleigh, during which the presiding judge chided Raleigh for calling for a trial by witnesses, because if the law required the government to produce witnesses, "horse-stealers" would "escape" conviction.[13] In a system of law that has grown out of a tradition of presenting sworn witness testimony in court, *Crawford* creates an illogical dichotomy: witnesses who write statements and swear to them under oath must be produced, but witnesses who make casual statements may not be required to take the oath or appear in court at all. By decoupling the hearsay rule from the right of confrontation, and putting in place an undefined and malleable test, *Crawford* and its progeny allow courts and the government to promote the efficiency of the criminal justice system's machinery at the expense of fundamental rights through the definition of "testimonial."[14]

Crawford and its progeny[15] missed an opportunity to consider the

> asymmetrical balance of power and the asymmetry of the stakes suggest that it is the prosecutor who ought to bear the risk that, through the fault of neither party, the witness will be unable to testify at trial. These factors will not generally be present when the proponent is a civil litigant or a criminal defendant.

Id.; Paul S. Milich, *Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over*, 71 OR. L. REV. 723, 774–79 (1992) (advocating abolition of the hearsay rule, making it admissible except in particular situations); *see also* William Twining, *Freedom of Proof and the Reform of Criminal Evidence*, 31 ISR. L. REV. 439, 439–44 (1997) (discussing the movements to reform the laws of evidence in Anglophone countries). *See generally* Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. 547, 548–51, 550 n.11 (2013) (discussing "new evidence scholarship," which has focused on "the goals of fostering accurate outcomes, avoiding factual errors, and allocating the risk of error in a fair and justified manner," partly through "explaining, justifying, or critiquing particular rules of evidence"—including hearsay).

13. S. REDMAYNE, THE TRYAL OF SIR WALTER RALEIGH KT. WITH HIS SPEECH ON THE SCAFFOLD 29 (London, W. Boreham 1719) ("[M]any Horse-stealers may escape, if they may be not condemn'd without Witnesses."); *accord* 1 DAVID JARDINE, CRIMINAL TRIALS 421 (London, Charles Knight 1832). The Author adopts Redmayne's spelling of Raleigh's name.

14. *Contra* Richard D. Friedman, Crawford, Davis, *and* Way *Beyond*, 15 J.L. & POL'Y 553, 555 (2007) (praising *Crawford*'s distinction between the Confrontation Clause and hearsay because it will be "intellectually very exciting" to let the new test develop "completely from scratch").

15. The *Crawford* holding has been further developed and expounded upon in a line of cases since 2004. *See* Williams v. Illinois, 132 S. Ct. 2221, 2243–44 (2012) (plurality opinion) (finding no Confrontation Clause violation when expert witness relied on objectively nontestimonial forensic laboratory report produced before

effect of excepting nontestimonial hearsay from the right to confront witnesses[16] and to give full effect to the Sixth Amendment.[17] By creating a dual system in which nontestimonial hearsay lies outside the right to confront, and only testimonial hearsay[18] lies within it,[19] the Court paved the way to abolition of the hearsay rule in criminal and civil cases.[20] Further,

---

defendant had been identified); Bullcoming v. New Mexico, 131 S. Ct. 2705, 2715–16 (2011) (holding substitution of different lab analyst at trial for the analyst who signed testimonial report violated defendant's right to confront witness); Michigan v. Bryant, 131 S. Ct. 1143, 1166–67 (2011) (assessing whether witness's statement to police was testimonial or merely enabling them "to meet an ongoing emergency" by objectively considering the primary purpose of police interrogation); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009) (applying *Crawford* to exclude a lab analyst report where the analyst was not presented as a trial witness); Giles v. California, 554 U.S. 353, 374–76 (2008) (plurality opinion) (refusing to recognize a forfeiture by wrongdoing exception to *Crawford*); Davis v. Washington, 547 U.S. 813, 822 (2006) (construing statements made to police "to enable [them] to meet an ongoing emergency" as nontestimonial).

16. *See* David E. Seidelson, *Hearsay Exceptions and the Sixth Amendment*, 40 GEO. WASH. L. REV. 76, 91–92 (1971) (reasoning that "a proper approach" to the treatment of hearsay exceptions under the Confrontation Clause "would assume the supremacy of the [S]ixth [A]mendment right of confrontation over any exception to the hearsay rule").

17. The importance of this right (as well as other rights included in the Sixth Amendment) was clear even during the Massachusetts's state convention in January 1788, when Mr. Holmes argued that, in the then-proposed constitution:

> The mode of trial is altogether indetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet with his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told.
>
> These are matters of by no means small consequence . . . .

THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 420 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS].

18. In *Crawford,* the Court did not define either nontestimonial or testimonial evidence, but stated that "[w]hatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Crawford v. Washington, 541 U.S. 36, 68 (2004). In *Giles v. California*, a plurality of the Court indicated in dicta that a hearsay declarant's "[s]tatements to friends and neighbors" as well as "statements to physicians in the course of receiving treatment" are nontestimonial. 554 U.S. at 376. *Michigan v. Bryant* reaffirmed this dicta. *See* 131 S. Ct. at 1158 & n.9.

19. *See* Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO. ST. J. CRIM. L. 209, 220 (2005).

20. *See Crawford*, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the [Bill of Rights'] Framers' design to afford the [s]tates

the Court compounded the problem by failing to define testimonial broadly and nontestimonial narrowly.[21] *Crawford* thus partly[22] opens the door to the presentation of unconfronted hearsay and entirely opens the door to the adoption of any of the free evidence models that would liberalize the admission of hearsay evidence.[23]

This Article examines *Crawford* and its progeny in Part II, then reviews the relevant history of the hearsay rule in Part III to highlight the failure of history to answer whether the Sixth Amendment requires production of hearsay declarants. Part IV then looks at the ways in which defendants' rights to confrontation, the presumption of innocence, the beyond a reasonable doubt standard, and the right to trial by jury have been eroded, and how *Crawford*'s testimonial–nontestimonial dichotomy contribute to that erosion of rights. Finally, Part V suggests that rather than focusing on how to define testimonial statements, thus approaching the right to confront witnesses from an evidence-law perspective, a better approach would be to reconsider the right of confrontation from a rights perspective. Under that approach, consideration should be given to reinstating the right in full while preserving equitable principles, such as to prevent the defendant from benefitting from wrongful conduct by interfering with prospective witnesses' trial testimony.[24] Dialogue about the

flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."). In *Bryant*, the Court noted in dicta that "the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence." 131 S. Ct. at 1162 n.13.

21. For example, in *Bryant*, the Court held that whether a statement made in response to police questioning is testimonial is determined by examining the primary purpose of the interrogation under the totality of the circumstances—a very broad standard. 131 S. Ct. at 1156.

22. *Crawford*'s limited ban on unconfronted testimonial hearsay prevents the effectuation of complete reform to a "free evidence" model as concerns evidence admitted against the defendant in criminal cases. *See Crawford*, 541 U.S. at 68.

23. *See generally* Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149 (1990) (analyzing the historical evolution and liberalization of proof rules); Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CALIF. L. REV. 2437, 2462 (2000) (discussing how the Federal Rules of Evidence are the culmination of Thayer's vision); Twining, *supra* note 12, at 439–44 (discussing evidence reforms and "New Evidence Scholarship"). Such suggested frameworks allowing for the unregulated use of relevant evidence are "normatively unsustainable." Alex Stein, *The Refoundation of Evidence Law*, 9 CAN. J.L. & JURISPRUDENCE 279, 285 (1996).

24. *See, e.g.*, FED. R. EVID. 804(b)(6) (providing an exception to the hearsay rule when the party the statement is offered against intended to cause and actually did

right should give greater consideration to the individual protected by the Bill of Rights: the defendant whose liberties are at stake.[25] Without greater attention to the ways in which a focus on the benefit of, or need for, prosecutorial evidence will almost *a fortiori* relegate a defendant's rights to a secondary concern—because the state always has a need for evidence against the defendant to secure a conviction—the presumption of innocence and the beyond a reasonable doubt standard will face continued erosion through unfettered liberalization of the hearsay doctrine.

II. *CRAWFORD* AND ITS PROGENY

A. *Limiting the Right to Confront to Testimonial Statements*

In *Crawford*, the Supreme Court redefined the scope of the right to confront witnesses by introducing a bright-line test to assess whether hearsay statements could be admitted against the criminal defendant without an opportunity to confront the speaker.[26] Singling out the 1603 trial of Sir Walter Raleigh as epitomizing the reasons for a right to confront witnesses, the *Crawford* Court asserted that it was doing one thing: getting at "the principal evil at which the Confrontation Clause was directed[, which] was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[27]

Focusing on the use of ex parte examinations, *Crawford* identified testimonial statements as the core concern of the Confrontation Clause.[28] Without considering whether the Confrontation Clause *also* was concerned about nontestimonial hearsay, or should be today, the Court restricted the

cause the declarant's unavailability); Giles v. California, 554 U.S. 353, 358–61 (2008) (noting that in order to use the "forfeiture by wrongdoing" exception to admit a homicide victim's statements, a purpose of the defendant's act must have been to make the victim unavailable as a witness).

25. *But see* Seidelson, *supra* note 16, at 90. Addressing the Supreme Court's 1895 decision in *Mattox v. United States*, Professor Seidelson states:

> [T]he Court determined that the right [to confront witnesses] had to 'give way to considerations of public policy and the necessities of the case.' Inherent in the Court's decision was the conclusion that the accused, rather than the prosecution, should suffer the adverse consequences arising from the adventitious fact of the declarant's death.

Id. (footnote omitted) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

26. *Crawford*, 541 U.S. at 68.

27. *Id.* at 50.

28. *Id.* at 51–52.

clause's reach to testimonial statements, which the Court declined to define but found includes those formal statements to government officers that were made for the purpose of establishing or proving a fact, such as "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [during] police interrogations."[29] More recently, in declaring that statements made in response to a police interrogation are to be evaluated by objectively examining the totality of the circumstances to assess the primary purpose of the interrogation, the Court effectively broadened the definition of nontestimonial statements, concomitantly contracting the scope of Confrontation Clause protection.[30]

Statements that do not qualify as testimonial are beyond the reach of the Confrontation Clause.[31] Thus, the Court has found that the rule against hearsay is not a matter of Confrontation Clause scrutiny.[32] The Court thus made "clear its intent that state legislatures should play a role in confrontation policy"[33]—a move that could make it easier to prosecute defendants, especially when the government is able to obtain evidence that can be characterized as nontestimonial.[34] *Crawford* marks receptivity to liberalization of hearsay exceptions and further erosion or abolition of the hearsay rule because nontestimonial hearsay is not a matter of Sixth Amendment Confrontation Clause concern.[35]

29. *Id.* at 68. In a subsequent case, the Court held that statements made during the course of an ongoing emergency for the purpose of obtaining help were nontestimonial. Davis v. Washington, 547 U.S. 813, 822 (2006). Police "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" are testimonial. *Id.* at 826.

30. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1156 (2011).

31. Giles v. California, 554 U.S. 353, 376 (2008).

32. *Crawford*, 541 U.S. at 60–61.

33. Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 288 (2006).

34. *See, e.g.*, United States v. Berrios, 676 F.3d 118, 124–25, 128 (3d Cir. 2012) (finding that a taped conversation between two alleged coconspirators, which was the "cornerstone" of the government's case against other alleged coconspirators who were not present during conversation, was nontestimonial); People v. Desai, No. 294287, 2010 WL 3385988, at *1 (Mich. Ct. App. Aug. 24, 2010) (noting that defendant was convicted in part based on unconfronted, nontestimonial confession of codefendant hit man, whose own separate jury was unable to reach a verdict); State v. Reardon, 860 N.E.2d 141, 142 (Ohio Ct. App. 2006) (finding that unconfronted hearsay statement by victim of attempted burglary, who was unavailable at trial, to police officer—"It's that fucker Albert Quinn, and . . . it's that fat fucker Reardon with the lazy eye down at the end of the street"—was nontestimonial).

35. *See Crawford*, 541 U.S. at 51, 68. *But see* David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 82 (suggesting the Court "recoupled" the hearsay

The Sir Walter Raleigh trial[36] serves as the Court's prime example of the notoriously unfair practices that led to the adoption of the right to confrontation in America[37] and the more modern judicial conclusion that the "primary object of the [Confrontation Clause] . . . was to prevent depositions or *ex parte* affidavits."[38] Under *Crawford* and its successors,[39] Lord Cobham's confession, made under oath to a government agent,[40] would not be admissible against a defendant, such as Raleigh, who had not had an opportunity to examine Cobham.[41] But a larger fundamental question arising from Raleigh's trial is whether the Bill of Rights is satisfied by a trial system that is open to prosecution by other hearsay.[42] At Raleigh's trial, Judge Warburton reportedly responded to Raleigh, "I marvel, Sir Walter, that you being of such Experience and Wit, should stand on this Point [that the common trial of England is by jury and witness]; for so, many Horse-stealers may escape, if they may not be condemn'd without Witnesses."[43] Whether or not the judge actually said these words, there is evidence to support that early 17th century law allowed the admission of hearsay and by statute required the government to produce only one or two in-court witnesses in treason cases.[44] Notice

rule to the Confrontation Clause by tying the right to 18th century hearsay law).

36. For a thorough discussion of Sir Walter Raleigh's trial for treason in 1603, see generally Allen D. Boyer, *The Trial of Sir Walter Ralegh: The Law of Treason, the Trial of Treason and the Origins of the Confrontation Clause*, 74 MISS. L.J. 869 (2005).

37. *Crawford*, 541 U.S. at 50.

38. Mattox v. United States, 156 U.S. 237, 242 (1895).

39. *See supra* note 15 and accompanying text.

40. Boyer, *supra* note 36, at 885.

41. *Id.* at 889–90.

42. *See generally Crawford*, 541 U.S. at 68.

43. REDMAYNE, *supra* note 13, at 29; *accord* 1 JARDINE, *supra* note 13, at 421. Cobham's accusation could not be based on hearsay, but other hearsay appears to have been freely admitted. *See, e.g.*, REDMAYNE, *supra* note 13, at 22 (admitting statements made by Cobham to his brother). At least one witness, Dyer, appeared in person at Raleigh's trial. *Id.* at 37. Other evidence consisted of read examinations and confessions. *See id.* at 12 (stating Raleigh would be given the opportunity to respond after the evidence was read).

44. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 24–25 (4th ed., London, W. Clark, and Sons 1669) (discussing statutes requiring two lawful accusers and two lawful witnesses for convictions of treason). *But see* Boyer, *supra* note 36, at 883–84 (arguing that by the time of Raleigh's trial, the law was unclear, and thus the testimony of two witnesses to prove treason was mere policy).

that *Crawford* opens the door to a trial bearing some disquieting similarities to aspects of the early 17th century system of trial by live-witness testimony and the free presentation of hearsay in criminal trials.[45]

Because *Crawford*'s bright-line test is applied to allow the use of unconfronted, nontestimonial hearsay as evidence of facts supporting elements of criminal conduct, defendants cannot count on a right of confrontation even when nontestimonial hearsay evidence is the cornerstone of the government's case.[46] Wiretapped conversations and words spoken to jailhouse informants, friends, and family members now supply evidence that, if statutorily admissible, obviates producing a witness for confrontation.[47] Unconfronted, nontestimonial hearsay can be introduced to buttress witnesses chosen to testify and shore up gaps in the government's story.[48] *Crawford*'s decoupling of the hearsay rule from the right to confront witnesses thus may be the first small step toward the reincarnation in American courtrooms of a trial by hearsay—in its worst case, coming full circle to the early 17th century English trial of a "horse-stealer."[49]

B. *The Once and Future Trial*

Already, lower courts have applied *Crawford* to find that a criminal defendant has no right to confront declarants who made statements to undercover police officers,[50] prison cellmates,[51] informants,[52] friends, or

45. *See Crawford*, 541 U.S. at 68; *see, e.g.*, 1 JARDINE, *supra* note 13, at 420–21; REDMAYNE, *supra* note 13, at 28–29. Raleigh's complaint was based on the denial of his statutory right to demand that his conviction be based on two in-court witnesses. 1 JARDINE, *supra* note 13, at 419–20; REDMAYNE, *supra* note 13, at 24. The Sixth Amendment's Confrontation Clause provides no similar substantive guarantee that the government will produce live witnesses to prove any facts. *See* U.S. CONST. amend. VI.

46. *See, e.g.*, United States v. Berrios, 676 F.3d 118, 124, 127–28 (3d Cir. 2012) (finding that a recorded conversation between co-conspirators, admitted against a third party not present during the conversation, was nontestimonial).

47. *See, e.g.*, *id.*; Brown v. Epps, 686 F.3d 281, 288 (5th Cir. 2012) (holding that statements of unidentified declarants to undercover officers setting up a drug deal were nontestimonial); United States v. Solorio, 669 F.3d 943, 952–53 (9th Cir. 2012) (finding undercover agents' statements made over the radio to other agents were nontestimonial).

48. *See, e.g.*, *Brown*, 686 F.3d at 288; *Solorio*, 669 F.3d at 952–53.

49. *See* REDMAYNE, *supra* note 13, at 29; *see also* 1 JARDINE, *supra* note 13, at 421.

50. *E.g.*, *Brown*, 686 F.3d at 288; *Solorio*, 669 F.3d at 952–53.

51. *E.g.*, United States v. Johnson, 581 F.3d 320, 324–25 (6th Cir. 2009) (finding no constitutional error when court admitted into evidence an unconfronted

family members,[53] and to undo the *Bruton* doctrine,[54] which previously prevented trial use of an alleged coconspirator's hearsay statement unless the defendant had an opportunity to confront that alleged coconspirator.[55] *Crawford* purported to strengthen the Confrontation Clause by changing the test from one that exempted from the clause only hearsay that fell within a firmly rooted exception or was accompanied by independent indicia of reliability[56] to a bright-line test.[57] By that design, *Crawford* also permits states and Congress to expand hearsay exceptions or abolish the hearsay rule altogether.[58]

As a result, much of the evidence that a court could admit under the *Roberts* reliability test continues to be admissible so long as state or federal law provides an exception to the hearsay rule, but courts can no longer exclude such statements merely because they are not accompanied by

tape-recorded conversation between an alleged coconspirator of the defendant and a prison cellmate).

52. *E.g.*, United States v. Smalls, 605 F.3d 765, 778–80 (10th Cir. 2010) (finding recorded statements of coconspirator to confidential informant were nontestimonial).

53. *E.g.*, State v. Robinson, 270 P.3d 1183, 1197–99 (Kan. 2012) (finding that victim's statements to friends in the months before her homicide were nontestimonial and admissible under state law hearsay exception); Salt Lake City v. Williams, 128 P.3d 47, 52 (Utah Ct. App. 2005) (holding that victim's statements to a friend, and also overheard by a 911 operator, were nontestimonial); *see also* State v. Carlson, No. 30435-0-II, 2006 WL 1237279, at *12, *16 (Wash. Ct. App. May 10, 2006) (reversing conviction in part because one victim's statements to family members and friends, although nontestimonial, did not meet requirements of any state hearsay exception).

54. *See* Colin Miller, *Avoiding a Confrontation? How Courts Have Erred in Finding That Nontestimonial Hearsay Is Beyond the Scope of the* Bruton *Doctrine*, 77 BROOK. L. REV. 625, 658–61 (2012).

55. Bruton v. United States, 391 U.S. 123, 137 (1968); Miller, *supra* note 54, at 633–37.

56. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

57. *See Crawford*, 541 U.S. at 68.

58. The rejection of reliability as a touchstone for Confrontation Clause analysis has been called *Crawford*'s "single most important, and potentially far-reaching result." Jules Epstein, *Avoiding Trial by Rumor: Identifying the Due Process Threshold for Hearsay Evidence After the Demise of the* Ohio v. Roberts *"Reliability" Standard*, 77 UMKC L. REV. 119, 120 (2008). *But see* Sklansky, *supra* note 35, at 6 (predicting that "strict application of the hearsay rule to prosecution evidence may bolster the application of the rule to evidence offered by criminal defendants" because it reinforces that hearsay is unreliable and will "strike many judges and legislators as fairer and more reasonable when they counterbalance restrictions on prosecution evidence").

independent indicia of reliability.[59] States and Congress are free to expand hearsay exceptions or abolish the rule to make all nontestimonial hearsay admissible.[60] Nontestimonial hearsay that is admitted without confrontation can be accusatory and potentially outcome-determinative.[61] By allowing use of unconfronted coconspirator statements, *Crawford* perpetuated some of the problems associated with *Roberts*.[62] For example, in one post-*Crawford* trial for felony-murder and robbery, the government introduced likely outcome-determinative accusatory statements made by

59. *See Crawford*, 541 U.S. at 68; *Roberts*, 448 U.S. at 66.

60. If expansive reforms are made in the future, the Court may be asked to define the limits placed on the admission of nontestimonial hearsay by the Fifth and Fourteenth Amendment Due Process Clauses. *See* Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521, 524 (1992) (noting that, prior to *Crawford*, "the courts look to the Confrontation Clause as the source of the limitations" on the admissibility of hearsay, and stating that Justices Scalia and Thomas have argued in favor of a reliability determination under the Due Process Clause); Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477, 482 (1998) (noting that, prior to *Crawford*, the Court's Confrontation Clause rulings played a role in inhibiting the abolition of the hearsay rule or the expansion of hearsay exceptions). Some commentators have identified *Crawford* as presenting an opportunity for hearsay reform. *See, e.g.*, Lininger, *supra* note 33, at 289–90.

61. *See, e.g.*, People v. Richter, 977 N.E.2d 1257, 1274 (Ill. App. Ct. 2012) ("[T]he State sought to introduce numerous statements [the victim] made primarily to friends, family members, and coworkers in the months preceding her death to show (1) why [she] feared defendant and (2) defendant's motive for killing [her]."); De Niz v. Clark, No. CV 07-5254 DSF (JC), 2011 WL 836448, at *1, *5 (C.D. Cal. Feb. 1, 2011) (finding no error in admitting a witness's written statement to the police that included a statement of the defendant's brother directly implicating defendant in the crime).

62. Concerning *Roberts,* Dean Toni Massaro wrote:

> The Court's reliability theory also jars some persons' sense of fairness when it is applied to traditional uses of hearsay testimony. For example, the government can introduce an incriminating out-of-court statement of a defendant's alleged co-conspirator without producing that accuser in court. However, the government's failure to produce the co-conspirator, or at least to account for his or her absence, may cause people to question prosecutorial integrity and to doubt whether the defendant has been given a fair hearing.

Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 866 (1988) (footnote omitted). Under *Crawford*, the prosecutor can introduce precisely the kinds of statements discussed by Dean Massaro, not because they are reliable, but because they are deemed nontestimonial. *See, e.g.*, United States v. Johnson, 581 F.3d 320, 324–25 (6th Cir. 2009) (holding that, under *Crawford*, unconfronted, alleged coconspirator's statements from a prison-yard conversation with a government informant were nontestimonial and admissible).

the defendant's alleged accomplice, who never testified at trial.[63] Instead, the trial court allowed the government to play a recording of a conversation between the alleged accomplice, O'Reilly, and a fellow inmate.[64] The Sixth Circuit described the recording presented as evidence against the defendant, Johnson, as follows:

> On the recording, O'Reilly speaks at length about the robbery, naming each of his five co-defendants and identifying Watson as the killer of the armed guard. He states that it was Johnson's idea to rob the ATMs, which were near the headquarters of Ford Motor Company, because Johnson (a Ford employee) thought the ATMs would contain large amounts of cash shortly after Ford issued certain profit-sharing checks to its employees. O'Reilly states that Johnson surveilled the DFCU prior to the robbery and recruited two of his Ford co-workers to participate. O'Reilly also refers to Johnson as "expendable" and a "dumb-ass" because Johnson underestimated the number of guards who would be in the armored truck and the amount of money that would be in the ATMs.[65]

Johnson was given no opportunity to cross-examine O'Reilly about any of his statements because the statements were deemed nontestimonial and met a hearsay exception.[66] The Sixth Circuit, applying *Crawford*'s test, affirmed this conclusion because O'Reilly was unaware that he was being recorded and clearly did not anticipate his words being used as evidence against Johnson.[67] Thus, the jury was unable to see O'Reilly in person and had no way to ascertain whether O'Reilly suspected that his fellow inmate was wearing a wire, had a grudge against Johnson, or obtained his information about Johnson from someone else and assumed it to be true. Under *Crawford*, a statement like O'Reilly's that is deemed nontestimonial is admissible if state law or the Federal Rules of Evidence allow, likely without any other due process safeguards.[68]

63. *Johnson*, 581 F.3d at 323–24.
64. *Id.* at 324.
65. *Id.*
66. *Id.*
67. *Id.* at 325.
68. *See* Crawford v. Washington, 541 U.S. 36, 62, 68 (2004) (suggesting that evidence not subject right of confrontation has no constitutional significance, and noting that *Roberts* introduced a "foreign" test in place of the constitutional rights); Imwinkelried, *supra* note 60, at 536–38 (discussing the likelihood that due process will not be a basis to exclude hearsay, and that the Fifth and Sixth Amendments "would permit American jurisdictions to follow the English lead and significantly liberalize the admissibility of hearsay" in criminal and civil cases).

III. THE HEARSAY PROBLEM

A. *History's Unsolved Knot—Clues to the Coupling*

Crawford and its progeny revive an age-old question: Should the Sixth Amendment be construed to limit the admissibility of hearsay evidence?[69] Notwithstanding *Crawford*'s reliance on originalism,[70] history does not provide a definitive answer to the specific question of whether the Confrontation Clause applies to hearsay declarants.[71] Because history does not provide a clear answer, the remaining question is whether the Confrontation Clause *should* apply to hearsay declarants. *Crawford*'s schema provides too great an opportunity to restrict the right to confront untempered by constitutional limits on the admission of hearsay evidence defined as outside the Sixth Amendment's protections.[72] The testimonial–nontestimonial test adopted by the Supreme Court might not have received favor by the framers of the Bill of Rights, and there is no assurance that any redefinition of "testimonial" would prove to be historically sound.[73] As

69. *Compare* Graham, *supra* note 19, at 211 ("This essay argues that history lends some support to the *Crawford* dual system of confrontation . . . . But, on the other hand, history undermines the Court's long-standing view that confrontation requires only cross-examination."), *with* Randolph N. Jonakait, *The (Futile) Search for a Common Law Right of Confrontation: Beyond* Brasier*'s Irrelevance to (Perhaps) Relevant American Cases*, 15 J.L. & POL'Y 471, 494 (2007).

> Perhaps the approach of *Crawford* and *Davis* is a good one, but it is not one that has proven support from the historical record. We cannot know if the [Bill of Rights] Framers of the Confrontation Clause would have found the distinction that the Court has articulated between the companion cases in *Davis* important, because the Framers, for practical purposes, said nothing about how they viewed that constitutional provision. But nothing in the historical record so far brought forth indicates that the distinction would have made any sense to them at all.

Id.

70. *See Crawford*, 541 U.S. at 43–50.

71. *See* Jonakait, *supra* note 69, at 494.

72. *See* Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 923–24 (1992) (discussing the free-market approach to trial process, whose advocates argue that abolishing the hearsay rule "should have no effect on the accuracy of verdicts," and responding that such reasoning ignores "hidden costs and inequities" that make the hearsay rule "an indispensable regulation that corrects for distortions in the adversary market; one which, if properly designed, can do so at a lower cost than alternative methods of market correction").

73. Jonakait, *supra* note 69, at 494.

discussed below, and as others have previously found, the historical record does not support *Crawford* quite as well as the Court and some scholars assert.[74] More importantly than its scant historical support, however, *Crawford* and its progeny demote the Confrontation Clause to a malleable evidence rule without closely examining the hearsay rule's relationship to the right to confront witnesses and the right to be presumed innocent until proven guilty using the beyond a reasonable doubt standard.

How and why the right to confront witnesses and the hearsay rule developed have been the subject of study, but remain inconclusive.[75] A great deal of work has been done by others to identify the timing of the hearsay rule's development as a firm rule,[76] and much work has been done to consider the relationship between the hearsay rule and the American right to confront witnesses,[77] but the story remains muddled. For example, according to *Crawford* proponent Professor Richard Friedman,

> The law against hearsay has not played a role in the historical account underlying the Confrontation Clause, just as it does not enter into the text of the Clause. Hearsay law, like evidence law more generally, was not well developed at the time the constitutions of the states of the United States, or the U.S. Constitution, articulated the confrontation right, much less during previous centuries.[78]

Even if the hearsay rule was not fully recognized as a firm rule of evidence, the idea that defendants were entitled to have witnesses brought into the courtroom was well understood. In June 1788, Virginia Governor Edmund Randolph, an opponent of a bill of rights,[79] apparently discounted

74. *See Crawford*, 541 U.S. at 43–50; *see, e.g.*, Graham, *supra* note 19, at 211 (arguing history lends some support to *Crawford*).

75. *See generally* Charles S. Lobingier, *Origin of the "Hearsay Rule"—Was It the Jury System?*, 25 GREEN BAG 304, 304–06 (1913) (noting that the exclusion of hearsay in ancient Roman and medieval Spanish courts only shows that the rule did not originate with the advent of the jury trial).

76. *See, e.g.*, John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1174–76 (1996) (noting that the modern hearsay rule did not exist as recently as the 18th century).

77. *See, e.g.*, Seidelson, *supra* note 16, at 84 (noting that, prior to *Roberts*, "the Court's opinions reflect[ed] an enlarging view of the role of the [S]ixth [A]mendment [C]onfrontation [C]lause in precluding the use of hearsay exceptions to the detriment of the accused").

78. Friedman, *supra* note 7, at 446.

79. *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 285 (2010) (discussing Randolph's arguments that a bill of rights would be ineffective).

the need for the Sixth Amendment by pointing out "[e]very one knows that the witnesses must be brought before the jury, or else the prisoner will be discharged."[80]

The nature of evidence itself provides a possible explanation for the development of the right to confront witnesses without hearsay playing a conspicuous role. The hearsay rule, as understood today, is a rule of exclusion.[81] All relevant evidence is considered admissible unless excluded by another rule.[82] The rule against hearsay is considered such a rule, which makes otherwise admissible evidence inadmissible.[83] There is strong evidence that, as recently as the late 18th century, courts allowed a great deal of hearsay to be heard by juries.[84] Yet there is also some evidence that English common law required that to "be evidence," evidence had to be firsthand knowledge presented under oath, thus excluding hearsay from evidence.[85] Some judges who admitted hearsay may have reasoned that the hearsay was not offered to prove a particular fact,[86] that the words said

80. THE COMPLETE BILL OF RIGHTS, *supra* note 17, at 435.

81. *See* FED. R. EVID. 802.

82. FED. R. EVID. 402.

83. *See* FED. R. EVID. 802.

84. *See* Langbein, *supra* note 76, at 1187–90 (reviewing historical records that demonstrate that hearsay was frequently allowed and suggesting that "the question of excluding hearsay and other suspect types of testimony may still have been remitted to judicial discretion").

85. *See* Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of* Giles*'s Forfeiture Exception to Confrontation Were or Were Not "Established at the Time of the Founding,"* 13 LEWIS & CLARK L. REV. 605, 638 (2009) (noting that English common law at the time of the American Revolution only recognized two hearsay exceptions: forfeiture by wrongdoing and a murder victim's dying declaration); WILLIAM NELSON, THE LAW OF EVIDENCE 1, 7 (London, In the Savoy 1717) (stating that evidence includes the testimony of witnesses, and emphasizing, in Latin, the importance of first-hand knowledge); 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 217 (1926) (noting the hearsay rule became "generally recognized" during the period between 1675 and 1690, possibly "partly due to a strong dictum of [Sir Edward] Coke's, and partly to the reflex action of the rejection of the rule requiring more than one witness").

86. *See* NELSON, *supra* note 85, at 232 ("Hearsay is admitted for Evidence where it is to establish another Witness's Testimony; as where a second swears that he heard the first Witness declare the same Thing formerly."). *But see* Morris's Lessee v. Vanderen, 1 U.S. (1 Dall.) 64, 66 (Pa. 1782) (explaining that a letter from a third party offered to establish one party's position in an ejectment suit was "disallowed by the court, it being a *particular fact*, which ought to be proved by witnesses on oath, records, [et cetera]").

carried other evidentiary value,[87] or that the record was incomplete without the hearsay.[88]

To fully appreciate why decoupling hearsay from the right to confront should be troubling to courts and scholars alike, it may be helpful to briefly consider pre- and post-ratification[89] discourse about hearsay and the right to confront at common law and in America, the expansion of hearsay exceptions after the Bill of Rights was ratified, and the modern push for liberalization or abolition of the hearsay rule.

B. *English and Pre-Bill of Rights American Cases and Treatises*

The common law's eventual reliance on live-witness testimony to be given in open court has long been recognized as providing advantages over written hearsay statements.[90] The hearsay rule may have developed in response to greater doubts about jurors' abilities to disregard shaky thirdhand statements[91] as jury practice evolved and juries became less self-informing.[92] As the adversarial system evolved from one in which jurors

87. *See* Langbein, *supra* note 76, at 1189 (noting that many 17th and 18th century judges admitted hearsay because "it is but matter of [e]vidence, and is left to the [j]ury how far they will give credit to [it]" (quoting 1 JOHN LILLY, GENERAL ABRIDGMENT OF THE LAW 549 (1719)] (internal quotation marks omitted)).

88. *See, e.g.*, The King v. Woodcock, (1789) 168 Eng. Rep. 352 (Crown) 352, 352–53, 354; 1 Leach 500, 501, 503–04 (noting that, were the record more "full," the statement would have been excluded for not meeting the requirements of the Marian statute, and because it was impossible to know whether the declarant "was in such a state of morality as would inevitably oblige her soon to answer before her Marker for the truth or falsehood of her assertions" (footnote omitted)).

89. Professor Davies correctly notes that, for purposes of interpreting the Bill of Rights, a date earlier than the ratification is appropriate. Davies, *supra* note 85, at 611. Because history does not provide an answer to the question addressed, the Author uses a conventional timing benchmark.

90. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 368 (4th ed., Oxford, Clarendon Press 1770) (discussing the common law interplay between the best evidence rule and hearsay).

91. *See* M.W. Chang, *A Historical Study on Evidential Hearsay and the Confrontation Clause of the United States*, 13 TILBURG FOREIGN L. REV. 43, 54–55 (2006). Some authors have focused on the assumption that hearsay was excluded due to distrust of juror evaluations of reliability by seeking to empirically test that assumption. *See* William C. Thompson & Maithilee K. Pathak, *Empirical Study of Hearsay Rules: Bridging the Gap Between Psychology and Law*, 5 PSYCHOL. PUB. POL'Y & L. 456, 465–69 (1999).

92. *See* Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 730–31 (1983) (describing the late 1600s to the early 1700s as a period during which juries became "neutral and passive fact

took an active role in gathering and assessing evidence to one in which jurors became neutral fact finders, jurors may have been viewed as less able to evaluate hearsay than when they were fact gatherers.[93] The hypothesis that distrust of jurors drove the creation of the hearsay rule[94] nonetheless seems inconsistent with historical examples of the use of the hearsay rule in nonjury systems such as under Roman law,[95] the judicial practice of sending preliminary questions of fact to juries,[96] and bench trials. What seems clear is that the rule emerged in connection with the requirement that knowledge be obtained by a qualified person who affirmed that knowledge under oath.[97]

The requirement for live witnesses appears inexorably related to the necessity of an oath. In the later 1700s, English judge Geoffrey Gilbert's posthumously published evidence treatise likewise noted the importance of an oath,[98] but the oath alone appears to have been insufficient, as courts in the early 1700s rejected deposition testimony that was not taken in the prisoner's presence.[99]

finder[s]"). *But see* Daniel Klerman, *Was the Jury Ever Self-Informing?*, 77 S. CAL. L. REV. 123, 124–25 (2003) (discussing the modern scholarly debate over whether juries were ever self-informing).

93. *See* Chang, *supra* note 91, at 54–55; Landsman, *supra* note 92, at 730–32.

94. *See, e.g.*, Langbein, *supra* note 76, at 1172 ("The essential attribute of the modern law of evidence is the effort to exclude probative but problematic oral testimony, such as hearsay, for fear of the jurors' inability to evaluate the information properly.").

95. *See* Lobingier, *supra* note 75, at 304–05 (discussing examples of the hearsay rule under Roman law, medieval Spanish code, and the seventh century Visigoth compilation alternatively known as *Forum Judicum* or *Fuero Juzgo,* none of which used juries, and suggesting that distrust of juries is not the only source for the rule); *see also* Richard M. Fraher, *Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof*, 7 LAW & HIST. REV. 23, 33–36 (1989) (discussing the medieval use of *fama*, or the majority belief of a particular community, to skirt the hearsay rule).

96. *E.g.*, The King v. Woodcock, (1789) 168 Eng. Rep. 352 (Crown) 354; 1 Leach 500, 504 (instructing the jury that if they found conditions for dying declaration had been met, they could consider the decedent's statement, but if not, should disregard it).

97. *See* THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 7 (London, S. Rider 1801) (emphasizing the requirement of both an oath and personal attendance in court); *see also* GEOFFREY GILBERT, THE LAW OF EVIDENCE 138, 142–43 (4th ed., London, His Majesty's Law Printers 1777) (discussing witnesses' capacity to take an oath).

98. GILBERT, *supra* note 97, at 149–50.

99. *See* John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV.

In 1767, Blackstone explained that hearsay could not be offered as proof of a particular fact, as an adjunct to the best-evidence rule.[100] Thus, while the record does not reveal strict adherence to our modern hearsay rule, 18th century English and American courts recognized the importance of oath and witness presence in the courtroom.[101] Courts understood that evidence primarily meant documents and witnesses.[102] The rule against hearsay, which excluded statements not made under oath, may not have been a rule that excluded otherwise admissible evidence, but rather one that defined what constituted evidence.[103]

437, 454–56 (1904).

100. 3 BLACKSTONE, *supra* note 90, at 368. Blackstone stated:

> [T]he one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed. . . . So, no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute) the courts admit of *hearsay* evidence, or an account of what persons deceased have declared in their life-time: but such evidence will not be received of any particular facts.

Id.; *see, e.g.*, Morris's Lessee v. Vanderen, 1 U.S. (1 Dall.) 64, 66 (Pa. 1782) (finding error to read into evidence a letter to prove "a *particular fact*, which ought to be proved by witnesses on oath, records, &c.").

101. *See, e.g.*, The King v. Brasier, (1797) 168 Eng. Rep. 202 (Crown) 202; 1 Leach 199, 200 (excluding hearsay statements of a seven-year-old assault victim). The court explained:

> [N]o testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath.

Id.; State v. Baynard, 1 Del. Cas. 662, 663–64 (Ct. Oyer & Terminer 1794) (excluding hearsay statement on the ground that the declarant could not have testified in court as a witness due to his race).

102. NELSON, *supra* note 85, at 1 (defining evidence in a larger sense as documentary evidence and also including "*Testimonia,* the Testimony of Witnesses, and other Proofs, to be produced and given to a Jury for the finding of any Issue joined between the Parties").

103. *See id.* Nelson also emphasized the importance of a witness's firsthand knowledge: "Witnesses are sworn to tell the [t]ruth, not what they believe; for they are to swear nothing but what they have heard or seen." *Id.* at 7; *see also* Queen v. Hepburn, 11 U.S. (7 Cranch) 290, 295 (1813) (describing hearsay as incompetent evidence).

The requirement of an oath at common law is consistent with the notion that hearsay did not qualify as evidence,[104] and also with the use of dying declarations made under circumstances in which the ordinary person of that time would fear dying with a lie on her lips.[105] Statutes recognized the requirement of the oath but further required that the person taking the oath be present in court.[106] Thus, when the Bill of Rights was considered and later ratified, out-of-court statements, even if recorded under oath, were ordinarily inadmissible.[107] According to Professor Thomas Davies, in the late 1700s, there were but two exceptions to the requirement that witnesses testify to firsthand knowledge in court and under oath: prior testimony given under a Marian statute[108] admitted when the declarant was dead, sick, or the defendant kept the declarant from testifying at trial, and dying declarations in murder cases.[109] Professor Davies thus concludes that

> [t]hese were the only kinds of admissible out-of-trial statements identified in the treatises and manuals that Americans would have had access to when the initial state declarations of rights and the federal Bill of Rights were framed. Hence, this would appear to be how framing-era Americans would have understood the confrontation right.[110]

Professor Davies notes that *The King v. Woodcock*[111] and *The King v.*

104. Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105, 196–97 (2005).

105. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1431, at 277 (James H. Chadbourn ed., rev. ed. 1974).

106. *See* 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'Y 349, 397–99 (2007).

107. *See* Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 944 n. 28 (2010); Davies, *supra* note 106, at 425–32.

108. 1 & 2 PHIL. & M., c. 13 (1554–55) (Eng.). For a discussion of the development and history of the Marian bail and committal statutes, see generally John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 317–24 (1973).

109. Davies, *supra* note 85, at 639; *see* 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 353 (London, A. Strahan 1803).

110. Davies, *supra* note 85, at 638 (footnote omitted).

111. The King v. Woodcock, (1789)168 Eng. Rep. 352 (Crown); 1 Leach 500.

Dingler,[112] cited in *Crawford*, could not have been known to the framers of the Bill of Rights at the time it was drafted, but nonetheless are consistent with the proposition that no other out-of-court statements constituted admissible evidence during this time period.[113]

The chronology alone does not provide all of the explanations for the hearsay rule or its relationship to confrontation. At least one author suggests that the hearsay rule is a fusion of seven different rules derived from concerns relating to reliability, cross-examination, and the ability to assess witness demeanor.[114] Two of these concerns—cross-examination and the ability to assess witness demeanor—are central to the Supreme Court's modern analysis of the right of confrontation. American cases from the middle to late 18th century suggest an evolving sense of cross-examination's importance,[115] but none shed much light on the scope of the Sixth Amendment right to confrontation.[116]

C. *Postratification Cases and the Development of Hearsay Exceptions*

The early 19th century texts, treatises, and cases recognize the hearsay rule's continued use, consistent with the common law.[117] The Supreme Court's view of hearsay was consistent with the common law rule that hearsay did not constitute evidence, as opposed to being evidence that should be excluded from the jury.[118] In 1813, in *Queen v. Hepburn*, the

112. The King v. Dingler, (1791) 168 Eng. Rep. 383 (Crown); 2 Leach 561.

113. Davies, *supra* note 85, at 638–39.

114. Frederick W. J. Koch, *The Hearsay Rule's True* Raison d'Être*: Its Implications for the New Principled Approach to Admitting Hearsay Evidence*, 37 OTTAWA L. REV. 249, 253–54 (2006).

115. *See, e.g.*, Clap v. Lockwood, 1 Kirby 100, 100 (Conn. Super. Ct. 1786) (refusing to allow introduction of sworn deposition testimony in a civil case against a party who was not notified of the deposition, reasoning that to do so would deprive the party of the benefits of cross-examination); Respublica v. Langcake, 1 Yeates 415, 416–17 (Pa. 1795) (ruling that, absent necessity, a hearsay declaration was inadmissible). *But see* T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 537–38 (1999) (arguing that the development of the hearsay rule was an outgrowth of increased lawyer involvement and cross-examination beginning in the 1780s).

116. *See* Thomas Y. Davies, *Revisiting the Fictional Originalism in* Crawford*'s "Cross-Examination Rule": A Reply to Mr. Kry*, 72 BROOK. L. REV. 557, 626–33 (2007) (articulating reasons for caution when relying upon postframing American sources).

117. In 1801, Thomas Peake stated, "The [l]aw never gives credit to the bare assertion of any one, however high his rank, or pure his morals; but always requires the sanction of an oath: It further requires his personal attendance in [c]ourt, that he may be examined and cross examined by the different parties." PEAKE, *supra* note 97, at 7.

118. *See* Queen v. Hepburn, 11 U.S. (7 Cranch) 290, 295 (1813).

Court used the hearsay rule to effectively block almost all suits for freedom by individuals held in slavery on the basis of the status of an ancestor.[119] Sitting as the highest appellate court in the territory, the Court rejected Maryland's common law rule allowing certain kinds of hearsay.[120] Chief Justice John Marshall's opinion in *Queen* has been recognized for its acknowledgment "[*t*]*hat hearsay evidence* is incompetent to establish any *specific* fact, which fact is in its nature susceptable [sic] of being proved by witnesses who speak from their own knowledge."[121] In a series of passages, the Court emphasized the inadmissibility of hearsay evidence and admonished against the creation of exceptions to the time-honored rule on the ground that hearsay possesses "intrinsic weakness" and that the exceptions

> of *pedigree*, of *prescription*, of *custom*, and . . . of *boundary* . . . . will not justify the admission of hearsay evidence to prove a *specific fact*, because the eye witnesses to that fact are dead. But if other cases standing on similar principles should arise, it may well be doubted whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish [c]ourts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule: the value of which is felt and acknowledged by all.[122]

In addition to suggesting that the hearsay rule was a well-established rule before 1813, *Queen* reinforces "[t]he framing-era treatises, which defined 'hearsay' as unsworn, out-of-court statements, [that] indicate . . . there was virtually a complete ban against the admission of hearsay statements as evidence of a defendant's guilt (the only exception being the dying declaration of a murder victim)."[123] It also arguably lends further support—to the extent that *any* postframing authority does so—to the proposition that the reason why neither the state nor federal Confrontation Clauses addressed nontestimonial hearsay evidence was because nontestimonial hearsay was not competent evidence.[124] Finally, *Queen*

119. *Id.*

120. *Id.* at 295–96.

121. *Id.* at 295; *see* Sklansky, *supra* note 35, at 23–24 (arguing that the hearsay rule presented a class bias favoring wealthy property owners, making the rule difficult to defend on the grounds stated in *Queen*).

122. *Queen*, 11 U.S. (7 Cranch) at 296.

123. Davies, *supra* note 116, at 635–36.

124. The hearsay in question in *Queen*—the comment of a tobacco inspector to the deposed third party—was, under *Crawford*'s standard, most likely

suggests that if the Confrontation Clause allowed states flexibility in developing hearsay doctrine,[125] the Court did not consider this important in 1813.[126]

Several state court decisions from the early 1800s shed light on how courts understood both the state and federal rights to confront witnesses by this time, but provide little insight into the minds of the framers of the state and federal provisions.[127] In 1821, a Tennessee judge noted that the Tennessee constitution's expression that "the accused has a right to meet the witnesses face to face" and the North Carolina constitutional provision that "'every man hath a right to confront the accusers and witnesses with other testimony' . . . mean[] the same thing, and any implications that might be raised on the diction in the one case, with the same and equal propriety might be raised in the other."[128] Interpreting both, the court concluded that the right to confront witnesses did not bar the admission of depositions taken before the defendant and with opportunity to cross-examine the declarant, because those practices had been allowed before and after the Revolution.[129] Although the Tennessee court compared two state constitutional provisions, the treatment of textual interpretation suggests there may be merit in further work to assess whether the Supreme Court's focus on the word *witnesses* to support the testimonial–nontestimonial

nontestimonial. *See Queen*, 11 U.S. (7 Cranch) at 294–95.

125. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Where nontestimonial hearsay is at issue, it is wholly consistent with the [f]ramers' design to afford the [s]tates flexibility in the development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.").

126. In *Queen*, the Court found that claims to freedom in Maryland were not exempt from the general rule "*[t]hat hearsay evidence* is incompetent to establish any *specific* fact, which fact is in its nature susceptable [sic] of being proved by witnesses who speak from their own knowledge." *Queen*, 11 U.S. (7 Cranch) at 295. *Queen* thus appears to announce a position that does not support *Crawford*'s statement, in 2004, that providing the States flexibility in developing hearsay doctrine would be consistent with the Sixth Amendment. *Compare id.*, *with Crawford*, 541 U.S. at 51 (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (relying on the text's application to "'witnesses' against the accused—in other words, those who 'bear testimony'").

127. This Article does not contend that court opinions from the 1800s help establish what the framers thought at the time they drafted the Bill of Rights.

128. Johnston v. State, 10 Tenn. (2 Yer.) 51, 53 (1821) (internal quotation marks omitted).

129. *Id.* at 59–56. The court also noted that a different rule would produce considerable incentives for a defendant to kill witnesses before trial. *Id.* at 60.

distinction in *Crawford*[130] finds a basis in history—if one desires an originalist interpretation of the clause.[131]

IV. SHIFTING THE BALANCE OF POWER THROUGH DEFINITION AND EROSION OF MEANING AND TESTING

A. *Reimagining the Witness*

Crawford's testimonial–nontestimonial distinction is founded on a historical record that does not support it. Justice Scalia's opinion for the Court apparently recognized this, for the Court states not that the Confrontation Clause was written to address *only* testimonial hearsay, but rather that trial by ex parte affidavit was the "principal evil" to which the Clause was addressed.[132] *Crawford* thus purports to answer—likely incorrectly[133]—the question of what ills the right of confrontation was intended to redress.[134] The Court's characterization of the elements of civil law practice in Raleigh's trial that led to the right of confrontation glosses over some important points.[135] First, ex parte affidavits were routinely admitted, and even Raleigh did not object to the reading of other witness statements and examinations.[136] Raleigh's objection was that the court was dishonoring a statute requiring the government to produce two witnesses in treason cases.[137] Defendants who were unlucky enough to be tried for

130. *See Crawford*, 541 U.S. at 51.

131. *But see* Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1869 (2012) (positing that the Confrontation Clause simply restricts the admission of nontestimonial statements "to a lesser degree" than it restricts the admission of testimonial statements).

132. *Crawford*, 541 U.S. at 50.

133. *See* Davies, *supra* note 116, at 635–36; Davies, *supra* note 85, at 638–39; Roger W. Kirst, *Does* Crawford *Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 83–85 (2005) (raising doubts about "whether Justice Scalia actually found the original meaning in *Crawford*" and explaining that reviewing the record using hindsight may lead to an incorrect understanding of the history of the right).

134. *See Crawford*, 541 U.S. at 60.

135. *See id.* at 43–45.

136. *See* 1 JARDINE, *supra* note 13, at 421–24; REDMAYNE, *supra* note 13, at 26–27. In an 1839 account of the trial, one of the admitted ex parte affidavits, Watson's declaration, began: "Mr. Brooke told me he had heard of a most dangerous plot . . . ." 1 JARDINE, *supra* note 13, at 424. In this account of the trial, Raleigh did lodge an objection to what "Brooke told Watson what Cobham told Brooke, that I said to him;—what proof is this?" *Id.* at 429.

137. *See* 1 JARDINE, *supra* note 13, at 419–20; REDMAYNE, *supra* note 13, at

ordinary theft, for example, were not entitled to confront witnesses at all[138] because the government could introduce hearsay evidence through whatever means satisfied evidence law.[139] The requirement that treason be proven by two witnesses, but that a confession could replace a witness, likely created the greatest incentives for government abuse.[140] But the admission of the examination of one hearsay declarant, Copley, at Raleigh's trial provides an illustration of how prosecutors could produce someone who knew nothing but hearsay.[141] Copley's examination merely reported what various individuals said that other individuals said[142]—all of which likely would be nontestimonial under *Crawford*.[143] In the absence of a statute requiring a live witness or a confession, early 17th century law

24–25, 29. In both accounts of the trial, the chief justice explained to Raleigh that this statute had been repealed. 1 JARDINE, *supra* note 13, at 420; REDMAYNE, *supra* note 13, at 24–25. Raleigh then asked the court to respect the statute in equity, which it flatly refused to do. 1 JARDINE, *supra* note 13, at 421–22; REDMAYNE, *supra* note 13, at 25–26.

138. *See* 1 JARDINE, *supra* note 13, at 421; REDMAYNE, *supra* note 13, at 29.

139. *See* 1 JARDINE, *supra* note 13, at 420–21; REDMAYNE, *supra* note 13, at 24–25, 29; *see also* GILBERT, *supra* note 97, at 59. Gilbert discussed depositions at civil law, which were taken in secret (a practice still in effect) and found that

> the Credit of Depositions *cæteris paribus* falls much below the Credibility of a present Examination *viva voce*, for the Examiners and Commissioners in such Cases do often dress up secret Examinations, and set up a quite different Air upon them from what they would seem if the same Testimony had been plainly delivered under the strict and open Examination of the Judge at the Assizes . . . .
>
> . . . . [Yet,] what is reduced to Writing by an Officer sworn to that Purpose from the very Mouth of the Witness, is of more Credit than what a Stander-by retains in Memory of the same Oath; for the Images of Things decay in the Memory.

Id.; *see also* Boyer, *supra* note 36, at 884 (noting that the requirement of two witnesses "was . . . a policy, in an area where the law was not completely settled, and it was a policy to which certain precedents indicated exceptions might be made").

140. *See* Boyer, *supra* note 36, at 884 (discussing policy of requiring two witnesses in treason trials during the last half of the 16th century); *id.* at 885–86 (noting that Raleigh's prosecutors chose to rely upon Cobham's recanted confession, only listing separate independent evidence "[a]lmost as an afterthought").

141. *See* 1 JARDINE, *supra* note 13, at 423; REDMAYNE, *supra* note 13, at 30.

142. Copley's examination, in a 1719 account, read: "Also *Watson* told me, that a special Person told him, that *Aremberg* offered to him a Thousand Crowns; and that *Brook* said, the Stirs in *Scotland* came out of *Raleigh*'s Head." REDMAYNE, *supra* note 13, at 30 (internal quotation marks omitted).

143. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004).

appears to have required nothing more. Statutory protections, such as the Marian statutes in effect in American courts during the late 1700s, and the requirement of an oath may have temporarily obscured the problem of how nontestimonial hearsay should fare under the Sixth Amendment's protections.

Crawford's emphasis on the word *witness* in the Sixth Amendment's Confrontation Clause to justify the testimonial–nontestimonial distinction[144] is similarly unsupported. Justice Scalia asserted that there were three "plausible" meanings of the words "witnesses against" the accused: (1) a person "who actually testif[ies] at trial"; (2) a person "whose statements are offered at trial"; or (3) "something in-between."[145] The Court adopted the position that a witness is someone who bears testimony.[146] Professor Akhil Reed Amar, whose earlier work was cited by *Crawford*,[147] argues that this is the correct meaning of "witness," which he contends must exclude many hearsay declarants.[148] Professor Richard Friedman similarly takes the view that a witness is someone who testifies,[149] and a testimonial statement is one made by a declarant who, at the time the statement was made, "*understood* that there was a significant probability that the statement would be used in prosecution."[150]

Like the definitions proposed by Professor Amar and Professor Friedman,[151] the definition adopted by the Court, excluding many hearsay declarants, bears an interesting resemblance to the usage of the word *witness* at the time of Sir Walter Raleigh's unfair trial.[152] Only one or two witnesses were required to testify in treason cases; all other proof could be circumstantial hearsay.[153] A witness thus was someone who appeared in court, as required by law, or whose ex parte confession was substituted for

144. *Id.* at 51.
145. *Id.* at 42–43.
146. *Id.* at 51.
147. *Id.* at 60–61.
148. Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 693–95 (1996).
149. Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 246 (2005).
150. *Id.* at 252.
151. *See supra* notes 148–50 and accompanying text.
152. *Compare Crawford*, 541 U.S. at 51, *with* REDMAYNE, *supra* note 13, at 29 ("If three Conspire a Treason, and they Confess it; here is never a Witness, yet they are condemned.").
153. *See* 1 JARDINE, *supra* note 13, at 419–21; REDMAYNE, *supra* note 13 at 29.

the required witness.[154] Construing *witness* to mean a person who testifies in court or whose ex parte affidavit, whether a confession or other sworn statement, is substituted for live testimony brushes aside the important question of whether under this definition, the government could and can avoid producing any real witnesses—those with firsthand knowledge of facts—to prove that someone was a common horse thief in 1603[155] or a member of an alleged drug conspiracy in 2013.

In ordinary terms, a witness is a person with firsthand knowledge of a fact.[156] When police investigate crimes, they interview witnesses. As an eyewitness to a crime is a witness—he or she may not be subpoenaed to testify at trial, but certainly such a person would be a witness to the events.[157] At trial, proof is to be made through the testimony of people who

154. *See* COKE, *supra* note 44, at 25 (noting of the 16th century treason statute that "[t]wo lawfull [sic] accusers in the act . . . are taken for two lawfull [sic] witnesses").

155. *See* 1 JARDINE, *supra* note 13, at 421; REDMAYNE, *supra* note 13 at 29.

156. Professor Randolph Jonakait points out that *Crawford*

> simply ignored Webster's third definition of the noun "witness," which states, "A person who knows or sees any thing; one personally present; as, he was *witness*; he was an *eye-witness*." This meaning links with Webster's first definition of a "witness" as a transitive verb: "To see or know by personal experience. I *witnessed* the ceremonies in New York, with which the ratification of the constitution was celebrated, in 1788." This definition, as well as the one Justice Scalia selected, makes sense in criminal cases. Those who bear testimony might be the people referred to as witnesses in the Confrontation Clause, but so too might be those who know something about a relevant event from their personal presence.

Randolph N. Jonakait, *"Witnesses" in the Confrontation Clause:* Crawford v. Washington*, Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155, 159 (2006) (footnotes omitted) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

157. Gilbert wrote in the 1700s:

> [I]f Oath be made that a Witness examined before the Coroner had been sought for against the Trial, and though all Endeavours have been used, yet he cannot be found, in such Case his Examination *may be read*, because I suppose it is to be presumed that the Witness is dead when he cannot be found after the strictest Enquiry.

GILBERT, *supra* note 97, at 138. This language plausibly conveys that a person did not become a witness by virtue of having been examined, but that a person was a witness because he knew something and therefore was examined. *See id.* If the witness was examined under oath before the coroner, and was deceased or unable to be found at time of trial, then that witness's examination could be read. *See id.* If, on the other

have knowledge—witnesses.[158] The definition proposed by Professor Amar and adopted by the Court[159] disregards the foundation of the trial process in this country: trials are conducted through the testimony of persons with knowledge, i.e., witnesses.[160] Even if *witness* is defined as a person who "bears testimony," a hearsay declarant falls within the definition as soon as his words are presented as evidence of a fact of which the hearsay declarant supposedly has personal knowledge.[161] If a hearsay declarant was not a witness who bears testimony, why allow impeachment of hearsay declarants?[162] The exclusion of hearsay declarants from the definition of

hand, the witness was not examined, then the witness would be lost to the trial process, but no less a witness. *See id.*

158. A person who lacks personal knowledge ordinarily is not a proper lay witness. *See* FED. R. EVID. 602.

159. *See supra* notes 147–50 and accompanying text.

160. *See* Josephine Ross, *After* Crawford *Double-Speak: "Testimony" Does Not Mean Testimony and "Witness" Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 155–56, 198 (2006) (discussing how *Crawford* allows the prosecution to call a person as a witness who is not a witness to the crime, but is someone to whom a witness spoke, and proposing a functional test for the right to confront witnesses that asked whether "the declarant's statements serve as an accusation against the defendant" and whether "the credibility of the declarant [is] important to the resolution of the case"). Professor Jonakait explains that the Court's definition of "witness" in the Sixth Amendment is inconsistent with other constitutional provisions, particularly the Sixth Amendment's own right to compulsory process. Jonakait, *supra* note 156, at 190–94.

161. *See* FED. R. EVID. 806 advisory committee's note ("The declarant of a hearsay statement which is admitted in evidence is in effect a witness."). Restricting the definition of "witness" to exclude hearsay declarants allows the proponent of evidence to introduce the declarant's words by using the listener as a conduit when it is convenient or useful to do so. *See, e.g.*, United States v. Johnson, 581 F.3d 320, 324–25 (6th Cir. 2009) (holding that, "because [declarant co-conspirator] did not know that his statements were being recorded and because it is clear that he did not anticipate them being used in a criminal proceeding against [the defendant]," he was not a witness for confrontation purposes).

162. FED. R. EVID. 806 (providing a hearsay declarant's credibility may be attacked); *see* Am-Cal Inv. Co. v. Sharlyn Estates, Inc., 63 Cal. Rptr. 518, 529 (Ct. App. 1967) ("[T]he trial court committed prejudicial error in receiving the inadmissible hearsay testimony of Duncan relating to the purported letter of commitment and then rejecting the admissible impeaching evidence. The impeaching evidence would have definitely tended to refute Duncan's testimony . . . ."); State v. Jordan, 663 N.W.2d 877, 880 (Iowa 2003) (allowing the government to impeach the defendant's out-of-court party admission although defendant did not testify in court, and noting "[t]he declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified" (quoting FED. R. EVID. 806 advisory committee's note)); State v.

witness disregards the fact that whether a person is a witness turns not on to whom a person spoke or why, but on what knowledge the person possesses, and secondarily, on a party's decision about whether to introduce that knowledge in support of a claim or defense. Either words are spoken by a person with knowledge of relevant factual information—a witness—or the words are irrelevant and should not be admitted against a criminal defendant.

B. *Expansion of Hearsay Exceptions*

The expansion of hearsay exceptions provides further insight into why *Crawford* raises the specter of the witnessless trial of the early 17th century common criminal. After the ratification of the Bill of Rights, positivist views appeared to begin replacing the best-evidence principle seen during the 18th century.[163] Although written nearly 20 years after the Sixth Amendment, in 1817, Phillipps documented, consistent with *Queen*, the principle that evidence was to be given in court, under oath, with an opportunity for cross-examination:

> It is a general principle in the law of evidence, that if any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn to speak the truth; and the reason of the rule is, because evidence ought to be given under the sanction of an oath, and that the person, who is to be affected by the evidence, may have an opportunity of interrogating the witness as to his means of knowledge and concerning all the particulars of the fact.[164]

Phillips, 840 P.2d 666, 670–71 (Or. 1992) (holding that defendant was entitled to impeach hearsay declarant by calling witness to relay same declarant's inconsistent statement).

163. *Compare* S.M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 167 (John A. Dunlap ed., 1st Amer. ed., New York, Gould, Banks & Gould 1816) ("The true meaning of [the best-evidence rule] is, not that courts of law require the strongest possible assurance of the matter in question, but that no evidence shall be given, which, from the nature of the thing, supposes still greater evidence behind in the party's possession or power . . . ."), *with* 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 51–52 (London, Hunt & Clarke 1827) (arguing that evidence "is derived from one or other or both of two sources: from the operations of the perceptive or intellectual faculties of the individual himself, and from the supposed operations of the like faculties on the part of other individuals at large," and arguing that the former is more reliable because it only relies on the perception of one individual).

164. PHILLIPPS, *supra* note 163, at 173; *see also* Queen v. Hepburn, 11 U.S. (7 Cranch) 290, 295 (1813) ("[*H*]*earsay evidence* is incompetent to establish any *specific* fact . . . .").

Not surprisingly, Phillipps' first American edition characterizes hearsay as "not [e]vidence."[165]

During the early 1800s, Jeremy Bentham "launched a comprehensive, sustained and vicious attack on all formal rules of evidence *and* procedure."[166] By the late 1800s, positivist debate initiated the creation of broader exceptions to the hearsay rule.[167] Professor James Bradley Thayer expressed a fundamental precept of evidence law that "all that is logically probative is admissible" "unless excluded by some rule or principle of law."[168] Thayer's view contrasts with preratification case law, which viewed hearsay as not competent evidence at all,[169] and with Gilbert's assertion that each man is entitled to the presentation of the best evidence of which "the [n]ature of the [t]hing is capable."[170]

This shift from Gilbert's expression that individuals have a "right" to the best available evidence against them to Thayer's expression that individuals should be tried with freedom of evidence inferentially suggests the re-envisioning of evidence law. Instead of a procedure protecting moral rights, evidence law became a procedure to administer efficient trials.[171] By 1880, while writing in favor of adoption of the res gestae exception to the hearsay rule, Thayer reduced the Confrontation Clause to a "familiar principle": "that evidence against an accused person must be given in his presence. We . . . value this principle, and have incorporated it in our written constitutions of government."[172] However, this does not undermine the admission of res gestae evidence.[173] Notwithstanding this principle, Thayer argued that res gestae hearsay should be admissible because such statements "are as likely to work in his favor as to work against him."[174] As discussed below, this reasoning runs counter to the presumption of

165. PHILLIPPS, *supra* note 163, at 173.

166. Twining, *supra* note 12, at 449; *see generally* 1 BENTHAM, *supra* note 163, at 24–29 (providing Bentham's positivist theory of legal evidence in general).

167. THAYER, *supra* note 11, at 265–66.

168. *Id.* at 265. Professor Thayer also favored restricting the use of jury trials and reducing the number of jury trials in both civil and criminal cases. *Id.* at 534–35.

169. *Compare id.* at 265, *with* PHILIPPS, *supra* note 163, at 173.

170. *Compare* THAYER, *supra* note 11, at 265, *with* GILBERT, *supra* note 97, at 8.

171. *Compare* GILBERT, *supra* note 97, at 4–5, *with* THAYER, *supra* note 11, at 265.

172. James B. Thayer, *Bedingfield's Case.—Declarations as a Part of the Res Gesta*, 14 AM. L. REV. 817, 828 (1880).

173. *Id.*

174. *Id.*

innocence and the requirement that a criminal defendant's guilt be proven beyond a reasonable doubt.[175] Thayer's treatise on evidence later proposed that the rule against hearsay be treated as an exception to admissibility of probative evidence:

> [W]hat is the rule, and what the exceptions? There lies a difficulty. A true analysis would probably *restate the law* so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible. To any such main rule there would, of course, be exceptions; but as in the case of other exceptions, so in the hearsay prohibition, this classification would lead to a restricted application of them, while the main rule would have freer course.[176]

Discounting hearsay dangers and the inherent value of presenting all witnesses in live court proceedings, Thayer asserted that

> hearsay statements often derive much credit from the circumstances under which they are made; say, *e.g.*, from the fact of being made under oath, or under impressive conditions, as being against interest, or made under strong inducements to say the contrary, or as part of a series of statements or a class of them which are usually careful and accurate, and the like . . . .[177]

Thayer advocated the admission of such statements "once the absence of the perceiving witness is accounted for" and lamented that the law had not from the beginning of time allowed the admission of hearsay "as secondary evidence."[178] John Henry Wigmore's influential works in turn "adopted and supplemented" Thayer's works, "and made them known to the profession."[179]

175. *See* discussion *infra* Part IV.C.3. *But see* Seigel, *supra* note 72, at 927 (arguing that without a hearsay rule, "[p]laintiffs and prosecutors might get their cases to the jury slightly more often . . . , but the hearsay evidence in many such cases would not be sufficiently probative to support a favorable verdict"). If hearsay evidence is insufficiently probative to support a verdict, prosecutors should not assert the need for hearsay, and it seems doubtful that *Crawford* alone would have caused increased dismissals of domestic violence cases, as some have shown. *See, e.g.*, Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 750 (2005).

176. THAYER, *supra* note 11, at 522 (emphasis added).

177. *Id.* at 523.

178. *Id.*

179. Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 909 (1937); *see also* 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW

Thayer and Bentham provide the foundation for today's "new evidence" theories of freedom of proof.[180] While freedom of proof has been given varying definitions, it often incorporates the proposition that hearsay should be presumptively admissible,[181] and for purposes of clarity, this Article adopts that interpretation.

The modern hearsay exceptions have proven a source of trouble for Confrontation Clause jurisprudence because if the right to confront applies to all hearsay declarants, then the government is more heavily burdened than courts and legislatures have wanted, as evidenced by their adoption of the many hearsay exceptions.[182] Additionally, the right to confrontation presents a barrier against convictions of defendants supposed guilty.[183] Positivist justifications for broad exceptions to the hearsay rule are premised on the belief that cross-examination of such hearsay declarants would provide little, if any, benefit.[184] Thus, it is attractive to define the right to confront in a way that allows as much free use of hearsay as possible, especially in cases of domestic violence and child abuse.[185]

vii–xii (1904).

180. Twining, *supra* note 12, at 440, 453.

181. *Id.* at 454–55.

182. *See* Ohio v. Roberts, 448 U.S. 56, 63 (1980) ("If one were to read this language literally, it would require . . . the exclusion of any statement made by a declarant not present at trial. But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." (citation omitted)), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004); Michael R. Dreeben, *Prefatory Article: The Confrontation Clause, the Law of Unintended Consequences, and the Structure of Sixth Amendment Analysis*, 34 GEO. L.J. ANN. REV. CRIM. PROC. iii, viii, x (2005) (discussing the Court's approach to this conflict prior to *Crawford*).

183. *See* U.S. CONST. amend. VI.

184. *See, e.g.*, Dutton v. Evans, 400 U.S. 74, 94–96 (1970) (Harlan, J., concurring) (advocating Wigmore's approach and arguing that "[a] rule requiring production of available witnesses would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient and of small utility to a defendant"). For a discussion of Justice Harlan's own contradictory views on the application of the Confrontation Clause to hearsay, see generally Dreeben, *supra* note 182, at vii–viii.

185. *See* Sklansky, *supra* note 35, at 29–30 (asserting that *Crawford* has "stalled" the "reform agenda" of liberalizing the admission of evidence to better address "criminal victimization of women and children, especially in cases of domestic violence, child abuse, and sexual molestation"); *see also* Lininger, *supra* note 175, at 798–99 (recommending the adoption of expansive hearsay exceptions to take advantage of *Crawford*'s ruling that nontestimonial hearsay is not subject to the right of confrontation).

At the same time, Confrontation Clause policy continues to take shape with the premise that hearsay law will remain the same, such that nontestimonial hearsay will continue to be evaluated under the current rules. For example, in *Williams v. Illinois*, the Court assessed whether an expert opinion that was based on unconfronted testimonial hearsay violated the Confrontation Clause.[186] Determining that the expert's testimony did not violate the Sixth Amendment because the out-of-court statement in question was not offered for the truth of the matter asserted,[187] four members of the Court rejected arguments that the holding would "open the door" to experts basing opinions on "factual premises not supported by any admissible evidence, and may also reveal the out-of-court statements on which the expert relied."[188] Justice Alito's plurality opinion concluded that these dangers were obviated by Federal Rule of Evidence 703's prohibition of an expert's disclosure of inadmissible evidence to the jury.[189]

C. Crawford's *Pernicious Effects*

1. *Reduces Confrontation to an Assessment of Evidence's Purported Importance*

The American justice system incorporates the principle that the defendant need not produce any evidence of innocence, but has the right to require the state to produce evidence against him. The drafters of the Constitution and the Bill of Rights were, broadly speaking, concerned about the government's power to influence outcomes and thereby lock away critics and troublemakers.[190] The hearsay rule helps protect the balance of power by ensuring that the government presents live witnesses to prove particular facts. The Confrontation Clause ensures that the defendant can then test the words of those live witnesses by cross-examination, in open court, before the defendant and jury.

186. Williams v. Illinois, 132 S. Ct. 2221, 2227 (2012) (plurality opinion).

187. *Id.* at 2240.

188. *Id.* at 2241.

189. *Id.*; *see* FED. R. EVID. 703. The plurality noted that this situation would also be prevented by the trial judge's role as the *Daubert* gatekeeper to expert evidence and the requirement of "independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony." *Williams*, 132 S. Ct. at 2241.

190. *See generally* THE COMPLETE BILL OF RIGHTS, *supra* note 17, at 419–44 (providing a thorough review of the debates in the state conventions concerning rights in criminal trials).

Crawford, by contrast, reduces the Confrontation Clause to depending upon evidentiary rulings. *Crawford* and its progeny have been criticized for substituting judicial determination of whether a statement is testimonial in place of the *Roberts* test of whether a statement is reliable.[191] *Roberts*, of course, was criticized for departing from the Confrontation Clause's scope in judicial assessments of reliability of evidence.[192] But both tests suffer from the same broader conceptual infirmities. First, both the *Roberts* reliability test and the *Crawford* testimonial-evidence test constrain the scope of the constitutional protection to particular kinds of hearsay evidence that turns on an underlying judgment of the perceived value of confronting that evidence.[193] Second, *Crawford*, its progeny, and *Roberts* before them disregard the interrelationship between the Confrontation Clause, the right to trial by jury, and the presumption of innocence.[194] The implications of the Court's decoupling of the Confrontation Clause from the hearsay rule may be far-reaching and inconsistent with the fundamental theoretical principles underlying the Confrontation Clause: the right to trial by jury and the presumption of

191. *See* Michael D. Cicchini, Essay, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 FORDHAM L. REV. 1301, 1310 (2011) (arguing that the Supreme Court has once again "killed" the Confrontation Clause by substituting a new framework that incorporates all of the flaws of *Roberts*).

192. *See* Crawford v. Washington, 541 U.S. 36, 60 (2004). *Crawford* criticized the rationale of *Roberts* on the following grounds:

> First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

Id. Scholarship debating the scope of *Crawford*'s testimonial statements recalls Professor John Douglass's 1999 critique of *Roberts* as having "produced a constitutional rule that excludes a slice of hearsay so thin that the application of the rule now seems little more than a theoretical possibility. Many have debated that the Court has cut too thin or too thick a slice, but the problem is deeper than that." John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 195 (1999) (footnote omitted). Asserting that unreliability is a poor basis for Confrontation Clause analysis of hearsay, Professor Douglass proposed that, although hearsay declarants are witnesses within the meaning of the clause, "virtual cross-examination" could provide effective confrontation of hearsay declarants. *Id.* at 196–97.

193. *See infra* Part IV.C.1.

194. *See infra* Part IV.C.2.

innocence.[195] To truly revive the Confrontation Clause, as *Crawford* promised, but failed to deliver, the Court should focus on the principles protected by the Confrontation Clause.[196]

Crawford's Confrontation Clause analysis has been analogized to "the discredited *Roberts* framework"[197] because it, too, rests the protections of the Confrontation Clause on a judicial assessment of whether the circumstances surrounding the making of a hearsay statement render that statement within the protections of the clause.[198] Professor Richard D. Friedman, a proponent of *Crawford* and free evidence, asserts that unconfronted, nontestimonial hearsay evidence *should* go to the jury in criminal cases.[199] Professor Tom Lininger describes *Crawford*'s new test as "present[ing] both opportunities and challenges for statutory [hearsay] law" that would best be solved by "statutes [that] supply a minimal level of confrontation rights vis-à-vis declarants of nontestimonial hearsay."[200]

In *Crawford,* as in its previous Confrontation Clause jurisprudence, the Court's use of an evidentiary definition to define the right to confront witnesses[201] permits lower courts to give the government greater power against the criminal defendant.[202] Despite its rhetorical protestations of

195. *See infra* Part IV.C.3.

196. *See infra* Part V.

197. Marc McAllister, *Evading Confrontation: From One Amorphous Standard to Another*, 35 SEATTLE U. L. REV. 473, 492 (2012).

198. *See* Cicchini, *supra* note 191, at 1321 (criticizing the *Crawford–Davis–Bryant* framework and advocating adoption of a test defining "testimonial" as "all accusatory hearsay" (quoting Michael D. Cicchini & Vincent Rust, *Confrontation After* Crawford v. Washington*: Defining "Testimonial,"* 10 LEWIS & CLARK L. REV. 531, 543 (2006))); Ross, *supra* note 160, at 207 (advocating a test of evidentiary function to better safeguard against judicial incentives "to rule in ways that allow a trial to proceed in the absence of witnesses").

199. *See* Richard D. Friedman, *Discussion: Confrontation and the Utility of Rules,* 16 MISS. C. L. REV. 87, 87 (1995) ("In most contexts, most hearsay should be admissible . . . . But we cannot abide by a presumptive rule of admissibility of hearsay unless at the same time[—]without relying on the jumble of hearsay exemptions — we define the bounds of a strong right of confrontation belonging to criminal defendants.").

200. Lininger, *supra* note 33, at 289–90.

201. *Id.* That the right has been fractured by the definition is poignantly demonstrated by reference to the clause being "strong" in some contexts and "weak" in others, so that "due process supplies the authority for confrontation," if at all, for nontestimonial statements. *Id.*

202. *See* Ross, *supra* note 160, at 207. As Professor Ross explained,

> there is strong incentive for judges to rule in ways that allow a trial to proceed

enforcing a robust right of confrontation, *Crawford*, like *Roberts* before it, circumscribes the right of confrontation to a particular class of evidence.[203] The apparent value judgments of *Crawford* can be distilled as follows: (1) testimonial evidence is likely to be reliable and is subject to the right of confrontation because it serves the function of history's ex parte affidavit, and (2) we need not be too terribly concerned with nontestimonial evidence, which is less likely to be reliable and was not at issue historically, because jurors are able to assess the unreliability of the nontestimonial evidence.[204] This is the inverse of *Roberts*'s value judgments: (1) reliable evidence need not be confronted because jurors are able to see that it is reliable and cross-examination is therefore unnecessary, and (2) unreliable hearsay requires confrontation in order to ensure that the jury understands that the evidence is not reliable.[205] At their core, both cases seek to define the scope of the right based on a classification of evidence that turns on value judgments about whether it is important that an individual be permitted to exercise the right.[206]

> in absence of witnesses. After all, the defendant's case is likely to be dismissed if judges construe the statements as testimonial. If the statements are deemed non-testimonial, the only recourse for the defendant is an appeal after a conviction, for which the standard of review will be the deferential abuse of discretion.

Id. (footnote omitted); *see also* Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 619 (2003) (stating, before *Crawford*, that the Court "ha[d] reduced a fundamental constitutional right to a rule of evidence. The Court ha[d] justified this restructuring by equating reliability with confrontation").

203. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004) (limiting the right of confrontation to testimonial evidence).

204. *See id.* at 61–65 (discussing reliability and testimonial statements).

205. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. 36. Professor Douglass described the *Roberts* line of precedent as

> lead[ing] trial courts to apply the Confrontation Clause as a rule of evidence, either admitting or excluding hearsay. The out-of-court statement must pass the constitutional test of 'reliability' or the court will exclude it altogether. If the court admits the statement, the case typically proceeds without exploring means of testing credibility or accuracy of the declarant's statement.

Douglass, *supra* note 192, at 193 (footnote omitted)). Note that the testimonial–nontestimonial test delineated by *Crawford* and its progeny likewise invites lower courts to treat the Confrontation Clause as a rule of evidence. If the hearsay statement was made with the intent or knowledge that it would likely serve as evidence in a criminal case, then the statement is excluded; otherwise, it is admitted without any ability to test the credibility or accuracy of the statement. *See Crawford*, 541 U.S. at 68.

206. *See Crawford*, 541 U.S. at 68; *Roberts*, 448 U.S. at 66.

Hinging the constitutional right to confront witnesses on a value judgment about whether confrontation is worthwhile allows judicial policy to influence outcomes, in at least some cases, through definition of the right.[207] Put another way, if courts can define the kind of evidence to which the right of confrontation applies, then the balance of power can be tipped in favor of the government by excluding from the right of confrontation classes of evidence for which the government asserts a need (in order to secure a conviction) but for which production of a live witness would be difficult, impossible, or burdensome. *Roberts* limited confrontation by accommodating postratification hearsay exceptions upon a finding of reliability.[208] This seemed to favor the government, because it is easy to characterize circumstances to support a finding that hearsay is reliable.[209] *Crawford* purported to create a robust right by anchoring it to in-court witnesses and a class of its possible substitutes, which superficially appears favorable to government by excluding many hearsay statements made to police officers.[210]

On the other hand, the Court could broadly define the kind of evidence to which the right of confrontation applies, which would favor the defendant.[211] When the Court stated that nontestimonial statements lack constitutional significance, the Court also confirmed that some statements *do* have constitutional status.[212] Hearsay that meets the definition of testimonial may not be admitted without the opportunity for cross-examination.[213] Thus, the Court tacitly accepts the proposition that states do not have flexibility in developing hearsay doctrine when it comes to testimonial statements.[214] The potential breadth of the definition of

207. *See* Cicchini, *supra* note 191, at 1307–08, 1317–20 (noting that Roberts failed to put any constraints on judicial discretion, and arguing that *Crawford* and its progeny rely heavily on the same judicial discretion they sought to eliminate).

208. *Roberts*, 448 U.S. at 66.

209. *See, e.g.*, Trigones v. Bissonnette, 296 F.3d 1, 9 (1st Cir. 2002) (holding that the state court's characterization that admitted hearsay statements fell within a hearsay exception and thus were reliable was reasonable under *Roberts*).

210. *See Crawford*, 541 U.S. at 51–52.

211. *See* Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 520 (1973) (arguing if the Confrontation Clause were "stretched to its full potential," it would favor defendants, and that "many *cognoscenti* suspect that hearsay exceptions display a prosecutorial bias to start with").

212. *Crawford*, 541 U.S. at 68.

213. *Id.*

214. *See id.*

testimonial remains the focus of much of the scholarship proposing modifications to *Crawford*'s test.[215]

Roberts sought to equate the right to confront witnesses with the hearsay rule, which seems a reasonable enough effort.[216] Unfortunately, the Court had long been enmeshed in the effort to accommodate modern hearsay exceptions, which address positivist utilitarian notions of judicial economy: the difficulty and expense of producing a live eyewitness and the usefulness of cross-examination.[217] The *Roberts* Court fell into the same conceptual trap that has perpetually troubled the Court since it first considered the right to confrontation in *Mattox v. United States*.[218] When the *Roberts* Court defined the right to confrontation in terms of the kind of evidence at issue, the Court expressed a view that the right is subject to aspects of evidentiary definition, and made it easier for the government to introduce incriminating evidence.[219] Rather than constraining hearsay exceptions to the "firmly rooted" exceptions recognized when the Bill of Rights was ratified, the Court added an exception to confrontation for statements accompanied by independent indicia of reliability.[220] Supposed

215. *See, e.g.*, Friedman, *supra* note 7, at 456–57 (noting that the *Crawford* Court offered three potential standards for what constitutes testimonial statements, and that noting only one "captures the animating idea behind the Confrontation Clause"); Friedman, *supra* note 14, at 573 (discussing open questions about the scope of testimonial); McAllister, *supra* note 197, at 492 (arguing the scope of testimonial under *Crawford* and its progeny makes results unpredictable).

216. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("[The] indicia of reliability requirement . . . . reflects the truism that hearsay rules and the Confrontation Clause are generally designed to protect similar values . . . ." (citations omitted) (internal quotation marks omitted)), *abrogated by Crawford*, 541 U.S. 36.

217. *See, e.g.*, *id.* at 63 (noting the Court in *Mattox v. United States* had found the dying declaration exception was contrary to the Confrontation Clause, but applying the Confrontation Clause as written would require the abrogation of "virtually every hearsay exception, a result long rejected as unintended and too extreme"); Dutton v. Evans, 400 U.S. 74, 86 (1970) (plurality opinion) ("It seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this Court has never equated the two, and we decline to do so now." (footnotes omitted)).

218. *See* Mattox v. United States, 156 U.S. 237, 243 (1895) (equating the Sixth Amendment's Confrontation Clause to a general rule, and finding 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").

219. *See Roberts*, 448 U.S. at 66.

220. *Id.* The Court's approach in *Roberts* has alternatively been called a refinement of a "functional approach" to interpreting the clause. White, *supra* note

reliability forms the basis for many of the hearsay exceptions now embodied in Federal Rule of Evidence 803.[221] *Crawford* similarly expresses a view that the confrontation right is subject to a question of evidentiary definition,[222] but axiomatically, it may ultimately *expand* the government's power to introduce incriminating evidence by de-constitutionalizing the effect of the hearsay rule.[223] This enables the law of evidence to reflect political morals concerning the value of obtaining a conviction by selectively circumscribing the right to confrontation to testimonial evidence alone. Moreover, unlike some other countries with relaxed hearsay rules, the American justice system does not unite the defendant, prosecution, and court in a meaningful search for truth.[224] Such differences recommend caution before transplanting rules or procedures that relax defendants' procedural protections from other countries.

If one considers roles played by the court, jury, and parties to an adversarial proceeding, several observations can be made. First, without the hearsay rule, live firsthand witnesses need not be produced as a matter of evidentiary competence. This can give the government substantially more discretion about whether to produce for cross-examination a dubious

202, at 604.

221. *See* FED. R. EVID. 803 & advisory committee's note (identifying "circumstantial guarantees of trustworthiness" as justifying exceptions). *But see* FED. R. EVID. 804(b) advisory committee's note (clarifying that Rule 804 exceptions do not proceed on the theory that a hearsay statement "possesses qualities which justify" admission, but on the theory that it is preferable to admit certain hearsay if declarant is unavailable).

222. Crawford v. Washington, 541 U.S. 36, 61 (2004); *see* Sklansky, *supra* note 35, at 46 (noting that in two recent cases, the Supreme Court did not use the terms *confrontation* or *hearsay*, "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").

223. *Crawford*, 541 U.S. at 61, 68; *see* Sklansky, *supra* note 35, at 54 (critiquing *Crawford* for coupling the right of confrontation to 18th century hearsay law, even as the Court decoupled the operational and argumentative links between the right and the hearsay rule).

224. "In many continental systems, the accused has the ability to request the investigating officials to pursue further lines of investigation. As Zalman argues, such requests can be seen as an intervention that 'strikes at the heart of adversarialness' by allowing the defense to direct part of the police investigation." Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C. J. INT'L L. & COM. REG. 387, 420 (2010) (quoting Marvin Zalman, *The Adversary System and Wrongful Conviction*, *in* WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 71, 80–81 (C. Ronald Huff & Martin Killias eds., 2008)).

witness who made nontestimonial hearsay statements.[225] Without the hearsay rule, the defendant has no right to compel the prosecution to produce a live witness with firsthand knowledge of any nontestimonial statement.[226] When nontestimonial hearsay is available, the government can control whom the defense can cross-examine by choosing whom to call as a witness.[227] As a matter of trial tactics, prosecutors may prefer to introduce hearsay over calling a live witness.[228] More troubling, "[t]he benefits of introducing hearsay increase in direct proportion with the probability that an in-court appearance would reveal deficiencies in the witness's testimony or would otherwise damage the proponent's case."[229] And, the greater the government's need for the evidence, "the greater the potential that the jury may overassess it and thereby erroneously convict an innocent defendant."[230] Because a criminal defendant has no right to depositions, defendants are unlikely to take the risk of using the right to compulsory process to seek out prosecution hearsay declarants to testify at trial even when they are available to be served.[231]

Second, if the right to confront witnesses were as broadly defined as possible, such that it applied to all evidence, then the defendant could

225. *See* Robert P. Mosteller, *The Sixth Amendment Rights to Fairness: The Touchstones of Effectiveness and Pragmatism*, 45 TEX. TECH. L. REV. 1, 26 (2012).

226. The defendant would have compulsory process to secure his own witnesses in his case-in-chief. The government has the burden of proof, and jurors will view the defendant's case in light of the government's case, rather than as a part of it.

227. White, *supra* note 202, at 616.

228. Professor Michael Seigel notes that there are infinite reasons a trial lawyer might prefer using hearsay, when allowed. Seigel, *supra* note 72, at 919 n.82. Empirical research suggests that jurors may not reward such tactics, but first they must learn that the prosecutor could have produced a live witness. *See* Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorneys' Strategic Choices*, 40 FLA. ST. U. L. REV. 1, 28 & fig.3, 32–33 & fig.5, 35–36 (2012).

229. Seigel, *supra* note 72, at 923.

230. Peter T. Wendel, *A Law and Economics Analysis of the Right to Face-to-Face Confrontation Post-*Maryland v. Craig*: Distinguishing the Forest from the Trees*, 22 HOFSTRA L. REV. 405, 466 (1993). Professor Wendel's economics analysis of *Maryland v. Craig*, 497 U.S. 836 (1990), in which the Court upheld the use of one-way closed circuit television for a child's testimony, notes that the cost–benefit analysis of confrontation compares the cost of an erroneous acquittal when a witness is not produced, which he finds to be small, against the increased probability of an erroneous conviction. *Id.* at 434, 473. This Article challenges the assumption that the hearsay exceptions provide "external guarantees of trustworthiness." *Id.* at 466. Assuming, arguendo, that they do, free admission of nontestimonial evidence would change the calculus because it does not carry such presumed external guarantees.

231. *See* Seigel, *supra* note 72, at 923–24.

compel the government to produce as a live witness every person with knowledge concerning a fact being used to establish guilt. There would be no need for a rule against hearsay in a criminal case in which the defendant was provided a complete right of confrontation. If the right to confrontation is incompletely recognized and construed as subject to evidentiary definition, then a firm hearsay rule that is not eroded by exceptions operates to limit judicial construction of the confrontation right.

Third, the government must produce some minimum quantum of evidence sufficient to prove guilt beyond a reasonable doubt.[232] The hearsay rule requires a certain minimum standard of evidentiary competence,[233] potentially limiting the quantum of evidence that the government can introduce against the defendant.[234] If the hearsay rule is absolute (without exceptions), the Confrontation Clause provides defendants the ability to conduct testing through cross-examination of all evidence, because hearsay cannot be introduced.[235] If the hearsay rule is limited by the existence of exceptions to the rule, then an absolute confrontation right compels the government to produce hearsay declarants, so that the hearsay rule is effectively superfluous.[236] If the hearsay rule is limited, and the right of confrontation is limited to apply only to evidence that is not within a hearsay exception, the government potentially has more available evidence from which to satisfy its burden of proof because prosecutors can introduce secondhand statements by witnesses without

232. *See* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631, 633–34, 732–33 (1988) (discussing the Supreme Court's acknowledgement of a constitutional requirement that some evidence be presented and distinguishing the beyond a reasonable doubt standard as more appropriately "characterized as addressing the *sufficiency* of evidence" but not the minimum quantum of evidence).

233. Professor Landsman posited that the rules of evidence "establish minimum standards of decency for the conducting of trials." Stephan Landsman, *Who Needs Evidence Rules, Anyway?*, 25 LOY. L.A. L. REV. 635, 646 (1992).

234. During its infancy, hearsay was considered as a competence issue. *See* GILBERT, *supra* note 97, at 149–50 (stating that hearsay was not competent evidence because such statements were not accompanied by the speaker's taking an oath). *But see* Langbein, *supra* note 76, at 1176 (discussing Geoffrey Gilbert and noting that judicial notes from the mid-18th century confirm "that the hearsay rule was not [then] in place in a recognizably modern form").

235. *See* California v. Green, 399 U.S. 149, 173–75 (1970) (Harlan, J., concurring); Dreeben, *supra* note 182, at vii–viii.

236. *See* Ohio v. Roberts, 448 U.S. 56, 63 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004); Dreeben, *supra* note 182, at x.

regard to their availability.[237]

Studies suggesting that jurors place less reliance on hearsay than on live-witness testimony[238] do not demonstrate that it is safe to allow jurors to hear unreliable hearsay for two reasons. In some cases, the choice will be between allowing the jurors to consider hearsay and presenting no evidence at all. Some studies support the conclusion that jurors do not ignore hearsay even if they do not value it as highly as live testimony.[239] Furthermore, although jurors may rely to a greater degree on live testimony,[240] this does not prevent jurors who consider hearsay from reaching a factually or morally unsound verdict.[241] Some research suggests

237. For example, the liberalization of hearsay rules in the United Kingdom may increase the admission of damaging and potentially unreliable evidence that almost certainly would be considered nontestimonial hearsay in the United States. *See* Diane Birch & Michael Hirst, *Interpreting the New Concept of Hearsay*, 69 CAMBRIDGE L.J. 72, 92 (2010) (discussing a British case in which a witness was permitted to testify to her recollection of the contents of her daughter's no-longer-available diary entries about her daughter's relationship with the defendant as evidence of the defendant's commission of sexual offenses against the daughter).

238. *See, e.g.*, Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*, 76 MINN. L. REV. 655, 662, 664 (1992) (presenting study findings and tentatively suggesting that damaging hearsay "did not increase guilty verdicts"). *But see* Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 Nw. U. L. REV. 995, 1041–42 (1994). Seigel explained,

> [Early] empirical findings . . . provide considerably less support for reform than even these cautious researchers suggest. None of the studies addresses the fact that hearsay evidence never appears at trial in some neutral manner. Rather, like all other evidence, hearsay statements are offered by a party, presumably for some particular reason. Sometimes a skillful trial lawyer will use hearsay to camouflage a weakness in her case; sometimes it will be the only available evidence on point; sometimes it will be the best evidence to prove its assertive content. By failing to measure the ability of jurors to evaluate hearsay evidence *in light of the reasons a party might be offering it*, the recent social scientific research is not likely to cast serious doubt on the usefulness of the hearsay rule.

Id. at 1042 (footnote omitted); *see also* Thompson & Pathak, *supra* note 91, at 467 (arguing that such studies "cannot indicate whether the jurors gave the hearsay evidence more or less weight than it deserved").

239. Sevier, *supra* note 228, at 49.

240. *See id.* at 11 & n.49 (discussing empirical studies showing jurors rely more heavily on live-witness testimony).

241. *See id.* at 50 (indicating that jurors are skeptical and analytical consumers of hearsay evidence).

that juries construct a story out of the many individual items of evidence introduced during trial.[242] When the government is able to introduce a number of unconfronted hearsay statements to fill gaps in the story, there is a potential for a change in outcome based on that evidence.[243] Study of whether unreliable rumor hearsay is given greater weight when it corroborates other hearsay evidence would be useful.[244] When those unconfronted hearsay statements are produced by jailhouse informants or snitches, even greater cause for concern exists.[245] Jurors are more likely to rely on hearsay if it is not accompanied by facts suggesting that the prosecutor introduced hearsay as a matter of preference.[246]

A further concern has to do with generational changes in communication. Twitter, Facebook, and other forms of electronic communication now are mainstream. Under a traditional rule, electronic

242. Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242, 251 (1986). Professors Pennington and Hastie found that

> experimental jurors' representations of evidence showed story structures and not other plausible structures. Second, jurors who choose different verdicts have different interpretations of the evidence, that is, different stories. Furthermore, differences in stories correspond to differences in verdict definitions suggesting a functional role for representations of evidence in this decision task.

Id.

243. *See id.* at 253 ("[V]ariability in the story construction stage is systematically related to verdict choice . . . . [J]urors who chose different verdicts differed in their evaluations of the evidence and relevance of the stimuli rather than in their computations of verdict decisions.").

244. *See* Cass R. Sunstein, *"She Said What?" "He Did That?" Believing False Rumors* 13 (Harvard Law Sch., Public Law Working Paper No. 08-56, 2008), *available at* http://ssrn.com/abstract=1304268 ("In a wide variety of experimental contexts, people's opinions have been shown to become more extreme simply because their initial views ha[ve] been corroborated . . . ."). The unfairness of using hearsay to corroborate other evidence is clear if one considers whether Sir Walter Raleigh's trial would have been less fair if Cobham's confession, admitted to corroborate other evidence against Raleigh, had been testified to by Cobham's brother instead of being presented as a signed confession. *See* Boyer, *supra* note 36, at 885–86.

245. *See* Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 276–77 (2012) (discussing the "pervasive problem" of jailhouse informant rings and of one report's finding that snitches played a role in 19 percent of wrongful convictions overturned by exonerating DNA evidence in 2000).

246. *See* Sevier, *supra* note 228, at 28 & fig.3 (summarizing results of a study attempting to address whether the proponent's motivations for introducing hearsay evidence affect jurors' reliance).

communications could qualify as hearsay.[247] If the hearsay rule is relaxed, social media postings—which are sometimes categorized as nontestimonial—may be introduced against defendants with no opportunity to confront the declarants.[248] At least one commentator fears that electronic communications present significant concerns relating to reliability.[249] When "e-hearsay" and circumstantial evidence paint the picture of guilt,[250] will a defendant who is unable to cross-examine the declarants receive a fair trial? Whether future generations of jurors will rely on e-hearsay as a reliable information source remains unknown.[251] Studies examining the Internet's effect on critical thinking suggest that whatever is known about how mock jurors evaluate hearsay may not reflect how future generations of jurors and judges will evaluate hearsay.[252] Further scholarship considering whether there is a generational element to juror response to hearsay, and more particularly, e-hearsay, would be useful before using past studies to conclude that future juries will appreciate and distinguish between hearsay and live testimony.

Finally, the use of an evidence-based definition of the Confrontation Clause right has the potential to change the American trial. Civil law systems are much more open to free evidence, but there are important differences. Some civil law countries require judges to undertake factual investigation.[253] The testimonial–nontestimonial test may cause a

247. *See* Liesa L. Richter, *Don't Just Do Something!: E-Hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process*, 61 AM. U. L. REV. 1657, 1660 (2012) (noting that online social media may "promote the creation of previously nonexistent electronic hearsay").

248. *See id.* at 1702–03 (discussing a murder trial in which the victim's text message stating, "Me and [defendant] are fighting" was deemed nontestimonial under *Crawford* and admitted under the hearsay exception for present sense impressions).

249. *See* Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 337–38 (2012).

250. *See* Richter, *supra* note 247, at 1684 (discussing admissibility of "tweets" as present sense impressions when accompanied by circumstantial evidence supporting a finding that the declarant had personal knowledge and tweeted contemporaneously).

251. *See* Andrew E. Taslitz, *Information Overload, Multi-Tasking, and the Socially Networked Jury: Why Prosecutors Should Approach the Media Gingerly*, 37 J. LEGAL PROF. 89, 112 (2012) ("College students generally tend not to distinguish among the credibility of sources and uncritically to accept what appears on a website, though much of it is unverified, unsubstantiated thoughts and opinions . . . ." (quoting LARRY D. ROSEN, REWIRED: UNDERSTANDING THE IGENERATION AND THE WAY THEY LEARN 156 (2010)).

252. *See id.* at 107–09.

253. Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A*

breakdown of respect for the adversarial process. When unconfronted surveillance—audio or video—is admitted into evidence against the accused, are there intangible losses, such as loss of respect for the judicial system and justice?

Roberts tried to balance state law hearsay doctrine against rights by recognizing modern hearsay exceptions while requiring that evidence introduced through those exceptions be subjected to judicial review for reliability.[254] *Crawford* leaves state hearsay law doctrine unchecked so long as the hearsay falls outside of the judicial definition of "testimonial."[255] Thus, while *Roberts* at least facially sought parity between the Confrontation Clause and the hearsay rule, but went too far in recognizing modern exceptions, *Crawford* restricted the right of confrontation to an indefinite subset of hearsay statements and removed all other restrictions on the admission of unconfronted hearsay evidence.[256] The effect is to change the quality of evidence that can be introduced against a criminal defendant by leaving minimal competence standards to state determination rather than constitutional analysis.

This enables states to set their own minimal competency requirements, thus injecting legislative policy about desired outcomes into the prosecutorial process. A prosecutor in State A thus may have much less difficulty presenting outcome-determinative hearsay evidence than a prosecutor in State B if State A's legislature effectively writes hearsay exceptions to take full advantage of the testimonial and nontestimonial definitions. The defendant in State A will have a very different trial than the defendant in State B. This should be troubling when one considers rules of evidence as serving substantive norms and what it means to criminal defendants when legislation authorizes the gathering of nontestimonial evidence through means such as electronic surveillance.[257]

Comparative Perspective, 42 LOY. L.A. L. REV. 979, 1006–07 (2009).

254. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

255. *See Crawford*, 541 U.S. at 68.

256. *See* Richter, *supra* note 247, at 1695–96 (discussing this distinction in regard to the present-sense-impression exception).

257. *See* Zalman, *supra* note 245, at 277.

> [T]he personnel and processes for detecting, apprehending, and prosecuting felons are far below the standards of reliability that should be demanded by a modern technological society and below levels of fairness expected in a country that takes due process and the rule of law seriously.

The hearsay rule thus defines the *kind* of trial that a defendant can count on by setting a threshold requirement of evidentiary competency, similar to the rule requiring relevance. The hearsay rule, however, also protects the right to confront witnesses by requiring the production of a person with firsthand knowledge to testify as a witness.[258] The right of confrontation itself cannot operate if the hearsay rule is interpreted to allow the government to avoid producing witnesses to testify viva voce. The two obviously are not duplicative; the hearsay rule could compel the presentation of live witnesses in the absence of a right of confrontation. One can exist without the other, but eliminating or constraining either or both allows political morals to meddle with individual rights. Thus, when the *Crawford* Court opened the door to the abolition of the hearsay rule or further expansion of its already myriad exceptions, while resting the right to confrontation on an evidentiary definition, the government's power to influence criminal adjudication increased.

The jury was interposed between the defendant and the government as a means of protecting the defendant from overreaching prosecutions and abuses of power.[259] When legislators and courts are able to erode fundamental principles and interpret the Sixth Amendment as a policy matter, they are able to diminish the jury's ability to function as a protective buffer. That this has occurred is demonstrated by a simple hypothetical. Under *Crawford*'s rationale, it is theoretically possible to convict a defendant entirely through unconfronted, nontestimonial hearsay

> The ultimate question is whether the prospect of, at a *minimum*, 2,000 innocent defendants going to prison every year . . . should move the innocence reform agenda.

Id.; *cf.* Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. Rev. 1155, 1160 (2006) (finding that, in the context of civil procedure, when the substantive interests at stake are highly valued, the "greater the harm from an error. The greater that harm, the greater the social benefit in avoiding it and the more society should be willing to spend on procedures to prevent it").

258. There is some evidence that it was considered against natural justice to introduce evidence that a defendant could not cross-examine. *See, e.g.*, GILBERT, *supra* note 97, at 61 (explaining that a deposition cannot be introduced against a person who had no opportunity to cross-examine the deponent if he was not a party because it is "against natural Justice that a Man should be concluded in a Cause to which he never was a Party").

259. *See* Randolph N. Jonakait, *Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development*, 10 U.N.H. L. REV. 97, 121 (2012) ("Eighteenth century Americans embraced the [jury] system as central to their freedoms and derided and fought English denials or abridgement of jury trials.").

evidence. Assume that five individuals are arrested for conspiring to commit terroristic acts. All five are in separate jail cells. All five talk to their cellmates, and assume that all five make statements that incriminate a sixth person. This sixth person could be convicted by the "testimony" of five cellmates who know nothing beyond what the defendant's alleged coconspirators said. The defendant would be unable to cross-examine anyone who has actual knowledge of the defendant's conduct. Can a jury find the defendant guilty beyond a reasonable doubt based solely on unconfronted evidence? One can easily imagine such an outcome, especially when the defendant is powerless to demonstrate the hearsay declarant's animus, motive, or lack of credibility through cross-examination.[260] In-court testimony also provides the witness the "liberty to correct and explain his meaning."[261] Although the Court has not addressed Due Process Clause limitations on convictions based solely on hearsay, it seems unlikely that a due process violation would be found where the evidence is nontestimonial.[262]

Thus, the problem with *Crawford* is not its erosion through the adoption of a "totality of circumstances" test to evaluate whether certain statements are testimonial, as some commentators have said.[263] The

260. *See, e.g.*, United States v. Smalls, 605 F.2d 765, 776, 780 (10th Cir. 2010). In *Smalls*, the Government had wired a jailhouse informant, who initiated a conversation with the defendant's coconspirator, and then sought to introduce the recording and transcript against the defendant without presenting the coconspirator. *Id.* at 768, 772. The district court excluded the statements, but the Tenth Circuit reversed, finding the coconspirator's statements were "unquestionably nontestimonial" and fell within the hearsay exception for statements against declarant's interest. *Id.* at 773, 778–79. The dissent articulated the position that the Confrontation Clause's "concerns are present whether or not the declarant knows that the government is tricking him into admitting his involvement and at the same time manufacturing 'testimony' against another." *Id.* at 788 (Kelly, J., dissenting).

261. 3 BLACKSTONE, *supra* note 90, at 373.

262. *See* Anthony Bocchino & David Sonenshein, *Rule 804(b)(6) – The Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause*, 73 MO. L. REV. 41, 42–43 (2008) (arguing that policy of allowing potentially untrustworthy hearsay to be admitted under the forfeiture-by-wrongdoing doctrine is unwise, but not going so far as to consider it a due process violation); Imwinkelried, *supra* note 60, at 536–38 (suggesting that due process is unlikely to be grounds for excluding hearsay).

263. *See, e.g.*, Brooks Holland, Crawford *& Beyond: How Far Have We Traveled From* Roberts *After All?*, 20 J.L. & POL'Y 517, 525, 528 (2012) (arguing that *Crawford*'s progeny have "return[ed] confrontation law to a malleable judicial test," and noting that "*Crawford* may now conceive of confrontation even more narrowly than *Roberts* did"); McAllister, *supra* note 197, at 475 & n.15.

problem with *Crawford* is that its core holding, like the antecedent *Roberts* holding, constrains confrontation to a certain kind of evidence without considering the validity of modern hearsay exceptions in the context of the right's application.[264] Compounding that problem, the Court's use of an undefined evidence-based test from the outset permitted a great deal of flexibility for further pronouncements on the subject of what evidence should be called testimonial.[265] In fact, the definition has been broadened considerably beyond that advocated by the main proponents of the testimonial standard's adoption.[266] By defining the right in terms of the value of confrontation to accommodate postratification evidentiary rules, the Court missed an opportunity to carefully consider whether hearsay exceptions adopted in the 19th century *should* breach the exclusionary wall against unconfronted statements built into the Sixth Amendment.

Identifying who is a witness based on whether the witness spoke to the government or intended to create evidence merely increases opacity on the use of the Confrontation Clause as a rule of evidence. Although the problem presented by *Crawford*'s new test can be lessened to some degree if the Court broadly defines testimonial, such an approach suffers by its continued subjugation of the constitutional right of confrontation to a judicial case-by-case assessment of whether a statement has strong or weak accusatory value—an assessment inherently underlying the testimonial–nontestimonial framework.[267] The characterization of a statement as testimonial or nontestimonial holds within it an underlying harmless-error analysis. Testimonial evidence is more likely to be accusatory and therefore strong, so that its wrongful admission is unlikely to be harmless.[268]

264. *See* Crawford v. Washington, 541 U.S. 33, 68 (2004).

265. *See id.* (leaving testimonial to be defined "another day"); Bellin, *supra* note 131, at 1868 ("The current Supreme Court's conclusion that the Confrontation Clause addresses *only* 'testimonial' statements, in concert with its pointed narrowing of the definition of 'testimonial,' results in the elimination (not strengthening) of the constitutional restrictions on the bulk of admissible hearsay.").

266. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting) (stating that the majority's new primary purpose test for whether hearsay statements are testimonial "distorts our Confrontation Clause jurisprudence and leaves it in a shambles"); *see also* Dibrell "Dib" Waldrip & Sara M. Berkeley, *"What Happened?": Confronting Confrontation in the Wake of* Bullcoming*,* Bryant*, and* Crawford, 43 ST. MARY'S L.J. 1, 13 (2011) ("The potential nontestimonial combinations of the [*Bryant*] majority's seemingly endless list are exponential in number—arguably broader than any application of the old *Roberts* . . . test. It seems that this hole in the Michigan ice is likely to expand into a crevasse.").

267. *See Crawford*, 541 U.S. at 68.

268. *See* Ross, *supra* note 160, at 194–95.

Nontestimonial evidence, conversely, may be more likely to be nonaccusatory and therefore weak, making the wrongful admission of such evidence harmless.[269]

Tests seeking to define "testimonial" demonstrate that where the exclusionary line is drawn may vary with the test-maker's perspective on how important it is to admit specific kinds of evidence against the defendant so that juries will convict.[270] This ignores the truth-neutral reasons for confrontation and justifies extending the right of confrontation to only testimonial statements on the ground that the Confrontation Clause's inherent fact-finding purpose would not be aided by the evidentiary exclusion of unconfronted, nontestimonial hearsay.[271] It also allows cost shifting to defendants.[272] Rather than focusing on how government powers were limited to protect individual rights, the Court's use of a totality of circumstances test to assess whether evidence is testimonial gives the appearance of being more concerned with ensuring admission of the same unconfronted evidence that was admitted under the old *Roberts* test but under a more unassailable bright-line standard that opens the door to the liberalization of the hearsay rule.

2. *Ignores Nonepistemic Reasons for Confrontation and the Hearsay Rule*

Crawford and its progeny disregard the truth-neutral reasons for the right of confrontation and the rule against hearsay. Both the right of confrontation and the hearsay rule serve an important neutral purpose: they ensure that a defendant has his day in court and that he is not deprived of a full and fair opportunity to question, probe, and respond to

269. *See id.*

270. *Compare* Friedman, *supra* note 149, at 255, 259 (defining testimonial evidence using the subjective intent of the speaker), *with* Carol A. Chase, *Is* Crawford *a "Get Out of Jail Free" Card for Batterers and Abusers? An Argument for a Narrow Definition of "Testimonial,"* 84 OR. L. REV. 1093, 1096 (2005) (advocating a narrow definition of "testimonial" that would require "government involvement in creating the statement with an eye toward admitting the statement at a trial").

271. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 559 (1992) ("This insistence that the sole function of the Confrontation Clause is to promote more accurate fact-finding ignores the historical background against which the Clause was drafted and overlooks the context in which it is placed.").

272. *See* John Leubsdorf, *Evidence Law as a System of Incentives*, 95 IOWA L. REV. 1621, 1634 (2010) (discussing the difficulty of justifying the hearsay rule as improving the quality of evidence sufficiently to offset its costs).

evidence brought against him.[273] Stephan Landsman posited that "[t]he rules of evidence . . . establish minimum standards of decency."[274] Discussing hearsay, Professor Ho Hock Lai asserts that "[j]ustice in the law of evidence can be explained in terms of care and caution and meaningfully understood as references to the cognitive and affective attitudes of the fact-finder."[275] "The degree of caution [courts] exercise[] in accepting the allegation . . . [reflects] the measure of respect and concern" for the individual against whom the statement is offered.[276] Thus, "[u]nderlying the hearsay rule is the belief that justice must be done in the search for truth."[277]

In a criminal trial, the Confrontation Clause ordinarily instills the highest level of caution against the use of hearsay evidence, corresponding to the gravity of criminal proceedings and respect for the defendant against whom charges have been brought.[278] Thus, the right of confrontation has a "societal dimension" that preserves "respect in the relationships between the accused and the individual witness-accuser, and the accused and the state as accuser."[279] Professor Eileen Scallen employs a useful classroom exercise to illustrate the societal dimension of confrontation isolated from the epistemic reasons for cross-examination:

> I [ask] my students . . . to put themselves in the shoes of an accused. Then, I ask them whether, if they were sure that the testimony was accurate or that the witness would be able to testify convincingly . . . (in short, if reliability was not an issue), and if they were sure that the

273. *Cf.* Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 111–12 (1988) (discussing the truth-neutral value of a defendant's participation in the trial process incorporated in the right to present evidence). Professor Ho Hock Lai describes this truth-neutral value as "justice as humanity," which is "exhibited in empathic care, an other-regarding affective attitude that supposes the capacity to take the position of a fellow human being and to experience the situation from her standpoint," and which "elicits in the virtuous a benevolent response" to the individual, even if the individual is guilty of a crime. H. L. Ho, *Re-Imagining the Criminal Standard of Proof: Lessons from the 'Ethics of Belief,'* 13 INT'L J. EVIDENCE & PROOF 198, 203–04 (2009) (footnote omitted).

274. Landsman, *supra* note 233.

275. HO HOCK LAI, A PHILOSOPHY OF EVIDENCE LAW: JUSTICE IN THE SEARCH FOR TRUTH 282 (2008).

276. *Id.* at 283.

277. *Id.*

278. *See id.* at 282–83.

279. Eileen A. Scallen, *Discussion: Interpretation of Federal Rule 801*, 16 MISS. C. L. REV. 25, 30 (1995).

> government had not manufactured the evidence against them (no procedural concern), they would still want to face their accuser. Virtually all of them say yes, but they have a hard time explaining why, except to resort to the maxim, "if you're going to say that about me, say it to my face." This maxim expresses the desire for respect in the dual relationships the accused has with an individual accuser and the state.[280]

German Professor Susanne C. Walther echoes Professor Scallen, arguing that the purpose of the right to confront witnesses is not a mere procedural right to examine witnesses but a "right to an effective defense" and a right to be heard.[281]

By allowing nontestimonial hearsay to escape the right to confront, *Crawford* allows states and the federal government to impair the defendant's right to an effective defense through manipulation of exceptions to the hearsay rule. In turn, the erosion of the hearsay rule reflects a lack of concern and respect for the defendant.[282] Those who consider this unimportant might consider how they would feel if unexpectedly thrust into a defendant's role themselves.

Furthermore, much about the procedure of trials suggests that factual accuracy is not the central goal of the justice system. The trial process itself may present conditions that are far from conducive to truth-finding.[283] Empirical data suggest that live-witness testimony and juror observation of live-witness demeanor actually may undermine the accuracy of jury fact-

280. *Id.*

281. Susanne C. Walther, *Pipe-Dreams of Truth and Fairness: Is* Crawford v. Washington *a Breakthrough for Sixth Amendment Confrontation Rights?*, 9 BUFF. CRIM. L. REV. 453, 473 (2006). According to Walther, the *Crawford* Court "missed a vital opportunity to clarify and expand the Sixth Amendment's Confrontation Clause" toward this right. *Id.*

282. *See* HO HOCK LAI, *supra* note 275, at 282–83.

283. *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 81–85 (1949) (describing "fight" theory trial tactics and calling "[o]ur present trial method . . . the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation"). Judge Frank also concluded that, because "business and industry daily rely" on hearsay, more hearsay should be admitted. *Id.* at 123. In business and industry, the players may base their reliance on their perceptions of the risk and likelihood of harm if the hearsay proves inaccurate. In a criminal trial, even if jurors give hearsay less credit than live testimony, they may be less likely to incorporate in their decisionmaking an assessment of the risk and likelihood of harm that may flow from any reliance on inaccurate hearsay, which may be greater in human terms than most business errors.

finding.[284] Thus, considering the right of confrontation and the hearsay rule solely in terms of their epistemic values may one day lead to the conclusion that all hearsay is admissible and there is no need for a right of confrontation at all. But a criminal trial is about what happened only at a superficial level. In this sense, a criminal conviction may be said to be just if the defendant is factually guilty.[285] Juries, however, do not serve the sole purpose of historical fact-finding.[286] Professor Seigel points out that when a defendant rests his defense on justification, excuse, or the absence of *mens rea*,

> the jury's verdict is best understood as a normative judgment about the conduct of one or more of the parties. Measuring this kind of verdict in terms of the accuracy of its reflection of historical truth is babble, because accuracy belongs to a positivist discourse. In these cases, the verdict can be measured only by concepts such as "fair" or "just"; that is, by concepts from a normative discourse.[287]

Juries sometimes acquit notwithstanding clear factual guilt. Such acquittals do not necessarily reflect failures of the truth-finding aspect of trials. The trial of John Peter Zenger for seditious libel in 1735 provides an example of a jury determining that a factually guilty defendant was *not guilty*, reinforcing the ideal of a free press.[288]

If a verdict turns on something inherently unknowable, such as a defendant's state of mind, or facts supported by ambiguous or insufficient

284. *See* LOUISE ELLISON, THE ADVERSARIAL PROCESS AND THE VULNERABLE WITNESS 76–77 (2001); Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 837–38 (2011); *see also* Morales v. Artuz, 281 F.3d 55, 61 (2d Cir. 2002) (noting that, "[e]ven if we accept the idea, grounded perhaps more on tradition than on empirical data, that demeanor is a useful basis for assessing credibility," the jurors' blocked view of the witness's eyes did not impair them from being able to assess her credibility). For a thorough discussion of the racial bias inherent in jurors' credibility assessments based upon witness demeanor, see generally Chet K.W. Pager, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373, 394–400 (2005).

285. *See* Friedman, *supra* note 12, at 547–48 (positing that, in the ideal world, the truth establishes fairness).

286. *See* Julie A. Seaman, *Black Boxes*, 58 EMORY L.J. 427, 475–77 (2008) (analyzing what would be left of the jury's role if historical facts were proven by an accurate lie detector, and discussing the hidden quasi-legislative function of juries).

287. Seigel, *supra* note 238, at 1016 (footnote omitted).

288. Lawrence W. Crispo et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 7–8 (1997).

evidence, then the verdict must be evaluated by whether it is fair or just.[289] In such a case, the right to confront witnesses and the hearsay rule appear to be bound up in the normative judgment, which may not be factually accurate. Treating either the right to confront or the hearsay rule as serving only a truth-finding function disregards the complexities of their relationship to the morality of the criminal trial[290]—complexities that distinguish the criminal trial from civil litigation. The free admission of hearsay evidence may (or may not) lack power to affect fact-finding, yet it still affects moral judgments by painting a picture that tinges perceptions of the defendant.

3. *Weakens the Presumption of Innocence, Beyond a Reasonable Doubt Standard, and Right to Trial by Jury*

The admissibility of nontestimonial hearsay without the right of confrontation impacts the presumption of innocence. The presumption of innocence guards against convicting a defendant based on, among other things, what may have been said outside of the trial about a defendant and not admitted as evidence.[291] As Professor Laurence Tribe explained, "[T]he presumption of innocence . . . represents far more than a rule of evidence. It represents a commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocent member of the community."[292] Furthermore, "[p]resuming anything but the factual innocence of an accused would, if the rhetoric [that supports the presumption of innocence] is taken seriously, compromise the

289. Seigel, *supra* note 238, at 1016.

290. *Cf.* Charles I. Lugosi, *Executing the Factually Innocent: The U.S. Constitution, Habeas Corpus, and the Death Penalty: Facing the Embarrassing Question at Last*, 1 STAN. J. C.R. & C.L. 473, 476 (2005) ("[A] divide between law and justice . . . allows for the view that it is morally and legally acceptable to execute the factually innocent. Law will permit the execution of a factually innocent person; justice will not.").

291. *See* Taylor v. Kentucky, 436 U.S. 478, 485 (1978) ("[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof of trial."); *see also* Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The right to a fair trial is a fundamental liberty secured by the [Fifth and] Fourteenth Amendment[s]. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." (citation omitted)).

292. Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 404 (1970).

impartiality and accusatorial nature of guilt determination."[293] The presumption of innocence shares a complex relationship with "the structural, procedural, and substantive characteristics of the criminal process."[294] The easier it is to prove a defendant's guilt, the harder it is to prove a defendant's innocence.[295]

Hearsay evidence admitted at trial carries with it a presumption of reliability or truth. If the evidence is untruthful or unreliable, then it should be excluded.[296] When hearsay is admitted without providing the defendant an opportunity to fully confront it because of the presumption of reliability or truth, the evidence tends to prove the facts asserted against that defendant. In other words, nontestimonial hearsay, by definition, helps to prove the defendant's guilt because, if it is admitted, it carries with it a presumption of reliability or truth that the defendant may not be permitted to challenge through face-to-face confrontation and cross-examination.

Thus, disconnecting the Confrontation Clause from the hearsay rule at least arguably distances the Fifth and Sixth Amendments from some of the principles upon which those rights were born.[297] The underlying theoretical foundations of Fifth and Sixth Amendment rights suggest that greater attention should be given to the interrelationship of the hearsay rule with the full complement of rights retained and documented in the Bill of Rights.

By reaffirming the procedural protections of those subjected to criminal prosecution, the authors of the Bill of Rights expressed "their belief that society holds a unique interest in limiting the state's power to

293. William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 348 (1995).

294. *Id.* at 351.

295. *Id.* at 353.

296. *See* FED. R. EVID. 803 advisory committee's note ("The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement *may possess circumstantial guarantees of trustworthiness* sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." (emphasis added)); FED. R. EVID. 804(b) advisory committee's note ("[H]earsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable *and if his statement meets a specified standard.*" (emphasis added)).

297. *See* Seigel, *supra* note 72, at 941–42 (recommending adoption of a rule admitting hearsay only when it is the best evidence, as defined, but cautioning that in a criminal case, such hearsay, "standing alone, should not be permitted to support an element of a crime beyond a reasonable doubt" because it increases the risk of a wrongful conviction).

stigmatize and punish and, to this end, that criminal procedures should guarantee protections transcending those offered to citizens subjected to civil suit or regulation."[298] As the *Independent Gazetteer* stated in 1788, the judiciary and the courts, as institutions of the government, favor prosecutors: "Judges, unencumbered by juries, have ever been found much better friends to government than to the people."[299] Richard Henry Lee, who was instrumental in the events leading to the Declaration of Independence, quoted Blackstone's admonishment that entrusting the administration of justice entirely "to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices of the state, these decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity."[300]

While expressions concerning the need to protect the individual from the government are common among the writings relating to the Bill of Rights, the need to criminalize conduct and punish offenders notably is not part of the dialogue of the Bill of Rights. In keeping with these sentiments, there is evidence that criminal procedure before the ratification of the Bill of Rights favored acquittals.[301] The reasonable doubt standard historically favored acquittal and provided a significant buffer between government and the individual.[302]

Today, in contrast, both the hearsay rule and the reasonable doubt standard have been significantly eroded. The hearsay rule has been eroded by state and federally codified exceptions.[303] The reasonable doubt standard has been eroded by the modern focus on "reduction of the complex to the simple and the moral to the rational."[304] "Over time, the

298. Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 8 (2005).

299. John O Kaminsk & Gaspare J. Saladino, *An Old Whig*, No. 8, INDEP. GAZETTER, Feb. 6, 1788, at 55, *reprinted in* THE COMPLETE BILL OF RIGHTS, *supra* note 17, at 466.

300. Letter from Richard Henry Lee to Edmund Randolph, Governor of Virginia (Oct. 16, 1787), *in* 5 THE COMPLETE ANTI-FEDERALIST 111, 114 (Herbert J. Storing ed., 1981).

301. *See* Jonakait, *supra* note 259, at 132 (disputing the "conclusion that the purpose of the first known articulation of the reasonable doubt standard" was to promote convictions and citing the Boston Massacre Trials in 1770 as but one example of the use of the reasonable doubt standard to favor acquittals).

302. *See id.*

303. *See, e.g.*, FED. R. EVID. 803–804.

304. Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes*

loss of our understanding of moral certainty and the increasing acceptance of articulability as a basis for reasonableness underscored a great shift in thinking about judgment by a juror."[305] Professor Steve Sheppard argues that the effect has been to shift the burden of proof to the defendant.[306] In 1993, the Honorable Jon O. Newman, then Chief Judge of the United States Court of Appeals for the Second Circuit, expressed concern about federal courts' rejection of instructions seeking to clarify the meaning of the reasonable doubt standard, and cited several studies that "suggest that the traditional charge might be producing some unwarranted convictions. At the very least, the conclusion one draws from such studies is that the charge currently in use is ambiguous and open to widely disparate interpretation by jurors."[307]

Criminal law has expanded considerably since the ratification of the Bill of Rights. The effect has been to increase the police and prosecutorial powers of the state and federal governments.[308] Harvard Law School Professor William Stuntz compared the relationship among prosecutors, legislatures, and the courts, observing that "discretionary enforcement frees legislators from having to worry about criminalizing too much, since not everything that is criminalized will be prosecuted; likewise, legislative power liberates prosecutors, widening their range of charging opportunities."[309] The increasing number of criminal statutes created by the legislatures then "constrains courts, both by taking away lawmaking opportunities and by blunting the effect of judicial tools like vagueness doctrine and the rule of lenity."[310] Finally,

in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1239 (2003).

305. *Id.* Professor Sheppard notes that the "articulability requirement of doubt" presents a potential "barrier to acquit for less-educated or skillful jurors" who cannot explain their reasons for doubt, which in turn provides a basis for other jurors to persuade the less skillful that "the doubt is not a legal basis to vote for acquittal." *Id.* at 1213.

306. *Id.*

307. Jon O. Newman, Madison Lecture, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 984–85 (1993).

308. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 528 (2001) ("Legislators gain when they write criminal statutes in ways that benefit prosecutors. Prosecutors gain from statutes that enable them more easily to induce guilty pleas. Appellate courts lack the doctrinal tools to combat those tendencies.").

309. *Id.*

310. *Id.*

> prosecutors keep courts at bay by using the charging opportunities legislators give them to generate guilty pleas. Guilty pleas, of course, avoid adjudication altogether; they leave courts very little role to play. Notice the nature of these relationships: prosecutorial and legislative power reinforce each other, and together both these powers push courts to the periphery.[311]

Most criminal cases are resolved pretrial by plea.[312] Putting aside the question of whether a factually guilty person may be found legally or morally innocent by acquittal despite clear factual guilt, the remaining cases that do go to trial can be described as some number of factually guilty and some number of factually innocent defendants.[313] Factually innocent defendants who do go to trial are heavily dependent upon "procedures [to] make an acquittal more likely" because they may not be able to prove innocence and may only be able to establish some doubt about their guilt.[314]

Evidence rules can, and sometimes do, shift the balance of power in favor of the government.[315] The *Crawford* schema's interpretation of nontestimonial evidence provides legislators with opportunities to revise evidence law for the purpose of securing convictions,[316] leaving to posttrial

311. *Id.*

312. *See* HINDELANG CRIMINAL JUSTICE REASEARCH CTR., UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS Table 5.24.2010 (2010), *available at* http://www.albany.edu/sourcebook/pdf/t5242010.pdf (providing statistics for criminal defendants disposed of in federal district courts during fiscal year 2010); *see also* Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J.L. & PUB. POL'Y 53, 64–65 (2012) (discussing the American Prosecutors Research Institute's consideration of the ratio of pleas to original charge as an objective measure of prosecutor performance). Plea agreements do not guarantee that factually innocent individuals are not convicted of crimes; the Innocence Project has, to date, documented 29 individuals who pleaded guilty but were later exonerated by DNA evidence. *DNA Exonerations Nationwide*, INNOCENCE PROJECT: FACT SHEETS, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (last visited Nov. 30, 2013).

313. Mosteller, *supra* note 225, at 12–13.

314. *Id.* at 13.

315. *See, e.g.*, FED. R. EVID. 413 (making certain prior crimes admissible against the defendant in sexual assault cases); FED. R. EVID. 414 (making certain prior crimes admissible against defendants in child molestation cases); FED. R. EVID. 415 (making similar acts admissible against defendant in cases involving sexual assault or child molestation).

316. For example, even prior to *Crawford*, Federal Rules of Evidence 413, 414, and 415 were all added to the rules by Congress through enactment of the Violent Crime Control and Law Enforcement Act of 1994 to help convict sexual offenders.

procedures the task of detecting and absolving wrongfully convicted individuals. Unfortunately, posttrial procedures are unlikely to reach all factually innocent convicted persons because these procedures place the burden of proving innocence on the defendant and typically require a heavy burden of proof.[317]

Thus, the testimonial–nontestimonial test encourages further erosion of the presumption of innocence,[318] more plea bargains in cases of unclear factual guilt or innocence (some of which may result in guilty pleas by factually innocent defendants),[319] and subtle promotion of the view that it is better to convict an innocent person so long as all guilty individuals are convicted. When constitutional protections are defined in a way that tips the scales of justice, it is relatively easy to foresee a shift in the criminal justice system toward one that exists to serve the public's desire to feel safe. For example, under a psychological approach to revenge, actual guilt is less important than whether procedures were followed and public belief is satisfied.[320] Under such an approach,

> [p]unishing the innocent may accomplish the very same purpose of gratifying hatred and assuaging fear as when the offender is in fact guilty. In fact, as long as the public believes the accused is guilty, there may be no need for a trial at all, much less constitutional [enhanced procedural protections]. Indeed, if some psychological benefits are a sufficient reason for punishment, an elaborate show publicly justifying a predetermined guilty verdict may offer the best psychological gains.[321]

V. RESTORING CONFRONTATION

A. *Redefining Testimonial*

Although some scholars have acknowledged that the Confrontation Clause probably requires that hearsay declarants be produced for confrontation and cross-examination, these same scholars propose Confrontation Clause tests that permit the admission of hearsay evidence

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135–37.

317. *See* Laufer, *supra* note 293, at 391.

318. *See supra* notes 303–307 and accompanying text.

319. *See supra* notes 311–314 and accompanying text.

320. Fellmeth, *supra* note 298, at 24.

321. *Id.* (footnote omitted).

without either. Professor Seidelson conducted an insightful analysis of the Supreme Court's jurisprudence and concluded that the right to confront could not be subordinated to legislatively created hearsay exceptions.[322] Still, he felt compelled to acknowledge prosecutorial need for presumptively trustworthy evidence, and proposed an alternative test that would accommodate hearsay.[323] Professor Penny White took a historical approach, finding the admission of hearsay without confrontation to be unsupported by the history of the right.[324] Yet, Professor White argued for a test that would allow hearsay evidence to be admitted.[325] Instead of requiring corroboration before admitting a hearsay statement without confrontation, Professor White advocated allowing unconfronted hearsay to be used to corroborate facts proven through live-witness testimony.[326]

More recently, in the wake of *Crawford* and some of its progeny, Professor Michael Cicchini proposed redefining testimonial statements as those statements that are "accusatory."[327] This is similar to the test proposed by Professor Friedman, which asks whether the hearsay declarant understood that her words would serve as evidence.[328] Along similar lines, Professor Marc McAllister proposed a replacement to the Court's totality-of-the-circumstances test for determining whether statements made during police questioning are testimonial.[329] Under Professor McAllister's proposed test, a statement "obtained from a would-be witness to a crime during the crime's *res gestae* would be deemed per se nontestimonial, never subject to the confrontation right," while statements obtained by police from a witness "outside the *res gestae* of a crime . . . may not be admitted in the absence of confrontation."[330] This test is closer to the original rationale

322. Seidelson, *supra* note 16, at 91–92.

323. *Id.* at 92.

324. White, *supra* note 202, at 620–22.

325. *See id.* at 620–21 (arguing that hearsay should be subject to review at the close of government's proof to ensure that hearsay is not considered for the purpose of meeting "the government's burden of proof on any element of the crime").

326. *See id.* at 621 (proposing a jury instruction that "[a]ny witness statement that was offered through another witness may be considered by you as corroboration, but it alone cannot support a finding of any element of the case").

327. Cicchini, *supra* note 191, at 1321. Professor Cicchini also noted this determination was completely dependent upon how the accusatory hearsay was used in the courtroom, particularly whether it was used to establish any element of the crime. *Id.* at 1321–22.

328. *See* Friedman, *supra* note 149, at 255.

329. McAllister, *supra* note 197, at 519–20.

330. *Id.* at 520–21.

underlying core hearsay exceptions,[331] but the res gestae exceptions are based on government need,[332] which is biased in favor of the government's successful prosecution of the case, and thus at odds with the numerous heightened protections of the Fifth and Sixth Amendments.

If scholars believe that the right to confrontation needs to be "rescued" or made "more robust," why do they propose tests that fall short of the full right of confrontation provided by the text? The literature suggests that the reasons can be summed up as follows: (1) the Court is not likely to adopt a test that rolls back 200 years of hearsay exceptions, and (2) there is a "need" for unconfronted hearsay evidence. In sum, tests to allow the use of hearsay abound because hearsay is useful to the government, and because society fears the criminal who was acquitted more than being falsely incarcerated for a crime one did not commit.

There are two responses to these rationales. First, the fact that the current Court is unlikely to adopt a test seems a frail justification for abandoning its support, if such test is what the Sixth Amendment requires. Regardless of longstanding precedent regarding hearsay exceptions, limitations on the right of confrontation remain exactly that: limitations placed on a constitutional right. Second, criminal procedure can accommodate a complete right of confrontation. Doing so would introduce a cost–benefit analysis into legislative expansion of criminal codes and into

331. The modern hearsay exceptions for present sense impression, excited utterance, business records, public records, statements made for medical treatment, and state of mind all trace to the historical view that statements constituting the res gestae of an event were not hearsay—the event spoke through the words and therefore did not meet the definition of hearsay. *See* M.C. Slough, *Res Gestae* (pt. 1), 2 U. KAN. L. REV. 41, 43–44 (1953) (summarizing categories of evidence which fall outside the rule of hearsay and constitute res gestae); Thayer, *supra* note 172, at 828–29 (advocating admissibility of res gestae evidence in both civil and criminal cases). Some modern commentators argue that this historical view is not sufficient to maintain these modern hearsay exceptions. *See, e.g.*, James Donald Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L.A. L. REV. 203, 206–07 (1995) ("[T]he [modern] res gestae exceptions should be abolished because judges apply them arbitrarily, and without consideration for the erroneous assumptions beneath the exceptions . . . .").

332. *See* Dutton v. Evans, 400 U.S. 74, 95–96 (1970) (Harlan, J., concurring) (noting that for some types of hearsay—such as for business records, "official statements, learned treatises, and trade reports"—requiring production of the declarant "would be unduly inconvenient and of small utility to a defendant"); Ross, *supra* note 160, at 148–49 (noting that labeling 911 calls as excited utterances or present sense declarations allowed the government to not "worry about obtaining the alleged victim's cooperation or summoning the witness to court").

prosecutorial decisionmaking during the charging and plea-bargaining process. After the Court decided in *Melendez-Diaz* that the Sixth Amendment requires the prosecution to produce, for cross-examination, technicians who write reports incorporating the machine analysis of a substance for illegal drug cases,[333] states changed their practices, legislators decriminalized possession of minor amounts of marijuana, and prosecutors were required to reconsider offering pleas.[334] In short, foreclosing the use of hearsay declarants as an alternative to live-witness testimony in criminal cases may be expensive, but it may not promote widespread acquittals of guilty defendants.[335]

Allowing defendants to make greater use of depositions in criminal cases would allow confrontation of witnesses who are outside trial subpoena power or likely to be unavailable at the time of trial. Depositions are no longer a favored mode of procedure in modern criminal cases, but were used in the late 1700s and early 1800s.[336] While depositions typically do not provide the jury with the opportunity to observe witness demeanor,[337] they would allow defendants to test the facts presented by hearsay statements. Modern technology makes participation at depositions possible even when the party cannot travel. The Court has already approved the use of closed-circuit television for presentation of a minor's

333. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009).

334. *See* Martin F. Murphy & Marian T. Ryan, Melendez-Diaz*: One Year Later*, BOS. B.J., Fall 2010, at 24, 26 (discussing Massachusetts's response).

335. At least one commentator describes how *Melendez-Diaz* may prevent wrongful convictions in some cases. *See generally* John Wait, *Another "Straightforward Application": The Impact of* Melendez-Diaz *on Forensic Testing and Expert Testimony in Controlled Substance Cases*, 33 CAMPBELL L. REV. 1, 1–3 (2010) (discussing discrepancies between testing results produced at trial and testing actually performed, and detailing the exoneration of one defendant convicted of homicide due to such a discrepancy).

336. *See* Davies, *supra* note 85, at 630–31.

337. In *United States v. Moore*, a defendant sought a trial postponement on the ground that certain witnesses were unavailable. United States v. Moore, 26 F. Cas. 1308, 1308 (C.C.D. Pa. 1801) (No. 15,805). Counsel for the defendant argued against the substitution of *de bene esse* depositions of witnesses, arguing:

> We have good reason to suspect a conspiracy among them, to fix this crime on the defendant. They have evinced the greatest heat and resentment towards him. A viva voce examination before the jury is necessary to our safety. On depositions, though we cross-examine, we shall lose the manner, appearance, temper, [et cetera], of the witnesses, so important in weighing their credit.

Id.

trial testimony when presenting live in-court testimony would psychologically harm the minor.[338] Expanding the use of depositions and technologies such as video link could permit a defendant to cross-examine prosecution witnesses when the witness is unlikely to be at trial through no fault of the prosecution.[339] Whether the Court would—or should—allow such remote depositions under the Sixth Amendment remains an open question worth exploring.[340]

When the defendant has silenced a witness to prevent that witness from appearing in court as a witness to the crime charged,[341] application of the forfeiture-by-wrongdoing doctrine can permit the admission of hearsay without a Confrontation Clause violation.[342] Forfeiture by wrongdoing is already used to ensure domestic violence cases are capable of prosecution when the defendant continues to abuse the victim in order to cause the victim's recantation or absence from trial.[343] Another legislative aid to the prosecution of domestic violence and child abuse would be the creation of more pretrial opportunities for confrontation, so the words of unavailable victims may be heard at trial.[344] Complete solutions to those problems may be unattainable without social reforms to improve the economic position of

338. Maryland v. Craig, 497 U.S. 836, 851–52 (1990).

339. *See* Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1386 (2005) (highlighting potential value of pretrial depositions to crime victims); Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 708–09, 719 (discussing innovations relevant to the introduction of out-of-court confronted testimony by children who are allegedly victims of sexual abuse—some of which are equally relevant to any criminal case—and analyzing the dysfunction of pre-*Crawford* Confrontation Clause constructions that reject the admission of prior cross-examined testimony but allow the admission of prior unconfronted hearsay).

340. Professor Friedman noted that "the rule of *Maryland v. Craig* is unchanged, at least for now . . . . *Crawford* addresses the question of *when* confrontation is required; *Craig* addresses the question of *what* procedures confrontation requires. The two cases can coexist peacefully, and nothing in *Crawford* suggests that *Craig* is placed in doubt." Friedman, *supra* note 7, at 454 (footnote omitted); *see also* Matthew J. Tokson, Comment, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581, 1603–07 (2007) (discussing arguments in favor of finding the use at trial of videotaped depositions of foreign witnesses or unavailable witnesses constitutional).

341. The Author does not include the use of forfeiture by wrongdoing to admit a homicide victim's words to prove the defendant's guilt of homicide. *See* Giles v. California, 554 U.S. 353, 359 (2008).

342. *Id.*

343. Lininger, *supra* note 175, at 808.

344. *Id.* at 754.

women and to end victimization.[345] In cases in which domestic violence or child abuse results in homicide, prosecution of the crime should be no different than any other homicide.

Certainly, even with such measures, some actually guilty defendants would be acquitted. The fundamental question is whether the Constitution favors limiting the government's power to obtain a conviction even if doing so will result in such an acquittal.[346]

B. *Addressing Modern Hearsay Exceptions*

In his well-known comment, *Triangulating Hearsay*, Laurence Tribe described the "testimonial triangle," positing that the hearsay problem forms a reliable inference chain from the declarant's act or assertion to the declarant's belief in the fact represented by the act or assertion to the conclusion that the external reality is that fact.[347] Tribe, who disfavored the hearsay rule,[348] wrote that to establish the inference of "the declarant's belief, one must remove the obstacles of . . . ambiguity and . . . insincerity."[349] To sustain the inference that the statement represents the external fact suggested by the declarant's belief, "one must further remove the obstacles of . . . erroneous memory and . . . faulty perception."[350] When the circumstances surrounding the hearsay statement or other "safeguards" adequately address concerns about these four obstacles, they have been

345. *See generally* Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1280–88 (2010) (presenting complexities and economic factors that may affect how victims choose to respond to domestic violence, and highlighting the necessity of broader societal reforms to improve the economic position of women).

346. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (noting this is a fundamental value underlying the different burdens of proof used in criminal versus civil cases).

347. Laurence H. Tribe, Comment, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974).

348. *See id.* at 957.

> [W]hile the British have seen fit to virtually abandon the hearsay rule in civil cases, progress in the United States has been exceedingly slow. Except for the liberalizing effects of some statutes and a handful of pathbreaking decisions in limited areas, the law of hearsay has persisted in its essentially unsatisfactory state.

Id. (footnotes omitted).

349. *Id.* at 959.

350. *Id.*

found to adequately substitute for cross-examination.[351] This view of the hearsay testimonial triangle has provided one justification for expansive exceptions to the basic rule prohibiting the use of hearsay evidence at trial.[352] The four hearsay dangers are the focus of considerable research and scholarship advocating the abandonment of the hearsay rule.[353]

Tribe's testimonial triangle implicitly assumes that a rational fact-finder can reliably infer that the hearsay dangers are not present, and that the presence of an alternative inference—that there is more to the story than the making of the statement tells us—is irrelevant. Thus, two separate concerns are presented. First, the external facts that are the subject of the statement are almost always incompletely represented by the hearsay statement alone. The party against whom hearsay is offered needs cross-examination to so demonstrate. When, for example, a witness states that he saw the defendant enter the scene of the eventual crime, the defendant might not question the sincerity of the speaker, his memory, or his perception. The statement may be perfectly unambiguous. Yet, the defendant may require cross-examination to attack the inferences that can be drawn from the external reality represented by the statement, such as the inference that the defendant remained at the scene long enough to commit the crime, or that no one else entered before or after the defendant. The hearsay exceptions rob the defendant in a criminal case of the opportunity to establish what the hearsay declarant knows beyond the fact represented by the statement. And it is the other information known—or not known—by the declarant that can change juror perception of the external fact's fit to the prosecution's theory of the case.

Second, as Professor Tribe acknowledged, except when an opportunity to cross-examine the declarant arises, none of the traditional hearsay exceptions eliminate all four of the separate hearsay dangers.[354] None permit the development of information that may provide alternative externalities,[355] motives,[356] or biases.[357] For example, a hearsay declarant

351. *See id.* at 961–69 (describing how different groups of hearsay may overcome the "infirmities of hearsay").

352. *See* 5 WIGMORE, *supra* note 105, §§ 1420–23, at 251–55.

353. *See, e.g.*, Matthew Caton, *Abolish the Hearsay Rule: The Truth of the Matter Asserted at Last* (pt. 1), 26 ME. B.J. 126, 127–29 (2011).

354. *See* Tribe, *supra* note 347, at 961–65 (noting that each group of hearsay leaves at least one leg of the testimonial triangle weak).

355. *See, e.g.*, Street v. United States, 602 A.2d 141, 145 (D.C. 1992) (noting defense counsel was free to inquire about alternative explanations for a complainant's conduct and behavior after an alleged rape); Patterson v. State, No. 03-03-00625-CR,

who reports the license plate number of a getaway car may not have had a good view, may have been wearing outdated eyeglasses, may have felt influenced to provide a plate number out of a desire to be helpful, or may have had a reason to substitute a different plate number. Concerns about reliability are exacerbated if the declarant was under the stress of excitement at the time he made the statements.[358] Furthermore, without cross-examination, the party against whom such evidence is offered cannot demonstrate the absence of fit to the prosecution's case. When cross-examination would reveal a lack of fit, the proponent of the hearsay evidence has a greater incentive to rely on hearsay rather than call the live witness.

When the Confrontation Clause is constrained to testimonial evidence and free evidence of nontestimonial evidence is an option, any concern for the hearsay dangers evaporates.[359] Besides arguing that the

2005 WL 1583515, at *3 (Tex. App. July 8, 2005) (noting that, assuming evidence of a child's "change in behavior" following alleged sexual abuse should have been admitted, it was harmless error to exclude pychologist's testimony of alternative possible sources because the defendant had an opportunity to develop these alternatives during cross-examination of the child).

356. *See, e.g.*, United States v. Brown, 546 F.2d 166, 169 (5th Cir. 1997) ("[I]t is an abuse of discretion and a violation of constitutional rights to deny to a defendant the right to cross-examine a witness at all on a 'subject matter relevant to the witness's credibility', such as the witness's possible motive for testifying falsely." (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)); State v. Marcos, 102 P.3d 360, 363, 365–66 (Haw. 2004) (finding right to confrontation was violated when defendant, charged with abuse of a household member, was not permitted to inquire about ongoing custody battle when the victim—who did not report her injuries until after custody battle began—may have had a motive to fabricate report of injuries).

357. *See, e.g.*, Mayben v. State, 629 So. 2d 723, 727–28 (Ala. Crim. App. 1993) (holding that defendant, charged with attempted murder of his ex-wife, should have been allowed to establish bias by inquiring into her attempts to obtain full custody of their children and threats to have defendant arrested for overdue child support obligations); Tuell v. State, 905 So. 2d 929, 930 (Fla. Dist. Ct. App. 2005) (holding that defendant should have been allowed to inquire into pending criminal charges against juvenile witnesses to establish bias because the right to cross-examination "outweigh[ed] the state's interest in preserving the confidentiality of juvenile delinquency records" (citing *Davis*, 415 U.S. at 318)). *But see* Mosley v. State, 616 So. 2d 1129, 1130–31 (Fla. Dist. Ct. App. 1993) (explaining that "the defendant's right to cross-examine on the question of bias is not unlimited" and thus defendant had no right to ask a police officer if the county could be held civilly liable for false arrest when defendant's arrest was clearly supported by probable cause).

358. *See* Moorehead, *supra* note 331, at 237–39.

359. At least one commentator has advocated abolishing the hearsay rule entirely in civil proceedings and substituting other procedural safeguards, such as a

court should use its discretion to exclude it,[360] the defendant is unable to do anything to protect himself from improper inference chains being drawn. The limited amount of discovery in criminal cases exacerbates the defendant's inability to meet the government's case.[361] Admitting into evidence unconfronted, nontestimonial evidence "shift[s] to the defendant all the risk of dealing with an uncooperative, but available declarant" because criminal defendants have "no right to compel pretrial examination of adverse witnesses or hearsay declarants."[362] Nontestimonial hearsay declarants, who are unaware that their statements may be used to convict

hearsay-notice rule. Matthew Caton, *Abolish the Hearsay Rule: The Truth of the Matter Asserted at Last* (pt. 2), 26 ME. B.J. 207, 207–08 (2011). The use of such an approach in criminal proceedings would shift the risk of producing a live witness from the government, who has the burden of proof, onto the defendant, who does not. *See* Eleanor Swift, Essay, *Abolishing the Hearsay Rule,* 75 CAL. L. REV. 495, 514 (1987). In regard to hearsay declarants that shift the burden of proof, Professor Swift explained that

> their systematic use allows plaintiffs and prosecutors to present hearsay statements, often in documentary form, without simultaneously producing a witness knowledgeable about the declarant, the statement, or any of her testimonial qualities or circumstances. Thus these parties expend fewer resources and take fewer risks while requiring defendants to bear more burdens in responding to a prima facie case.

Id. Others have advocated significantly expanding hearsay exceptions or otherwise modifying the rule to relax the rule's exclusionary effect. *See, e.g.*, David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 HOFSTRA L. REV. 585, 620–25 (2006) (suggesting four "smaller steps" while acknowledging that most sweeping proposals to expand admission of hearsay into evidence are unlikely to gain immediate acceptance); Friedman, *supra* note 12, at 563–64 (advocating the absolute exclusion of testimonial prosecution hearsay evidence and the free admittance of nontestimonial hearsay in both civil and criminal cases); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339, 1354 (1987) (advocating adoption of the "foundation fact" approach, which would provide judicial discretion over admission of hearsay evidence). Professor Milich argues that the many modern exceptions to the hearsay rule provide the grounds for abolition of the rule. *See* Milich, *supra* note 12, at 734, 769–70, 774 (advocating abolition of the rule and implementation of a simpler set of rules, and noting that "[h]earsay's supposed inherent lack of trustworthiness is brushed aside when the opportunity to admit such irreplaceable incriminating evidence arises").

360. *See* FED. R. EVID. 403.

361. *See* John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2103–04 (2000) (asserting that, prior to *Crawford*, "[d]espite serious disadvantages in the discovery process, federal criminal defendants actually face a broader range of admissible hearsay than civil litigants and prosecutors").

362. *Id.* at 2190.

an individual of criminal conduct, may be careless in expressing themselves in ways they would not if they knew that their words were being used as evidence. Thus, *Crawford* may require cross-examination for reliable statements and eliminate it for those that are inherently unreliable due to their lack of formality and the absence of an oath. Even if a statement was so unreliable that its admission was erroneous, application of the harmless error rule would likely preserve the verdict.[363]

The ease with which courts could assert that hearsay was accompanied by independent indicia of reliability was one of the primary objections to the *Roberts* test.[364] But *Roberts* provided a judicial stopgap against entirely unreliable hearsay.[365] While Professor Alan Sklansky has pointed out that it is difficult to find a case in which hearsay evidence has been the cause of a wrongful conviction, past studies may not completely predict hearsay's ability to influence future jurors.[366] This is because the final chapter of *Crawford*—whether reformation or abolition of the hearsay rule—has not yet occurred.

C. *Resetting the Balance*

Many of the tests proposed by scholars as a replacement for *Crawford* focus on extending the right to confront witnesses based on the accusatory nature of a statement.[367] Alternative proposed tests include: (1) defining

363. *See id.* at 2118 (discussing studies showing that appellate courts reverse criminal verdicts in less than 20 percent of cases in which prosecution evidence was admitted erroneously and in only 6 percent of cases in which hearsay was admitted under the residual exception).

364. *See, e.g.*, Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1, 9–10 (1987) ("When hearsay is held to be trustworthy simply by virtue of falling within a preexisting exception, the defendant may be provided with no more than a ritualistic trial—a trial that he enters with the deck constitutionally stacked against him.").

365. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

366. Sklansky, *supra* note 35, at 18.

367. *See, e.g.*, Ross, *supra* note 160, at 198 (suggesting a two-part functional approach: "(1) . . . [D]id the declarant's statements serve as an accusation against the defendant at the time these statements were repeated at trial? (2) Was the credibility of the declarant important to the resolution of the case, or just the credibility of the person who repeated the declarant's statement at trial?"); *see also* Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 513–14 (1997) (proposing, prior to *Crawford*, reconceptualization of the right to confrontation as applying only to in-court testimony and hearsay statements that the declarant

testimonial statements as those that are accusatory and made with the anticipation that they will be used against the defendant,[368] or as those that are accusatory statements based on their function at trial;[369] (2) defining testimonial statements as those that fall within the res gestae of the crime;[370] and (3) defining testimonial statements narrowly, as those created with the involvement of a government agent who sought to create evidence for use at trial.[371]

None of these tests completely protect the defendant's right of confrontation; all are compromises, and all continue to treat the Confrontation Clause as a rule of evidence—if the evidence falls within the definition of nontestimonial hearsay, there is no right to confrontation.[372] As Professor Ross explained, the *Crawford* test, which evaluates whether a statement is testimonial by examining the speaker's intent, encourages the government to create or obtain nontestimonial hearsay.[373] But the test favored by Ross—asking whether a hearsay statement serves the function of an accusation at trial—does not take into account that nonaccusatory statements can prove facts that may be disputed and essential to the question of guilt or innocence. For this reason, it may not reach critical items of evidence in a world of free evidence.

These tests share common features of the test set forth in 1997 by Professor Friedman, who drew a distinction between a person who testifies on behalf of the prosecution and a person who makes a statement while going about his or her business, without recognizing that the words would be evidence.[374] Professor Friedman argued that the former was a witness within the meaning of the Sixth Amendment, while the latter should fall outside the Confrontation Clause's scope.[375] *Crawford* and its progeny adopted that distinction, with some modification of the test for police

intended to "be used in much the same manner that in-court testimony would be").

368. *See* Friedman, *supra* note 367, at 513–15.

369. *See* Ross, *supra* note 160, at 196–97.

370. *See* McAllister, *supra* note 197, at 520.

371. *See* Chase, *supra* note 270, at 1096.

372. *See, e.g.*, Ross, *supra* note 160, at 162 ("Assuming the witness was available for trial, *Crawford* announced that the Constitution required nothing less than cross-examination of that witness for all testimonial statements."); *id.* at 163 ("[S]ome evidence that is the equivalent of trial testimony will be deemed 'testimonial,' and all other evidence against an accused will not even be governed by the Sixth Amendment.").

373. *Id.* at 205–06.

374. Friedman, *supra* note 367, at 513–14.

375. *Id.*

interrogations, which arguably narrowed the scope of statements falling within the Clause's protection.[376]

This framework makes no sense when examined closely, not only for the reasons discussed above, but also because it is illogical. The person who makes a statement without recognizing that the statement may be used in a subsequent proceeding is no less a potential witness than the person who does recognize that his statement likely will be used as evidence. The only difference between the two, assuming that both remain available to testify in court at the time of trial, rests in the choices made by police and prosecutors. The criminal justice system is controlled by legislators, police, prosecutors, and courts. When legislatures or courts define "witness" to exclude hearsay declarants whose statements are sought to be used as evidence by prosecutors,[377] they ignore the imbalance of power between the government and the individual, and diminish the defendant's ability to defend himself in open court. It has the capability in an individual case to be unjust, and to perpetuate a sentiment that the Bill of Rights does not mean what it says.

The root of the problem is not that the Confrontation Clause was moored to the hearsay rule. Rather, it is that the Confrontation Clause was moored to the modern exceptions created for the rule during the gradual liberalization of evidence rules in criminal cases. Restoring the Confrontation Clause and the hearsay rule to their respective roles—with the hearsay rule compelling the government to produce its witnesses in court, and the Confrontation Clause ensuring that the defendant can defend against the words uttered before the jury—avoids the injustice of the current schema.[378]

376. Michigan v. Bryant, 131 S. Ct. 1143, 1156 (2011); Crawford v. Washington, 541 U.S. 36, 51–53, 68 (2004).

377. *See, e.g.*, Lucy S. McGough, *Hearing and Believing Hearsay*, 5 PSYCHOL. PUB. POL'Y & L. 485, 486 (1999) (discussing political influence on the growth of state-created exceptions for hearsay statements made by child abuse victims relating to the abuse).

378. This Article does not take a position on the use of hearsay exceptions by defendants in criminal cases or by any party in civil cases. The Confrontation Clause would not preclude defense use of hearsay if the rules so allowed. *Cf.* Edward J. Imwinkelried, *The Reach of* Winship*: Invalidating Evidentiary Admissibility Standards that Undermine the Prosecution's Obligation to Prove the Defendant's Guilt Beyond a Reasonable Doubt*, 70 UMKC L. REV. 865, 887–88 (2002) (discussing the logical extension of *In re Winship* to allow defendants to present conditionally relevant evidence of alternative perpetrators by a lower standard of admissibility, consistent with defendant's burden to establish only reasonable doubt, not proof by a

The right to confront witnesses should apply to hearsay statements the government seeks to present in court as proof of a fact going to the question of guilt. Professor David Seidelson reached a similar conclusion more than 40 years ago:

> [A] proper approach would assume the supremacy of the [S]ixth [A]mendment right of confrontation over any exception to the hearsay rule. Typically, hearsay exceptions are the product of legislative or judicial action. Neither is capable of restricting a constitutional right. It is tempting to stop there and assert that no exception to the hearsay rule should justify inculpating the accused without allowing confrontation and cross-examination before the fact finder, but . . . such a view promises little likelihood of judicial acceptance.[379]

Professor Seidelson continued on to propose exceptions that met three criteria: absolute necessity, high degree of trustworthiness, and the statement's creation at a "time when [the] declarant had no motive to distort the truth."[380] Providing a safety valve is attractive, but unfortunately any safety valve would likely become the focus of reform efforts. "Absolute necessity" would likely give way to simple "necessity," which would likely become a euphemism for "desired." History has shown that the right to confront witnesses fares poorly because it stands in the way of criminal prosecutions and interferes with the efficient administration of justice. Using equitable principles, such as the doctrine of forfeiture by wrongdoing, to temper the harshness of blind application of the right may be the best way to ensure that justice is not entirely blind.[381]

Critics of applying the Confrontation Clause to all hearsay that is offered to prove a fact that helps establish the defendant's guilt typically

preponderance of the evidence).

379. Seidelson, *supra* note 16, at 91–92.

380. *Id.* at 92 & n.128 (quoting BLACK'S LAW DICTIONARY 118 (rev. 4th ed. 1968)) (internal quotation marks omitted).

381. *See, e.g.*, Mattox v. United States, 156 U.S. 237, 243 (1895) ("To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."); *see also* Reynolds v. United States, 98 U.S. 145, 158 (1878) ("[I]f a witness is absent by [the defendant's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts.").

point to the historical exception for dying declarations in criminal cases as demonstrating the illogic of such a rule.[382] The historical dying declaration carried an equivalency to in-court testimony in that the declarant's circumstances were considered the equivalent of an oath.[383] Skepticism about the validity of the effect of impending death on truthfulness may be rooted in modern views of religion and matters of faith, making the dying declaration a historical relic. Other hearsay exceptions do not fit the same model as the dying declaration and arguably have little place in a system that was designed to ensure that a defendant can confront the witnesses against him.

Critics of such a proposal argue that it is too drastic and would prohibit the use of even routine business records without producing a live witness.[384] Whether it is folly to apply the Confrontation Clause to exclude all hearsay offered to prove a fact going to the defendant's guilt when the declarant is unavailable to testify and no prior opportunity to confront has been afforded should be considered from a somewhat different perspective than most scholarship has allowed. If you were wrongfully indicted and faced not a witness, but hearsay evidence at trial, would you believe that justice was served? Courts cannot be counted on to disfavor the prosecutor, especially if they believe that the defendant is likely guilty.[385] Scholars and courts must be willing to consider the question outside the context of the government's asserted need for the admission of evidence without a witness because that need reflects a desire to convict the defendant. The attempt to accommodate the government's need for evidence against the defendant reflects a desire to ensure that defendants are convicted when we believe the evidence against them. Rethinking the Confrontation Clause in a way that lives up to the Bill of Rights may require reconsidering the assumptions of guilt or innocence inherent in much modern thinking about hearsay and its exceptions.

382. *See, e.g.*, William H. Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May be Used in Criminal Trials*, 6 CONN. L. REV. 529, 541–43 (1974) (noting that historical use of dying declarations suggests the right of confrontation was not intended to be an absolute rule, and arguing the "folly" of excluding hearsay when witnesses are unavailable or when hearsay may be superior to other evidence).

383. Davies, *supra* note 106, at 413–14; Davies, *supra* note 116, at 636 n.318.

384. *See, e.g.*, Friedman, *supra* note 367, at 511.

385. *See An Old Whig*, *supra* note 299.

VI. CONCLUSION

Extending the right of confrontation to all statements offered to prove a fact relevant to guilt has been rejected as "folly"[386] and as unfriendly to crime victims,[387] much as *Crawford* seemed unfriendly to victims when contrasted with *Roberts*.[388] It also would burden prosecutors, much as *Melendez-Diaz* and *Bullcoming* seemingly made prosecution of crimes more expensive and difficult.[389] In many cases, the exclusion of unconfronted hearsay statements may result in the failure to charge or the acquittal of some factually guilty individuals.[390] Particularly in cases of domestic violence or child abuse, a rule that precludes the filing of charges or results in the acquittal of a factually guilty person is disquieting.[391] Such concerns have already played a role in the expansion of the number of hearsay exceptions.[392] They also likely have played a role in how scholars

386. *See* Baker, *supra* note 382, at 542–43.

387. *See, e.g.*, Lininger, *supra* note 175, at 771–72 (describing the importance of hearsay evidence, particularly for victims, in domestic violence cases).

388. *See, e.g.*, Chase, *supra* note 270, at 1093–96 (describing the impact of *Crawford* on domestic violence cases and advocating a narrow definition of *testimonial* to leave more evidence subject only to hearsay rules and the Due Process Clause).

389. *See* Wait, *supra* note 335, at 37–38 (noting that although the costs of complying with *Melendez-Diaz* were higher, these were necessary costs to safeguard against abuse of the system and to ensure confrontation).

390. *See, e.g.*, Lininger, *supra* note 175, at 750 (discussing dismissals of domestic violence prosecutions after *Crawford*).

391. If nontestimonial statements are subject to the right to confront, child abuse and homicide trials may become more difficult to prosecute. *E.g.*, People v. Phillips, No. 08CA2013, 2012 WL 5266041, at *23–24 (Colo. App. Oct. 25, 2012) (finding statements made by six-year-old decedent to school employees and police officer about injuries and abuse were nontestimonial); *see also* Melissa Moody, *A Blow to Domestic Violence Victims: Applying the "Testimonial Statements" Test in* Crawford v. Washington, 11 WM. & MARY J. WOMEN & L. 387, 403–04 (2005).

> There is something appealing about viewing the Sixth Amendment's Confrontation Clause in a historical vacuum, as the Supreme Court did in *Crawford*. Always requiring an accuser to appear seems the most obvious interpretation; indeed, it is so obvious as to be irrefutable. Unfortunately, as with many perfect theories, this conceptual framework breaks down in modern day criminal law practice. While the Framers did not consider the problem of recanting victims of domestic violence, modern state courts routinely face this problem.

Id. The framers of the Sixth Amendment naturally did not consider this problem, because the relevant problem was not whether a victim was entitled to see an individual convicted, but what rights the individual retained against the government.

392. A number of states except from hearsay out-of-court statements made by

have interpreted the Sixth Amendment. But the Bill of Rights did not seek to balance the number of wrongful acquittals against the number of wrongful convictions, nor was it crafted to serve prosecutorial goals. The Bill of Rights was concerned with ensuring that government power would not impinge on an individual's rights. The testimonial–nontestimonial distinction, like the Court's *Roberts* framework, does not give full measure to the Sixth Amendment.

children or domestic violence victims concerning abuse under various conditions. *See, e.g.*, CAL. EVID. CODE § 1360(a)–(b) (West Supp. 2013) (stating hearsay statements made by child victims of abuse or neglect are admissible provided the proponent gives notice, the statements bear sufficient indicia of reliability, and the child must testify or, if the child is unavailable, other evidence corroborates the abuse or neglect); COLO. REV. STAT. § 13-25-129(1), (3) (2013) (providing the same requirements as California); FLA. STAT. ANN. § 90.803(23)(a) (West 2013) (stating that the child must have "a physical, mental, emotional, or developmental age of 11 or less" in order to meet the exception, and the child will be considered unavailable if the court finds that testifying carries a "substantial likelihood of severe emotional or mental harm"); 725 ILL. COMP. STAT. ANN. 5/115-10(a)–(b) (West Supp. 2013) (providing a hearsay exception for children under the age of 13 and the "intellectually disabled"); N.J. R. EVID. 803(c)(27) (2011) (providing that out-of-court statements by a sexual misconduct victim under the age of 12 are admissible if the court finds, "on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy"); OKLA. STAT. ANN. tit. 12, § 2803.1(A) (West 2009) (providing the same reliability requirements in criminal and juvenile proceedings as New Jersey for statements of victims of physical or sexual abuse who are under the age of 13, disabled, or incapacitated); TEX. CODE CRIM. PROC. ANN. art. 38.072, § 2(a) (West Supp. 2013) (stating that a statement offered must describe the offense, have been made by the child or disabled person against whom the offense was allegedly committed, and must have been made to the first adult, other than the defendant, to whom the victim made a statement regarding the alleged act).