(RE)CONSTITUTIONALIZING CONFRONTATION: REEXAMINING UNAVAILABILITY AND THE VALUE OF LIVE TESTIMONY

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I. INTRODUCTION

The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him."[1] Despite the sweeping tone of this declaration, the Confrontation Clause has been misunderstood, maligned, and misapplied by courts for the last century. At its core, confrontation reflects society's notions of justice and procedural fairness.[2] Confrontation developed under Roman law as a production requirement, unconnected to cross-examination. It was designed to ensure fair criminal procedure by requiring witnesses to testify live before both the accused and the trier of fact. In response to notorious abuses in England, where defendants were convicted without witnesses testifying live at trial, confrontation was included in the Bill of Rights by the Framers.[3] But a mere century later, courts began to misconstrue the grant, sapping it of its intended meaning.

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1. U.S. CONST. amend. VI.

2. *See* discussion *infra* Part II.A, C (examining the procedural and empirical value of live confrontation).

3. *See* discussion *infra* Part II.B (examining the history of confrontation). Confrontation rights may also be conferred by a state constitution or a statutory grant. *See, e.g.*, CAL. CONST. art. I, § 15; CAL. PENAL CODE § 686(3) (West 1985). State constitutions are often interpreted to offer protections identical to those guaranteed by the U.S. Constitution. *See, e.g.*, People v. Contreras, 129 Cal. Rptr. 397, 400 (Ct. App. 1976).

Beginning in 1895, the Supreme Court's confrontation jurisprudence departed from the Framers' design as the Court began to conflate confrontation with the law of evidence and to subordinate constitutional analysis to a review of substantive law.[4] The leading evidence scholar of the time, John Henry Wigmore, opined that live testimony was dispensable. To Wigmore, confrontation was synonymous with cross-examination—so long as a transcript of a prior cross-examined statement could be read in court, live testimony before the jury was unnecessary.[5]

Throughout the twentieth century, the Court embraced Wigmore's opinion, though it contradicted both the historical record and the common law.[6] At common law, witnesses could be excused from testifying live and declared unavailable only if they were dead, *in extremis*, or detained by the defendant.[7] But, reflecting popular public policy, the Court developed a confrontation analysis that protected the admissibility of evidence at the expense of a defendant's procedural rights. While confrontation and procedural justice demanded that accusers testify live before the defendant and jury, the Court allowed written testimony as a substitute, implicitly deconstitutionalizing live testimony. An entire class of admissible testimonial hearsay was born.[8]

In particular, the Court allowed the extraconstitutional waiver of live testimony when healthy witnesses were merely absent from court. If the attendance of a witness cannot be secured by "reasonable means," Federal Rule of Evidence 804(a)(5) and its state counterparts permit a court to declare the witness unavailable.[9] The witness's prior testimony is then admitted in writing.[10] This exception, unknown to the Framers, is applied in federal and state courts with virtually standardless discretion, subject only to deferential review. As a result, live testimony is abridged with regularity under a precedent of conflicting, unguided, and often puzzling decisions.[11]

4. *See* discussion *infra* Part III.A.1 (analyzing Mattox v. United States, 156 U.S. 237 (1895)).

5. *See* discussion *infra* Part III.A.2 (analyzing Wigmore's opinion of the scope of the Sixth Amendment).

6. *Compare infra* Part III.A.3 (examining Court rulings), *with infra* Part II.B (examining the historical record).

7. *See, e.g.*, Motes v. United States, 178 U.S. 458, 471–73 (1900) (examining confrontation at common law).

8. *See* discussion *infra* Part III.A.3 (analyzing the Court's development of the unavailability doctrine).

9. FED. R. EVID. 804(a)(5). *See also* CAL. EVID. CODE § 240(a)(5) (West 1995).

10. FED. R. EVID. 804(b)(1). *See also* CAL. EVID. CODE § 1291(a)(2) (West 1995).

11. *See* discussion *infra* Part III.B (examining the application of the unavailability doctrine by trial courts).

For instance, courts have upheld excusing live testimony when key witnesses for the state were on vacation or when "diligent" searches for witnesses began within only a day or two of trial.[12] Sometimes a prior codefendant or a "reputable" jailhouse snitch can avoid testifying live.[13] Under Rule 804(a)(5), a prosecutor can present alien witnesses at a preliminary trial, subject them to the limited cross-examination suitable at that stage, and later claim that the witnesses are unavailable when they have been deported.[14] Depending upon how the prosecution frames its efforts to secure a witness, the state can "cherry pick" which witnesses testify live and which do not, using written testimony to bolster the credibility of shaky witnesses.[15] As currently designed, the unavailability doctrine is antithetical to the Framers' intent.

In 2004, however, the Court reversed the direction of confrontation jurisprudence with *Crawford v. Washington*.[16] *Crawford* disentangled constitutional analysis from the law of evidence and reestablished confrontation as a categorical procedural right. Noting the historical roots of confrontation and respecting the Framers' intent, the Court held that testimonial evidence is categorically subject to the Confrontation Clause.[17] The Court did not, however, disentangle confrontation from cross-examination. Instead, the Court reaffirmed Wigmore's unfounded opinion that a prior opportunity to cross-examine *any* unavailable witness satisfied

12. *E.g.*, State v. Ford, 502 P.2d 786, 789–90 (Kan. 1972); State v. Smith, 551 N.E.2d 190, 197 (Ohio 1990).

13. *E.g.*, People v. Hovey, 749 P.2d 776, 780–81, 785–86 (Cal. 1988) (admitting the written statement of a defendant's cellmate who "witnessed" a confession). *Cf.* People v. Guiterrez, 284 Cal. Rptr. 230, 239–40 (Ct. App. 1991), *disapproved on other grounds*, People v. Cromer, 15 P.3d 243, 250 n.3 (Cal. 2001).

14. *See, e.g.*, United States v. Olafson, 213 F.3d 435, 440–43 (9th Cir. 2000).

15. *See* People v. Louis, 728 P.2d 180, 192 (Cal. 1986) (noting that unreliable testimony may sound best when read), *disapproved on other grounds*, People v. Mickey, 818 P.2d 84, 114 n.9 (Cal. 1991).

16. *See* Crawford v. Washington, 541 U.S. 36 (2004). The Court's opinion reflects the broad strokes of an amicus brief authored by several prominent law professors. *See* Brief Amicus Curiae of Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller & Rodger C. Park, in support of Petitioner, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410) [hereinafter Brief Amicus]. One of the authors, Richard D. Friedman, first articulated his call to reexamine confrontation jurisprudence in 1998 in Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998).

17. *See Crawford*, 541 U.S. at 68. Defining "testimonial" is outside of the scope of this Note. The *Crawford* Court declined to provide parameters for the concept. *Id*. The Court, however, has given subsequent guidance in the context of statements made to police. *See* Davis v. Washington, 126 S. Ct. 2266, 2273–74 (2006) (reaffirming *Crawford*'s application of confrontation rights exclusively to "testimonial statements").

confrontation.[18] By emphasizing the value of cross-examination, the Court has implicitly disregarded the value of live testimony. By not narrowing the definition of unavailability, the Court continues to devalue live testimony, allowing it to be liberally abridged in violation of the Framers' design.

In light of the historical and originalist rationale employed in *Crawford*, the Court should reconsider its valuation of live testimony in its prior confrontation analysis—namely, the Court should reexamine the unavailability doctrine. First, the Court should reaffirm the constitutional value of live testimony by recognizing that the Sixth Amendment was intended to embrace this common-law requirement. Second, the Court should require that unavailability rulings be reviewed de novo to reflect their constitutional value. Third, the Court should articulate a workable framework for analyzing unavailability that reflects Sixth Amendment values.

A century of Supreme Court decisions has failed to settle the conflicts that surround the scope of the Sixth Amendment. Toward that goal, Part II will examine the procedural, historical, and empirical values that led to the inclusion of the confrontation right in the Bill of Rights. This background provides a basis for Part III, which analyzes how the Court has misinterpreted confrontation and effectively deconstitutionalized it by expanding the unavailability doctrine. Part IV constructs an approach to reexamine unavailability that better protects the full scope of confrontation rights.

II. DEFINING CONFRONTATION

A. THE PROCEDURAL VALUE OF LIVE CONFRONTATION

Requiring a defendant's accusers to state their claims in the defendant's presence is considered by society to be a fundamental aspect of fair dealing. Few would question our deeply rooted "say it to my face" philosophy.[19] But why not satisfy this procedural obligation at a

18. *Crawford*, 541 U.S. at 53–54, 59, 68. Friedman also supports the sufficiency of prior cross-examination to satisfy the Confrontation Clause. *See* Friedman, *supra* note 16, at 1043.

19. *See, e.g.*, Coy v. Iowa, 487 U.S. 1012, 1017–19 (1988) (describing face-to-face confrontation as part of our societal code of ethics and quoting President Eisenhower as stating, "In this country, if someone . . . accuses you, he must [do so to your face.]"). *See also* State v. Webb, 2 N.C. 139, 139 (1 Hayw.) (1794) (observing that confrontation is a rule "founded on natural justice"); AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 90 (1997) (noting that the rationale for confrontation is "fairness").

preliminary stage? What value is achieved by satisfying confrontation live before the jury?

Judges and defendants agree that the best means of determining witness credibility is cross-examination in the presence of the jury.[20] While some challenge the empirical basis of this opinion, the public doubtlessly believes it.[21] To illustrate, imagine a thought experiment where you, the reader, are wrongly accused of a crime: would you (1) demand that your accuser repeat the charge in front of the jury so that the jury can observe the accuser's demeanor and, in particular, observe the accuser's reaction to your cross-examination, or (2) waive that right and submit a transcript to the jury of your accuser's testimony, complete with responses to your questions on cross-examination? While hardly scientific, (1) is your likely choice. The requirement that witnesses be produced live is fundamental to society's understanding of justice.

1. The Procedural Value of Live Testimony—Ensuring Fair and Equal Participation

Our society's core notion of procedural fairness demands that confrontation occur *before the jury*. It just seems fair.[22] Before being criminally condemned by society, defendants ought to be able to question their accusers *in the presence* of the jury. It affronts our notion of justice to suggest that confrontation can be equally well served in some extrajudicial location, beyond the jury's perception.[23] Only live confrontation ensures a defendant equal participation in the trial process. Only live confrontation allows both sides to develop and present their cases contemporaneously. The alternative, developing cross-examination at a preliminary trial as a contingency, is manifestly impractical and unequally burdensome to the defense. Relying on preliminary cross-examination allows the prosecution

20. *See* Thomas J. Reed, Crawford v. Washington *and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 188 (2004); discussion *infra* Part II.C.1 (discussing the value of live confrontation as perceived by leading jurists and scholars).

21. *See, e.g.*, Letter from the Federal Farmer No. 4 (Oct. 12, 1787), *reprinted in* THE COMPLETE BILL OF RIGHTS 446, 447 (Neil H. Cogan ed., 1997) (praising the value of cross-examination before a jury). *See also* discussion *infra* Part II.C.2 (examining the empirical criticism of the value of live confrontation).

22. *See, e.g.*, *Coy*, 487 U.S. at 1017–19 (noting that our societal sense of justice and fairness requires a direct airing of accusations rather than a surreptitious one); discussion *infra* Part II.C.1 (illustrating the opinion of leading jurists and scholars that live confrontation before the trier of fact is empirically beneficial).

23. *See, e.g.*, Virgin Islands v. Aquino, 378 F.2d 540, 549 (3d Cir. 1967) (strongly criticizing a judicial policy that equates extrajudicial confrontation with live confrontation).

to meet only a minimal burden of showing just cause at a preliminary hearing while requiring the defense to essentially defend their case-in-chief at that premature stage. This unfair dichotomy requires defense counsel to develop, announce, and execute their trial strategy at a preliminary hearing without imposing a similar burden on the prosecution.[24] Surely the average citizen would not think that a transcript of preliminary confrontation is as procedurally fair as requiring witnesses to be produced live at trial. Judges, lawyers, and defendants are even less likely to think that such preliminary confrontation guarantees equal and fair procedural participation.[25]

In Rawlsian terms, the Sixth Amendment is designed to promote a participation model of "pure" procedural justice—its guarantees are designed to ensure a defendant's equal opportunity for procedural participation based on our societal views of fairness and natural justice.[26] In contrast, evidence law, such as the hearsay doctrine, is designed primarily to promote "perfect" procedural justice by encouraging accurate outcomes through reliable evidence.[27] Nevertheless, courts have frequently confused

24. *See, e.g.*, California v. Green, 399 U.S. 149, 195–202 (1970) (Brennan, J., dissenting) (strongly criticizing judicial treatment of preliminary confrontation as "similarly situated" to trial confrontation and illustrating how one cannot substitute for the other); *infra* note 353 (discussing the same).

25. *See, e.g.*, *Green*, 399 U.S. at 195–202 (Brennan, J., dissenting); *Aquino*, 378 F.2d at 549; discussion *infra* Part II.C.1 (illustrating jurists' views on the value of live confrontation).

26. *Compare* U.S. CONST. amend. VI (granting, inter alia, rights of confrontation, compulsory process, and assistance of counsel), *with* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 243–73 (2004) (offering a guide to analyze whether particular legal doctrines conform to different models of procedural fairness). A participation model defines fairness by whether a given procedure ensures that involved parties have an equal opportunity to participate. Solum, *supra*, at 182–83, 243. Under Rawls's formulation, this model exemplifies "pure" procedural justice, where no independent criterion defines a correct result except that fair procedure is properly followed. JOHN RAWLS, A THEORY OF JUSTICE 85–86 (1971); Solum, *supra*, at 260.

Furthermore, the Supreme Court has recognized that the Sixth Amendment serves a fairness-based participatory model of procedural justice. *See* Faretta v. California, 422 U.S. 806, 818 (1975). As the Court stated,

> The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice . . . . [T]he [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.

Id.

27. *See, e.g.*, 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1420, at 202 (3d ed. 1940) (stating that the goal of the hearsay rule is to promote accuracy). An accuracy model of procedural justice defines fairness by whether a given procedure produces correct outcomes, that is, by whether the guilty are convicted and the innocent are acquitted. Under Rawls's formulation, this model exemplifies "perfect" procedural justice. *See* RAWLS, *supra* note 26, at 85–86; Solum, *supra* note 26, at 244.

the two.[28] Unlike the hearsay doctrine, however, the primary goal of the Sixth Amendment is not to promote accurate outcomes. Although its guarantees may incidentally result in furthering accuracy, the primary goal of the Sixth Amendment is to guarantee fair and equal criminal procedure.[29] In the context of confrontation, this participation model of procedural fairness is achieved by requiring the production and examination of live witnesses at trial. Simply, live testimony is procedurally necessary to guarantee fair and equal participation to all parties. Conflating the rationale for confrontation with the purpose of the hearsay rule, however, inappropriately focuses attention on issues of accuracy, which leads to abridging the fundamental purpose of confrontation (fair procedure) when accuracy goals are deemed met.[30]

2. The Problem—Subordinating the Value of Live Testimony

Courts and scholars assert that the Confrontation Clause ensures two results: (1) securing the defendant's opportunity to cross-examine witnesses and (2) guaranteeing production of witnesses so that testimony and cross-examination is observed by the jury.[31] The source of disagreement is the extent to which confrontation embraces both of these

28. *Compare, e.g.*, Crawford v. Washington, 541 U.S. 36, 61 (2004) (implying that confrontation promotes an accuracy model of procedural justice by stating that "the Clause's ultimate goal is to ensure reliability of evidence"), *and* Lilly v. Virginia, 527 U.S. 116, 123 (1999) (same, explaining that "'[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence'" (quoting Maryland v. Craig, 497 U.S. 836, 845 (1990))), *and Craig*, 497 U.S. at 845 (same), *and* Ohio v. Roberts, 448 U.S. 56, 65–66 (1980) (same, describing the Clause's purpose as guaranteeing "accuracy in the factfinding process"), *overruled by Crawford*, 541 U.S. 36, *with Crawford*, 541 U.S. at 61–62 (implying that confrontation promotes a participation model of "pure" procedural justice by defining confrontation as "a procedural rather than a substantive guarantee" that "commands, not that evidence be reliable, but that" particular participatory procedures be categorically guaranteed), *and Lilly*, 527 U.S. at 142 (Breyer, J., concurring) ("[I]t is debatable whether the Sixth Amendment principally protects 'trustworthiness,' rather than 'confrontation.'"), *and Craig*, 497 U.S. at 862 (Scalia, J., dissenting) ("[T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures . . . .").

29. *See, e.g.*, *Crawford*, 541 U.S. at 61, 67–68 (noting that the Confrontation Clause does not ensure reliable evidence but rather ensures that the state's power to convict is checked by particular procedural mechanisms); *Faretta*, 422 U.S. at 818 (holding that the Sixth Amendment guarantees equal participation at criminal trials by guaranteeing procedure "fundamental to the fair administration of American justice").

30. *See, e.g.*, *Crawford*, 541 U.S. at 62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."); Coy v. Iowa, 487 U.S. 1012, 1018 n.2 (1988) (suggesting the same).

31. *E.g.*, 5 WIGMORE, *supra* note 27, § 1395, at 123–27. Some courts cite a third purpose: assuring that testimony is under oath. *E.g.*, California v. Green, 399 U.S. 149, 158 (1970). But this is misguided, as extrajudicial and *ex parte* declarations may easily be taken under oath independent of confrontation.

values[32] and which theory of procedural justice the Clause embodies—accuracy or fairness.[33]

Confrontation is widely considered to protect a right to cross-examine testimonial witnesses.[34] Wigmore and courts have promoted the value of cross-examination as "[t]he main and essential purpose of confrontation"[35] and "the greatest legal engine ever invented for the discovery of truth."[36] As discussed further in Part III, however, two errors infect constitutional confrontation analysis when cross-examination and accuracy are so emphatically defined.

First, the recognition of cross-examination comes at the expense of recognizing the value of producing live witnesses, which Wigmore described, without support, as "secondary and dispensable."[37] Despite substantial historical evidence to the contrary, constitutional jurisprudence has roughly followed Wigmore's lead, embracing cross-examination as absolute[38] while abridging the production of witnesses for ever-widening reasons.[39]

Second, linking confrontation to the discovery of truth narrows the multiple values addressed by the Clause to only a single factor.[40] While

32. *Compare, e.g.*, *Green*, 399 U.S. at 195–202 (Brennan, J., dissenting) (praising live testimony), *with* 5 WIGMORE, *supra* note 27, § 1395, at 123, 125–27, § 1396, at 127 (opining that live testimony is dispensable).

33. *See supra* note 28 and accompanying text. *See also* State v. Webb, 2 N.C. 139, 139 (1 Hayw.) (1794) (observing that confrontation is a rule "founded on natural justice"); AMAR, *supra* note 19, at 90 (noting that "fairness" is the rationale for confrontation).

34. *See Crawford*, 541 U.S. at 68. *Cf. infra* notes 210–12 and accompanying text (questioning whether the Confrontation Clause should be construed as conferring a right of cross-examination at all); *infra* notes 128–30 and accompanying text (discussing the relatively late development of the modern concept of cross-examination, the use of which occurred regularly only after the Constitution's framing).

35. 5 WIGMORE, *supra* note 27, § 1395, at 123. *See also* Davis v. Alaska, 415 U.S. 308, 315 (1974) (quoting the same).

36. 5 WIGMORE, *supra* note 27, § 1367, at 29. *See also* Kentucky v. Stincer, 482 U.S. 730, 736 (1987); Ohio v. Roberts, 448 U.S. 56, 63–64 (1980), *overruled by Crawford*, 541 U.S. 36; *Green*, 399 U.S. at 158. For a contrary view that cross-examination can obscure the search for truth, see John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 833–35 & n.31 (1985) (challenging Wigmore's aphorism as "nothing more than an article of faith"). Langbein posits that cross-examination by professional counsel is "frequently truth-defeating . . . tedious, repetitive, time-wasting, and insulting." *Id.* at 833 n.31.

37. 5 WIGMORE, *supra* note 27, § 1395, at 123, § 1396, at 127. *See also* Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH. L. REV. 67, 69 (1970); discussion *infra* Part III.A.2.

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

39. *See* discussion *infra* Part III.A.3 (discussing judicial expansion of the doctrine of unavailability).

40. *Cf.* Friedman, *supra* note 16, at 1027–29 (criticizing a reliability-based confrontation analysis).

accuracy may be *one* value served by confrontation, it is neither *the only* value served nor confrontation's *core* value.[41] The right to confrontation fulfills a deep, fundamental role in our sense of justice.[42] It functions, ideally, as a pure, fair procedural grant, regardless of its effect on accuracy or truth.[43] Defining constitutional procedural rights by their truth-discovering ability undermines their procedural function.[44] Constitutional criminal procedure defines justice not by whether an accurate result occurs (the guilty are convicted) but by whether a fair procedure is followed.[45] No doubt, accurate outcomes would be enhanced, not diminished, by unreasonable searches.[46] Requiring defendants to testify at their trials would doubtlessly improve the discovery of truth.[47] In fact, there is no evidence to suggest that bench trials would be less effective at generating accurate outcomes than jury trials.[48] But we would hardly dispense with these procedures, ad hoc, if they were "unnecessary" to advance an accurate outcome in a particular case.[49] The Fourth, Fifth, and Sixth Amendments guarantee pure procedural rights, not perfect accuracy in outcomes.[50] Constitutional criminal procedure does not guarantee appropriate convictions but guarantees that a state's power to convict is checked by particular procedural mechanisms.[51]

41. *See id*. at 1028.

42. *See infra* Part II.B (discussing the history of confrontation over the past millennia).

43. *See Crawford*, 541 U.S. at 61; Friedman, *supra* note 16, at 1028; *supra* notes 26–30 and accompanying text.

44. That is, defining confrontation as promoting a "perfect" accuracy-based procedural justice conflicts with its role to promote a "pure" model of procedural justice. *See* RAWLS, *supra* note 26, at 85–86; *supra* note 30 and accompanying text.

45. *See, e.g.*, *Crawford*, 541 U.S. at 61, 67–68 (stating that the Confrontation Clause requires that certain procedures be followed, not that certain results be achieved); Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963) (holding, in the context of a right to counsel, that an indispensable procedural element of a fair trial must be guaranteed as a matter of fundamental fairness, without regard to the procedure's impact on accuracy). *Cf.* RAWLS, *supra* note 26, at 85–86 (illustrating doctrines that support "pure," fairness-based procedural justice in contrast with those that promote "perfect" accuracy-based procedural justice).

46. *Cf*. U.S. CONST. amend. IV (prohibiting unreasonable searches).

47. *Cf*. U.S. CONST. amend. V (guaranteeing a right against self-incrimination).

48. *Cf*. U.S. CONST. amend. VI (guaranteeing a right to a jury trial in criminal prosecutions).

49. *See Crawford*, 541 U.S. at 62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."); Coy v. Iowa, 487 U.S. 1012, 1018 n.2 (1988) (suggesting the same).

50. In the context of confrontational rights, the Court endorsed this view in *Crawford*, 541 U.S. at 61, 67–68, overruling the contrary view endorsed in *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980). *See supra* notes 26–30 and accompanying text (discussing the tension between pure-procedural and accuracy-based models of justice).

51. *See Crawford*, 541 U.S. at 61, 67–68; RAWLS, *supra* note 26, at 85–86.

In *Crawford*, the Court acknowledged the fallacy of framing confrontation analysis in terms of factual reliability.[52] First, the Court noted that factual reliability is an amorphous, subjective concept.[53] Second, acknowledging the history of confrontation, the Court held that the right was designed as a procedural guarantee to ensure fairness—embracing the notion that nontruth values are implicated while rejecting the idea that the right was designed merely to promote accuracy.[54] Yet, in *Crawford*, the Court reexamined confrontation only in the context of cross-examination. The Court's rationale, however, applies equally to reexamining confrontation as a witness production requirement. Such a live testimony requirement forms the historical basis for confrontation itself.

B. THE HISTORICAL VALUE OF LIVE CONFRONTATION

The Supreme Court's century-long battle to define confrontation has been marred by inconsistent results.[55] The Court and scholars have often subscribed to a notion that the historical meaning of confrontation is obscure.[56] As Justice Harlan wrote, "[T]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into [its] intended scope."[57] Yet, the term is hardly indecipherable.[58] On the contrary, judicial insistence on the uncertainty of the term may be a deliberate attempt to avoid its plain meaning. To recognize the term's literal meaning—a defendant's right to be brought face to face with witnesses at trial—raises the jurisprudential unthinkable: the end of testimonial hearsay in criminal procedure.[59]

52. *Crawford*, 541 U.S. at 61–62. *See also* Friedman, *supra* note 16, at 1027–29 (criticizing the Court's prior application of a reliability analysis to the Confrontation Clause).

53. *Crawford*, 541 U.S. at 63. *See also* Friedman, *supra* note 16, at 1027–29 (noting the same).

54. *See Crawford*, 541 U.S. at 61; *supra* notes 26–33 and accompanying text (defining models of procedural justice).

55. Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 539 (2003).

56. *Id*. at 540 & n.3 (listing scholarship describing the origins of confrontation as "murky" and "obscure").

57. California v. Green, 399 U.S. 149, 173–74 (1970) (Harlan, J., concurring). Justice Harlan considered the term confrontation to be "ambiguous." *Id*. at 174–75.

58. *See* Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (discussing the term's etymology); Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 539 n.290 and accompanying text (1994) (discussing the same).

59. *See* White, *supra* note 55, at 595. *See also* Idaho v. Wright, 497 U.S. 805, 813–14 (1990) (rejecting a literal interpretation of confrontation as "'too extreme'" (quoting Bourjaily v. United States, 483 U.S. 171, 182 (1987))); Maryland v. Craig, 497 U.S. 836, 848 (1990).

As discussed in Part III, Wigmore's popular view defines confrontation as "*merely another term for the test of Cross-examination*."[60] If that were the case, it raises the obvious questions: Why did the Framers favor the word confrontation over the term cross-examination? Why avoid using a more precise term that was equally known at the time?[61] To confront literally means "[t]o stand or come in front of . . . or meet facing"; confrontation stands for "[t]he bringing of persons face to face; *esp*. for examination and eliciting of the truth."[62] To examine the significance of the Framers' selection of the term requires tracing the origins of the witness production requirement that comprised the conception of confrontation in the eighteenth century.

Traditional thinking considers the genesis of the confrontation right to be Sir Walter Raleigh's conviction based on hearsay in 1603.[63] While some modern courts recognize that the origins of confrontation reach beyond seventeenth-century England into antiquity,[64] confrontation analysis remains largely framed by colonial common law.[65] This tendency to define confrontation by a mere snapshot of English law in 1791 teaches neither the full historical value of the right nor the progressive significance of American constitutional justice. As Part III later examines, courts mistakenly restrict confrontation to a more narrow protection than that intended by the Framers, typically limiting it to only cross-examination.[66] Understanding confrontation's long history, however, illuminates the integral importance of a much older and constitutionally independent requirement: the production of witnesses to testify live before the accused and the jury.

60. 5 WIGMORE, *supra* note 27, § 1365, at 27. *See infra* Part III.

61. *See* Larkin, *supra* note 37, at 70.

62. 3 THE OXFORD ENGLISH DICTIONARY 719 (2d ed. 1989). The words originate in medieval Latin, joining "*con*" ("together") with "*front-em*" ("forehead, face"). *Id*. *See also Coy*, 487 U.S. at 1016 (noting similar etymology).

63. *E.g.*, FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 104 (1951); California v. Green, 399 U.S. 149, 157 n.10 (1970).

64. *See* Crawford v. Washington, 541 U.S. 36, 43 (2004) (noting a confrontation right in Roman law); Lilly v. Virginia, 527 U.S. 116, 140–41 (1999) (Breyer, J., concurring) (noting the ancient roots of confrontation); Herrmann & Speer, *supra* note 58, at 482 (quoting the Court's Biblical reference to Roman law in *Coy*, 487 U.S. at 1015–16).

65. *See, e.g.*, *Crawford*, 541 U.S. at 43–56.

66. *See* White, *supra* note 55, at 540–41. *Cf. infra* notes 175–77 and accompanying text (noting that the practice of cross-examination did not become common in England until the nineteenth century).

1. The Classical and Medieval Origins of Confrontation as a Production Requirement

a. Confrontation's Ancient Roots

Classical philosophy instructs us to distrust the written word as a source of truth.[67] As Plato taught, writings "cannot defend themselves by argument and cannot teach the truth effectually."[68] A text needs its author to give it meaning.[69] If you question a transcript, wishing to understand its contents, it "always say[s] only one and the same thing."[70]

For millennia, criminal justice has favored fact-finding via the procedural requirement that witnesses testify in person before both the trier and the accused. In Hebrew law, triers of fact (judges, Levitical priests, or the king) examined witnesses orally with the accused present.[71] For example, one cannot imagine Solomon reviewing the written testimony of two mothers, attesting maternity to the same child, and then issuing an order to have the child divided (by sword) between them.[72] In the classical era, justice depended on both the trier's observation of a witness's demeanor and the effect the accused's presence had on the witness's testimony.

b. Roman Law and the *Viva Voce* Requirement

Similarly, like English law in the eighteenth century, Roman law followed an accusatorial model of criminal procedure. An individual accuser prosecuted a defendant and bore the burden of proof.[73] Roman criminal law guaranteed a right of confrontation through twin procedural mechanisms: First, Roman procedure developed the *viva voce* production requirement—witnesses were to appear live and testify orally before the trier of fact.[74] Second, Roman procedure gave the defendant the right to be

67. *See, e.g.*, PLATO, PHAEDRUS 275c–78b (Harold North Fowler trans., Harvard Univ. Press 1995).

68. *Id*. at 276c.

69. *Id*. at 275e.

70. *Id*. at 275d. According to Plato, Socrates argued that writings serve only as a remembrance to their authors. *Id*. at 275c–d, 278a. To others, writings "preserve a solemn silence." *See id*. at 275d.

71. Friedman, *supra* note 16, at 1022–23. *See Deuteronomy* 17:9, 19:17–18, 1 *Kings* 3:16–28.

72. *See* 1 *Kings* 3:16–28.

73. *See* Herrmann & Speer, *supra* note 58, at 484.

74. *Id*. at 485–89.

present at those proceedings.[75] These interrelated guarantees assured that a defendant would personally encounter his accuser in the trier's presence.[76]

These procedural guarantees began to develop by at least the first century BCE, as verified by Cicero, who prosecuted Gaius Verres for gubernatorial malfeasance. According to Cicero, Verres's crimes included convicting defendants *in absentia* and administering convictions when accusers were absent from court.[77] By the first century CE, this Roman conception of confrontation solidified, as evidenced by the often-quoted passage in *Acts of the Apostles* in which Paul, accused of religious sedition, asserted his legal rights as a Roman citizen.[78] The Roman governor Festus reminded King Agrippa that under Roman law an accused has the right to meet his accusers face to face and to make a defense before the tribunal.[79]

Throughout the first few centuries of the Roman Empire, imperial *constitutiones* repeatedly granted defendants the right to be present at trial and required accusers to testify live before the tribunal.[80] During the first-century era of Paul, this production requirement extended only to prosecuting accusers; other witnesses' testimony could be introduced in writing.[81] Writings, however, were considered less credible than live testimony, which was subject to cross-examination before the trier of fact.[82] But by the second century, the *viva voce* production requirement expanded, compelling *all* prosecution witnesses to appear live and testify before the accused.[83] This rule is credited to Emperor Hadrian (117–138), who refused to admit written testimony while adjudicating criminal cases.[84] Sixteen centuries later, jurists Matthew Hale and William Blackstone

75. *Id*. The term *viva voce* literally means "living voice." 19 THE OXFORD ENGLISH DICTIONARY 713 (2d ed. 1989).

76. Herrmann & Speer, *supra* note 58, at 485–86. As a result, cross-examination was employed in criminal trials, even as early as the first century. *See id*. at 488 (citing 2 THE INSTITUTIO ORATORIA OF QUINTILIAN 168–87 (Harold Edgeworth Butler trans., Harvard Univ. Press 1921).

77. THE OXFORD CLASSICAL DICTIONARY 942 (2d ed. 1949) (discussing the infamy of Gaius Verres, governor of Sicily, and Cicero's charges against him); Herrmann & Speer, *supra* note 58, at 486 (same).

78. *See Acts* 25:16. *See also* Coy v. Iowa, 487 U.S. 1012, 1015–16 (1988) (citing same); Herrmann & Speer, *supra* note 58, at 486 (examining the same); Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384 (1959) (same).

79. *Acts* 24:1–6, 25:1–16.

80. Herrmann & Speer, *supra* note 58, at 486–87.

81. *Id.* at 488.

82. *Id*. at 487–89. Modern courts, however, require juries to consider the recitation of a transcript of testimony from a prior proceeding as if it were given live at trial. *E.g.*, CALIFORNIA JURY INSTRUCTIONS–CRIMINAL § 2.12 (2005).

83. *See* Herrmann & Speer, *supra* note 58, at 488–89.

84. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373–74 (1768); Herrmann & Speer, *supra* note 58, at 489.

lauded this *viva voce* requirement as a cornerstone in the greatness of the English jury trial and the mechanism behind the fairness of English criminal procedure.[85]

The Roman sense of criminal justice valued these procedural rights despite their cost. As the jurist Ulpian wrote, "[I]t is better that the crime of a guilty person remain unpunished than that an innocent person be convicted."[86] Fifty-eight years after Rome's fall in 476, Justinian, Emperor of the Eastern Roman Empire (Byzantium), systemized and codified Roman law.[87] In 539, Justinian amended his famed Code with a *constitutio* encompassing accepted criminal procedure, including the requirements that witnesses be produced live at trial and that their testimony occur in the defendant's presence.[88] Under Justinian's *constitutio*, transcripts of prior judicial proceedings were admissible only in civil cases; live testimony was required in all criminal cases.[89]

c. Confrontation Under Canon Law

With the fourth-century establishment of Christianity in the Roman Empire, the Church adopted secular accusatorial procedure as the canon-law method for dispute resolution.[90] Church criminal proceedings, covering violations of secular law by clergy, were tried under a procedure that mirrored the state's criminal procedure.[91] In 603, Pope Gregory I adopted confrontation principles into canon law by directing that Justinian's *constitutio* guide canonical procedure.[92]

After the fall of the Roman Empire, continental secular procedure gave way to Germanic methods based on irrational ordeals, oaths, and battles.[93] Canonical jurists, however, condemned these methods as "vulgar" and continued to follow Roman procedure in criminal cases.[94] Until the thirteenth century, canon law required accusing witnesses to testify live in court before both the trier of fact and the defendant.[95] For example, the

85. *See* 3 BLACKSTONE, *supra* note 84, at 373–74; THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 257–59 (1713) [hereinafter HALE].

86. Herrmann & Speer, *supra* note 58, at 485.

87. *See id*. at 490.

88. *Id*. at 490–91.

89. *Id.* at 491 & nn.56–57 & 59 (discussing Justinian's codification of the *viva voce* production requirement in his *Novel 90*).

90. *Id*. at 493.

91. *Id*. at 493–94.

92. *Id*. at 497 (noting the adoption of Justinian's *Novel 90* by the Pope).

93. *Id*. at 499–500.

94. *Id*. at 500.

95. *Id*. at 500–15.

Church's Second Council of Douzy issued orders in 874 requiring the physical production of witnesses in all criminal trials.[96] During this same period, a group of unknown clerics secured enhanced procedural protections through a scheme of forged legal texts.[97] Ascribing the texts to earlier popes, the forgers mandated the physical presence at trial of the accused, accuser, and all witnesses.[98] The forgeries were accepted as genuine, cited, and considered part of canon law for the next three centuries.[99] In particular, the texts strongly endorsed the Roman *viva voce* production requirement, authorizing only oral testimony before the trier and prohibiting testimony received in writing.[100] This greatly influenced later authentic canon-law texts, which adopted the *viva voce* requirement as well.[101]

In 1140 a sectarian legal scholar, Gratian, wrote a compendium of canon law.[102] His work, the *Decretum*, was quickly recognized as an authoritative text and became a working guide for ecclesiastical judges.[103] Drawing on the earlier forgeries, Gratian addressed criminal procedure at length, reiterating the *viva voce* production requirement and the defendant's right to be present to make a defense.[104] The *Decretum* harmonized canon law with Roman criminal procedure, constructing uniform rules for both sectarian and secular courts.[105] Nevertheless, this harmonization did not lead to guaranteeing the Roman procedure that required witnesses to testify live before both the defendant and fact finder. Instead, inquisitorial examination soon took hold in Europe.[106]

d. Continental Inquisitorial Examination

In the late twelfth century, both Church and secular courts abandoned a defendant's right to be present during testimony in favor of secret inquisitorial proceedings.[107] While fact-finding judges still heard witness testimony *viva voce*, the defendant's participation was limited to submitting

96. *Id.* at 500–02.
97. *Id*. at 503–11.
98. *Id*. at 503–04.
99. *Id*. at 503–04, 509.
100. *See id*. at 507–08.
101. *See id*. at 509–11.
102. *Id.* at 511–12.
103. *Id*.
104. *Id*. at 511–13 & n.173.
105. *Id*. at 513.
106. *Id*. at 515.
107. *Id*. at 515–16.

questions to be asked at the judges' discretion.[108] To fulfill the Justinian requirement that witnesses be present in court before the defendant, medieval judges gave defendants the opportunity to observe witnesses being received in court to be sworn.[109] The terms "face-to-face" and "confrontation" came to describe this procedure whereby previously examined witnesses appeared "face-to-face" before the defendant who would "confront" them, but only by observation.[110]

Even at the height of the Inquisition, defendants had this formal (albeit not functional) confrontation right: the opportunity to see their accusers in court.[111] But faced with broad internal corruption, the Church considered the Roman procedural protections dictated in the *Decretum* to be too cumbersome and protective for the needs of the times.[112] When Pope Innocent III drafted procedural guidelines for the Inquisition, he omitted a suspect's right to be present during testimony or to make a defense.[113] To his credit, the pope considered his task to be one of civil rather than criminal law, his goal being to remove bad clergy.[114] Nevertheless, inquisitorial procedure spread to secular criminal law; with it, the requirement to produce witnesses at trial waned.[115]

2. Developing the Right of Confrontation in England and the Colonies

a. Inquisitorial Procedure in England

The English courts of law praised by Blackstone and Hale for their jury trials were not necessarily the norm in sixteenth- and seventeenth-

108. *Id*. at 516. The biblical story of Daniel and Susanna was the purported justification for this procedure. *Id*. at 516–17. In the story, two men accuse Susanna of adultery, but Daniel questions them individually, thereby uncovering inconsistencies in their perjured testimony. *Daniel* 13:1–63. While the story was used to justify inquisitional practices, modern sensibility suggests it better supports the sequestration rule and the value of cross-examination. Herrmann & Speer, *supra* note 58, at 517–18.

109. Herrmann & Speer, *supra* note 58, at 518–19 (noting that the procedure was designed to meet the technical requirements of Justinian's *Novel 90*).

110. *See id*. at 537; White, *supra* note 55, at 546.

111. *See* Herrmann & Speer, *supra* note 58, at 523.

112. *Id. Cf*. Gitlow v. New York, 268 U.S. 652, 666–71 (1925) (holding that certain constitutional guarantees are subordinate to the state's need for self-preservation); Brief for the Petitioner at 27–49, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027) (arguing for broad extrajudicial state power to address the contemporary problems of national security).

113. Herrmann & Speer, *supra* note 58, at 524.

114. *Id.*

115. *See id*. at 526–28. In some courts, if a defendant maintained his innocence, witnesses were required to be produced live. *See id*. at 530. Defendants, however, waived this benefit if they confessed guilt during the torture stage of the prosecution. *See id*. In later centuries, a more progressive inquisitorial procedure required the production of witnesses *prior* to the application of torture. *Id.* at 531–33.

century England. Several English courts adhered to continental inquisitorial procedure, including the infamous Court of the Star Chamber.[116] It was precisely the infamy of these procedures that led to the abolition of these courts in the mid-1600s.[117] The Star Chamber's jurisdiction extended to noncapital criminal cases, which it heard in an administrative fashion.[118] Criminal defendants submitted answers to interrogatories in writing, which justices compared against the written affidavits of witnesses; parties appeared solely by counsel, and judgment was made on the submitted writings.[119]

To some, the Court of the Star Chamber was a model of administrative efficiency, well suited to avoid the "capricious clumsiness" of jury trials.[120] Its strength, like that of the courts of the Inquisition, was its expedience in addressing the perceived need of the period for the rapid, decisive handling of criminal cases.[121] Even its enthusiasts, however, recognized that it was a "cruel" and "political" court, which the king used to circumvent the authority of Parliament.[122]

Not all of the English courts that followed inquisitorial methods lacked procedural protections. Chancery Courts followed the Roman *viva voce* requirement, with judges personally examining witnesses orally to observe their behavior and assess their credibility.[123] As a preliminary matter, masters examined witnesses and reported on witnesses' credibility to the chancellor.[124] Depositions from these examinations, however, were considered significantly less credible than live testimony and admissible only under narrow showings of necessity.[125]

116. *See* Friedman, *supra* note 16, at 1023–24.

117. *Id*. *See also* 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 337–45 (1883) (noting cases that garnered the Star Chamber its infamy).

118. 1 STEPHEN, *supra* note 117, at 337–38.

119. FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 118 (James F. Colby ed., 1915); 1 STEPHEN, *supra* note 117, at 338.

120. *See* MAITLAND & MONTAGUE, *supra* note 119, at 117.

121. *See id*. *Cf.* contemporary cases cited *supra* note 112.

122. *See* MAITLAND & MONTAGUE, *supra* note 119, at 118–19.

123. THE LAW OF EVIDENCE 58–59 (1st Eng. ed. 1756) [hereinafter GILBERT] (the first edition of this work, while anonymous, is routinely credited to its author, Geoffrey Gilbert) (citing Emperor Hadrian's views on the value of personally observing witness testimony).

124. *Id*. at 60.

125. *Id*. at 60–62 (citing death, sickness, and inability to find a witness as the only grounds to admit depositions). Gilbert observed that the traditional rule allowed use of a deposition only if the witness had died. Gilbert noted, however, that this rule was relaxed to facilitate perjury prosecutions against the witness himself. *Id*. at 66.

b. English Courts at Law—*Viva Voce* Testimony and Pretrial Examination

Until the sixteenth century, juries in English common-law courts were self-informing.[126] Trials typically lacked testimonial witnesses and, without witnesses, confrontation did not exist.[127] Cross-examination, in the modern sense, did not begin to develop until the mid-1700s when criminal defendants were first allowed defense counsel.[128] In fact, a complete adversarial system of cross-examination did not develop in England until *after* the American Revolution.[129] Instead, as discussed below, English confrontation began in the 1500s as the *viva voce* requirement that witnesses testify live in court, face to face with the defendant. But, as a practical matter, examination was limited to judicial interrogation.[130]

126. *See* 1 DAVID JARDINE, CRIMINAL TRIALS 24 (1832) [hereinafter 1 CRIMINAL TRIALS]; Daniel Klerman, *Was the Jury Ever Self-Informing?*, 77 S. CAL. L. REV. 123, 124–26 (2003) (arguing that juries were mostly self-informing but that some in-court testimony did exist).

127. *See* 5 WIGMORE, *supra* note 27, § 1364, at 10–13.

128. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 82–88 (1995); White, *supra* note 55, at 547–48; Jeremy A. Blumenthal, Comment, *Reading the Text of the Confrontation Clause: "To Be" or Not "To Be"?*, 3 U. PA. J. CONST. L. 722, 731–32 (2001).

At common law, counsel was not permitted to assist felony defendants with factual issues at trial. *See, e.g.*, 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 39, § 1, at 400 (1721); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 26–28 (2003) [hereinafter LANGBEIN, ORIGINS]. Parliament first permitted defense counsel in 1696 but only in treason cases. An Act for Regulating of Trials in Cases of Treason and Misprison of Treason, 1695, 7 & 8 Will. 3, c. 3, § 1 (Eng.); 2 HAWKINS, *supra*, ch. 39, § 10, at 402; Jonakait, *supra*, at 84–85. In felony cases, defense attorneys were prohibited from examining witnesses. Jonakait, *supra*, at 82–83. Defense counsel began to regularly participate in criminal trials only in the 1780s. *See* LANGBEIN, ORIGINS, *supra*, at 169–70; John H. Langbein, *The Historical Origins of the Privilege Against Self-incrimination at Common Law*, 92 MICH. L. REV. 1047, 1068 & n.96 (1994) [hereinafter Langbein, *Self-incrimination*]. A full right to counsel paralleling the Sixth Amendment did not emerge in England until 1836. *See* An Act for Enabling Persons Indicted of Felony to Make Their Defense by Counsel or Attorney, 1836, 6 & 7 Will. 4, c. 114 (Eng.); Jonakait, *supra*, at 93–94.

For a more detailed discussion of the denial of defense counsel in English criminal trials, see Langbein, *Self-incrimination*, *supra*, at 1049–55. The doctrine was, however, broadly criticized by legal scholars at the time. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349–50 (1769) (observing that it was illogical to grant counsel in cases of petty misdemeanors but deny the same when a defendant's life was at stake).

129. Jonakait, *supra* note 128, at 93–94; White, *supra* note 55, at 548.

130. Jonakait, *supra* note 128, at 85–86. *Cf.* 2 HAWKINS, *supra* note 128, ch. 39, § 2, at 400 (noting that trial judges served as quasi-defense counsel to protect defendants' rights, including ensuring that verdicts were supported by sufficient evidence); LANGBEIN, ORIGINS, *supra* note 128, at 28–31 (noting the same).

A judge would typically take witnesses "through their testimony line by line, acting as both examiner and cross-examiner, until he was satisfied that the fullest possible case had been presented." J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND: 1660–1800, at 342 (1986). Langbein criticizes the effectiveness of such quasi-representation, noting that judges were rarely motivated to conduct vigorous examinations of prosecution witnesses. *See* Langbein, *Self-incrimination*, *supra* note 128, at 1050–52.

While law courts often admitted written evidence prior to the mid-1600s, it was considered of questionable value.[131] As early as 1552, Parliament codified the requirement that witnesses in treason trials must be personally produced to testify in the defendant's presence.[132] In 1554, Parliament reiterated the same production requirement.[133] But in that same year, English judicial construction functionally eviscerated Parliament's procedural grant.[134] With a judiciary subservient to the crown,[135] courts

131. 5 WIGMORE, *supra* note 27, § 1364, at 15. *Cf.* JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 26–27 (1974) [hereinafter LANGBEIN, PROSECUTING CRIME] (discussing the use of pretrial examinations as evidence).

132. An Act for the Punishment of Diverse Treasons, 1552, 5 & 6 Edw. 6, c. 11, § 9 (Eng.) (requiring that accusers "if they be then living, shall be brought in person before the party so accused, and avow and maintain that [which] they have to say against the said party to prove him guilty"); 5 WIGMORE, *supra* note 27, § 1364, at 19 & n.40 (quoting the same but misidentifying the statute as 5 Edw. 6, c. 12, § 22).

133. An Act Whereby Certain Offences Be Made Treasons, 1554, 1 & 2 Phil. & M., c. 10, § 11 (Eng.) (requiring that accusers "shall if they be then living and within the Realm, be brought forth in person before the [accused], if he require the same, and object and say openly in his hearing what they or any of them can against him"); 5 WIGMORE, *supra* note 27, § 1364, at 19 & n.41 (quoting the same).

In later sessions, Parliament repeatedly enacted similar production standards that required witnesses in treason cases to testify "face to face" in the presence of the accused. *See* An Act Whereby Certain Offences Be Made Treason, 1571, 13 Eliz., c. 1, § 9 (Eng.) (requiring that witnesses shall "be brought forth in person before the party so [accused] Face to Face, and there shall avow and openly declare all they can say against the party"); An Act Whereby Certain Offences Be Made Treason, 1559, 1 Eliz., c. 5, § 10 (Eng.) (requiring "which said Witnesses . . . (if they be then living,) shall be brought forth in person before the [accused] face to face, and there shall avow and openly declare all they can say against the said party"); Act of Supremacy, 1558, 1 Eliz., c. 1, § 21 (Eng.) (requiring "said Witnesses or so many of them as shall be living and within this Realm . . . shall be brought forth in person, face to face before the [accused], and there shall testify and declare what they can say against the Party"); Friedman, *supra* note 16, at 1024 & n.73 (citing the same). *See also infra* note 180 (citing a similar statute from 1661).

Although these production requirements applied only in treason cases, there is evidence that as early as the mid-sixteenth century, live testimony was preferred in felony prosecutions as well. *See infra* note 151 and accompanying text (discussing that the Marian statutes required accusers and witnesses to be bound over to testify live at trial). It bears noting, however, that all of these statutes were silent as to cross-examination. *Cf. infra* notes 211–12 and accompanying text (considering whether the confrontation right was intended to guarantee a right of cross-examination).

134. 5 WIGMORE, *supra* note 27, § 1364, at 19–20 & n.42 (citing the first incidence of judicial nullification in Trial of Sir Nicholas Throckmorton, 1 How. St. Tr. 869, 873, 880, 883 (1554).

135. 1 STEPHEN, *supra* note 117, at 335.

considered the rule to be repealed due to its inconvenience.[136] This dichotomy between legislative and judicial command remained largely unsettled until after the Parliamentary Revolution deposed the monarchy and established the Commonwealth.[137]

At the same time, during the Tudor reign of Queen Mary in the mid-1500s, Parliament enacted legislation that served as the precursor to our modern pretrial process.[138] These Marian Statutes authorized the pretrial examination of defendants and witnesses by justices of the peace.[139] Written records from examinations were intended to organize information for the court and were not assigned evidentiary force.[140]

The first of these statutes, the Bailment of Prisoners statute,[141] was designed to prevent a prisoner's unjustified release by providing supervising judges with information regarding the circumstances of the case.[142] Prior to granting bail, justices of the peace examined defendants and witnesses and then submitted a written report to the court summarizing their findings.[143]

The second of these statutes, the Examination of Prisoners statute enacted the next year,[144] extended the examination process to defendants

136. *See* 5 WIGMORE, *supra* note 27, § 1364, at 19 & n.42 (citing, among others, Trial of Sir Walter Raleigh, 2 How. St. Tr. 1, 16, 18 (1603) (finding the witness-production statute to be repealed because of inconvenience); Trial of Thomas Howard, Duke of Norfolk, 1 How. St. Tr. 957, 958, 978, 992 (H.L. 1571) (finding the treason statute to be "too hard and dangerous" for the crown)). To secure treason convictions, the Crown relied primarily on coerced statements elicited by torture. *See* 1 CRIMINAL TRIALS, *supra* note 126, at 25–27. Witnesses were not allowed to correct errors in their statements nor were they allowed to appear live in court, which avoided recantation. *See id*. Moreover, prosecutors introduced only selected excerpts of confessions at trial, "skillful[ly] pruning" from the depositions to make their cases. *See id*.

137. *See* 1 CRIMINAL TRIALS, *supra* note 126, at 29 (noting a settling of the doctrine during the Commonwealth era); 1 STEPHEN, *supra* note 117, at 357–58 (same); 5 WIGMORE, *supra* note 27, § 1364, at 22–23 & n.50 (suggesting a slightly later settling of the doctrine framed in terms of a prohibition on hearsay).

138. *See* An Act Appointing an Order to Justices of Peace for the Bailment of Prisoners, 1554, 1 & 2 Phil. & M., c. 13 (Eng.); An Act to Take the Examination of Prisoners Suspected of Manslaughter or Felony, 1555, 2 & 3 Phil. & M., c. 10 (Eng.); Crawford v. Washington, 541 U.S. 36, 43–44 (2004) (citing the same); LANGBEIN, PROSECUTING CRIME, *supra* note 131, at 15–16 (citing the same).

139. *Crawford*, 541 U.S. at 44; LANGBEIN, PROSECUTING CRIME, *supra* note 131, at 21–34; 1 STEPHEN, *supra* note 117, at 221.

140. *See* White v. Illinois, 502 U.S. 346, 361 (1992) (Thomas, J., concurring); LANGBEIN, PROSECUTING CRIME, *supra* note 131, at 24–34; 1 STEPHEN, *supra* note 117, at 221.

141. An Act Appointing an Order to Justices of Peace for the Bailment of Prisoners, 1554, 1 & 2 Phil. & M., c. 13 (Eng.).

142. LANGBEIN, PROSECUTING CRIME, *supra* note 131, at 6, 10–11.

143. *Id*. at 11–12.

144. An Act to Take the Examination of Prisoners Suspected of Manslaughter or Felony, 1555, 2 & 3 Phil. & M., c. 10 (Eng.).

who were not granted bail.[145] This committal statute serves as the basis for Anglo-American pretrial process.[146] It is erroneous, however, to believe that this statute was designed to promote continental inquisitorial procedure.[147] Unlike inquisitorial process, the purpose of this examination was not to create evidence.[148] More likely, the statute served a sui generis English legislative purpose—to associate justices of the peace with the role filled by modern public prosecutors. Namely, the statute facilitated the gathering and organizing of information akin to a modern pretrial criminal investigation.[149] Written records of the examinations served as court and prosecutorial memoranda, a precursor of the modern criminal information or indictment.[150]

The Marian Statutes' express language required justices of the peace to bind over witnesses for *live* oral testimony at jury trial, in sharp contrast to inquisitorial procedure.[151] Courts admitted written records of pretrial examinations into evidence only when a witness was either dead, too sick to attend trial, or kept away by means of the accused.[152] Moreover, during the Tudor era, use of these writings alone was generally insufficient to justify conviction; live oral testimony was still required.[153]

Nonetheless, later notorious examples of trial by deposition caught the public's attention and inflamed sentiment, resulting in a demand for more protective procedures.[154] Courts and scholars have long cited William Shakespeare's work as expressing the period's popular notion of confrontation:[155]

145. LANGBEIN, PROSECUTING CRIME, *supra* note 131, at 15–16.

146. *See id*. at 16.

147. *Id*. at 21–22.

148. *Id*. at 22–34.

149. *See id*. at 24, 34–45.

150. *See id*.

151. *See* An Act Appointing an Order to Justices of Peace for the Bailment of Prisoners, 1554, 1 & 2 Phil. & M., c. 13 § 1 (Eng.); An Act to Take the Examination of Prisoners Suspected of Manslaughter or Felony, 1555, 2 & 3 Phil. & M., c. 10, § 2 (Eng.); LANGBEIN, PROSECUTING CRIME, *supra* note 131, at 24.

152. 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 52, 284 (1736) [hereinafter 2 HALE, PLEAS]; 2 HAWKINS, *supra* note 128, ch. 46, § 6, at 429; LANGBEIN, PROSECUTING CRIME, *supra* note 131, at 29; 5 WIGMORE, *supra* note 27, § 1364, at 21 n.47 (collecting cases supporting the rule). *But see* Crawford v. Washington, 541 U.S. 36, 44 (2004) (citing Hale to support that such writings were admissible but failing to note the narrow conditions under which Hale states admission of such was granted).

153. *See* LANGBEIN, PROSECUTING CRIME, *supra* note 131, at 30.

154. *See Crawford*, 541 U.S. at 44; 1 STEPHEN, *supra* note 117, at 326, 333–35; White, *supra* note 55, at 541–43.

155. *See, e.g.*, Lilly v. Virginia, 527 U.S. 116, 140–41 (1999); Coy v. Iowa, 487 U.S. 1012, 1016 (1988); 5 WIGMORE, *supra* note 27, § 1364, at 21–22.

> Then call them to [the trier's] presence; face to face,
> And frowning brow to brow, ourselves will hear
> The accuser and the accused freely speak . . . .[156]

Increasingly, defendants demanded that their accusers be brought before them "face-to-face" in the trier's presence.[157]

Legendary among these defendants was Sir Walter Raleigh, whose 1603 trial for treason[158] is popularly credited with embedding confrontation into the public's conception of justice.[159] Among other charges, Raleigh was accused of plotting to assassinate James VI of Scotland before he could be crowned James I, the first of the Stuart monarchy that united England and Scotland.[160] Defending himself against written accusations, Raleigh asserted that his accuser had recanted and would not repeat the charge if presented live in court.[161] Citing statutory authority,[162] Raleigh demanded that the declarant be produced to testify in person.[163] Raleigh did not demand an opportunity to cross-examine the witness; he asserted only his right to have the witness produced live.[164] The court rejected Raleigh's demand, stating that the statute had been "found to be inconvenient" and had been repealed.[165] One justice candidly told Raleigh that he feared that the witness would recant if produced live: "[T]o save you, his old friend, it may be that he will deny all that which he hath said."[166] The witness was not produced; Raleigh was convicted and executed.[167]

156. WILLIAM SHAKESPEARE, RICHARD THE SECOND act 1, sc. 1.

157. Friedman, *supra* note 16, at 1024 & n.72 (citing mid-sixteenth-century cases in which defendants demanded that witnesses against them be produced "face to face").

158. Trial of Sir Walter Raleigh, 2 How. St. Tr. 1, 1 (1603). *See Crawford*, 541 U.S. at 44 (citing the same for its notorious refusal to produce witnesses at trial); 1 STEPHEN, *supra* note 117, at 333–36 (discussing the same).

159. *See* California v. Green, 399 U.S. 149, 157 n.10 (1970); Friedman, *supra* note 16, at 1024 n.71; Herrmann & Speer, *supra* note 58, at 482.

160. *See* Trial of Sir Walter Raleigh, 2 How. St. Tr. at 25; 1 STEPHEN, *supra* note 117, at 333.

161. *See* 1 STEPHEN, *supra* note 117, at 333–34; Herrmann & Speer, *supra* note 58, at 545.

162. Raleigh cited, inter alia, An Act for the Punishment of Diverse Treasons, 1552, 5 & 6 Edw. 6, c. 11, § 9 (Eng.); An Act Whereby Certain Offences Be Made Treason, 1571, 13 Eliz., c. 1, § 9 (Eng.). Trial of Sir Walter Raleigh, 2 How. St. Tr. at 15. *See also supra* notes 132–33 (quoting the text of those statutes).

163. Trial of Sir Walter Raleigh, 2 How. St. Tr. at 15; 1 STEPHEN, *supra* note 117, at 333–34 (noting the same); Herrmann & Speer, *supra* note 58, at 545 (noting the same).

164. Herrmann & Speer, *supra* note 58, at 545.

165. Trial of Sir Walter Raleigh, 2 How. St. Tr. at 15, 18; 1 STEPHEN, *supra* note 117, at 334–35 (noting that it was "extremely curious" that the court found the presentation statute had been repealed). *See also* 5 WIGMORE, *supra* note 27, § 1364, at 19–20 & n.42 (chronicling judicial nullification of the same witness presentation statute); *supra* note 136 and accompanying text (same).

166. Trial of Sir Walter Raleigh, 2 How. St. Tr. at 18 (Warburton, J.). *See also* 1 STEPHEN, *supra* note 117, at 335 (discussing the same); Herrmann & Speer, *supra* note 58, at 545 (discussing the same).

167. 1 STEPHEN, *supra* note 117, at 335.

Three years later, the same lord chief justice who denied Raleigh the right to confront his accusers face to face praised the value of live testimony as a superior feature of English law, arguing that it should be maintained when England united with Scotland, a civil-law nation:

> For the Testimonies, being viva voce before the Judges in open face of the world . . . [are] much to be preferred before written depositions by private examiners or Commissioners. First, for that the Judge and Jurors discern often by the countenance of a Witness whether he come prepared, and by his readiness and slackness, whether he be ill affected or well affected, and by short questions may draw out circumstances to approve or discredit his testimony, and one witness may contest with another where they are viva voce. All which are taken away by written depositions . . . .[168]

But despite the kingdoms' unification, the Stuart kings, James I and his son Charles I, waged an acrimonious struggle for power against Parliament for the next forty years.[169] Charles I attempted to seize absolute authority, which culminated in civil war.[170] Parliament prevailed in 1649 when it seized Charles I, tried him for treason, and beheaded him outside his second-floor banquet hall at Whitehall Palace.[171] After the regicide, the "face-to-face" production requirement that Parliament had enacted ninety years earlier prevailed as the criminal procedure norm—Raleigh's demand was posthumously heard.[172]

c. *Viva Voce* Testimony in the English Commonwealth and Restoration Periods

Throughout the period that led up to the parliamentary civil wars, English courts increasingly recognized a defendant's right to have his accusers testify live.[173] In 1641, on the eve of civil war, Parliament abolished the Court of the Star Chamber, and trial by deposition perished

168. Case of the Union of the Realms, (1606) 72 Eng. Rep. 908, 913 (K.B.) (Popham, C.J.) (describing the superiority of English common law over Scottish civil law during parliamentary debate on the legality of uniting England and Scotland under James I). *See* Friedman, *supra* note 16, at 1023 n.69 (quoting the same but misstating the year).

169. *See* The Early Stuarts and the English Civil War, http://www.britainexpress.com/History/Early_Stuarts_and_the_Civil_War.htm (last visited Sept. 4, 2006).

170. *See id*.

171. *See id*.

172. *See* 1 CRIMINAL TRIALS, *supra* note 126, at 29 (noting a settling of the doctrine during the Commonwealth era); 1 STEPHEN, *supra* note 117, at 357–58 (same); 5 WIGMORE, *supra* note 27, § 1364, at 21–23 & nn.47 & 50 (suggesting a slightly later settling of the doctrine framed in terms of a prohibition on hearsay).

173. 5 WIGMORE, *supra* note 27, § 1364 at 21–22 & n.47; Friedman, *supra* note 16, at 1024 & n.74 (citing, inter alia, Trial of Lieutenant-Colonel John Lilburne, 4 How. St. Tr. 1269 (1649)).

with it.[174] In criminal cases, courts admitted extrajudicial statements only as corroborating or supplemental evidence, insufficient to support conviction on its own.[175] Courts began to allow defendants to cross-examine witnesses and to call defense witnesses.[176] The *viva voce* requirement that witnesses testify live was dispensed with on only three narrow grounds where attendance was impossible: death, illness, or detention by the defendant.[177]

By the eighteenth century, the right to live production of testimonial witnesses was settled in English criminal procedure.[178] Nevertheless, the restoration of the Stuart monarchy in 1660 brought with it fresh claims of judicial corruption and perjured evidence. Concern renewed that the crown wielded power over an often subservient and partisan judiciary.[179] In 1661 Parliament again codified a statute requiring the production of witnesses in trials for treason.[180] Again the crown met parliamentary action with prosecutorial abuses.[181] The Revolution of 1688 followed, soothed by another wave of parliamentary protections.[182]

174. *See* MAITLAND & MONTAGUE, *supra* note 119, at 118, 120; Wikipedia, Star Chamber, http://en.wikipedia.org/wiki/Star_Chamber (last visited Sept. 3, 2006); Wikipedia, English Civil War, http://en.wikipedia.org/wiki/English_Civil_War (last visited Sept. 3, 2006).

175. GILBERT, *supra* note 123, at 152–53; 5 WIGMORE, *supra* note 27, § 1364, at 17.

176. 1 STEPHEN, *supra* note 117, at 358.

177. *See* Trial of the Lord Morley, 6 How. St. Tr. 769, 770–71 (H.L. 1666) (stating that the failure to find a witness was insufficient reason to dispense with the live testimony requirement); 2 HALE, PLEAS, *supra* note 152, at 284; 2 HAWKINS, *supra* note 128, ch. 46, § 6, at 429; 1 STEPHEN, *supra* note 117, at 358; 5 WIGMORE, *supra* note 27, § 1364, at 21 & n.47. *See also* Crawford v. Washington, 541 U.S. 36, 45 (2004) (noting the period's construction of strict rules of unavailability); West v. Louisiana, 194 U.S. 258, 262 (1904) (same), *abrogated on other grounds by* Pointer v. Texas, 380 U.S. 400, 406 (1965); 3 BLACKSTONE, *supra* note 84, at 382–83 (noting that English law courts did not depose aged witnesses to preserve their testimony and that courts refused to receive written depositions from witnesses abroad, even when the cause of action arose in a foreign country).

178. *See, e.g.*, Trial of Wm. Kidd, 14 How. St. Tr. 147, 177 (1701) (stating the *viva voce* requirement for testimonial evidence); 5 WIGMORE, *supra* note 27, § 1364, at 24–25 & nn.55–56.

179. MAITLAND & MONTAGUE, *supra* note 119, at 113; 1 STEPHEN, *supra* note 117, at 369.

180. An Act for Safety and Preservation of His Majesties Person and Government Against Treasonable and Seditious Practices and Attempts, 1661, 13 Car. 2, c. 1, § 5 (Eng.) (requiring that witnesses "shall be brought . . . before [the accused] face to face and shall openly avow and maintain upon Oath what they have to say against [the accused]"). *See also Crawford*, 541 U.S. at 44 (citing the same); Friedman, *supra* note 16, at 1024 n.73 (citing the same).

181. *See* White, *supra* note 55, at 547 n.54.

182. *See* An Act for Regulating of Trials in Cases of Treason and Misprison of Treason, 1695, 7 & 8 Will. 3, c. 3, § 1 (Eng.); White, *supra* note 55, at 547 n.54 (citing the same). For a brief history of the "Glorious" Revolution of 1688, see BBC, 'Glorious' Revolution of 1688, http://www.bbc.co.uk/history/timelines/britain/stu_glorious_rev.shtml (last visited Apr. 7, 2006).

d. American Colonial Concerns

Meanwhile, although the vacillations of English justice may have left many uneasy at home, American colonists felt even less at rest. Distrust of colonial courts stemmed from skepticism of judicial impartiality—colonists viewed jurists as supporting imperial rule at the expense of impartial justice.[183] Colonists feared the crown's autocratic power, the colonial extension of which was the courts.[184] For colonists, jury trials and their associated procedural protections limited royal power.[185]

With the start of the French and Indian War in 1754, instances of unfairness in England's colonial administration increased. The Stamp Act of 1765 was an infamous example among colonists and a key ingredient in fermenting revolutionary propaganda.[186] When cases under the Act and its progeny were tried in colonial courts, colonists responded with jury nullification.[187] Parliament replied by giving jurisdiction in these cases to vice-admiralty courts, which sat without a jury under civil inquisitorial procedure.[188] Infuriated colonists reacted by threatening admiralty judges in New York and New England.[189] In response, Parliament removed adjudication of the cases to Nova Scotia.[190] The crisis was short-lived, but the damage was done.[191]

To the colonists, the violation was not only economic but also constitutional.[192] The crisis represented the beginning of an erosion of colonial faith in the justice of British rule.[193] Additional acts by Parliament further alienated colonists' security in what they viewed as their procedural trial rights. This development solidified a colonial commitment to these procedural rights as fundamental.[194]

In 1774 the First Continental Congress prepared petitions of grievances to the King, Parliament, and others. In particular, the Congress

183. JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 51 (1986). *See also* THE DECLARATION OF INDEPENDENCE paras. 10, 11 (U.S. 1776) (listing the King's control over the judiciary as a justification for independence).

184. *See* REID, *supra* note 183, at 50; White, *supra* note 55, at 548–49.

185. REID, *supra* note 183, at 48, 50.

186. *See* Larkin, *supra* note 37, at 71; Pollitt, *supra* note 78, at 396.

187. Pollitt, *supra* note 78, at 396–97.

188. *See id*.

189. *Id*. at 397.

190. *See id.* at 396–97.

191. *See* REID, *supra* note 183, at 52–53, 177–83; Larkin, *supra* note 37, at 71.

192. *See* REID, *supra* note 183, at 52–53.

193. *See id.*

194. *See* Larkin, *supra* note 37, at 71–73; White, *supra* note 55, at 550.

voiced concern over maintaining the right to a jury trial, conducted "face to face, in open Court."[195] Two years later, the Second Continental Congress declared independence from Britain, specifically listing deprivation "of the benefits of Trial by Jury" as a justification for dissolution.[196]

3. Constitutionalizing Confrontation in the United States

As the newly independent states formed governments, legislative conventions began drafting state constitutions.[197] Virginia was first to complete its Declaration of Rights, passing it three weeks *before* the Declaration of Independence was signed.[198] It prominently included a criminal defendant's right "to be confronted with . . . accusers and witnesses."[199] Seven of the remaining states followed Virginia's lead and constitutionalized confrontation.[200] The last two states to do so, Massachusetts and New Hampshire, specified a "face to face" meeting.[201]

By 1778 the Framers completed drafting the U.S. Constitution.[202] While the Constitution delineated a federal judiciary, it was silent as to what procedure would be followed in federal courts.[203] Opposition to the Constitution's ratification centered on the fear that without an express federal Bill of Rights, Congress may, at some future time, abridge rights deemed fundamental to the citizens of the states.[204] Patrick Henry of

195. Larkin, *supra* note 37, at 73 (quoting a letter from the First Continental Congress to the citizens of Quebec, *in* 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 107 (Worthington Chauncey Ford ed., 1904)).

196. *See* THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

197. *See* Pollitt, *supra* note 78, at 398.

198. Larkin, *supra* note 37, at 75. *See* VIRGINIA DECLARATION OF RIGHTS § 8 (1776), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 235 (1971).

199. *See* VIRGINIA DECLARATION OF RIGHTS, *supra* note 198, § 8.

200. *See* DELAWARE DECLARATION OF RIGHTS § 14 (1776), *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 198, at 278; MARYLAND DECLARATION OF RIGHTS § XIX (1776), *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 198, at 282; MASSACHUSETTS DECLARATION OF RIGHTS § XII (1780), *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 198, at 342; NEW HAMPSHIRE BILL OF RIGHTS § XV (1783), *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 198, at 377; NORTH CAROLINA DECLARATION OF RIGHTS § VII (1776), *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 198, at 287; PENNSYLVANIA DECLARATION OF RIGHTS § IX (1776), *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 198, at 265; VERMONT DECLARATION OF RIGHTS Ch. I, § X (1777), *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 198, at 323.

201. MASSACHUSETTS DECLARATION OF RIGHTS, *supra* note 200, § XII; NEW HAMPSHIRE BILL OF RIGHTS, *supra* note 200, § XV.

202. Pollitt, *supra* note 78, at 399.

203. *Id*.

204. *Id.*

Virginia feared that without constitutional protections like those guaranteed by Virginia, "Congress may introduce the practice of the civil law."[205] Abraham Holmes of the Massachusetts ratifying convention objected that the Constitution did not guarantee "whether [a defendant] is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses."[206]

A compromise resulted whereby Virginia, New York, Massachusetts, New Hampshire, and other states agreed to ratify the Constitution on the condition that the first Congress adopt a federal Bill of Rights.[207] On June 8, 1789, James Madison introduced to the House a proposal that would become the Sixth Amendment.[208] It was adopted on December 15, 1791.[209]

4. Conclusion: Eighteenth-Century Confrontation Was Live Testimony Before the Fact Finder

Historically, the production of live witnesses was integral to confrontation, not merely a coincidental companion. When the Framers wrote the Sixth Amendment, the right of a defendant "to be confronted with the witnesses against him"[210] guaranteed that those witnesses would be produced to testify live in court. The Sixth Amendment did not guarantee a defendant the right *to* confront witnesses, but it conferred the right "to be confronted" *by* those witnesses.[211] The Amendment literally conferred the right to have witnesses appear live in court and state their allegations to the defendant's face. It did not *expressly* confer a right for a defendant to cross-examine those witnesses.[212] Rather, this witness-

205. *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (Jonathan Elliot ed., 2d ed. 1836); Pollitt, *supra* note 78, at 399 (quoting the same).

206. *See* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 110–11 (Jonathan Elliot ed., 2d ed. 1836). *See also* Crawford v. Washington, 541 U.S. 36, 48 (2004) (quoting from the same); Pollitt, *supra* note 78, at 399 (quoting the same).

207. Pollitt, *supra* note 78, at 399.

208. THE COMPLETE BILL OF RIGHTS, *supra* note 21, at 385.

209. Larkin, *supra* note 37, at 76.

210. U.S. CONST. amend. VI.

211. *Id.*; Blumenthal, *supra* note 128, at 728, 737.

212. *Cf.* Blumenthal, *supra* note 128, at 740–41, 746–47 (proposing that the primary purpose of confrontation was to verify testimony by requiring a witness's live attendance to prevent fabricated written evidence). While this requirement is part of the role of confrontation, considering it to be the right's primary focus ignores the historic weight placed on the value of live confrontation as procedural fairness. *See supra* Part II.B.3.

Whether the Framers intended that the Sixth Amendment should *also* confer a right of cross-examination, as most courts summarily assume, is a question outside the scope of this Note that deserves further academic examination. The concept of cross-examination, however, is so ingrained in

production guarantee ensured that any confrontation or testimony would occur in the presence of both the defendant and the jury.

This production requirement dates back millennia, existing in various forms since Roman law. It was a right popularly demanded by British citizens at home and in the colonies. While modern courts use pretrial examinations as substantive evidence, this usage was never the purpose of such procedures historically. Instead, the history of English law teaches that live testimony came to be considered a fundamental feature of procedural fairness in criminal trials. When defendants demanded their right "to be confronted with the witnesses against" them, they were demanding the right to have their accusers produced live in court before the jury. This right is the demand reproduced *in haec verba* in the Sixth Amendment.

C. THE EMPIRICAL VALUE OF LIVE CONFRONTATION

1. The Empirical Value of Live Testimony Before the Jury—Observation of Demeanor

Three centuries ago, Sir Matthew Hale praised the jury trial procedure developed in seventeenth-century England as "the best Trial in the World."[213] Hale noted the superiority of a jury trial's evidentiary procedure, namely that testimony was given openly in court, personally, and not in writing.[214] The value of live testimony was that it avoided the pitfalls of written evidence by providing the trier of fact with direct access to the witness's demeanor:

> [T]he very Manner of a Witness's delivering his Testimony will give a probable Indication whether he speaks truly or falsely, and by this Means also he has Opportunity to correct, amend, or explain his Testimony upon further Questioning with him, which he can never have after a Deposition is set down in Writing.[215]

our judicial process and societal sense of justice that it would, in the alternative, doubtlessly be conferred under the Fourteenth and Fifth Amendments as a part of due process.

Cf. supra notes 128–30 and accompanying text (discussing the relatively late development of the practice of cross-examination); *supra* notes 132–33(citing sixteenth-century statutes requiring live testimony and "face to face" accusation but silent as to cross-examination).

213. HALE, *supra* note 85, at 252.

214. *Id*. at 257.

215. *Id*. at 257–58.

For Hale, the critical feature of a jury trial was that the production of live witnesses allowed the jury to calculate the weight that should be afforded to testimony:

> Also by this personal Appearance and Testimony of Witnesses, there is Opportunity of confronting the adverse Witnesses, of observing the Contradiction of Witnesses . . . .
>
> And Further, The very Quality, Carriage, Age, Condition, Education . . . of Witnesses, is by this Means plainly and evidently set forth to the Court and the Jury . . . and the Jurors as they see Cause may give the more or less Credit to their Testimony . . . and if there be just Cause to disbelieve what a Witness swears, [jurors] are not bound to give their Verdict according to the Evidence or Testimony of that Witness, and they may sometimes give Credit to one Witness, tho' oppos'd by more than one.[216]

English criminal justice was distinguished from continental civil law because it allowed juries to favor the evidence of one witness whose testimony contradicted that of others.[217] As Hale observed, the production of live witnesses enabled this discrimination by the jury. This production allowed a jury to transcend merely evaluating the numerical quantity of evidence, as was the civil-law norm, and instead assess its qualitative merit—a mechanism at the core of our societal notion of justice.[218]

Twenty-five years before the Bill of Rights was ratified, Sir William Blackstone expressed the popular notion of procedural justice—one that continues to resonate today.[219] Blackstone echoed Hale's praise for the requirement that witnesses testify live at trial "in open court, in the presence of the parties, . . . and before the judge and jury."[220] Blackstone's *Commentaries* were avidly read in the colonies, and scholars believe they greatly influenced colonial constitutional thought.[221] Blackstone's opinion of confrontation likely influenced and mirrored that of the Sixth Amendment's drafters and continues to influence modern courts.[222]

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216. *Id*. at 258–59.

217. *Id*. at 259. *See also* Crawford v. Washington, 541 U.S. 36, 43 (2004) (comparing the criminal procedure of continental civil with common law).

218. *See* HALE, *supra* note 85, at 258–59.

219. *See* 3 BLACKSTONE, *supra* note 84, at 372–75. *See also Crawford*, 541 U.S. at 43 (noting the same).

220. 3 BLACKSTONE, *supra* note 84, at 372.

221. *See* 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 712 (1938); Larkin, *supra* note 37, at 72.

222. *See* Larkin, *supra* note 37, at 72–77. *See also Crawford*, 541 U.S. at 43, 61–62 (citing Blackstone's view of the tradition of live testimony).

Blackstone recognized that distrust of written testimony dated to the Roman *viva voce* requirement, noting, "This open examination of witnesses *viva voce*" facilitates "confronting . . . adverse witnesses" in a way "which can never be had upon any other method of trial."[223] Blackstone elaborated on the value of live confrontation before the jury, writing:

> [B]y this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the absence of those who made them; and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it.[224]

Over a century later, Justice Henry Lamm wrote from the bench of the Missouri Supreme Court:

> We well know there are things of pith that cannot be preserved in or shown by the written page . . . . [O]ne witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.[225]

Judge Jerome Frank likewise observed, "The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' . . . by his manner . . . which 'cold print does not preserve' . . . ."[226] Judge Learned Hand agreed, noting that demeanor evidence was of paramount value when conflicting testimony left the jury open to a range of determinations: "[T]hat part of the evidence which the printed words do not preserve . . . is the most telling part, for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors . . . ."[227]

223. 3 BLACKSTONE, *supra* note 84, at 373–74 (citing the criminal procedure codified by Emperor Hadrian requiring live production of testimonial witnesses).

224. *Id*.

225. Creamer v. Bivert, 113 S.W. 1118, 1120–21 (Mo. 1908) (Lamm, J.).

226. Broad. Music, Inc. v. Havana Madrid Rest. Corp., 175 F.2d 77, 80 (2d Cir. 1949) (Frank, J.) (quoting Morris Plan Indus. Bank v. Henderson, 131 F.2d 975, 977 (2d Cir. 1942)).

227. NLRB v. Universal Camera Corp., 190 F.2d 429, 430 (2d Cir. 1951) (Hand, J.).

2. The Criticism of Social Scientists—Rebutting an Empirical Assault

Society's view of justice may endorse the value of live testimony, but social scientists have been less receptive.[228] In short, psychologists think people are poor lie detectors.[229] As one scholar stated, "[L]egal procedures could be improved by abandoning live trial testimony in favor of presentation of deposition transcripts. Transcripts are probably superior to live testimony as a basis for credibility judgments because they eliminate distracting, misleading, and unreliable nonverbal data and enhance the most reliable data, verbal content."[230] This view may leave many citizens thankful that the Framers of the Constitution were not psychologists.

The criticism of the empirical value of live testimony falls short in three fundamental respects. First, like Wigmore's opinion, it presupposes that the value of live testimony is driven solely by its ability to reveal deception.[231] This assumption ignores that criminal constitutional rights protect fairness-based procedural guarantees, not merely accuracy-based goals.[232] In *Crawford*, the Supreme Court rejected the constrained accuracy-based view of constitutional rights in favor of ensuring procedural guarantees that the Framers deemed necessary to justice.[233]

Second, empirical criticism of live testimony fails to consider the procedure's additional benefits. Aside from addressing society's sense of justice, live testimony serves other objectives. Furthering accuracy, live testimony may have a deterrent effect on dishonest witnesses.[234] The common view that people *can* detect deception may deter perjury. Procedurally, live testimony ensures parity between the state and the defendant in the adversarial presentation of cases. It gives the defense equal

228. *See* Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1158–59 & n.13 (1993) (citing research questioning the ability of humans to accurately detect deception).

229. Bella M. DePaulo et al., *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERSONALITY & SOC. PSYCHOL. REV. 346, 346 (1997); Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 809–10 (2002); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991).

230. Wellborn, *supra* note 229, at 1091.

231. *Compare* discussion *supra* Part II.A (examining the procedural value of live testimony independent of it furthering accuracy), *with infra* Part III.A.2 (examining Wigmore's opinion of confrontation).

232. *See* Crawford v. Washington, 541 U.S. 36, 61, 67–68 (2004).

233. *See id*.

234. Wellborn, *supra* note 229, at 1092.

opportunity to develop its case contemporaneously at trial versus relying on preliminary examinations.[235]

Third, and most importantly, the applicability of current psychological research to juries is inconclusive. As a predicate issue, the research methodology suggests a limited, if not inapposite, suitability to juries. Five major differences limit applying the typical psychological experiment to the jury trial. First, lack of context—psychological experiments present a single narrative from which credibility must be assessed whereas trial testimony occurs in the context of other evidence and testimony.[236] Second, lack of cross-examination—in psychological experiments, test subjects assess credibility without a narrative's proponent being subjected to any adversarial testing.[237] Third, lack of deliberation—in experiments, subjects make individual assessments of credibility, whereas jurors decide credibility by consensus in group discussion.[238] Fourth, lack of a stake in the outcome and lack of an oath—experiment subjects lack any personal motivation regarding their narration's veracity and do not deliver their narration under oath subject to penalty of perjury.[239] Fifth, lack of a representative test sample—the majority of psychological studies are conducted on college undergraduates who lack the variety of age, experience, and diversity of a typical jury.[240]

These methodological shortcomings suggest a limited ability for this research to devalue live testimony. Considered overall, however, psychological research may lend support to the value of live testimony, not just detract from it. On the one hand, psychologists note that people's confidence in their judgment of deception bears little relation to their accuracy.[241] Some studies suggest that people are right about half of the time,[242] which implies that trial by coin-flipping would be an expedient alternative to empanelling juries. On the other hand, additional studies tell a different story.

235. *See supra* notes 22–25 and accompanying text (discussing criticism of the judicial policy of equating prior cross-examination to live testimony).

236. Wellborn, *supra* note 229, at 1079.

237. *Id*.

238. *See id.* at 1079–82. Wellborn identifies these first three differences but concludes that they are unimportant.

239. In some studies, the narrators and the observers were either friends or dating, raising questions about the level of comfort between the parties. *See* DePaulo et al., *supra* note 229, at 350.

240. *See id.* at 350 (noting that three-quarters of the studies examined were conducted almost exclusively on high school and college students).

241. *Id*. at 353.

242. Wellborn, *supra* note 229, at 1087.

Leading researchers Paul Ekman and Wallace Friesen have developed a nonverbal behavioral model that categorizes actions into three broad channels—face, body, and voice.[243] These channels are "differentially controllable"—one channel may be easier to control and convey little unintentional information, while a "leaky" channel is difficult to control and would convey involuntary information.[244] During deception, witnesses are less able to control "leakier" channels from disclosing deception cues despite their ability to restrain leakage from other channels.[245]

Facial expressions are the most easily controlled; it is unlikely that subjects exposed to facial cues alone can detect deception.[246] Body movement, however, is less controllable.[247] Some studies suggest that voice is the least controllable of all, making it the most diagnostic of deception.[248] In fact, vocal cues indicating deception (pitch, errors, and hesitation) are difficult to control even when the subject has a strong motivation to lie.[249] As a result, vocal cues comprise the majority of deception-indicating cues.[250] Unlike body cues, these vocal cues are observed "at a significant frequency" during lying, distinguishing insincere witnesses from the sincere.[251]

Not surprisingly, when research subjects are able both to observe a speaker's body and to hear a speaker's voice, deception detection is at its best, over twice as effective as simply reviewing a written transcript alone.[252] In contrast, when subjects review only written transcripts, the deception-detection devices of body and vocal cues are unavailable, and the subjects' capacity for accurate detection decreases by half.[253] Empirical

243. Blumenthal, *supra* note 228, at 1189–90. *See* Paul Ekman & Wallace V. Friesen, *Nonverbal Leakage and Clues to Deception*, 32 PSYCHIATRY 88 (1969); Paul Ekman & Wallace V. Friesen, *The Repertoire of Nonverbal Behavior: Categories, Origins, Usage, and Coding*, 1 SEMIOTICA 49 (1969).

244. *See* Blumenthal, *supra* note 228, at 1190.

245. *See id*.

246. *See id*. at 1190–91.

247. Miron Zuckerman et al., *Controlling Nonverbal Displays: Facial Expressions and Tone of Voice*, 17 J. EXPERIMENTAL SOC. PSYCHOL. 506, 506–07 (1981).

248. *See* Kassin, *supra* note 229, at 816; Zuckerman, et al., *supra* note 247, at 506–07, 521.

249. *See* Blumenthal, *supra* note 228, at 1195–97; Zuckerman et al., *supra* note 247, at 507, 521.

250. *See* Blumenthal, *supra* note 228, at 1192–93.

251. *See id*. at 1193. *See generally* Chris William Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 291 (2004) (analyzing how cognitive limitations make it *observably* more difficult for insincere witnesses to consistently answer spontaneous questions under live cross-examination).

252. Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6. S. CAL. INTERDISC. L.J. 1, 21–22 (1997) (comparing the use of written transcripts to the use of both vocal and body cues, in relation to a standard deviation of mere chance).

253. *Id*.

research, therefore, offers support for the value of live testimony to promote accuracy, not the opposite.[254]

3. Conclusion: Justice Demands Live Confrontation, Not Trials by Transcript

The credibility of uncertain and unreliable witnesses may appear improved by reading their testimony to the jury—shaky witnesses look better on paper than in person.[255] Judge Learned Hand noted, "nothing is more difficult than to disentangle the motives of another[] . . . . But for that very reason those parts of the evidence which are lost in print become especially pregnant . . . ."[256] Our sense of justice supports Judge Jerome Frank's intuition when he wrote:

> [A] "stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." . . . The witness' demeanor, not apparent in the record, may alone have 'impeached' him.[257]

Edmund Morgan proposed that a jury's observation of a witness's vocal demeanor is critical to evaluating confrontation.[258] Morgan noted that demeanor evidence is most valuable when a jury observes cross-examination because if cross-examination is not perceived in person, the technical accuracy of a witness's response can mask the response's insincerity.[259] After all, the jury's role is not a binary one, dividing evidence between reliable truth and unreliable falsity, but a contextual assessment based on a continuum of credibility.

The thoughts of Judge Hand, Judge Frank, and Morgan illustrate our society's belief in the value of producing witnesses to testify live at trial.

254. *See* Sanchirico, *supra* note 251, at 299, 363–65 (concluding that insincere witnesses are at a cognitive disadvantage during live examination, which produces observable delays in their responses). An insincere witness's vocal delays are masked when a pretrial transcript is later read at trial. In cases of live testimony, one scholar has proposed that because jurors overemphasize facial cues, jury instructions should be changed to guide jurors' attention to vocal cues. *See* Blumenthal, *supra* note 228, at 1201.

255. *See* People v. Louis, 728 P.2d 180, 192 (Cal. 1986) (noting that suspect testimony may sound best when read), *disapproved on other grounds*, People v. Mickey, 818 P.2d 84, 114 n.9 (Cal. 1991).

256. NLRB v. Universal Camera Corp., 190 F.2d 429, 431 (2d Cir. 1951) (Hand, J.).

257. Broad. Music, Inc. v. Havana Madrid Rest. Corp., 175 F.2d 77, 80 (2d Cir. 1949) (Frank, J.) (quoting JOSEPH NATHAN ULMAN, THE JUDGE TAKES THE STAND 267 (1933)).

258. Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 186–87 (1948).

259. *See id*.

That value reflects our society's view of procedural justice—production is both functionally necessary and procedurally fair. This production requirement is the historical root of confrontation and should be respected today.

III. CONFRONTATION JURISPRUDENCE: A FULL CIRCLE IN TWO CENTURIES

In our nation's first years, Chief Justice John Marshall described the confrontation right as a fundamental cornerstone of justice, stating, "I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important."[260] Over the next two centuries, both scholars and the Supreme Court lost sight of Marshall's counsel, forgetting the right's meaning and miring confrontation in hearsay law.[261] A defendant's procedural right to have witnesses produced live atrophied under a growing number of exceptions adopted from the law of evidence.[262] Live testimony became, in effect, deconstitutionalized, with state criminal courts analyzing the unavailability doctrine as an evidentiary rule without respect for its constitutional implications.[263]

As a result, trial courts have decided constitutional questions with contradictory outcomes, especially under the rubric of unavailability. Guided by vague standards codified as evidence law, courts have inadvertently abridged a fundamental right with only deferential review protecting the Constitution.[264] If they were not dead, the Framers would be apoplectic.

260. United States v. Burr, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694) (Marshall, C.J.).

261. *See* White, *supra* note 55, at 619 (suggesting that the Court's twentieth-century confrontation jurisprudence essentially reduced the constitutional right to a rule of evidence).

262. *See* discussion *infra* Part III.A.3 (examining the Court's expansion of the unavailability doctrine).

263. *See* discussion *infra* Part III.A.3–B (criticizing the expansion and application of unavailability).

264. *See* discussion *infra* Part III.B (criticizing the undisciplined application of the unavailability doctrine).

A. DECONSTITUTIONALIZING CONFRONTATION: CONFLATING CONSTITUTIONAL RIGHTS WITH EVIDENCE RULES

In 1852, in *United States v. Reid*,[265] the Supreme Court outlined a framework for defining Sixth Amendment rights.[266] Justice Taney found the Constitution's design to be progressive, not merely a codification of English law. The Court analyzed the Sixth Amendment by examining the procedural rights in state constitutions rather than by examining those in England.[267] The Court noted that the history of English procedure was uneven and at times oppressive, which motivated the Framers to guarantee procedural rights that English law had not effectively secured.[268]

Taken as a whole, the Sixth Amendment constitutionalized rights that were not secured in England for another half-century.[269] The Framers were not content simply to limit constitutional rights to those granted to them as British subjects.[270] The American Revolution redefined the relationship between citizens and government, reversing the traditional hierarchy of power descending from governmental authority.[271] The Constitution circumscribed governmental authority, which was distrusted, and instead empowered citizens with guaranteed rights.[272]

Under this view, the Framers intended the Bill of Rights to grant progressive fundamental protections that government could not abridge.[273]

265. United States v. Reid, 53 U.S. (12 How.) 180 (1852).

266. *See id*. at 182–84.

267. *See id*. at 183–84.

268. *See id*. at 182–84.

269. *See* Jonakait, *supra* note 128, at 93–95 (discussing the right to counsel in colonial law and noting that England did not grant a full right to counsel in felony cases until 1836). In fact, some of the rights conferred by the Sixth Amendment were guaranteed under colonial charters as early as 1660 despite not being available in England until 175 years later. *See id*. *See also supra* notes 128–129 and accompanying text (discussing the development of rights in England that paralleled those in the Sixth Amendment).

270. White, *supra* note 55, at 548–49. *See generally* Jonakait, *supra* note 128 (proposing that the Sixth Amendment represents the constitutionalization of an adversarial system of criminal procedure that developed independently from English law, sui generis to the colonies).

271. *See* DANIEL E. WILLIAMS, PILLARS OF SALT: AN ANTHOLOGY OF EARLY AMERICAN CRIMINAL NARRATIVES 20 (1993).

272. *See id*.; White, *supra* note 55, at 548–49.

273. White, *supra* note 55, at 549 (specifically noting American distrust of discretion in the hands of a judiciary that was historically partial to the government). *Compare* Crawford v. Washington, 541 U.S. 36, 67 (2004) (noting that the Framers installed a system of criminal procedural protections in the Sixth Amendment designed to be beyond the reach of judicial discretion), *and* REID, *supra* note 183, at 51 (discussing colonial concern over judicial partiality), *with* THE DECLARATION OF INDEPENDENCE paras. 10, 11 (U.S. 1776) (listing the King's control over the judiciary as a grievance).

Nevertheless, the Court has repeatedly framed confrontation jurisprudence in the static terms of eighteenth-century English evidence law.[274]

1. The *Mattox* Mistakes—Three Steps to Deconstitutionalizing Confrontation

A century after the adoption of the Bill of Rights, the Court first articulated the scope of the Confrontation Clause in *Mattox v. United States*.[275] The Court stated that the Clause granted a defendant two prerogatives: (1) the opportunity to cross-examine the witness and (2) an opportunity of "compelling [a witness] to stand face to face with the jury in order that they may look at him, and judge . . . his demeanor."[276] However, ignoring its own guidance in *Reid*, the Court proceeded to introduce three fundamental errors into Confrontation Clause jurisprudence that haunted the Court's decisions for the next century.

a. Conflating Constitutional Rights with Evidence Law

First, the *Mattox* Court conflated constitutional analysis with the law of evidence, a misjoinder that the Court began to unravel only with *Crawford* over a century later.[277] Ignoring the Court's progressive Constitution-based approach in *Reid*, Justice Brown based the *Mattox* opinion on a review of evidence rulings in state and English cases.[278] The *Mattox* Court failed to consider the inapplicability of this analysis to the Sixth Amendment. The obvious point (but one that often escaped the Court's attention until *Crawford*) is that constitutional interpretation does not mirror interpretation of substantive evidence law, the Constitution being a body of meta-law independent and superior to enacted or common law. Justice Brown, however, labeled the Confrontation Clause a "general rule[] of law."[279] Thus, the Court failed to notice that it relied on state

274. *See* White, *supra* note 55, at 540.

275. *See* Mattox v. United States, 156 U.S. 237, 242–43 (1895). In *Mattox*, the defendant was tried three times for the same murder. The first trial was overturned by the Supreme Court, the second resulted in a hung jury, and by the third, the principal witness against Mattox had died. Mattox's conviction at the third trial was based on a transcript of the witness's testimony from the first trial. Reed, *supra* note 20, at 190. For a comparative analysis of the case, compare White, *supra* note 55, at 556–60 (critical of the Court's decision), with Reed, *supra* note 20, at 190–92 (generally supportive of the Court's approach).

276. *Mattox*, 156 U.S. at 242. *But see supra* notes 210–12 and accompanying text (questioning whether the Confrontation Clause should be construed as conferring a right of cross-examination at all).

277. *See* White, *supra* note 55, at 557–58. *Compare Mattox*, 156 U.S. at 243 (describing the Confrontation Clause as a "general rule[] of law"), *with Crawford*, 541 U.S. at 61, 67 (treating the Confrontation Clause as a categorical procedural guarantee).

278. *See Mattox*, 156 U.S. at 240–44; White, *supra* note 55, at 557.

279. *Mattox*, 156 U.S. at 243.

evidence cases that did not address the Federal Constitution at all.[280] In effect, the Court defined the Federal Constitution based solely on its normative assessment of state evidence law.[281] Likewise, when the Court considered pre-Constitution English cases authoritative, the Court effectively preempted the Constitution, rejecting its progressive guarantee of rights that England had never been able to consistently secure for its own people.[282] Indeed, Justice Brown effectively wrote English case law into the Constitution, despite the former's unsettled and contradictory nature.[283]

Justice Brown's analysis further presumed that the Constitution's protections were coexistent with and limited by English common law. Remarkably and without support, he wrote:

> We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject . . . since the days of Magna Charta [sic].[284]

While contemporary scholars refute Justice Brown's limited interpretation,[285] it established misguided dicta that would influence the Court for decades.[286] In the instant case, Justice Brown's result *may* have been correct—originalist intent *may* have held that confrontation is adequately met with a deceased witness's prior cross-examined testimony.

280. At the time, the Sixth Amendment was not considered to apply to the states. *See* West v. Louisiana, 194 U.S. 258, 262 (1904), *abrogated by* Pointer v. Texas, 380 U.S. 400, 406 (1965). The Court first applied the Sixth Amendment to the states in 1965. *See Pointer*, 380 U.S. at 403.

281. Three justices dissented in *Mattox*, distinguishing the state cases on which Justice Brown relied. The dissent argued that a number of the cases were inapplicable civil cases and that the rest did not point to a definitive, settled rule. *Mattox*, 156 U.S. at 252–57 (Shiras, J., dissenting).

282. *See id.* at 240–41 (majority opinion) (noting that the Court's outcome is in line with English law).

283. *See id.* at 243 (stating that much of the Bill of Rights is subordinate to those substantive law exceptions that existed prior to its adoption). This may be true in certain narrow cases, if the Framers intended such. The broad categorical statement, however, is unsupported.

284. *Id.* To the contrary, confrontation rights were unevenly granted under English common law, and generally only available after 1640. *See supra* notes 128–129, 154–182, and accompanying text (examining the history of confrontation at English common law). Contrary to Justice Brown's assertion, no confrontation rights were mentioned in England's Magna Carta or other grants of rights. *Cf.* The Statutes of Westminster; The First, 1275, 3 Edw. 1, c. 1–51 (Eng.) (silent as to confrontation rights); Magna Carta, 1297, 25 Edw. 1, c. 29 (Eng.) (guaranteeing a defendant "lawful judgment" but silent as to procedural detail).

285. *E.g.*, White, *supra* note 55, at 593–94 (describing Justice Brown's interpretation as "preposterous"). White notes that the purpose of the Bill of Rights was to assert rights *not* honored in England, the opposite of what Justice Brown claimed. *Id.* at 594.

286. *Compare, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 662 (1833) (suggesting that the Sixth Amendment codified English common law), *with* HELLER, *supra* note 63, at 14–15 (rebutting the same).

Justice Brown's approach, however, was fundamentally flawed. Confrontation should be satisfied because such was the scope intended by the Framers, not merely because a normative assessment of evidence law found the practice to be common. Nevertheless, Justice Brown's deconstitutionalizing, general-law approach clouded the Court's cases for over a century.[287]

b. Limiting the Purpose of Confrontation and Devaluing Live Cross-Examination

Second, without citation, *Mattox* limited the "purpose" of the Confrontation Clause to only one dimension of its design—preventing *ex parte* written testimony in criminal cases.[288] While this dimension may be *a* purpose behind confrontation, it is not its *only* purpose. Notably, *Mattox* ignored the instrumental and justice-based values served by requiring live testimony.[289] Justice Brown described these values as "an incidental benefit" that may be discarded for the sake of "public policy and the necessities of the case"[290]—the same values that Justice Marshall considered essential to justice and "incumbent on courts" to protect.[291] But Justice Brown's language would prevail and play a critical role in the development of judicial thought.[292]

By limiting confrontation's purpose, Justice Brown missed the focus of the case before him. After Mattox's first trial, the state's principal witness, who died before the later trial, reportedly recanted, claiming repeatedly that his previous testimony was given under duress.[293] Justice Brown's opinion held that because the witness was unavailable, a proper

287. Justice Brown's approach was the first step in the "indicia of reliability" and "firmly-rooted" hearsay exceptions doctrines. *See* Ohio v. Roberts, 448 U.S. 56, 64–66 (1980) (relying on *Mattox* as precedent for these doctrines), *overruled by* Crawford v. Washington, 541 U.S. 36 (2004).

288. *See Mattox*, 156 U.S. at 242. *Cf. Crawford*, 541 U.S. at 50 (finding the Confrontation Clause to be directed "particularly" at proscribing the evidentiary use of *ex parte* examinations).

289. *See supra* Part II (discussing the procedural, historical, and empirical values of live testimony). *Cf. Crawford*, 541 U.S. at 68 (holding that cross-examined hearsay can substitute for live testimony).

290. *Mattox*, 156 U.S. at 243. *Cf.* Maryland v. Craig, 497 U.S. 836, 860–61 (1990) (Scalia, J., dissenting) (stating that the Confrontation Clause was designed to withstand the tide of policy debates). In contrast, Justice Brown repeatedly implies that cross-examination is less dispensable, stating that the substance of confrontation is preserved if cross-examination occurred at some previous time. *See Mattox*, 156 U.S. at 242, 244. This view matches the Court's current thinking. *See Crawford*, 541 U.S. at 68 (holding the same).

291. United States v. Burr, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694) (Marshall, C.J.).

292. *See, e.g.*, Douglas v. Alabama, 380 U.S. 415, 418–19 (1965) (citing *Mattox* to support that the Confrontation Clause primarily prevents *ex parte* written testimony, thus concluding that prior cross-examination may excuse the live production of witnesses).

293. *See Mattox*, 156 U.S. at 244–45.

foundation could not be established to challenge his statements—death did not change *that* rule.[294] A transcript of the prior testimony was admitted, but Mattox was not allowed to impeach the statements.[295] Justice Brown held that prior cross-examination outside the jury's presence was sufficient to meet the "purpose" of the Clause—avoiding *ex parte* written testimony.[296] Confrontation was met even though Mattox was prevented from challenging the sincerity of his accuser. Justice Brown's narrow view restricted the values protected by the Clause so as to avoid the very protection intended by the Framers—allowing a defendant to confront the sincerity of witnesses before the fact finder. For Mattox, it was a legal fiction to claim that prior cross-examination outside of the jury's presence satisfied his need to confront his accuser.[297]

c. Applying a Benefit-Burden Analysis to Constitutional Procedural Rights

Third, the *Mattox* Court applied a benefit-burden approach to confrontation analysis, an approach the Court would not repudiate until *Crawford*.[298] Justice Brown stated that both reason and the Constitution's language supported a categorical right to live confrontation before the jury.[299] But he noted that "technical adherence" to the Constitution was unnecessary, stating, "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."[300]

The issue in *Mattox*—use of a deceased witness's prior cross-examined testimony—*may* reflect a paradigmatic example of an appropriate exception to the Confrontation Clause. The Court, however, failed to limit its decision to analyzing whether the Clause was intended to

294. *Id.* at 248–50. The dissent vigorously objected to this result. *Id.* at 257–61 (Shiras, J., dissenting) (finding that "wiser policy" would allow Mattox to impeach the testimony).

295. The Federal Rules of Evidence would allow a different result today. *See* FED. R. EVID. 806 (allowing for the impeachment of hearsay declarants); FED. R. EVID. 613(a) (abrogating the requirement that witnesses be confronted with inconsistent statements before being impeached).

296. *See Mattox*, 156 U.S. at 242.

297. The *Mattox* dissent noted, "the death of the witness deprived the accused of the opportunity of cross-examining him as to his conflicting statements, and the loss of this opportunity of cross-examination deprived the accused of the right to impeach the witness . . . the right to prove that the testimony . . . was untrustworthy." *Id.* at 260–61 (Shiras, J., dissenting).

298. *Compare id.* at 243 (majority opinion) (equating the Confrontation Clause with "general rules of law" that "must occasionally give way to considerations of public policy"), *with* Crawford v. Washington, 541 U.S. 36, 67–68 (2004) ("By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to [the Framers'] design.").

299. *Mattox*, 156 U.S. at 243.

300. *Id.* (emphasis added). *See also* White, *supra* note 55, at 559 (discussing the same).

abrogate this particular common-law exception. Justice Brown broadly declared that "the safety of the public" warranted balancing "incidental" confrontation benefits against public needs, analogizing the perceived reliability of dying declarations to the necessity in *Mattox*.[301] In doing so, Justice Brown sowed the seeds of the "indicia of reliability" doctrine by suggesting that public necessity and reliability should be weighed against "incidental" confrontation benefits. In the future, the Court would apply this rationale to create exceptions not based on well-established common-law rules, further limiting the scope of the Sixth Amendment.[302]

2. Wigmore's Opinion—Misinterpreting the Constitution and Misreading Common Law

While Justice Brown's deconstitutionalizing approach was problematic, his *Mattox* opinion repeatedly praised the value of cross-examination.[303] Four years later, the Court affirmed the value of cross-examination in *Kirby v. United States*.[304] Writing for the Court, Justice Harlan followed the *Mattox* approach by analyzing evidence law in deciding the case.[305] Five years later, Wigmore published his influential evidence treatise,[306] which asserted, without support,[307] that cross-

301. *Mattox*, 156 U.S. at 243–44. *Cf. supra* notes 210–12 and accompanying text (questioning whether the Confrontation Clause should be construed as conferring a right of cross-examination at all).

302. *See* Maryland v. Craig, 497 U.S. 836, 849–50, 853 (1990) (noting that public policy justifies abridging Sixth Amendment rights in certain cases and excusing confrontation where the well-being of a child witness is at risk); Ohio v. Roberts, 448 U.S. 56, 64–66 (1980) (noting the same public policy justification and exempting so-called trustworthy statements from confrontation requirements), *overruled by Crawford*, 541 U.S. 36.

303. *See Mattox*, 156 U.S. at 242–44.

304. Kirby v. United States, 174 U.S. 47 (1899). In *Kirby*, the Court reversed a conviction that was based only on the production of the record of a third party's conviction. Kirby was confronted at trial only with the record of a prosecution with which he was not involved. *Id*. at 53–55, 64.

305. *See id*. at 56–61 (Harlan, J.). Harlan retreated from *Mattox* in other respects, using *Kirby* to affirm the Constitution's supremacy. *See id*. at 56.

306. The treatise was published in a four-volume set in 1904 and revised into ten volumes in 1940. This Note primarily examines the 1940 revision, 5 WIGMORE, *supra* note 27, which is viewed as the definitive source for Wigmore's historical work. *See* John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1170 n.7 (1996). Wigmore's comprehensive and erudite recitation of English hearsay law, originally published as *The History of the Hearsay Rule*, 17 HARV. L. REV. 437 (1904), was substantially reprinted in 5 WIGMORE, *supra* note 27, § 1364, at 8–26.

307. Despite extensively supporting his historical analysis of hearsay, see *supra* note 306, Wigmore neither supported his assertion that cross-examination is the only right guaranteed by confrontation nor supported his assertion that live confrontation before the jury is disposable. *See* 5 WIGMORE, *supra* note 27, § 1365, at 27 (no citations), § 1396, at 127 (no citations), § 1397, at 128–30 (no citations).

examination was the *only* right guaranteed by confrontation.[308] Parroting *Mattox* verbatim, Wigmore categorized live testimony as an "incidental" benefit.[309] While promoting cross-examination in general as "the greatest legal engine ever invented for the discovery of truth,"[310] Wigmore asserted that the live production of witnesses was "secondary and dispensable,"

In his discussion on the purpose of confrontation, Wigmore offers only three citations that antedate the Sixth Amendment, each of which fails to support his proposition. The first citation does not stand for the proposition stated. *See id*. § 1395, at 123 (quoting MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 306 (1736) [hereinafter 1 HALE, PLEAS], and An Act for the Punishment of Diverse Treasons, 1552, 5 & 6 Edw. 6, c. 11, § 9 (Eng.) (misidentified by Wigmore as 5 & 6 Edw. 6, c. 12, § 12)). The 1552 statute miscited by Wigmore requires that accusers in treason cases "be brought in person before the party so accused" and state their accusations directly—no right of cross-examination is expressly granted. *See* 5 & 6 Edw. 6, c. 11, § 9. Hale notes that, as a consequence, treason defendants were able to cross-examine accusers, whereas the same witness production requirement did not apply in mere felony cases. *See* 1 HALE, PLEAS, *supra* note 307, at 306. Hale never states that the only or essential purpose of confrontation was to facilitate cross-examination. *See id*.

The second citation undermines Wigmore's view entirely. *See* 5 WIGMORE, *supra* note 27, § 1395, at 123 (citing Proceedings in Parliament Against Sir John Fenwick, 13 How. St. Tr. 537, 591, 638 & 712 (H.C. 1696) (noting the common-law *viva voce* requirement to produce live witnesses resulted in valuable demeanor evidence)). In contrast to Wigmore's proposition, it bears noting that Fenwick was tried by Parliament in its legislative capacity because the state was unable to meet its requirement to produce witnesses to testify live in the criminal court. *See* Proceedings in Parliament Against Sir John Fenwick, *supra*, at 578–83.

The third citation, a civil case heard at Chancery, refers only to confrontation generally. *See* 5 WIGMORE, *supra* note 27, § 1395, at 123 (citing Duke of Dorset v. Girdler, (1720) Eng. Rep. 238, 238 (Ch.)).

See also Larkin, *supra* note 37, at 69–70 & n.9 (stating that Wigmore's opinion conflicted with the Framers' view of confrontation and that his opinion may merely have been "convenient at the time"). *Cf*. *infra* note 308 (listing Wigmore's claims that cross-examination is the sole value protected by confrontation); *infra* notes 311–12 and accompanying text (listing Wigmore's assertions that live confrontation is dispensable).

Similarly, Langbein has sharply criticized Wigmore's historical analysis of the right against self-incrimination, claiming that Wigmore inaccurately placed solidification of the right in the wrong century. *See* Langbein, *Self-incrimination*, *supra* note 128, at 1074–81, 1083–84 (alleging "weak support for Wigmore's proposition" and refuting Wigmore's use of source material as anachronistic). Langbein has also refuted Wigmore's proposition that the modern law of evidence, including the hearsay rule, can be traced back to the seventeenth century. *See generally* Langbein, *supra* note 306 (proposing that the modern law of evidence began to develop only in the mid-to-late eighteenth century). *See also* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 301–02 (1978) (proposing that Wigmore places the solidification of the hearsay rule too early by a century).

308. 5 WIGMORE, *supra* note 27, § 1365, at 27 (claiming that confrontation is "*merely another term*" for cross-examination, which is the only right confrontation guarantees), § 1395, at 123 (claiming that the only "essential purpose of confrontation is *to secure . . . cross-examination*"), § 1396, at 127 ("The satisfaction of the right of Cross-examination . . . disposes of any objection based on the so-called right of Confrontation."), § 1397, at 128–30 ("There never was at common law any recognized right to an indispensable thing called Confrontation *as distinguished from Cross-examination*.").

309. *Id*. § 1365, at 27 (claiming, but without citation, that the value of live confrontation before the jury was "incidental," "subordinate," and "minor").

310. *Id*. § 1367, at 29.

again without citing support for his conclusion.[311] As Wigmore opined, "The satisfaction of the right of Cross-examination . . . disposes of any objection based on the so-called right of Confrontation."[312] Confusingly, Wigmore asserted that cross-examination was the *only* confrontation consideration known at common law, while citing his own history of hearsay which listed numerous cases illustrating face to face and *viva voce* production requirements.[313] Wigmore's proposition is negated by his own discussion of Raleigh's trial and the personal production debate that it created—Raleigh was, after all, demanding that his accuser testify live, not demanding to cross-examine him.[314]

As a whole, Wigmore's treatise was considered authoritative and cited frequently by courts. Despite being unsubstantiated and contrary to historical record, Wigmore's opinion of confrontation greatly influenced Sixth Amendment jurisprudence, seeping into the collective judicial consciousness.[315] Over the last century, it has been cited repeatedly by the Court, playing a role in almost every major Confrontation Clause case.[316] Some courts have copied Wigmore's language verbatim into their case law. The South Dakota Supreme Court once lifted verbatim over a thousand words (three complete sections) from Wigmore without noting that it was

311. *Id*. § 1395, at 123. Regarding Wigmore's failure to support this conclusion, see *supra* note 307.

312. 5 WIGMORE, *supra* note 27, § 1396, at 127. *But see, e.g.*, Coy v. Iowa, 487 U.S. 1012, 1018 n.2 (1988) (refuting Wigmore's assertion as logically flawed); Motes v. United States, 178 U.S. 458, 474 (1900) (holding that prior cross-examination is not sufficient to satisfy confrontation where the witness was absent from trial "due to the negligence of the prosecution").

313. 5 WIGMORE, *supra* note 27, § 1397, at 128–30 (internally citing § 1364). *Cf. Id.* § 1364, at 18–25 (listing numerous cases undermining the proposition that live testimony was dispensable); *supra* notes 173–78 and accompanying text (examining the same). Nevertheless, some jurists have accepted Wigmore's proposition without question. *See, e.g.*, *Coy*, 487 U.S. at 1029 (Blackmun, J., dissenting).

314. *See* 5 WIGMORE, *supra* note 27, § 1364, at 18–20; *supra* notes 158–67 and accompanying text.

315. *Compare* Phillips v. Wyrick, 558 F.2d 489, 495 (8th Cir. 1977) (stating, without citation, Wigmore's view of live confrontation as an "incidental advantage"), *with* 5 WIGMORE, *supra* note 27, § 1365, at 27.

316. *See* White v. Illinois, 502 U.S. 346, 361 (1992); Maryland v. Craig, 497 U.S. 836, 847 (1990); *Coy*, 487 U.S. at 1019, 1029; Kentucky v. Stincer, 482 U.S. 730, 737 n.8 (1987); Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986); Delaware v. Fensterer, 474 U.S. 15, 19–20 (1985); Ohio v. Roberts, 448 U.S. 56, 66 n.9 (1980), *overruled by* Crawford v. Washington, 541 U.S. 36 (2004); Davis v. Alaska, 415 U.S. 308, 315–16 (1974); Dutton v. Evans, 400 U.S. 74, 94 (1970); California v. Green, 399 U.S. 149, 154, 178, 179, 192 (1970); Bruton v. United States, 391 U.S. 123, 128 n.3 (1968); Barber v. Page, 390 U.S. 719, 723 (1968); Pointer v. Texas, 380 U.S. 400, 404 (1965); Douglas v. Alabama, 380 U.S. 415, 419 (1965); Snyder v. Massachusetts, 291 U.S. 97, 107 (1934), *abrogated on other grounds by* Malloy v. Hogan, 378 U.S. 1, 2 (1964); Dowdell v. United States, 221 U.S. 325, 330 (1911).

quoting directly, making Wigmore the father of confrontation jurisprudence in the Rushmore state.[317]

Nevertheless, neither popular ideals nor case law supported Wigmore's opinion that live testimony was dispensable.[318] Wigmore reconciled this lack of support by compiling principles to address the unavailability of witnesses.[319] Wigmore dispensed with the related constitutional concerns in three short paragraphs, again without citation: cross-examination satisfies confrontation; live testimony is preferred if the witness is available, which is an issue for the law of evidence.[320]

When Wigmore defined availability, he acknowledged the three common-law exceptions: death, infirmity, and inequitable conduct.[321] But, according to Wigmore, the law of evidence permitted substantial extensions to the common-law rules without offending confrontation: First, confrontation did not exclude any evidence admissible by way of a hearsay exception.[322] Second, future revisions or extensions to evidence exceptions would, categorically, not offend a confrontation right.[323] Third, witnesses absent from a court's jurisdiction were considered unavailable, and it should not be incumbent on a party to persuade them to attend

317. *See* State v. Heffernan, 123 N.W. 87, 90–92 (S.D. 1909) (copying portions of 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1395–97 (1904)). Interestingly, for support, Wigmore's 1940 revision cites *Heffernan* plagiarizing its own text. 5 WIGMORE, *supra* note 27, § 1397, at 132. After Wigmore's death, the citation was removed. *See* 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 160 (James H. Chadbourn ed., 1974) [hereinafter 5 WIGMORE (1974)].

318. *See, e.g.*, Motes v. United States, 178 U.S. 458, 474 (1900) (holding that prior cross-examination alone is not sufficient to satisfy the Confrontation Clause where the witness's "absence was due to the negligence of the prosecution").

319. *See* 5 WIGMORE, *supra* note 27, §§ 1401–18.

320. *Id*. § 1396, at 127, § 1397, at 131. A century later, the Supreme Court repudiated Wigmore's assertion that extrajudicial statements are regulated by evidence law instead of by the Constitution. *See Crawford*, 541 U.S. at 50–51.

321. 5 WIGMORE, *supra* note 27, § 1403 (death), § 1405 (inequitable conduct), § 1406 (infirmity), § 1408 (insanity). The cases cited by Wigmore regarding the illness exception illustrate that, at common law, the exception was narrowly construed—common sickness and age were insufficient grounds for exception. *See id.* § 1406, at 159 n.5.

322. *Id*. § 1398, at 141. Likewise, Wigmore asserted that depositions should be accepted equally in criminal and civil cases. *Id*. § 1401, at 147. The Supreme Court renounced Wigmore's approach in *Crawford*, 541 U.S. at 50–51.

323. 5 WIGMORE, *supra* note 27, § 1397, at 135 (opining that "the permissibility of such changes should not be left in the slightest doubt"). Subsequent Supreme Court decisions caused the treatise editors to retract these statements in later editions. *See* 5 WIGMORE (1974), *supra* note 317, § 1397, at 162 (casting doubt on Wigmore's opinion).

voluntarily.[324] Fourth, and most crucial, if a witness cannot be secured after a bona fide search, the witness is considered unavailable.[325]

On this critical last point, declaring lost witnesses unavailable, Wigmore lists only one case citation antedating the Bill of Rights—a politically charged religious persecution trial later overturned by the House of Lords.[326] The only federal case Wigmore cited does not support his proposition.[327] His other citations were from jurisdictions where the Sixth Amendment did not apply.[328] In contrast, Wigmore's historical discussion of hearsay refutes his availability assertion by demonstrating that missing witnesses were not excused from live testimony requirements.[329]

Through his treatise, Wigmore effectively recreated confrontation, misstated the common law, and manufactured exceptions to live confrontation that had no antecedent basis. His treatise was, however, widely influential and became the foundation for the modern availability

324. 5 WIGMORE, *supra* note 27, § 1404, at 149. The Court later repudiated Wigmore on this point as well. *See* Barber v. Page, 390 U.S. 719, 723 (1968). Again, the treatise editors subsequently retracted these statements. *See* 5 WIGMORE (1974), *supra* note 317, § 1404, at 205 (labeling the original text as Wigmore's "classic view").

325. *See* 5 WIGMORE, *supra* note 27, § 1405, at 155. The Court has never repudiated Wigmore on this point.

326. *See id.* § 1405, at 155 n.1 (citing Trial of Titus Oates, 10 How. St. Tr. 1079, 1227, 1285 (K.B. 1685)). *But see id.* § 1364, at 21 n.47 (citing the same case for the opposite proposition—to require excluding the evidence); Harmelin v. Michigan, 501 U.S. 957, 969–73 (1991) (discussing the reversal of Oates's conviction due to the illegality of the sentence, considered a paradigmatic example of a cruel and unusual punishment).

327. 5 WIGMORE, *supra* note 27, § 1405, at 155 n.1 (citing Motes v. United States, 178 U.S. 458 (1900)). In citing *Motes*, however, Wigmore makes an error of logical negation. *Motes* held that no exceptions to live production existed when a witness's absence was caused by a prosecutor's negligence. The Court did *not* hold the obverse—that a production exception existed when a witness is absent despite a bona fide effort to secure attendance. *See Motes*, 178 U.S. at 474; *infra* notes 331–35 and accompanying text.

328. 5 WIGMORE, *supra* note 27, § 1405, at 155 n.1 (citing multiple state cases).

329. *See id*. § 1364, at 21 n.47 (citing, for example, Trial of the Lord Morley, 6 How. St. Tr. 769, 770 (H.L. 1666) (stating the common-law rule that extrajudicial statements were not admissible merely because a witness could not be found but were only allowed if a witness's absence was because of death, illness, or the defendant's wrongdoing)). *See also* Reynolds v. United States, 98 U.S. 145, 158–59 (1878) (discussing Lord Morley's Case and agreeing that at common law, the defendant's wrongdoing must cause a witness to be absent before live production was excused); West v. Louisiana, 194 U.S. 258, 262 (1904) (noting that common-law exceptions did not likely include "non-residence, permanent absence [or] inability to procure" the witness), *abrogated on other grounds by* Pointer v. Texas, 380 U.S. 400, 406 (1965).

doctrine. His opinion of availability and confrontation would influence the Court for the next century.[330]

3. A Recipe for Sausage—The Doctrine of Unavailability

In 1900 Justice Harlan again wrote for the Court in *Motes v. United States*.[331] This time, Harlan retreated from the broad *Mattox* approach. Harlan noted that the witness in *Motes* was fully cross-examined at the preliminary hearing; nevertheless, the witness's absence from trial was "manifestly due to the negligence" of the prosecution.[332] The Court noted that at common law prior testimony was only admissible in three scenarios—where the witness was (1) deceased, (2) unable to testify due to insanity or infirmity, or (3) kept away by the opposing party.[333] The Court, however, admonished that confrontation was not defined by the law of evidence. Instead, Harlan restated the supremacy of the Constitution, refusing to "lay down a rule which would deprive a prisoner of the advantage of having a witness . . . against him examined and cross-examined *before the jury*."[334] The Court held that prior cross-examined testimony does *not* satisfy confrontation if the witness's absence is the state's fault.[335]

Nevertheless, for over sixty years, the Confrontation Clause lay dormant and defendants were routinely convicted using the written testimony of absent witnesses.[336] In 1965, however, the Court again addressed confrontation during the Warren Court reforms. In *Pointer v. Texas*, the Court held that confrontation was a fundamental right "made

330. For example, Justice Cardozo adopted Wigmore's opinion that exceptions to the Sixth Amendment could "be enlarged from time to time" as the law of evidence changed. *See* Snyder v. Massachusetts, 291 U.S. 97, 107–08 (1934) (Cardozo, J.) (dicta), *abrogated on other grounds by* Malloy v. Hogan, 378 U.S. 1, 2 (1964). *Cf.* 5 WIGMORE, *supra* note 27, § 1397, at 135 (stating the same opinion). *But see supra* note 323 and accompanying text (noting later judicial repudiation of the opinion).

331. *See Motes*, 178 U.S. 458 (Harlan, J.). In *Motes*, multiple defendants were tried for conspiracy and murder. *Id*. at 467–69. At the preliminary hearing, one defendant became a prosecution witness, implicating the others. *Id*. at 467–68. At trial, this key witness, who had been jailed with his codefendants, was released to stay at a local hotel. *Id.* at 468. He promptly disappeared. *Id.*

332. *Id*. at 470–71.

333. *Id*. at 472–73. *See also West*, 194 U.S. at 262 (stating the same).

334. *Motes*, 178 U.S. at 473–74 (emphasis added) (citing R. v. Scaife, (1851) 117 Eng. Rep. 1271, 1273 (Q.B.) (unanimously ruling that an absent witness's statements could be admitted only if the defendant caused the absence, or if the witness was dead or too ill to travel; mere inability to procure attendance did not justify admitting a statement)).

335. *Id*. at 474.

336. Reed, *supra* note 20, at 193. *See, e.g.*, *West*, 194 U.S. at 262, 267 (holding that the Sixth Amendment did not apply to states and upholding a conviction based on absent witnesses' testimony).

obligatory on the States by the Fourteenth Amendment."[337] But, in dicta, the Court voiced support for Wigmore's proposal, implying that if a witness was previously cross-examined, absence from trial might be excused.[338] On the same day, the Court reiterated that dicta in *Douglas v. Alabama*, relying on *Mattox* and Wigmore to suggest that prior cross-examination "may satisfy the clause even in the absence of physical confrontation."[339]

In 1968, writing for the Warren Court in *Barber v. Page*, Justice Marshall pushed back at the pendulum.[340] Rejecting Wigmore's view, Marshall held that absence from a jurisdiction was not sufficient to find a witness unavailable—a good-faith effort to obtain attendance was required.[341] Marshall wrote, "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine *and* the occasion for the jury to weigh the demeanor of the witness."[342] It was irrelevant whether or not cross-examination had previously occurred—live testimony had an independent constitutional value.[343] Marshall noted that cross-examination at a preliminary trial was, by its nature, inferior to confrontation at trial.[344] Crucially, however, Marshall left the door open for the Court to follow Wigmore's larger point in the future—that the

337. Pointer v. Texas, 380 U.S. 400, 403 (1965). Pointer was convicted based on the preliminary hearing testimony of the alleged victim who had since left the state. *See id*. at 401–02. Pointer was not represented by counsel at the hearing and did not cross-examine the witness. *Id*.

338. *See id.* at 407. The Court directly cites Wigmore earlier in the opinion. *Id*. at 404. *Cf., e.g.*, 2 HAWKINS, *supra* note 128, ch. 46, §§ 6–7, at 429–30 (noting that no such exception existed at common law).

339. Douglas v. Alabama, 380 U.S. 415, 418–19 (1965). *But see* 2 HAWKINS, *supra* note 128, ch. 46, §§ 6–7, at 429–30 (noting that no such exception to physical confrontation was known at common law).

340. *See* Barber v. Page, 390 U.S. 719 (1968) (Marshall, J.). Barber's conviction relied on the preliminary testimony of a codefendant, imprisoned in a neighboring state during the trial. *Id*. at 720. The prosecution "made absolutely no effort to obtain" the witness's attendance at trial. *Id*. at 723.

341. *Id*. at 724–25. For witnesses in federal custody, a writ of habeas corpus *ad testificandum* can be used to secure attendance. *See* 28 U.S.C. § 2241(c)(5) (2000) (authorizing federal courts to issue such writs). If a witness is not incarcerated, many states have enacted versions of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, which facilitates interstate cooperation in securing witness attendance. *Barber*, 390 U.S. at 723 & n.4. *See, e.g.*, CAL. PENAL CODE §§ 1334–1334.6 (West 2004) (codifying the Uniform Act in California).

342. *Barber*, 390 U.S. at 725 (emphasis added). The Court reaffirmed Marshall's view of confrontation as a procedural right in *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

343. *See Barber*, 390 U.S. at 725.

344. *Id*. at 725–26 & n.6 (citing Virgin Islands v. Aquino, 378 F.2d 540 (3d Cir. 1967)). In *Aquino*, Judge Freedman extensively discusses the value of live confrontation before the jury and excoriates as a legal fiction the idea that an effective cross-examination is possible at a preliminary hearing. *See Aquino*, 378 F.2d at 549–50.

common-law availability exceptions might be expanded to excuse witnesses who were unable to be found.[345]

Two years later, after President Nixon's appointment of Warren Burger as Chief Justice,[346] the divided Burger Court issued *California v. Green*,[347] a schizophrenic opinion that both supported and rejected *Barber*. On the one hand, Justice White's opinion for the Court reaffirmed the separation and supremacy of constitutional rights from general law.[348] The Court agreed with *Barber* that the Constitution secured both the right of cross-examination and the right to have the jury observe that confrontation.[349] On the other hand, White's opinion inexplicably continued in dicta to contradict *Barber*, extolling at length the adequacy of preliminary cross-examination.[350] White claimed that preliminary cross-examination "provides substantial compliance with the purposes behind the confrontation requirement."[351] White continued, "As long as the State has made a good-faith effort to produce the witness, the actual presence or absence of the witness cannot be constitutionally relevant."[352] Wigmore's

345. *See Barber*, 390 U.S. at 722, 725–26.

346. Chief Justice Burger's term began on June 23, 1969. Members of the Supreme Court of the United States, http://www.supremecourtus.gov/about/members.pdf (last visited Apr. 7, 2006). President Nixon's impact on the Court's confrontation jurisprudence was immediate. As *The New Yorker* opined at the time,

> President Nixon has reversed the course that the Warren Court had taken for some fifteen years . . . . [W]here the Warren Court's most controversial rulings merely stated that defendants in criminal actions had long been denied their ordinary Constitutional rights, the Burger Court has gone back to the old system of tacitly approving that denial.

The Talk of the Town, NEW YORKER, Jan. 2, 1971, at 15–16 (discussing Dutton v. Evans, 400 U.S. 74 (1970)).

347. California v. Green, 399 U.S. 149 (1970) (White, J.). In *Green*, the Court held that the Confrontation Clause does not apply if a witness is present in court, subject to cross-examination, even if the witness feigns forgetfulness. *See id.* at 158, 161–62, 164 (noting that the jury may still evaluate the witness's demeanor). Chief Justice Burger joined Justice White's opinion but authored a separate short concurrence emphasizing deference to state legislatures in areas implicating evidence law. *See id.* at 171–72 (Burger, C.J., concurring). For the view that *Green* was wrongly decided, see White, *supra* note 55, at 567–69 (criticizing the value of deferred cross-examination at trial).

348. *Green*, 399 U.S. at 155–57.

349. *See id.* at 158. The Court extensively discussed the value of live confrontation. *Id.* at 160–61.

350. *See id.* at 165–66 (formulating the often-quoted phrase, "given under circumstances closely approximating those that surround the typical trial").

351. *Id.* at 166.

352. *Id.* at 167 n.16 (considering the prior testimony from a reliability point of view). Justice Harlan, grandson of the Justice who authored *Motes*, concurred but noted that the Court historically conflated cross-examination with confrontation. *Id.* at 172 (Harlan, J., concurring). Harlan proposed that the Court should reevaluate confrontation, suggesting that the Clause's purpose was to require prosecutors to produce witnesses to testify live. *Id.* at 173–87. In a rare about-face, Harlan retracted his opinion later that year, supporting Wigmore's view that Confrontation requires cross-examination if witnesses testify live but does not require witnesses to be produced live. *See* Dutton v. Evans, 400 U.S. 74, 94–95 (1970) (Harlan, J., concurring).

view, unknown at common law, was given life. Live testimony could be excused with a prior examination and a good-faith subpoena effort.

Justice Brennan vigorously dissented, noting the Court's contradiction of *Barber* and contesting the fairness of relying on preliminary confrontation.[353] But the damage was done—the exception, which did not previously exist, did now. Over the next two years, President Nixon made three more appointments to the Court.[354] With the support of each of the four Nixon appointees, the Court confirmed the new exception in *Mancusi v. Stubbs*.[355] The Court found no confrontation violation where the victim, a foreigner, was declared unavailable because he was outside the court's power to compel attendance.[356] Justice Marshall authored a blistering dissent, defending his decision in *Barber*.[357] Marshall chided that the prosecution did not even contact the victim to notify him that a trial was scheduled, much less invite his voluntary attendance.[358] *Barber* required a "good-faith effort," which this was not.[359] The Court defended its decision by holding that prior testimony had "an assurance of reliability."[360] Based on *Dutton v. Evans*, decided two years earlier, the Court held that admissibility hinged on whether a statement bears "indicia of reliability," not whether confrontation is satisfied.[361]

The *Dutton* plurality had endorsed Wigmore's construction of confrontation—cross-examination is required for in-court testimony, but

353. *Green*, 399 U.S. at 195–202 (Brennan, J., dissenting). This part of Brennan's dissent spans seven pages of *United States Reports* and should be read by anyone who indulges the notion that preliminary trial examination equals live confrontation before a jury. For a similar view, see the California Supreme Court's analysis of *Barber* in *People v. Green*, 451 P.2d 422, 426, 428 (Cal. 1969), *vacated*, *Green*, 399 U.S. at 170. *See also supra* notes 23–24 and accompanying text (criticizing the utility of preliminary cross-examination).

354. Justice Blackmun began serving on the court on June 9, 1970. Both Justice Powell and Justice Rehnquist were sworn onto the Court on January 7, 1972. Members of the Supreme Court of the United States, *supra* note 346.

355. *See* Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) (Rehnquist, J., delivered the opinion of the Court, in which Burger, C.J., and Brennan, Stewart, White, Blackmun, and Powell, JJ., joined).

356. *Id.* at 212, 216. The Court reasoned that the witness was in another country, thus beyond the reach of United States courts. *See id*. at 212–13. In 2001, a California Court of Appeal ruled that subsequent international treaties of comity in criminal matters suggest that a foreign witness should not be considered per se unavailable under *Mancusi*. Instead, a good-faith effort requires turning to such treaties. People v. Sandoval, 105 Cal. Rptr. 2d 504, 513–15 (Ct. App. 2001).

357. *Mancusi*, 408 U.S. at 220–23 (Marshall, J., dissenting).

358. *Id*. at 223.

359. *Id*. at 220, 223.

360. *Id*. at 213 (majority opinion).

361. *See id*. (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion)).

the admission of extrajudicial statements is left to the law of evidence.[362] The plurality stated, "[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring" the reliability of evidence.[363] Again, Justice Marshall dissented, rejecting the plurality's "indicia of reliability" test as "beyond the principled reach of our prior decisions."[364]

But again the damage was done. With the *Mancusi* endorsement of the *Dutton* "indicia of reliability" test, the Court not only expanded the unavailability doctrine beyond the common law by admitting the written testimony of witnesses who were "unable" to be found but also ceded the responsibility of policing that doctrine to the law of evidence. To do otherwise, Justice Harlan noted, "would significantly curtail development of the law of evidence to eliminate the necessity for production of declarants where production would be unduly inconvenient."[365] In sum, between 1968 and 1972, the Court exalted the constitutional value of producing witnesses in *Barber*, found the value to be dispensable in *Green*, decided that the real issue was reliability in *Dutton*, and determined that prior testimony was plenty reliable in *Mancusi*. According to the Court's logic, although *Mancusi* had expanded the unavailability doctrine beyond its common-law limits, no constitutional harm resulted because prior testimony "bore sufficient 'indicia of reliability.'"[366]

In *Ohio v. Roberts*, the Court tried to reconcile its confrontation analysis for prior testimony by cementing it to the law of evidence.[367] The Court voiced support for live confrontation, noting that its absence "calls into question the ultimate 'integrity of the fact-finding process.'"[368] But, in its next sentence, the Court stated that "competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial."[369] The

362. *See Dutton*, 400 U.S. at 89 (plurality opinion); *id*. at 94 (Harlan, J., concurring); 5 WIGMORE, *supra* note 27, § 1397, at 131. *But see* Crawford v. Washington, 541 U.S. 36, 50–51 (2004) (repudiating Wigmore and *Dutton* on this assertion); White v. Illinois, 502 U.S. 346, 360 (1992) (Thomas, J., concurring) (questioning Harlan and Wigmore's view).

363. *Dutton*, 400 U.S. at 89 (plurality opinion). *Accord White*, 502 U.S. at 356–57. *But see* discussion *supra* Part II.A (arguing that the rationale for the Clause is to ensure procedural fairness, not accurate outcomes).

364. *Dutton*, 400 U.S. at 109 (Marshall, J., dissenting).

365. *Id*. at 95–96 (Harlan, J., concurring).

366. *See Mancusi*, 408 U.S. at 216 (quoting *Dutton*, 400 U.S. at 89).

367. *See* Ohio v. Roberts, 448 U.S. 56, 64–66 (1980), *overruled by Crawford*, 541 U.S. 36.

368. *Id.* at 64 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (quoting Berger v. California, 393 U.S. 314, 315 (1969))).

369. *Id.* at 64 (internal citations omitted) (quoting *Chambers*, 410 U.S. at 295).

Court, restating Wigmore's theory of admissibility,[370] delineated a two-part rule: First, the Confrontation Clause reflects a "preference for face-to-face accusation" that may be dispensed with, if necessary, when the declarant is unavailable.[371] Furthermore, even unavailability is not required if the utility of confrontation is remote.[372] Second, prior testimony must have sufficient "indicia of reliability."[373] Reliability is "inferred" if the statement "falls within a firmly rooted hearsay exception."[374] Then the assertion is so trustworthy that "cross-examination would be superfluous."[375] Relying on dicta in *Green*, the *Roberts* Court held that preliminary testimony is, by its very nature, reliable.[376]

As a result, *Roberts* held that "'substantial compliance'" with confrontation was met when counsel asked a witness a series of leading questions at a preliminary hearing.[377] The testimony was deemed reliable despite the teenage witness's motivation to lie to avoid prosecution and parental punishment and despite the witness's disappearance to avoid

370. *See* Reed, *supra* note 20, at 201 (comparing *Roberts* to Wigmore).

371. *Roberts*, 448 U.S. at 65. *See also* Maryland v. Craig, 497 U.S. 836, 849 (1990) (supporting the same); 5 WIGMORE, *supra* note 27, § 1396, at 127 (suggesting the same).

372. *Roberts*, 448 U.S. at 65 n.7 (citing Dutton v. Evans, 400 U.S. 74 (1970)). In an additional curb to encouraging live testimony, the Court subsequently expanded this statement. The Court held that unavailability was required only before admitting statements made at prior judicial proceedings; other extrajudicial statements could be admitted without regard to any attempt to procure the declarant's live testimony. *See* White v. Illinois, 502 U.S. 346, 354–56 (1992); United States v. Inadi, 475 U.S. 387, 392–94 (1986). Ironically, this holding produced a rule whereby the state had to show that a witness was unavailable to admit prior, cross-examined testimony but did not have to establish unavailability to introduce prior, unconfronted testimony. *See* White, *supra* note 55, at 580–81. The Court reasoned that when "reliable" hearsay is involved, requiring the state to produce the declarant would be too burdensome and would not improve the accuracy of the jury's findings. *White*, 502 U.S. at 355–56. *Crawford* returned unavailability as a requirement for admitting any testimonial hearsay. *Crawford*, 541 U.S. at 68.

373. *Roberts*, 448 U.S. at 65–66.

374. *Id.* at 66. *Accord* Bourjaily v. United States, 483 U.S. 171, 182–83 (1987). If the statement does not fall within a "firmly rooted hearsay exception," then it is presumptively unreliable and "particularized guarantees of trustworthiness" must be shown. *Roberts*, 448 U.S. at 66. *Accord* Idaho v. Wright, 497 U.S. 805, 818 (1990). This formalistic distinction leads to perplexing results. *Compare Wright*, 497 U.S. at 817–18 (holding that a young child's statement about her sexual abuse to a physician was "presumptively unreliable and inadmissible" because it was not admitted under a "firmly rooted hearsay exception"), *with White*, 502 U.S. at 355–56 & n.8 (holding that a young child's statement about her sexual abuse was reliable because it was admitted under a firmly rooted hearsay exception, namely the exception for spontaneous declarations and medical care).

375. *Wright*, 497 U.S. at 820–21 (claiming that "statements admitted under a 'firmly rooted' hearsay exception are so trustworthy that adversarial testing would add little to their reliability"). *Accord White*, 502 U.S. at 357.

376. *Roberts*, 448 U.S. at 72–73 (citing California v. Green, 399 U.S. 149, 165 (1970)).

377. *Id.* at 70–71 & n.11 (quoting *Green*, 399 U.S. at 166).

testifying.[378] The Court ignored that virtually no attempt whatsoever was exerted to secure the witness.[379] Roberts made the same plea that Raleigh made—produce the witness before the trier. Like Lord Popham before, the Court denied Roberts's request. The Framers' constitutional design was now broken. The Court's new rule was the extraconstitutional tautology: confrontation is unnecessary when it is unnecessary.[380]

B. MAKING SAUSAGE: THE UNAVAILABILITY DOCTRINE IN PRACTICE

At common law, only death or illness *in extremis* excused live confrontation.[381] Now, the Court recognized a new exception to confrontation unknown to the Framers—witnesses could be declared unavailable if the state was unsuccessful in securing their attendance. Prior testimony would be admissible if the state made a good-faith effort to secure the witness.[382]

The Court did little to define a "good-faith effort."[383] In total, the Court stated that "the possibility of a refusal is not the equivalent of asking,"[384] and that "expense or inconvenience is no excuse," but it is "a question of reasonableness."[385] As a practical matter, whether live testimony will be abridged at trial is determined by the forum jurisdiction's

378. *Id*. at 72.

379. *See id.* at 79–81 (Brennan, J., dissenting) (labeling the effort to find the witness as "derelict" and chronicling efforts that could have been made to find the witness).

380. Justice Thomas noted the obvious point that such a construction likely violates the Framers' design. *See White*, 502 U.S. at 363 (Thomas, J., concurring). Thomas noted that the Court's *Roberts* formulation limits the Confrontation Clause from addressing "the historical evil to which it was directed," namely prosecutorial abuse of "formalized testimonial materials" like prior testimony. *Id*. at 365.

381. *See, e.g.*, Motes v. United States, 178 U.S. 458, 473–74 (1900). *See also* 2 HAWKINS, *supra* note 128, ch. 46, §§ 6–7, at 429–30 (noting that the inability to procure attendance was not a common-law exception to the live testimony requirement). A defendant could also forfeit the right of confrontation by conniving to detain the witness. *See Motes*, 178 U.S. at 473–74.

382. *See Roberts*, 448 U.S. at 65–66, 73 (finding that if a witness is unavailable, prior cross-examined testimony is reliable and thus admissible); Mancusi v. Stubbs, 408 U.S. 204, 212 (1972) (finding a healthy witness to be unavailable if the state could not compel attendance); Barber v. Page, 390 U.S. 719, 724–25 (1968) (requiring a "good-faith effort" to secure attendance). Arguably, if the statement was not made at a prior judicial proceeding, *no* effort was required to secure attendance. *See supra* note 372 and accompanying text.

383. The issue of whether a defendant has had an opportunity for cross-examination is not addressed by this Note. This Note focuses on defining "good-faith" efforts to secure a witness, assuming that prior testimony satisfied an opportunity to cross-examine in accordance with *Crawford*, 541 U.S. 36, 68 (2004).

384. *Barber*, 390 U.S. at 724.

385. California v. Green, 399 U.S. 149, 189 n.22 (1970). *Accord Roberts*, 448 U.S. at 74.

law of evidence addressing unavailability.[386] Federal and state courts tend to agree that their evidence codes require "genuine and bona fide" efforts or "due diligence."[387] But, ultimately, that determination is left to the discretion of the trial court and subject only to deferential review.[388]

As a result, trial judges decide, in their discretion, the constitutional question of whether confrontation may be abandoned, without independent appellate review protecting a defendant's constitutional rights or unifying the case law. A confusing, conflicting, and remarkably absurd hodge-podge of precedent emerges with each trial judge becoming a constitutional convention unto themselves.[389] The *Barber* Court's "good-faith" requirement is often unrecognizable.

Remarkably, state supreme courts have found the prosecutorial due diligence standard satisfied when the effort to secure a witness began the morning of the trial.[390] Murder convictions have been upheld when the prosecution's effort to secure a key witness began only a few days before trial.[391] When prosecutors have suggested that a witness might have been

386. In federal courts, a declarant is considered unavailable if the state cannot secure the declarant's attendance "by process or other *reasonable* means." FED. R. EVID. 804(a)(5) (emphasis added). State courts may apply slightly different language. *See, e.g.*, CAL. EVID. CODE § 240(a)(5) (West 1995) (requiring "reasonable diligence"). The declarant's prior testimony is then admissible. *See, e.g.*, FED. R. EVID. 804(b)(1); CAL. EVID. CODE § 1291(a)(2) (West 1995).

387. *See, e.g.*, United States v. Mann, 590 F.2d 361, 367 (1st Cir. 1978) (requiring bona fide efforts); People v. Cromer, 15 P.3d 243, 248 (Cal. 2001) (citing authority construing "reasonable diligence" as requiring "due diligence").

388. Federal courts and most state courts review evidence rulings deferentially even as applied to unavailability with its constitutional implications. *See, e.g.*, United States v. Samaniego, 345 F.3d 1280, 1284 (11th Cir. 2003); United States v. McGuire, 307 F.3d 1192, 1205 (9th Cir. 2002); McCarty v. State, 904 P.2d 110, 128 (Okla. Crim. App. 1995). Recently, California abandoned deferential review, deciding that the constitutional implications require de novo review. *See Cromer*, 15 P.3d at 244, 250 & n.3.

389. *See* Milton Roberts, Annotation, *Sufficiency of Efforts to Procure Missing Witness' Attendance to Justify Admission of His Former Testimony—State Cases*, 3 A.L.R. 4th 87 (1981) (collecting a myriad of conflicting and sometimes absurd state unavailability rulings).

390. *See* State v. Ford, 502 P.2d 786, 789 (Kan. 1972).

391. *See McCarty*, 904 P.2d at 128 (commencing efforts five days before a murder trial); Commonwealth v. Wayne, 720 A.2d 456, 467 (Pa. 1998) (commencing efforts to secure the witness four days before a capital murder trial); State v. Nelson, 259 So. 2d 46, 50 (La. 1972) (upholding as sufficient a search of the witness's last known address over the weekend before a murder trial). For one judge in an aggravated assault and battery case, efforts begun six days before trial were sufficient because the prosecutor had been under the impression that the defendant would plead guilty. The Supreme Court of Wyoming upheld the lower court in that case. King v. State, 780 P.2d 943, 954–55 (Wyo. 1989).

trying to evade a subpoena, some courts have been particularly gracious in accepting desultory, last-minute searches.[392]

Some courts have endorsed haphazard efforts that defy explanation.[393] When witnesses have moved, follow-up efforts have not been required.[394] Appellate courts have endorsed docket congestion as a factor in whether a continuance should be granted to allow for a witness to be produced.[395] The Ohio Supreme Court held that the state met its "obligation to contact witnesses" in a murder trial when the prosecution's key witness, the coroner, was unavailable because he was on vacation in the Bahamas.[396] Prosecutors have used unavailability to admit written testimony when they lost track of jailhouse informants who witnessed "confessions."[397]

Courts have held that diligent efforts do not require "20–20 hindsight," so the accuser's absence at a pretrial hearing does not put the state on notice that he may not appear at trial.[398] One court held that the opportunity to cross-examine at a bond hearing was constitutionally sufficient.[399] Had the Framers foreseen this, they might have been happier under the Crown.

392. *See, e.g.*, *Ford*, 502 P.2d at 789 (holding that when a deputy went to the witness's office on the day of trial, the witness left by the back door, ergo evading service, and thus more effort was not needed).

393. State supreme courts have upheld declaring witnesses unavailable when the prosecution left subpoenas with their parents a week or so before trial, despite the witness not residing there at the time. *See, e.g.*, State v. Alderdice, 561 P.2d 845, 847–48 (Kan. 1977) (upholding as sufficient leaving a subpoena with the witness's mother while the witness was with his father or grandparents); State v. Thomas, 290 So. 2d 690, 693 (La. 1974) (murder trial). One court found an accomplice to be unavailable in a rape trial, admitting his preliminary testimony against the defendant, after the state had left two subpoenas at his home and spoken to his mother by phone. *See* People v. Guiterrez, 284 Cal. Rptr. 230, 239–40 (Ct. App. 1991), *disapproved on other* grounds, *Cromer*, 15 P.3d at 250 n.3.

394. *See, e.g.*, Tolbert v. State, 521 S.E.2d 827, 828 (Ga. Ct. App. 1999) (finding the witness unavailable where the prosecution started looking for the witness two weeks before trial, but the witness had moved).

395. *See, e.g.*, United States v. McGuire, 307 F.3d 1192, 1205 (9th Cir. 2002) (considering scheduling convenience to be a factor); People v. Saucedo, 40 Cal. Rptr. 2d 153, 157–58 (Ct. App. 1995), *disapproved on other grounds*, *Cromer*, 15 P.3d at 250 n.3.

396. State v. Smith, 551 N.E.2d 190, 197 (Ohio 1990) (also upholding the denial of a continuance).

397. *See* People v. Hovey, 749 P.2d 776, 780, 785–86 (Cal. 1988) (cellmate witness disappeared after being paroled); People v. Whetstone, 326 N.W.2d 552, 555–56 (Mich. Ct. App. 1982) (same).

398. State v. Marshall, 589 P.2d 44, 45–46 (Ariz. Ct. App. 1978).

399. State v. Kee, 956 S.W.2d 298, 303 (Mo. Ct. App. 1997).

C. RETURNING CONFRONTATION TO THE CONSTITUTION: *CRAWFORD V. WASHINGTON*

In *Coy v. Iowa*, the Court signaled its unease with where its confrontation jurisprudence had gone. Writing for the Court, Justice Scalia remarked on the history of confrontation and directly challenged Wigmore's view that cross-examination was the sole right it secured.[400] Dissenting in *Maryland v. Craig*, Scalia continued to criticize the Court's balancing policy, stating that the Clause was, as a categorical guarantee, designed to weather policy debates.[401] Scalia contended that the Clause protected the right for the jury to observe confrontation.[402] Only constitutional amendment, not judicial action, could rightly change the Confrontation Clause's scope.[403]

Two years later, concurring in *White v. Illinois*, Justice Thomas, joined by Justice Scalia, again questioned the Court's "confused" treatment of the relationship between confrontation and evidence law.[404] Thomas, again criticizing Wigmore's construction of confrontation, noted that the Court's "indicia of reliability" formulation permits one of the exact harms that confrontation was designed to forbid, namely the admission of extrajudicial written testimony.[405]

When the Court heard *Lilly v. Virginia* in 1999, Richard Friedman submitted an amicus brief with the American Civil Liberties Union ("ACLU") arguing for the Court to reexamine its confrontation doctrine.[406] While the Court cited the brief only in the concurrence in *Lilly*, the Court relied on Friedman's argument five years later in *Crawford v. Washington*.[407] Friedman argued that reliability, on which the Court was focused, is a poor criterion to advance truth-determination.[408] Moreover, the purpose of the Sixth Amendment is not to advance truth but to guarantee a procedural right that serves a "strong symbolic purpose" in our

400. Coy v. Iowa, 487 U.S. 1012, 1015–20 & n.2 (1988) (Scalia, J.).

401. *See* Maryland v. Craig, 497 U.S. 836, 860–61 (1990) (Scalia, J., dissenting).

402. *Id*. at 862.

403. *Id*. at 870.

404. White v. Illinois, 502 U.S. 346, 358 (1992) (Thomas, J., concurring).

405. *Id*. at 360–65.

406. *See* Lilly v. Virginia, 527 U.S. 116, 140 (1999) (Breyer, J., concurring).

407. *See* Crawford v. Washington, 541 U.S. 36, 60–68 (2004). Friedman made his call for reexamination in his article, *Confrontation: The Search for Basic Principles*, *supra* note 16. He restated his opinion in a brief for *Crawford*. *See* Brief Amicus, *supra* note 16.

408. Friedman, *supra* note 16, at 1027–28 (noting that reliability is difficult to categorically assess and that unreliable forms of evidence, such as live testimony, do assist in finding truth).

society.[409] Friedman proposed that the Confrontation Clause categorically applies to all "testimonial" statements.[410] The Clause grants the defendant an absolute right to confront any declarant making a testimonial statement used at trial.[411] But Friedman digressed from the Clause's original witness-production goal by supporting the Court's departure from historical live-testimony requirements. Friedman proposed that confrontation can be satisfied by "an adequate opportunity to examine the witness under oath"[412] and may be met *before* trial if the witness is later unavailable.[413]

In 2004, *Crawford v. Washington* overruled *Roberts*, reestablishing confrontation as a procedural right to be categorically applied to all testimonial statements offered at trial.[414] Writing for the Court, Justice Scalia rejected Wigmore's limited application of confrontation.[415] Scalia

409. Brief Amicus, *supra* note 16, at 13–17.

410. Friedman, *supra* note 16, at 1030–31. Friedman broadly proposed that extrajudicial statements should be considered testimonial largely based on the intent or understanding of the declarant. *See* Brief Amicus, *supra* note 16, at 20–22; Friedman, *supra* note 16, at 1038–43 (proposing that a statement is testimonial if a reasonable person in the declarant's position would believe the statement could later be used at trial). In *Crawford*, the Court noted Friedman's broad definition but expressly declined to define the scope of "testimonial." *Crawford*, 541 U.S. at 52, 61, 68. Other scholars have criticized Friedman's definition as overbroad and lacking either textual or historical support. *See, e.g.*, Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045 (1998) (noting that Friedman's view "unwittingly reflects residual traces of hearsay doctrine and tends to slight constitutional text, history, and structure"). Subsequently, the Court implicitly rejected Friedman's view. The Court has endorsed a narrower definition of testimonial, one framed in terms of the state's purpose in eliciting a statement. *See* Davis v. Washington, 126 S. Ct. 2266, 2273–74 (2006).

411. Brief Amicus, *supra* note 16, at 22–25; Friedman, *supra* note 16, at 1030–31, 1043. Friedman does, however, recognize the common-law exception of forfeiture by misconduct. *See* Brief Amicus, *supra* note 16, at 23–24; Friedman, *supra* note 16, at 1031, 1043.

412. Friedman, *supra* note 16, at 1032.

413. *Id.* at 1032–33, 1043. *See also* Brief Amicus, *supra* note 16, at 22–24. Friedman's analysis is not wrong on its face—historically, live testimony was not required if the witness was unavailable. *See supra* notes 173–78 (discussing the common-law rule). But because the Court has radically expanded unavailability beyond its historical limits, Friedman's view becomes constitutionally unsupportable when that expansion is incorporated into his framework. *See, e.g.*, 2 HAWKINS, *supra* note 128, ch. 46, §§ 6–7, at 429–30 (noting that inability to procure attendance was not historically an exception to requiring live testimony); discussion *supra* Part III.A.3 (analyzing the Court's creation of the exception). Friedman has, however, noted that the constitutional value of live testimony might merit reconsideration. *See* Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J.L. REFORM 695, 701 (2002) [hereinafter Friedman, *Remote Testimony*].

414. *Crawford*, 541 U.S. at 68. The *Crawford* Court extensively examined the historical development of confrontation, concluding that the right applied to testimonial hearsay without exception. *See id.* at 42–56. In *Davis v. Washington*, the Court removed all question as to whether *Roberts* maintained any validity with regard to nontestimonial hearsay. *See Davis*, 126 S. Ct. at 2273–75 & n.4. In *Davis*, the Court expressly cited its overruling of *Roberts* and held that the Confrontation Clause applies exclusively to "testimonial statements." *See id.*

415. *Crawford*, 541 U.S. at 50–51.

disengaged confrontation from a *Roberts*-style evidence law analysis.[416] Scalia construed confrontation to convey a necessary right to cross-examine all testimonial witnesses.[417] But testimonial statements from unavailable witnesses still can be admitted if the defendant had a prior opportunity for cross-examination.[418] Unfortunately, neither Friedman nor the *Crawford* Court addressed confrontation independent of cross-examination. *Crawford* thus failed to consider the implications on the unavailability doctrine itself—a doctrine expanded beyond its constitutional boundaries and relegated to the unsupervised, deferential haze of evidence law.

IV. (RE)CONSTITUTIONALIZING CONFRONTATION: REEXAMINING THE UNAVAILABILITY DOCTRINE

As the Court remarked in *Crawford*, the Framers did not intend "to leave the Sixth Amendment's protection to the vagaries of the rules of evidence."[419] Doing so does "violence to their design."[420] But that is exactly where the unavailability doctrine is litigated. Whether a defendant actually confronts his accusers face to face before the jury depends on the laws of evidence, not the Constitution. Moreover, the unavailability exception embodied in Federal Rule of Evidence 804(a)(5) and its state counterparts simply did not exist when the Bill of Rights was adopted.[421] It is an extraconstitutional judicial creation unknown to the Framers.[422]

The Court must apply the originalist and historical rationale it employed in *Crawford* to reexamine unavailability. While Friedman and the *Crawford* Court are correct to find that confrontation is a categorical procedural right, their analysis has missed the damage that the Court has wrought on the Sixth Amendment via unavailability. Simply, live

416. *Id*. at 61–68 (noting that a reliability-based analysis does "violence" to the Constitution's design).

417. *Id*. at 54–59, 68 (construing cross-examination as the sine qua non of confrontation). *Cf*. *supra* notes 210–12 and accompanying text (questioning whether the Confrontation Clause should be construed as conferring a right of cross-examination at all).

418. *Crawford*, 541 U.S. at 54, 59, 68. This mirrored Friedman's proposal, *supra* note 16, at 1043.

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

420. *Id*. at 68.

421. *Compare* 2 HAWKINS, *supra* note 128, ch. 46, §§ 6–7, at 429–30 (noting that the mere inability to procure attendance was not a common-law exception to the live testimony requirement), *and supra* notes 173–78 (discussing the common-law rule), *with* FED. R. EVID. 804(a)(5) (making inability to procure attendance grounds to declare a witness unavailable). *See also* Reed, *supra* note 20, at 223 (noting that even nineteenth-century state courts recognized only the death of a witness as a confrontation exception).

422. *See* discussion *supra* Part III.A.3 (analyzing the Court's creation of the exception).

testimony before the jury has an independent constitutional significance that the Sixth Amendment was designed to protect. It does "violence" to the Framers' design to state, as Friedman and the *Crawford* Court did, that prior cross-examination satisfies confrontation. The unavailability doctrine embodied in Federal Rule of Evidence 804(a)(5) must be reexamined.

A. THE SUPREME COURT SHOULD ARTICULATE THE INDEPENDENT CONSTITUTIONAL VALUE OF REQUIRING THE PRODUCTION OF LIVE WITNESSES

In the wake of *Crawford*, the Court should reaffirm what was known to the Framers—the Sixth Amendment confers a right, not a preference, for defendants to be confronted by their accusers before the jury. Live production was a right under colonial common law; it was a right under state constitutions when the Sixth Amendment was adopted. It was a right until this last century when the Court denigrated it to "a preference."[423]

Crawford, with its absolute requirement for cross-examination, can be too easily read to support the Wigmorian proposition that confrontation *is* the right of cross-examination. While the Sixth Amendment *may* confer an integral, indispensable right of cross-examination, the Framers' choice of a broader term signals more. The *Crawford* Court notes that the common law conditioned the admissibility of written testimony on a witness's unavailability.[424] But the Court fails to note that in 1791, unavailable meant either *dead* or *in extremis*. Only the metabolically challenged were excused from testifying live; mere absence or inconvenience was not an excuse.

The Court should recognize the independent constitutional value of requiring live testimony and protect it though a narrowly construed unavailability doctrine.

B. THE SUPREME COURT SHOULD REQUIRE THAT UNAVAILABILITY BE REVIEWED DE NOVO

Courts currently apply de novo review to the adequacy of a defendant's opportunity to cross-examine a testimonial witness.[425] But, ironically, when the right to confrontation before the jury is discarded, for example by Federal Rule of Evidence 804(a)(5) or its state counterparts,

423. *See* Ohio v. Roberts, 448 U.S. 56, 65 (1980), *overruled by Crawford*, 541 U.S. 36.
424. *See Crawford*, 541 U.S. at 54.
425. *See, e.g.*, United States v. Robinson, 389 F.3d 582, 591–92 (6th Cir. 2004).

the trial court is reviewed deferentially.[426] As Friedman noted, abandoning a defendant's right to confrontation before the jury "has not been thought to raise a constitutional problem . . . though perhaps it should."[427] Deferential review results in the unchecked loss of a procedural right conveyed by the Framers and the development of a vague, conflicting stew of precedent.[428]

Determination of the prosecutorial due diligence required to declare a witness unavailable merits independent appellate review as a mixed question of law and fact.[429] The determination encompasses a uniquely legal dimension, where the application of constitutional principles controls. The determination requires applying an appropriate legal standard, albeit a vague "good-faith effort" criterion, to the historical facts. It is not a process dependent on witness demeanor where deferential review traditionally applies. The Court's strict standards of review in other constitutional settings support requiring de novo review here.[430]

In reviewing mixed questions of constitutional law and fact, the Court has warned that "[a] policy of sweeping deference would permit . . . varied results . . . inconsistent with the idea of a unitary system of law."[431] Independent review is necessary for appellate courts to control and clarify constitutional principles, as well as to provide constitutional guidance to law enforcement.[432]

C. THE SUPREME COURT SHOULD ARTICULATE A WORKABLE FRAMEWORK FOR TRIAL COURTS TO APPLY WHEN ADDRESSING WITNESS UNAVAILABILITY

The lack of analytical guidance available to trial courts facing unavailability rulings severely curtails the scope and consistency of a

426. *See* discussion *supra* Part III.B (examining appellate review of unavailability); citations *supra* note 388 (illustrating the application of a deferential standard of review to availability).

427. *See* Friedman, *Remote Testimony*, *supra* note 413, at 701.

428. California has recognized this problem and requires that de novo review be applied to availability. *See* People v. Cromer, 15 P.3d 243, 244, 250 & n.3 (Cal. 2001).

429. In *Thompson v. Keohane*, 516 U.S. 99, 111–14 (1995), the Court articulated an analysis to determine the standard of review in mixed questions of law and fact. The Court considered whether the question depended on the trial court's assessment of demeanor or whether the question depended on applying constitutional or legal principles to the facts in the case. *Id*.

430. *E.g.*, *id*. (holding that de novo review applied to whether a confession is obtained consistent with the Constitution). By analogy, the Court likewise reviews de novo questions of "constitutional fact" in First Amendment cases. *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508 (1984).

431. Ornelas v. United States, 517 U.S. 690, 697 (1996) (discussing the de novo standard of review required for Fourth Amendment probable cause and reasonable suspicion findings).

432. *See id*.

defendant's confrontation rights. The Court should articulate an analytical framework for trial judges that conforms with Confrontation Clause protections. Three broad options exist for articulating an unavailability doctrine.

First, the Court could consider that the Framers' intent was progressive, designed to guarantee an absolute confrontation right for witnesses to be produced live to testify *viva voce*. This suggests that the Sixth Amendment, which as a whole innovated rights beyond those that existed in the common law,[433] was intended to reach beyond the common-law doctrine of unavailability as well. While idealistic, this proposal has little support and is the least practical.

Second, the Court could consider that the Framers' intent was to constitutionalize the unavailability doctrine of the time, limiting future liberalization of the doctrine that would hinder a defendant's right to be confronted live at trial by his accuser. If the Court were to accept this view, a simple analytic framework could be articulated: as the common law allowed, a witness would be unavailable and the witness's prior cross-examined testimony admitted if the witness was dead, *in extremis*, or detained by the defendant's conduct. This proposal is the most constitutionally and historically supportable. Its broad effect on criminal prosecutions, however, makes it unlikely that the Court would endorse it and reverse its last century of jurisprudence.

Third, and most likely, the Court could consider a pragmatic approach. This would be a compromise designed to protect a defendant's right to confrontation without upending the ability of prosecutors to try cases. In this approach, the Court would acknowledge the right to live confrontation, not just the preference for it. Yet, parallel to its treatment of other constitutional rights, the Court would find that the right is not absolute. The Court could uphold the absent-witness exception embodied in Federal Rule of Evidence 804(a)(5) and its state counterparts but articulate a *narrow* construction of the necessity required to employ it. Namely, the court should outline a strict "good-faith effort" analysis for courts to apply when judging prosecutorial due diligence to secure a witness's attendance. I propose a strict necessity analysis that examines the timing and sufficiency of efforts.

433. *See supra* notes 269–74 and accompanying text (discussing the Sixth Amendment as a progressive grant, guaranteeing rights that were unavailable under English rule).

1. The Timing of Efforts

The proper point of inquiry should begin when the prosecution is on notice of its need for a witness's testimony. With that notice, a duty arises for the prosecution to take reasonable, prudent steps to secure the witness's attendance. The specific actions and timetable required to fulfill that duty will depend on the circumstances. In particular, the likelihood that a witness will not attend necessitates heightened efforts by the prosecution before due diligence can be found. When the prosecution obtains knowledge that a witness is unlikely to appear, the prosecution's duty to take affirmative action ripens. Dilatory, desultory, or indifferent efforts from that time forward will not satisfy the prosecution's duty of diligence.

As such, when prosecutors are on notice of the need to secure a witness's testimony for trial, a court's due diligence analysis should consider what prosecutorial efforts have been made starting from the time of that notice. A court should not frame its inquiry based on the period after which a subpoena is issued or the period immediately preceding trial.[434] Prosecutors should not be allowed to "sit on their hands" until procuring the witness is impossible, only then to begin a "diligent" search.[435] In practice, prosecutors are likely aware of the need for a witness's trial testimony when preliminary testimony is taken. While circumstances may not merit affirmative steps that far in advance of trial, prosecutors still have a general duty to secure a witness's attendance.[436] If prosecutors believe that a witness's attendance is in doubt, however, affirmative action must commence. From that point, if delay by the prosecution results in a witness's absence, then diligence would not be satisfied and prior testimony would be inadmissible. The "sufficiency" of other later efforts is irrelevant.

434. Courts often ignore the fact that prosecutors had notice of the need to find a witness well before they commenced their search when conducting a due diligence analysis. For instance, in *People v. Hovey*, 749 P.2d 776, 785–86 (Cal. 1988), law enforcement had notice that the witness would likely be absent from trial well before they attempted to contact him. Nevertheless, the court found that law enforcement had exercised due diligence based upon actions taken right before trial. This approach inappropriately removes from the court's due diligence analysis any efforts that prosecutors could have made at an earlier stage, such as keeping in contact with a witness or asking for a witness's voluntary assistance at trial.

435. For example, if a prosecutor uses the testimony of an alien witness to meet its burden at a preliminary hearing, the prosecutor cannot wait until the witness has left the country or been deported before commencing efforts to secure the witness's attendance. *See* sources cited *infra* note 438 (discussing alien witnesses).

436. Informal steps, such as soliciting a witness's voluntary future cooperation and staying in contact with a witness, should be a part of any diligent effort, even at that preliminary stage.

In practice, courts should examine: (1) the prosecution's assessment when testimony is first taken (such as at a preliminary hearing) of the need for a witness at trial; (2) the assessment at that time of whether the witness would later attend trial; and (3) when, if ever, that assessment changed. A court should then analyze the prosecution's actions from that time forward.

2. The Sufficiency of Efforts

In general, a court should consider whether the prosecution's leads were completely explored in a bona fide and timely effort to secure a witness's attendance.[437] A duty to procure a witness includes a duty to use reasonable means to prevent a present witness from becoming absent. If the prosecution has the ability to prevent a witness's absence but fails to use that ability, then due diligence is not satisfied.[438] An effort is lacking if more would have been done had the prior testimony not been available to the prosecution.[439]

In assessing prosecutorial diligence, courts should consider the following factors:

1. Diligence is not satisfied *if*:

Only perfunctory efforts were made; *or*

A witness's absence resulted from government action or inaction.

437. A similar inquiry applies in California. *See* People v. Cromer, 15 P.3d 243, 252 (Cal. 2001). California courts, for example, require "persevering application, untiring efforts in good earnest, [and] efforts of a substantial character." People v. Sanders, 905 P.2d 420, 444 (Cal. 1995). Efforts must be "stringent" to justify abridging live testimony. *See* People v. Louis, 728 P.2d 180, 193 (Cal. 1986).

438. The First Circuit addressed this issue in *United States v. Mann*, 590 F.2d 361, 368 (1st Cir. 1978). In *Mann*, the state's principal witness and original codefendant was a foreign citizen. *Id*. at 363. The prosecutor took her testimony at a deposition, returned her passport, and gave her an airline ticket to Australia. *Id*. The prosecution made no effort to obtain her appearance at trial, instead relying on having her declared unavailable. *Id*. at 363, 366–68. The First Circuit reversed and remanded for a new trial. *Id*. at 371. In contrast, consider *United States v. Eufracio-Torres*, 890 F.2d 266, 268 (10th Cir. 1989), where prosecutors served alien witnesses with subpoenas prior to deportation, instructed them on reentry, travel reimbursements, and appearance fees, and received promises from them that they would return for trial. *See also* United States v. Guadian-Salazar, 824 F.2d 344, 346 (5th Cir. 1987) (illustrating similar efforts).

While illegal-alien witnesses have been found unavailable after deportation, it bears noting that Immigrations and Customs Enforcement policy suspends deportation of material witnesses when a subpoena is issued. *See* 8 C.F.R. § 212.5(a) (2006) (stating an immigration policy of suspending the deportation of witnesses); 8 C.F.R. § 215.3(g) (2006) (specifying that a material witness in a criminal trial is eligible for suspension of deportation); 8 C.F.R. § 212.5(b) (2006) (outlining the conditions that allow parole detainees to testify at trial); 8 C.F.R. § 241.6 (2006) (stating that those same conditions apply to stays of deportation). Diligent efforts should consider these policies.

439. The Tenth Circuit applied some of these considerations in *Cook v. McKune*, 323 F.3d 825, 835–36 (10th Cir. 2003). *Accord Mann*, 590 F.2d at 367–68.

2. More extensive efforts are required *if*:

The witness is more crucial to the prosecution's case;

The crime charged is more serious;

The witness has a motivation to favor the prosecution; *or*

The witness's credibility is otherwise suspect.

3. Failure to make minimal efforts, such as asking for and assisting with a witness's voluntary attendance or maintaining contact with a witness, indicates a lack of diligence.

Countervailing these factors, a defendant may forfeit his right to confrontation by wrongdoing. While the defendant should not bear the burden of the state's failure to secure live testimony, the state should not bear the burden of the defendant's wrongful conduct.[440]

D. ISSUES RAISED BY RECONSTITUTIONALIZING CONFRONTATION

Solidifying a Sixth Amendment right to live confrontation heightens the conflict between defendants' rights and those of victims and witnesses. In particular, the extent to which prosecutors should be allowed to pursue witness testimony raises significant questions that merit further academic and judicial examination. For example, does prosecutorial diligence require exercising witness detention statutes to ensure live testimony?[441] Should it even be allowed?[442] What role, if any, should technological advances play

440. The implications of heightening the right to confrontation are harshest in the context of sexual or domestic abuse, particularly in cases involving children. In these cases, victims are often unable or unwilling to testify. Friedman has suggested that the forfeiture by misconduct doctrine may ameliorate some of the harsh consequences of a firm confrontation right in those instances. *See* Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 248, 252–55 (2002). Likewise, the Supreme Court has strongly signaled its support for a revitalized use of constitutional forfeiture to address the equitable problems created post *Crawford*. *See* Davis v. Washington, 126 S. Ct. 2266, 2279–80 (2006).

441. Both the federal government and most state governments have codified statutes authorizing detention of material witnesses until trial. *See, e.g.*, 18 U.S.C. § 3144 (2000); CAL. PENAL CODE § 1332 (West 2004). The constitutionality of witness detention statutes has long been upheld. *See, e.g.*, Hurtado v. United States, 410 U.S. 578, 588 (1973); Stein v. New York, 346 U.S. 156, 184 (1953), *overruled on other grounds by* Jackson v. Denno, 378 U.S. 368, 391 (1964).

442. Such statutes raise grave issues regarding a witness's Fourth and Fifth Amendment rights. Yet, courts have upheld their use. *See, e.g.*, United States v. Nai, 949 F. Supp. 42, 45–46 (D. Mass. 1996); *In re* Francisco M., 103 Cal. Rptr. 2d 794, 807–08 (Ct. App. 2001).

in criminal trials?[443] Should preliminary testimony be preserved by video rather than by transcript?[444]

The consequences of protecting Sixth Amendment rights may be ameliorated by the definition of testimonial evidence itself.[445] By embracing a testimonial view of the Sixth Amendment, the Court has effectually removed from confrontation consideration many varieties of hearsay.[446] In the future, courts and scholars should examine whether classes of hearsay traditionally subjected to Sixth Amendment consideration really need to be.[447] The relationship between a declarant's unavailability and a defendant's conduct also should be examined. Addressing these issues should relieve the conflict between confrontation rights and practical policy concerns in areas such as prosecuting sexual predators and domestic abusers.

V. CONCLUSION

The constitutional concern of the Framers was not prosecutorial inconvenience. The Framers feared criminal trials without live testimony. They feared trials where defendants were not confronted by their accusers before the jury. Historically, confrontation literally meant requiring the live production of witnesses. In 1791 the common law protected that procedural right. Ironically, a century after the Constitution guaranteed that right, the

443. Friedman argues that video testimony should be allowed where the witness would otherwise be found unavailable (for example, where a foreign citizen is not in the United States). *See* Friedman, *Remote Testimony*, *supra* note 413, at 695–96, 704, 715–17 (proposing changes to proposed Federal Rule of Criminal Procedure 26 to address constitutional concerns). *But see* United States v. Yates, 438 F.3d 1307, 1318 (11th Cir. 2006) (en banc) (holding that the state's need to present the key testimony of witnesses who were Australian citizens did not rise to the level of necessity required under *Maryland v. Craig* to necessitate deviating from in-court testimony). *Cf.* United States v. Gigante, 166 F.3d 75, 79–80 (2d Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000) (holding that remote testimony by video could be used where a witness in the Federal Witness Protection Program suffered from terminal cancer and would otherwise be held unavailable).

444. While admission of testimony by video may be an improvement over reading a transcript, courts have been reluctant to consider it as a substitute for live testimony. *See, e.g.*, Aguilar-Ayala v. Ruiz, 973 F.2d 411, 419 (5th Cir. 1992) (noting that cross-examination is best perceived live and that videotape is not an adequate substitute for live testimony).

445. For example, in parallel to the Court's treatment of Fifth Amendment *Miranda* rights, the Court recently held that statements made to police regarding ongoing emergencies were nontestimonial and thus not subject to the confrontation guarantee. *Compare Davis*, 126 S. Ct. at 2273–74, 2277, *with* New York v. Quarles, 467 U.S. 649, 658–59 (1984). *Davis* frees law enforcement of the Hobson's choice of deciding between securing public safety and securing admissible evidence.

446. *See Davis*, 126 S. Ct. at 2273–75 & n.4 (holding that the Confrontation Clause does not apply to nontestimonial hearsay).

447. *Cf. id.* (holding that statements elicited "to enable police assistance to meet an ongoing emergency" do not fall under Sixth Amendment scrutiny).

Supreme Court drifted away from preserving it. The vogue in scholarship and judicial analysis reduced confrontation to a device to facilitate public policy and support evidence law.

With *Crawford*, the Court again recognized what had been lost in twentieth-century jurisprudence—the Sixth Amendment guards a defendant's procedural protections. The time has come for the Court to recognize what the Framers knew—live confrontation before the fact finder was required in all but the narrowest circumstances. Confrontation is not merely the right of cross-examination, capable of being satisfied if the examination takes place outside of trial. As Justice Scalia warned, "This reasoning abstracts from the right to its purpose[], and then eliminates the right."[448] The Court should extend its analysis in *Crawford* to recognize that live testimony is not a "preference" but a constitutional procedural guarantee. As such, the Court should reexamine the unavailability doctrine, in particular Federal Rule of Evidence 804(a)(5) and its state counterparts. The Court must articulate an analytical framework that lower courts can apply to protect constitutional rights while offering prosecutors practical guidance. The Court must protect *all* the rights conferred by the Sixth Amendment—it is only fair.

448. Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting).