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Constitutional Evasion and the Confrontation Puzzle

David L. Noll
Rutgers School of Law, dnoll@kinoy.rutgers.edu

CONSTITUTIONAL EVASION AND THE CONFRONTATION PUZZLE

DAVID L. NOLL*

Abstract: One of the most notable developments in contemporary constitutional law is the breakdown of jurisprudence interpreting the Sixth Amendment's Confrontation Clause following the U.S. Supreme Court's 2004 decision in *Crawford v. Washington.* There, the Court promised doctrine that faithfully applied the Clause's original meaning, was simple to administer, and protected criminal defendants against convictions secured through suspect evidence. Post-*Crawford* case law has not delivered on these promises. This Article argues that *Crawford*'s failure reflects an unsuccessful attempt to regulate evasion of the Confrontation Clause. Though justified by the Court on originalist grounds, the rule of *Crawford*, holding that "testimonial" evidence triggers a right to confront the responsible "witness," is best understood as an attempt to regulate governmental evasion of the basic Sixth Amendment right to confront witnesses who give live testimony in legal proceedings. The need for doctrine that performs this function results from the transformation in evidence between the framing and present day. The *Crawford* Court, however, did not acknowledge the need to regulate evasion of the basic confrontation right, nor did it grapple with important policy questions a legal policymaker regulating evasion of the law must address. This account: (1) suggests a reorientation of confrontation doctrine that would permit the Court to overcome the uncertainty that plagues post-*Crawford* jurisprudence; (2) suggests a decision tree for courts considering whether and how to regulate seemingly evasive activities; and (3) contributes new data to the long-running debate between "pragmatist" and "doctrinalist" scholars over the utility of identifying a separate category of doctrine that implements constitu-

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tional norms as opposed to elaborating the Constitution's textual and historical meaning.

INTRODUCTION

Over the past decade, caselaw applying a criminal defendant's Sixth Amendment right "to be confronted with the witnesses against him"[1] has ceased generating theoretically defensible results. Consider the prosecutions of Kendrick Proctor, Rae Carruth, and Sandy Williams.

On August 4, 2001, Rodriguez "Yogi" Proctor called 911 to report that his brother Kendrick was high and firing a gun into the ground.[2] Yogi understood the criminal justice system well enough to know that the call would be recorded and used as evidence; he said that Kendrick had "been in the penitentiary so he ain't supposed to possess no gun," and that "y'all [the police] know him real good."[3] Yogi also had a motive to lie. He had a prior felony conviction[4] and the gun Kendrick was shooting had been taken from the front dashboard of Yogi's car.[5]

When Kendrick was tried on firearms charges, the trial judge referred to Yogi as the "chief prosecuting witness"[6] but nonetheless permitted the prosecution to offer a transcript of his 911 call without calling Yogi as a witness. Applying the U.S. Supreme Court's 2004 decision in *Crawford v. Washington*,[7] the U.S. Court of Appeals for the Fifth Circuit affirmed.[8] It rejected Kendrick's argument that the prosecution's use of the call violated Kendrick's right to be confronted with the witnesses against him.[9]

On the evening of November 15, 1999, NFL wide-receiver Rae Carruth participated in the murder of his pregnant girlfriend Cherica Adams.[10] As Adams was driving behind Carruth, Carruth slowed his SUV to a stop, forcing Adams to slow down to avoid hitting him.[11] A car driven by Carruth's friend pulled alongside Adams, and a passenger in the car fired five shots at Adams.[12] Adams called 911, was taken to the hospital, slipped into a coma, and later died.[13] At Carruth's trial, the State introduced statements

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[1] U.S. CONST. amend. VI.

[2] United States v. Proctor, 505 F.3d 366, 368 (5th Cir. 2007).

[3] *Id.* at 368–69.

[4] Brief of Appellee at 8, *Proctor*, 505 F.3d 366 (No. 07-60011).

[5] *Proctor*, 505 F.3d at 368.

[6] Brief for Appellant at 13, *Proctor*, 505 F.3d 366 (No. 07-60011).

[7] 541 U.S. 36 (2004) (holding that the introduction of "testimonial" evidence triggers a right to confront the responsible "witness").

[8] *Proctor*, 505 F.3d at 368.

[9] *Id.* at 372.

[10] *See* Wiggins v. Boyette, 635 F.3d 116, 118–19 (4th Cir. 2011).

[11] *Id.*

[12] *Id.*

[13] *Id.*

that Adams made to a police officer and nurse at the hospital, in which she explained how she was shot.[14]

In a collateral challenge to Carruth's conviction, the North Carolina courts concluded that the State violated Carruth's confrontation rights by introducing Adams's post-shooting statements.[15] Applying *Crawford*, the North Carolina courts reasoned that Adams was a "witness" who Carruth was entitled to cross-examine before her statements could be admitted.[16] That Carruth arranged Adams's murder—eliminating any possibility that she could be called as a witness—did not enter the court's analysis.[17]

In 2006, the State of Illinois tried Sandy Williams for rape.[18] To establish that Williams committed the rape, the State called an analyst who worked in its forensic laboratory system.[19] The analyst testified that a DNA profile derived from semen in the rape kit collected from the victim following the rape matched a DNA profile derived a sample of from Williams's blood.[20] The forensic analysts who derived the DNA profile from the rape kit did not appear as trial witnesses.[21] The justices of the U.S. Supreme Court set out four different approaches to determining whether the testifying analyst's testimony violated Williams's confrontation rights,[22] none of which attracted the support of a majority.[23] The Court appears to be at a loss about how to proceed. In May 2014, it denied a dozen petitions for certiora-

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[14] *Id.* at 119.

[15] State v. Wiggins, No. 99 CRS 46567, 2005 WL 857109, at *2 (N.C. Super. Ct. Mar. 18, 2005). The error ultimately was found harmless because other evidence overwhelmingly established Carruth's guilt. *Id.* at *1, *4; *see Wiggins*, 635 F.3d at 128–29.

[16] *See Wiggins*, 2005 WL 857109, at *2.

[17] *See id.*

[18] *See* Williams v. Illinois, 132 S. Ct. 2221, 2229 (2012) (plurality opinion).

[19] *See id.*

[20] *Id.* at 2230–31. More precisely, the analyst Sandra Lambatos testified as follows:

> [B]ased on her own comparison of the two DNA profiles, she "concluded that [petitioner] cannot be excluded as a possible source of the semen identified in the vaginal swabs," and that the probability of the profile's appearing in the general population was "1 in 8.7 quadrillion black, 1 in 390 quadrillion white, or 1 in 109 quadrillion Hispanic unrelated individuals." Asked whether she would "call this a match to [petitioner]," Lambatos answered yes . . . over defense counsel's objection.

Id. at 2229 (alterations in original) (recounting the analyst's trial testimony).

[21] *Id.* at 2231.

[22] *Compare id.* at 2240 (concluding that a defendant is not entitled to confront analysts if the testifying expert personally vouches for forensic conclusions), *with id.* at 2244 (concluding that a defendant is not entitled to confront analysts if analysts lack the "primary purpose" of generating criminal evidence), *and id.* at 2260 (Thomas, J., concurring) (concluding that a defendant is not entitled to confront analysts if their conclusions are reported in an "informal" document), *and id.* at 2265 (Kagan, J., dissenting) (concluding that a defendant is generally entitled to confront analysts).

[23] *Id.* at 2227 (plurality opinion).

ri imploring it to clarify standards for the admissibility of forensic reports under *Williams*.[24]

All of these cases applied an understanding of the Confrontation Clause set out in the Supreme Court's 2004 decision in *Crawford*.[25] The first of two originalist interventions at the turn of the twenty-first century,[26] *Crawford* held that if criminal evidence contains a "testimonial" statement, the person responsible for the statement must testify at trial unless that person is "unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination."[27] The Court reasoned that this "testimonial" rule captured the original meaning of the Sixth Amendment and protected the interests of courts and criminal defendants. Doctrine organized around the testimonial concept, the Court promised, would faithfully apply the original meaning of the Sixth Amendment, be simple for courts to administer, and protect criminal defendants against the use of suspect evidence.[28]

In practice, *Crawford* delivered what Justice Antonin Scalia, the author of the *Crawford* opinion, now describes as a "shambles."[29] A decade after *Crawford*, irreconcilable divisions among the justices and abiding uncertainty over the forms of evidence that trigger the confrontation right characterize confrontation doctrine. The leading academic proponent of *Crawford* suggests it may take decades for doctrine to reach a stable equilibrium.[30] Others describe post-*Crawford* jurisprudence as a "debacle,"[31] "train wreck,"[32] and

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[24] *See* Arauz v. California, 134 S. Ct. 2664 (2014) (mem.) (denying petition for certiorari); Brewington v. North Carolina, 134 S. Ct. 2660 (2014) (mem.) (same); Edwards v. California, 134 S. Ct. 2662 (2014) (mem.) (same); Galloway v. Mississippi, 134 S. Ct. 2661 (2014) (mem.) (same); James v. United States, 134 S. Ct. 2660 (2014) (mem.) (same); Marshall v. Colorado, 134 S. Ct. 2661 (2014) (mem.) (same); Maxwell v. United States, 134 S. Ct. 2660 (2014) (mem.) (same); Ortiz-Zape v. North Carolina, 134 S. Ct. 2660 (2014) (mem.) (same); Turner v. United States, 134 S. Ct. 2660 (2014) (mem.) (same); Walker v. Wisconsin, 134 S. Ct. 2663 (2014) (mem.) (same); Williams v. Massachusetts, 134 S. Ct. 2672 (2014) (mem.) (same); Yohe v. Pennsylvania, 134 S. Ct. 2662 (2014) (mem.) (same).

[25] 541 U.S. 36 (2004).

[26] *See also* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding that the Second Amendment confers an individual right to possess and use a firearm for lawful purposes including self-defense in an individual's residence).

[27] *Crawford*, 541 U.S. at 53–54. The only exceptions to this rule were those "established at the time of the founding," such as for dying declarations. *Id.* at 54.

[28] *See, e.g.*, *id.* at 60 (accepting the suggestion that the Court revise its doctrine "to reflect more accurately the original understanding of the [Confrontation] Clause"); *id.* at 67 (expressing desire to not "leave too much discretion in judicial hands").

[29] *See* Michigan v. Bryant, 562 U.S. 344, 380 (2011) (Scalia, J., dissenting).

[30] *See* Richard D. Friedman, *Who Said the* Crawford *Revolution Would Be Easy?*, 26 CRIM. JUST. 14, 19 (2012) ("The confrontation right has been around for centuries, and will be for centuries to come. If it takes a while longer to get it right, so be it.").

[31] George Fisher, *The* Crawford *Debacle*, 113 MICH. L. REV. FIRST IMPRESSIONS 17, 26 (2014), http://michiganlawreview.org/the-crawford-debacle/ [http://perma.cc/2GA2-L4NU] ("[T]he *Crawford* framework's greatest failing is its stubborn refusal to make sense.").

"mess."[33] At the trial-court level, the scope of the Confrontation Clause turns on formalistic distinctions that lack any apparent basis in the Sixth Amendment or an established theory of evidence. For example, whether a report of forensic testing can be admitted without giving the accused an opportunity to confront the report's author turns on the "formality" and "solemnity" of the document in which the report is memorialized.[34] A notarized affidavit triggers a right of confrontation,[35] whereas a letter lacking indicia of formality does not,[36] even if the two documents set forth the exact same information.

To be sure, this jurisprudential shambles benefits some defendants by giving them additional leverage in plea bargaining.[37] But it falls short as regulation. Because the admissibility of evidence under *Crawford* lacks an obvious basis in the Sixth Amendment or an established theory of evidence, confrontation doctrine benefits defendants in a scattershot way. Meanwhile, intuitively problematic forms of evidence—such as Yogi Proctor's 911 call—are admitted without affording the accused an opportunity for confrontation.

This Article aims to explain the failure of contemporary Confrontation Clause doctrine. It contends—in contrast to accounts that focus on the Court's historiography, broader embrace of originalism, and fidelity to *Crawford*'s principles in post-*Crawford* cases[38]—that the answer lies in the

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[32] Kevin C. McMunigal, Crawford*, Confrontation, and Mental States*, 64 SYRACUSE L. REV. 219, 220 (2014) (observing that commentators have described contemporary Confrontation Clause jurisprudence as "'incoherent,' 'uncertain,' 'unpredictable,' 'a train wreck,' suffering from 'vagueness' and 'double-speak,' and, simply put, a 'mess.'" (footnotes omitted)).

[33] *Id.*; *see also* Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 FORDHAM L. REV. 1301 (2011) (stating that contemporary Confrontation Clause doctrine is "highly subjective, fact-intensive, [and] malleable"); David Crump, *Overruling* Crawford v. Washington*: Why and How*, 88 NOTRE DAME L. REV. 115, 132 (2012) (calling post-*Crawford* doctrine "unworkable"); Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, 55 B.C. L. REV. 775, 780 (2014) (describing "other major hazards in the post-*Crawford* minefield"). *But see* Dylan O. Keenan, Note, *Confronting* Crawford v. Washington *in the Lower Courts*, 122 YALE L.J. 782 (2012) (arguing, based on a logistic regression analysis of lower court decisions, that lower courts "have made sense of *Crawford*").

[34] *Williams*, 132 S. Ct. at 2255 (Thomas, J., concurring).

[35] *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 329–30 (2009) (Thomas, J., concurring).

[36] *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring).

[37] *See generally* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2458 (2004).

[38] *See, e.g.*, Crump, *supra* note 33, at 127 (pointing out "erroneous reasoning" in *Crawford*); Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the* Crawford-Davis *"Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y 349, 352 (2007) (arguing that *Crawford* does not reflect the framers' understanding and that originalism generally is a flawed approach to constitutional interpretation); Michael R. Noveck, *Recent Development: The Death of Confrontation Clause Originalism?*, 47 HARV. C.R.-C.L. L. REV. 251, 253 (2012) (arguing that the Court's failure to embrace a broader forfeiture rule required it to abandon *Crawford*'s originalist premises); Ben

nature of the rule *Crawford* laid down. Though *Crawford* justified the testimonial rule on originalist grounds, that rule is best understood as an attempt to regulate governmental evasion of the basic right to be confronted with witnesses who present live testimony. The *Crawford* regime's failure results from the fact that the Court did not acknowledge that the task for doctrine was to regulate evasion. Further, the Court ignored important questions a policymaker regulating evasion of a legal norm must address. These missteps triggered the failure of contemporary Confrontation Clause jurisprudence.

The argument proceeds in two steps. The initial move is to recognize a point virtually absent from the voluminous literature on the post-*Crawford* Confrontation Clause: the Clause's text and historical meaning do not compel *Crawford*'s "testimonial" rule.[39] Insofar as criminal prosecutions were concerned, "evidence" at the framing consisted largely of witness testimony, which was sometimes taken in pre-trial proceedings where the accused was not afforded a right "to be confronted with the witnesses against him."[40] Indeed, colonial trial minutes do not distinguish between witness testimony and other forms of evidence, describing witnesses simply as "Evidences" for the prosecution or the defense.[41] "Evidence" did *not* include most out-of-court statements—including the kind of statements contained in 911 calls, reports of criminal investigations, and reports of forensic testing. To framing-era lawyers, such statements would have constituted "no evidence" at all.[42] They were not legal proof of guilt or innocence.

Because of this, historical understandings of the Confrontation Clause do not answer when, if ever, statements by an individual who is *not* a witness in a legal proceeding trigger a right of confrontation. Those who enacted the Sixth Amendment would have understood a criminal defendant's right "to be confronted with the *witnesses* against him"[43] to apply to persons

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Trachtenberg, *Testimonial Is as Testimonial Does*, 66 FLA. L. REV. 467, 468 (2014) (questioning historical accuracy of *Crawford*'s understanding of the Confrontation Clause).

[39] For prior suggestions to this effect, see Davies, *supra* note 38, at 351–52; Randolph N. Jonakait, *The (Futile) Search for a Common Law Right of Confrontation: Beyond* Brasier*'s Irrelevance to (Perhaps) Relevant American Cases*, 15 J.L. & POL'Y 471, 472 (2007). *See also Crawford*, 541 U.S. at 70–71 (Rehnquist, J., concurring).

[40] U.S. CONST. amend. VI; *see infra* notes 229–252 and accompanying text (discussing pretrial proceedings during the framing era).

[41] *See* JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 629 n.81 (1970); George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749–57*, 1 N.Y.U. J.L. & LIBERTY 671, 675 (2005) (providing example of colonial trial minutes from 1752 describing witnesses as "Evidences for the Crown" and "Evidences for the defendant").

[42] 2 GEOFFREY GILBERT, THE LAW OF EVIDENCE 889 (Capel Lofft ed., 1791); *see infra* note 218 and accompanying text.

[43] U.S. CONST. amend. VI (emphasis added).

who appear in a legal proceeding and offer live testimony. They would not have understood the Confrontation Clause to say what evidence *is*, or the conditions under which evidence not created by an ordinary witness could be admitted. The rule of *Crawford* untethers the Clause from witnesses and sets up the Clause as a general source of regulation for *all* evidence. From a historical perspective, this move is dubious.

The second step in the Article's argument involves the justification for *Crawford*'s untethering of the Confrontation Clause from its original meaning. Though the historical meaning of the Clause does not compel *Crawford*'s testimonial rule, that rule can be justified as an effort to regulate evasion of the accused's confrontation right made possible by the sea change in the understanding of evidence between the framing and the present day. Under the framing-era understanding of evidence, the accused's right "to be confronted with the witnesses against him" provided a relatively complete guarantee of the quality of criminal evidence. Evidence generally consisted of witness testimony, and a right of confrontation ensured such testimony's fairness and completeness. Under the modern understanding of evidence, the protection provided by a right to confront *witnesses* is far weaker. Because the law today understands evidence to include many sources of information besides witness testimony,[44] the prosecution can easily use non-witness evidence to establish the defendant's guilt.[45] When it does so, the government may appear to be evading the confrontation right.

Crawford's testimonial rule bridges the gap created by the transformation in the understanding of evidence between the framing era and the present day. By subjecting all "testimonial" evidence to the Confrontation Clause regardless of whether it was generated by a witness in the ordinary sense of the term, *Crawford* addresses the government's ability to evade the Confrontation Clause by using forms of evidence that serve the same function as witness testimony but are not subject to the basic confrontation right.[46]

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[44] *See* FED. R. EVID. 401(a) (defining relevant evidence as any evidence with a "tendency to make a fact more or less probable than it would be without the evidence"). *See generally* JEFFERSON L. INGRAM, CRIMINAL EVIDENCE (2011) (outlining forms of evidence used in modern criminal prosecutions).

[45] Bentham observed that "merely with a view to rectitude of decision . . . no species of evidence whatsoever . . . ought to be excluded." 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 1 (1827).

[46] For a prior suggestion to this effect, see Fisher, *supra* note 31, at 26 (observing that "the declarant's or interrogator's intent to create trial evidence while evading cross-examination" is a "common component" of statements subject to the Confrontation Clause in the Court's post-*Crawford* caselaw). In describing *Crawford* as an "anti-evasion" rule, I do not mean to imply that the prosecution acts in bad faith when it makes use of statements by a speaker that the accused has not confronted, or that the prosecution specifically intends to strip the accused of the right to confront the witnesses against him or her. As explained below, legal systems label different kinds of

But if the testimonial rule is best understood as an effort to regulate governmental evasion of the confrontation right, it is not a successful one. The *Crawford* Court did not acknowledge that it was undertaking to regulate evasion of the basic confrontation right, appreciate the differences among forms of evasion that a legal system can regulate, or recognize the costs and benefits of regulatory strategies that different forms of evasion entail.[47] Indeed, *Crawford* suggested that courts could understand which activities should be considered evasive simply by understanding the Confrontation Clause's text. These missteps led to the doctrinal breakdown that continues to this day. When the Court encountered evidence that did not intuitively involve evasion of the confrontation right, it splintered.

This account of the breakdown of contemporary Confrontation Clause jurisprudence has wide-ranging implications. Most immediately, an accurate understanding of the *Crawford* experience suggests a reorientation of modern Confrontation Clause doctrine that would permit the Court to overcome the divisions and theoretical uncertainty that plague post-*Crawford* jurisprudence. The *Crawford* experience also teaches that to succeed at an operational level, judge-made doctrine that regulates evasion of constitutional norms must answer a predictable set of questions about the doctrine's basis and scope.[48] Unpacking those questions yields a decision tree or structured set of choices for courts asked to regulate activities that seem to involve evasion of a constitutional norm.[49]

Understanding that decision tree in turn sheds light on a long-running debate in constitutional theory between pragmatist scholars, who contend that constitutional decisions invariably reflect an ad hoc patchwork of interpretative, institutional, and remedial concerns,[50] and "new doctrinalists,"[51]

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activity "evasive," only some of which require that a regulated actor act in bad faith or with conscious intent to avoid the law. *See infra* notes 395–398 and accompanying text (describing different understandings of evasion); *see also* Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 618–19 (2011) (considering reasons why conduct might be deemed evasive and exploring their relationship to a regulated actor's state of mind).

[47] *See infra* notes 395–405 and accompanying text.

[48] *See infra* notes 458–479 and accompanying text.

[49] *See* DAVID C. SKINNER, INTRODUCTION TO DECISION ANALYSIS 20 (2009); *see also infra* notes 458–479 and accompanying text.

[50] *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 36–41 (2010) (explaining mechanisms through which constitutional understandings evolve); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332 (1987) (arguing that "solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy," is central to constitutional governance); Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 177 (2006) (objecting to the contention that a gap exists between "pure" constitutional meaning and implementing doctrine); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873 (1999) (arguing that "remedial equilibration," or the tailoring of rights to remedial considerations, is an inescapable feature of constitutional adjudication).

who maintain that it is useful and theoretically coherent to approach doctrine that implements the Constitution as a distinct form of constitutional reasoning.[52] The *Crawford* experience teaches that doctrine that responds to the evasion of constitutional norms problem is conceptually distinct from doctrine that elaborates the Constitution's textual and historical meaning, and that, at least within this context, recognizing the distinction may be indispensable to the development of workable doctrine.

Part I briefly summarizes how post-*Crawford* case law has failed to deliver on the decision's promises of fidelity to the Constitution and clear, easily administrable doctrine.[53] Part II provides historical context by describing how those who adopted the Confrontation Clause would have understood its reference to "witnesses."[54] Part III sets out the Article's central argument—that *Crawford*'s sub rosa recognition of a rule that regulates evasion of the Confrontation Clause precipitated the failure of contemporary confrontation doctrine.[55] Part IV describes some implications of this account.[56]

I. THE CONFRONTATION PUZZLE

What makes *Crawford* a puzzle for constitutional law is the gulf between the decision's ambitions and the jurisprudential regime it established. *Crawford* offered a detailed account of the Confrontation Clause's origins and announced a new interpretation of the Clause that was superficially

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[51] *See* Brannon P. Denning, *The New Doctrinalism in Constitutional Scholarship and* District of Columbia v. Heller, 75 TENN. L. REV. 789, 790 (2008) (suggesting the "New Doctrinalism" label).

[52] *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001) (cataloging ways that constitutional doctrine implements constitutional norms as opposed to elaborating their textual and historic meaning); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975) (proposing that many of the Supreme Court's most important constitutional decisions are best seen as a "constitutional common law" that is not strictly required by the Constitution's textual and historical meaning); Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212 (1978) (positing that constitutional norms have "conceptual limits" distinct from those recognized in court decisions and that "the contours of federal judicial doctrine regarding these norms . . . mark only the boundaries of the federal courts' role of enforcement"). For scholarship specifically addressing the regulation of evasion of constitutional norms, see generally Brannon P. Denning & Michael B. Kent, Jr., *Anti-Anti-Evasion in Constitutional Law*, 41 FLA. ST. U. L. REV. 397 (2014) (considering reasons why the Court fails to sanction evasion of constitutional norms), Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 4 UTAH L. REV. 1773 (2012) [hereinafter Denning & Kent, *Anti-Evasion Doctrines*] (identifying and describing anti-evasion doctrines in constitutional law), Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009) (describing various examples of types of "constitutional workarounds"), and *infra* note 457 (further describing this literature).

[53] *See infra* notes 57–163 and accompanying text.

[54] *See infra* notes 164–344 and accompanying text.

[55] *See infra* notes 345–447 and accompanying text.

[56] *See infra* notes 448–537 and accompanying text.

consistent with its text and the regulation of evidence at common law.[57] That interpretation, *Crawford* promised, would be simple for courts to administer and protect against prosecutions based on suspect evidence.[58] A supermajority of justices supported the decision; only Chief Justice William Rehnquist and Justice Sandra Day O'Connor objected to *Crawford*'s reinterpretation of the Confrontation Clause.[59]

This Part offers a fuller picture of the Court's failure to deliver on *Crawford*'s promises. Section A provides a short history of the Court's treatment of the Confrontation Clause prior to *Crawford*.[60] Section B then describes the Court's central holdings in the *Crawford* case.[61] Section C details the Court's inability to elaborate workable Confrontation Clause jurisprudence in the decade since *Crawford* was decided.[62]

A. The Road to Crawford

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy" five enumerated rights, including "the right . . . to be confronted with the witnesses against him."[63] A handful of Supreme Court decisions from the nineteenth century and early twentieth century applied the Confrontation Clause in federal criminal appeals.[64] But it was not until the Sixth Amendment's 1965 incorporation[65] that the Court began to grapple with the Clause's meaning in earnest.

The first landmark in the Court's modern jurisprudence was the 1980 decision in *Ohio v. Roberts*.[66] The Court opined there that the central challenge for Confrontation Clause doctrine was to reconcile the accused's right to be confronted with the witnesses against him with the liberal use of hearsay (out-of-court statements) permitted by the modern law of evidence.[67] Speaking through Justice Harry Blackmun, the Court stated that a literal read-

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[57] *See Crawford*, 541 U.S. at 42–53.

[58] *See id.* at 66–68.

[59] *See id.* at 69 (Rehnquist, C.J., concurring).

[60] *See infra* notes 63–81 and accompanying text.

[61] *See infra* notes 82–112 and accompanying text.

[62] *See infra* notes 113–163 and accompanying text.

[63] U.S. Const. amend. VI.

[64] *See* Kirby v. United States, 174 U.S. 47, 61 (1899); Robertson v. Baldwin, 165 U.S. 275, 282 (1897); Mattox v. United States, 156 U.S. 237, 259–60 (1895). *See generally* CHARLES ALAN WRIGHT, ET AL., 30A FEDERAL PRACTICE & PROCEDURE § 6356 (2013) [hereinafter WRIGHT & GRAHAM] (describing the Supreme Court's interpretation of the Confrontation Clause from the time of the Civil War to the present).

[65] *See* Pointer v. Texas, 380 U.S. 400, 407–08 (1965) (extending the confrontation right to state proceedings).

[66] 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36.

[67] *Id.* at 63.

ing of the Confrontation Clause "would abrogate virtually every hearsay exception."[68] This result, however, was "unintended" and "too extreme."[69]

According to *Roberts*, the Confrontation Clause instead established a super-structure that regulated the forms of evidence used in criminal trials and prohibited the use of particularly unreliable hearsay.[70] The confrontation right reflected a "preference for face-to-face confrontation at trial,"[71] which in turn generated a "rule of necessity[:] . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."[72] In the face of prosecutorial complaints,[73] the Court soon abandoned the unavailability requirement.[74] Once it did so, the prosecution's use of hearsay was consistent with the Confrontation Clause if adequate "indicia of reliability" ensured the hearsay's accuracy.[75] Statements covered by a "firmly rooted hearsay exception" were presumptively reliable.[76] Otherwise, the prosecution could introduce hearsay statements only if it showed "particularized guarantees" of the statements' accuracy.[77]

In practice, *Roberts* tended to equate the Confrontation Clause with non-constitutional hearsay law.[78] The "dominant theme" under *Roberts* "was that essentially all hearsay that satisfied traditional ('firmly rooted') exceptions had a free pass" from Sixth Amendment scrutiny[79]—and even recent exceptions were deemed "firmly rooted."[80] As one scholar has observed, "there was something profoundly unsatisfactory about looking at

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[68] *Id.*

[69] *Id.*

[70] *Id.* at 65–68.

[71] *Id.* at 63.

[72] *Id.* at 65.

[73] *See* Brief for the United States at 35–37, United States v. Inadi, 475 U.S. 387 (1986) (No. 84-1580), 1985 WL 669910, at *10 (arguing that admission of statements in conformity with the traditional co-conspirator rule does not violate the Confrontation Clause, and that Clause does not proscribe or regulate the admission of hearsay).

[74] *See Inadi*, 475 U.S. at 394.

[75] *Roberts*, 448 U.S. at 66.

[76] *Id.*

[77] *Id.*

[78] *See* WRIGHT & GRAHAM, *supra* note 64, § 6367 (discussing admissibility of different forms of hearsay under *Roberts*).

[79] Christopher B. Mueller, *Cross-Examination Earlier or Later: When Is It Enough to Satisfy* Crawford*?*, 19 REGENT U. L. REV. 319, 320 (2007); *see also* Miguel A. Méndez, Crawford v. Washington*: A Critique*, 57 STAN. L. REV. 569, 575 (2004) (describing the Court's treatment of the relationship between hearsay and the right to confrontation).

[80] *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 183 (1987) (holding the exception for co-conspirator statements was firmly rooted); United States v. Seeley, 892 F.2d 1, 2 (1st Cir. 1989) (holding the exception for declarations against penal interest was firmly rooted); Lenza v. Wyrick, 665 F.2d 804, 810 (8th Cir. 1981) (holding the exception for statements reflecting declarant's "state of mind" was firmly rooted).

hearsay doctrine as imposing one set of reliability criteria and the Confrontation Clause as imposing substantially the same standard, only different."[81]

B. "A Successful Blend of Originalism and Formalism"[82]

Crawford rejected the *Roberts* framework root and branch. In *Crawford*, a police officer interrogated Sylvia Crawford shortly after her husband Michael stabbed Kenneth Lee, who had tried to rape Sylvia several weeks earlier.[83] Sylvia's statements to the police officer were inconsistent with Michael's claim that he stabbed Lee in self-defense.[84] At trial, Michael refused to waive Washington's spousal privilege, which prevented Sylvia from testifying.[85] The privilege does not apply to out-of-court statements, so the state introduced a tape recording of Sylvia's interrogation to rebut Michael's claim that he acted in self-defense.[86]

The trial court concluded that use of the recording did not violate *Roberts*, because Sylvia had first-hand knowledge of the attack, was speaking in the heat of the moment, and was unlikely to lie to a police officer.[87] The Washington Court of Appeals reversed[88] and the Washington Supreme Court reversed again.[89] Each court reached different conclusions about the reliability of Sylvia's statements.[90]

The U.S. Supreme Court reversed a third time, holding that the admission of Sylvia's tape-recorded interrogation violated the Confrontation Clause.[91] In an opinion by Justice Scalia, the Court said that the lower courts' application of *Roberts* revealed "a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion."[92] *Roberts*'s fusion of the Confrontation Clause and the statutory hearsay rule led to a "[v]ague . . . manipulable" standard that was

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[81] Mueller, *supra* note 79, at 320.

[82] Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 192 (2005) (capitalization normalized).

[83] *Crawford*, 541 U.S. at 38; State v. Crawford, 54 P.3d 656, 658 (Wash. 2002) (en banc), *rev'd*, 541 U.S. 36. The State charged Michael with assault and attempted murder. *Crawford*, 541 U.S. at 40.

[84] *Crawford*, 541 U.S. at 39–40.

[85] *Id.* at 40.

[86] *Id.*

[87] *Id.*

[88] State v. Crawford, 107 Wash. App. 1025, 2001 WL 850119, at *1 (Ct. App. 2001), *rev'd*, 54 P.3d 656, *rev'd*, 541 U.S. 36.

[89] *Crawford*, 54 P.3d at 658.

[90] *See Crawford*, 541 U.S. at 40. *Compare Crawford*, 54 P.3d at 664 (finding Sylvia's testimony trustworthy), *with Crawford*, 2001 WL 850119, at *5 (finding Sylvia's testimony untrustworthy).

[91] *Crawford*, 541 U.S. at 69.

[92] *Id.* at 67.

incompatible with the "categorical constitutional guarantee[]" set out in the Confrontation Clause.[93] The *Roberts* standard "depart[ed]" from "the original meaning of the Confrontation Clause"[94] and was "so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations."[95]

These failings necessitated a return to first principles. Citing opinions by Justices Scalia, Clarence Thomas, and Stephen Breyer[96] and the scholarship of two law professors,[97] the Court set forth a lengthy account of the historical origins of the right of confrontation. Based on this account, the Court concluded that where "testimonial" evidence was at issue, the Sixth Amendment required that the accused be afforded the right to confront the "witness" responsible for the evidence, even if that person was not a witness who gave testimony in a legal proceeding.[98] The right was categorical. Any evidence containing a testimonial statement triggered a right of confrontation, regardless of how it was produced. Regardless of its reliability or importance to the case, testimonial evidence could be admitted without confrontation only if the individual responsible for the evidence was unavailable to testify at trial and the accused had a prior opportunity to cross-examine that individual.[99] The only narrow exceptions to this rule were those "established at the time of the founding."[100]

While holding that all "testimonial" statements implicated the Confrontation Clause,[101] the Court "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'"[102] "Various formulations" were possible.[103] The Court stated that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[104]

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[93] *Id.* at 67–68.

[94] *Id.* at 42.

[95] *Id.* at 62–63.

[96] *Id.* at 60–61 (citing Lilly v. Virginia, 527 U.S. 116, 140–43 (1999) (Breyer, J., concurring); White v. Illinois, 502 U.S. 346, 366 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment)).

[97] *Id.* at 61 (citing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 125–31 (1997); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998)).

[98] *Id.* at 68.

[99] *Id.*

[100] *Id.* at 54; *see also id.* at 62 (excepting forfeiture by wrongdoing); *id.* at 73 (excepting dying declarations).

[101] *Id.* at 50.

[102] *Id.* at 68.

[103] *Id.* at 51.

[104] *Id.*

Crawford thus promised three benefits. First, Confrontation Clause doctrine would henceforth be "faithful to the Framers' understanding."[105] Second, fidelity to the Clause's "categorical . . . guarantee[]" would simplify regulation of criminal evidence by eliminating judicial discretion to decide whether evidence could be admitted without an opportunity for confrontation.[106] Third, revitalized, simplified doctrine would protect defendants "against paradigmatic confrontation violations."[107]

Scholarly reaction to *Crawford* was generally favorable.[108] Writing shortly after the decision, one commentator praised Justice Scalia as "the unlikely friend of criminal defendants"[109] and presented *Crawford* as an example of the "successful blend of originalism and formalism."[110] *Crawford*'s "formalistic rule" turned on "simple, clear requirements of testimony, cross-examination, and unavailability, rather than ad hoc estimates of reliability."[111] The rule was "rooted in the historical record," and "serve[d] the historical goal of constraining judicial discretion and testing evidence before jurors' eyes."[112]

C. The Breakdown of Contemporary Confrontation Clause Jurisprudence

Post-*Crawford* jurisprudence did not deliver on these promises. This point is now widely recognized,[113] so I offer only a single example here and return to the breakdown of contemporary Confrontation Clause jurisprudence in Part III below.[114]

One of the first problems the Court grappled with following *Crawford* was how the revitalized confrontation right applied to reports of forensic testing.[115] Analysts—who may be unaware of whether their work will inculpate or exculpate a suspect—perform such testing in a controlled environment using standard procedures.[116] When analysts follow appropriate protocols, some forensic science disciplines—most notably Y-STR DNA

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[105] *Id.* at 59.

[106] *Id.* at 67.

[107] *Id.* at 60.

[108] *See, e.g.*, Symposium, Robert M. Pitler, Crawford *and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1 (2005).

[109] Bibas, *supra* note 82, at 183.

[110] *Id.* at 192.

[111] *Id.*

[112] *Id.*

[113] *See supra* notes 31–33 and accompanying text.

[114] *See infra* notes 350–447 and accompanying text.

[115] *See generally* Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington, 15 J.L. & POL'Y 791 (2007) (demonstrating that the intersection of expert testimony and *Crawford* has become a serious practical concern for lower courts).

[116] *See* Brian Caddy & Peter Cobb, *Forensic Science*, *in* CRIME SCENE TO COURT: THE ESSENTIALS OF FORENSIC SCIENCE 1, 10 (2d ed. 2004).

analysis—can identify the source of physical evidence with a high degree of accuracy and reliability.[117]

Because of its perceived reliability, many state evidence codes permit courts to admit reports of forensic testing as evidence under exceptions to the hearsay rule.[118] Under *Crawford*, however, a report's admissibility under the hearsay rule is only the first step of the analysis. If a report of forensic testing is deemed to contain a testimonial statement, the accused is entitled to confront the analyst (or analysts) responsible for the statement.[119] If the analyst does not—or cannot—testify, the report cannot be admitted.

Two cases decided shortly after *Crawford* implied that forensic reports categorically triggered a right to confront the authors of the reports. In 2009, in *Melendez-Diaz v. Massachusetts*, the Court held that three "certificates" reporting the results of drug testing were subject to the Confrontation Clause because they resembled affidavits and performed a function—establishing facts pertinent to guilt—similar to live trial testimony.[120] And in 2011, in *Bullcoming v. New Mexico*, the Court reached the same conclusion with respect to a "Report of Blood Alcohol Analysis" introduced in a prosecution for driving under the influence.[121] More consequentially, *Bullcoming* ruled that the prosecution cannot satisfy the confrontation requirement by calling a witness who is generally familiar with a laboratory's procedures but who lacks personal knowledge of the specific test results offered into evidence.[122]

In 2012, the temporary doctrinal stability ended with *Williams*.[123] As the Introduction notes, the central evidence in *Williams* was trial testimony by a forensic analyst who concluded that the defendant was the source of semen collected from a rape victim.[124] The analyst based her testimony on

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[117] *See generally* COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 133 (2009) [hereinafter *NAS REPORT*] (surveying research and proposing recommendations to improve the quality and reliability of forensic evidence).

[118] *See* Brief of the States of Alabama et al. as Amici Curiae in Support of Respondent, *Melendez-Diaz*, 557 U.S. 305 (No. 07-591), 2008 WL 4185394, at *1A (collecting statutes from forty-two states and the District of Columbia). The *Federal Rules of Evidence* do not specifically address reports of forensic testing but provide a hearsay exception for "a statement that . . . is made for—and is reasonably pertinent to—medical diagnosis or treatment; and . . . describes medical history; past or present symptoms or sensations; their inception; or their general cause." FED. R. EVID. 803(4).

[119] *Crawford*, 541 U.S. at 51.

[120] 557 U.S. at 308.

[121] *See* 131 S. Ct. 2705, 2716–17 (2011).

[122] *Id.* at 2710 ("The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.").

[123] *See* 132 S. Ct. at 2229–30 (plurality opinion).

[124] *See id.* at 2229–30; *supra* notes 18–23 and accompanying text.

her comparison of two DNA profiles. An Illinois state laboratory derived the first profile from a sample of the defendant's blood, which had been collected while he was incarcerated on other charges.[125] The analyst who generated this profile appeared as a trial witness and was cross-examined.[126] Cellmark Laboratories, a private laboratory that operated under contract with Illinois, generated the second profile from a rape kit collected shortly after the crime.[127] No Cellmark employees testified at trial.[128]

The question was simple—was testimonial evidence introduced in violation of *Crawford*, *Melendez-Diaz*, and *Bullcoming*?—but the Court splintered. In ninety-two pages of slip opinions, the justices offered four approaches to determining whether a report of forensic testing triggered a right to confront the analysts who performed the underlying testing.[129] None of the approaches attracted the support of a majority of justices.[130]

A four-justice plurality consisting of the Chief Justice John Roberts and Justices Anthony Kennedy, Breyer, and Samuel Alito offered two "independent" bases for concluding that the analyst's testimony did not violate the Confrontation Clause. The plurality's main rationale assumed that Cellmark's report was testimonial but never entered into evidence.[131] As the plurality read the trial transcript, the analyst who testified did not vouch for the Cellmark report or even suggest that it was derived from the evidence in the rape kit collected from the victim. Instead, the analyst merely opined that the DNA profiles in the Illinois and Cellmark reports matched.[132] In effect, her testimony was that *if* the Cellmark report was derived from semen in the victim's rape kit, Williams was the perpetrator.[133] Appreciating the limited purpose of the analyst's testimony required extraordinary sophistication on the part of the factfinder. But there was no concern about jury confusion in *Williams*, because the case was tried to the bench and the trial judge was presumed to have applied the rules of evidence correctly.[134]

The limited scope of the analyst's testimony raised a question about the sufficiency of the evidence: If the Cellmark report did not enter into evidence, how did the judge who presided over Williams's trial know that report was derived from the victim's rape kit? But Williams did not argue that

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[125] *Williams*, 132 S. Ct. at 2229 (plurality opinion).
[126] *Id.* at 2230.
[127] *Id.* at 2229.
[128] *Id.* at 2228–29.
[129] *See* Williams v. Illinois, No. 10-8505, slip op. (U.S. June 18, 2012); *see also Williams*, 132 S. Ct. at 2221–76.
[130] *Williams*, 132 S. Ct. at 2227 (plurality opinion).
[131] *Id.* at 2236.
[132] *Id.*
[133] *Id.* at 2236–37.
[134] *See id.*

Cellmark could have accessed Williams's DNA from a source other than the rape kit.[135] The coincidence that Williams's DNA matched the profile in Cellmark's report provided a sufficient basis for the trial court to conclude that Cellmark had in fact tested the rape kit.[136] This analysis conflicted with *Bullcoming*, which held that the accused is entitled to be confronted with the "particular scientist" who conducted a forensic test whose results are introduced at trial.[137]

Perhaps because of this conflict, the plurality offered a second rationale for upholding the admission of the Cellmark DNA report. On this rationale, it did not matter whether the Cellmark report entered into evidence, because the report was nontestimonial in any event.[138] This was because Cellmark's analysts were unaware of how their work product would be used.[139] Because the analysts did not know whether their report would inculpate or exculpate Williams, they lacked the "primary purpose" of generating evidence for use in a criminal prosecution, and the Clause did not apply.[140] This rationale conflicted with both *Melendez-Diaz* and *Bullcoming*.[141]

Justice Elena Kagan, joined by three other justices, dissented.[142] In her view, the plurality's suggestion that the testifying witness's opinion was "independent" of the Cellmark report was fiction.[143] Furthermore, *Melendez-Diaz* and *Bullcoming* foreclosed the conclusion that the Cellmark report was nontestimonial.[144]

Justice Thomas cast the deciding vote. Like the dissent, he believed the testifying expert's testimony could not be uncoupled from the Cellmark re-

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[135] *Id.* at 2238.

[136] *See id.*

[137] *See* 131 S. Ct. at 2710.

[138] *Williams*, 132 S. Ct. at 2242 (plurality opinion).

[139] *Id.* at 2244.

[140] *Id.*

[141] *See id.*; *Bullcoming*, 131 S. Ct. at 2724 (Kennedy, J., dissenting); *Melendez-Diaz*, 557 U.S. at 345 (Kennedy, J., dissenting). In both of those cases, the dissents had advanced the same argument. Justice Anthony Kennedy stated in *Melendez-Diaz*: "Often, the analyst does not know the defendant's identity, much less have personal knowledge of an aspect of the defendant's guilt. The analyst's distance from the crime and the defendant, in both space and time, suggests the analyst is not a witness against the defendant in the conventional sense." 557 U.S. at 345 (Kennedy, J., dissenting). In *Bullcoming*, Justice Kennedy observed:

> In the New Mexico scientific laboratory where the blood sample was processed, analyses are run in batches involving 40–60 samples. Each sample is identified by a computer-generated number that is not linked back to the file containing the name of the person from whom the sample came until after all testing is completed. The analysis is mechanically performed by the gas chromatograph . . . .

Bullcoming, 131 S. Ct. at 2724 (Kennedy, J., dissenting).

[142] *Williams*, 132 S. Ct. at 2270 (Kagan, J., dissenting).

[143] *Id.*

[144] *Id.* at 2265–66 (citing *Bullcoming*, 131 S. Ct. 2705; *Melendez-Diaz*, 557 U.S. 305).

port.[145] He also rejected the plurality's conclusion that the Cellmark report was nontestimonial, reasoning that Cellmark's employees must have known their analysis might be used in a criminal prosecution.[146] Nevertheless, the Cellmark report lacked the "formality" and "solemnity" that Justice Thomas alone believes are essential to the applicability of the Confrontation Clause.[147] Thus, Justice Thomas agreed with the plurality's bottom-line conclusion that the report was nontestimonial.[148]

Though five justices had voted to uphold Williams's conviction, Justice Thomas's rejection of the plurality's reasoning led Justice Kagan to conclude their conflicting writings gave no way to determine when the use of forensic evidence complied with the Confrontation Clause.[149] Accordingly, Justice Kagan made an extraordinary announcement: the dissenters would give no precedential effect to the Court's judgment.[150]

As the Kagan dissent suggests, the fractured writings in *Williams* do not yield a consistent answer as to whether a report of forensic analysis can be admitted without giving the accused an opportunity to be confronted with the report's authors. Following *Williams*, the Supreme Court's case law supports four approaches to that issue. They variously privilege: (1) the "independence" of expert testimony that relies on the report (the *Williams*'s plurality's primary rationale);[151] (2) the "primary purpose" of analysts who conducted the testing described in the report (the *Williams*'s plurality's alternate rationale);[152] (3) the report's functional similarity to trial testimony (the *Melendez-Diaz* and *Bullcoming* rationale);[153] and (4) the formality of the report (Justice Thomas's approach in *Williams*).[154]

The combination of these approaches and voting blocs yields sixteen possible outcomes for the basic fact pattern at issue in *Melendez-Diaz*, *Bull-*

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[145] *Id.* 2256–57 (Thomas, J., concurring in the judgment).

[146] *Id.* at 2261.

[147] *Id.* at 2260.

[148] *Id*.

[149] *Id.* at 2277 (Kagan, J., dissenting). Justice Kagan noted that Justice Thomas's concurrence rejected "every aspect of [the plurality's] reasoning and every paragraph of its explication." *Id.* at 2265.

[150] *See id.* ("[U]ntil a majority of this Court reverses or confines [*Melendez-Diaz* and *Bullcoming*], I would understand them as continuing to govern, in every particular, the admission of forensic evidence").

[151] *See id.* at 2235–40 (plurality opinion) (privileging the ability of a testifying witness to offer an independent opinion about the source of physical evidence based on personal knowledge).

[152] *See id.* at 2242–44 (privileging the prosecutorial or non-prosecutorial purpose of the underlying testing).

[153] *See id.* at 2265 (Kagan, J., dissenting, joined by Scalia, Ginsburg, and Sotomayor, JJ.) (proposing to consider whether the forensic report substitutes for testimony that could be given by analysts involved in the underlying testing).

[154] *See id.* at 2255 (Thomas, J., concurring in the judgment) (considering the formality of the report).

coming, and *Williams*.[155] In four of these scenarios post-*Williams*, there are not five votes to admit nor deny the report.[156] Six of the scenarios result in the exclusion of a forensic report if the accused is not given an opportunity to confront the report's author, and the remaining six result in admitting the report.

The uncertainty concerning reports of forensic testing[157] well illustrates the current state of Confrontation Clause jurisprudence.[158] Such reports, moreover, are only one part of the Court's post-*Crawford* docket. Part III demonstrates that the Court has encountered similar difficulties articulating how *Crawford* applies to statements made to government officers in the aftermath of a crime.[159] In other important areas, involving for example autopsy reports,[160] statements to medical personnel,[161] and non-hearsay state-

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[155] Where approaches (1) and (2) conflict neither is counted in the analysis in the text, because it is unclear whether the *Williams* plurality could attract a fifth vote to limit or overrule *Melendez-Diaz* and *Bullcoming*. Of course, rather than counting votes one could identify *Williams*'s holding by identifying "that position taken by those [justices] who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977). Yet the fact that none of the opinions supporting the judgment in *Williams* did so on "narrow" grounds complicates this analysis.

[156] In these fact patterns, the *Williams* plurality's rationales conflict, and the formality of a forensic report would not break the tie. Thus, whether the Court would admit the report is unclear.

[157] *See* State v. Michaels, 95 A.3d 648, 665 (N.J. 2014) ("[T]he fractured holdings of *Williams* provide little guidance in understanding when testimony by a laboratory supervisor or co-analyst about a forensic report violates the Confrontation Clause.").

[158] The occasional unanimous decision does not detract from confrontation doctrine's underlying instability. For example, in 2015 in *Ohio v. Clark*, the Court unanimously concluded that a three-year-old's statements to daycare teachers to the effect that his stepfather had beaten him were nontestimonial and therefore did not implicate the Confrontation Clause. *See* 135 S. Ct. 2173, 2177 (2015). In support of this conclusion, the Court observed that although the child's statements "had the natural tendency to result in Clark's prosecution," there was "no indication that the primary purpose of the conversation was to gather evidence for [that] prosecution." *Id.* at 2181–83. Evidence of child abuse created an "ongoing emergency . . . . [T]he immediate concern was to protect a vulnerable child who needed help." *Id.* at 2181. Ohio teachers have a statutory duty to report child abuse to police, but their questions to the child victim were "caring"; the teachers "undoubtedly would have acted with the same purpose whether or not they had a state-law duty to report abuse." *Id.* at 2182–83; *see* OHIO REV. CODE ANN. § 2151.421(A)(1) (West 2015) (imposing a duty on certain officials to report suspected abuse of children). Statements by "very young" children "will rarely, if ever, implicate the Confrontation Clause." *Clark*, 135 S. Ct. at 2182. Moreover, "statements to individuals who are not law enforcement officers . . . are much less likely to be testimonial than statements to law enforcement officers." *Id.* at 2181. Which of these points was essential to the Court's conclusion that the Confrontation Clause did not apply was not obvious. The conclusion that the child's statements were nontestimonial was based on "all the circumstances." *Id.*

[159] *See infra* notes 350–377 and accompanying text.

[160] *See, e.g.*, United States v. Feliz, 467 F.3d 227, 236 (2d Cir. 2006), *cert. denied*, 549 U.S. 1238 (2007) (holding autopsy reports are subject to Confrontation Clause requirements).

[161] *See, e.g.*, United States v. Peneaux, 432 F.3d 882, 893 (8th Cir. 2005), *cert. denied*, 549 U.S. 828 (2006) (holding the statement was not subject to Confrontation Clause requirements).

ments,[162] the Court has gone a decade without granting certiorari to elaborate *Crawford*'s meaning.

Post-*Crawford* Confrontation Clause jurisprudence, then, is far from the "successful blend of originalism and formalism" predicted immediately following *Crawford*.[163] As regulation and applied constitutional theory, *Crawford* has failed.

II. WHO ARE CONFRONTATION CLAUSE "WITNESSES"?: HISTORICAL CONTEXT AND ORIGINAL UNDERSTANDING

What happened? As I will argue, the failure of the *Crawford v. Washington* regime created by the Supreme Court in 2004 is not primarily a failure of constitutional interpretation. That is, it was not the Court's failure to appreciate the Clause's textual meaning that precipitated the breakdown in Confrontation Clause jurisprudence.[164] Nevertheless, it is only with an understanding of the Clause's textual and historical meaning that one can understand *Crawford*'s functional logic, the decision's analytical oversights, and the ramifications of those oversights for confrontation doctrine and constitutional theory.

This Part therefore demonstrates that the textual and historical meaning of the Clause in no way compels the Court's testimonial rule. Expanding on an understanding first articulated by the Massachusetts Supreme Judicial Court in 1836[165] and later advanced in differing forms by Dean John Henry Wigmore,[166] the second Justice John Marshall Harlan,[167] and Professor Akhil Reed Amar,[168] I show that those who enacted the Sixth Amendment most likely understood the Confrontation Clause to give the accused a right to confront ordinary witnesses who appeared in a legal proceeding and gave live testimony. They would not have understood the accused's "right . . . to be confronted with the witnesses against him" to subject anyone who generates "testimonial" evidence to confrontation.[169] Nor would they have

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[162] *See, e.g.*, People v. Combs, 101 P.3d 1007, 1020 (Cal. 2004), *cert. denied*, 545 U.S. 1107 (2005) (holding non-hearsay statements are not subject to Confrontation Clause).

[163] Bibas, *supra* note 82, at 192.

[164] *See, e.g.*, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMM. 95, 101 (2010) (distinguishing interpretation of a constitutional provision from the construction of implementing doctrine that carries the provision's meaning into effect).

[165] *See* Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 437–38 (1836).

[166] *See* 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1373, at 1711–12 (1904).

[167] *See* Dutton v. Evans, 400 U.S. 74, 94–95 (1970) (Harlan, J., concurring in the result).

[168] *See* Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045–46 (1998); Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 647 (1996) [hereinafter Amar, *Foreword*].

[169] *Cf.* Crawford v. Washington, 541 U.S. 36, 53–54 (2004) (establishing the "testimonial rule").

understood that right to define what evidence was or the conditions under which non-witness evidence could be admitted.

Section A addresses threshold questions about interpretation of the Confrontation Clause.[170] Sections B and C describe the historical context in which the Sixth Amendment was adopted, and show that—because of the framing generation's understanding of evidence—the Clause would have been understood to regulate only the testimony of ordinary witnesses.[171] Section D surveys historical evidence that confirms the accuracy of this interpretation.[172]

A. Procedural and Regulatory Models of the Confrontation Clause

The central interpretative question presented by the Confrontation Clause is what the Clause means by a "witness" against the accused.[173] The Clause's applicability depends crucially on whether a person who makes a statement used as evidence is a "witness." If so, the Clause by its plain terms gives the accused the right to be confronted with that person. If not, the Clause has no application.

Initially, it is clear that the Confrontation Clause does not use the term "witnesses" in the sense familiar from everyday life. We might speak of "witnesses" to a crime or a car accident or the signing of a will, who have first-hand knowledge of the event. But the Clause does not use "witnesses" in this "eyewitness" sense. Its reference to "witnesses *against* [*the accused*]"[174] implies that a person not only have information about a historical fact, but also that the information be used for a particular purpose—to prove guilt.[175]

The distinction between eyewitnesses and people who might be called "accusatory" witnesses is apparent from the Sixth Amendment's text. Beyond this, interpretation of the Confrontation Clause is more difficult. As the Supreme Court recognized in *Ohio v. Roberts*, the modern law of evi-

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[170] *See infra* notes 173–183 and accompanying text.

[171] *See infra* notes 184–257 and accompanying text.

[172] *See infra* notes 258–344 and accompanying text.

[173] *See* U.S. CONST. amend. VI. The Confrontation Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.* "The Supreme Court has interpreted 'confronted' to mean, more or less, 'cross-examined in the defendant's presence.'" David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 7 n.29, 37 (citing *Dutton v. Evans*, 400 U.S. 74, 95 (1970) (Harlan, J, concurring in the result); Davis v. Alaska, 415 U.S. 308, 316 (1974)). Therefore the central interpretive question involves the meaning of "witnesses."

[174] U.S. CONST. amend. VI (emphasis added).

[175] *See* Amar, *Foreword*, *supra* note 168, at 647. As Professor Amar observes, "If I tell my mom what I saw yesterday, and she later testifies in court, I am not the witness; she is." *Id. But see* Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. Rev. 1865, 1881–87 (2012) (arguing that "witnesses against the accused" extends to eyewitnesses).

dence permits the use of many forms of evidence other than testimony of ordinary witnesses.[176] A general theory of the Confrontation Clause must explain whether and how the Clause applies to this evidence.[177]

In approaching that question, it is useful to contrast two theories of the Confrontation Clause: the "regulatory" model and the "procedural" model. Under the regulatory model, the Clause gives the accused the right to confront individuals who make particular *kinds of statements* that are used to establish guilt.[178] This Article uses the term "regulatory" model, because this interpretation results in the Clause regulating what evidence consists of and the conditions under which evidence may be admitted. If the person responsible for a covered statement does not appear as a trial witness (and no exception applies), the statement may not be introduced as evidence. An evidentiary ruling made by Chief Justice John Marshall at Aaron Burr's 1807 conspiracy trial in the Circuit Court of the District of Virginia captures the "regulatory" view: "I know not . . . why a man should have a constitutional claim to be confronted with the witnesses against him," Marshall wrote, "if mere verbal declarations, made in his absence, may be evidence against him."[179]

Alternatively, "witnesses against [the accused]" might refer to persons who appear in a legal proceeding and give live testimony.[180] Under this "procedural" model, the Confrontation Clause applies only to testimony of individuals who are recognizably "witnesses against [the accused]." With respect to testimony of such witnesses, the Clause guarantees a right of confrontation. With respect to other forms of evidence, the Clause is silent. It does not address whether the person responsible for generating evidence must be made available for confrontation, nor does it address the kinds of

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[176] *See* 448 U.S. 56, 63 (1980) (stating that the Clause, if applied literally, would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme"), *abrogated by Crawford*, 541 U.S. 36.

[177] *See* Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation Clause*, 17 HASTINGS CONST. L.Q. 383, 385 (1990) (describing the two different approaches the Court has used to apply the Confrontation Clause).

[178] *See, e.g.*, Brief for Petitioner at 23, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 21939940, at *23 (arguing that the Confrontation Clause applies to "*ex parte* in-court testimony or its functional equivalent"); Richard D. Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. PA. L. REV. 1171, 1239–40 (2002) (arguing that the "the core idea behind the Clause is to ensure that those who provide testimony against the accused do so openly, under oath, in the presence of the accused, subject to examination by the accused, and, if reasonably possible, at trial").

[179] United States v. Burr, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694).

[180] *See Witness*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/witness [http://perma.cc/NR28-2G28] (defining "witness" as "a person who makes a statement in a court about what he or she knows or has seen"); *see also Witness*, AM. HERITAGE DICTIONARY ENG. LANGUAGE, https://www.ahdictionary.com/word/search.html?q=witness&submit.x=38&submit.y=25 [https://perma.cc/JG4T-8XVD] (defining "witness" as "[o]ne who is called on to testify before a court").

information that can be used as evidence of a criminal defendant's guilt. This interpretation is captured by an 1836 decision of the Massachusetts Supreme Judicial Court.[181] The Confrontation Clause on this view "was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of the common law."[182] Whether statements by a person who was not a witness were "competent evidence" depended on the common law of evidence, not the confrontation right.[183]

B. The Original Understanding

The historical context in which the Sixth Amendment was adopted strongly suggests that the procedural model captures the Confrontation Clause's textual and historical meaning. At the framing, criminal evidence generally consisted of witness testimony, and a right of confrontation would have corrected a practice—the use of unconfronted witness testimony taken in pre-trial proceedings—that framing-era lawyers were familiar with. Within this context, the accused's right "to be confronted with the witnesses against him" would have been understood to apply to ordinary witnesses—nothing more, nothing less.

1. "Evidence" at the Framing

The framing-era criminal trial differed from its modern counterpart in important ways.[184] Public, bureaucratic police departments did not yet exist, so private individuals performed many law enforcement functions.[185] At times, a private "prosecutor" rather than a government lawyer represented

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[181] *See Richards*, 35 Mass. (18 Pick.) at 434 (applying Massachusetts Declaration of Rights' Confrontation Clause: the accused shall have the right to "meet the witnesses against him, face to face").

[182] *Id.* at 437.

[183] *See id.*

[184] *See generally* J.M. BEATTIE, THE FIRST ENGLISH DETECTIVES: THE BOW STREET RUNNERS AND THE POLICING OF LONDON, 1750–1840 (2012); GOEBEL & NAUGHTON, *supra* note 4141; JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2005) [hereinafter LANGBEIN, ORIGINS]; PETER KING, CRIME, JUSTICE, AND DISCRETION IN ENGLAND, 1740–1820 (2000); ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880 (Thomas A. Green ed., 1989); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1 (1983).

[185] *See, e.g.*, BEATTIE, *supra* note 184, at 235–52 (describing the origins of London's Metropolitan Police force); STEINBERG, *supra* note 185, at 92–149 (describing the origins of Philadelphia Police Department); *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993) (describing the development of the U.S. criminal justice system from the colonial period to the present).

the state.[186] The accused was not consistently afforded the right to counsel.[187] Non-statutory crime could be prosecuted.[188]

For purposes of understanding the Confrontation Clause, however, the most important feature of the framing-era criminal trial is the understanding of evidence upon which it was premised. Lawyers today tend to understand evidence as any source of information that tends to prove or disprove the accused's guilt that can be used without violating the law.[189] Factfinders in modern criminal trials accordingly consider a wide range of materials: statements to police officers and other agents of the government, 911 calls, video surveillance, documents, physical objects, expert reports, and, of course, testimony of witnesses who appear and testify, among other things.[190]

In the late eighteenth century, attorneys and jurists understood evidence differently.[191] They believed that most sources of information were legally irrelevant to the determination of guilt, and insisted on proving facts through *viva voce* testimony of live witnesses.[192] A judge of the Old Bailey, London's main criminal court, captured this understanding when he wrote in 1789 that "[t]he most common and ordinary species of legal evidence consists of the depositions of witnesses taken on oath before the Jury, in the face of the Court, in the presence of the prisoner, and received under all the advantages that examination and cross-examination can give."[193] In his landmark 1828 dictionary, Noah Webster expressed much the same view: "The declarations of a witness furnish evidence of facts to a court and jury . . . ."[194] The two existing historical studies of colonial criminal procedure, which focus on New York and New Jersey, likewise reflect a witness-centric understanding of evidence.[195] Minute entries from colonial criminal trials reproduced in those studies do not distinguish between witness testimony and other forms of evidence; they describe witnesses who testified for the

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[186] FRIEDMAN, *supra* note 185, at 21; LANGBEIN, ORIGINS, *supra* note 184, at 40; Thomas, *supra* note 41, at 686–91.

[187] *See* FRIEDMAN, *supra* note 185, at 57–58; LANGBEIN, ORIGINS, *supra* note 184, at 167–77.

[188] *See generally* United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812) (first holding that U.S. courts may not recognize common law crimes).

[189] In the language of the *Federal Rules*, information is "relevant" and therefore admissible as evidence if it "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." FED. R. EVID. 401.

[190] *See generally* INGRAM, *supra* note 44 (detailing forms of evidence used in modern criminal proceedings).

[191] LANGBEIN, ORIGINS, *supra* note 184, at 236–37.

[192] *See* Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149, 1151 (1990).

[193] R v. Woodcock (1789) 168 Eng. Rep. 352, 352.

[194] 1 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 76 (1828), *available at* https://archive.org/stream/americandictiona01websrich#page/692/mode/2up [https://perma.cc/9F88-QFJP].

[195] *See* GOEBEL & NAUGHTON, *supra* note 41, at 629 n.81; Thomas, *supra* note 41, at 675.

prosecution simply as "Evidences for the King" and witnesses for the defense as "Evidences" for the accused.[196] For example, the minutes for the trial of Elisabeth Goble, tried in a New Jersey court in 1752 "for murdering a bastard child," read: "Evidences for the Crown: Mary Rogers, Jemima Stay, Phebe Cole, Robert Arnold and Elisabeth Arnold; evidences for the defendant, Doctor Elijah Gillett."[197]

The assumption that evidence consisted of witness testimony had origins in the oath. In the seventeenth and eighteenth centuries, the oath was thought to provide a uniquely powerful guarantee that a declarant's statements were true.[198] A late seventeenth-century tract opined that an oath before God was "[t]he greatest assurance, that a Man can give of the truth of his Testimony; the last result, the highest and utmost appeal that we can make."[199] Perjury was a grave sin: "[I]f one forswear one's self, one virtually in so doing utterly forsakes God, and his Mercy and Truth."[200]

By contrast, statements that were not made under oath were considered too casual and ephemeral to rank as evidence. Lord Baron Geoffrey Gilbert, author of the leading eighteenth-century evidence digest, wrote that "nothing can be more 'indeterminate' than loose and wandering 'testimonies' taken upon the uncertain report of the talk and discourse of others."[201] Unsworn statements were "of no value in a court of justice, where all things were determined under the solemnity of an oath."[202]

The centrality of the oath is reflected in *King v. Brasier*,[203] an appeal decided by the twelve judges of England's common law courts in 1779, twelve years prior to the enactment of the American Bill of Rights. The defendant had been convicted of raping a child based on testimony "by the

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[196] GOEBEL & NAUGHTON, *supra* note 41, at 629 n.81; Thomas, *supra* note 41, at 675. The same equivalence between witnesses and evidence writ large is evident in a 1726 letter from New York Attorney General Richard Bradley to Deputy Attorney General Evert Wendell. *See* GOEBEL & NAUGHTON, *supra* note 41, at 630. Advising Wendell on how to prosecute a forcible entry case, Bradley directs Wendell to bind over the victims for trial and asks: "Have they not sons or daughters or [] servants who saw it? If they have, such are the best evidence . . . . Pray bind them to all give evidence for the King on the information filed last October term . . . ." *Id.* (quoting Letter from Richard Bradley, N.Y. Attorney Gen., to Evert Wendell, N.Y. Deputy Attorney Gen. (Jan. 21, 1726).

[197] Thomas, *supra* note 41, at 675.

[198] *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 595 (1997); *see also* 2 GILBERT, *supra* note 42, at 889.

[199] Fisher, *supra* note 198, at 606 n.104 (quoting JOHN ALLEN, OF PERJURY 15 (1682)).

[200] *Id.* (quoting JOHN DAUNCEY, A GUIDE TO ENGLISH JURIES 49–50 (1682)).

[201] 2 GILBERT, *supra* note 42, at 890. Gilbert wrote the treatise near the beginning of the eighteenth century. It was published in six English and U.S. editions between 1754 and 1801. *See* T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 504–05 (1999) (providing bibliographical information).

[202] 2 GILBERT, *supra* note 42, at 889.

[203] R v. Brasier (1779) 168 Eng. Rep. 202, 202.

mother of the child, and by another woman who lodged with her, to whom the child, immediately on her coming home, told all the circumstances of the injury which had been done to her."[204] At trial, the mother and her lodger repeated statements the child made to them in the immediate aftermath of the rape.[205] However, the child victim "was not sworn or produced as a witness."[206] The judges found the testimony defective because the child was not sworn, and "no testimony whatever can be legally received except upon oath."[207] Because the child's statements were not made under oath, they were not legal evidence. The judges directed a pardon for the accused.[208]

The assumption that evidence consisted of witness testimony was also linked to the "best evidence" principle, which grew out of pleading practice in civil cases.[209] As evidence began to develop into a distinct field of law, jurists insisted that facts be established through the "best" evidence a fact permitted.[210] Following the early empiricists,[211] the best evidence of historical events not memorialized in formal documents was thought to be testimony of witnesses who experienced those events firsthand.[212]

The importance of the oath and the best evidence principle combined in the common law's most distinctive evidentiary practice: its seemingly categorical prohibition of hearsay.[213] Today, hearsay has a precise, technical

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[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.* The opinion did not refer to the child's statement as hearsay or mention the developing "rule" against hearsay. *See id.* at 202–03.

[208] *Id.* at 203. Recognizing the obvious injustice of the result, the judges ruled that a seven-year-old *could* be sworn as a witness if she understood the nature and consequences of the oath. *Id.* at 202. This holding did not affect the outcome of *Brasier*, because the victim had not been sworn.

[209] *See* LANGBEIN, ORIGINS, *supra* note 184, at 236; *see also* Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 277 (1988); David L. Noll, *A Reader's Guide to Pre-Modern Procedure*, 65 J. LEGAL EDUC. (forthcoming 2015).

[210] *See* Gallanis, *supra* note 201, at 505–09. The modern "best evidence" principle simply requires originals of certain types of evidence to be used, but accurate duplications will usually suffice. *See* FED. R. EVID. 1001–1004.

[211] *See* DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING (1748), *reprinted in* THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 585, 593–94 (Edwin A. Burt ed., 1939) ("[A]ll th[e] creative power of the mind amounts to no more than the faculty of compounding, transposing, augmenting, or diminishing the materials afforded us by the senses and experience"); JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1690), *reprinted in* THE ENGLISH PHILOSOPHERS FROM BACON TO MILL, *supra*, at 238 ("All ideas come from sensation or reflection.").

[212] Gilbert wrote that "there is that faith and credit to be given to the honesty and integrity of a credible and disinterested witness attesting any fact" that the witness personally experienced "that the mind equally acquiesces therein as on a knowledge by demonstration" from first-hand experience. 1 GILBERT, *supra* note 42, at 3.

[213] *See* LANGBEIN, ORIGINS, *supra* note 184, at 233–46; WIGMORE, *supra* note 166, § 1361; Gallanis, *supra* note 201, at 504–05.

definition. As formulated in the *Federal Rules of Evidence*, it is (1) a statement not made at trial, (2) offered "to prove the truth of the matter asserted" in the statement, that (3) does not fall within a recognized exclusion from the hearsay rule.[214] Framing-era lawyers understood "hearsay" more expansively and used the term to refer to practically any evidence generated outside the context of a legal proceeding that was introduced at trial.[215] Moreover, hearsay was a colloquialism rather than a term of art.[216]

As a formal matter, framing-era courts' position on the evidentiary value of hearsay was uncompromising. In both England and the colonies, judges repeatedly stated that hearsay was "no Evidence."[217] As this formulation implies, the idea was *not* that hearsay, while probative of guilt, required regulation because of its propensity to mislead the jury.[218] Rather, hearsay seems to have been treated the way a modern court would treat testimony based on psychic revelation. Even if the jury heard this "evidence," it was inadequate as a matter of law—i.e., "no evidence"—to prove a fact that was part of the prosecution's burden of proof.[219]

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[214] FED. R. EVID. 801; *see also id.* rr. 802–807 (setting out modern hearsay rule and exceptions to it).

[215] *See* Thomas Y. Davies, *Revisiting the Fictional Originalism in* Crawford*'s "Cross-Examination Rule": A Reply to Mr. Kry*, 72 BROOK. L. REV. 557, 561 n.15 (2007).

[216] Professor John Langbein recounts that as late as 1753, the reporter of the *Old Bailey Session Papers* "was so unfamiliar with the term 'hearsay' that he misspelled it." LANGBEIN, ORIGINS, *supra* note 184, at 236.

[217] *See* 2 GILBERT, *supra* note 42, at 889; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *368 ("[N]o evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as proof of any general customs, or matters of common tradition or repute) the courts admit of hearsay evidence, or an account of what persons deceased have declared in their lifetime: but such evidence will not be received of particular facts."); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 427 (7th ed. 1795) ("It seems agreed that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross-examination; and therefore it seems a settled rule, that it shall never be made use of but only by way of inducement or illustration of what is properly evidence."). Langbein collects many examples of cases in which judges disapproved of the use of hearsay on the ground that it was not evidence. LANGBEIN, ORIGINS, *supra* note 184, at 235 ("What another told you is not evidence." "What his Father told you is no Evidence." "That's no Evidence. You must not swear what you heard, but only what you know."). For American examples, see Gregory v. Baugh, 25 Va. (4 Rand.) 611, 636 (1827) ("The fundamental rule of evidence is, that the best evidence which the nature of the case will admit of, must be produced; and this rule is without exception. Another rule is, that no evidence can be received but upon oath; and this excludes hearsay evidence in general."), and Wilson v. Boerem, 15 Johns. 286, 286 (N.Y. Sup. Ct. 1818) ("The declarations *in extremis*, of a person who would, if living, be a competent witness, are inadmissible evidence, . . . with the single exception of cases of homicide, when the declaration of the deceased, after the mortal blow, as to the fact of the murder, is admitted.").

[218] *See* Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974) (providing a classic statement of this rationale).

[219] LANGBEIN, ORIGINS, *supra* note 184, at 236.

Notwithstanding the legal nothingness of hearsay, eighteenth-century judges were far from rigorous in excluding it in criminal trials. Indeed, a number of cases for which records survive involve flagrant use of hearsay.[220] The exclusion of defense counsel[221] undoubtedly accounts for some of these cases.[222] Other examples perhaps reflect the fact that the participants in framing-era trials understood that hearsay was no evidence. Akin to the judge in a modern bench trial, who presumably applies the rules of evidence without the assistance of objections, participants in framing-era trials may have heard hearsay yet understood that it could not reliably serve as evidence of guilt or innocence.[223]

Eighteenth-century courts' relaxed approach to excluding hearsay has prompted scholarly debate over when the hearsay "rule"—more precisely, the practice of preventing the jury from hearing hearsay to prevent influence by improper considerations—acquired the force of law.[224] The primitive nature of appellate decision-reporting in the framing era complicates the question, and rules of evidence "were largely subject to discretionary waiver by the presiding judge, because there was no realistic sanction for ignoring them."[225] Nonetheless, the inconsistent exclusion of hearsay evi-

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[220] *See* LANGBEIN, ORIGINS, *supra* note 184, at 238–39 (collecting examples of hearsay being used without objection in Old Bailey proceedings); *see also* GOEBEL & NAUGHTON, *supra* note 41, at 642–43 (collecting examples of hearsay being used without objection in criminal trials from colonial New York); Gallanis, *supra* note 201, at 512–15 (collecting examples of hearsay being used without objection in Old Bailey proceedings).

[221] Until the 1730s, defense counsel were routinely excluded from felony cases in England. LANGBEIN, ORIGINS, *supra* note, at 184, at 106–07. In a sample of forty-eight cases tried by New Jersey's Court of Oyer & Terminer, George Thomas found that half of defendants were represented by counsel. Thomas, *supra* note 41, at 688. Kenneth Thomas's and Larry Eig's annotated Constitution contends that colonial practice with respect to the provision of counsel varied, "ranging from the existent English practice to appointment of counsel in a few states where needed counsel could not be retained." THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1638–39 (Kenneth R. Thomas & Larry M. Eig eds., 2013).

[222] Without assistance of counsel, defendants were unlikely to object to the introduction of statements that were not, technically, evidence. *See* Gallanis, *supra* note 201, at 538–40.

[223] *See* John H. Langbein, *Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 301–02 (1978) (discussing the Old Bailey case of Adam White, where the jury heard hearsay that the defendant raped a child but gave the statement no credit); *see also* Williams v. Illinois, 132 S. Ct. 2221, 2236–37 (2012) (plurality opinion) (illustrating modern bench trial practice).

[224] Wigmore concluded, based on review of state trials and civil cases, that the rule against hearsay "gain[ed] a complete development and final precision [by] the early 1700's." John H. Wigmore, *The History of the Hearsay Rule*, 7 HARV. L. REV. 437, 437 (1904). Based on a review of the *Old Bailey Session Papers*, Langbein more recently concluded that there was "greater sensitivity" to the hearsay rule in criminal cases by the 1730s, though hearsay continued to be heard through the 1780s. LANGBEIN, ORIGINS, *supra* note 184, at 234–42. Gallanis concluded based on a review of evidence treatises and reported decisions that "very little change in the *application* of hearsay law occurred between 1754 and 1780, but that the 1780s were a period of considerable activity and that by 1800 much of the modern approach to hearsay was already in place." Gallanis, *supra* note 201, at 503 (emphasis added).

[225] Sklansky, *supra* note 173, at 5.

dence does not appear to have affected the framing era's understanding of what constituted evidence. Treatises and court opinions almost universally held that hearsay was "no evidence,"[226] with only a handful of exceptions discussed immediately below.

2. Use of Pre-Trial Statements

Despite the "insistent orality" of the eighteenth-century criminal trial,[227] statements made before trial were sometimes introduced as evidence of the accused's guilt. Furthermore, the use of those statements would in some circumstances deprive the accused of the opportunity to be confronted with the witnesses against him or her.

The most important category of pre-trial statements consisted of those made in proceedings under the "Marian" bail and committal statutes.[228] Named for Queen Mary I and enacted in the mid-sixteenth century, the Marian statutes regulated the process of pre-trial investigation and detention in England through the nineteenth century.[229]

The central feature of Marian procedure was a pre-trial hearing used to initiate a criminal prosecution and freeze the evidence when events were fresh in the witnesses' minds. The statutes authorized the local justice of the peace ("JP")—typically a man of stature in the community, though not necessarily a judge[230]—to hear criminal complaints brought by private parties.[231] When a private "prosecutor" brought a suspect (the "prisoner") before the JP, the JP examined and gathered information from the prisoner regarding the facts and circumstances of the crime.[232] If the statutory requirements were satisfied, the JP would "bind over" the prosecutor, the accused, and the material witnesses for trial, in a process akin to modern-day bail.[233] The defendant would be jailed, and the prosecutor and witnesses ordered to appear for trial with their appearance perhaps secured by a

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[226] *See supra* note 217 and accompanying text (explaining that framing-era courts in both England and the colonies found hearsay to be "no evidence").

[227] LANGBEIN, ORIGINS, *supra* note 184, at 63.

[228] *See* An Act Appointing an Order to Justices of Peace for the Bailment of Prisoners 1554, 1 & 2 Phil. & Mar. c. 13 (Eng.); *see also* An Act to Take the Examination of Prisoners Suspected of Manslaughter or Felony 1555, 2 & 3 Phil. & Mar. c. 10 (Eng.).

[229] *See* LANGBEIN, ORIGINS, *supra* note 184, at 40–48; JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 5–125 (1974) (providing an account of the development of criminal prosecution during the sixteenth century); Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105, 128 (2005) (describing the Marian statutes); Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 493–94 (2007) (same).

[230] *See* LANGBEIN, ORIGINS, *supra* note 184, at 46.

[231] 1 & 2 Phil. & Mar. c. 13.

[232] *Id.*

[233] LANGBEIN, ORIGINS, *supra* note 184, at 43–44.

bond.[234] Within two days of the committal hearing, the JP was to summarize as much of the prosecutor's, witnesses', and accused's statements "as shall be material to prove the felony" in a document known as a "deposition."[235] Under a separate statute, coroners were required to investigate deaths that occurred within their jurisdictions[236] and exercised powers similar to those of a JP.[237]

Practice under the Marian statutes continued in the colonies. Some states simply followed the Marian statutes as part of the inherited law of England, while other states enacted their own, very similar versions of them.[238] Legal historians note that "[t]he practice of subjecting criminal suspects to examination before justices of the peace . . . was commonplace in eighteenth-century America."[239] "Without exception, administrators of criminal justice in British North America made use of the process established by the Marian committal statute."[240]

Consistent with the view that evidence consisted of testimony by live witnesses, individuals who gave testimony in a committal hearing were required to appear for trial and testify a second time. They sometimes failed to do so, however. A committal hearing witness might die before trial,[241] be unable to travel,[242] be "detained and kept back" by the defendant,[243] or fail to appear for unknown reasons. When a committal hearing witness failed to appear for trial, the prosecution might seek to introduce the witness's testi-

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[234] 2 & 3 C Phil & M. c. 10.

[235] *Id.*; *see also* LANGBEIN, ORIGINS, *supra* note 184, at 41 (detailing deposition terminology).

[236] Coroner's Act 1751, 25 Geo. 2 c. 29 (Eng.).

[237] Coroners were instructed, at an inquisition for murder, manslaughter, or accessory thereto, to:

> [P]ut in writing the effect of the evidence given to the jury . . . [and] bind all such by Recognizance or Obligation as do declare any thing material to prove the said Murder or Manslaughter Offenses . . . to appear at the next general Jail Delivery to be held within the County[,] City or Towne Corporate where the trial thereof shall be . . . .

1 & 2 Phil. & M. c. 13.

[238] GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT 253–54 & n.24 (2012).

[239] William E. Nelson, *Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania*, 59 SMU L. REV. 3, 51 (2006).

[240] Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1095 (1994).

[241] *E.g.*, Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 437 (1836) (allowing evidence of a deceased witness's testimony from a prior trial).

[242] *E.g.*, Lord Morley's Case (1666) 6 How. St. Tr. 770, 770 (H.L.) (allowing a detained witness's previously given testimony).

[243] 1 GILBERT, *supra* note 42, at 241.

mony from the committal hearing, which the JP or someone else present at the initial examination would recount.[244]

The use of such testimony necessarily deprived the accused of an opportunity to confront adverse witnesses at trial. If the accused had not been given the opportunity to confront witnesses at the committal hearing, use of pre-trial testimony would deprive the accused of *any* opportunity for confrontation. Importantly, the lawfulness of this practice was unsettled during the framing era. As late as 1835, a South Carolina court surveying the English case law observed there was "great diversity of opinion on the question whether the [pre-trial] deposition of a deceased witness, taken in the absence of the accused, is or is not admissible on his trial."[245] The U.S. Supreme Court did not hold that an opportunity to confront a witness at a prior *trial* permitted use of the witness's statements at a subsequent trial until 1895.[246]

In addition to testimony from Marian committal hearings, framing-era lawyers would have been familiar with three other kinds of pre-trial statements used as trial "evidence." The first were dying declarations of a person who had received a mortal injury, which were admissible when the declarant was aware of his or her impending death.[247] These statements were admitted on the theory that a "situation so solemn, and so awful [was] consid-

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[244] *See Richards*, 35 Mass. (18 Pick.) at 437. Scholarly opinion is divided over the precise circumstances in which testimony from a committal proceeding could be used at trial, and particularly, whether the use of such testimony in felony trials required that the defendant have been afforded an opportunity to confront the absent witness at the committal hearing. According to Professor Thomas Davies, "the framing-era authorities . . . indicated that the written record of a sworn Marian examination was admissible [merely] if the witness had become genuinely unavailable prior to trial." Davies, *supra* note 229, at 565–66. Robert Kry, a former law clerk to Justice Scalia during October Term 2003 (when *Crawford* was decided), counters that statements from committal hearings were only admissible when the accused had an opportunity to confront the witness at the hearing, and that any uncertainty about the accused's right to cross-examination at the committal hearing was resolved in favor of requiring cross-examination by the enactment of the Sixth Amendment. *See* Kry, *supra* note 229, at 494–95, 552. Both Davies and Kry probably overstate the extent to which practice was settled at the framing. In his published journal of the New York Conspiracy of 1741 (an ostensible slave insurrection), Chief Justice of the Supreme Court of the Province of New York Daniel Horsmanden explained: "[T]he witnesses were always examined apart from each other first, as well upon the trials as otherwise and then generally confronted with the persons they accused who were usually sent for and taken into custody upon such examinations." DANIEL HORSMANDEN, THE NEW-YORK CONSPIRACY 7 (2d ed. 1810). This debate notwithstanding, all agree that testimony from committal hearings was sometimes introduced at trial.

[245] State v. Hill, 20 S.C.L. (2 Hill.) 607, 609 (Ct. App. 1835).

[246] *See infra* note 329 and accompanying text (discussing Mattox v. United States, 156 U.S. 237 (1895)).

[247] *See Woodcock*, 168 Eng. Rep. at 352.

ered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice."[248]

Secondly, pre-trial statements were used to corroborate the testimony of witnesses who testified at trial. In the eyes of contemporary jurists, such statements were not substantive evidence, but showed merely "that [the witness] affirmed the *same* thing on *other* occasions, and that the witness is still confident [i.e., consistent] with himself."[249] Gilbert offered the example of a fresh complaint of a crime: "though the *positive* proof resulting from such report be indefinitely small,"[250] it showed that the victim (who Gilbert assumed was testifying as a trial witness) did not invent the crime after the fact.

Thirdly, some pre-trial statements that today would be considered hearsay were admitted on the theory that they were the best evidence of a fact at issue. Thus, courts appear to have preferred that written documents establish matters such as contracts, land ownership, and pedigree, because documents were better proof than *viva voce* testimony.[251] Similarly, proof of a defendant's reputation in the community required the repetition of out-of-court statements, because "from the nature of the subject no other [evidence] can be expected."[252]

On the whole, however, the use of pre-trial statements at trials did not seriously challenge the view that evidence generally consisted of live witness testimony. The "most common and ordinary species of legal evidence" was testimony of trial witnesses who appeared and testified in person.[253] The most important kind of pre-trial statements used as evidence—those taken under the Marian statutes—were recognizably the testimony of witnesses. Other pre-trial statements that appeared in framing-era criminal trials were either not considered evidence (corroboration hearsay) or were sufficiently rare (made in awareness of impending death or "better" evidence than live testimony) that they did not affect the general, witness-dominated character of the framing-era trial.

3. How Did Framing-Era Lawyers Read the Confrontation Clause?

Within this context, the Confrontation Clause would have been understood in the sense captured by the procedural model described above. This

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[248] *Id.* at 353.

[249] 2 GILBERT, *supra* note 42, at 890 (alterations in original).

[250] *Id.* at 890–91 (alteration in original).

[251] 1 GILBERT, *supra* note 42, at 279; 2 GILBERT, *supra* note 42, at 889; *see also* GOEBEL & NAUGHTON, *supra* note 41, at 647–48 ("The scope of [written evidence] was very broad in the eighteenth century, chiefly because it was not then thought of in terms of any hearsay rule . . . .").

[252] 1 GILBERT, *supra* note 42, at 279.

[253] *Woodcock*, 168 Eng. Rep. at 353.

understanding would have expressed the framers' views regarding the best methods for ascertaining facts and also corrected an abuse that they were familiar with—taking testimony in a pre-trial proceeding and using it at trial without affording the accused the confrontation right.

Such a directive would have been a logical way of promoting the fairness of criminal adjudication. In effect, the confrontation right prevented the federal government from bifurcating the processes of generating evidence and adjudicating the defendant's guilt. A right to confront ordinary witnesses ensured that witnesses made accusations face-to-face, when the presence of the accused underscored the gravity of the accusations and deterred the witness from lying.

The right of confrontation furthermore provided a broad, if not comprehensive, guarantee that criminal cases were decided on the basis of a complete factual record. Confrontation ensured the court's ability to resolve gaps and ambiguities in testimony through questioning and cross-examination. And it ensured that the jury would have the opportunity to observe witnesses' demeanor as they testified.

As it happens, confrontation was well known to serve these functions. In 1604, the judges of the King's Bench observed, commenting on the merits of English and Scottish procedure, that "the Testimonies, being *viva voce* before the Judges in open face of the world, [is] much to be preferred before written depositions by private examiners or Commissioners."[254] Live testimony allowed the court to observe the witnesses' behavior on the stand, which provided the best opportunity to assess their credibility and draw out contradictions.[255]

A directive giving the accused the right to confront the witnesses against him or her would *not* have been understood to hold that certain

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[254] Case of the Union of the Realm (1604) 72 Eng. Rep. 908, 913.

[255] The judges reasoned:

> 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.

Id. Blackstone made a similar point:

> [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 . . . .

BLACKSTONE, *supra* note 217, at *373 (discussing civil trials). To the same effect, Matthew Hale wrote: "[B]y this personal appearance and testimony of witnesses, there is opportunity of confronting the adverse witnesses; of observing the contradiction of witnesses sometimes of the same side; and by this means great opportunities are gained, for the true and clear discovery of the truth." 2 MATTHEW HALE, HISTORY OF THE COMMON LAW OF ENGLAND 141–47 (5th ed. 1794).

statements trigger a right of confrontation regardless of the context in which they were made. To framing-era lawyers, the idea that the Clause regulated out-of-court statements would have been strange, because the legal effect of a statement depended critically on it having been made under oath or the speaker's awareness of impending death.[256] Because most statements were legally irrelevant to the determination of guilt—"no evidence," in the eighteenth-century formulation—those who proposed and enacted the Sixth Amendment likely never considered the question of whether a hearsay declarant was a "witness" and therefore subject to the confrontation requirement.

Similarly, a directive giving the accused the right to confront the witnesses against him or her would not have been understood to regulate evidence generally. A right to be confronted with "witnesses" is not naturally read to define what evidence is or the conditions under which it can be admitted. Moreover, the suggestion that the Confrontation Clause requires all evidence to be presented through witnesses (which underlies *Roberts*'s erroneous statement that literal application of the Confrontation Clause would destroy all hearsay exceptions)[257] cannot be reconciled with eighteenth-century courts' tolerance for forms of non-witness evidence such as documents, corroboration hearsay, and dying declarations. If the makers of these forms of evidence were witnesses to whom a right of confrontation attached, the accused's right to confront the witnesses against him or her would have barred their use—but we know it did not.

This is not to say that those who enacted the Sixth Amendment were indifferent to the fairness and completeness of criminal evidence. Rather, the limited scope of the "historical" Confrontation Clause reflects the fact that the Clause is premised on a specific set of assumptions about the format criminal trials would take and the non-constitutional evidentiary practices governing them. The confrontation directive ensured fairness and accuracy of a specific kind of evidence—witness testimony—because that kind evidence dominated the framing-era criminal trial.

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[256] *See supra* notes 191–219 and accompanying text (explaining the late-eighteenth-century perception of evidence); *supra* notes 247–248 and accompanying text (explaining how framing-era attorneys perceived dying declarations in the evidentiary context). The 1791 American edition of Gilbert's evidence treatise even used scare quotes to describe statements by an out-of-court hearsay declarant: "[N]othing can be more 'indeterminate' than loose and wandering 'Testimonies' taken upon the uncertain Report of the Talk and Discourse of others." 2 GILBERT, *supra* note 42, at 890.

[257] *See Roberts*, 448 U.S. at 63 ("If one were to read [the Confrontation Clause] literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial."); *see also* Davies, *supra* note 38, at 465 (discussing how *Crawford* "depart[s] from the Framers' design insofar as [it] allow[s] secondhand, hearsay evidence to be admitted that tends to prove the guilt of the defendant").

C. Confirmatory Evidence

The prior section argues that the procedural model of the Confrontation Clause, not the regulatory model, most likely captures its textual and historical meaning. On this view, the Clause regulates the way in which testimony of ordinary witnesses is taken; it does not regulate what evidence is or the conditions in which non-witness evidence may be used. This section surveys historical evidence that confirms the accuracy of this conclusion. It considers four historical sources that were central to the Court's decision in *Crawford*: (1) framing-era dictionaries, (2) English state trials, (3) pre-framing decisional law, and (4) post-framing decisional law.

1. Dictionary Definitions

To begin, the thesis that the procedural model captures the original understanding of the Confrontation Clause is consistent with the way in which framing-era dictionaries define "witnesses" and "testimony." Dr. Samuel Johnson's 1755 dictionary contains a single definition of "witness" that refers to persons.[258] It defines a "witness" as "[o]ne who gives testimony" and illustrates the definition with a quotation from Shakespeare's *Henry VIII*: "The king's attorney, . . . Urg'd on the examinations, proofs, confessions Of divers witnesses . . . ."[259]

Noah Webster's 1828 *American Dictionary of the English Language* gives five definitions of "witness."[260] One defines a witness as an eyewitness.[261] Of the remaining four definitions, only one makes grammatical sense in the context of the Confrontation Clause.[262] That definition defines a "witness" as "[o]ne who gives testimony; as, *the witnesses in court* agreed in all essential facts."[263]

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[258] SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 2290 (1755), *available at* http://johnsonsdictionaryonline.com/?p=2671 [http://perma.cc/2SFU-HUKH].

[259] *Id.* (quoting WILLIAM SHAKESPEARE, KING HENRY VIII act 2, sc. 1, *reprinted in* 2 WILLIAM MILLER, THE DRAMATIC WORKS OF WILLIAM SHAKESPEARE 143, 153 (1806)). Johnson gives several use illustrations that refer to eyewitnesses, including from the Bible's Book of Genesis, John Milton, and the *Decay of Piety*. As noted above, the Confrontation Clause's reference to "witnesses against [the accused]" precludes reading the Clause to refer to eyewitnesses. *See supra* notes 174–175 and accompanying text.

[260] 2 WEBSTER, *supra* note 42, at 115.

[261] *Id.*

[262] *See id.* Omitting use examples, the four other definitions are as follows:

> 1. Testimony; attestation of a fact or event. 2. That which furnishes evidence or proof. 3. A person who knows or sees any thing; one personally present; as, he was witness; he was an eye-witness. 4. One who sees the execution of an instrument, and subscribes it for the purpose of confirming its authenticity b[y] his testimony.

Id.

[263] *Id.* (emphasis added).

It is true that Webster's definition of "witness" references "testimony," which Webster defines as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[264] But it does not follow, as *Crawford* maintained,[265] that Webster believed anyone who gave testimony was for that reason a "witness." The "testimony" definition goes on to explain that "[s]uch [an] affirmation *in judicial proceedings*, may be verbal or written, but must be under oath."[266] Webster thus contemplated that some testimony would be given by ordinary witnesses in legal proceedings and some would not. For example, he referred to the Gospels as the "testimony" of God, who clearly is not a witness subject to the confrontation right.[267]

2. State Trials

In the sixteenth and seventeenth centuries, English governments conducted a series of trials that became notorious for their use of unfair procedure.[268] The state trials are often thought to have motivated the Confrontation Clause's adoption.[269] *Crawford* endorsed this view and relied on four of them: Sir Walter Raleigh's 1603 trial for treason; the 1554 treason trial of Nicholas Throckmorton; the 1696 attainder proceedings against Sir John Fenwick; and John Lilburne's 1637 trial before the Star Chamber.[270] These cases also support the thesis that the procedural model captures the original understanding of the Confrontation Clause.

a. Raleigh's Case

The most notorious of the state trials—and one that supports the procedural model of the Clause—was Raleigh's.[271] In a highly politicized proceeding, the result of which was preordained, the Crown sought to establish that Raleigh had participated in the "Bye conspiracy," an aspect of a larger plot to depose the newly crowned James I and install Arabella Stuart in his

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[264] *Id.*

[265] *See Crawford*, 541 U.S. at 51.

[266] 2 WEBSTER, *supra* note 42, at 94.

[267] *See id.* (providing as usage example number five: "The book of the law[;] He brought forth the king's son—and gave him the testimony 2 Kings 11:12"); *id.* (providing as usage example number eight: "The word of God; the Scriptures").

[268] *See* 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 356–57 (1883).

[269] *See, e.g.*, *Mattox*, 156 U.S. at 242; FRANCIS H. HELLER, THE SIXTH AMENDMENT 106–07 (1951); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 90 (1987).

[270] *See Crawford*, 541 U.S. 44–47.

[271] *See* STEPHEN, *supra* note 268, at 333–37 (discussing Raleigh's trial). *See generally* Harry L. Stephen, *The Trial of Sir Walter Raleigh*, 2 PROC. ROYAL HIST. SOC'Y 172 (1919) [hereinafter Stephen, *Trial of Sir Raleigh*] (same).

place.[272] The prosecution's case depended centrally on Raleigh's own statements and two pre-trial examinations of his alleged co-conspirator, Lord Cobham, in which Cobham confessed to participating in the conspiracy and implicated Raleigh.[273]

Raleigh conducted a brilliant pro se defense. When depositions of Cobham's examinations were introduced, he responded that Cobham had recanted.[274] In a celebrated speech, Raleigh demanded that Cobham be produced so that Raleigh could confront him over the inconsistencies in his accounts of the conspiracy.

The two standard sources for the trial are Jardine's *Criminal Trials* and Howell's *State Trials*.[275] Both were written for a popular audience and thus should not be considered verbatim transcripts. Jardine reports Raleigh stating:

> [I]t is strange to see how you press me still with my Lord Cobham, and yet will not produce him; . . . [H]e is in the house hard by, [i.e., the Tower of London] and may soon be brought hither; let him be produced, and if he will yet accuse me or avow this confession of his, it shall convict me and ease you of further proof.[276]

Crucially, the depositions of Cobham's examinations summarized statements of a person who was recognizably a witness. The English lawyer Harry Stephen observed that in trials of the time, the usual manner of proceeding was to introduce "the written account of statements made generally . . . to members of the Court, by persons whom it thought desirable to examine" prior to trial.[277] That Cobham was examined in this manner is evi-

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[272] *See* Stephen, *Trial of Sir Raleigh*, *supra* note 271, at 172.

[273] *See id.* at 179. The Crown introduced depositions of other witnesses' testimony and put on a witness, Dyer, who testified that a Portuguese gentleman told him that the King would never be crowned "for Don Raleigh and Don Cobham will cut his throat ere that day come." Raleigh's Case (1603) 2 How. St. Tr. 1, 25 (Eng.). This "evidence," however, had vanishingly little probative value. Raleigh asked of the Portuguese gentleman's statement, "[W]hat proof is it against me?" Attorney General Coke responded that the statement "must perforce arise out of some preceding intelligence, and shows that your treason had wings." Raleigh's Case (1603) 1 Jardine Crim. Tr. 400, 436 (Eng.). The statement, that is, showed that the gentleman had somehow heard about the conspiracy from someone. Under any conceivable burden of proof, that fact was inadequate to establish Raleigh's guilt. As Harry Stephen observed, "[I]t is plain that Coke knew that Cobham's 'confession' was the only ground on which he could possibly hope to obtain a conviction . . . . The case depended therefore on the examinations of Cobham and of Raleigh himself." Stephen, *Trial of Sir Raleigh*, *supra* note 271, at 174. *But see* Park, *supra* note 269, at 90 (suggesting that Dyer's testimony was important to the prosecution); Myrna Raeder, *Remember the Ladies and the Children Too*, 71 BROOK. L. REV. 311, 318 (2005) (same).

[274] *Raleigh's Case*, 1 Jardine Crim. Tr. at 412.

[275] *See Raleigh's Case*, 2 How. St. Tr. at 1; *Raleigh's Case*, 1 Jardine Crim. Tr. at 400.

[276] *Raleigh's Case*, 1 Jardine Crim. Tr. at 427.

[277] Stephen, *Trial of Sir Raleigh*, *supra* note 271, at 179.

dent from an exchange in which the Lord Chief Justice explained why Cobham had been examined twice—an apparent departure from the procedure the Lords were familiar with:

> My Lords, when Lord Cobham was first examined upon interrogatories, he denied everything, but he refused to sign his Examination, standing upon it as a matter of honour, that being a Baron of the realm, his declaration was to be accepted without subscription. Notwithstanding, he said at last, that if I would say he was compellable and ought to do it, then he would sign. Whereupon I, then lying at Richmond for fear of the plague, was sent for, and I came to the Lord Cobham, and told him he ought to subscribe, or it would be a contempt of a high nature; which presently after he did.[278]

Cobham thus appears to have given evidence in a manner similar to the witness in a modern deposition on interrogatories.[279] An officer of the court elicited his testimony through interrogatories and recorded it in a written document that was later introduced at trial.

The Crown also relied on a letter by Cobham, which Attorney General Edward Coke produced in melodramatic flourish in the trial's final minutes.[280] In *Crawford*, the Court implied that Raleigh responded to Coke's production of the letter by demanding that Cobham be produced.[281] But Raleigh made no such demand, nor did he need to.

As Howell reports, Raleigh responded to the production of Cobham's letter by "pull[ing] a Letter out of *his* pocket," in which Cobham exonerated Raleigh of wrongdoing.[282] Raleigh read this letter and proclaimed: "Now I wonder how many souls this man hath! He damns one in this Letter, and another in that."[283]

Insofar as Raleigh's trial exemplifies the abuses the Confrontation Clause sought to regulate, its crucial feature is the Lords' bifurcation of evidence-creation and the adjudication of guilt. As the Massachusetts Supreme Judicial Court commented in the 1836 decision noted above, the constitu-

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[278] *Raleigh's Case*, 1 Jardine Crim. Tr. at 415.

[279] *See* FED. R. CIV. P. 31 (establishing procedure for depositions by written questions).

[280] *Raleigh's Case*, 2 How. St. Tr. at 27.

[281] *Crawford*, 541 U.S. at 44.

[282] *Raleigh's Case*, 2 How. St. Tr. at 28 (emphasis added).

[283] *Id.* at 29. Jardine's report is to the same effect but with less dramatic flourish;

> At this Confession [Cobham's second letter] Sir. W. Raleigh was much amazed; yet by-and-bye seemed to gather his spirits again, and said, 'I pray you hear me a word: you have heard a strange tale of a strange man; you shall see how many souls this Cobham hath, and the King shall judge by our deaths which of us is the perfidious man . . . . Hear now, I pray you, what Cobham hath written to me.

Raleigh's Case, 1 Jardine Crim. Tr. at 446–47.

tional right of confrontation protected against such "evidence by deposition, which could be given orally in the presence of the accused."[284]

b. Other State Trials

Other notorious state trials also involved the same bifurcation of evidence-creation and adjudication and thus provide strong support for the procedural model of the Confrontation Clause. They support the regulatory model weakly, if at all. For example, at Lord Throckmorton's treason trial, the Crown sought to establish that Throckmorton had participated in the 1554 rebellion of Sir Thomas Wyatt.[285] The central evidence against Throckmorton consisted of confessions by Throckmorton's alleged co-conspirators, given in the same manner as Cobham's confession and also recorded in written documents that were introduced at trial.[286]

Similarly, in Fenwick's attainder proceeding, the central evidentiary dispute was whether the testimony of a witness, Cordel Goodman, who had been examined by the Clerk of the House of Commons and "spirited away" by Fenwick's wife, could be admitted.[287] Fenwick was tried under a statute that authorized attainder proceedings against persons involved in a conspiracy to depose William III following the Glorious Revolution.[288] A lengthy debate in the House of Commons focused on the fact that Fenwick had not been given the opportunity to question Goodman at the initial examination.[289] The House voted to admit the testimony, though some members argued that doing so was inconsistent with "the forms of inferior courts of law [and] equity."[290] There is no question that Goodman was a witness in the ordinary sense of the term. The clerk of the House of Commons reported that Goodman took the oath on May 28, 1696.[291]

Finally, Lilburn's trial,[292] which led to popular condemnation of the Court of Star Chamber, centered on allegations that he had printed and distributed "divers . . . scandalous Books."[293] The Lords' primary evidence against Lilburn was the affidavit of a button-seller accusing Lilburn and another of printing seditious books in Holland.[294] The report of Lilburn's

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[284] *Richards*, 35 Mass. (18 Pick.) at 437.
[285] Throckmorton's Case (1554), 1 How. St. Tr. 869 (Eng.).
[286] *See id.*
[287] Fenwick's Case (1696), 13 How. St. Tr. 537, 591–92 (Eng.).
[288] 1812, 8 Will. 3 c. 4, *reprinted in Fenwick's Case*, 13 How. St. Tr. 547.
[289] *Fenwick's Case*, 13 How. St. Tr. at 603–07.
[290] *Id.* at 603. *Crawford* described the House of Commons' vote as "closely divided." 541 U.S. at 44. In fact, the vote was 218 "Yeas" to 145 "Nos." *Fenwick's Case*, 13 How. St. Tr. at 607.
[291] *Fenwick's Case*, 13 How. St. Tr. 547.
[292] Lilburn's Case (1637), 3 How. St. Tr. 1315 (Eng.).
[293] *See id.* at 1321.
[294] *See id.*

case was written by Lilburn and does not disclose how the affidavit was obtained; however, standard operating procedure in the Court of Star Chamber was to examine a witness prior to trial, record the testimony in a document that the witness certified, and then introduce the document at trial.[295] Even in summary *ore tenus* proceedings, used when the defendant "confessed" guilt (perhaps encouraged by torture), "the defendant had to have confessed freely the matter laid to his charge during examination by the Crown's law officer."[296]

In short, the state trials generally involved live testimony that was given by witnesses in the ordinary sense of the term. The flaw in these proceedings was not the use of *any* out-of-court statements as a substitute for in-court testimony,[297] but rather, the failure to "br[ing] hither"[298] witnesses whose testimony, given ex parte in a prior stage of a criminal proceeding, was introduced at the trial as evidence of guilt.

3. Pre-Framing Decisional Law

Judicial opinions available to lawyers at the framing also support the thesis that the procedural model captures the original understanding of the Confrontation Clause. For present purposes, a workable sample of that case law is provided by the decisions *Crawford* relied upon as evidence of the Sixth Amendment's original meaning. If *any* decision supported the broader regulatory model of the Clause, one would expect to find it cited in *Crawford*, which maintained that the regulatory model reflects the original understanding.

In addition to the state trials discussed above, *Crawford* relied on four English cases from the eighteenth century: *King v. Woodcock*,[299] *King v. Dingler*,[300] *King v. Radbourne*,[301] and *King v. Paine.*[302] All four involved the

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[295] As one scholar explained,

> Either the examiner of the court or special commissioners examined such witnesses as were brought to their notice by either plaintiff [in criminal cases, the attorney general] or defendant, witnesses were then examined on oath and secretly, and their testimony, like that of the principals, written down and returned by the examiner or commissioners to the court.

Edward P. Cheyney, *The Court of Star Chamber*, 18 AM. HIST. REV. 727, 738 (1913); *accord* Thomas G. Barnes, *Star Chamber Mythology*, 5 AM. J. LEGAL HIST. 1, 5 (1961).

[296] Barnes, *supra* note 295, at 5.

[297] *See* Allen D. Boyer, *The Trial of Sir Walter Raleigh: The Law of Treason, the Trial of Treason and the Origins of the Confrontation Clause*, 74 MISS. L.J. 869, 871 (2005).

[298] *Raleigh's Case*, 1 Jardine Cr. Tr. at 427.

[299] (1789) 168 Eng. Rep. 352.

[300] (1791) 168 Eng. Rep. 383.

[301] (1787) 168 Eng. Rep. 330.

[302] (1739) 87 Eng. Rep. 584.

interpretation and application of the Marian statutes. Three of these decisions (*Woodcock*, *Dingler*, and *Radbourne*) refer to persons who testified in Marian committal proceedings as "witnesses"[303]—a usage of the term consistent with the thesis that the procedural model captures the original understanding of the Confrontation Clause. *Woodcock* and *Dingler* go further and refer to persons who made statements outside the context of an ongoing legal proceeding using other terms.[304]

King v. Paine, a misdemeanor libel case decided in 1696, is more equivocal.[305] Paine wrote a libelous book and gave it to Brereton.[306] According to the *Modern Reports*, Brereton "transmitted a copy thereof, through several hands to the Mayor of Bristol, which occasioned the Mayor to send for Brereton to examine him, which he did upon oath, but not in the presence of Paine."[307] Brereton died before Paine's trial and the Crown moved to admit his statement to the Mayor.[308] Paine objected on the ground that there was no legal authority for admitting the statement.[309] The Crown responded that the evidence was given to a JP, and that evidence given to a JP was always admissible because JPs were permitted to administer the oath.[310]

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[303] *Dingler*, 168 Eng. Rep. at 383 ("The prisoner was immediately apprehended, and taken before Robert Abingdon, Esq. a Magistrate for Westminster, who took the examination of the prisoner, and the information of the witnesses who then attended, pursuant to the statute of Philip and Mary."); *Woodcock*, 168 Eng. Rep. at 353 (referring to the Magistrate who took the out-of-court deposition: "It was on in the discharge of that part of Mr. Read's duty by which he is, on hearing the witnesses, to bail or commit the prisoner"); *Radbourne*, 168 Eng. Rep. at 332 ("The Court received the deposition in evidence; but the fact having been committed at the dead of night, there was no positive evidence, either by the contents of [the victim's] information, or by the several witnesses who were examined *viva voce*, that the prisoner was guilty." (citation omitted)). In R v. Westbeer (1739), 168 Eng. Rep. 108, the court admitted the statement of the deceased "Curteis Lulham, an accomplice, [who] had made a full confession in writing, and given information upon oath against the prisoner before the Lord Chief Justice Lee pursuant to [the Marian statutes]." The case report does not refer to Lulham as a witness.

[304] *Dingler*, 168 Eng. Rep. at 383–84 ("Garrow, for the prisoner, objected to the depositions thus taken being read in evidence, either as *the dying declaration* of a *party* conscious of approaching dissolution . . . or as a deposition taken pursuant to the statutes of Philip and Mary . . . ." (emphasis added)); *Woodcock*, 168 Eng. Rep. at 353 (referring to the "dying declaration of a *person* who has received a fatal blow" (emphasis added)).

[305] *See* 87 Eng. Rep. at 584.

[306] *Id.*

[307] *Id.* at 585.

[308] *Id.*

[309] *Id.*

[310] *Id.* The prosecution argued:

> [T]he statute makes no difference in this case, for the power of a justice of peace to take examinations is not grounded upon it; for he might examine a criminal by virtue of his office, and the statute only enforces the execution of his office by commanding him to take such examinations . . . .

Id.

The puisne judge and justices of the Court of Common Pleas decided that the statement should not be admitted.[311]

The grounds for the judges' decision and the scope of the rule *Paine* established are subjects of extensive debate.[312] Importantly, it is unclear whether Brereton was a witness in the ordinary sense of the term when he made his statement to the Mayor. Although the Mayor appears to have been a JP, it is not clear whether he was acting in his official capacity when he took Brereton's statement.[313] If so, Brereton could fairly be described as a "witness" in a nascent legal proceeding. If the Mayor simply placed Brereton under oath and took his statement, the case for describing Brereton as a witness in an ongoing legal proceeding would be weaker.

In sum, the pre-framing decisional law discussed in *Crawford* generally supports the procedural model of the Confrontation Clause. Three of the four cases cited by *Crawford* use "witnesses" to refer to ordinary witnesses—the usage that the procedural model assumes. Only *Paine* arguably supports the regulatory model, and it is ambiguous.[314]

4. Early State Decisions

In addition to the state trials and English cases already discussed, *Crawford* relied on early American state decisions reported between 1794 and 1858.[315] They too support the thesis that the procedural model captures the original understanding of the Confrontation Clause.

One group of the early state decisions addressed evidence given in American versions of Marian committal proceedings.[316] Unsurprisingly,

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[311] *See id.* at 165.

[312] *Compare Crawford*, 541 U.S. at 46 (stating that *Paine* "settled the rule requiring a *prior* opportunity for cross-examination as a matter of common law" (emphasis added)), *with* Davies, *supra* note 229, at 137 ("[T]he judges actually ruled that valid depositions could not be taken in misdemeanor cases at all . . . . *Paine* did not hold any adverse implications for the admissibility of Marian depositions in felony cases."), *and* Kry, *supra* note 229, at 507 ("The examination was excluded both because there was no opportunity for cross-examination and because there was no statutory authority to take examinations in misdemeanor cases, either ground alone being sufficient to exclude.").

[313] *See* R v. Paine (1739), 91 Eng. Rep. 246 ("In an information for a libel against the Government, not guilty being pleaded, upon trial the Attorney-General offered in evidence depositions taken before a justice of peace relating to the fact, the deponent being since dead."); R v. Payne (1739), 91 Eng. Rep. 1387 ("It was moved in B. R. that the information of B. (now dead) taken before a justice of peace might be read as evidence for the King in an information against the defendant for a libel . . . ."); R v. Pain (1739), 90 Eng. Rep. 527, 527, 1062 ("The Attorney-General offers the examination of one Brereton, taken upon oath before the Mayor of Bristol (he being dead) . . . .").

[314] *See supra* notes 305–313 and accompanying text.

[315] *See Crawford*, 541 U.S. at 49–50.

[316] *See* United States v. Macomb, 26 F. Cas. 1132 (D. Ill. 1851) (No. 15,702); *Richards*, 35 Mass. (18 Pick.) at 434; State v. Houser, 26 Mo. 431 (1858); State v. Campbell, 30 S.C.L. (1

questions arose about whether testimony from committal proceedings was admissible when the witness failed to appear and testify at trial. Courts gave varying answers depending on variations in the fact patterns they encountered and their understanding of the common law of evidence.[317] (The Sixth Amendment did not enter the analysis because it had not yet been incorporated.) In all of these decisions, the evidence at issue was recognizably live testimony of a witness given to a JP or coroner.[318]

The other group of state decisions *Crawford* relied on involved witness testimony given in other kinds of legal proceedings: a civil deposition;[319] prior criminal trials;[320] and an arrest warrant hearing.[321] Again, courts gave varying answers to whether testimony from these proceedings was admissible if the pre-trial witness did not appear at trial.[322] But in no case did a court consider evidence that was *not* the testimony of a live witness. The assumption was rather that when the testimony of a *trial* witness was unavailable, courts should consider admitting at trial the testimony of a witness *from an earlier proceeding*. In 1835, in *State v. Hill*, the court reasoned:

> [D]irect and cross examinations are the best means of eliciting the whole truth, and the manner of the witness is one of the tests by which to determine the degree of credit to which he is entitled; but this is not always attainable, and what a deceased *witness*, or one who from other causes has become incapacitated to give evidence, has sworn on a former trial, is admitted on the principle that it is the best of which the case admits . . . .[323]

Rich.) 124 (Ct. App. 1844); Bostick v. State, 22 Tenn. (3 Hum.) 344 (1842); Johnston v. State, 10 Tenn. (2 Yer.) 58 (1821).

[317] *Compare Richards*, 35 Mass. (18 Pick.) at 439–40 (excluding the statement of a committal hearing witness who died, because other witnesses could not recall the dead witness's precise testimony), *and Houser*, 26 Mo. at 439 (excluding the statement of a committal hearing witness who left the jurisdiction prior to trial), *and Campbell*, 30 S.C.L. (1 Rich.) at 131 (excluding a statement given to the coroner by a witness who died prior to trial), *with Macomb*, 26 F. Cas. at 1137 (admitting the statement of a committal hearing witness who died prior to trial), *and Bostick*, 22 Tenn. (3 Hum.) at 344 (same), *and Johnston*, 10 Tenn. (2 Yer.) at 58 (same).

[318] *See supra* note 317 and accompanying text.

[319] State v. Webb, 2 N.C. (1 Hayw.) 103 (1794). *But see* Kry, *supra* note 229, at 502–03 (suggesting that the statement at issue in *State v. Webb* was taken under North Carolina's equivalent of the Marian statutes).

[320] *E.g.*, Kendrick v. State, 29 Tenn. (10 Hum.) 479 (1850); Finn v. Commonwealth, 26 Va. (5 Rand.) 701 (1827); State v. Atkins, 1 Tenn. (1 Overt.) 229 (1807).

[321] *Hill*, 20 S.C.L. (2 Hill.) 607.

[322] *Compare Kendrick*, 29 Tenn. (10 Hum.) at 492 (admitting prior trial testimony), *with Webb*, 2 N.C. (1 Hayw.) at 103 (excluding civil deposition testimony), *and Hill*, 20 S.C.L. (2 Hill.) at 611 (excluding testimony from an arrest warrant hearing); *Atkins*, 1 Tenn. (1 Overt.) at 229 (excluding prior trial testimony); *and Finn*, 26 Va. (5 Rand.) at 704 (excluding testimony given at a prior trial by a witness who had since left the jurisdiction).

[323] 20 S.C.L. (2 Hill.) at 607 (emphasis added).

Insofar as these cases excluded evidence for lack of confrontation, they involved testimony of ordinary witnesses. They did not grapple with whether a person who made a statement outside of an ongoing legal proceeding should be treated as a "witness" for purposes of the Confrontation Clause. As such, the early state decisions provide little support for the regulatory model of the Confrontation Clause.

5. Later Sources

Students of criminal procedure accustomed to debate over the admissibility of hearsay may find it odd that the Sixth Amendment confrontation right extends only to witnesses in the ordinary sense of the term. Yet courts and commentators have long advanced this view, which the procedural model of the Confrontation Clause captures.

Article XII of the Massachusetts Declaration of Rights provides that in a criminal prosecution, "every subject shall have a right . . . to meet the witnesses against him face to face."[324] In 1836, the Massachusetts Supreme Judicial Court concluded that the Massachusetts confrontation right controlled only the manner in which witness testimony was taken and not the persons who were required to testify as witnesses.[325] According to the court, the Massachusetts confrontation clause was meant "to exclude evidence by deposition, which could be given orally in the presence of the accused, but was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of the common law."[326] In other words, the confrontation right attached only to evidence offered by a person who, under "settled rules of the common law," appeared as a witness.[327] The confrontation right did not address questions such as whether a person who generated evidence was required to appear as a witness, and whether the confrontation right attached to evidence that was not generated by an ordinary witness.[328]

At the federal level, the Supreme Court did not consider the Confrontation Clause in any depth until its 1895 decision in *Mattox v. United States*.[329] Mattox was charged with murder, and his first trial ended in a

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[324] MASS. CONST. art. XII.

[325] *Richards*, 35 Mass. (18 Pick.) at 434.

[326] *Id.*

[327] *See id.* at 437.

[328] *See id.*

[329] 156 U.S. 237. Prior to *Mattox*, the Supreme Court appears to have decided only a single case in which the meaning of the Confrontation Clause was disputed. *See* WRIGHT & GRAHAM, *supra* note 64, § 6356. That case held that if a witness was absent by the "procurement" of the defendant, the defendant could not invoke the Confrontation Clause to prohibit the use of the missing witness's prior testimony. Reynolds v. United States, 98 U.S. 145, 158 (1879)

mistrial.[330] Before his second trial, two of the government's witnesses who gave testimony at the former trial died.[331] The reporter's stenographic notes of their testimony at the first trial were admitted into evidence.[332] This documented testimony constituted the "strongest proof" against the accused.[333] The question was whether Mattox's opportunity to confront the witnesses at the first trial was enough to satisfy the Confrontation Clause.[334]

The Supreme Court rejected Mattox's argument that admission of this testimony violated the Confrontation Clause in terms that underscore the centrality of witnesses to the confrontation right:

> To say that a criminal, after having once been convicted by the testimony of a *certain witness*, should go scot free simply because death has closed the mouth *of that witness*, would be carrying his constitutional protection to an unwarrantable extent . . . The substance of the constitutional protection is preserved to the prisoner in the advantage he has *once had of seeing the witness face to face*, and of subjecting him to the ordeal of a cross-examination.[335]

Nine years following *Mattox*, Dean Wigmore endorsed an understanding of the Confrontation Clause similar to the procedural model in the first edition of his evidence treatise.[336] The bulk of Wigmore's treatise is devoted to elaborating the common law hearsay rule.[337] However, Wigmore also considered the relationship between the hearsay rule and the Confrontation Clause, and concluded that the Clause was no obstacle to the admission of otherwise permissible hearsay.[338]

The effect of the Confrontation Clause, Wigmore concluded, was that "as far as testimony is required under the Hearsay rule to be taken *infra-judicially*, it shall be taken in a certain way, namely, subject to cross-examination—not secretly or *ex parte* away from the accused."[339] The Constitution did not prescribe what evidence consisted of or the form it should

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[330] *Mattox*, 156 U.S. at 240.
[331] *Id.*
[332] *Id.*
[333] *Id.*
[334] *Id.* That the question was open at the time of *Mattox* casts doubt on Justice Scalia's and Kry's view that *King v. Paine* "settled," as a matter of common law, the rule that an unavailable witness's testimony could be introduced if the defendant had a prior opportunity to confront those witnesses. *See also supra* note 312 and accompanying text (comparing differing views of the scope of the rule established in *Paine*).
[335] *Mattox*, 156 U.S. at 243–44 (emphasis added).
[336] WIGMORE, *supra* note 166, at 1171–72.
[337] *See id.* §§ 1360–1810.
[338] *Id.* § 1373, at 1752–54
[339] *Id.* § 1397, at 1755 (emphasis added).

take; it left that to the law of evidence.[340] Rather, the Constitution proscribed "*what mode* of procedure shall be followed—*i.e.* a cross-examining procedure—in the case of such testimony as is required by the ordinary law of evidence to be given infra-judicially."[341]

Wigmore's view is not identical to what this Article terms the procedural model of the Confrontation Clause. Wigmore thought the Clause applied to testimony given in court or "infra-judicially."[342] By contrast, the critical event that triggers the Confrontation Clause under the procedural model is testimony by a *witness* in an ongoing legal proceeding. The procedural model therefore recognizes the Confrontation Clause's applicability to witness testimony that is not given within the four walls of a court, as occurred with coroner inquests and some Marian committal hearings.[343]

Nevertheless, the procedural model shares one of Wigmore's critical insights. Wigmore recognized that the confrontation right was not intended to regulate evidence generally—the premise of what this Article terms the "regulatory" model of the Clause. In Wigmore's view, that function was performed by the law of evidence, which, because it is not codified in a Constitution, is able to change over time.

Of course, even as the Massachusetts Supreme Judicial Court, the *Mattox* Court, and Wigmore advanced a witness-centered interpretation of the Confrontation Clause, other courts and commentators maintained that the Clause had a more expansive regulatory scope. As early as 1807, cases suggested that any person who in any context makes a statement that is used to establish the accused's guilt is effectively a "witness" with respect to whom the right of confrontation attaches.[344] But given the text of the Sixth Amendment, the historical context in which it was adopted, early applications of the confrontation right to witness testimony, and the absence of early applications of the confrontation right to evidence that is *not* the testimony of an ordinary witness, it is notable that respected courts and commentators have long followed the procedural model of the Confrontation Clause.

The limited scope of what we might call the "original" Confrontation Clause does not mean that the Clause is irrelevant to the regulation of the many forms of non-witness evidence that figure in modern criminal trials. As the next two Parts describe, the government's ability to generate harms

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[340] *Id.*

[341] *Id.* (emphasis added).

[342] *See id.*

[343] *See supra* notes 228–244 and accompanying text (discussing the Marian statutes and procedure).

[344] *See, e.g.*, *Burr*, 25 F. Cas. at 193 (disallowing prosecutorial use of verbal declarations against an accused, that were made in the absence of the accused and without an opportunity for confrontation).

that a constitutional provision seeks to regulate without formally violating the law is a paradigmatic justification for recognizing an anti-evasion rule that extends the provision's operational scope. As a textual and historical matter, however, the procedural model more accurately captures the Confrontation Clause's original meaning.

III. A THEORY OF *CRAWFORD*'S FAILURE

Parts I and II of this Article describe the breakdown of the Supreme Court's Confrontation Clause jurisprudence following its 2004 decision in *Crawford v. Washington* and explain how those who adopted the Clause understood it. The framers most likely understood the Clause to give criminal defendants the right to confront ordinary witnesses—the premise of what this Article term the procedural model of the Clause. The Clause did not address the circumstances in which other forms of evidence could be admitted. With this baseline understanding, this Part returns to the Supreme Court's failure in *Crawford* and subsequent cases to establish a workable Confrontation Clause jurisprudence.

This Part demonstrates that the rule of *Crawford* is best understood not as a straightforward application of the Clause's original meaning but as an attempt to regulate *government evasion* of the Clause made possible by the transformation in the understanding of evidence between the founding and the present day. *Crawford*, however, did not acknowledge that the task for doctrine was to regulate evidentiary practices that evade the core confrontation right. It did not appreciate the differences among established conceptions of evasion and the regulatory strategies they entail. Moreover, *Crawford* reasoned that the activities that should be regulated as evasion could be identified by interpreting the Sixth Amendment's text—a method of interpretation that was conceptually incapable of performing that task. These oversights precipitated the breakdown of contemporary Confrontation Clause jurisprudence.

Section A traces the path through which the scope of the Confrontation Clause came to turn on whether evidence contained a "testimonial" statement.[345] Section B demonstrates why this "testimonial rule" is best justified as an effort to control governmental evasion of the Clause.[346] Section C identifies three errors in *Crawford* that led to the Court's failure to regulate government evasion successfully.[347] Section D discusses doctrinal ramifications of these failures.[348]

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[345] *See infra* notes 350–377 and accompanying text.
[346] *See infra* notes 378–394 and accompanying text.
[347] *See infra* notes 395–406 and accompanying text.
[348] *See infra* notes 407–447 and accompanying text.

A. Origins of the Testimonial Rule

A reading of the Court's *Crawford* opinion does not immediately reveal its operational logic.[349] On its face, the opinion appears to identify a body of doctrine that had departed from the original meaning of the Confrontation Clause and consider whether to overrule that doctrine. Having answered the overruling question in the affirmative, the opinion seems to lay down a legal test that is more faithful to the Clause's original meaning. In fact, the operational holding of *Crawford* has nothing to do with historical meaning.

The *Crawford* opinion made three central moves. To justify rejecting a quarter-century of precedent, the opinion first set out a lengthy critique of the Court's approach to the Confrontation Clause in *Ohio v. Roberts*.[350] As Part I explains, *Roberts* equated the Confrontation Clause with the hearsay rule and held that out-of-court statements did not implicate the Clause if they fell within a "firmly rooted hearsay exception" or had "particularized guarantees of trustworthiness."[351] Drawing on scholarly and judicial criticism of *Roberts*, the *Crawford* opinion decried *Roberts* as a "departure" from "the Framers' understanding."[352]

Because *Crawford* rejected *Roberts*, the Court needed to develop a new interpretation of the Confrontation Clause. Thus, the second and most lengthy section of the *Crawford* opinion traced the historical background to the Confrontation Clause.[353]

Key to the Court's account were the sixteenth- and seventeenth-century state trials discussed in Part II, particularly the trial of Sir Walter Raleigh.[354] Quoting Jardine, the Court opined that "the justice of England has never been so degraded and injured" as in Raleigh's case.[355] In addition to the state trials, the Court described English and American cases from the seventeenth through nineteenth centuries in which courts discussed the use of testimony that was taken before trial.[356]

Based on its survey of these sources, the Court concluded that by the time of the framing, "English law developed a right of confrontation."[357] Ac-

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[349] *See* Crawford v. Washington, 541 U.S. 36 (2004).

[350] *Id.* at 60–68; *see also* Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. 36.

[351] *Roberts*, 448 U.S. at 66.

[352] *Crawford*, 541 U.S. at 59–60.

[353] *Id.* at 43–50.

[354] *See id.* at 43–46; *supra* notes 268–298 and accompanying text (discussing Raleigh's and other sixteenth- and seventeenth-century state trials).

[355] *Crawford*, 541 U.S. at 44 (quoting Raleigh's Case (1603), 1 Jardine Crim. Tr. 400, 420 (Eng.)).

[356] *Id.* at 45–47.

[357] *Id.* at 44. *But see* Davies, *supra* note 38, at 354; Jonakait, *supra* note 39, at 472.

cording to the Court, the colonists knew this confrontation "right" and included it in state constitutions that served as models for the Sixth Amendment; they applied the right in cases from the framing and antebellum periods.[358]

This history supported two "inferences" about the Confrontation Clause's meaning.[359] First, the Court concluded that "the principal evil" the Confrontation Clause sought to address was the civil law practice of using transcripts of ex parte examinations as trial evidence.[360] Second, the Court reasoned that the framers would only have permitted the use of testimony of a witness who did not appear at trial if he or she were unavailable to testify and if the defendant had a prior opportunity to cross-examine the witness.[361] The only exceptions to this rule were those recognized at the founding, such as for dying declarations.[362]

Having set forth its understanding of the Confrontation Clause's historical meaning, the Court finally turned to defining the Confrontation Clause's operational scope. As Part II demonstrates, framing-era lawyers generally understood criminal "evidence" to consist of witness testimony. Today, however, "evidence" includes an array of material other than witness testimony that would have been unimaginable to the framers.[363] Because of the transformation in the understanding of evidence, the *Crawford* Court had to address how the Confrontation Clause applied, if at all, to the many forms of non-witness evidence that are used in modern criminal trials.[364]

Perhaps because the point had not been briefed, the Court did not consider the possibility that the Clause applies only to ordinary witnesses.[365] However, the Court disposed of Wigmore's thesis that the Confrontation Clause regulates "in-court testimony" in three short sentences.[366] Wigmore's view, the Court asserted, "would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices."[367]

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[358] *Crawford*, 541 U.S. at 47–50.

[359] *Id.* at 50.

[360] *Id.*

[361] *Id.* at 53–54.

[362] *Id.* at 62.

[363] *See generally* INGRAM, *supra* note 44 (detailing forms of evidence used in modern criminal proceedings).

[364] *See Crawford*, 541 U.S. at 51–53.

[365] The State of Washington's fifteen-page merits brief argued that there was inadequate justification for reversing *Roberts*. Brief for Respondent at 13–15, *Crawford*, 541 U.S. 36 (02-9410), 2003 WL 22228001, at *13–15. The United States' brief advanced the argument, ultimately adopted by the Court, that "[t]he Confrontation Clause governs the admissibility of out-of-court statements only when the statements are testimonial in nature." Brief for the United States as Amicus Curiae at 8, *Crawford*, 541 U.S. 36 (No. 02-9410), 2003 WL 22228005, at *8 (capitalization normalized).

[366] *Crawford*, 541 U.S. at 50.

[367] *Id.* at 51. This assertion is incorrect. Raleigh's trial, among others, involved the use of unconfronted witness statements that were taken "in-court," or at least by an officer of the Crown.

The Court then announced *Crawford*'s operational holding: the Confrontation Clause applies to all evidence that contains a "testimonial" statement.[368] The Court did not offer examples of framing-era cases in which non-witness evidence was excluded on the ground that it was "testimonial" and the defendant had not been afforded a right to be confronted with the maker of the evidence. Nor did the Court identify a single historical precedent in which the "testimonial" formulation was material to a court's analysis of the admissibility of hearsay. Instead, the critical paragraph of the opinion relied entirely on quotations from Webster's 1828 dictionary.[369] The Court's analysis proceeded in two steps: (1) a witness was someone who bore testimony. Therefore, (2) all "testimony" was subject to the Confrontation Clause.

At least some members of the Court must have known that this logical fallacy[370] grossly distorted the Clause's historical meaning. As Part II demonstrates, Justice Scalia's opinion for the Court discussed a variety of historical sources that suggest the Clause was originally understood to apply to ordinary witnesses.[371] Dissenting from the Court's central holding, Justice Rehnquist objected that the testimonial rule was "no better rooted in history than our current doctrine."[372]

The Court insisted, however, that the original textual meaning of the Confrontation Clause compelled the testimonial rule.[373] In addition, it emphasized that the Clause's scope turned on its textual meaning, not the Clause's underlying regulatory objectives. Justice Scalia wrote that the Clause ulti-

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See supra note 278 and accompanying text (discussing use of witness testimony in Raleigh's trial). Applying the Confrontation Clause in these cases would have corrected "flagrant inquisitorial practices." *See Crawford*, 541 U.S. at 50.

[368] *Crawford*, 541 U.S. at 51–52.

[369] *See id.* With citations, that paragraph reads as follows:

> [The Confrontation Clause] applies to "witnesses" against the accused—in other words, those who "bear testimony." 2 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Id. at 51 (second alteration in original).

[370] Specifically, the Court's analysis relied on an improper transposition. Clowns are funny, but not all funny people are clowns. By the same token, witnesses against the accused give testimony, but not all testimony is given by witnesses against the accused.

[371] *See supra* notes 173–344 and accompanying text (discussing *Crawford*'s use of historical sources and its treatment of the Clause).

[372] *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring).

[373] *See id.* at 52 n.3 (majority opinion).

mately strives to ensure the reliability of evidence.[374] Yet the confrontation right—a procedural rather than substantive guarantee—commands that this reliability be assessed through "testing in the crucible of cross-examination."[375]

The upshot of the Court's analysis was that the "testimonial" concept determined the scope of the Confrontation Clause. As the Court would soon clarify, the fact that evidence contained a testimonial statement was both necessary and sufficient to subject the evidence to the Confrontation Clause.[376] If evidence was testimonial, it could not be admitted (save for a few narrow exceptions) unless the responsible witness was unavailable and the accused had a prior opportunity for confrontation.[377]

B. Testimony and Evasion

In the voluminous literature on the post-*Crawford* Confrontation Clause, a basic point has gone virtually unnoticed: application of the Clause to all testimonial evidence expands the Clause's scope far beyond its historical scope.[378] At the framing, the accused's "right to be confronted with the witnesses against him" would have been understood to apply only to ordinary witnesses. Those witnesses would not necessarily have testified at trial; a witness might testify at a Marian committal hearing and fail to appear for trial, for example.[379] But they would have been "witnesses" in the ordinary sense of the term and not what today are termed hearsay declarants.

By contrast, the Confrontation Clause under *Crawford* applies to *any* evidence that incorporates a testimonial statement, regardless of whether the speaker is an ordinary witness and regardless of the context in which evidence is created. Instead of the live testimony of a witness serving as the trigger, the introduction of evidence deemed to contain "testimonial" speech triggers the right under *Crawford*. The question is why a nominally originalist decision expanded the Clause so far beyond its historical scope.

The answer lies in the need to regulate evasion of the basic confrontation right. Although the Court's claim that the testimonial rule captures the Clause's original meaning is false, the impulse for recognizing that rule is obvious once one acknowledges the sea change in the understanding of evi-

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[374] *Id.* at 61.

[375] *Id.*

[376] *See* Davis v. Washington, 547 U.S. 813, 824 (2006) (holding with respect to the testimonial concept that "[a] limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter").

[377] *Crawford*, 541 U.S. at 68.

[378] *See supra* note 38 and accompanying text (noting prior suggestions to this effect).

[379] *See supra* notes 245–246 and accompanying text (discussing how courts handled pre-trial statements by witnesses).

dence between the founding and the present day. Eighteenth-century jurists and lawyers generally understood criminal evidence as the testimony of witnesses.[380] In contrast, under modern understandings reflected in the *Federal Rules*, evidence today is anything that "has *any tendency* to make a fact more or less probable than it would be without the evidence."[381] The rules of evidence generally and the hearsay rule in particular express a weak preference that evidence be presented through trial witnesses. Nevertheless, as Professor John Leubsdorf has observed, live testimony is often a "Trojan horse" for facts the testifying witness cannot personally vouch for,[382] and, as the *Roberts* court stated, the hearsay rule is "riddled with exceptions."[383]

Because "evidence" today includes sources of information other than witness testimony, the right to confront witnesses has become an underinclusive guarantee of two values the Confrontation Clause protects—evidentiary fairness and completeness. The right of confrontation continues to guarantee the fairness and completeness of witness testimony, whether given at trial or before.[384] But the government can use substitutes for witness testimony to obtain criminal convictions that are not subject to the core confrontation right because they are not testimony of an ordinary witness against the accused. For example, in *United States v. Proctor*, a 2007 Fifth Circuit case mentioned in the Introduction, the prosecution secured Kendrick Proctor's conviction using the transcript of a 911 call that substituted for what Yogi Proctor would have testified to, had he been called as a trial witness and cross-examined.[385]

Seen from this perspective, the extension of the Confrontation Clause to all testimonial evidence is best seen in functional terms, as the recognition of an *anti-evasion* rule. More precisely, the *Crawford* rule is best understood as an effort to prevent the government from using substitutes for witness evidence that impermissibly circumvent the defendant's basic confrontation right. In holding that testimonial, non-witness evidence is subject to the Clause, the Court imposed on that evidence the guarantee of fairness

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[380] *See supra* notes 191–197 and accompanying text (discussing attorneys' and jurists' perceptions of evidence in the late eighteenth century).

[381] FED. R. EVID. 401 (emphasis added) (defining relevant evidence); *see also id.* r. 402 (generally providing for the admission of relevant evidence).

[382] *See* John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1237 (2006).

[383] *See Roberts*, 448 U.S. at 62.

[384] *See, e.g.*, People v. Harris, 212 Cal. Rptr. 216 (Ct. App. 1985) (holding there is no confrontation right impairment where the defendant has an opportunity to cross-examine the witness at a preliminary examination); State v. Massengill, 99 N.M. 283 (Ct. App. 1983) (finding that the defendant had an opportunity to develop testimony at the preliminary hearing stage).

[385] *See* United States v. Proctor, 505 F.3d 366, 369 (5th Cir. 2007).

and completeness that the Sixth Amendment explicitly provides for witness testimony.[386]

The expansion of a constitutional criminal procedure right to address evasion of the right made possible by social change is not without precedent. Indeed, the Court's handiwork in *Crawford* has parallels to its approach to the Fifth Amendment privilege against self-incrimination.[387]

Since the late nineteenth century, the privilege has been understood to prohibit the use as evidence of pre-trial confessions that are not voluntarily given.[388] In the first half of the twentieth century, changes in police interrogation practices resulted in a large number of confessions that, if not the product of physical violence, did not reflect a suspect's voluntary choice to confess.[389] As a police manual instructed, interrogation "for a spell of several hours" or "for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination" could "induce the subject to talk without resorting to duress or coercion."[390]

In 1966, in *Miranda v. Arizona*, the Supreme Court famously held that if a custodial arrestee was not given the familiar warnings before confessing, the confession could not be used as evidence of guilt.[391] *Miranda*'s legitimacy is the subject of continuing debate.[392] But the rule it established is

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[386] I take no position on whether individual justices or the Court as a whole were subjectively motivated by the desire to regulate evasion. For justices who recognized that the testimonial rule was not compelled by the Confrontation Clause's original meaning, the perceived need to regulate practices that evaded the core confrontation right in a normatively problematic manner must have been a dominant consideration. The present claim, however, is not about the justices' motivations but about the functional logic of *Crawford*'s testimonial rule. The need to regulate evasion of the Clause provides the best functional explanation for the Court's recognition of the testimonial rule, I argue, and for the Court's subsequent inability to elaborate a workable confrontation regime.

[387] *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself.").

[388] *See* Boyd v. United States, 116 U.S. 616, 638 (1886); *see also* Katharine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination*, 42 J. AM. LEGAL HIST. 235, 237 (1998) (describing the development of this understanding of the privilege).

[389] *See* THOMAS & LEO, *supra* note 238, at 129–40, 151–61 (describing the transition from "the third degree" to "professional" interrogation practices during J. Edgar Hoover's leadership of the FBI).

[390] Miranda v. Arizona, 384 U.S. 436, 451 (1966) (quoting CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 112 (1956)).

[391] *Miranda*, 384 U.S. at 444.

[392] For entry points into debates over *Miranda*'s legitimacy, compare Joseph D. Grano, Miranda's *Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988) (contending that courts may not legitimately promulgate rules intended to further compliance with constitutional norms because the promulgation of rules that do not track constitutional meaning is not an exercise of "[t]he judicial power" recognized in Article III), and Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985) (same), with Evan H. Caminker, Lecture, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1 (2001) (contending that judicial recognition of such

persuasively defended as a response to police circumvention of the Fifth Amendment privilege through interrogation practices that obscured the voluntariness of pre-trial confessions.[393] By supplementing the fact-dependent, perjury-prone standard of the voluntariness test with a more easily administered proxy (were the warnings given?), *Miranda* counteracted interrogation practices that traded on ambiguity over whether a particular confession was involuntary and thereby undermined the Fifth Amendment privilege.[394]

The voluminous literature on *Miranda* attests that the style of constitutional interpretation the Court relied on there is more controversial than interpretation that purports simply to apply the Constitution's textual meaning. Part IV returns to these debates; for now, the key point is the functional similarity between *Miranda* and *Crawford*. If interpreted consistently with its textual and historical meaning, the Confrontation Clause does not directly regulate evidence that is not the statement of a "witness against the accused." The law's tolerance for such evidence permits the government to secure criminal convictions through evidence that may be inferior to witness testimony in its fairness and completeness. Just as *Miranda* responded by expanding the reach of the Fifth Amendment privilege, *Crawford* responded by expanding the reach of the Confrontation Clause.

C. Crawford*'s Errors*

Although the impulse to regulate evasion of the Confrontation Clause by expanding its regulatory reach is understandable, the way in which *Crawford* did so is flawed. The Court's errors were threefold: the Court failed to (1) acknowledge that it was regulating evasion, (2) grapple with important questions regarding the scope of its new anti-evasion rule, and (3) choose an adequate method to define activities that should be treated as evasive.

1. The Understanding of "Evasion"

To begin with, *Crawford* did not acknowledge that the task for doctrine was to regulate evidentiary practices that evaded the Confrontation Clause. The Court's lack of candor might have been harmless if not for the uncertainty over the activities that warrant regulation as "evasion." Centuries-old de-

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rules is appropriate in some circumstances and a traditional exercise of the judicial power), and Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. Rev. 500 (1995) (contending that *Miranda*'s safeguards, or an equally effective alternative, are required under a proper interpretation of the Fifth Amendment privilege), and David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (cataloging constitutional decisions that lay down rules designed to ensure compliance with constitutional norms as opposed to elaborating the textual and historical meaning of those norms).

[393] *See* Strauss, *supra* note 392, at 194–95.

[394] *See id.* at 195.

bates over how to distinguish tax avoidance and tax evasion,[395] as well as more recent work in criminal theory, show that the reasons for proscribing evasion are unsettled.[396] Indeed, the very meaning of the concept is contested.

At least three ways of understanding "evasion" might be used to regulate evasion of the Confrontation Clause: the *substance over form* approach, *mental state* approach, and *purposive* approach.

The *substance over form* approach is premised on the idea that the law should concern itself with the substance of regulated actors' actions, not immaterial details that do not affect the "real" nature of those actions. Accordingly, this approach understands "evasion" as activity that is "materially similar" or "functionally equivalent" to activity proscribed by law.[397] In the confrontation context, such an approach would regulate the use of evidence that, if not the testimony of a witness, served a similar function—i.e., establishing guilt.

The *mental state* approach is premised on the idea that it is problematic for regulated actors to act with conscious intent to evade the law, or with knowledge that they are engaging in a substitute for activities the law proscribes.[398] Accordingly, this approach treats a regulated actor's actions as "evasive" if they are undertaken with a prohibited mental state—most obviously, intent to evade the law. In the confrontation context, the approach

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[395] Tax lawyers often distinguish between tax "avoidance," which is considered lawful, and tax "evasion," which is not. *See generally* BORIS I. BITTKER ET AL., FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 4.3 (3d ed. 2002) (discussing tax evasion generally); Stuart P. Green, *What Is Wrong with Tax Evasion?*, 9 HOUS. BUS. & TAX. L.J. 220 (2009) (suggesting that the widespread confusion over exactly why tax evasion is morally wrong is in part responsible for widespread tax non-compliance); Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859 (1982) (discussing tension between substance and form as a theme that runs throughout tax law) (review of BORIS I. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS (1981)).

[396] *See generally* LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD AND KINDRED PUZZLES OF THE LAW (1996) (discussing the interplay between law and morality with regard to evasion and other various crimes); Buell, *supra* note 46 (considering reasons why conduct might be deemed evasive and exploring their relationship to a regulated actor's state of mind); Dan Kahan, *Ignorance of Law Is an Excuse: But Only for the Virtuous*, 96 MICH. L. REV. 127 (1997) (providing an "anti-Holmesian" account in which ignorance of the law provides an excuse to certain crimes); Leo Katz, *A Theory of Loopholes*, 39 J. LEGAL STUD. 1 (2010) (offering a generally positive account of the exploitation of legal loopholes).

[397] *See, e.g.*, Altria Grp., Inc. v. Unites States, 658 F.3d 276, 284 (2d Cir. 2011) (suggesting that in tax law, substance, rather than form, determines consequences); District of Columbia v. Neyman, 417 F.2d 1140, 1142 (D.C. Cir. 1969) ("[T]he judicial challenge, on presentation of a substantial claim of tax evasion, is to penetrate through form in a most careful search for substance, upon which the incidence of taxation depends.").

[398] *See, e.g.*, ASA Investerings P'ship v. Comm'r, 201 F.3d 505, 513 (D.C. Cir. 2000) (describing the "business purpose doctrine," which links favorable tax treatment to whether a transaction was motivated by a legitimate business purpose); Rice's Toyota World, Inc. v. Comm'r, 752 F.2d 89, 91 (4th Cir. 1985) (articulating a two-pronged inquiry to determine whether a transaction had a legitimate business purpose).

might proscribe the use of substitutes for witness testimony if the prosecution specifically intended to strip the accused of her confrontation rights in generating or using evidence (an intent standard), or if the individual who made a statement was aware that it would be used as evidence (a knowledge standard).

The *purposive* approach defines "evasion" as conduct that, even if technically legal, conflicts with the objectives of a norm.[399] The emphasis here is on whether activity conflicts with the background objectives of the relevant norm rather than an actor's state of mind. In the confrontation context, the approach would regulate evidentiary practices that are inconsistent with the Clause's purposes, however those purposes are understood.

2. Selecting an Anti-Evasion Rule

The Court's failure in *Crawford* to acknowledge that doctrine was regulating evasion led to its second error: it overlooked important questions about the scope of its new anti-evasion rule and the normative basis for proscribing activity that it deemed evasive. Approaches to regulating evasion differ not only in how they conceptualize "evasion" but also in the regulatory strategies they entail. Doctrine directed at actions that are "functionally equivalent" to unlawful activities will look different than doctrine directed at regulated actors' states of mind, both of which look different from doctrine that seeks to vindicate a law's underlying purposes.

Moreover, different approaches to regulating evasion present different bundles of costs and benefits. Consider two of the relevant dimensions: an approach's ability to respond to novel forms of evasion, and the degree of guidance it provides to regulated actors. The substance-over-form approach gives the legal system great flexibility to respond to novel forms of evasion, because it catches all activities that are "equivalent" to the proscribed activity, but provides little guidance to regulated actors other than an instruction not to tread too closely to the line.[400] The mental-state approach provides a high degree of certainty to regulated actors; to avoid being sanctioned for evading the law, an actor need only avoid the forbidden mental state.[401] But for the same reason, the approach may fail to reach novel forms of evasion. The purposive approach gives the legal system a high degree of flexibility to respond to novel forms of evasion, provided a norm's purposes

[399] *See*, *e.g.*, Reece v. Bank of New York Mellon, 760 F.3d 771, 776 (8th Cir. 2014) (disapproving reading of Internal Revenue Code that "would thwart clear congressional intent by permitting plaintiffs to evade federal jurisdiction through clever gamesmanship"); United States v. Shafer, 445 F.2d 579, 583 (7th Cir. 1971) (rejecting a reading of Code that would "foster easy evasion to thwart the Congressional intent").

[400] *See* Buell, *supra* note 46, at 619.

[401] *See id.* at 623–24.

are sufficiently broad. That feature, however, is in tension with rule of law values. The broader a norm's purposes, the more difficult it will be for regulated actors to understand the activities that will be sanctioned as evasive.[402]

Because of differences along these and other dimensions, a legal policymaker cannot decide simply to regulate "evasion" of a norm. Identifying evasion and an appropriate strategy for regulating it instead requires a policymaker to employ a normative theory that explains why particular activities should be considered evasive, and to weigh the tradeoffs among strategies for regulating those activities. Just as the design of primary norms requires a policymaker to weigh the costs and benefits of different modes of regulation—ex ante versus ex post, rules versus standards, civil liability versus criminal, etc.[403]—so do decisions about regulating evasion. By failing to acknowledge the task for doctrine, *Crawford* avoided these questions entirely.

3. Distinguishing Evasive Activity from Activity That Is Directly Regulated

Crawford's third error involved the method the court *did* use to define the scope of its anti-evasion rule. Recall that the testimonial rule rests on the Sixth Amendment's reference to "witnesses against . . . the accused."[404] With the aid of Webster's 1828 dictionary, the Court reasoned that the confrontation right applies to all forms of "testimonial" evidence, because "witnesses" are persons who give "testimony."[405]

The style of textual interpretation the Court used to define the scope of the Confrontation Clause is incapable of identifying which activities should be regulated as evasive. The goal of textual interpretation is to discover the "original meaning" or "original understanding" of the norm being interpreted.[406] By contrast, a policymaker undertaking to regulate evasion must determine which activities should be regulated *notwithstanding the fact that they do not violate the basic, textually defined norm*. Under any possible model, evasive activities do not violate a legal norm directly but work around it in an impermissible manner. Textualist interpretation cannot answer whether an activity is evasive in this sense.

Crawford, then, left things as follows. In holding that the Confrontation Clause applied to all testimonial evidence, the Court undertook to regulate evidentiary practices deemed to involve evasion of the Clause. Yet the

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[402] *See* Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 712 (1996).

[403] *See generally* SAMUEL ESTREICHER & DAVID L. NOLL, LEGISLATION AND REGULATORY STATE, ch. 1 (LexisNexis 2015) (cataloging choices lawmakers must make when designing legislation).

[404] *See Crawford*, 541 U.S. at 51; *see also* U.S. CONST. amend. VI.

[405] *Crawford*, 541 U.S. at 51.

[406] *Id.* at 60.

Court did not consider the different ways evasion can be understood or the tradeoffs among strategies for regulating evasion. Finally, it reasoned that "evasive" evidentiary practices could be identified through an interpretative method—textualist interpretation—that was incapable of resolving those questions.

D. Doctrinal Consequences

Once these features of *Crawford* are recognized, the Court's inability to develop a workable Confrontation Clause jurisprudence in subsequent cases is easy to understand. At the Supreme Court level, post-*Crawford* doctrine has focused on two forms of evidence: (1) statements to government officers responding to reports of crime, and (2) reports of forensic testing. In both areas, *Crawford*'s errors impeded the development of doctrine that would successfully regulate governmental evasion of the Confrontation Clause.

1. Post-Crime Statements

The Court first grappled with identifying the activities that should be regulated as evasion in *Davis v. Washington* and *Hammon v. Indiana*, a pair of cases decided jointly in 2006.[407] The cases presented two variations on the same fact pattern. In *Davis*, the prosecution introduced a recording of a 911 call made by a domestic abuse victim.[408] In *Hammon*, the prosecution introduced an affidavit signed by a domestic violence victim, which memorialized a statement the victim gave to a police officer after calling 911 and reporting abuse.[409] The victims did not testify at trial, although they apparently could have been subpoenaed.[410]

Neither victim was a "witness against the accused" in the sense contemplated by the framers of the Confrontation Clause. They did not give live testimony in a legal proceeding. Thus, the crucial question for the Court was whether use of the victims' statements should be regulated as evasion of the basic confrontation right.

In a concurring opinion, Justice Thomas proposed that the Court answer that question by examining the prosecution's reasons for using the statements.[411] Justice Thomas has long maintained that the Clause applies of its own force only to witness testimony and "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[412] In

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[407] *Davis*, 547 U.S. 813.
[408] *Id.* at 817–18.
[409] *Id.* at 819–20.
[410] *See id.*
[411] *Id.* at 838 (Thomas, J., concurring in part and dissenting in part).
[412] *Id.* at 836–37.

Davis, he proposed that even if the Clause did not apply to the victims' statements of its own force, it would apply "if the prosecution attempted to use out-of-court statements as a means of circumventing the literal right of confrontation"[413]—that is, if the prosecution specifically intended to strip the accused of his or her Confrontation Clause rights.

The Court rejected Justice Thomas's understanding of the Confrontation Clause as insufficiently protective but did not engage his suggestion that it use a specific-intent test to identify evasion of the Confrontation Clause.[414] Having done so, however, the Court needed to identify which forms of non-witness evidence implicated the Confrontation Clause.

As in *Crawford*, the Court did not acknowledge the differences among forms of evasion that the law can regulate, the tradeoffs presented by the regulatory strategies different forms of evasion entail, or the need for a normative theory to identify practices that should be deemed evasive. To answer whether the post-crime statements were testimonial and thus covered by the Confrontation Clause, the Court instead focused on "the primary purpose of the interrogation."[415] If an interrogation sought "to establish or prove past events potentially relevant to later criminal prosecution,"[416] the resulting statements were testimonial. If an interrogation lacked such a purpose, the resulting statements were nontestimonial.[417]

The Court's new primary purpose test reflects a mental-state approach to regulating evasion. Like Justice Thomas's proposed test, the primary purpose test equates evasion with a particular mental state. Where the Court differs from Thomas is the mental state that subjects evidence to the Confrontation Clause. Under the primary purpose test, statements are testimonial if actors involved in an interrogation are *aware* that the interrogation is structured so as to generate evidence that could be used at trial to establish the defendant's guilt.[418] The test rests on an intuition that criminal evidence should be produced under trial conditions. If participants in an interrogation

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[413] *Id.* at 838.

[414] The Court stated: "[W]e do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition." *Id.* at 826 (majority opinion).

[415] *Id.* at 822.

[416] *Id.*

[417] *Id.* In 2015 in *Ohio v. Clark*, the Court said in a statement that is arguably dictum that a primary purpose of generating evidence was necessary but not sufficient to subject evidence to regulation under the Confrontation Clause. *See* 135 S. Ct. 2173, 2180–81 (2015). The Court did not attempt to set out a general theory of the conditions that subject a statement to the Confrontation Clause.

[418] *See* Michigan v. Bryant, 562 U.S. 344, 360 (2011) ("[T]he relevant inquiry is . . . the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.").

know they are generating evidence and fail to appear for trial, statements from the interrogation are inadmissible.

There are at least two difficulties with this test. First, the notion that "good" evidence is uniquely produced under trial conditions is at war with modern theory of knowledge and evidence codes based on that theory.[419] As those codes recognize, many of the most important decisions in life, from where to enroll in college to whether to undergo a medical procedure, are based on information that is not produced under trial conditions.

Second, because much information that is not produced under trial conditions has evidentiary value, a test that turns on *awareness* that the information could be used as evidence has no logical stopping point. If relevant, admissible evidence is anything that "has any tendency to make a [material] fact more or less probable than it would be without the evidence,"[420] awareness that a statement *could* be used as evidence does not meaningfully constrain the universe of statements subject to the Confrontation Clause. The only constraint is the legal sophistication of those involved in an interrogation—which, in the case of government officers, is often high.

As such, the line between evidence-generating and non-evidence-generating interrogations is fictional. As Justice Thomas observed, police officers responding to crime are trained "*both* to respond to the emergency situation *and* to gather evidence" for use in a later prosecution.[421] Giving one of these purposes primacy requires courts to identify a mental state that often does not exist.

In 2008, in *Giles v. California*, the Court had an opportunity to reconsider the activities that should be regulated as evasion of the Confrontation Clause.[422] The defendant shot and killed his girlfriend.[423] To rebut his claim of self-defense, the State introduced statements the victim made three weeks prior to the shooting, to the effect that the defendant had threatened to kill her if he caught her cheating.[424] The defendant claimed that the use of these statements denied him the right to be confronted with the "witness" that he indisputably shot and killed. *Giles* thus invited analysis of whether the use of pre-trial statements amounts to evasion of the Confrontation

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[419] *See* FED. R. EVID. 401 advisory committee's note on proposed rules. *See generally* Landsman, *supra* note 192 (describing the origins of the modern approach to evidence in the writings of Jeremy Bentham).

[420] FED. R. EVID. 401.

[421] *Davis*, 547 U.S. at 838 (Thomas, J., concurring in part and dissenting in part).

[422] *See* 554 U.S. 353 (2008).

[423] *Id.* at 356.

[424] *Id.* at 356–57.

Clause when an intervening cause—there, the defendant's killing of the declarant—caused a declarant's inability to testify as a trial witness.

The Court, however, assumed the Confrontation Clause applied[425] and considered whether the defendant had forfeited his right to confrontation under a common law hearsay exception known as the "forfeiture by wrongdoing" doctrine.[426] Based on historical descriptions of the exception, the Court held that defendants forfeited their Confrontation Clause rights only when they specifically intended to interfere with the criminal justice system.[427] Because the defendant killed out of wrath, and not to interfere with the criminal justice system, the victim's statements could not be admitted. The result grated: the victim's statements could not be introduced, even as rebuttal evidence, because the state did not give the defendant a formal opportunity to cross-examine his victim before he killed her.

In 2011, in *Michigan v. Bryant*, the Court encountered yet another opportunity to grapple with the evidentiary practices that should be regulated as evasion of the Confrontation Clause.[428] The fact pattern raised the same question as *Giles*: whether the use of pre-trial statements should be regulated as evasion when the defendant caused the declarant's inability to appear as a trial witness. In *Bryant*, a drug dealer shot a client who escaped to a nearby gas station.[429] At the gas station, police interrogated the victim about the shooting for five to ten minutes.[430] An ambulance took him to the hospital, where he died.[431] The victim's statements were introduced at trial.

The Court held in an opinion by Justice Sonia Sotomayor that the use of the interrogation at trial did not violate the Confrontation Clause,[432] but its reasons were puzzling. According to the *Bryant* decision, the victim's statements were nontestimonial because (1) the officers who conducted the interrogation had a purpose other than generating criminal evidence (ostensibly, they sought primarily to apprehend "an armed shooter, whose motive for and location after the shooting were unknown");[433] and (2) the excitement of being shot meant the victim was unlikely to lie.[434] With respect to the latter point, *Bryant* reasoned that *Davis*'s primary purpose test was "not unlike" the excited utterance exception to the hearsay rule, which admits

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[425] *See id.* at 358.
[426] *See id.* at 358–68.
[427] *Id.* at 368.
[428] *See* 562 U.S. 344.
[429] *Id.* at 348.
[430] *Id.* at 349.
[431] *Id.*
[432] *Id.* at 371–78.
[433] *Id.* at 374.
[434] *Id.* at 361.

statements on the theory that "the declarant, in the excitement, presumably cannot form a falsehood."[435]

Bryant's focus on reliability reflects a purposive approach to regulating evasion of the Confrontation Clause. *Bryant* reads the Clause as a protection against the use of unreliable evidence; statements that a judge deems reliable do not trigger a right of confrontation because they do not implicate this objective. But this account of the Clause's purposes ignores the historical practices that are thought to have motivated the Clause's enactment, as well as the way in which confrontation improves the *fairness* of the criminal proceedings.[436] Moreover, the claim that the Clause merely guarantees evidentiary accuracy conflicts with *Crawford*'s holding that the Confrontation Clause guarantees a *procedural* right that operates independently of the reliability of evidence proffered by the prosecution.[437] As understood by *Crawford*, the Confrontation Clause does not command that evidence be reliable, but rather that its reliability be tested through cross-examination.[438] Under *Bryant*, the availability of this procedural right turns on a judge's ex ante assessment of evidentiary reliability. These views are incompatible.

Bryant's incompatibility with *Crawford* prompted a strong dissent from Justice Scalia and academic defenders of *Crawford*.[439] Although correct on its own terms, the criticism overlooked the underlying issue. *Crawford*, *Davis*, *Giles*, and *Bryant* all grappled with how to define the forms of non-witness evidence that should be regulated as evasion of the Confrontation Clause while advancing different theories of what constitutes evasion. Because *Crawford* framed the question as one of constitutional meaning, neither the cases nor the commentary were argued in those terms.

2. Reports of Forensic Testing

Crawford's failure to acknowledge the task for doctrine or consider which form (or forms) of evasion to regulate, and its use of an inapt interpretative tool to determine the scope of its anti-evasion rule, led to a similar breakdown in doctrine on the use of forensic evidence.

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[435] *Id.* at 361–62 (citing *Davis*, 547 U.S. at 822, 832, 828–30).

[436] *See supra* notes 256–257 and accompanying text (discussing framing-era lawyers' likely understanding of the forms of evidence subject to confrontation).

[437] *See Crawford*, 541 U.S. at 61.

[438] *Id.*

[439] *See, e.g.*, *Bryant*, 562 U.S. at 379 (Scalia, J., dissenting); WRIGHT & GRAHAM, *supra* note 64, § 6371.5 (calling *Bryant* "reprehensible"). Perhaps the most sympathetic reading of the *Bryant* decision sees it as an example of the critical race theory technique of "dismantling the master's house using the master's tools." Symposium, I. Bennett Capers, *Reading* Michigan v. Bryant*, "Reading" Justice Sotomayor*, 123 YALE L.J.F. 427, 434 (2014), http://www.yalelawjournal.org/forum/reading-michigan-v-bryant-reading-justice-sotomayor [http://perma.cc/6JYW-XLXB].

As Part I explains, post-*Crawford* doctrine has vacillated on whether reports of forensic analysis are testimonial and the circumstances in which an expert witness who is not involved in forensic testing can present the results of such testing at trial.[440] In 2012, in *Williams v. Illinois*, a plurality coalesced around the position that an expert can introduce the results of testing that he or she did not personally perform.[441] But the *Williams* plurality holds together only if the test results recounted by the testifying expert are not memorialized in a "formal" or "solemnized" document.[442] Meanwhile, at least one lower court has complained that "the fractured holdings" of *Williams* do not provide proper guidance as to when laboratory supervisor or co-analyst testimony regarding a forensic report violates the Confrontation Clause.[443]

By this point, the causes of this doctrinal confusion are apparent. Forensic analysts are not ordinary witnesses. Thus, the central question is whether using reports of forensic testing without affording the accused an opportunity to confront the responsible analysts amounts to evasion of the Confrontation Clause. To answer that question, doctrine must recognize the differences among competing conceptions of evasion and use a normative theory that identifies the activities to be regulated as evasion. The justices differ in their positions on those questions. One bloc of the Court has concluded that reports of forensic testing present no risks that warrant regulation under the Confrontation Clause.[444] Another bloc has taken the position that the risks of forensic evidence are in all ways equivalent to those of unconfronted witness testimony, mandating application of the confrontation requirement jot-for-jot.[445] Justice Thomas uniquely maintains that the risks of scientific evidence are irrelevant unless the evidence is presented in a "formal" or "solemnized" document—in which case the confrontation requirement applies with full force.[446]

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In sum, *Crawford* reads as an originalist decision, but its most important analytical move had nothing to do with the historical meaning of the Sixth Amendment. The decision expanded the reach of the Confrontation Clause to any evidence that embodied a testimonial statement, supported only by a conclusory assertion that doing so was necessary to avoid "fla-

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[440] *See supra* notes 113–163 and accompanying text.
[441] *See* 132 S. Ct. 2221, 2244 (2012) (plurality opinion).
[442] *See id.* at 2259–60 (Thomas, J., concurring).
[443] *See* State v. Michaels, 95 A.3d 648, 665 (N.J. 2014).
[444] *See Williams*, 132 S. Ct. at 2242 (plurality opinion).
[445] *See id.* at 2265 (Kagan, J., dissenting).
[446] *See id.* at 2260 (Thomas, J., concurring in the judgment).

grant inquisitorial practices" and a pair of quotations from Webster's 1828 dictionary.[447]

The Court did not initially acknowledge the most compelling functional justification for this move—the need to regulate evasion of the Confrontation Clause enabled by the transformation in evidence between the founding and the modern day. To this day, only Justice Thomas has put forward a theory of how far the Court's new anti-evasion rule should extend or explained the government practices likely to involve evasion of the Confrontation Clause. Despite the fact that strategies for policing evasion present varying bundles of costs and benefits, the Court has not considered the optimal strategy for policing evasion of the Clause.

In hindsight, it is clear how these oversights prevented the development of workable Confrontation Clause jurisprudence. When the Court was called on to decide cases where the use of non-witness evidence did not intuitively involve evasion of the confrontation right, it splintered because of the foundational uncertainty over the function that the doctrine was performing.

IV. LEARNING FROM *CRAWFORD*

The preceding Parts offer an answer to the puzzle at the heart of this Article. The Supreme Court's inability to establish workable Confrontation Clause jurisprudence in the decade since it decided *Crawford v. Washington* in 2004 results from *Crawford*'s unsuccessful attempt to regulate governmental evasion of the basic right to be confronted with witnesses who offer live testimony at trial or in a pre-trial proceeding. Although the sea change in evidence between the founding and the present day creates a pressing need for doctrine that performs this function, *Crawford* ignored important questions a policymaker undertaking to regulate evasion of a legal norm must answer. Further, it impeded the development of workable doctrine by failing to distinguish between evidence that triggers confrontation because it is directly regulated by the Confrontation Clause, and evidence that triggers confrontation because the government engaged in evasion.

This Part concludes by explaining some of this account's implications for confrontation doctrine and constitutional theory. It argues that the Court's failure to regulate evasion of the Confrontation Clause successfully in *Crawford* and subsequent cases suggests a decision tree, or structured set of choices, for courts asked to regulate seemingly evasive activity. This approach promises to improve the legitimacy, effectiveness, and coherence of anti-evasion doctrine. Section A outlines the decision tree for regulating constitutional evasion.[448] Section B situates it within the broader literature

[447] *See Crawford*, 541 U.S. at 51.

[448] *See infra* notes 451–479 and accompanying text.

on constitutional interpretation.[449] Finally, although this Article cannot address all of the doctrinal issues that remain open following *Crawford*, section C illustrates the benefits of the decision-tree approach by applying it to the category of evidence at issue in *Crawford*, *Davis v. Washington, Giles v. California*, and *Michigan v. Bryant*: statements to government officers made in the aftermath of a crime.[450]

A. Regulating Constitutional Evasion: A Decision-Tree Approach

The lessons taken from *Crawford* depend on how one understands the federal courts' lawmaking authority in the area of constitutional criminal procedure.[451] According to some jurists and scholars, courts lack authority to promulgate doctrine that does anything more than apply the Constitution's text.[452] On this "pure interpretative" model of judicial authority, the task for courts adjudicating constitutional claims—including claims that a governmental actor has evaded a constitutional norm—"is basically one of interpretation, the application of fixed and binding norms to new facts."[453] For those who subscribe to the pure interpretive model, the lesson of the *Crawford* experience is simple: regulation of non-witness evidence through the Confrontation Clause is illegitimate.[454]

Most jurists and scholars, however, understand the courts' authority to extend beyond merely applying constitutional meaning.[455] For them, the question is what the failure of contemporary Confrontation Clause jurisprudence teaches about the design of court-made constitutional doctrine. When undertaking to regulate activity that appears to involve evasion of a constitutional norm, how can courts avoid creating the deeply unstable doctrine that characterizes post-*Crawford* Confrontation Clause jurisprudence? An important recent article demonstrates that the type of problem *Crawford* grapples with is pervasive; concerns about evasion "touch all areas of con-

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[449] *See infra* notes 480–509 and accompanying text.

[450] *See infra* notes 510–537 and accompanying text.

[451] *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 607–742 (6th ed. 2009) (developing theories of the courts' lawmaking powers).

[452] *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (arguing that this authority is left to the legislature).

[453] Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705–06 (1975).

[454] There is thus some irony to the fact that Justice Scalia, the Court's most vocal critic of *Miranda v. Arizona*, 384 U.S. 436 (1966), is also the architect of the *Crawford* regime, 541 U.S. 36 (2004). As noted above, these two lines of doctrine are informed by an identical functional logic.

[455] *See* FALLON, *supra* note 52, at 37–44.

stitutional law."[456] Yet surprisingly little scholarship considers *how* such doctrine is created.[457]

Here, *Crawford* holds valuable lessons. Like a plane crash or train derailment, the Court's failure to develop workable Confrontation Clause jurisprudence following *Crawford* has value as a case study of how to approach a problem that regularly appears. More concretely, the *Crawford* experience suggests that when undertaking to regulate activities that appear to involve evasion of a constitutional norm, courts must answer a predictable set of questions concerning the scope of evasion-regulating doctrine and the normative basis for subjecting "evasive" activities to regulation. Addressing these questions does not eliminate the need to engage difficult questions of constitutional interpretation; there is no universal answer to how courts should respond to constitutional evasion. But it directs judicial attention toward questions that are essential to the formulation of workable doctrine, and thus promises to improve the legitimacy, coherency, and effectiveness of doctrine that regulates constitutional evasion.

1. The Scope of the Primary Norm

Crawford first teaches that the beginning point for regulating constitutional evasion is to understand the scope of the evaded norm. At the root of the *Crawford* regime's failure is the Court's failure in *Crawford* to distinguish between evidence that is subject to the Confrontation Clause because it is the testimony of a "witness against the accused" and evidence that is subject to the Clause because it reflects governmental evasion of the Clause. To avoid repeating this mistake, courts asked to regulate evasion of a constitutional norm should initially inquire whether the putatively evasive activity falls within the basic scope of the norm being evaded. If, for example, the use of recorded 911 calls appears to involve evasion of the defendant's right to be confronted with the witnesses against him, the first question is wheth-

[456] Denning & Kent, *Anti-Evasion Doctrines*, *supra* note 52, at 1773.

[457] To my knowledge, Brannon Denning's and Michael Kent's recent paper, *see id.*, is the only scholarly work that systematically considers judicially-promulgated anti-evasion doctrine. Two specific areas of constitutional law, election law and criminal procedure, are notable for the extent to which they have engaged concerns about evasion. In election law, judicial engagement with evasion has been prompted by phenomena such as southern lawmakers' ingenious efforts to avoid complying with the Civil Rights Amendments, and more recently, Congress's efforts to regulate the sale of access to political power through campaign finance regulations. *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 65–87, 334–435 (3d ed. 2010). In criminal procedure, questions about evasion have been prompted by, for example, police efforts to elicit confessions in a manner that violates the Fifth Amendment privilege, discussed *supra* note 391 and accompanying text, and the practice of pre-textual stops and arrests, which has figured in debates over New York City's recently disbanded stop-and-frisk policy. *See generally* Floyd v. New York, 959 F. Supp. 2d 668 (2013) (finding New York City Police Department's stop-and-frisk policy unconstitutional).

er the Confrontation Clause applies the calls' use as evidence of its own force.

Answering this question requires that courts distinguish between doctrine that applies a provision's textual meaning and doctrine that regulates evasion of the provision—a distinction revisited in section B. It does not entail a commitment to a particular method of constitutional interpretation, however. So long as a method of interpretation seeks to explain what it means, textually, for "the accused [to] enjoy the right . . . to be confronted with the witnesses against him,"[458] it is capable of answering whether the provision applies of its own force. The analysis is therefore compatible with leading schools of constitutional interpretation, including those that associate constitutional meaning with original understanding,[459] historical usage and practice,[460] moral principle,[461] and the interplay of these sources.

2. The Regulatory Response

If the "evasive" activity does not fall within the basic scope of the constitutional provision it implicates, the next question is whether it warrants a regulatory response. In *Crawford*, the Court assumed that the answer was yes. The Court thought it inconceivable that the Clause would only apply to testimony given "infra-judicially."[462] But this was intellectually lazy. Activities that initially appear evasive may not warrant regulation depending on how a court understands evasion, and not all forms of evasion are legitimately regulated through court-promulgated doctrine.

Crawford teaches that, to answer whether putatively evasive activity warrants regulation, a court must understand the different ways governmental action can evade a constitutional norm and use an interpretative theory that answers whether the government's actions create an impermissible state of the world. To continue the above example, the use of 911 calls might be considered evasive for a number of reasons: because live trial testimony could convey the same information; because the use of the calls is inconsistent with the Confrontation Clause's objectives; because the prosecution intends to deprive the accused of the right to be confronted with the witnesses against him; or for other reasons.

Answering whether a particular practice constitutes evasion requires a court to consider the normative basis for regulating evasion and its authority to regulate it. Again, many interpretative approaches are capable of answer-

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[458] U.S. CONST. amend. VI.

[459] *See, e.g.*, *Crawford*, 541 U.S. at 49.

[460] *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2559–60 (2014).

[461] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 87 (1986).

[462] *See supra* note 367 and accompanying text (explaining the Court's rejection of Wigmore's view of the Clause).

ing these questions, but at least with respect to the kind of procedural norms at issue in *Crawford*, I contend that a focus on *constitutional harm* is particularly useful. Both originalist and non-originalist decisions recognize that in addition to proscribing certain activities through conduct-regulating rules, the Constitution seeks to prevent specific end states.[463] What characterizes these states of the world is the presence of *harm* the Constitution sought to regulate, produced through actions that do not necessarily violate the Constitution's *conduct-regulating* provisions. The presence of such harm, notwithstanding actors' technical compliance with the law, is a paradigmatic justification for recognizing an anti-evasion rule. Colloquially, the regulated actor takes advantage of the formal structure of law to get off on a technicality.

A hypothetical posed by Professor Amar illustrates the benefits of a focus on constitutional harm.[464] Suppose that in the middle of a criminal trial, proceedings are adjourned and the prosecutor, jury, and judge repair to the judge's chambers to hear the story of *W*, an eyewitness to the crime. When trial resumes the next day, the prosecutor offers a video of *W*'s story as evidence of the defendant's guilt.[465] Because the court's actions so obviously create a harm the Confrontation Clause was intended to regulate, it is natural to insist that the defendant be given the right to confront *W*. And in fact, the case law so holds: absent special circumstances, *W*'s testimony cannot be taken outside the defendant's presence.[466]

In the three-part typology of Part III section C, a focus on constitutional harm reflects a purposive approach to regulating evasion.[467] Activity that does not fall within the basic scope of a constitutional provision is deemed evasive if it conflicts with the provision's underlying objectives. As noted above, a purposive approach gives the legal system a high degree of flexibility to respond to novel forms of evasion.[468] In addition, it organizes activ-

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[463] *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 546 (2001) (reasoning, with respect to a statute that prohibited recipients of Legal Services Corporation funds from challenging existing welfare laws, that "[a] scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech"); Printz v. United States, 521 U.S. 898, 935 (1997) (reasoning that the Brady Act's background check requirements were "fundamentally incompatible with our constitutional system of dual sovereignty").

[464] *See* Amar, *Foreword*, *supra* note 168, at 693.

[465] *See id.*

[466] *See* Maryland v. Craig, 497 U.S. 836, 856 (1990) (holding that state may not deny accused child rapist the opportunity to confront his victim at trial absent a "case-specific" "showing of necessity [that] the trauma of testifying . . . is sufficiently important to justify the use of a special procedure that permits [the] child witness . . . to testify [without] face-to-face confrontation").

[467] *See supra* note 397–399 and accompanying text (discussing the function over form, mental state, and purposive approaches).

[468] *See supra* notes 401–402 and accompanying text.

ity that the substance-over-form and mental state approaches struggle to classify, in a way that has an obvious foundation in constitutional authority.

Return to Professor Amar's example. Recording *W*'s testimony in the judge's chambers seems to involve an intention to evade the Confrontation Clause. It results in the use of evidence that is functionally similar to witness testimony insofar as the videotape is used to prove the defendant did the crime. But those facts are neither necessary nor sufficient to the conclusion that the defendant should be afforded the right to confront *W*. On the one hand, the fact that the court took *W*'s testimony in chambers for innocent reasons—for example, because the courtroom air conditioning broke—seems irrelevant to the conclusion that the defendant is entitled to confront *W*. On the other, the fact that evidence functions similarly to witness testimony seems inadequate to trigger the confrontation right in all circumstances. For example, if the defendant had threatened to kill *W* when she testified, the judge's actions would seem to be justified.

Focusing on a norm's underlying objectives reconciles these intuitions. In the air-conditioning scenario, the processes of evidence-creation and adjudication bifurcate in a manner analogous to the historical practices that motivated adoption of the Confrontation Clause. In the threat-to-kill scenario, the State does not deny the defendant an opportunity to confront his accuser, but uses a substitute for confronted witness testimony out of necessity. Because the first scenario directly implicates the Confrontation Clause's regulatory objectives whereas the second does not, it is natural to regulate the first but not the second as evasion of the Confrontation Clause.

To be sure, successfully regulating evasion through the purposive approach requires courts to identify the purpose (or purposes) a norm serves with enough precision to identify activities that implicate that purpose. As the Court's Confrontation Clause jurisprudence shows, that task imposes high informational and analytical demands. Lacking authoritative evidence of what the framers hoped to accomplish in the Confrontation Clause, justices have variously said that the Clause seeks to ensure the accuracy of criminal adjudication,[469] the fairness of criminal proceedings,[470] and the intrinsic value of looking one's accusers in the whites of their eyes.[471] On multi-member courts, a purposive approach to regulating evasion further requires that a stable majority of judges share the same understanding of a norm's objectives over time.[472] Nevertheless, analysis of purpose is a staple

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[469] *See, e.g.*, Dutton v. Evans, 400 U.S. 74, 89 (1970).

[470] *See, e.g.*, Pointer v. Texas, 380 U.S. 400, 404 (1965).

[471] *See, e.g.*, Coy v. Iowa, 487 U.S. 1012, 1018 (1988) ("The phrase still persists, 'Look me in the eye and say that.'").

[472] *See* Frank Easterbrook, *Foreword: Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (providing a well-known statement of this point).

of constitutional argument[473] and many areas of doctrine informed by purposive analysis lack the instability of post-*Crawford* doctrine.[474] The relative stability of these areas of doctrine suggests that informational and analytic burdens do not create an insurmountable barrier to regulating evasion through a purposive approach.

3. The Source of Authority

If apparently evasive activity warrants a regulatory response, the next question is whether regulation should be implemented under the specific provision being evaded or under a broader source of authority, such as the Due Process Clause. In *Crawford*, the Court assumed that the appropriate remedy for the use of evidence that involved evasion of the confrontation right was to give the accused the right to confront the individual who generated the evidence, and exclude evidence where an opportunity for confrontation was not provided.[475] In closer cases, the choice of an appropriate remedy—and the textual authority for that remedy—will turn on two factors: the obviousness of the evasion, and the means-end fit between the primary constitutional provision and the regulatory response the court believes appropriate.

The obviousness of evasion is pertinent because where evasion is obvious, regulating it through the primary norm will likely address the harm created by the evasive activity. In Professor Amar's hypothetical, it is natural to insist that the accused be given an opportunity to confront *W* because the court's actions obviously involve evasion of the Confrontation Clause.

The means-end fit between the primary constitutional provision and the desired regulatory response is relevant because applying the primary provision to evasive conduct will not remedy the underlying constitutional harm in all circumstances. Suppose a court concluded, following *Ohio v. Roberts* and *Michigan v. Bryant*, that the Confrontation Clause seeks primarily to prevent criminal convictions based on unreliable evidence.[476] The use of unreliable forensic reports might create a constitutionally impermissible end-state, but it is questionable whether confrontation is an appropri-

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[473] *See* PHILIP BOBBITT, CONSTITUTIONAL FATE 74–92 (1982).

[474] *See, e.g.*, Doggett v. United States, 505 U.S. 647, 654 (1992) (speedy trial right); Penson v. Ohio, 488 U.S. 75, 84 (1988) (right to counsel); Ohio v. Johnson, 467 U.S. 493, 503 (1984) (double jeopardy); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982) (public trial).

[475] *See supra* note 98 and accompanying text (explaining how the *Crawford* Court concluded that where "testimonial" evidence was at issue, the Clause required that the accused be afforded the right to confront the "witness" responsible for the evidence, even if that person was not a witness who gave testimony in a legal proceeding).

[476] *See* Michigan v. Bryant, 562 U.S. 344, (2011); Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36.

ate remedy. Cross-examination of forensic analysts appears to do little to ensure the reliability of the underlying analysis.[477] Thus, doctrinal interventions would more profitably focus on the scientific bases for analysts' conclusions, institutional sources of error, and the presence or absence of standards and best practices in the laboratory conducting the underlying testing.[478] Such remedies are more naturally implemented through the Due Process Clause, which has long been understood to regulate the use of particularly unreliable evidence generated through state action.[479]

4. Candor

Finally, *Crawford* teaches that when writing a decision, a court undertaking to regulate evasion of a constitutional provision should acknowledge the function that the doctrine is performing. The Court's inability to develop a workable Confrontation Clause jurisprudence following *Crawford* suggests that this specific form of candor is crucial to the development of workable doctrine. As discussed in the following section, candor furthermore flags the possibility that Congress may legitimately play a role in regulating evasion.

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[477] In a 2009 study, Professors Brandon Garrett and Peter Neufeld examined transcripts from 137 trials in which the defendant was convicted based on forensic evidence and later exonerated through post-conviction DNA testing. *See* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 1 (2009). None of the cases in Garrett and Neufeld's sample "involve[d] trials in which hearsay exceptions of any kind seem to have played a significant role." Sklansky, *supra* note 173, at 73. The convictions were instead driven by errors that testifying analysts vouched for in live trial testimony. Garrett & Neufeld, *supra*, at 16–20. Cross-examination rarely disclosed these errors, because defense counsel were unable to effectively challenge the conclusions proffered by the prosecution's experts. Garrett and Neufeld found that,

> [C]ross-examination of the [prosecution] analysts was rarely effective in disclosing flaws in their work or their reasoning; . . . defense counsel rarely retained their own experts, because "courts routinely denied funding"; and that even when defendants did present testimony from their own experts, the experts were sometimes "inexperienced" and lacked "access to the underlying forensic evidence."

Sklansky, *supra* note 173, at 73 (summarizing the Garrett and Neufeld findings). Some of the cases in Garrett and Neufeld's study, however, involved testimony by an examiner who reported the results of work performed by another. *See id.* at 73 n.334.

[478] *See* NAS REPORT, *supra* note 117, at 22–26 (identifying these factors, among others, as the major sources of error in the U.S. forensic science system).

[479] *See* Perry v. New Hampshire, 132 S. Ct. 716, 723 (2012); Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 729–37 (2013). For the state action requirement, see *Perry*, 132 S. Ct. at 725–26, and Colorado v. Connelly, 479 U.S. 157, 165 (1986).

B. The Legal Status of Anti-Evasion Doctrine

The suggestion that courts should consider how to implement evasion-regulating doctrine prompts a series of questions about the legal status of anti-evasion doctrine. Within the U.S. legal community, parties take for granted that the Supreme Court may legitimately promulgate doctrine that applies the Constitution's textual meaning to novel facts. But the explicitly regulatory objectives of anti-evasion doctrine take the Court out of this familiar terrain. From where do courts derive authority to regulate evasive governmental action? How does anti-evasion doctrine relate to judicial decisions that simply apply constitutional meaning to new facts? Is anti-evasion doctrine the kind of "constitutional law" that, under *Marbury v. Madison*, cannot be revised through legislation?[480]

Two positions on these questions find support within the scholarly literature.[481] Under one view, doctrine that undertakes to regulate evasion of constitutional norms is part-and-parcel of constitutional law proper and cannot usefully be distinguished from doctrine that elaborates and applies constitutional meaning. "Methodological pragmatists" posit that the way in which courts understand constitutional rights is inevitably influenced by remedial considerations—including, as is relevant here, governmental actors' ability to evade constitutional norms.[482] The most forceful advocate of this position in the contemporary literature is Professor Daryl Levinson.[483] Based on extended analysis of three post-*Brown* institutional reform litigations, Levinson contends that "constitutional rights are inevitably shaped by, and incorporate, remedial concerns."[484] Indeed, it generally is impossible to disentangle a constitutional "right" from the remedy that follows if the right is violated. In the justices' internal deliberations and the public justifications for their decisions, "[c]onstitutional adjudication is functional not just at the level of remedies, but all the way up."[485]

Two features of Levinson's account are especially relevant to judicial regulation of constitutional evasion. First, Levinson sees no point to dividing judge-made constitutional law into doctrine that interprets the Constitution's meaning and doctrine that remedies violations or otherwise "implements" constitutional meaning.[486] Virtually "any constitutional right can be

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[480] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

[481] *See, e.g.*, Denning & Kent, *Anti-Evasion Doctrines*, *supra* note 52, at 1832–33.

[482] *See supra* note 50 and accompanying text (discussing constitutional theory of pragmatist scholars); *see also* Caminker, *supra* note 392, at 25–26 (discussing police evasion of the privilege against self-incrimination in the context of *Miranda*).

[483] *See* Levinson, *supra* note 50.

[484] *Id.* at 873.

[485] *Id.*

[486] *Id.* at 900.

described as overenforced, or prophylactic, relative to some hypothesized 'core' principle."[487] Accordingly, efforts to identify a separate domain of implementing doctrine distinct from the Constitution's "real" meaning (whether identified with original meaning, moral principle, or other phenomena) are at best quixotic, and at worst a distraction from the forces that animate constitutional decision making in the real world.[488]

Second, because concerns about remedies are, as it were, baked into the definition of constitutional rights, Congress does not necessarily have power to modify remedial doctrines, including those that regulate constitutional evasion.[489] Because there is no neat dividing line between decisions that interpret the Constitution's meaning and those that implement constitutional norms, no single part of judge-made "constitutional law" is categorically subject to legislative revision. What matters when Congress attempts to revise judge-made rules of decision "is the constitutional judgment of the Court," which ultimately must reconcile the preexisting body of doctrine with Congress's enactments.[490] That judgment is achieved by "a process of remedial equilibration" that "frustrates any attempt to distill the pure essence of rights."[491]

The counterpoint to Levinson's unified vision of constitutional adjudication is provided by "new doctrinalist" scholarship[492] that recognizes a distinct body of judge-made constitutional law dedicated to implementing the Constitution. A pair of articles by Professors Henry Monaghan and Lawrence Sager[493] first suggested this category of doctrine, which is now the subject of an extensive literature.[494] Its defining feature is its independence from constitutional meaning derived through traditional methods of textual and historical interpretation. As expressed by Monaghan, "a surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions."[495] Doc-

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[487] *Id.* at 922.
[488] *Id.*
[489] *Id.* at 926.
[490] *Id.*
[491] *Id.*
[492] *See* Denning, *supra* note 51, at 790 (suggesting this term).
[493] Monaghan, *supra* note 52; Sager, *supra* note 52.
[494] *See, e.g.*, FALLON, *supra* note 52 (discussing distinction between judge-interpreted constitutional meaning and constitutional doctrine that implements constitutional meaning); Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220, 221 (2006) (same); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) (same); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005) (same); Solum, *supra* note 164 (same).
[495] Monaghan, *supra* note 52, at 2–3.

trinalists call the development of implementing doctrine "constitutional construction," as distinguished from "interpretation" of the Constitution's semantic meaning.[496]

Various labels have been proposed for implementing doctrine, which reflect differences in the way that scholars conceive of its legal status and place in the constitutional order.[497] In more explicitly functional terms, all implementing doctrines are defined by their forward-looking, regulatory character. Implementing doctrine does not tell what the Constitution *means* but instead establishes legal rules that, if successful, ensure that it functions in the intended manner.

For doctrinalists, the legitimacy of implementing doctrine rests on overlapping theories of authority. Some implementing doctrine, such as standards of proof, is unavoidable if Article III courts are to adjudicate cases and controversies.[498] Even if implementing doctrine is not strictly necessary to the adjudication of *individual* cases and controversies, Article III may justify such doctrine because it improves courts' ability to judge cases on the merits over the long run. Some observers see this justification at work in Supreme Court's 1966 opinion in *Miranda v. Arizona*; confronted with a large number of "confessions," the voluntariness of which could not be ascertained via case-by-case factfinding, the Court put in place a proxy—the *Miranda* warnings—that permits courts to reliably determine whether confessions were obtained in compliance with the Fifth Amendment.[499] Monaghan adds a further, institutional argument for the legitimacy of court-created implementing doctrine. The incorporation of the Bill of

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[496] *See* Solum, *supra* note 164, at 100–04.

[497] As understood by Monaghan, "constitutional common law" is a species of federal common law that draws its authority from the Constitution but is not different in kind from the specialized federal common law that developed to regulate areas of special federal concern following *Erie*, and as such, it is subject to revision by Congress. *See* Monaghan, *supra* note 52, at 17; *see also* Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78–80 (1938). Sager argues that "federal judicial constructs"—by which he means judge-made doctrine—under-enforce "true" constitutional meaning because of the courts' institutional inability to develop workable regulatory schemes without the assistance of Congress. *See* Sager, *supra* note 52, at 1214. Sager's proposal is that Congress enact legislation that enforces constitutional rights fully (or *over*-enforces constitutional rights). The more recent consensus seems to be that Congress may change the way in which constitutional rights are enforced, but that legislation must provide the minimum level of regulation required by the Constitution. *See, e.g.*, Berman, *supra* note 494, at 104; *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 4 (2009) (recognizing the distinction between interpretation of constitutional meaning and construction of implementing law, and explaining construction as a process that characteristically occurs in institutions other than courts).

[498] *See* Berman, *supra* note 494, at 10.

[499] *See id.* at 136 (describing *Miranda* as a "rule designed to minimize adjudicatory error"); Caminker, *supra* note 392, at 25–26 (discussing police evasion and *Miranda*); *see also Miranda*, 384 U.S. at 467–68 (describing the *Miranda* warnings).

Rights against the states created a powerful need for national law specifying the forms of governmental action that are consistent with the Constitution.[500] Given Congress's relative inactivity in the area of individual rights and the absence of positive legislation that precludes the development of federal common law, the "federal law of civil liberties" is plausibly understood as a form of federal common law developed under the Supreme Court's stewardship.[501]

Although doctrinalists agree with Levinson about the centrality of remedies to constitutional decision-making, they reject the suggestion that constitutional law is an undifferentiated mass of legal, institutional, and remedial concerns. Having ascertained constitutional meaning to the extent possible, "[t]he work that remains to be done is distinctively lawyers' work, involving not just the identification of constitutional meaning, but also the creative design of implementing strategies and the allocation of responsibility between courts and other institutions of government."[502]

In a further contrast to Levinson, doctrinalists tend to welcome the involvement of Congress in the development of doctrine that implements the Constitution.[503] The case for involving Congress invokes familiar institutional competencies: its ability to investigate social facts and legal conditions; its ability to draft specific legal controls; and its ability to make use of regulatory mechanisms, such as funding conditions, that are unavailable to courts.[504] Though scholars differ over which constitutionally grounded decisions Congress can modify, they agree that Congress can supplement or replace court-developed remedial schemes if legislation provides the level of regulation the Constitution requires.[505] In institutional terms, doctrinalists see no reason why courts should be the sole creators of law that implements the Constitution even if, as *Marbury* instructs, the Supreme Court has the final word on what the Constitution *means*.

The *Crawford* experience does not resolve the larger debate among methodological pragmatists and doctrinalists. However, it suggests that *Crawford*-type anti-evasion rules are best understood as a form of implementing doctrine and that, with respect to this form of doctrine, there is a tractable

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[500] Monaghan, *supra* note 52, at 19.

[501] *Id.*

[502] FALLON, *supra* note 52, at 5.

[503] *See, e.g.*, FALLON, *supra* note 52, at 131; Berman, *supra* note 494, at 106; Monaghan, *supra* note 52, at 25–26.

[504] *See* NEIL K. KOMESAR, CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 53–97 (1997) (discussing Congress's comparatively greater ability to access information and craft legal directives necessary to achieving social goals).

[505] *See, e.g.*, Caminker, *supra* note 392, at 19–20; Monaghan, *supra* note 52, at 26.

and theoretically useful distinction between doctrine that elaborates constitutional meaning and doctrine that implements the Constitution.[506]

Recall the causes of the *Crawford* regime's failure. As Part III argues, *Crawford*'s "testimonial" rule is driven by concerns about governmental evasion of the confrontation right. To regulate activities that the Court perceived as "core confrontation violations,"[507] *Crawford* redefined "witnesses against [the accused]" as individuals who generate "testimonial" evidence[508]—an example of what Levinson terms "remedial incorporation."[509] In presenting this anti-evasion rule as something that was required by the Sixth Amendment's text, *Crawford* delayed the development of workable doctrine. As Part III demonstrates, the Court's decision to present the testimonial rule as constitutional meaning obscured the task for doctrine, prevented the Court from identifying the evidentiary practices that should be regulated as evasion, and frustrated consideration of those questions in later cases.

In contrast, it is reasonable to think that if the Court had followed the decision-tree approach outlined above, the legitimacy and effectiveness of post-*Crawford* doctrine would be much improved. The theoretical basis for applying the confrontation right would have been clear: evidence would either be testimony of a "witness" expressly covered by the Confrontation Clause or a substitute for witness testimony that involved evasion of the confrontation right. With a stable theoretical basis, implementing doctrine could reasonably be expected to be more coherent and stable.

At least in this specific context, recognizing a distinct category of implementing doctrine has a clear payoff. The Court's decision to present its rule as unadorned constitutional meaning, by contrast, had significant negative consequences for the development of modern Confrontation Clause jurisprudence.

C. What Crawford *Should Have Said*

The preceding sections argue that the *Crawford* experience suggests a decision tree for courts asked to regulate seemingly evasive activities and explain that *Crawford*-type anti-evasion rules are best understood as a form of implementing doctrine rather than an interpretation of the Constitution's meaning. Having done so, this section concludes with some doctrinal implications of the argument. Given the Article's focus, it cannot address all of the

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[506] *See* Levinson, *supra* note 50, at 922.
[507] *Crawford*, 541 U.S. at 63.
[508] *Id.* at 51.
[509] Levinson, *supra* note 50, at 886–87.

doctrinal issues that remain open following *Crawford*.[510] Instead, it applies the decision-tree approach to the kind of evidence at issue in *Crawford*, *Bryant*, *Davis v. Washington*, and *Giles v. California*, and considers when the Confrontation Clause should regulate "post-crime" statements—those made to government officers in the aftermath of a crime.

Recall the basic fact pattern common to these cases: following a crime, a person with information about it gives statements to an agent of the government, such as a 911 operator or police officer. The account is recorded,[511] memorialized in the officer's notes,[512] or memorialized in a written statement that the declarant signs.[513] The declarant fails to appear as a witness at trial, and the government moves to admit the post-crime statements as evidence of the defendant's guilt. The statements typically fall within an exception to the hearsay rule, so the crucial question is whether the Confrontation Clause bars the prosecution from introducing them as evidence.[514]

The initial point to recognize is that, as a textual and historical matter, the Confrontation Clause does not apply to post-crime statements of its own force. An individual who gives a statement to a government officer in the aftermath of a crime is not a "witness against [the accused]" in the sense contemplated by those who enacted the Clause, because such an individual is not a witness who gives live testimony in a legal proceeding. Thus, if the Clause is not read as an all-purpose license for the development of constitutional evidence law, the case for applying the Clause to post-crime statements turns centrally on whether the statements' use involves evasion of the core confrontation right.

The next question is whether the use of post-crime statements creates a state of the world that is constitutionally impermissible. Following the suggestion in Part IV section A,[515] the question can usefully be approached by considering whether the practice creates a *harm* that the Confrontation Clause seeks to regulate.

Although individuals who make post-crime statements are not witnesses against the accused in the sense originally contemplated by the Confrontation Clause, they are similar to the witnesses who appeared in Marian proceedings and offered testimony to initiate a criminal prosecution. This functional similarity suggests that the use of unconfronted post-crime statements creates a

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[510] In particular, given the many variations among forensic science disciplines and the forms in which forensic analysis is presented, a complete analysis of how the Confrontation Clause applies to forensic evidence must await further work.

[511] *See, e.g.*, Davis v. Washington, 547 U.S. 813, 818–19 (2006).

[512] *See, e.g.*, Giles v. California, 554 U.S. 353, 356–57 (2008).

[513] *See, e.g.*, *Davis*, 547 U.S. at 820–21.

[514] *See, e.g.*, *Bryant*, 562 U.S. at 348–350; *Davis*, 547 U.S. at 821.

[515] *See supra* notes 263–268 and accompanying text.

constitutionally cognizable harm. But in view of the diversity of modern criminal evidence, it is helpful to define that harm with more precision.

As this Article suggests, and *Mattox v. United States*, *Roberts*, and *Crawford* all recognize, the basic harm that the Confrontation Clause regulates is bifurcating the processes of generating evidence and adjudicating guilt.[516] Taking testimony before trial and introducing it as evidence of the accused's guilt necessarily deprives the accused of an opportunity to be confronted with adverse witnesses at trial. Indeed, it was not until 1895 that the Supreme Court held that an opportunity to confront adverse witnesses at a prior trial satisfied the Confrontation Clause.[517] If the accused is not present when testimony is initially taken, bifurcated proceedings furthermore deprive the accused of *any* opportunity to be confronted with the witnesses against him.

To the extent that the Clause regulates criminal evidence beyond this core scenario, it is not concerned with the use of any evidence that might be considered inferior to *viva voce* testimony of trial witnesses. As Part II demonstrates, reading the Confrontation Clause to regulate what constitutes evidence is at odds with its historical meaning. Moreover, the regulatory model of the Clause suffers from a basic incompatibility with the remedy that the Supreme Court has always applied for violations of the Clause: exclusion of unconfronted statements. Confrontation may be an effective way of ensuring that judges and juries have the opportunity to observe the characteristics of a witness in person.[518] As a way of ensuring the fairness and completeness of evidence that is not generated by an ordinary witness, however, confrontation's value varies—and is sometimes nonexistent.[519]

Rather than operating to define evidence or the conditions in which non-witness evidence can be used, the Clause in historical context was specifically concerned with evidence (1) generated through *state-created* procedures, (2) serving as a *substitute* for trial testimony, and (3) that was *inferior to trial testimony* in its fairness and completeness. It was this form of evidence that Raleigh was complaining about when he demanded that Cobham be "brought hither" so that Raleigh could confront him about the inconsistencies in his account of the Bye conspiracy.[520] And it was this form of evidence that framing-era lawyers would have been familiar with from

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[516] *See Crawford*, 541 U.S. at 50; *Roberts*, 448 U.S. at 64; Mattox v. United States, 156 U.S. 237, 242–43 (1895).

[517] *Mattox*, 156 U.S. at 243.

[518] BLACKSTONE, *supra* note 217, at *373 (discussing civil trials in which confrontation allows for "the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, of the witness").

[519] *See supra* note 477 and accompanying text (discussing the minor effect that cross-examination of forensic analysts has on the reliability of their conclusions).

[520] *See* Raleigh's Case (1603), 1 Jardine Crim. Tr. 400, 427 (Eng.).

the Marian statutes, which directed justices of the peace to take testimony in pre-trial proceedings where the accused might not have the opportunity to be confronted with adverse witnesses.[521] The Clause thus reflects a concern with *why* the prosecution is relying on evidence inferior to live trial testimony, not simply the relative advantages and disadvantages of trial testimony and other forms of proof. It is where the state institutionalizes the production of substitutes for trial testimony that the objectives of the Confrontation Clause are most salient.

The use of post-crime statements generally involves such evidence. In the modern world, the response to crime continues to be organized by the state and structured to generate evidence for use in criminal prosecutions. 911 calls are recorded.[522] Police officers are trained to elicit information pertinent to criminal prosecutions[523] and are rewarded based on their ability to do so. Other government employees are required to uncover and report crimes.[524]

It is true, as Justice Thomas observes, that government agents often have multiple reasons for eliciting information about crime, and, particularly, may elicit information "to meet an ongoing emergency."[525] But even then, they still participate in a state-created system designed to create evidence, which produces evidence inferior to trial testimony in its fairness and completeness if one accepts the premises of the Confrontation Clause. It follows that doctrine can legitimately regulate the use of post-crime statements as evasion of the Confrontation Clause, even if the prosecution does not specifically intend to strip the accused of the right to be confronted with the witnesses against him or her.[526]

There are important limits to this principle, however. When the accused has the practical ability to secure the testimony of a declarant whose post-crime statements are introduced at trial, as by subpoenaing the declarant to testify, he or she is empowered to do what Raleigh demanded of the Crown: "bring forth" the witness against him or her.[527] Nor does the use of post-crime statements create a constitutionally relevant harm when, in tort terms, an intervening cause prevents the declarant from appearing as a trial witness. Think for example of a declarant who is killed by the defendant,[528]

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[521] *See supra* notes 231–241 and accompanying text (discussing Marian statutes).

[522] *See Davis*, 547 U.S. at 818–19.

[523] *See Bryant*, 562 U.S. at 348.

[524] *See* Myrna S. Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009, 1023–26 (2007) (discussing *Crawford*'s effect on child abuse cases).

[525] *Davis*, 547 U.S. at 841 (Thomas, J., concurring in part and dissenting in part).

[526] *See id.* at 838.

[527] *See Raleigh's Case*, 1 Jardine Crim. Tr. at 427.

[528] *See Giles*, 554 U.S. at 356–57.

one who dies of natural causes before trial,[529] or one who moves to a location beyond the subpoena power of U.S. courts.[530] Here, the prosecution proposes to use a form of evidence that is inferior to trial testimony in its fairness and completeness and was generated through state-created processes. However, *use* of the inferior evidence is necessitated by the intervening cause, and not by the processes the state has established for generating evidence and adjudicating guilt. As such, the scenarios do not involve the use of inferior evidence as a *substitute* for trial testimony in the sense contemplated by the Confrontation Clause.

The next question is whether doctrine regulating the use of post-crime statements should be implemented under the Confrontation Clause or a broader source of constitutional authority. As two scholars observed in an important pre-*Crawford* article, the use of post-crime statements is intuitively evasive.[531] When the prosecution introduces recorded 911 calls as evidence of the defendant's guilt, callers are effectively permitted "to dial in their testimony, without having to appear at trial, take an oath, or subject themselves to cross-examination."[532] Prosecutors know this. For example, in *Bryant*, the prosecution noted in its opening remarks that the deceased victim's post-crime statement was "[t]he most important piece of evidence you'll hear during this trial."[533] The victim was "speaking to you from the grave and telling you what happened . . . and telling you who's responsible."[534]

The only possible remedy for the use of such statements is the exclusion of statements where the accused was not afforded the right to confront an adverse witness; the statements cannot be made more complete or fair through other interventions. Regulation should therefore be implemented under the Confrontation Clause, as it is under current doctrine.

In concrete terms, this approach to pre-trial statements would generate marginal but potentially important changes to the law. Participants in police interrogations would generally be subject to the confrontation requirement (as *Crawford* held),[535] as would 911 callers (contra *Davis*)[536] and individuals who make statements to police officers responding to reports of crime (as the Court held in *Hammon v. Indiana*, decided jointly with *Davis*).[537] The

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[529] *See Mattox*, 156 U.S. at 240.

[530] *See* FED. R. CRIM. P. 17(e)(1) (providing that a subpoena can be served on a witness anywhere in the United States).

[531] *See* Friedman & McCormack, *supra* note 178, at 1239–40.

[532] *Id.*

[533] *See Bryant*, 768 N.W.2d 65, 76 (Mich. 2009), *vacated*, 562 U.S. 344.

[534] *Id.*

[535] *Crawford*, 541 U.S. at 52.

[536] *Davis*, 547 U.S. at 828–29.

[537] *Id.* at 830.

baseline scope of the confrontation requirement would thus be *broader* than it is under *Crawford* and subsequent cases.

Where the doctrine suggested by this Article's decision tree differs from current law is in the exceptions to the baseline confrontation requirement. The use of post-crime statements would not trigger a right of confrontation where the defendant had the practical ability to secure trial testimony of the declarant, or the declarant was genuinely unable to testify as a trial witness because of developments for which the state was not responsible.

Doctrine configured along these lines has a stronger claim to legitimacy than existing doctrine. The confrontation requirement would continue to apply to the category of evidence contemplated by the framers: testimony of ordinary witnesses given in any stage of a criminal case. Where the requirement applied to evidence that is *not* the testimony of any ordinary witness, the evidence would implicate the particular harm the Clause sought to address.

There is also reason to think that doctrine structured along the lines suggested here would be more administrable than current doctrine. With a cogent theoretical basis for determining the scope of the Confrontation Clause, it would be comparatively easy to determine whether specific evidence triggered a right to confrontation. The questions that determine the applicability of the Confrontation Clause—Is evidence generated by an ordinary witness? Does it create the harm the Clause sought to regulate?—are susceptible to established forms of argument and proof.

CONCLUSION

The failure of Confrontation Clause jurisprudence following *Crawford* is one of the most notable and theoretically important developments in modern constitutional law. *Crawford* promised easily administrable, defendant-protecting, constitutionally grounded regulation of the evidence used in criminal prosecutions. Contemporary Confrontation Clause doctrine has failed to deliver on these promises.

This Article demonstrates that the failure of the *Crawford* regime originates in the Supreme Court's unsuccessful effort to regulate evidentiary practices that evade the Confrontation Clause. *Crawford* regulates evidence that is not generated by "witnesses against the accused" through a constitutional anti-evasion rule. The need for such a rule is obvious once one recognizes the transformation in the understanding of evidence between the framing and the modern day. *Crawford*, however, did not acknowledge that the task for doctrine was to regulate evasion, consider the different forms of evasion a legal system can regulate, or recognize the tradeoffs presented by the regulatory strategies they entail. Moreover, *Crawford* reasoned that

"evasive" activities could be identified through textual interpretation—a mode of interpretation incapable of performing that task. These missteps led to a breakdown in Confrontation Clause jurisprudence that continues to this day.

This account of contemporary Confrontation Clause jurisprudence suggests a pathway out of the *Crawford* "shambles" and has broader implications for constitutional law. Because of social and legal change, governmental actors frequently are able to bring about outcomes the Constitution sought to prevent without violating its prescriptive, conduct-regulating commands. The analytic framework suggested by the *Crawford* experience promises to improve the effectiveness and coherence of doctrine that responds to this recurring problem of constitutional law.